



**EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL
FROM INDONESIA**

REPORT OF THE PANEL

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

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CASES CITED IN THIS REPORT

Short title	Full case title and citation
Canada – Autos	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R , WT/DS142/AB/R , adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Welded Pipe	Panel Report, <i>Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu</i> , WT/DS482/R and Add.1, adopted 25 January 2017
China – Broiler Products	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Cellulose Pulp	Panel Report, <i>China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada</i> , WT/DS483/R and Add.1, adopted 22 May 2017
China – GOES	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R , adopted 16 November 2012, DSR 2012:XII, p. 6251
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union</i> , WT/DS454/R and Add.1 / WT/DS460/R , Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R-WT/DS460/AB/R
China – X-Ray Equipment	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Bed Linen	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R , adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Fasteners (China)	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , 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 – Hormones	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R , adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EU – Biodiesel (Argentina)	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R and Add.1, adopted 26 October 2016
EU – Biodiesel (Argentina)	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
EU – Footwear (China)	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R , adopted 22 February 2012, DSR 2012:IX, p. 4585
Japan – Alcoholic Beverages II	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R , WT/DS10/AB/R , WT/DS11/AB/R , adopted 1 November 1996, DSR 1996:I, p. 97

Short title	Full case title and citation
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R , adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R , adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R , adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R , adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R , WT/DS178/AB/R , adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW , adopted 21 November 2001, DSR 2001:XIII, p. 6481
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW , adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Stainless Steel (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , WT/DS179/R , adopted 1 February 2001, DSR 2001:IV, p. 1295
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R , adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

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
CFPP	Cold filter plugging point
CIF	Cost, insurance, and freight
CPO	Crude palm oil
DET	Differential Export Tax
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBB	European Biodiesel Board
EU Basic Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, and corrigendum to Council Regulation (EC) No. 1225/2009, OJ L 7, 12.1.2010
FOB	Free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
HPE	Reference price that is published monthly by the Indonesian Authorities and is based on the average price from the previous month from three sources, i.e. CIF Rotterdam, CIF Malaysia, and the Indonesian commodity exchange market, all brought back to the FOB level
PFAD	Palm fatty acid distillate
PME	Palm methyl ester
RME	Rapeseed methyl ester
SG&A	Selling, general, and administrative
SME	Soybean methyl ester
USD	US dollars
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
Wilmar Group	P.T. Wilmar Bioenergi and P.T. Wilmar Nabati
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 10 June 2014, Indonesia requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia*, Indonesia.¹

1.2. Consultations were held on 23 July 2014 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 30 June 2015, Indonesia requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.² At its meeting on 31 August 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in documents WT/DS480/2 and WT/DS480/2/Corr.1, in accordance with Article 6 of the DSU.³

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

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in documents WT/DS480/2 and WT/DS480/2/Corr.1 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁴

1.5. On 4 November 2015, the parties agreed that the panel would be composed as follows:

Chairperson: Ms Deborah Milstein
Members: Mr Gilles Le Blanc
Mr Mathias Francke

1.6. Argentina, Australia, Brazil, Canada, China, India, Japan, Norway, the Russian Federation, Singapore, Turkey, Ukraine, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. The Panel began its work on this case later than it would have wished due to staff constraints in the WTO Secretariat.⁵ The Panel held its organizational meeting with the parties on 4 May 2016. During this meeting, Indonesia requested to postpone the proceedings pending the possible appeal of the panel report in *EU – Biodiesel (Argentina)*.^{6, 7} The European Union did not object to Indonesia's request. On 3 June 2016, the Panel decided to grant Indonesia's request and delay the proceedings until the Appellate Body Report in *EU – Biodiesel (Argentina)* had been circulated.

¹ Request for consultations by Indonesia, WT/DS480/1 (Indonesia's consultations request).

² Request for the establishment of a panel by Indonesia, WT/DS480/2 (Indonesia's panel request).

³ DSB, Minutes of the meeting held on 31 August 2015, WT/DSB/M/367.

⁴ Constitution note of the Panel, WT/DS480/3.

⁵ *EU – Biodiesel (Indonesia)*, communication from the Panel (dated 15 April 2016, circulated 22 April 2016), WT/DS480/4.

⁶ Indonesia further clarified its request in its communication dated 13 May 2016.

⁷ The Panel Report in *EU – Biodiesel (Argentina)* was appealed by the European Union on 20 May 2016. (Notification of an Appeal by the European Union, WT/DS473/10 (dated 20 May 2016 and circulated on 26 May 2016) and by Argentina on 25 May 2016. (Notification of an Other Appeal by Argentina, WT/DS473/11 (dated 25 May 2016 and circulated on 31 May 2016)).

1.8. On 6 October 2016, the Appellate Body circulated its report in *EU – Biodiesel (Argentina)*, which was adopted by the DSB on 26 October 2016. On 4 November 2016, following a communication from the Panel requesting clarification⁸, Indonesia requested the Panel to resume its work and hold an additional organizational meeting to consider a proposed timetable and working procedures.⁹ The Panel held its second organizational meeting on 30 November 2016. After consultation with the parties, the Panel adopted its Working Procedures¹⁰, Additional Working Procedures on Business Confidential Information (BCI)¹¹, and timetable on 13 December 2016.

1.9. The Panel held a first substantive meeting with the parties on 29-30 March 2017. A session with the third parties took place on 30 March 2017. The Panel held a second substantive meeting with the parties on 4-5 July 2017. On 1 September 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 3 October 2017. The Panel issued its Final Report to the parties on 26 October 2017.

1.3.2 Request for a ruling on third party access to BCI pursuant to the Panel's Additional Working Procedures on Business Confidential Information (BCI)

1.10. On 6 January 2017, the Panel received a communication from Indonesia, requesting the Panel to limit third-party access to certain company specific data provided by individual Indonesian producers, pursuant to paragraph 6 of the Panel's adopted Additional Working Procedures on Business Confidential Information.¹² On 12 January 2017, the European Union objected to the request, submitting that Indonesia's request is inconsistent with the DSU and fails to comply with the terms of paragraph 6 of the Additional BCI Procedures.¹³ On 17 January 2017, the Panel informed the parties and the third parties that it had denied Indonesia's request to limit third-party access to certain BCI. The Panel's decision is set out in Annex D-1.

1.3.3 Requests for enhanced third party rights by Russia and the European Union

1.11. On 12 December 2016, Russia requested the Panel to exercise its discretion under Article 12.1 of the DSU to modify its Working Procedures and grant enhanced third party rights in this proceeding.¹⁴ On 13 January 2017, the European Union requested the Panel to grant Russia's request, albeit for different reasons than those contained in Russia's request.¹⁵ On 2 March 2017, the Panel informed the parties and the third parties that it had rejected those requests by Russia and the European Union. The Panel's decision is set out in Annex D-2.

2 FACTUAL ASPECTS

2.1. This dispute concerns the anti-dumping measures imposed by the European Union on imports of biodiesel from Indonesia that were adopted following the conclusion of an investigation on imports of biodiesel from Argentina and Indonesia.¹⁶ This investigation was previously the subject

⁸ Communication from the Panel dated 28 October 2016.

⁹ In a communication dated 9 November 2016, the European Union informed the Panel that it considered that outstanding developments may have a direct bearing on the question of whether or not it is necessary, appropriate or fruitful to continue with the present proceedings at this time. Specifically, the European Union referred to the fact that at that time it had yet to inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. In addition, the European Union stated that the measure at issue had been substantially annulled by the municipal courts of the European Union, and expected that a pending appeal related to this annulment would be concluded within a reasonable period of time. In a communication dated 11 November 2016, Indonesia confirmed that it wished to proceed with the dispute in the absence of any objective changes in factual circumstances.

¹⁰ See the Panel's Working Procedures in Annex A-1.

¹¹ Additional Working Procedures of the Panel on Business Confidential Information, Annex A-2.

¹² Communication from Indonesia dated 6 January 2017, 03/ITN/I/2017.

¹³ Communication from the European Union dated 12 January 2017.

¹⁴ Communication from Russia dated 12 December 2016.

¹⁵ Communication from the European Union dated 13 January 2017.

¹⁶ Commission Regulation (EU) No. 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ L 141, 28.5.2013 (Provisional Regulation), (Exhibit IDN-1), p. 6; Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013 (Definitive Regulation), (Exhibit IDN-2), p. 2.

of the dispute *EU – Biodiesel* concerning a complaint by Argentina, in respect of imports of biodiesel from Argentina.¹⁷

2.2. The investigation was initiated by the European Commission on 29 August 2012¹⁸ following a complaint submitted by the European Biodiesel Board (EBB).¹⁹ The EU authorities²⁰ imposed provisional anti-dumping duties on 29 May 2013²¹ and definitive anti-dumping duties on 27 November 2013.²² Provisional anti-dumping duties were applied ranging from zero to 9.6%²³ and were subsequently definitively collected on 27 November 2013.²⁴ Definitive dumping margins were calculated ranging from 8.8% to 23.3% and definitive anti-dumping duties were applied corresponding to the calculated injury margins, which ranged from 8.8% to 20.5%.²⁵ The duties were applied in the form of specific duties expressed as a fixed amount in euro/tonne.

2.3. On 20 December 2016, the European Commission initiated a review of the anti-dumping measures imposed on imports of biodiesel originating in Argentina to bring them into conformity with the recommendations and rulings adopted by the DSB, following the adoption of the panel report, as modified by the Appellate Body report in the *EU – Biodiesel (Argentina)* dispute.²⁶ In its notice of initiation, the European Commission indicated that it also considered it appropriate to examine the anti-dumping measures imposed on imports of biodiesel from Indonesia, considering that: (a) the anti-dumping measures imposed on imports of biodiesel from Indonesia are subject to a WTO dispute and involve essentially the same claims as raised by Argentina in the *EU – Biodiesel (Argentina)* dispute; and (b) the legal interpretations contained in the adopted panel and Appellate Body reports in *EU – Biodiesel (Argentina)* appear also to be relevant for the investigation concerning Indonesia.²⁷

¹⁷ Panel Report and Appellate Body Report in *EU – Biodiesel (Argentina)*, WT/DS473/R and WT/DS473/AB/R. Argentina challenged certain aspects of the anti-dumping measures that were imposed in respect of imports of biodiesel from Argentina. In addition, Argentina made "as such" claims concerning the second subparagraph of Article 2(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community. (Panel Report, *EU – Biodiesel (Argentina)*, paras. 2.2-2.3).

¹⁸ Notice of initiation of an anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, OJ C 260, 29.8.2012, (Exhibit IDN-4). On 10 November 2012, the EU authorities initiated an anti-subsidy proceeding with regard to imports of biodiesel from Argentina and Indonesia. (Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia, OJ C 342, 10.11.2012, (Exhibit IDN-5)). The domestic industry withdrew its complaint on 7 October 2013 and the investigation was terminated on 27 November 2013. (Commission Regulation (EU) No. 1198/2013 of 25 November 2013 terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No. 330/2013 making such imports subject to registration, OJ L 315, 26.11.2013, (Exhibit IDN-6)).

¹⁹ Consolidated version of the new anti-dumping complaint concerning imports of biodiesel originating in Argentina and Indonesia (Complaint), (Exhibit IDN-3).

²⁰ At the time of the investigation, the European Commission conducted investigations and adopted preliminary determinations; the European Council adopted the final determinations on the basis of proposals from the European Commission.

²¹ Provisional Regulation, (Exhibit IDN-1).

²² Definitive Regulation, (Exhibit IDN-2).

²³ Provisional Regulation, (Exhibit IDN-1), recital 179.

²⁴ Definitive Regulation, (Exhibit IDN-2).

²⁵ Definitive Regulation, (Exhibit IDN-2), recital 215. The injury margins for two Indonesian producers were determined to be higher than the corresponding dumping margins. Anti-dumping duty rates were assessed at the rate of the dumping margins for those producers.

²⁶ Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473) OJ C476/3 of 20 December 2016, (Exhibit IDN-8).

²⁷ The European Commission indicated that the scope of the review was limited to the cost of production of the product under investigation when constructing normal value and the production capacity and capacity utilisation in the context of establishing the impact of the dumped imports on the domestic industry. (Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473) OJ C476/3 of 20 December 2016, (Exhibit IDN-8)).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Indonesia requests that the Panel find that the anti-dumping measures imposed by the European Union on imports of biodiesel from Indonesia are inconsistent with²⁸:

- a. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because in constructing the normal value for the Indonesian producers under investigation, the European Union did not calculate the cost of production of biodiesel on the basis of the records kept by those producers even though the records were in accordance with the generally accepted accounting principles and accurately and reasonably reflected the actual cost of production of biodiesel, and because the European Union therefore failed to properly calculate the cost of production and properly construct the normal value for those producers.
- b. Article 2.2 of the Anti-Dumping Agreement because the European Union failed to construct the normal value for the Indonesian producers under investigation on the basis of the cost of production of biodiesel in the country of origin, i.e. Indonesia.
- c. Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because when constructing the normal value for the Indonesian producers under investigation, the European Union did not establish a cap for the profits as required by Article 2.2.2(iii) and the amount for profits established was not determined by the European Union on the basis of a reasonable method. The European Union therefore failed to properly construct the normal value for those producers.
- d. Articles 2.3 and 2.4 of the Anti-Dumping Agreement because the European Union did not construct the export price for one Indonesian producer under investigation on the basis of the price at which the imported biodiesel was first resold to independent buyers in the European Union.
- e. Article 9.3 (*chapeau*) of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because on account of the inconsistencies with Article 2 specified above in the context of the calculation of the dumping margin for the Indonesian producers, the European Union calculated a margin of dumping and imposed and collected anti-dumping duties in excess of the actual dumping margin, if any, by the Indonesian producers. This resulted in the levy of anti-dumping duties on the Indonesian producers that exceeded their margin of dumping which, under Article 9.3 of the Anti-Dumping Agreement, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by a producer/exporter.
- f. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because the European Union's determination of injury to the Union industry was not based on an objective examination of the effect of those imports on prices in the domestic market for biodiesel and the consequent impact of those allegedly dumped imports on domestic producers of biodiesel. The European Union's findings regarding the price effects of the allegedly dumped imports including price undercutting were not based on an objective examination of the evidence on the record as, among others, the European Union did not ensure price comparability in terms of physical characteristics and model-matching and based its determination of price undercutting on partial and unexplained sales of the sampled European Union producers.
- g. Articles 7.1, 7.2, 9.2, and 9.3 (*chapeau*) of the Anti-Dumping Agreement because the European Union incorrectly imposed and definitively collected provisional anti-dumping duties with respect to the imports from one Indonesian producer under investigation, in excess of the actual provisional margin of dumping of this producer, as it based itself on a provisional dumping margin tainted by calculation errors.

²⁸ Indonesia's first written submission, para. 362; second written submission, para. 206.

3.2. Indonesia submits that, as a consequence of the measures imposed by the European Union, the benefits accruing to Indonesia under the Anti-dumping Agreement and the GATT 1994 were impaired or nullified. Indonesia considers that the measures at issue should be withdrawn.²⁹

3.3. Indonesia requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-Dumping Agreement and the GATT 1994.³⁰

3.4. The European Union requests that the Panel reject Indonesia's claims in this dispute in their entirety.³¹

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraphs 18 and 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Brazil, China, Japan, Norway, Russia, Turkey, and the United States are reflected in their executive summaries, provided in accordance with paragraphs 18 and 20 of the Working Procedures adopted by the Panel (see Annexes from C-1 to C-9). Canada, India, Singapore, and Ukraine did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 3 October 2017, the Panel issued its Interim Report to the parties. On 17 October 2017, the parties submitted communications to the Panel. Neither party asked the Panel to review specific aspects of the Interim Report, nor requested an interim review meeting.

6.2. We have made a number of changes of an editorial or formatting nature to correct typographical and other non-substantive errors, as well as to reflect the parties' designations of information as BCI.

7 FINDINGS

7.1 Introduction

7.1. Indonesia has advanced claims on an "as applied" basis concerning the anti-dumping measures at issue in this case. Indonesia challenges several aspects of the dumping determination related to the construction of normal value and export price, certain aspects of the European Union's consideration of price effects and finding of significant price undercutting made in the context of the injury determination, the collection of definitive anti-dumping duties, and finally, the decision to impose and definitively collect provisional anti-dumping duties on imports from one Indonesian producer under investigation. These claims have been brought under a number of provisions of the Anti-Dumping Agreement and GATT 1994.

7.2. We shall address Indonesia's claims after first recalling the general principles governing treaty interpretation, the standard of review, and the burden of proof in WTO dispute settlement proceedings.

²⁹ Indonesia's first written submission, para. 363; second written submission, para. 207.

³⁰ Indonesia's first written submission, para. 364; second written submission, para. 208.

³¹ European Union's first written submission, para. 149; second written submission, para. 77.

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

7.2.1 Treaty interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.³² It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.³³

7.2.2 Standard of review

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

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.5. In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

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

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we are to apply with respect to both the factual and the legal aspects of the present dispute.

7.6. When a panel is reviewing an investigating authority's determination of facts, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings support the overall determination.³⁴ Moreover, with respect to a "reasoned and adequate explanation", the Appellate Body observed:

What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took

³² Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

³³ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.

³⁴ Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".³⁵

7.7. Finally, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.³⁶ At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".³⁷

7.2.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.³⁸ Therefore, as the complaining party, Indonesia bears the burden of demonstrating that the measure at issue is inconsistent with the provisions of the covered agreements that it invokes. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely, a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.³⁹ It is generally for each party asserting a fact to provide proof thereof.⁴⁰

7.3 Whether the EU anti-dumping measures imposed on imports of biodiesel from Indonesia are inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

7.3.1 Introduction

7.9. Indonesia claims that the anti-dumping measures applied by the European Union on biodiesel imports from Indonesia are inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, as follows:

- a. First, the European Union acted inconsistently with the first sentence of Article 2.2.1.1 and, as a consequence Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, by failing to calculate the cost of production on the basis of the records kept by the producers. Indonesia submits that the costs of crude palm oil (CPO) reflected in the records of the exporting producers were substituted with the reference export price for CPO published by the Indonesian authorities.⁴¹
- b. Second, the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value for the Indonesian producers under investigation on the basis of the cost of production of biodiesel in the country of origin, Indonesia.⁴²

7.10. Indonesia submits that the substance of its claims are indistinguishable from claims raised by Argentina under these provisions in the dispute *EU – Biodiesel (Argentina)* in respect of anti-dumping measures imposed on imports of biodiesel from Argentina.⁴³ Indonesia submits that

³⁵ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (referring to Appellate Body Report, *US – Lamb*, para. 106). (emphasis original)

³⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

³⁷ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

³⁸ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

³⁹ Appellate Body Report, *EC – Hormones*, para. 104.

⁴⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

⁴¹ Indonesia's first written submission, para. 44; second written submission, para. 4.

⁴² Indonesia's first written submission, para. 99; second written submission, para. 10.

⁴³ Indonesia's first written submission, para. 45.

given the identical fact pattern and decisions made by the European Union, these claims warrant the same finding of inconsistency with the above provisions of the Anti-Dumping Agreement and GATT 1994.⁴⁴ The European Union has not disputed the relevance of the findings contained in the panel and Appellate Body reports in *EU – Biodiesel (Argentina)* to the resolution of the dispute.⁴⁵

7.11. For the purpose of addressing these claims, we consider below whether Indonesia has demonstrated that the costs of CPO reflected in the records of the exporting producers⁴⁶ were substituted with the reference export price for CPO published by the Indonesian authorities, and thereafter, we address whether in doing so, the European Union acted inconsistently with the provisions cited by Indonesia.

7.3.2 The EU authorities' determination of the cost of production for the construction of normal value for Indonesian biodiesel producers

7.12. Indonesia submits that the set of circumstances facing Indonesia are "essentially identical"⁴⁷ to the factual circumstances of claims raised by Argentina in *EU – Biodiesel (Argentina)*. We address the similarities in the EU authorities' determination of the cost of production for Argentine and Indonesian biodiesel producers in the construction of normal value before considering Indonesia's claims.

7.13. On 29 May 2013, the European Commission imposed provisional anti-dumping duties on biodiesel originating in Argentina and Indonesia, imposing provisional anti-dumping duties on Indonesian producers at margins of between zero and 9.6%.⁴⁸ The EU authorities concluded that since both the Argentine and Indonesian domestic markets for biodiesel were heavily regulated, domestic sales were not in the ordinary course of trade, and the normal value would have to be constructed.⁴⁹ To construct normal value, the EU authorities calculated the normal value by adding to the producers' own production costs during the investigation period, the selling, general, and administrative (SG&A) expenses incurred and a reasonable profit margin.⁵⁰ At that time, the petitioner, the EBB, claimed that the "Differential Export Tax" (DET) system in Argentina and Indonesia depresses the price of soybeans and soybean oil (the main raw material inputs used in the production of biodiesel in Argentina) and CPO (the main raw material input used in the production of biodiesel in Indonesia) and therefore distorts the costs of biodiesel producers. The EU authorities indicated that they did not have enough information at that stage to make a decision as to the most appropriate way to address that claim.⁵¹ The EU authorities indicated that the question as to whether the costs reasonably reflect the costs associated with the production of biodiesel would be further examined at the definitive stage.⁵²

7.14. In the Definitive Disclosure, the EU authorities confirmed that their further investigation had established that the DET system in place in Indonesia and Argentina depressed the domestic prices of the main raw material input in Indonesia and Argentina to artificially low levels, and as a consequence, this affected the cost of biodiesel producers in both countries.⁵³ The EU authorities explained that, due to the distortions caused by the DET system in the respective countries, the costs of the main raw material were not reasonably reflected in the records kept by the producers.⁵⁴ In the case of Indonesia, the EU authorities noted that during the investigation period, biodiesel exports were taxed between 2% and 5%, while CPO exports were taxed

⁴⁴ Indonesia's first written submission, paras. 45 and 100.

⁴⁵ The European Union acknowledges the factual description provided by Indonesia in respect of its claims. (European Union's first written submission, paras. 6 and 14; second written submission, paras. 8 and 11). The European Union additionally noted that the EU investigating authorities decided to reopen the investigation regarding anti-dumping measures in force equally in respect of imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the DSB in *EU – Biodiesel (Argentina)*. In light of this, the European Union submits that Indonesia's claims are "unnecessary, premature and misconceived". (European Union's first written submission, para. 12).

⁴⁶ We note that the Indonesian government does not set the price of CPO in Indonesia.

⁴⁷ Indonesia's first written submission, para. 100; second written submission, para. 11.

⁴⁸ Provisional Regulation, (Exhibit IDN-1), recital 179.

⁴⁹ Provisional Regulation, (Exhibit IDN-1), recitals 44-45 and 63-64.

⁵⁰ Provisional Regulation, (Exhibit IDN-1), recital 63.

⁵¹ Provisional Regulation, (Exhibit IDN-1), recitals 45 and 63.

⁵² Provisional Regulation, (Exhibit IDN-1), recitals 45 and 63.

⁵³ General Disclosure Document, AD593, Anti-Dumping Proceeding concerning imports of biodiesel originating in Argentina and Indonesia (1 October 2013) (Definitive Disclosure), (Exhibit IDN-7), recital 26.

⁵⁴ Definitive Disclosure, (Exhibit IDN-7), recitals 25, 34, and 57.

between 15% and 20%. The export for palm fruit was set at a rate of 40%.⁵⁵ The EU authorities concluded that since the DET system limits the possibility to export CPO, larger quantities of CPO are available on the domestic market, which lowers domestic CPO prices. The EU authorities noted that the domestic price of CPO was significantly lower than the international reference price, with the difference "being very close to the export tax applied to CPO".⁵⁶

7.15. In light of its finding that the markets were distorted, the EU authorities therefore decided to disregard the actual costs of raw materials as recorded by the Argentine and Indonesian investigated companies in their accounts and replace those costs with the price at which those companies would have purchased the raw materials in the absence of a distortion, in constructing the respective normal values of Argentine and Indonesian producers.⁵⁷ To replace the costs in the records of Indonesian producers, the EU authorities used the reference price (HPE) for CPO published by the Indonesian authorities. The EU authorities explained that the published HPE price is a reference export price that is set monthly by Indonesian authorities and averages the published international prices from three different sources: cost, insurance, and freight (CIF) Rotterdam, CIF Malaysia, and the Indonesian commodity exchange market. The HPE price is set on the basis of the same sources, on a free on board (FOB) basis.⁵⁸

7.16. The Government of Indonesia and several Indonesian producers raised objections concerning the decision by the EU authorities to replace the recorded costs of CPO in the constructed normal value.⁵⁹ In the Definitive Regulation, the EU authorities confirmed their conclusion that domestic prices of CPO were artificially lower than international prices due to the distortion caused by the Indonesian DET. The EU authorities additionally confirmed their decision to use reference HPE prices published by the Indonesian authorities and rejected comments made by Indonesian producers and the Government of Indonesia.⁶⁰

7.3.3 Whether the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers

7.17. Indonesia first requests us to find that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. Indonesia refers to the panel and Appellate Body findings in *EU – Biodiesel (Argentina)* in support of its claim. We note that Indonesia's claim is principally concerned with the second condition in the first sentence of Article 2.2.1.1 of the

⁵⁵ Definitive Disclosure, (Exhibit IDN-7), recital 60. The EU authorities found that during the investigation period biodiesel exports from Argentina were taxed at a nominal rate of 20% with an effective rate of 14.58%, while soybean exports were taxed at 35% and soybean oil exports were taxed at 32%. (Definitive Disclosure, (Exhibit IDN-7), recital 31).

⁵⁶ Definitive Disclosure, (Exhibit IDN-7), recital 59. In the case of Argentine producers, the EU authorities noted that the difference between the international and the domestic price of soya beans and soya bean oil is the export tax on the product and other expenses incurred for exportation. Thus, the EU authorities concluded that producers of soya beans and soya bean oil obtain the same net price no matter whether they sell for export or domestically. (Definitive Disclosure, (Exhibit IDN-7), recital 33).

⁵⁷ Definitive Disclosure, (Exhibit IDN-7), recitals 35 and 58.

⁵⁸ Definitive Disclosure, (Exhibit IDN-7), fn 8. In the case of Argentine producers, the EU authorities replaced the costs at which investigated companies purchased soya beans with the average of the reference prices of soya beans published by the Argentine Ministry of Agriculture for export FOB Argentina during the investigation period. (Definitive Disclosure, (Exhibit IDN-7), recital 36; see also Definitive Regulation, (Exhibit IDN-2), recitals 35-42).

⁵⁹ P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), pp. 2-23; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), pp. 2-20; Government of Indonesia, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-11), pp. 1-3; Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), pp. 4-6; and P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), pp. 5-9.

⁶⁰ Definitive Regulation, (Exhibit IDN-2), paras. 66-74. The EU authorities similarly confirmed their conclusions that the price of soybean raw materials in Argentina was artificially lower than international prices due to the distortion caused by the Argentine DET, and further confirmed their decision to use an international reference price as set by the Argentine government. (Ibid. paras. 35-42).

Anti-Dumping Agreement.⁶¹ We also recall that Indonesia asserts that the substance of its claims is indistinguishable from claims raised by Argentina under these provisions in the *EU – Biodiesel (Argentina)*, and as a result the same finding of inconsistency is warranted.⁶²

7.18. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement provide as follows:

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.⁶³

...

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[*]

[*fn original]⁶ The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

7.19. Article VI:1 of the GATT 1994 reads, in relevant part:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

...

(b) ... is less than ...

...

⁶¹ Indonesia submits that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 as a result of failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement. (Indonesia's first written submission, para. 98).

⁶² Indonesia's first written submission, para. 45.

⁶³ Fn omitted.

- (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

7.20. In addressing whether the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the panel and the Appellate Body in *EU – Biodiesel (Argentina)* both found that Article 2.2.1.1 establishes the records of the investigated producer as the preferred source of information for the determination of the cost of production. In this respect, Article 2.2.1.1 provides for two circumstances in which an investigating authority can choose not to follow the general rule to calculate costs on the basis of the records kept by the producer/exporter. The first is that the records are inconsistent with the generally accepted accounting principles of the exporting country. The second is that the records do not reasonably reflect the costs associated with the production and sale of the product under investigation.⁶⁴

7.21. The panel and the Appellate Body both reasoned that the second condition in the first sentence of Article 2.2.1.1 does not permit an investigating authority to examine the reasonableness of reported costs incurred by an exporting producer when the actual costs recorded in the records of the producer or exporter are found within acceptable limits to be accurate and faithful.⁶⁵ Given the structure of the first sentence of Article 2.2.1.1, the Appellate Body considered it clear that the records of the individual exporters or producers under investigation are subject to the condition to "reasonably reflect" the "costs".⁶⁶ The Appellate Body explained that the condition in the first sentence of Article 2.2.1.1 that the records "reasonably reflect" the costs associated with the production and sale of the product under consideration, relates to "whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".⁶⁷ The Appellate Body found support for its interpretation in the additional rules set out in the second and third sentences of Article 2.2.1.1 and footnote 6 of the Anti-Dumping Agreement⁶⁸, and in Article 2.2, which refers to the costs of production in the country of origin.⁶⁹

7.22. In order to establish whether the records reasonably reflect the costs actually incurred, the panel considered a comparison should be made between the costs in the producer's or exporter's records and the costs incurred by that producer or exporter. In its view, such a comparison does not permit an investigating authority to enquire into whether the records of the producer or exporter reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances. Therefore, an investigating authority should not be permitted to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin.⁷⁰

7.23. In assessing whether the EU authorities had acted consistently with Article 2.2.1.1 in the investigation, the panel found relevant that the EU authorities decided not to use the cost of soybeans in the production of biodiesel in Argentina because "the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system".⁷¹ In the panel's view, this did not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records did not reasonably reflect the costs associated with the production and sale of biodiesel.⁷² The panel therefore found that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the

⁶⁴ Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.18 and 6.46; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227.

⁶⁵ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.231 and fn 400.

⁶⁶ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20.

⁶⁷ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

⁶⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.22. See also Panel Report, *EU – Biodiesel (Argentina)*, para. 7.234.

⁶⁹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.23.

⁷⁰ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242. See also Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.30, 6.37, and 6.39.

⁷¹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.

⁷² Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.

producers under investigation on the basis of the records kept by the producers.⁷³ Having reached this finding, the panel did not consider it necessary for purposes of resolving the dispute to address Argentina's further claims that, the European Union failed to properly construct the normal value and thus acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.⁷⁴

7.24. The Appellate Body upheld the panel's finding that the European Union acted inconsistently with Article 2.2.1.1 in constructing the normal value for Argentine producers.⁷⁵

7.25. We recall as set out above⁷⁶, at the definitive stage, the EU authorities revised the methodology and decided not to use the recorded costs of the main raw materials (soybean oil in the case of Argentine producers and CPO in the case of Indonesian producers) to establish the cost of production of biodiesel for Argentine and Indonesian investigated producers for the same reason: that "DET systems depressed the domestic prices of the main raw material input in both Argentina and Indonesia to an artificially low level", which was considered to "affect the costs of the biodiesel producers in both countries concerned".⁷⁷ Thus, the EU authorities applied the same rationale for deciding not to use the recorded cost of the main raw material to establish the cost of production of biodiesel for Argentine and Indonesian investigated producers.

7.26. Under these circumstances, we see no basis to deviate from the findings by the panel in *EU – Biodiesel (Argentina)* in respect of Indonesia's claim concerning Article 2.2.1.1 of the Anti-Dumping Agreement. Nor has the European Union identified any cogent reasons for us to do so.⁷⁸ Like the panel in *EU – Biodiesel (Argentina)*, we find that the EU authorities did not provide a legally sufficient basis under Article 2.2.1.1 for concluding that the Indonesian producers' records did not reasonably reflect the costs associated with the production and sale of biodiesel, and therefore, we find that the EU authorities acted inconsistently with its obligations under Article 2.2.1.1 by derogating from using the costs reflected in the records kept by the producers.⁷⁹

7.27. Based on the foregoing, we uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the producers under investigation on the basis of the records kept by the producers.

7.28. Indonesia also requests that we find that, as a result of failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union failed to properly construct the normal value and thus acted inconsistently with Article 2.2 and Article VI:1(b)(ii) of the GATT 1994.⁸⁰ We recall that Indonesia has requested us to reach the same findings of inconsistency as in *EU – Biodiesel (Argentina)*, given the identical factual circumstances and decisions made by the European Union.⁸¹ In this regard, the panel did not consider it necessary for purposes of resolving the dispute to address Argentina's further claims under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.⁸² We have come to the same conclusions regarding Indonesia's claims.

7.3.4 Whether the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value on the basis of the cost of production in the country of origin

7.29. Indonesia separately requests that we find that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing

⁷³ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.249.

⁷⁴ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.250.

⁷⁵ Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.56-6.57.

⁷⁶ See paras. 7.14. -7.16. above.

⁷⁷ Definitive Regulation, (Exhibit IDN-2), recital 30. See also *ibid.* recitals 35-42 and 66-74.

⁷⁸ In reaching this finding, we recall that it is well established that adopted panel and Appellate Body reports create legitimate expectations, and that the same legal issues should be resolved in the same way in subsequent cases, absent cogent reasons for finding differently. (See, for example, Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 14; *US – Stainless Steel (Mexico)*, para. 160; *US – Shrimp (Article 21.5 – Malaysia)*, para. 109; and *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

⁷⁹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.

⁸⁰ Indonesia's first written submission, para. 98.

⁸¹ Indonesia's first written submission, para. 45.

⁸² Panel Report, *EU – Biodiesel (Argentina)*, para. 7.250.

to construct the normal value on the basis of the cost of production in the country of origin.⁸³ Indonesia submits that the cost used by the EU authorities for CPO, derived from international prices, cannot be understood to be a cost in the country of origin.⁸⁴

7.30. In addressing a similar claim raised by Argentina in *EU – Biodiesel (Argentina)*, the panel and the Appellate Body shared the view that the phrase "cost of production in the country of origin" in Article 2.2 and "cost of production of the product in the country of origin" in Article VI:1(b)(ii) may be understood as a reference to the price paid or to be paid to produce something within the country of origin.⁸⁵ The Appellate Body observed that nothing in the language of these two provisions precludes that an investigating authority may need to look for information on the cost of production from sources outside the country.⁸⁶ However, the reference to "in the country of origin", indicates that, whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. In these instances, information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable and it is not sufficient to simply substitute the costs from outside the country of origin for the "cost of production in the country of origin".⁸⁷

7.31. In assessing whether the EU authorities had acted consistently with Article 2.2 or Article VI:1(b)(ii) of the GATT 1994, the panel evaluated whether the cost used by the EU authorities for soybeans could be understood to be a cost in the country of origin, Argentina. The panel considered it clear that the EU authorities did not use the cost of soybeans in Argentina, as the EU authorities specifically selected the average reference price of soybeans published by the Argentine Ministry of Agriculture to remove the perceived distortion in the market place caused by the Argentine DET. In this respect, the panel stated that the EU authorities selected this cost precisely because it was not the cost of soybeans in Argentina.⁸⁸ The panel therefore found that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value on the basis of the cost of production in Argentina.⁸⁹ The Appellate Body upheld the panel's finding.⁹⁰

7.32. As with the decision to replace the actual purchase price of soybean reflected in Argentine producers' records, the EU authorities replaced the actual purchase price of CPO as reflected in the producers' records with an international HPE reference price published by Indonesian authorities.⁹¹ The EU authorities found that prices of CPO prevailing in Indonesia were artificially lower than international prices and considered that the HPE reference price published by Indonesian authorities served as "the price at which [domestic biodiesel producers] would have purchased the CPO in the absence of such a distortion".⁹² In this sense, the EU authorities selected the HPE reference price to remove the perceived distortion in the market place caused by the Indonesian DET, in the same way that the EU authorities had selected a reference price to remove the perceived distortion in the domestic price of soybeans caused by the Argentine DET. Under these circumstances, in the absence of any rebuttal by the European Union, we see no basis to depart from the analysis undertaken by the panel and the Appellate Body in *EU – Biodiesel (Argentina)*. We therefore find that the cost of CPO used by the European Union in respect of Indonesian producers is not a cost "in the country of origin".

⁸³ Indonesia's first written submission, para. 100 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.260; and Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.81 and 6.83).

⁸⁴ Indonesia's first written submission, paras. 111-116.

⁸⁵ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.256; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.69.

⁸⁶ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. This could occur for instance, in circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available. (Ibid.).

⁸⁷ Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73.

⁸⁸ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.258.

⁸⁹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.260.

⁹⁰ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.83. The Appellate Body recognized that domestic prices could in fact reflect world prices, and that prices at the border could simultaneously be characterized as both an international and a domestic price. The Appellate Body agreed with the panel, however, that the mere fact that a reference price is published by the Argentine Ministry of Agriculture does not necessarily make this price a domestic price in Argentina. (Ibid. para. 6.81).

⁹¹ See para. 7.15. above.

⁹² Definitive Regulation, (Exhibit IDN-2), recital 67.

7.33. In light of this finding, we uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a cost for CPO that was not the cost prevailing "in the country of origin" in the construction of normal value.

7.3.5 Conclusions

7.34. We recall above the findings of the panel, as upheld by the Appellate Body in *EU – Biodiesel (Argentina)* regarding the obligations contained in Article 2.2.1.1 of the Anti-Dumping Agreement, and Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. We consider the panel's findings that the European Union acted inconsistently with these provisions in that dispute are directly relevant to the assessment of Indonesia's claims in this proceeding. We therefore uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the producers under investigation on the basis of the records kept by the producers. In addition, we uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a cost for CPO that was not the cost prevailing "in the country of origin" in the construction of normal value.

7.4 Whether the European Union established an amount for profits inconsistently with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement

7.4.1 Introduction

7.35. Indonesia claims that the method applied by the European Union to establish an amount for profits for Indonesian producers is inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement. Indonesia alleges that the European Union's approach suffers from two main flaws. First, Indonesia claims that the European Union acted inconsistently with the requirement in Article 2.2.2(iii) to calculate a cap for profits, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". Second, Indonesia claims that the European Union did not determine an amount for profits on the basis of a "reasonable" method, as required under Articles 2.2 and 2.2.2(iii).

7.4.2 The EU authorities' determination of an amount for profits for Indonesian biodiesel producers

7.36. Before addressing Indonesia's claims, we recall the following facts related to the European Union's determination of an amount for profits for Indonesian biodiesel producers.

7.37. The EU authorities determined that Indonesian market conditions for biodiesel were such that domestic sales were not considered as being made in the ordinary course of trade, and therefore, the amount of profit could not be based on actual data from the sampled companies for purposes of constructing the normal value of the like product.⁹³ The EU authorities therefore resorted to Article 2(6)(c) of the EU Basic Regulation⁹⁴ (which mirrors the language in Article 2.2.2(iii) of the Anti-Dumping Agreement). The EU authorities determined the amount for profits as "the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve, that is 15% based on turnover".⁹⁵ The EU authorities subsequently confirmed in the Definitive

⁹³ Provisional Regulation, (Exhibit IDN-1), recital 65. The EU authorities noted that, during the investigation period, the fully State-owned oil and gas company Pertamina was the biggest company active on the domestic market, representing more than 90% of the domestic biodiesel purchases from the sampled producers. The EU authorities determined that Pertamina is mandated by the State to blend the biofuels with fossil fuels for sale at its gas stations, and every month, the Indonesian Ministry of Trade administratively sets the "HPE price (or Export Check Price)" as a benchmark price used to calculate the monthly level of export duties. Pertamina purchases biodiesel at the level of the HPE price set by the Indonesian government. (Provisional Regulation, (Exhibit IDN-1), recital 64).

⁹⁴ Council Regulation (EC) No. 1225/2009 of 30 November on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, and corrigendum to Council Regulation (EC) No. 1225/2009, OJ L 7, 12.1.2010.

⁹⁵ Provisional Regulation, (Exhibit IDN-1), recital 65.

Regulation the 15% profit margin as "a reasonable amount that can be achieved by a relatively new, capital-intensive industry in Indonesia".⁹⁶

7.38. The Government of Indonesia and Indonesian producers submitted comments during the investigation, including objections to the 15% profit margin used when constructing normal value. Several Indonesian producers objected that the EU authorities should have determined a profit amount based on actual amounts on sales of products in the same general category of products, pursuant to Article 2(6)(b) of the EU Basic Regulation.⁹⁷ Two Indonesian producers, P.T. Wilmar Bioenergi and P.T. Wilmar Nabati (Wilmar Group) and P.T. Pelita Agung Agrindustri referred in this regard to sales of oleochemicals in Indonesia.⁹⁸ Several producers also objected that the EU authorities did not determine a profit cap as required under Article 2(6)(c) of the EU Basic Regulation (and Article 2.2.2(iii) of the Anti-Dumping Agreement) and ensure that the 15% profit margin did not exceed that cap.⁹⁹

7.39. In addition, several Indonesian producers asserted that the EU authorities relied on the target profit margin that had been determined for the EU industry in the context of the 2009 anti-dumping investigation into biodiesel imports from the United States, as the basis to determine the 15% margin for Indonesian producers. These producers objected that it was not reasonable or appropriate to base the profit margin for Indonesian producers on the average profit obtained by the EU industry during the 2004-2006 period as this is not based on data relating to Indonesia.¹⁰⁰ P.T. Pelita Agung Agrindustri argued that, even in the case that data from Indonesian producers cannot be used, the EU authorities should have based the profit amount on publicly available data relating to other markets rather than basing the profits on the target profit margin of the EU industry. P.T. Pelita Agung Agrindustri submitted that the profit margin of 6.8% that was established for the US producers in the 2011 US bioethanol anti-dumping investigation would have been appropriate.¹⁰¹

7.40. Several producers argued that, given that their revenues were in US dollars (USD), the average interest rate for USD loans offered by private banks in Indonesia for working capital and investment loans (which was between 5% and 6.3%) should be used to determine a profit amount.¹⁰² Indonesian producer Wilmar Group argued that EU authorities should have taken into account a study prepared by LMC International that concluded that actual profit margins in the biodiesel sector in Indonesia were between 2.4% and 3.2%.¹⁰³ Indonesian producer P.T. Musim Mas submitted that a 15% profit margin for the producer company was excessive taking into account an investment cost for a 300,000 tonne per year palm methyl ester (PME) plant is about USD 30 million in Indonesia. Assuming an average price of PME at USD 1140 per tonne during the

⁹⁶ Definitive Regulation, (Exhibit IDN-2), recital 84.

⁹⁷ P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), pp. 3 and 6; Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), pp. 3-5.

⁹⁸ Submission by the Wilmar Group filed on 25 July 2013, (Exhibit IDN-14 (BCI)), p. 1; P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), p. 6. See also Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), p. 12.

⁹⁹ P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), p. 10; P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), pp. 23-25; and P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 21.

¹⁰⁰ P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), pp. 6-9; Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), p. 4. See also P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), pp. 23-25; and P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 21.

¹⁰¹ P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), p. 15 (referring to Council Implementing Regulation (EU) No. 157/2013 of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol from the United States, recital (166)).

¹⁰² P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), p. 26; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 22; and Government of Indonesia, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-11), p. 4.

¹⁰³ Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), p. 5; Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), p. 12. Wilmar Group considered that such a rate would be in line with commercial interest rate in Indonesia ([[***]]). (Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), p. 5).

investigation period, a 25% profit margin would result in a payback period of slightly less than 5 months, which is too ambitious for any young and innovative industry.¹⁰⁴

7.41. Several Indonesian producers also objected to the EU authorities' reference to the short and medium term borrowing rate in Indonesia of around 12% published by the World Bank as a basis to confirm the reasonableness of the 15% profit margin. Indonesian producer P.T. Musim Mas submitted that the 12% borrowing rate was well above its actual borrowing cost of [[***]].¹⁰⁵ Several producers further noted that the EU authorities referred to the short and medium term borrowing rate of 14% in Argentina published by the World Bank as a basis to confirm the reasonableness of a 15% profit margin applied to Argentine producers, arguing that a different treatment is justified for Argentine and Indonesian producers given that the short and medium term borrowing rate in Indonesia is lower (i.e. 12%) as compared to Argentina (i.e. 14%).¹⁰⁶ At most, they argued that the 12% rate should have been used as the profit cap under Article 2(6)(c) of the EU Basic Regulation.¹⁰⁷ In addition, the Government of Indonesia claimed that it was duplicative to replace the CPO costs in the context of constructing normal value while using at the same time a 15% profit margin to reflect the profit margin in an undistorted market.¹⁰⁸

7.42. The EU authorities rejected comments that a profit amount should have been determined based on Article 2(6)(b) of the EU Basic Regulation on the ground "that all Indonesian (and Argentinian) companies in the sample don't have sales in the ordinary course of trade of products of the same general category of products (i.e. any other fuel)".¹⁰⁹ In this regard, the EU authorities rejected that sales of a blend of biodiesel with mineral diesel could be used to determine a profit amount. The EU authorities explained as follows:

Whether or not the sales of a blend of biodiesel with mineral diesel fall under the same general category of products, Article 2(6)(b) of the basic Regulation states, as already mentioned in recital (68) above, that such sales should be made in the ordinary course of trade. Given that the domestic sales of biodiesel are not in the ordinary course of trade, the sales of the blend of biodiesel with mineral diesel is not, *mutatis mutandis*, considered to be in the ordinary course of trade.¹¹⁰

7.43. The EU authorities determined that, given the short and medium term borrowing rate in Indonesia is around 12% according to World Bank data, it was reasonable to expect a higher profit margin to be obtained when doing business in the domestic biodiesel markets than the borrowing cost of capital.¹¹¹ The EU authorities noted that the reference to the medium term borrowing rate was not meant to set a benchmark but to "test the reasonableness of the margin used".¹¹² The EU authorities also noted that various profit levels were used in the 2009 biodiesel proceeding against the United States, with the weighted average profit well above 15%.¹¹³ Finally, the EU authorities rejected the argument of the Government of Indonesia that it was duplicative to replace the cost of CPO since cost adjustments under Article 2(5) of the EU Basic Regulation and the reasonable profit under Article 2(6)(c) of that Regulation "are two clearly distinct issues".¹¹⁴

¹⁰⁴ P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 10.

¹⁰⁵ P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 10.

¹⁰⁶ P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), p. 26; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 22.

¹⁰⁷ P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), p. 25; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 21.

¹⁰⁸ Government of Indonesia, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-11), p. 2.

¹⁰⁹ Definitive Disclosure, (Exhibit IDN-7), recital 68. See also Definitive Regulation, (Exhibit IDN-2), recital 79.

¹¹⁰ Definitive Disclosure, (Exhibit IDN-7), recital 72; Definitive Regulation, (Exhibit IDN-2), recital 84.

¹¹¹ Definitive Disclosure, (Exhibit IDN-7), recital 72; Definitive Regulation, (Exhibit IDN-2), recital 84.

¹¹² Definitive Regulation, (Exhibit IDN-2), recital 84.

¹¹³ Definitive Disclosure, (Exhibit IDN-7), recital 72; Definitive Regulation, (Exhibit IDN-2), recital 84.

¹¹⁴ Definitive Regulation, (Exhibit IDN-2), recital 84.

7.4.3 Whether the European Union acted inconsistently with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement by failing to calculate a profit cap and ensure that the profit margin established for each Indonesian exporter did not exceed that cap

7.44. Indonesia first argues that the European Union violated Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement for the simple fact that it did not calculate the profit cap, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

7.45. Article 2.2 requires an investigating authority to use a "reasonable amount for administrative, selling and general costs and for profits" in constructing normal value.

7.46. Article 2.2.2 provides:

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.47. Indonesia argues that Article 2.2.2 imposes two mandatory conditions when determining an amount for profits pursuant to subparagraph (iii): first, the amount for profits must be determined on the basis of "any other reasonable method"; and second, the amount for profits so established shall not exceed the cap defined therein. Indonesia submits that the panels in *EC – Bed Linen*, *Thailand – H-Beams*, and *EU – Footwear (China)* have confirmed that both of these conditions must be met when applying a methodology pursuant to Article 2.2.2(iii) and there can be no exception to the requirement to meet either of these obligations.¹¹⁵ Indonesia submits that there was no discussion of a benchmark for the cap nor did the EU authorities respond to requests from Indonesian producers for information pertaining to the profit cap.¹¹⁶ Hence, Indonesia considers that it is clear that the EU authorities made no attempt to calculate a profit cap when applying the methodology under Article 2.2.2(iii).

7.48. The European Union argues that Article 2.2.2(iii) requires only that a profit margin established by an investigating authority does not exceed such a cap, and there is no mandatory requirement in Article 2.2.2(iii) to calculate a profit cap. In the European Union's view, a profit margin may not exceed the cap even absent any express reference to its calculation in the determination.¹¹⁷ The European Union further considers that there cannot be an obligation on an

¹¹⁵ Indonesia's first written submission, paras. 138-142 (referring to Panel Reports, *EU – Footwear (China)*, paras. 6.52 and 7.300-7.301; *Thailand – H-Beams*, para. 7.124; and *EC – Bed Linen*, para. 6.97). See also Indonesia's first written submission, paras. 156 (referring to Panel Report, *EU – Footwear (China)*, para. 7.300).

¹¹⁶ Indonesia's first written submission, paras. 146-150.

¹¹⁷ European Union's opening statement at the first meeting of the Panel, para. 22. The United States shares the view that there cannot be an obligation to calculate the profit cap when the necessary information for such a calculation does not exist. Moreover, the United States submits that an investigator is not obliged to calculate a cap and indicate what that cap amount is in its determination, but rather an investigating authority may use "any other reasonable method" to determine an amount for profits so long as that amount so

investigating authority to calculate the profit cap when the necessary information for such calculation does not exist, making it objectively impossible to calculate the cap.¹¹⁸ The European Union contends that this was precisely the case in the investigation at hand, as sampled Indonesian companies did not provide information to the EU authorities of sales in the ordinary course of trade of products in the same general category that could have been used to calculate a profit cap. The European Union also rejects that there is any requirement that an investigating authority must solicit the necessary data from non-investigated Indonesian producers, arguing that EU authorities do not have the authority to oblige any party to provide data to calculate a cap.¹¹⁹

7.49. The parties' arguments raise the issue of whether there is a mandatory requirement in Article 2.2.2(iii) to calculate a profit cap, or whether, as the European Union argues, there are exceptions to the requirement, for instance, in cases where investigated companies do not provide information to the investigating authorities of sales in the same general category of product, or it is not possible to calculate a cap for some other reason.

7.50. We find no basis for the European Union's argument that there is no mandatory requirement in Article 2.2.2(iii) to calculate a profit cap. We recall, as previous panels have observed, Article 2.2.2(iii) permits an investigating authority to use "any other reasonable method" to determine an amount for profit subject to a ceiling or cap, defined as "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".¹²⁰ The panel in *EU – Footwear (China)* found that the European Union acted inconsistently with Article 2.2.2(iii) precisely for the reason that it had failed to consider the calculation of the cap at the time it made its determination.¹²¹ Furthermore, in reaching its finding, the panel found unconvincing the argument that had been made by the European Union that the necessary data for calculating the cap was not available. Even accepting that data was not available for calculating a cap, the panel reasoned that an investigating authority cannot be excused from complying with the requirements in Article 2.2.2(iii).¹²²

7.51. We share the view of the panel in *EU – Footwear (China)*, including the view that an investigating authority may not be excused from the obligation to calculate the cap whenever applying a methodology pursuant to Article 2.2.2(iii) based on the argument that data is not available. We consider that there are important reasons for requiring an investigating authority to calculate a cap and to further provide details on the cap in the determination. Absent this information, interested parties would be unaware of whether the determined amount for profit exceeds the cap or not. This lack of information would improperly place the burden on interested parties to then try to demonstrate that the chosen amount for profit is in excess of the cap. The burden would also shift to a WTO Member representing the exporting producers to bring a challenge and demonstrate before a WTO panel that the profit amount used in constructing normal value exceeds the cap and is therefore in violation of Article 2.2.2(iii). We also consider that the obligation to calculate the cap is fundamental for the reason mentioned by Indonesia; namely that, absent a firm obligation, investigating authorities would be incentivized to adopt a passive approach to establishing a cap as a way to lessen their obligation under Article 2.2.2(iii).¹²³

7.52. As concerns the investigation that is the subject of the present dispute, we have no evidence that the EU authorities addressed the issue of the cap in the investigation. Furthermore, the European Union has confirmed in this proceeding that the EU authorities were not able to calculate a cap for profits.¹²⁴ Since it is clear that the EU authorities did not calculate a cap, it is

established does not exceed the profits normally realized by producers of the same general category of products in the exporting country. In such a situation, the United States submits that a complaining party would need to demonstrate before a WTO panel that a breach of Article 2.2.2(iii) results.

(United States' third-party submission, para. 18; third-party response to Panel question No. 1, para. 1).

¹¹⁸ European Union's opening statement at the first meeting of the Panel, paras. 23-25.

¹¹⁹ European Union's first written submission, paras. 41-46.

¹²⁰ Panel Reports, *EU – Footwear (China)*, paras. 6.52 and 7.300-7.301; *Thailand – H-Beams*, paras. 7.124-7.125; and *EC – Bed Linen*, paras. 6.97-6.98.

¹²¹ Panel Report, *EU – Footwear (China)*, paras. 7.299-7.300.

¹²² Panel Report, *EU – Footwear (China)*, para. 7.300. ("Even assuming it to be the case that relevant data on the basis of which the cap could be calculated was not available to the Commission in this case, we fail to see how this excuses the Commission from complying with the requirements of the AD Agreement".)

¹²³ Indonesia's second written submission, para. 35.

¹²⁴ European Union's first written submission, para. 51.

equally clear that the EU authorities failed to ensure that the amount for profit did not exceed that cap, contrary to the second condition set forth in Article 2.2.2(iii).

7.53. While we share the view of the panel in *EU – Footwear (China)* that an investigating authority may not be excused from the obligation to calculate the cap whenever applying a methodology pursuant to Article 2.2.2(iii) based on the argument that data is not available, we shall also address the parties' arguments as to whether or not data necessary to calculate a profit cap was available to the investigating authority in the underlying investigation.

7.54. As a general matter, Indonesia sees no basis as to why the EU authorities could not have solicited additional data from producers. Indonesia submits that the EU authorities regularly solicit data from producers, including producers located in third countries when investigating non-market economies. Furthermore, Indonesia submits that an investigating authority could resort to information from publicly available sources to determine the cap.¹²⁵ Indonesia considers that this would not have been necessary in the present investigation, as the EU authorities had the necessary data before them on which to calculate a profit cap. First, Indonesia submits that the EU authorities chose to limit the same general category of products to "other fuels", as reflected in recital 68 of the Definitive Disclosure.¹²⁶ Indonesia submits that one producer, Wilmar Group and related party [[***]] provided information on the profit margins obtained on sales of blends of biodiesel and mineral diesel, i.e. "other fuels", which could have provided a basis to calculate the cap.¹²⁷ Even if these sales were considered to be unacceptable, Indonesia submits that the European Union has also acknowledged that [[***]] had sales of diesel fuel and marine fuel oil – also "other fuels" – which could have been used.¹²⁸

7.55. Alternatively, Indonesia argues that the EU authorities could have defined the "same general category" as oleochemicals, and used profit data for sales of oleochemicals to calculate the profit cap. Indonesia submits that the technical, physical, and chemical characteristics of a product as well as input materials and the production process are relevant factors to determining whether products are in the same general category.¹²⁹ Indonesia submits that oleochemicals and biodiesel are produced from the same feedstock through a similar process, share the same basic properties, and address the technical markets and therefore, both should be considered to fall within the same general category of basic organic chemicals.¹³⁰ Indonesia considers it was particularly unwarranted to reject profits on sales of oleochemicals, considering that the EU authorities decided to include biodiesel for non-fuel use in the scope of the product concerned. In recital 24 of the Definitive Regulation, Indonesia notes that the EU authorities denied a request for end-use relief for biodiesel for non-fuel use "in view of the fact that biodiesel declared as for non-fuel use has the same physical properties as biodiesel for fuel use".¹³¹ More generally, Indonesia rejects that the scope of the same general category of products (described as "any other fuel") can be found to be narrower than the scope of the product concerned (as including biodiesel for non-fuel use).¹³² More

¹²⁵ Indonesia's first written submission, para. 156; response to Panel question No. 68, para. 17; and second written submission, paras. 31-32.

¹²⁶ Indonesia's response to Panel question No. 64, paras. 7-8; Definitive Disclosure, (Exhibit IDN-7), recital 68 ("Article 2(6)(b) is not applicable given that all Indonesian (and Argentinian) companies in the sample don't have sales in the ordinary course of trade of products of the same general category of products (i.e. any other fuel)").

¹²⁷ Indonesia' opening statement at the first meeting of the Panel, para. 20; responses to Panel question No. 6, para. 14, and No. 64, para. 10.

¹²⁸ Indonesia's response to Panel question No. 64, paras. 4-8.

¹²⁹ Indonesia's response to Panel question No. 13, paras. 18-19. Indonesia notes that demand side factors may all be relevant to the determination of the same general category of products, but are a less important factor in cases where there are dual or multiple uses of the product concerned. (Ibid. paras. 23-24).

¹³⁰ Indonesia's first written submission, paras. 151-153 (referring to Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), pp. 6-7); Definitive Disclosure, (Exhibit IDN-7), recital 68.

¹³¹ Indonesia's second written submission, para. 46 (referring to Definitive Regulation, (Exhibit IDN-2), recital 24).

¹³² Indonesia's second written submission, paras. 49-50. Indonesia finds support for this conclusion in Article 3.6 of the Anti-Dumping Agreement which states that:

generally, Indonesia submits that an investigator should not be permitted to define the same general category of products too narrowly, as doing so effectively allows an investigating authority to choose to exclude using sales of other products to calculate a profit cap, which thereby enables the investigator to evade complying with the requirements of Article 2.2.2(iii).¹³³

7.56. The European Union disagrees with Indonesia that the "same general category of products" should be construed in an overly broad manner, especially given that the intention behind the methodologies contained in Article 2.2.2 is to approximate as closely as possible the price of the like product in the domestic market of the exporting country. In this respect, the European Union agrees with the reasoning set out by the panel in *Thailand – H-Beams* that, the broader the same general category of products is construed, the potential increases that the constructed normal value will not be representative of the price of the like product.¹³⁴

7.57. The European Union argues that Indonesia has not met its burden of proof to explain why other oleochemicals constitute the same category of products with biofuels, taking into account their different end uses and markets, and different profit margins for that matter.¹³⁵ The European Union also sees no contradiction in the narrow approach with respect to determining the same general category of products (i.e. limiting the same general category to "any other fuel"), while the prevention of circumvention requires a broader approach to defining the scope of the product subject to investigation.¹³⁶

7.58. Finally, the European Union submits that it would not have been appropriate to base a profit cap on sales of blended biodiesel with mineral diesel, as the European Union contends that sales of blended biodiesel with mineral diesel suffered from the "same deficiencies" as sales of biodiesel, i.e. these sales were found, *mutatis mutandis*, not to be in the ordinary course of trade because they contained domestically sold biodiesel in their blend, which was found not to be in the ordinary course of trade.¹³⁷ The European Union considers that the reference in Article 2.2.2(iii) to profit "normally" realized operates to permit an investigating authority to reject data that is obviously distorted by some act of State for purposes of calculating a profit cap. While the European Union does not suggest an "ordinary course of trade" requirement is included in Article 2.2.2(iii), the European Union argues that the fact that sales of a given product are not in the ordinary course of trade informs the analysis of "normally" under Article 2.2.2(iii). In other words, in certain occasions data can simultaneously be not in the ordinary course of trade and not "normal" within the meaning of Article 2.2.2(iii). The European Union finds support for its argument in the following discussion of the Appellate Body in *US – Hot-Rolled Steel* that was made in the context of Article 2.1:

In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.¹³⁸

The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

(emphasis added)

¹³³ Indonesia's second written submission, paras. 53-54.

¹³⁴ European Union's opening statement at the first meeting of the Panel, paras. 27-28 (referring to Panel Report, *Thailand – H-Beams*, paras. 7.112 and 7.115).

¹³⁵ European Union's first written submission, paras. 47-48, opening statement at the first meeting of the Panel, para. 29; response to Panel question No. 19, paras. 39-40; and second written submission, para. 35.

¹³⁶ European Union's second written submission, para. 36.

¹³⁷ European Union's second written submission, para. 25.

¹³⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

7.59. As highlighted by this passage, the European Union argues that the rationale of providing for a cap for profits which is used to construct the profit is to ensure that the chosen profit is "normal" in the domestic market.¹³⁹ In its view, the fact that sales of biodiesel blended with mineral diesel were found not to be in the ordinary course of trade establishes that they are not an appropriate basis to calculate the profit cap as there was no profit "normally" realized on sales of blended biodiesel with mineral diesel by other exporters or producers within the meaning of Article 2.2.2(iii).¹⁴⁰

7.60. Indonesia disagrees with the European Union's interpretation of the word "normally" in Article 2.2.2(iii). Indonesia argues that the term "normally" in Article 2.2.2(iii) is intended to limit the discretion of an investigating authority by not allowing it to use data that is a statistical outlier. In this sense, the profit cap cannot be based on a statistical outlier, but should be based for instance on an average of profit data as taken from various sources. Indonesia contends that its interpretation is supported by the structure of Article 2.2.2, as well as the use of the word "normally" in other provisions of the Anti-Dumping Agreement. Indonesia submits that the term "normally" cannot be intended as having the same meaning as the language "in the ordinary course of trade" that is used elsewhere in the Anti-Dumping Agreement, which provides investigating authorities with discretion to take into account commercial conditions surrounding sales and disregard certain sales on that basis.¹⁴¹

7.61. The parties' debate as whether or not it was possible to calculate a profit cap in the particular investigation raises several additional questions regarding the discretion of an investigating authority surrounding the determination of the profit "normally" realized by other exporters or producers and the scope of the same general category of products.

7.62. We begin by noting that Article 2.2.2(iii) does not specify a particular requirement on an investigating authority as to how to define what products fall within the same general category of products, for purposes of determining "the profit normally realized". We agree with the European Union that there is no obligation to construe the scope of products in the same general category broadly. The panel in *Thailand – H-Beams* noted that the methodologies in Articles 2.2 and 2.2.2 aim to approximate the price of the like product. Referring in that case to Article 2.2.2(i), the panel observed that the use of a broader category of products when defining the same general category of products means that more products other than the like product will be included, which in turn may result in a constructed normal value that is less representative of the price of the like product.¹⁴² We share this view and consider it equally applicable in the context of Article 2.2.2(iii).

7.63. Against this background, we see no basis why the European Union would be required to treat oleochemicals as falling within the same general category as biodiesel. In our view, a reasonable and objective authority may conclude that the same general category of products is a narrower category.¹⁴³ In light of this discretion, based on the information we have before us, we disagree with Indonesia that the EU authorities were necessarily required to rely on data on sales of oleochemicals as a basis to calculate the profit cap under Article 2.2.2(iii). In stating this, we do not mean to suggest that the EU authorities were therefore excused from establishing the profit cap.

¹³⁹ European Union's second written submission, paras. 21-33.

¹⁴⁰ The European Union recalls that Indonesia has not disputed the finding by the EU authorities that there were no sales of biodiesel in the ordinary course of trade in Indonesia. (European Union's first written submission, para. 23 (referring to Definitive Regulation, (Exhibit IDN-2), recital 28)). The European Union further submits that data provided on sales of blends of biodiesel and mineral diesel could not be used for purposes of Article 2.2.2(iii) because profit amounts were only provided on the biodiesel element, and not the sales of the blended product. (European Union's opening statement at the second meeting of the Panel, paras. 18-19). Indonesia disputes this argument. (Indonesia's response to Panel question No. 64, paras. 4-10).

¹⁴¹ Indonesia's response to Panel question No. 71, paras. 26-35. See also response to Panel question No. 70, para. 25.

¹⁴² Panel Report, *Thailand – H-Beams*, para. 7.115.

¹⁴³ The European Union submits that according to Wilmar Group's website, oleochemicals are a very broad category of products, including soap, noodles, refined glycerine, cosmetic esters and palm waxes. (European Union's response to Panel question No. 19, para 40 (referring to Wilmar Group website <http://www.wilmar-international.com/our-business/tropical-oils/manufacturing/tropical-oils-products/oleochemicals/> (accessed 28 September 2017))).

7.64. We also see no issue with the decision of the EU authorities to define the scope of the same general category of products as "any other fuel"¹⁴⁴ while at the same time denying a request for end-use relief for biodiesel for non-fuel use. We recall that Article 2.2.2 aims to approximate the price of the like product. In approximating this price, an investigating authority may determine a category of products that fall in the same general category for purposes of constructing an amount for profit (or SG&A expenses) with the goal of approximating as closely as possible the price of the like product. This decision to define the category in this way could result, for instance, from the fact that a significant portion of sales of the product concerned fall within that category based on a particular end use (e.g. as a fuel). At the same time, an investigating authority may determine the need to take action to prevent circumvention in respect of products sold in the domestic market with similar physical properties but different end uses. In the case at hand, the EU authorities determined that the product for which end-use relief was requested had similar physical properties and could be further processed and thereby converted for use as a fuel.¹⁴⁵

7.65. We disagree, however, with the European Union's interpretation of the term "normally" in Article 2.2.2(iii). We see no basis for the European Union's argument that "profit normally realized" in Article 2.2.2(iii) means that an investigator may disregard the profit realized on sales that are considered not compatible with normal commercial practice. The word "normally" is defined as "[i]n a regular manner; regularly" or "[u]nder normal or ordinary conditions; as a rule, ordinarily" or "[i]n a normal manner, in the usual way".¹⁴⁶ This suggests that the term "normally" in Article 2.2.2(iii) refers to commonality of occurrence, and therefore to profits that are regularly, ordinarily, usually, or as a rule realized. We consider this understanding is consistent with the way that the word "normally" is used, for example, in footnote 8 of the Anti-Dumping Agreement, concerning what the date of sale should "normally", i.e. usually, be. Similarly, Article 5.8 states that the volume of dumped imports shall "normally" be regarded as negligible, except in the case countries which individually account for less than 3% of the imports of the like product in the importing Member collectively account for more than 7% of imports of the like product in the importing Member.

7.66. We find that the structure of subparagraphs of Article 2.2.2 is also relevant in this regard. Subparagraphs (i) and (ii) refer to the use of "actual amounts", without any qualification that such sales must relate to any form of "normal" commercial conditions. The three alternative methods for calculating profit amounts in the three subparagraphs constitute "close approximations"¹⁴⁷ of the general rule contained in the *chapeau* of Article 2.2.2, and while subparagraphs (i) and (ii) express a preference for the actual data regarding the exporter and like product in question, there is "an incremental progression away from these principles before reaching 'any other reasonable method' in Article 2.2.2(iii)".¹⁴⁸ Since the data becomes more approximate as one progresses from subparagraph (i) to subparagraph (iii), it seems highly unlikely that the drafters would have envisaged an investigating authority considering the "normality" of the commercial conditions under subparagraph (iii) but not under subparagraphs (i) and (ii).

7.67. In addition, we are not persuaded by the European Union's reliance on the findings of the Appellate Body in *US – Hot-Rolled Steel* that:

In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.¹⁴⁹

7.68. In that case, the Appellate Body necessarily understood "normal value" as referring to sales that are compatible with normal commercial practice. This does not mean that the term "normal"

¹⁴⁴ Definitive Disclosure, (Exhibit IDN-7), recital 68.

¹⁴⁵ Definitive Regulation, (Exhibit IDN-2), recital 23.

¹⁴⁶ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1945.

¹⁴⁷ Panel Report, *EC – Bed Linen*, para. 6.60.

¹⁴⁸ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.335.

¹⁴⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

should be interpreted throughout the Anti-Dumping Agreement as referring to normal commercial practice, particularly when an "ordinary course of trade" standard is not expressly provided for, or in cases where the term "normally" appears to relate more to commonality of occurrence.

7.69. We therefore disagree with the European Union's interpretation of "normal" and its view that data available to establish "profits normally realized" within the meaning of Article 2.2.2(iii) may be disregarded in circumstances where, according to the European Union, "all of the data might be obviously distorted by some act of the State"¹⁵⁰ or data pertains to sales that are not considered as being made in the ordinary course of trade. Consequently, we also disagree with the assessment that it was appropriate to disregard information on profit amounts on sales of blends of biodiesel with mineral diesel for the purposes of calculating the cap for the same reason, i.e. that sales were not considered as being made in the ordinary course of trade.¹⁵¹

7.70. We also have doubts regarding the failure of the EU authorities to consider whether data on sales of diesel fuels and marine fuel oil by [[***]] could have been used to determine the profit cap, considering that these products could be considered as "other fuels", and hence, would fall within the same general category of product.¹⁵² In our view, the EU authorities could have considered these sales for the determination of the profit cap.

7.71. Ultimately, an investigating authority retains a degree of discretion to define the same general category of products pursuant to Article 2.2.2(iii). In this particular investigation, we believe that there were sales of products in the same general category that could have provided a basis to calculate the cap. In addition, if an investigating authority chooses to reject data provided in the investigation, the investigating authority would then be required to seek relevant data elsewhere, including from publicly available sources in order to comply with its obligations under Article 2.2.2(iii). We are also not persuaded by the European Union's argument that the term "normally" in Article 2.2.2(iii) permits an investigating authority to enquire into the commercial conditions surrounding those sales and to disregard certain sales based on the prevailing commercial conditions.

7.72. For the foregoing reasons, we therefore disagree with the argument of the European Union that it was objectively impossible to calculate the profit cap in the underlying investigation. In reaching this finding, we agree with the European Union that there is no obligation to construe the scope of products in the same general category broadly, and therefore, the EU authorities were not required to treat oleochemicals as falling within the same general category as biodiesel. We also agree with the decision of the EU authorities to define the scope of the same general category of products as "any other fuel" while at the same time denying a request for end-use relief for biodiesel for non-fuel use. However, we reject the European Union's argument that the phrase "profits normally realized" within Article 2.2.2(iii) permits an investigating authority to disregard data on sales that are not considered compatible with normal commercial practice. Consequently, we also reject the argument that it would have been appropriate to disregard information on profit amounts on sales of blends of biodiesel with mineral diesel for the purposes of calculating the cap for the same reason, i.e. that sales were not considered as being made in the ordinary course of trade. In addition, we also find that the EU authorities should have considered sales of diesel fuels and marine fuel oil by [[***]] to determine the profit cap.¹⁵³

7.73. Accordingly, we conclude that Indonesia has demonstrated that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement in the original investigation in

¹⁵⁰ European Union's second written submission, para. 23.

¹⁵¹ We recall that the EU authorities did not specifically address in the investigation whether data on sales of blends of biodiesel and mineral diesel could be used to calculate the profit cap for purposes of Article 2.2.2(iii). The EU authorities instead concluded that data on sales of blends of biodiesel and mineral diesel of one Indonesian producer could not be used to determine a profit amount under Article 2(6)(b) of the EU Basic Regulation, which implements the obligation contained in Article 2.2.2(i) of the Anti-Dumping Agreement, subject to the additional requirement that sales in the same general category be made in the ordinary course of trade. (Definitive Regulation, (Exhibit IDN-2), recital 84).

¹⁵² Definitive Disclosure, (Exhibit IDN-7), recital 68.

¹⁵³ Indonesia rejects the European Union's assertions that it was not possible to calculate a profit cap as *ex post* rationalization that should be rejected. (Indonesia's first written submission, paras. 141 and 149-150; second written submission, para. 28). In light of our disagreement with the European Union's position that it was objectively impossible to calculate a profit cap based on a lack of data before it, we do not consider it necessary to address Indonesia's argument further.

determining the amount for profits for Indonesian producers by failing to determine the profit cap, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". As a result of this violation, Indonesia further requests that we find the European Union also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement.¹⁵⁴ We note that the *chapeau* of Article 2.2.2 indicates that amounts for administrative, selling, and general costs and for profits shall be determined "[f]or the purpose of paragraph 2" of Article 2 of the Anti-Dumping Agreement. Accordingly, we consider that Indonesia's claim under Article 2.2 is purely consequential and we therefore additionally find that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement.

7.4.4 Whether the European Union determined a profit margin for Indonesian producers on the basis of a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement

7.74. Indonesia additionally seeks a finding that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement. The European Union submits that the method on which the EU authorities determined the level of profits was reasonable, and the resulting amount was also itself reasonable.¹⁵⁵ We now address and make findings with respect to this additional aspect of Indonesia's claim, as our views in this regard could be relevant in the context of implementation.

7.75. Argentina raised a similar claim in *EU – Biodiesel (Argentina)* that, through the determination of a 15% profit margin for Argentine producers, the European Union failed to determine an amount for profits on the basis of a reasonable method within the meaning of Article 2.2.2(iii).¹⁵⁶ The EU authorities applied the same methodology when determining an amount for profits for both Argentine and Indonesian producers during the biodiesel investigation, and determined the same profit margin for all Argentine and Indonesian producers, i.e. 15% based on turnover as "a reasonable amount that can be achieved by a relatively new, capital intensive industry" in Argentina and Indonesia.¹⁵⁷ The panel in *EU – Biodiesel (Argentina)* found that Argentina failed to establish that the European Union acted inconsistently with Article 2.2.2(iii) in its determination of a 15% margin in constructing the Argentine producers' normal value.¹⁵⁸ This finding was not the subject of an appeal.

7.76. Indonesia acknowledges the panel's finding in *EU – Biodiesel (Argentina)* but nevertheless maintains that this does not prevent the Panel from finding in this proceeding that the same 15% profit margin established for Indonesian producers was not determined pursuant to a reasonable method as required by Article 2.2.2(iii). In this regard, Indonesia submits that there are factual differences between Argentine and Indonesian producers, and the evidence before the EU authorities during the investigation clearly demonstrates that a different margin should have been chosen for Indonesian producers.¹⁵⁹ The European Union submits that, although the facts are not identical in the two cases, Indonesia has not met its burden of proof as complainant to establish that the method for calculating profits for Indonesian producers was not reasonable or that the amount was not reasonable.¹⁶⁰

7.77. We have set out the facts in paragraphs 7.37. to 7.43. above related to the European Union's determination of an amount for profits for Indonesian biodiesel producers. Under its approach, the EU authorities took as a starting point the profit margin that the EU biodiesel industry was reasonably expected to achieve during the early stages of development of the industry in 2005-2006, which was found to be 15%. The European Union confirmed that this amount was the average profit obtained by the EU industry during the 2004-2006 period which

¹⁵⁴ Indonesia's first written submission, para. 180; second written submission, para. 84.

¹⁵⁵ European Union's first written submission, para. 34.

¹⁵⁶ Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.307-7.351. Unlike Indonesia in this dispute, Argentina did not separately claim that the European Union acted inconsistently with the requirement in Article 2.2.2(iii) to calculate a cap for profits and to ensure that the profit margin did not exceed such a cap.

¹⁵⁷ Definitive Regulation, (Exhibit IDN-2), recitals 44 and 84.

¹⁵⁸ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.351.

¹⁵⁹ Indonesia's first written submission, para. 165; second written submission, para. 60.

¹⁶⁰ European Union's first written submission, paras. 37-38. See also comments on Indonesia's response to Panel question No. 75, para. 22.

had been determined in the context of the 2009 anti-dumping duty investigation into biodiesel imports from the United States.¹⁶¹ The EU authorities considered that it was reasonable to use this 15% profit margin for the Indonesian and Argentine biodiesel industries as these industries were found to be at the same stage of development as the EU industry during the 2005-2006 period.¹⁶² As indicated in the Definitive Regulation, the EU authorities confirmed the reasonableness of the 15% profit margin by looking at the short and medium term borrowing rates in both Argentina and Indonesia, which was found to be 14% and 12%, respectively, according to World Bank data. The EU authorities specifically noted that the reference to the short and medium term borrowing rate was not meant to set a benchmark but to "test the reasonableness" of the margin used.¹⁶³ The EU authorities considered it reasonable to expect a higher profit margin to be obtained in the domestic market than the prevailing borrowing cost of capital in those countries. Accordingly, the 15% profit was found to be "a reasonable amount that can be achieved by a relatively new, capital-intensive industry in Indonesia".¹⁶⁴

7.78. Since the panel in *EU – Biodiesel (Argentina)* evaluated the methodology used by the EU authorities – which is the same methodology used to establish an amount for profits for Indonesian producers – to establish a profit margin for Argentine producers, we begin by recalling those findings. We will then assess the relevance of those findings in light of the arguments raised by Indonesia in this dispute.

7.79. In *EU – Biodiesel (Argentina)*, the panel began with an assessment of what constitutes "any other reasonable method" under Article 2.2.2(iii) before assessing "whether reliance on such a method can be discerned from the explanations provided by the EU authorities in the investigation at issue".¹⁶⁵ We first refer to the panel's interpretation of the meaning of "any other reasonable method" under Article 2.2.2(iii):

We turn first to the ordinary meaning of the term "method" in the context of Article 2.2.2(iii). Dictionary definitions of the term include "[p]rocedure for attaining an object", "[a] mode of procedure; a (defined or systematic) way of doing a thing", and "[a] written systematically-ordered collection of rules, observations, etc. on a particular subject".^[575] Based on these definitions, we understand the term "method" to refer, in general terms, to a process or procedure, as opposed to an outcome.

The context of the term in Article 2.2.2(iii) sheds further light on its scope. First, the term is qualified by the words "any other". The use of "any" suggests a particularly broad scope^[576], and the use of "other" suggests that the other subparagraphs of Article 2.2.2 illustrate what may be captured by the term "method" under Article 2.2.2(iii). In that regard, we note that the chapeau and paragraphs preceding Article 2.2.2(iii) provide, in relevant part, that the amounts for administrative, selling and general costs and for profits may be "based on" or "determined on the basis of": (i) actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation; (ii) the actual amounts incurred and realized by the exporter or producer in question in respect of the same general category of products; or (iii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product.^[577] It is significant, in our view, that these three alternatives refer to the kind of specific data on which the amount of

¹⁶¹ European Union's response to Panel question No. 7, paras. 6-8. See also Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.340-7.342; and Commission Regulation (EC) No. 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, (Exhibit IDN-25), recital 164.

¹⁶² The European Union has confirmed that the EU authorities' finding in respect of investigated Argentine producers was based on the same finding. (European Union's response to Panel question No. 7, paras. 6-8).

¹⁶³ Definitive Regulation, (Exhibit IDN-2), recital 84. The EU authorities confirmed the reasonableness of the 15% profit margin for Argentine producers by looking at the short and medium term borrowing rate in Argentina, which was found to be 14% according to World Bank data. (Definitive Regulation, (Exhibit IDN-2), recital 44).

¹⁶⁴ Definitive Regulation, (Exhibit IDN-2), recital 84. The EU authorities reached the same finding in respect of investigated Argentine producers. (Definitive Regulation (Exhibit IDN-2), recital 44; see also Provisional Regulation, (Exhibit IDN-1), recitals 44 and 65).

¹⁶⁵ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.333.

profit can be determined, rather than a specific procedure or methodology for the calculation of the amount for profits. This suggests to us that the term "method" in subparagraph (iii) refers to a reasoned consideration of the evidence before the investigating authority for the determination of the amount for profits, rather than to a pre-established procedure or methodology.^[578] In addition, these "other" methods indicate a preference for the actual data regarding the exporter and like product in question, with an incremental progression away from these principles before reaching "any other reasonable method" in Article 2.2.2(iii). It flows from that context that the phrase "any other reasonable method" may be used in the absence of reliable data concerning the actual exporter or other exporters and the like product.^[579] This, in turn, suggests that an investigating authority would usually have recourse to Article 2.2.2(iii) in circumstances where its options for basing the determination of an exporter's profit margin are constrained. This context, together with absence of any additional guidance in Article 2.2.2(iii) on what the "method" chosen should entail in terms of either the source or scope of the data or procedure, suggests to us a broad and non-prescriptive understanding of the term.

Second, as we have noted above, in addition to the requirement that it be determined on the basis of "any reasonable method", Article 2.2.2(iii) imposes a ceiling on the amount for profits determined^[580], requiring that the amount for profits "not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". The presence of this constraint, in the absence of any other guidance on the kind of "method" to be adopted, confirms our broad and non-prescriptive understanding of the term "method".

We now turn to assess what constitutes a "reasonable" method in the context of Article 2.2.2(iii). In the context of Article 2.2.2(iii), it is clear from the use of "any other" before "reasonable" that what is "reasonable" is connected to the preceding paragraphs and the chapeau and that the "methods" set in the preceding paragraphs and the chapeau are presumptively reasonable. As we have discussed, these indicate a preference for the actual data of the exporter and like product in question, with an incremental progression away from these principles before reaching "any other reasonable method" in Article 2.2.2(iii). In our view, this context suggests that the general function of Article 2.2.2 is to approximate what the profit margin (as well as administrative, selling and general costs) would have been for the like product in the ordinary course of trade in the domestic market of the exporting country.^[581] Thus, in our view, the reasonableness of the method used under Article 2.2.2(iii) for determining the profit margin turns on whether it is rationally directed at approximating what that margin would have been if the product under consideration were sold in the ordinary course of trade in the domestic market of the exporting country.

Based on the foregoing considerations, we understand the term "any other reasonable method" in Article 2.2.2(iii) to involve an enquiry into whether the investigating authority's determination of the amount for profits is the result of a reasoned consideration of the evidence before it, rationally directed at approximating the profit margin to what would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country.¹⁶⁶

[fn original]⁵⁷⁵ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1767.

[fn original]⁵⁷⁶ Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, fn 197; *Canada – Autos* para. 79.

[fn original]⁵⁷⁷ See above, para. 7.310, for the text of Article 2.2.2(iii) of the Anti-Dumping Agreement.

[fn original]⁵⁷⁸ Argentina acknowledges that "neither of the two procedures set forth in (i) and (ii) represents a complex or elaborated method. They are rather simple" (adding, however, that "they go beyond the mere unsubstantiated assertion with respect to what profits are"). (Argentina's response to Panel question No. 108, para. 86)

¹⁶⁶ Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.334-7.338.

[fn original]⁵⁷⁹ We note that the panel in *EC – Bed Linen* found that there is no hierarchy among the methods for determining the amount for profits in Articles 2.2.2(i)-(iii). (Panel Report, *EC – Bed Linen*, para. 6.59). The question of the interaction between these methods, or a potential hierarchy among them, has not been raised in this dispute and accordingly we express no views in that regard.

[fn original]⁵⁸⁰ We note that the ceiling does not apply to the determination of the amounts for administrative, selling and general costs.

[fn original]⁵⁸¹ Panel Report, *Thailand – H-Beams*, para. 7.112.

7.80. Thus, the panel reached the view that "any other reasonable method" in Article 2.2.2(iii) "involve[s] an enquiry into whether the investigating authority's determination of the amount for profits is the result of a reasoned consideration of the evidence before it, rationally directed at approximating the profit margin to what would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country".¹⁶⁷

7.81. The panel then turned to examine whether the EU authorities' explanations for determining a 15% profit margin as applied to Argentine producers in the investigation met this requirement. In its evaluation, the panel found relevant that the application by the petitioner EBB had drawn attention to findings made by the EU authorities in the 2009 investigation into biodiesel imports from the United States that a profit margin of 15% "represented a level reasonable achieved by the European Union biodiesel industry"¹⁶⁸, in particular, as a profit level that would reasonably guarantee productive investment for a "newly established" biodiesel industry.¹⁶⁹ The panel took the view that the EU authorities had therefore arrived at the figure of 15% based on their experience with the relevant industry in other investigations. Accordingly, the panel concluded that "the EU authorities arrived at the 15% figure by taking into account the characteristics of a biodiesel industry that is 'young', 'innovative' and 'capital intensive' and by drawing on their earlier experience in a recent, similar investigation".¹⁷⁰

7.82. The panel next noted the EU authorities' explanation that they had "tested" the 15% margin by comparing it to the short and medium term borrowing rate in Argentina of around 14% that was published by the World Bank. The panel was of the view that the EU authorities' determination of the amount for profits "proceeded from a reasoned consideration of the evidence before them".¹⁷¹ In particular, the panel concluded that the 15% figure was chosen on the basis of what appear to be plausible similarities between the stage of development of the Argentine biodiesel industry at the time of the investigation, on the one hand, and the stage of development of the EU industry at the time of the investigation of biodiesel from the United States, on the other hand. The panel disagreed with Argentina that such an approach did not qualify as a "method" within the meaning of Article 2.2.2(iii).¹⁷²

7.83. The panel then proceeded to evaluate the reasonableness of the EU authorities' approach. The panel concluded that "an unbiased and objective investigating authority could reasonably consider, as an initial step, that profit margins determined in prior investigations of other producers in the same industry at similar stages of development provide an indication of the profit margins of producers in a subsequent investigation."¹⁷³ The panel further reasoned that it would be appropriate for an unbiased and objective investigating authority to "test" that figure against relevant benchmarks. Notably, the panel found that the EU authorities had considered four such benchmarks, including: the World Bank indicator for short and medium term borrowing rates (which was 14%); the rate of the actual profits of Argentine biodiesel producers (which were "in excess of 25%"¹⁷⁴); a 5% benchmark that had been proposed by one Argentine producer as a profit figure that was regularly used in similar commodity-related markets; and an 11% benchmark representing target profit in the context of determining the injury elimination margin for the EU industry.¹⁷⁵ The panel was persuaded by the EU argument that a 5% margin was not

¹⁶⁷ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.338.

¹⁶⁸ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.340.

¹⁶⁹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.340.

¹⁷⁰ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.342.

¹⁷¹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.344.

¹⁷² Panel Report, *EU – Biodiesel (Argentina)*, para. 7.344.

¹⁷³ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.347.

¹⁷⁴ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.348.

¹⁷⁵ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.348.

systematically used, as well as the argument that the 11% figure was not appropriate for a "young and innovative" biodiesel industry.¹⁷⁶

7.84. On this basis, the panel found "the selection and testing of the 15% profit margin resulted from a reasoned analysis that ... was rationally directed at approximating what the Argentine producers' profit margin for the like product would have been if the like product had been sold in the ordinary course of trade in the domestic market of the exporting country".¹⁷⁷

7.85. The panel noted what it described as a "degree of inconsistency" in the EU authorities' assessment, including in the decision to reject a request by Argentine producers to use the 11% figure, as that was the figure used for calculating the target profit in the context of determining the injury elimination margin for the EU industry in the US biodiesel investigation, instead of the 15% profit rate.¹⁷⁸ Notwithstanding this observation, the panel reasoned that an objective and unbiased investigating authority could have plausibly differentiated between the determination of the profit margin of Argentine producers for the purpose of constructing normal value on the one hand, and the determination of the profit margin of the European Union industry for the purpose of determining the level of injury, on the other hand. The panel found this was reasonable given the view that the EU domestic industry had matured, justifying a reduction in its target profit in the absence of dumped imports, while the Argentine industry was found to be "young and innovative".¹⁷⁹

7.86. Based on the above reasoning, the panel therefore found that Argentina failed to establish that the European Union acted inconsistently with Article 2.2.2(iii) in its determination of a 15% margin.¹⁸⁰

7.87. We are of the view that the panel's assessment that the approach taken by the EU authorities constitutes a "method" within the meaning of Article 2.2.2(iii) also applies in this dispute.¹⁸¹ We further note that Indonesia has not disputed this finding. Accordingly, we are not required to assess whether the approach taken by the EU authorities in respect of Indonesian producers constitutes a "method" under Article 2.2.2(iii). The only question that we are required to consider is whether the method used by the EU authorities in respect of Indonesian producers was "reasonable" within the meaning of Article 2.2.2(iii). We will therefore consider the parties' arguments in relation to this issue.

7.88. There is no disagreement between the parties regarding the decision by EU authorities to consider the profits obtained by the biodiesel industry outside of Indonesia (in this case the profits obtained by the EU authorities in the 2005-2006 period) as a relevant starting point to determine the reasonable profit margin for Indonesian producers.¹⁸² However, Indonesia maintains that the focus of Article 2.2.2(iii) is on the profit margin in the exporting country and not the profit margin obtained by the same industry in another country.¹⁸³ Accordingly, Indonesia argues that the Panel must enquire into whether the EU authorities' determination of the amount of profits is the result of a reasoned consideration of the evidence before it that is rationally directed at approximating the profit margin *in Indonesia*.¹⁸⁴ In this respect, Indonesia considers that it has given *prima facie* evidence that the EU authorities failed to take into account important differences in the stage of development of the Indonesian biodiesel industry as compared to the EU industry in the 2005-2006 period, and has therefore established that the European Union failed to apply a reasonable method in respect of Indonesian producers. Therefore, Indonesia considers that the burden of proof shifts to the European Union to rebut its claim.¹⁸⁵ The European Union contends

¹⁷⁶ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.348.

¹⁷⁷ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.349.

¹⁷⁸ The panel stated: "there seems to be a degree of inconsistency between this reasoning, on the one hand, and the use by the EU authorities of the 15% profit margin determined on the basis of its earlier experience from the United States investigation, on the other". (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.350).

¹⁷⁹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.350.

¹⁸⁰ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.351.

¹⁸¹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.344.

¹⁸² Indonesia's second written submission, para. 66.

¹⁸³ Indonesia's first written submission, para. 163 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.338).

¹⁸⁴ Indonesia's second written submission, para. 66.

¹⁸⁵ Indonesia's responses to Panel question No. 75, para. 49, and No. 76, paras. 50-51.

that statements made by Indonesia do not qualify as *prima facie* evidence, but rather, constitute assertions unsupported by evidence, which are inadequate to establish its claim. The European Union submits that, in any event, it has provided the necessary rebuttal in the information it has provided.¹⁸⁶

7.89. According to Indonesia, the evidence shows that the European Union industry was "two, maximum three years old" during the 2005-2006 period. Indonesia submits that the evidence also shows that some of the Indonesian producers were already active in the biodiesel industry in 2006 and 2007, which means that the Indonesian industry was already five to six years old during the investigation period in 2011 and 2012. In Indonesia's view, this demonstrates that the European Union's claim that the Indonesian industry was at a similar stage of development as the European Union industry was in 2005-2006 is factually incorrect.¹⁸⁷

7.90. The European Union submits that the EU authorities properly concluded that the Indonesian biodiesel industry was at a similar stage of development during the investigation period as the European Union was during the 2005-2006 period. The European Union argues that information in the public domain shows that the EU biodiesel industry started in the 1990s. Hence, the EU industry would have been more than five to six years old by the 2005-2006 period and there is no basis to Indonesia's argument that the European Union industry was between two and three years old during that period.¹⁸⁸

7.91. The European Union further submits that it is not sufficient to establish the maturity of one industry or another by reference to the number of years an industry has been in existence. The European Union submits that a biodiesel industry in one country may develop more quickly or slowly than a biodiesel industry in another country.¹⁸⁹ The European Union submits that reference to production volumes, the pace of increase or stagnation of production volumes, the number of producers and the level of competition, and the overall size of the producing country may be helpful elements in assessing the stage of development of a biodiesel industry.¹⁹⁰ In this respect, the European Union has submitted publicly available evidence on the production levels of the EU industry in the 2004-2005 period as compared to Indonesian production levels in 2012. The European Union submits that EU production reached nearly 2 million tonnes in 2004, 3 million tonnes in 2005, and 5 million tonnes in 2006. In comparison, annual production reached 2.2 million tonnes in Indonesia in 2012, similar to the production volume of the EU industry in the years 2004 and 2005.¹⁹¹

7.92. We note that Indonesia has also not disputed the statement that the EU industry started in the 1990s.¹⁹² Indonesia also does not disagree that factors other than the date of starting operations – such as the pace of development or production volumes of biodiesel industries – may be relevant for determining whether the Indonesian industry was at a similar stage of development as the EU industry was in the 2005-2006 period.¹⁹³ Indonesia has not commented on or otherwise objected to production statistics submitted by the European Union¹⁹⁴, which, according to the European Union, shows that production in Indonesia in 2012 was similar to that of the EU industry in the 2004-2005 period. To the extent that production volumes may indicate the stage of development of an industry, the figures submitted by the European Union suggest that the

¹⁸⁶ European Union's comments on Indonesia's response to Panel question No. 75, para. 22.

¹⁸⁷ Indonesia's second written submission, paras. 70-71.

¹⁸⁸ European Union's response to Panel question No. 75, paras. 30-32.

¹⁸⁹ European Union's opening statement at the second meeting of the Panel, para. 31.

¹⁹⁰ European Union's response to Panel question No. 74, para. 28; comments on Indonesia's response to Panel question No. 74, para. 19.

¹⁹¹ European Union's response to Panel question No. 75, paras. 31-32 (referring to European Biodiesel Board, EU production statistics 1998-2013, (Exhibit EU-6 (numbered by the Secretariat) (submitted as Exhibit EU-4 in response to Panel question No. 75, para. 31)); ECOFYS, *International biodiesel markets: Developments in production and trade* (Berlin, 2011), (Exhibit EU-3 (numbered by the Secretariat) (submitted as Exhibit EU-1 in response to Panel question No. 74, para. 29 and No. 75, para. 31)); and USDA, Indonesia Biofuels Annual Report 2017 (20 June 2017), (Exhibit EU-4 (numbered by the Secretariat) (submitted as Exhibit EU-2 in response to Panel question No. 74, para. 29 and No. 75, para. 32), p. 13)).

¹⁹² Indonesia did not provide comments on the European Union's response to Panel question No. 75, in which the European Union contended that information in the public domain shows that the EU biodiesel industry started in the 1990s.

¹⁹³ Indonesia's response to Panel question No. 75, para. 49.

¹⁹⁴ USDA, Indonesia Biofuels Annual Report 2017 (20 June 2017), (Exhibit EU-4 (numbered by the Secretariat) (submitted as Exhibit EU-2 in response to Panel question No. 74, para. 29 and No. 75, para. 32)).

EU industry had similar annual production in the 2004-2005 period as compared to Indonesia's annual production in 2012. In our view, this would suggest that it was not unreasonable for the EU authorities to find that the two industries were at a similar stage of development. Based on this observation, it seems plausible to rely on the profits obtained by the EU industry in the 2005-2006 period as a starting point for its determination of a profit amount for sampled Indonesian producers.

7.93. The figures on annual production volumes also call into question Indonesia's argument that the Indonesian industry had been in existence (five to six years at the time of the investigation) much longer than the EU industry had been in the 2005-2006 period (roughly two to three years). Even if we accept Indonesia's contention that the maturity of an industry may be established based on the number of years in existence, the similarity in production volumes contradict Indonesia's position. On the contrary, the similarity in production volumes supports the position of the European Union that the pace of development may be very different in different countries. Overall, we are not persuaded by Indonesia's argument that the EU authorities failed to take into account important differences in the stage of development, as a basis to establish that the EU authorities did not apply a reasonable methodology.

7.94. The parties have also responded to a question from the Panel regarding the stages of development of the Argentine and Indonesian industries during the investigation period. Indonesia submits that the Indonesian biodiesel industry was at a more advanced stage than the Argentine industry at the time of the investigation.¹⁹⁵ In support of this statement, as set out in the complaint submitted in this investigation, Indonesia submits data on the installed capacity for biodiesel in Indonesia and Argentina in the 2008-2012 period.¹⁹⁶ The European Union rejects that the Indonesian and Argentine industries were at different stages of development at the time of the investigation, referring to production volumes during the 2006-2012 period.¹⁹⁷ Based on our review of this information, we are not convinced that the EU authorities acted unreasonably in their determination of a profit amount for both sampled Argentine and Indonesian producers.

7.95. Indonesia further takes issue with the EU authorities' decision to confirm the reasonableness of the 15% profit margin by reference to the short and medium term borrowing rates published by the World Bank. First, Indonesia submits that the Indonesian producers submitted detailed information, including company-specific information to demonstrate what would be a reasonable profit margin and that the EU authorities should have taken this evidence into account.¹⁹⁸ Indonesia submits that such company-specific information provides a more appropriate approach to determining the profit amount in the Indonesian market than World Bank data, which reflects data for the overall country, and not the biodiesel industry.¹⁹⁹ Second, Indonesia also argues that the EU authorities failed to take into account that the World Bank short and medium term borrowing rate was lower for Indonesia (i.e. 12%) than for Argentina (i.e. 14%). In Indonesia's view, while a 14% short and medium term rate might support the reasonableness of a 15%

¹⁹⁵ Indonesia's response to Panel question No. 74, paras. 45-46.

¹⁹⁶ Indonesia submits data on the installed capacity for Indonesia was 4.5 billion litres in November 2010 and 4.8 billion litres in April 2012 while it can be seen that the installed capacity in Argentina was 2.8 billion litres in 2010. Indonesia notes that the Indonesian biodiesel industry reached a capacity of 3 billion litres in 2008, pointing out that the Argentine industry reached that capacity three years later in 2011. (Indonesia's response to Panel question No. 74, paras. 45 (referring to Annex 18 to the Consolidated version of the new anti-dumping complaint concerning imports of biodiesel originating in Argentina and Indonesia, (Exhibit IDN-34); and Complaint, (Exhibit IDN-3)), and 46 (referring to USDA, Indonesia Biofuels Annual Report 2010 (20 December 2010); and Complaint, (Exhibit IDN-3)).

¹⁹⁷ According to the European Union, the Argentine and Indonesian biodiesel industries both began operating in small volumes in the 2006-2007 period. The European Union submits that reports in the public domain estimate a level of production of 50,000 tonnes in Indonesia in 2006, and 30,000 tonnes in Argentina in 2006, which increased to 500,000 tonnes and 230,000 tonnes in 2008, respectively. In 2012, the European Union submits that annual production had levelled somewhat, reaching 2.2 million tonnes in Indonesia and 2.8 million tonnes in Argentina. (European Union's response to Panel question No. 74, para. 29 (referring to ECOFYS, *International biodiesel markets: Developments in production and trade* (Berlin, 2011), (Exhibit EU-3 (numbered by the Secretariat)); USDA, Indonesia Biofuels Annual Report 2017 (20 June 2017), (Exhibit EU-4 (numbered by the Secretariat)), p. 13; and USDA, Argentina Biofuels Annual Report 2015 (1 July 2015), (Exhibit EU-5 (numbered by the Secretariat)), p. 14)).

¹⁹⁸ Indonesia's first written submission, paras. 171-173.

¹⁹⁹ Indonesia's second written submission, paras. 73-74.

margin for Argentina, the same cannot be said for a 12% short and medium term rate, which is significantly lower than the determined 15% profit margin.²⁰⁰

7.96. The European Union argues that the EU authorities' approach to confirm the reasonableness of the 15% margin by comparing it to the World Bank short and medium term borrowing rate for Indonesia was reasonable. The European Union contends that the EU authorities found it was reasonable to expect biodiesel producers to obtain a profit margin that exceeded that level.²⁰¹ With respect to data provided by certain Indonesian producers, including actual profit margins, the European Union submits that the data was less reliable than World Bank data.²⁰² In this regard, the European Union notes that the actual profits on domestic sales of biodiesel of all but one of the four Indonesian sampled producers were in fact higher than 15%, reaching 30%.²⁰³

7.97. We first address the decision by the EU authorities to confirm the reasonableness of the 15% margin by comparing it to the short and medium term borrowing rate in Indonesia. We recall that there is no particular methodology prescribed by Article 2.2.2(iii), subject to the requirement that an investigating authority uses a "reasonable method". An investigating authority therefore has discretion in the approach it takes. In this respect, the EU authorities selected the profit amount obtained by the EU authorities in the 2005-2006 period and confirmed the reasonableness of this figure by testing it against certain benchmarks. In particular, the selection and testing of the 15% profit margin against the short and medium term borrowing rate in Argentina was found in *EU – Biodiesel (Argentina)* to have resulted from a reasoned analysis that was rationally directed at approximating the profit margin for sales by biodiesel producers, domestic sales by Argentine producers in that case.²⁰⁴ We consider it would also be appropriate for the EU authorities to follow the same approach in respect of Indonesian producers, so long as it can be considered to have been reasonable. We note the European Union's explanation that the short and medium term borrowing rate in Indonesia was not intended as a profit cap, in the sense of Article 2.2.2(iii). We do not find this approach inherently unreasonable, despite the fact that the short and medium term borrowing rates in Indonesia and Argentina are not identical, in particular considering that the rate was not intended to constitute a profit cap. We therefore disagree with Indonesia that the lower short and medium term borrowing rate for Indonesia demonstrates that the method followed by the EU authorities in respect of Indonesian producers was unreasonable.

7.98. We now turn to the data submitted by Indonesian producers during the investigation regarding what would be a reasonable profit margin. In this connection, Indonesian producers provided data that: a reasonable profit margin for the biodiesel industry would be between 2.4% and 3.2% on turnover²⁰⁵; actual borrowing costs were around [[***]]²⁰⁶; the profit margin established by the European Union would imply an unrealistically short payback period²⁰⁷; and the average interest rate for USD loans offered by private banks in Indonesia for working capital and investment loans (which was between 5 and 6.3%).²⁰⁸ We recall that the EU authorities considered it reasonable to rely on the 15% profit margin based on what it considered to be plausible similarities between the stage of development of the EU and the Indonesian biodiesel industries and to then test the reasonableness of that rate. In the exercise of its discretion, an investigating authority may not consider it appropriate to rely on all data that is provided by interested parties.

²⁰⁰ Indonesia's first written submission, paras. 168; second written submission, paras. 77-78.

²⁰¹ European Union's first written submission, para. 33.

²⁰² European Union's response to Panel question No. 10, para. 12.

²⁰³ European Union's first written submission, para. 39; second written submission, para. 39; and response to Panel question No. 12, para. 17 ("Even if it was not explicitly mentioned in the measure at issue, the profit realized by three of the Indonesian producers was actually higher than 15%, while for the fourth producer it was only slightly lower.")

²⁰⁴ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.349.

²⁰⁵ Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), p. 12.

²⁰⁶ Submission by the Wilmar Group filed on 25 July 2013, (Exhibit IDN-14 (BCI)), p. 2.

²⁰⁷ Indonesia's first written submission, para. 128 (referring to P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 2). Indonesian producer P.T. Musim Mas submitted that a 15% profit margin for the producer company was excessive taking into account an investment cost for a 300,000 tonnes per year PME plant is about USD 30 million in Indonesia. Assuming an average price of PME at USD 1140 per tonne during the investigation period, a 25% profit margin would result in a payback period of slightly less than 5 months, which is too ambitious for any young and innovative industry. (P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 10).

²⁰⁸ P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 22.

In this particular case, the EU authorities found the Indonesian biodiesel market was distorted and thus, did not consider it appropriate to base the determination of normal value on actual values.

7.99. Finally, we note that Indonesia questions the determination of a 15% margin, considering that the EU authorities had adjusted the target profit for the domestic industry downwards from 15% to 11%, after finding that the EU industry had matured since the 2005-2006 period. Indonesia notes that a similar adjustment was not made for the Indonesian industry despite the fact that the Indonesian industry was more mature during the investigation period than the EU industry was during the 2005-2006 period.²⁰⁹ The panel in *EU – Biodiesel (Argentina)* addressed this argument.²¹⁰ The panel took the view that this was reasonable given the view that the EU domestic industry had matured, justifying a reduction in its target profit in the absence of dumped imports, while the Argentine industry was found to be "young and innovative".²¹¹ We have rejected above Indonesia's argument that the Indonesian industry was at a different (more advanced) stage of development than the EU industry was during the 2005-2006 period. Absent convincing evidence that the industry was at a different stage of development, we do not find the approach taken by the EU authorities was unreasonable.

7.100. For the foregoing reasons, we therefore reject Indonesia's request that we find that the European Union additionally acted inconsistently with Article 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement.

7.4.5 Conclusions

7.101. As indicated above, we conclude that there is a mandatory requirement in Article 2.2.2(iii) to calculate a profit cap, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". As the EU authorities did not establish, or even attempt to establish such a cap in the investigation of Indonesian producers, we find that Indonesia has demonstrated that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement in failing to determine the profit cap and ensure that the profit amount established by the EU authorities does not exceed such a cap. We concluded that the European Union also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement as a result of failing to determine the profit cap. We reject, however, Indonesia's request that we find that the European Union additionally acted inconsistently with Article 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement.

7.5 Whether the European Union constructed the export price inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement

7.5.1 Introduction

7.102. Indonesia claims that the European Union acted inconsistently with Article 2.3 and the fourth and fifth sentences of Article 2.4 of the Anti-Dumping Agreement by failing to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by P.T. Musim Mas was first resold to independent buyers in the European Union. In particular, Indonesia asserts that the EU investigating authorities improperly failed to include in that first independent resale price the additional amount – or premium – that was paid by clients to the related importer to P.T. Musim Mas, [[***]]. The European Union argues that the premium does not form part of the price at which the imported biodiesel was first resold to an independent buyer.

²⁰⁹ Indonesia's second written submission, para. 72; response to Panel question No. 75, paras. 47-48.

²¹⁰ In *EU – Biodiesel (Argentina)*, Argentina argued that the 11% profit figure used by the investigating authority in the present investigation to calculate the injury elimination level would have been appropriate because it reflects similar levels of development between the Argentine and EU industries. (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.320).

²¹¹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.350.

7.5.2 The EU authorities' construction of the export price for P.T. Musim Mas

7.103. We begin by recalling the relevant facts related to the European Union's determination of an export price for P.T. Musim Mas. Under the mandatory biodiesel blending regulatory framework of certain EU member states, palm fatty acid distillate (PFAD)-based biodiesel is eligible to be "double counted" for the purpose of compliance with EU mandatory biodiesel blending targets. This means that the contribution made by PFAD biodiesel is recognized to be twice that made by other types of biodiesel or biofuels. Because of this, producers are only required to use half as much PFAD biodiesel when blending with mineral diesel to comply with EU mandatory biodiesel blending targets. Customers are willing to pay more for PFAD biodiesels as a result, and hence, a producer is able to charge a premium to the client.²¹² As relevant to Indonesia's claim in this dispute, biodiesel may only be "double counted" in Italy subject to the issuance of a certificate by the Italian government confirming that the biodiesel is eligible for double counting.²¹³

7.104. In the investigation into biodiesel imports from Indonesia, the EU authorities concluded that there was a "national practice"²¹⁴ that clients purchasing PFAD biodiesel eligible for double counting would only pay the additional amount or premium for such biodiesel upon issuance of the certificate by the Italian government confirming the eligibility of the biodiesel for double counting. Upon receipt of such a certificate, the related importer would send a separate invoice to the client for payment of the outstanding premium to the related importer.²¹⁵ Evidence on the Panel's record confirms this practice.²¹⁶ Indonesia has also argued in this proceeding that, once customers became familiar with the operation of the double counting scheme, the invoice contained a single price that reflected the fact that PFAD biodiesel was eligible for double counting.²¹⁷

7.105. In the Provisional Regulation, the EU authorities determined that the additional amount or premium that was paid by the client to P.T. Musim Mas' related importer [[***]] did not form part of the price for resale to the first independent customer.²¹⁸ The EU authorities considered that:

Such premiums are not linked to the product concerned as such, but rather to the provision of documents by the related importer in order to obtain a government certificate which enables the related importer's client to fulfil the necessary conditions to blend only half the biodiesel quantity (given that this biodiesel can be counted 'double').²¹⁹

7.106. In its comments on the Provisional Disclosure, P.T. Musim Mas objected to the exclusion of the double counting premium from the first independent resale price.²²⁰ In the Definitive Regulation, the EU authorities maintained their decision that the premium paid for PFAD biodiesel did not form part of the export price, explaining that, even if it considered the premium as part of the export price, the premium would in any event have to be deducted again "in order to compare the export price with the same normal value with due account taken for differences that affect price comparability".²²¹

²¹² Provisional Regulation, (Exhibit IDN-1), fn 1.

²¹³ Provisional Regulation, (Exhibit IDN-1), fn 1.

²¹⁴ Provisional Regulation, (Exhibit IDN-1), fn 1.

²¹⁵ Provisional Regulation, (Exhibit IDN-1), recital 69.

²¹⁶ Supplementary Agreement between [[***]] and [[***]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI)).

²¹⁷ Indonesia's second written submission, para. 103 (referring to Contract between [[***]] and [[***]] on the sale of Biodiesel (7 March 2014), (Exhibit IDN-33 (English translation) (BCI))). See also Indonesia's response to Panel question No. 77, para. 53 (referring to Contracts between [[***]] and [[***]] on the sale of Biodiesel (24 October 2014), and between [[***]] and [[***]] on the sale of Biodiesel (6 March 2014), (Exhibit IDN-35 (English translation) (BCI)).

²¹⁸ Provisional Regulation, (Exhibit IDN-1), recital 69.

²¹⁹ Provisional Regulation, (Exhibit IDN-1), recital 69.

²²⁰ P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), p. 4.

²²¹ Definitive Regulation, (Exhibit IDN-2), recital 100. Article 2(10)(k) of the EU Basic Regulation implements aspects of Article 2.4 of the Anti-Dumping Agreement that address differences which affect price comparability. Under Article 2.4, an investigator is permitted to make due allowance 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.

7.5.3 Whether the European Union properly excluded the double counting premium from the price at which the imported biodiesel was first resold to independent buyers in the European Union

7.107. Indonesia's challenge with respect to the construction of the export price of P.T. Musim Mas raises a single issue: whether the additional premium paid to P.T. Musim Mas' related importer [IMBI] for PFAD biodiesel, forms part of the price at which the imported biodiesel was first resold to an independent buyer for purposes of Article 2.3 of the Anti-Dumping Agreement.

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

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

7.109. Indonesia submits that the language in Article 2.3 makes clear that the price charged to the first independent buyer is the starting point for the construction of an export price.²²² In Indonesia's view, the term "price" in Article 2.3 refers to the sum of money for which an article or item is sold. Indonesia submits that Article 2.3 does not contain any requirements or qualifications to the general rule that the price at which the imported products are first resold to an independent buyer should be used as the starting point for the construction of export price. For instance, Indonesia notes that Article 2.3 does not specify that the price at which a product is first resold to an independent buyer must be included in one invoice and be payable in one instance or free from any contingent conditions.²²³

7.110. Indonesia emphasizes that Italian customers contractually agreed to pay the premium and were willing to pay a higher price for the biodiesel sold because it was eligible for double counting. In Indonesia's view, this demonstrates that the premium is intrinsically linked to the product being sold, contrary to the determination made by the investigating authority.²²⁴ Indonesia submits that this link is confirmed in contractual agreements between P.T. Musim Mas' related importer [[***]] and its customers.²²⁵

7.111. The European Union does not dispute that the export price should be constructed on the basis of the price at which the imported product is first resold to an independent buyer.²²⁶ However, the European Union is of the view that the premium has no link to the product concerned and is therefore not part of the price charged to the first independent buyer. The

²²² Indonesia's first written submission, para. 206 (referring to Panel Report, *US – Stainless Steel (Korea)*, para. 6.91).

²²³ Indonesia's first written submission, para. 207. Indonesia submits that the mere fact that the payment of part of the price is contingent on the presentation of certain documents does not mean that the price should be decreased by the amount of the premium for purposes of Article 2.3 of the Anti-Dumping Agreement. Rather, in Indonesia's view, the contingency is simply a modality of the payment. (Indonesia's first written submission, para. 213).

²²⁴ Indonesia's first written submission, paras. 210-211 and 213.

²²⁵ Indonesia's second written submission, para. 102 (referring, for example, to Supplementary Agreement between [[***]] and [[***]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI))).

²²⁶ European Union's response to Panel question No. 26, para. 45 ("The question here is what is the 'price at which the imported products are first resold' within the meaning of Article 2.3.") See also response to Panel question No. 32, para. 51 ("The relevant legal standard for the purposes of this claim is in Article 2.3: 'the price at which the imported products are first resold'.") In the Specific Provisional Disclosure provided to [[***]], the EU authorities explained that "[t]he double counting allowance was not considered part of the export price." (Specific Provisional Disclosure for [[***]], annex 2 A, (Exhibit IDN-19 (BCI)), p. 4 (emphasis added)). Indonesia maintains that the use of the term "allowance" by the EU authorities does not mean that that the EU authorities treated the premium as an "allowance" within the meaning of Article 2.4 of the Anti-Dumping Agreement. According to Indonesia, the premium was reported in the initial sales MS Excel table of [[***]] as an "allowance", and was subsequently reported by the EU authorities as an "allowance" due to the formatting of the European Commissions' MS Excel data table. (Indonesia's first written submission, fn 138). The European Union has not contested this point.

European Union argues that Article 2.3 concerns the price that pertains to what is imported and what is resold, which is the product. The premium is not imported or resold.²²⁷ According to the European Union, the fact that Italian customers contractually agreed and were willing to pay the premium, or the fact that the premium was anticipated revenue to P.T. Musim Mas does not establish that the premium is part of the price.²²⁸

7.112. Article 2.3 of the Anti-Dumping Agreement authorizes a Member to construct the export price where, *inter alia*, the actual export price is unreliable because of association between the exporter and importer.²²⁹ The plain language of Article 2.3 makes clear that "the price charged to the first independent buyer is a starting-point for the construction of an export price".²³⁰ Article 2.3 does not itself contain any guidance regarding the methodology to be employed in order to construct the export price. The only rules governing the methodology for construction of an export price are set forth in Article 2.4, which provides that "[i]n 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".²³¹ The panel in *US – Stainless Steel (Korea)* found that this sentence authorizes the only allowances that can be made.²³² After determining the price charged to the first independent buyer, an investigating authority would then work "backwards from the price at which the imported products are first resold to an independent buyer".²³³

7.113. There is no dispute that customers purchasing the biodiesel from P.T. Musim Mas' related importer [[**]] are the first independent buyers. The sole issue is whether the premium that the customer pays to P.T. Musim Mas' related importer [[**]] is properly considered as part of the price that is charged to first independent buyers.

7.114. There is no prior guidance on the interpretation of the term "price" as it appears in the phrase "the price at which the imported products are first resold to an independent buyer" in Article 2.3 of the Anti-Dumping Agreement. The Shorter Oxford English Dictionary defines the term "price" as "the sum in money or goods for which a thing is or may be bought or sold, or a thing or person ransomed or redeemed".²³⁴ This would suggest that the phrase "the price at which the imported products are first resold to an independent buyer" refers to the sum in money for which the imported product was bought or sold. There is no further guidance regarding the term "price". In our view, as discussed in *US – Stainless Steel (Korea)*, the language "first resold" relates to the price being the starting point for the construction of the export price, from which an investigating authority would work "backwards" to construct an export price that would have been paid by the related importer had the sale been made on a commercial basis.²³⁵ Accordingly, in constructing the export price, we consider that a Member must begin by determining the sum in money for which the imported product was bought by or sold to an independent buyer. A member may thereafter make any adjustments for allowances to the extent permitted under the fourth sentence of Article 2.4 of the Anti-Dumping Agreement. However, this does not change the fact that a Member must begin with the price charged to the first independent buyer.

7.115. We do not agree with the decision by the EU authorities that the premium is not part of the sum in money for which the exported product was bought by the first independent buyer. Both parties accept – as the EU authorities recognized – that customers are willing to pay a higher price

²²⁷ European Union's response to Panel question No. 26, para. 45.

²²⁸ European Union's first written submission, para. 63. The European Union argues that a statement in a contract between two private enterprises cannot be determinative of the legal interpretation of what "price" means under the Anti-Dumping Agreement. (European Union's first written submission, para. 64).

²²⁹ Panel Report, *US – Stainless Steel (Korea)*, para. 6.90.

²³⁰ Panel Report, *US – Stainless Steel (Korea)*, para. 6.91.

²³¹ Panel Report, *US – Stainless Steel (Korea)*, para. 6.91.

²³² Panel Report, *US – Stainless Steel (Korea)*, para. 6.94.

²³³ Panel Report, *US – Stainless Steel (Korea)*, para. 6.99.

²³⁴ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2342.

²³⁵ The panel in *US – Stainless Steel (Korea)* noted that the purpose of "working backwards" from the price at which products are first resold to an independent buyer is to remove the unreliability arising from association or a compensatory arrangement between the exporter and the importer or third party. The panel was referring to allowances to construct an export price contained in the fourth sentence of Article 2.4. (Panel Report, *US – Stainless Steel (Korea)*, para. 6.99).

for the PFAD biodiesel eligible for double counting.²³⁶ This is because of its particular physical properties which make it eligible for double counting. The parties additionally agree that the premium amount is determined by market factors and equals the increased amount that customers are willing to pay for double counting-eligible biodiesel.²³⁷ Customers are willing to pay a premium precisely because they are permitted to use half as much PFAD-based biodiesel when blending with mineral diesel. If the product did not qualify for the certificate and was ineligible for double counting because of its physical characteristics, the additional premium would not be paid.

7.116. The European Union argues that there is a price for the product and a separate price for the premium, and additionally emphasizes that it is the product which is imported and resold while the premium is neither imported nor resold.²³⁸ First, the very notion that there is a price for the product and a price for the premium is misconceived. The premium represents an additional amount that the customer is willing to pay for the specific type and quantity of PFAD-based biodiesel that is eligible for double counting. The customer attributes the additional value to the fact that the biodiesel is eligible for double counting because of its particular physical properties. In the abstract, the premium is not anything additional that is being purchased. Therefore, it makes no sense to refer to the premium as having its own price. The fact that the premium is not imported also does not have any bearing on whether it may be considered part of the price at which the product is first resold. Similarly, the premium cannot be resold as it is simply a component of the price that is paid for the product.

7.117. The European Union has described the premium as a "distinct element" that is provided for separately in the contract and is paid in a different invoice.²³⁹ The European Union has also argued that the premium has no link to the product concerned but rather, is linked to the provision of documents.²⁴⁰ A 2011 sales contract submitted by Indonesia as evidence in this proceeding confirms that the premium was, initially at least, paid in a separate invoice upon receipt of a certificate confirming the eligibility of the PFAD biodiesel for double counting.²⁴¹ In addition, the provided contract indicates that P.T. Musim Mas' related importer [[***]] provided documentation to the buyer to request the certificate.²⁴² We do not in any event consider it relevant that the amount of the premium may be paid separately in a different invoice or that documentation was provided that would enable the buyer to confirm the eligibility of the particular imported biodiesel for double counting. As we explained above, there is no guidance in Article 2.3 that requires that the price is paid in a single transaction or is reflected in a single invoice.²⁴³ We also do not see how documentation confirming the physical properties or authenticity of a product means that the premium is not paid in exchange for the imported product.

7.118. We note the possibility exists that the certificate may not be granted if the biodiesel is found to be ineligible for double counting. As a factual matter, there is no evidence that this has occurred. In any event, the possibility that the certificate may not be granted has no bearing on our conclusion that, *in cases where the premium is paid for PFAD biodiesel*, the premium should be considered as part of the price at which the product is first resold. We do not see any incoherence in the view that the premium forms part of the price at which the product is first resold in any case the premium is paid, but does not form part of the price if it is not actually paid.

²³⁶ Definitive Regulation, (Exhibit IDN-2), recital 176 ("In fact data shows that double counting biodiesel has a small price premium over virgin biodiesel, the price of which is linked to mineral diesel.")

²³⁷ Indonesia's response to Panel question No. 25, para. 41; European Union's response to Panel question No. 25, para. 44; and Provisional Regulation, (Exhibit IDN-1), recital 69.

²³⁸ European Union's response to Panel question No. 26, para. 45.

²³⁹ European Union's second written submission, para. 45.

²⁴⁰ European Union's first written submission, para. 65.

²⁴¹ Supplementary Agreement between [[***]] and [[***]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI)), recitals 1-4.

²⁴² Supplementary Agreement between [[***]] and [[***]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI)), recitals 1-4.

²⁴³ We note that Indonesia has also submitted several 2014 sales contracts as evidence, indicating that certain customers were willing to make payment for PFAD biodiesel and the premium in a single invoice. In our view, this supports Indonesia's contention that customers had become familiar with the operation of the double counting scheme and the eligibility of PFAD biodiesel to qualify for the certificate, and thus were willing to pay the full amount for the double counting-eligible biodiesel and the premium in the same invoice. (Contract between [[***]] and [[***]] on the sale of Biodiesel (7 March 2014), (Exhibit IDN-33 (English translation) (BCI)); Contracts between [[***]] and [[***]] on the sale of Biodiesel (24 October 2014), and between [[***]] and [[***]] on the sale of Biodiesel (6 March 2014), (Exhibit IDN-35 (English translation) (BCI)); see also Indonesia's second written submission, para. 103).

7.119. For the foregoing reasons, we therefore find that Indonesia has made a *prima facie* case that the European Union acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by failing to include the double counting premium as part of the price at which imported biodiesel produced by P.T. Musim Mas was first resold to an independent buyer within the meaning of that provision. In light of this finding, we are not required to address additional arguments of Indonesia or the European Union regarding the relevance of the rules contained in the third and fourth sentences of Article 2.4 of the Anti-Dumping Agreement or rules regarding differences affecting price comparability contained elsewhere in Article 2.4.²⁴⁴

7.5.4 Conclusions

7.120. As indicated above, we consider that the price charged to the first independent buyer is the starting-point for the construction of an export price under Article 2.3 of the Anti-Dumping Agreement. In constructing the export price, we consider that a Member must begin by determining the sum in money for which the imported product was bought by or sold to an independent buyer. There is no further guidance to the term price in Article 2.3 relating to the price of products first resold to an independent buyer. On this basis, we consider that the premium that the customer pays to P.T. Musim Mas' related importer [[***]] is properly considered as part of the price that is charged to first independent buyers. Therefore, we find that Indonesia has established that the European Union acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by failing to include the double counting premium as part of the price at which imported biodiesel produced by P.T. Musim Mas was first resold to an independent buyer within the meaning of that provision.

7.6 Whether the European Union's consideration of price effects was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.6.1 Introduction

7.121. Indonesia claims that the EU authorities' consideration of the price effects of dumped imports is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Indonesia raises two main claims²⁴⁵:

- a. the EU authorities failed to ensure price comparability between imported and domestic biodiesel, by relying on low volume sales of cold filter plugging point (CFPP) 13 degrees centigrade biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports; and
- b. the EU authorities failed to establish the existence of significant price undercutting by failing: (i) to take into account noticeable differences between imported and domestic biodiesel; and (ii) to examine the significance of price undercutting with regard to the majority of the EU industry's sales.

7.6.2 The EU authorities' consideration of the effect of dumped imports on the price of biodiesel sold in the domestic market

7.122. We begin by setting out the relevant facts concerning the EU authorities' price undercutting analysis. The EU authorities indicated that they would examine the effects of the imports from Argentina and Indonesia cumulatively for purposes of the injury analysis.²⁴⁶ Despite the cumulative assessment, the price undercutting calculations were made separately for

²⁴⁴ The European Union has argued, for instance, that the premium paid for double counting biodiesel only results because of intervention by the Italian government. The European Union argues that state intervention of this type that creates special or exclusive rights and is specifically designed to encourage one type of activity is functionally equivalent to a decision to impose a tax, or "is in the nature of a negative tax". The European Union argues that the purpose of the first three sentences of Article 2.4 of the Anti-Dumping Agreement is to address state interventions like the double counting regime, and hence, the premium would in any event need to be deducted under these parts of Article 2.4. The European Union additionally emphasizes that there is no double counting premium scheme present in Indonesia. (European Union's first written submission, paras. 67-69 and 72; response to Panel question No. 36, para. 53; and second written submission, paras. 44, 46-48, and 51).

²⁴⁵ Indonesia's first written submission, para. 223; second written submission, para. 114.

²⁴⁶ Provisional Regulation, (Exhibit IDN-1), recital 90.

Argentina and Indonesia, due to the product differences between biodiesel produced by these countries. The comparison between imported and domestic biodiesel was made based on the CFPP, which is the temperature at which the biodiesel turns back into fat and cannot be used as fuel.²⁴⁷ The biodiesel produced in Indonesia and sold to the EU market was mostly "palm methyl ester" (PME) with a CFPP level of 13 degrees centigrade (hereinafter "CFPP 13 biodiesel" or "PME"). The biodiesel from Argentina was exclusively "soybean methyl ester" (SME) with a CFPP level of zero degrees centigrade.²⁴⁸ While SME and PME can be used in certain environments in their pure form, they are nearly always blended with "rapeseed methyl ester" (RME), which has a lower CFPP, before being used in the European Union.²⁴⁹

7.123. The EU industry produced biodiesel composed from different feedstocks, mainly from rapeseed (RME), but also from other feedstocks, including palm oil, waste, and virgin oils.²⁵⁰ The EU industry blended several feedstocks together to produce the final biodiesel that was sold to customers.²⁵¹ The EU industry sold blended biodiesel at various CFPP levels, but mainly at a CFPP level of zero degrees centigrade (CFPP 0) and below.²⁵² In the price undercutting calculations, the EU authorities compared the price of PME from Indonesia and SME from Argentina to the price of blended CFPP 0 biodiesel sold by the EU industry (hereinafter "blended CFPP 0 biodiesel"). CFPP 0 biodiesel is a blend of different biodiesels. The EU industry used both its own production of biodiesel and imported biodiesel when producing blended CFPP 0 biodiesel. The EU authorities excluded blended CFPP 0 biodiesel made using imported biodiesel from their price undercutting calculations.²⁵³

7.124. Since Argentina exported SME with CFPP 0 to the EU market, the EU authorities compared prices of Argentine SME directly to the domestic sales of blended CFPP 0 biodiesel.²⁵⁴ Indonesia mainly exported CFPP 13 biodiesel to the European Union.²⁵⁵ Given that the volume of sales of domestically-produced CFPP 13 biodiesel was very low, the EU authorities considered that a direct comparison between imported and domestic CFPP 13 biodiesel was not "reasonable".²⁵⁶ The EU authorities therefore compared Indonesian imports with blended CFPP 0 biodiesel produced by the EU industry. In order to compare CFPP 13 biodiesel from Indonesia to blended CFPP 0 biodiesel from the European Union, the EU authorities made an adjustment to account for the different CFPP levels between the compared products. The EU authorities calculated this adjustment by taking the price difference between the EU industry's sales of blended CFPP 0 biodiesel and the EU industry's sales of CFPP 13 biodiesel, and then adding that amount to the price of Indonesian biodiesel.²⁵⁷ As a result, the price of Indonesian PME was adjusted upwards by 17.35%, to construct what the

²⁴⁷ Provisional Regulation, (Exhibit IDN-1), recital 94.

²⁴⁸ Provisional Regulation, (Exhibit IDN-1), recital 30.

²⁴⁹ The EU authorities also indicated that SME is blended with PME, because SME in its pure form does not meet the European standard EN 14214 as regards iodine and cetane numbers. (Provisional Regulation, (Exhibit IDN-1), recital 32).

²⁵⁰ Provisional Regulation, (Exhibit IDN-1), recital 30; Definitive Regulation, (Exhibit IDN-2), recitals 18 and 117.

²⁵¹ Definitive Regulation, (Exhibit IDN-2), recital 123. This recital reads:

Unlike the exporting producers in Argentina and Indonesia, the Union industry does not sell biodiesel made from one feedstock, but blends several feedstocks together to produce the final biodiesel that is sold.

²⁵² European Union's second written submission, para. 57.

²⁵³ Definitive Regulation, (Exhibit IDN-2), recitals 121 and 128; European Union's first written submission, para. 92.

²⁵⁴ In *EU – Biodiesel (Argentina)*, Argentina did not submit any claims with regard to the EU authorities' consideration of price undercutting. Argentina challenged other aspects of the injury determination, in particular the evaluation of certain injury factors under Article 3.4 (production capacity and capacity utilization) and the examination of the other factors causing injury to the domestic industry under Article 3.5 (overcapacity, EU industry' imports of product concerned, double counting regimes in some EU Member States, lack of vertical integration, and access to raw materials). (Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.368-7.529; Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.114-6.148).

²⁵⁵ Indonesia clarifies that around 19% of PME imports from Indonesia had CFPP levels other than CFPP 13, ranging between CFPP 7 and CFPP 17. (Indonesia's second written submission, para. 131).

²⁵⁶ Provisional Regulation, (Exhibit IDN-1), recital 96.

²⁵⁷ Provisional Regulation, (Exhibit IDN-1), recital 96; Definitive Regulation, (Exhibit IDN-2), recital 124.

price of imports of CFPP 0 biodiesel from Indonesia would have been.²⁵⁸ The price was then compared to the price of blended CFPP 0 biodiesel sold by the EU industry.

7.125. In the Provisional Regulation, the EU authorities explained this methodology as follows:

All sales from Argentina to the EU were at a CFPP of 0 degrees centigrade. These sales were therefore compared to the sales of Union producers of biodiesel at a CFPP of 0.

All sales from Indonesia to the EU were at a CFPP of 13 degrees centigrade. Given the very small volume of sales of Union producers at this CFPP – since PME from Indonesia is almost always blended with other biodiesel from other sources before being sold to the first independent customer – a direct comparison was not considered reasonable. The export price of the PME from Indonesia at CFPP 13 was therefore adjusted upwards to a price at CFPP 0 by taking the difference in price on the Union market between the sales of PME at CFPP 13 manufactured by the Union industry and the average price of biodiesel at CFPP 0.²⁵⁹

7.126. Based on the above methodology, the EU authorities considered that there was significant price undercutting caused by the dumped imports of biodiesel from Argentina and Indonesia as compared with the price of EU biodiesel. The average undercutting margin for Indonesia was 4% during the investigation period.²⁶⁰ The EU authorities confirmed their findings in the Definitive Regulation.²⁶¹

7.6.3 Whether the adjustment made by the EU authorities to the price of imports of Indonesian biodiesel was flawed

7.127. Indonesia first claims that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to ensure price comparability between imported and domestic biodiesel in terms of differences in quantities. Indonesia contends that the EU authorities failed to account for the low volume of sales of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports.

7.128. Article 3.1 of the Anti-Dumping Agreement sets out the basic principles that a determination of injury shall be based on positive evidence and involve an objective examination. It reads as follows:

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

7.129. The second sentence of Article 3.2 provides more specific guidance regarding the objective examination of the effect of dumped imports on prices in the domestic market. It provides:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.130. Indonesia argues that the adjustment to the price of CFPP 13 biodiesel imports did not resolve the issue of the lack of comparability in terms of volume differences, and is therefore

²⁵⁸ Indonesia's first written submission, para. 226(b) (referring to Specific Provisional Disclosure for the Wilmar Group, annex 8, (Exhibit IDN-20), p. 1); European Union's response to Indonesia's question No. 2, paras. 2-3.

²⁵⁹ Provisional Regulation, (Exhibit IDN-1), recitals 95-96.

²⁶⁰ Provisional Regulation, (Exhibit IDN-1), recitals 97 and 126.

²⁶¹ Definitive Regulation, (Exhibit IDN-2), recitals 121-129 and 147.

inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Indonesia refers to the EU authorities' conclusion that a direct comparison between Indonesian imports and EU sales of CFPP 13 "was not considered reasonable" given the "very small volume of sales" of EU-produced CFPP 13 biodiesel.²⁶² According to Indonesia, based on this statement, the EU authorities found that the EU industry's price of CFPP 13 biodiesel was "not comparable"²⁶³ to Indonesian CFPP 13 biodiesel due to significant differences in volumes and therefore that the price was "unreliable"²⁶⁴ for the purpose of price effects analysis.²⁶⁵ Indonesia argues that, if the sales price of the EU producers' CFPP 13 biodiesel is non-comparable for a direct comparison, then EU sales of CFPP 13 are also non-comparable for calculating the price adjustment (to address different CFPP levels).²⁶⁶ Indonesia underlines that the volume difference between CFPP 13 biodiesel (6,300 tonnes) and blended CFPP 0 biodiesel (993,860 tonnes) produced by the EU industry that was used for calculating the adjustment is nearly the same as the volume difference between Indonesian CFPP 13 biodiesel (995,663 tonnes) and EU-produced CFPP 13 biodiesel (6,300 tonnes) that was rejected for the purpose of a direct comparison.²⁶⁷ Accordingly, Indonesia argues that the EU authorities failed to properly consider differences in quantities when making the price adjustment to account for physical differences between CFPP 13 biodiesel and blended CFPP 0 biodiesel. The result was a distorted calculation of the price adjustment, which undermined the accuracy of the price undercutting margin that was calculated.²⁶⁸

7.131. The European Union denies that the EU authorities found the price of EU industry's sales of CFPP 13 biodiesel was "unreliable" in the way Indonesia argues. Rather, a direct comparison between Indonesian and EU biodiesel at CFPP 13 was not considered "reasonable"²⁶⁹ or "representative"²⁷⁰ due to a very small volume of EU industry's sales at this CFPP "from the total of all biodiesel made and sold by the EU industry".²⁷¹ The European Union notes that the EU industry did not sell biodiesel made from one feedstock, but blended several feedstocks together to produce the final biodiesel that was sold to customers.²⁷² The EU authorities therefore compared the price of CFPP 13 biodiesel from Indonesia to the price of blended CFPP 0 biodiesel from the European Union, which had the highest share of domestic sales.²⁷³ In particular, the sales of blended CFPP 0 biodiesel amounted to 993,860 tonnes, which represented 37% of the sales of the EU sampled producers, while other sales were mainly at lower CFPP levels.²⁷⁴ The European Union submits that in order to ensure price comparability at CFPP 0, the export price of CFPP 13 biodiesel from Indonesia was adjusted upwards to a price at CFPP 0 biodiesel.²⁷⁵ The European Union argues that this adjustment was calculated on the basis of transactions of similar volumes.²⁷⁶

7.132. Article 3.1 or 3.2 of the Anti-Dumping Agreement do not provide any specific guidance as to how an investigating authority should make adjustments for price comparability in the context of injury determination. This stands in contrast to Article 2.4 of the Anti-Dumping Agreement that provides specific guidance in respect of allowances to be made to ensure price comparability between the export price and the normal value in the context of dumping determination. For purposes of Article 3.2, previous panels have noted that price comparability can be ensured, for instance, by carefully defining product categories for the collection of price information or by making adjustments to prices as warranted by the factual circumstances of the case.²⁷⁷ In light of our standard of review, the question before us is whether the EU authorities' calculation of the

²⁶² Indonesia's first written submission, para. 245.

²⁶³ Indonesia's first written submission, paras. 246 and 248-249; second written submission, paras. 115, 118-120, and 125-126.

²⁶⁴ Indonesia's first written submission, paras. 246 and 248-249.

²⁶⁵ Indonesia's first written submission, para. 246.

²⁶⁶ Indonesia's first written submission, paras. 248-249.

²⁶⁷ Indonesia's second written submission, paras. 115-116 and 118; opening statement at the second meeting of the Panel, para. 60.

²⁶⁸ Indonesia's first written submission, paras. 250 and 254; second written submission, para. 122.

²⁶⁹ Provisional Regulation, (Exhibit IDN-1), recital 96.

²⁷⁰ European Union's first written submission, para. 86.

²⁷¹ European Union's response to Panel question No. 88, para. 41.

²⁷² European Union's first written submission, para. 82; response to Panel question No. 95, para. 54 (referring to Definitive Regulation, (Exhibit IDN-2), recital 123).

²⁷³ European Union's second written submission, para. 57; response to Panel question No. 88, para. 41.

²⁷⁴ European Union's second written submission, paras. 56-57.

²⁷⁵ European Union's first written submission, para. 94.

²⁷⁶ European Union's first written submission, para. 95 (referring to Definitive Regulation, (Exhibit IDN-2), recital 124).

²⁷⁷ Panel Reports, *EC – Fasteners (China)*, para. 7.328; *China – X-Ray Equipment*, para. 7.51.

adjustment to account for different CFPP levels of Indonesian and EU biodiesel, in the context of its overall price undercutting analysis, was reasonable and objective.

7.133. As noted above, the EU authorities considered that a direct comparison between CFPP 13 biodiesel from Indonesia and CFPP 13 biodiesel made by the EU industry could not be made because of "very small volumes of sales" by the EU industry at this CFPP level. The European Union explained that CFPP 13 biodiesel constituted a small share of all biodiesel sold and produced by the EU industry.²⁷⁸ The EU sampled producers sold 6,300 tonnes of CFPP 13 biodiesel during the investigation period, which constituted 0.23% of total sales of the EU sampled producers during the investigation period.²⁷⁹ The low volumes of CFPP 13 sales thus represented a minuscule proportion of EU industry sales, which would not provide a robust basis for the price effects analysis. This would mean that the price comparison and the analysis of the effect of the imports would not have taken into account the vast majority (99.77%) of EU industry's sales. Such a comparison to such a small share of the EU industry's sales would not provide a reasonable picture of the effect of the dumped imports on the prices of the domestic like product to establish the existence of *significant* price undercutting, as required by Article 3.2.²⁸⁰ It would not seem unreasonable that the EU authorities instead decided to compare the price of Indonesian imports to the EU industry's price of blended CFPP 0 biodiesel, which represented 37% of EU industry's sales (993,860 tonnes) during the investigation period. The European Union has specified that sales of blended CFPP 0 biodiesel represented the largest share of any of the types of biodiesel sold in the European Union by volume.²⁸¹

7.134. We disagree with Indonesia that the EU authorities' decision not to make a direct comparison between imported and domestic CFPP 13 biodiesel rendered the price of CFPP 13 biodiesel produced by the EU industry to be "unreliable" or "non-comparable".²⁸² As we explain above, sales of 6,300 tonnes of CFPP 13 biodiesel produced by the EU industry during the investigation period constituted 0.23% of total sales of the EU sampled producers during the investigation period. The European Union has explained that it was not considered reasonable to base the price comparison on such a low percentage of sales by the EU industry, i.e. a low overall proportion of the EU industry's sales. We see no evidence on the record that the EU authorities considered that the price of CFPP 13 biodiesel was in any way unusable due to a large difference in volumes. Even though the EU authorities did not use the price of CFPP 13 biodiesel for the purpose of a direct comparison with Indonesian imports, this data was part of the record before the EU authorities. We do not find it unreasonable that the EU authorities relied on this data for a different purpose, i.e. to establish an adjustment factor to the price of CFPP 13 biodiesel from Indonesia in order to bring it to a CFPP level of 0.

7.135. We note that the EU authorities looked into the difference in quantities between sales of CFPP 13 biodiesel and blended CFPP 0 biodiesel made by the EU industry in the context of making the price adjustment. In particular, the EU authorities examined the quantities per transactions of sales of CFPP 0 biodiesel manufactured and blended in the European Union as compared to sales transactions of CFPP 13 biodiesel. In recital 124 of the Definitive Regulation, the EU authorities explained as follows:

For imports from Indonesia, which are at a CFPP of 13 or above, an adjustment was made, being the difference in price between the Union industry's sales of CFPP 13 and the Union industry's sales of CFPP 0, in order to compare the CFPP 13 and above from

²⁷⁸ Recital 96 of the Provisional Regulation notes that "PME from Indonesia is almost always blended with other biodiesel from other sources before being sold to the first independent customer". The Panel asked the European Union whether the decision not to make a direct comparison was strictly due to low volume of sales of CFPP 13 biodiesel or also to address the issue of blending. The European Union replied that the adjustment was made due to the low percentage of CFPP 13 biodiesel made and sold by the EU industry from the total of all biodiesel made and sold by the EU industry. (European Union's response to Panel question No. 88, para. 41).

²⁷⁹ European Union's response to Indonesia's question No. 2, para. 6; Indonesia's response to Panel question No. 108, para. 102.

²⁸⁰ Indonesia agrees that a finding of price undercutting with respect to the EU industry's sales of CFPP 13 biodiesel would not have been sufficient for considering whether there has been *significant* price undercutting by the dumped imports from Indonesia. (Indonesia's second written submission, para. 124).

²⁸¹ European Union's second written submission, para. 57.

²⁸² Indonesia's first written submission, paras. 246, 248-249, and 253; second written submission, paras. 120 and 125-126.

Indonesia with the CFPP 0 manufactured and blended in the Union. One Indonesian exporting producer noted that as the sales of CFPP 13 by the Union industry were made in small quantities per transaction, that these prices should be compared to similar sized transactions of CFPP 0. On inspection of transactions of CFPP 0 of a similar quantity per transaction, the difference in price found was in line with the difference using all transactions of CFPP 0, with differences in price both above and below the average price difference. As a result there was no change to the level of price undercutting found in the provisional Regulation in recital 97.²⁸³

7.136. Following an examination of quantities per transaction, the EU authorities observed that the difference in price remains the same regardless of the fact whether the average price was used based on all CFPP 0 transactions or only on the price of CFPP 0 transactions with the volume similar to the volume of CFPP 13 biodiesel transactions. Thus, contrary to what is suggested by Indonesia, the EU authorities took into account volume aspects of the sales in the context of making an adjustment.

7.137. Indonesia also notes that the EU authorities should have employed the same method for the calculation of the adjustment on account of physical differences that was used in the prior investigation concerning biodiesel from the United States, which factored in the type of feedstock used in producing biodiesel as a basis to make price comparisons instead of focusing on CFPP.²⁸⁴ The EU authorities addressed the same point raised by interested parties during the investigation, explaining that the method based on CFPP was appropriate in the present investigation, because the CFPP level was a determinative factor for customers that were not concerned with the composition of biodiesel once the product meets a required CFPP level.²⁸⁵ As mentioned above, Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not specify a methodology that must be followed in conducting a price effects analysis. An investigating authority enjoys a degree of discretion to determine the analytical methodologies that will be applied in the course of an investigation, provided that such method respects the basic principles in Article 3.1 that a determination of injury must be based on positive evidence and involve an objective examination.²⁸⁶

7.138. In addition, Indonesia submits that approximately 19% of biodiesel imports from Indonesia had a CFPP level other than CFPP 13, ranging from CFPP 7 to CFPP 17 degrees centigrade. Indonesia submits that the EU authorities improperly applied the adjustment calculated for CFPP 13 biodiesel to all biodiesel imports from Indonesia, without regard to the different prices of CFPP 7 to CFPP 17 varieties (other than CFPP 13 biodiesel).²⁸⁷ The Panel questioned the parties on the volumes and prices of CFPP 7 to CFPP 17 biodiesel imports. Indonesia referred to the data of two producers that sold biodiesel other than CFPP 13 and indicated that the overall price differential between CFPP 7 and CFPP 15 biodiesel was around [[***]] and the difference between CFPP 13 and CFPP 17 was [[***]].²⁸⁸ In its response, the European Union explained that sales of CFPP 12, CFPP 13, and CFPP 14 collectively accounted for 94% of all biodiesel imports from

²⁸³ Definitive Regulation, (Exhibit IDN-2), recital 124.

²⁸⁴ In that investigation, the price of the respective feedstock (palm, soybean, or rapeseed oils) was used to calculate an allowance on account of physical differences between different types of biodiesel before a price comparison was made. The EU authorities also factored in the percentage of particular types of biodiesel in blended varieties to take into account all biodiesel that was imported or sold by the sampled EU producers. Indonesia submits that this method would have allowed to resolve the issue of difference in quantities and to permit the calculation of a reliable adjustment on account of physical differences. (Indonesia's second written submission, paras. 134-138; Commission Regulation (EC) No. 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, (Exhibit IDN-25), recital 84; and Council Regulation (EC) No. 599/2009 of 7 July 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America, (Exhibit IDN-26), recital 123).

²⁸⁵ Definitive Regulation, (Exhibit IDN-2), recitals 122-123; Indonesia's first written submission, para. 255 (referring to Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), pp. 28-29; and P.T. Pelita Agung Agrindustri, Post-Hearing Brief (30 August 2013), (Exhibit IDN-24), p. 7).

²⁸⁶ Panel Reports, *Thailand – H-Beams*, para. 7.159; *China – Broiler Products*, paras. 7.474-7.476; *China – X-Ray Equipment*, para. 7.41; and *China – Cellulose Pulp*, para. 7.62.

²⁸⁷ Indonesia's second written submission, paras. 131-133; first written submission, para. 244; and response to Panel question No. 102.

²⁸⁸ Indonesia's response to Panel question No. 102, paras. 89-91.

Indonesia.²⁸⁹ The European Union also noted that Indonesia had only referred to the price difference between the lowest price biodiesel import (presumably CFPP 17) and the highest price import (presumably CFPP 7).²⁹⁰ This suggests that the price differential between CFPP 12, CFPP 13, and CFPP 14 would be appreciably smaller. In these circumstances, we consider that it was reasonable for the EU authorities to calculate an adjustment on the basis of CFPP 13 considering that so few imports were at the extremes (CFPP 7 and CFPP 17) that they would have an insignificant impact on the overall assessment.

7.139. Finally, in the second written submission, Indonesia raised additional arguments as to why the prices of CFPP 13 biodiesel produced by the EU industry cannot serve as the basis for calculating the adjustment to the price of imports from Indonesia. First, Indonesia submits that there may be additional costs when producing CFPP 13 biodiesel in the European Union, due to the fact that imported CPO feedstock from Malaysia or Indonesia may need to be used in the production of CFPP 13 biodiesel, which may have implications for the price of the final product. In Indonesia's view, this possibility may distort the comparison between CFPP 13 biodiesel and CFPP 0 biodiesel prices.²⁹¹ Second, Indonesia submits that the European Union itself acknowledged that the production of PME in the European Union is uneconomical which, according to Indonesia, demonstrates that "the odd sale of 6,300 MT of the Union produced CFPP 13°C biodiesel is unlikely to be representative of the value that the customers assign to the physical differences between PME and CFPP 0°C".²⁹²

7.140. We are of the view that these arguments are founded on a completely different basis from those adduced by Indonesia in its first written submission, in respect of its challenge to the adjustment, and we therefore do not consider it appropriate to make findings with regard to these additional arguments that have been raised in the second written submission.

7.141. In the first written submission, Indonesia focused its claim concerning the price adjustment on the EU authorities' failure to account for differences in quantities. Indonesia did not present any arguments in connection with the additional costs when producing CFPP 13 biodiesel in the European Union. Indonesia's arguments related to the presence of additional costs are a completely different basis for challenging the adjustment and cannot be considered as an elaboration of Indonesia's arguments presented in the first written submission or a rebuttal to the arguments of the European Union. We recall that Paragraph 6 of the Working Procedures provides that each party shall present the facts of the case and its arguments in its first written submission in advance of the first substantive meeting of the Panel with the parties.²⁹³ Paragraph 6 of the Working Procedures is an expression of the principle of due process: the complainant must make its case at a sufficiently early stage of the proceeding to allow the respondent sufficient time to defend itself. Indonesia's additional arguments are based on the information provided in the Provisional Regulation, and we therefore consider that these arguments could have been articulated in Indonesia's first written submission.²⁹⁴

7.142. In consideration of the above, we conclude that Indonesia has failed to establish that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by relying on prices of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports.

²⁸⁹ European Union's response to Panel question No. 101, para. 57.

²⁹⁰ European Union's comments on Indonesia's response to Panel question No. 102, paras. 46-47.

²⁹¹ Indonesia's second written submission, paras. 128-129.

²⁹² Indonesia's second written submission, para. 130.

²⁹³ Paragraph 6 of the Panel's Working Procedures states that:

Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

²⁹⁴ In the context of the injury determination, the EU authorities addressed the issues related to the DET system in their non-attribution analysis. In particular, the imports of biodiesel from Argentina and Indonesia made by the EU industry were examined as a non-attribution factor. (Provisional Regulation, (Exhibit IDN-1), recitals 132-136; Definitive Regulation, (Exhibit IDN-2), recitals 151-160). This issue was a subject to dispute in *EU – Biodiesel* (Argentina). (Panel Report, *EU – Biodiesel* (Argentina), paras. 7.473-7.490).

7.6.4 Whether the EU authorities failed to take into account noticeable differences between imported and domestic biodiesel and to examine the significance of price undercutting with regard to the majority of the EU industry's sales

7.143. Indonesia submits that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to take into account certain product differences between imported and domestic biodiesel as well as the majority of the EU industry's sales in its price undercutting analysis. Therefore, the EU authorities failed to properly consider the effect of the dumped imports from Indonesia on the price of the EU biodiesel.

7.144. Indonesia draws on the Appellate Body's interpretation of "significant price undercutting" to argue that the EU authorities failed to make a "dynamic assessment" of whether the price of PME imports from Indonesia had any effects on the price of the blended CFPP 0 biodiesel from the European Union.²⁹⁵ Indonesia submits that the analysis fails to take into account that PME from Indonesia and blended CFPP 0 biodiesel from the European Union have noticeably different physical characteristics (different feedstock and CFPP levels), considerable price differences (the price of blended CFPP 0 biodiesel is 21% more expensive than Indonesian PME) and different modes of use (PME is rarely used by consumers in its pure form and must be blended with other types of biodiesel).²⁹⁶ Considering that the price comparison was made between different types of biodiesel, Indonesia argues that the price effects analysis should have involved a discussion of price substitutability, price correlation, and the degree of the impact that movement of prices of imported PME might have on the EU producers' sales of blended CFPP 0 biodiesel.²⁹⁷ Indonesia further argues that the EU authorities' finding of significant price undercutting is flawed because it is based on a comparison concerning only 37% of the EU industry's sales.²⁹⁸

7.145. The European Union argues that PME from Indonesia was in competition with EU biodiesel. The European Union submits that imported and domestic biodiesel had similar basic physical, chemical, technical characteristics and uses, and were considered to be like products.²⁹⁹ The European Union notes that during the investigation the EU authorities rejected an argument raised by an interested party that PME from Indonesia was not a like product to RME and other EU biodiesels as well as to SME from Argentina due to the higher CFPP level of PME (which necessitates that PME is blended with other types of biodiesel before use).³⁰⁰ In this respect, the EU authorities stated that PME is in competition with biodiesel produced in the European Union, which includes RME as well as biodiesel from palm oil and other feedstocks.³⁰¹ The EU authorities considered that PME is interchangeable with biodiesel produced by the EU industry, because it can be used in the EU market throughout the year by blending with other biodiesels.³⁰² The European Union also refers to the EU authorities' findings that imports from Indonesia and Argentina are blended with mineral diesel by the same trading companies and sold to customers in direct competition with EU biodiesel.³⁰³

7.146. The European Union further submits that it was reasonable to use only sales of blended CFPP 0 biodiesel, which represented 37% of the EU sampled producers' sales, because blended CFPP 0 biodiesel was the product with the highest volume of sales of the EU industry, while other sales were mainly of biodiesel with lower CFPP ratings.³⁰⁴

²⁹⁵ Indonesia's second written submission, para. 144 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.158).

²⁹⁶ Indonesia's second written submission, paras. 146-147; first written submission, paras. 258 and 269.

²⁹⁷ Indonesia's second written submission, paras. 148-151.

²⁹⁸ Indonesia's second written submission, paras. 160-168; first written submission, paras. 259-269.

²⁹⁹ European Union's response to Panel question No. 90, paras. 43-44 (referring to Provisional Regulation, (Exhibit IDN-1), recital 34).

³⁰⁰ European Union response to Panel question No. 90, para. 45 (referring to Definitive Regulation, (Exhibit IDN-2), recitals 17-18).

³⁰¹ Definitive Regulation, (Exhibit IDN-2), recital 18.

³⁰² Definitive Regulation, (Exhibit IDN-2), recital 18.

³⁰³ European Union's response to Panel question No. 90, para. 43 (referring to Provisional Regulation, (Exhibit IDN-1), recital 89).

³⁰⁴ The European Union explained that the EU authorities "relied on 37% of the sampled producers' sales because sales of biodiesel of CFPP 0 were by far the most important sales of the sampled EU industry by volume, while other sales were mainly at lower CFPP". (European Union's second written submission, para. 57).

7.147. We note that in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body stated that the inquiry with regard to "significant price undercutting" requires "a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation".³⁰⁵ The consideration as to whether the observed price undercutting is significant will necessarily depend on the circumstances of each case and may involve an examination of the nature of the products or product types at issue, the extent and duration of price undercutting, or the relative market shares of the product types with respect to which the authority has made a finding of price undercutting.^{306, 307}

7.148. The obligation under Article 3.2 is to "consider", i.e. to take into account, whether there has been a significant price undercutting (or whether the effect of dumped imports is otherwise significant price depression or significant price suppression), rather than to make a *determination* regarding the effects of dumped imports on prices.³⁰⁸ The provisions of Article 3 contemplate "a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination."³⁰⁹ The consideration of the effects of dumped imports on prices is a step in the logical progression toward a determination whether injury is caused by the dumped imports.³¹⁰ The consideration of price effects under Article 3.2 is necessary in order to answer the ultimate question in Article 3.5 as to whether dumped imports are causing injury to the domestic industry. The outcome of this inquiry thus forms a basis for the overall causation analysis under Article 3.5, which requires an investigating authority to demonstrate that the dumped imports are causing injury to the domestic industry "through the effects of" dumping, or subsidies "[a]s set forth in paragraphs 2 and 4".³¹¹

7.149. Article 3.2 establishes a link between the price of dumped imports and that of like domestic products, by requiring that a comparison be made between the two.³¹² When conducting a price effects analysis and comparing prices of the imported product to a certain domestic product, panels and the Appellate Body have emphasized that it is appropriate and important to consider factors affecting comparability, including the competitive relationship between the imported and domestic products at issue. Specifically, the Appellate Body stated in *China – GOES* that even though there is no explicit requirement regarding price comparability in Article 3.2, the failure to ensure price comparability is incompatible with basic principles for injury determination provided in Article 3.1.³¹³ The panels in *China – Broiler Products* and *China – X-Ray Equipment* highlighted that the failure to ensure price comparability in the price effects analysis could lead to a distorted analysis of the causal link between dumped imports and the injury to the domestic industry.³¹⁴ The panel in *China – X-Ray Equipment* stated that if two products being compared are not in competition with each other and thus are not comparable, the results of such analysis would not provide a reasonable basis for the causation analysis.³¹⁵

7.150. We agree with Indonesia that there are complexities in the competitive relationship between PME imports from Indonesia and blended CFPP 0 biodiesel from the European Union that were not considered by the EU authorities in their price undercutting analysis. We note in particular that due to its higher CFPP level, Indonesian PME is generally not used on its own in the

³⁰⁵ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.159.

³⁰⁶ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161.

³⁰⁷ In making its claim under Articles 3.1 and 3.2, Indonesia also refers to the legal standard under Article 3.5 developed by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*. (Indonesia's second written submission, para. 149 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.262)). In this regard, we note that the requirements under Articles 3.2 and 3.5 are different. In *China – GOES*, the Appellate Body stated that the inquiry under Article 3.2 "does not duplicate the different and broader examination regarding the causal relationship" between dumped imports and injury to the domestic industry pursuant to Article 3.5. (Appellate Body Report, *China – GOES*, para. 154).

³⁰⁸ Appellate Body Report, *China – GOES*, para. 130.

³⁰⁹ Appellate Body Report, *China – GOES*, para. 128.

³¹⁰ Panel Report, *China – Cellulose Pulp*, para. 7.64.

³¹¹ Appellate Body Report, *China – GOES*, para. 143 (emphasis original); Panel Report, *China – X-Ray Equipment*, para. 7.50.

³¹² Appellate Body Report, *China – GOES*, para. 136.

³¹³ Appellate Body Report, *China – GOES*, para. 200. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161 and fn 382.

³¹⁴ Panel Reports, *China – Broiler Products*, para. 7.475; *China – X-Ray Equipment*, para. 7.51.

³¹⁵ Panel Report, *China – X-Ray Equipment*, para. 7.50.

EU market, but is rather an input to produce blended biodiesel.³¹⁶ Specifically, the EU authorities stated that:

SME and PME biodiesel could be used in their pure forms but they are generally blended, either among themselves or with RME, before being used in the European Union. The reason for blending SME with PME is that SME in its pure form does not meet the European standard EN 14214 as regards iodine and cetane numbers. The reason for blending PME (and SME) with RME is that PME and SME have a higher Cold Filter Plugging Point (CFPP) than RME and are not therefore suitable for use in their pure form during winter months in cold regions of the European Union.³¹⁷

7.151. The EU authorities also observed that:

[T]he Cold Filter Plugging Point ('CFPP') of PME (at +13 Centigrade) means that PME cannot be used across the Union without being mixed with other biodiesels to bring down the CFPP.³¹⁸

7.152. In response to a question from the Panel, Indonesia explained that the amount of PME used in a blend would depend on the season and location. In Southern Europe, CFPP -5 biodiesel is used in winter months while CFPP +5 biodiesel is used in summer months. In Northern Europe, CFPP -10 biodiesel is used in winter months and CFPP 0 biodiesel is alternately used in summer months. Indonesia noted that in summer months, PME is blended at an average of 70% in Italy and Spain, while in winter months it cannot be used at all. In the Scandinavian countries, PME may not even be used at all during the year.³¹⁹ The European Union has not contested this explanation.

7.153. We note that the Definitive Regulation confirms that sales of PME are affected by issues pertaining to seasonality:

Both SME and PME are imported into the Union, and are also manufactured within the Union, and are blended with RME and other biodiesels manufactured within the Union before being sold or blended with mineral diesel. The blenders have the choice of purchasing biodiesel from different feedstocks and different origins to produce their final product, based on the market and the climatic conditions throughout the year. PME is sold in larger quantities during the summer months and smaller quantities during the winter months, but it is still in competition with RME and Union made biodiesel and also SME from Argentina.³²⁰

7.154. This recital suggests that PME competes with SME from Argentina, RME, and other biodiesels produced by the EU industry, because they are used to make various blends that are suitable for certain climatic conditions. However, this recital does not address the important issue of whether imports of PME from Indonesia compete with blended CFPP 0 biodiesel produced by the EU industry. Taking into account this statement of the EU authorities, the Panel specifically asked the European Union to explain whether climatic conditions affect the competition between PME and blended CFPP 0 biodiesel. The European Union did not specifically address the issue of competition between imported PME and blended CFPP 0 biodiesel in its reply. The European Union simply stated that "[c]limatic conditions influence the suitable CFPP of the blend in different parts of the European Union", and that PME is blended with biodiesel having a lower CFPP (e.g. RME) in order to achieve CFPP 0.³²¹

7.155. We note that recital 34 of the Provisional Regulation indicates that imported biodiesel and EU biodiesel had similar basic physical, chemical, technical characteristics, and uses, and were

³¹⁶ Provisional Regulation, (Exhibit IDN-1), recitals 32 and 148. The European Union explained that the main product sold in the European Union was CFPP 0, which contains PME and other biodiesels blended together. (European Union's response to Panel question No. 88, para. 41). The European Union further noted that "[a]s PME has a higher CFPP (mostly CFPP 13), it is blended with biodiesel having a lower CFPP (e.g. RME) in order to achieve CFPP 0". (European Union's response to Panel question No. 91, para. 47).

³¹⁷ Provisional Regulation, (Exhibit IDN-1), recital 32.

³¹⁸ Provisional Regulation, (Exhibit IDN-1), recital 148.

³¹⁹ Indonesia's response to Panel question No. 89.

³²⁰ Definitive Regulation, (Exhibit IDN-2), recital 117.

³²¹ European Union's response to Panel question No. 91, para. 48.

considered to be like products.³²² We also note that recital 18 of the Definitive Regulation rejects the argument of an interested party that PME is not a like product to biodiesel produced by the EU industry due to its high CFPP level, which necessitates that PME is blended with other types of biodiesel before use in the EU market. In particular, recital 18 reads:

PME produced in Indonesia is in competition with biodiesel produced in the Union, which is not just RME but also biodiesel made from palm oil and other feedstocks. PME can be used throughout the Union throughout the year, by blending with other biodiesels before use, in the same way as RME and SME. PME is therefore interchangeable with biodiesel made in the Union and therefore is a like product.³²³

7.156. The fact that the imported and domestic products were considered to be like products does not automatically mean that each of the products included in the basket of imported products is alike in *all* respects to each of the products included into the basket of domestic products.³²⁴ Nor does the fact that the imported and domestic products were considered to be like products address the particular competitive dynamic that PME may only be used in a blend, and is actually a component of the different blends sold to end users in the EU market. PME might compete with RME to the extent that they both are used to produce a blend. However, this does not mean that PME and blended CFPP 0 biodiesel are in competition with each other. In response to a question from the Panel the European Union confirmed this understanding, noting that "[recital 18 of the Definitive Regulation] does not state that Indonesian imports of PME and blends or EU industry CFPP 0 biodiesel are in competition with each other."^{325, 326}

7.157. The EU authorities found that the imported biodiesel was blended with mineral diesel by the same trading companies and sold to customers at the EU market in direct competition with biodiesel produced by the EU industry.³²⁷ Even though both PME from Indonesia and blended CFPP 0 biodiesel might compete for sales to the companies who blend biodiesel with mineral diesel, this point nonetheless does not address the fact that the EU authorities failed to explain

³²² Recital 34 of the Provisional Regulation states:

The investigation has shown that the product concerned, the product produced and sold on the domestic market of Argentina and Indonesia, and the product produced and sold in the Union by the Union industry have similar basic physical, chemical, technical characteristics and uses. They are therefore provisionally considered to be alike within the meaning of Article 1(4) of the basic Regulation.

(Provisional Regulation, (Exhibit IDN-1), recital 34)

³²³ Definitive Regulation, (Exhibit IDN-2), recital 18.

³²⁴ Panel Report, *China – X-Ray Equipment*, para. 7.65 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.13-7.76), which reads:

[A] number of panels have clarified that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration.

In addition, the panel in *China – Broiler Products* stated:

[I]n our view, ensuring that the products being compared are "like products" will not always suffice to ensure price comparability. Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported products.

(Panel Report, *China – Broiler Products*, para. 7.483)

³²⁵ European Union's response to Panel question No. 92, para. 49.

³²⁶ The European Union also notes that the EU authorities conducted a cumulative assessment of the effects of the dumped imports from Indonesia and Argentina on the prices of the domestic like product. The fact that the EU authorities decided to undertake a cumulative assessment based on the circumstances is not determinative of whether the requirements of Article 3.2 have been met. In any event, although the European Union refers to the fact that imports were assessed cumulatively, as Indonesia points out, the EU authorities assessed price undercutting separately for Indonesia and Argentina, due to the difference in products exported by these countries. The EU authorities clearly indicated that all Argentine exports were at a CFPP level of 0, while Indonesian imports were not, requiring a price adjustment, as discussed above. (European Union's response to Panel question No. 90, para. 42; Indonesia's comments on the European Union's response to Panel question No. 90, paras. 17-20).

³²⁷ Provisional Regulation, (Exhibit IDN-1), recital 89.

whether the comparison between sales of PME and blended CFPP 0 biodiesel was made at a proper comparison level, given that PME is an input to the blends, including CFPP 0 biodiesel.³²⁸

7.158. In our view, an objective and unbiased investigating authority should have explained why it was reasonable and adequate to compare the prices of blended CFPP 0 biodiesel with the prices of PME that is used as an input to produce such blend. The particular physical properties and end uses (for blending) have implications when it comes to competition between the compared products, i.e. an end user cannot simply use PME to the extent that blended CFPP 0 biodiesel is not available, due to climatic limitations related to CFPP levels. This necessarily affects price comparability in respect of those products. Although the EU authorities made an adjustment to the price of Indonesian PME to account for different CFPP levels of Indonesian and EU biodiesel, we are of the view that this adjustment is not sufficient to account for complexities in competitive relationships between PME and blended CFPP 0 biodiesel, given that Indonesian PME is an input to blended biodiesel, including blended CFPP 0.

7.159. Under these circumstances, we consider that the competitive dynamic between imports of Indonesian PME and blended CFPP 0 biodiesel is significantly more complex than the EU authorities' determination would suggest. The effect of seasonality in particular suggests that competition between imported PME and blended CFPP 0 biodiesel will often be nuanced, rather than "direct". While it is not impossible that a more complex analysis would still have justified a finding that imports of PME had a significant price undercutting effect on price of blended CFPP 0 biodiesel sold by the EU industry, Indonesia has raised a series of legitimate questions regarding the validity of the EU authorities' analysis. The European Union has failed to resolve these questions, or rebut the case made by Indonesia.³²⁹

7.160. We now turn to Indonesia's argument that the EU authorities improperly limited the price undercutting analysis to only 37% of the EU industry's sales. As discussed above, the EU authorities based the price undercutting calculations on the EU industry's sales of blended CFPP 0 biodiesel, which was the product with the highest volume of sales, representing 37% of the EU sampled producers' sales. We note that Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not require an investigating authority to consider the existence of price undercutting with regard to the entire range of domestic like products.³³⁰ There is no requirement in the Anti-Dumping Agreement that provides any specific percentage of the domestic industry sales to be considered in the price effects analysis. Indonesia acknowledges that there is no obligation under Article 3.2 to establish the existence of price undercutting with regard to the entire range of domestic like products.³³¹ Rather, Indonesia argues that extending the price undercutting analysis to at least two or three additional products sold by the EU industry would have significantly increased the credibility of the EU authorities' findings.³³² Indonesia adds that the EU authorities did not assess the significance of price undercutting in relation to the remaining 63% of the EU industry's

³²⁸ We note the argument of the European Union that PME imports from Indonesia were bought by both the EU industry in self-defence and also by blenders and traders. The European Union submits that the EU producers were in competition with traders and blenders which bought PME directly and Indonesian exporting producers with related importers in the European Union, which imported PME and then resold it. The European Union submits that this would be the correct price competition point. (European Union's opening statement at the second meeting of the Panel, paras. 43-44). Indonesia agrees that EU producers are likely to be in competition with traders and blenders. (Indonesia's response to Panel question No. 100, para. 86). This argument of the European Union fails to address the issue of whether there is a direct competition between CFPP 13 biodiesel from Indonesia and blended CFPP 0 biodiesel sold by the EU industry.

³²⁹ We note the argument of the European Union that the existence of significant price undercutting was considered in the framework of other factors, such as an increase in volume of dumped imports from Indonesia and its market share in the EU market as well as a series of factors having a bearing on the state of the domestic industry. (European Union's first written submission, paras. 99-105). The fact that the existence of significant price undercutting was considered together with other factors examined for the purpose of injury analysis does not change our conclusion that the EU authorities' analysis of the price relationship between imported PME and blended CFPP 0 biodiesel is flawed, because it is not clear that imports of PME had an effect on prices of blended CFPP 0 biodiesel sold by the EU industry.

³³⁰ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180 (referring to Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.141).

³³¹ Indonesia's first written submission, para. 241 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180).

³³² Indonesia's second written submission, para. 166; opening statement at the second meeting of the Panel, para. 79.

sales.³³³ We found above that the EU authorities' analysis of the price relationship between imported PME and blended CFPP 0 biodiesel is inadequate, because it fails to establish whether imports of PME from Indonesia had an effect on prices of blended CFPP 0 biodiesel sold by the EU industry. Given our finding that the price undercutting analysis is flawed, the question whether this analysis should have included a broader range of the domestic like products becomes moot. Given the failure by the EU authorities to properly establish price undercutting in respect of the price comparison that they did make, there is no sense in seeking to ascertain whether or not the EU authorities' analysis is sufficient to draw any conclusions regarding the existence of price undercutting more generally, including in respect of other products sold by the EU industry.³³⁴

7.161. Based on the above, we find that Indonesia has demonstrated that the EU authorities failed to establish that imports from Indonesia had an effect on prices of blended CFPP 0 biodiesel sold by the EU industry. Therefore, we find that Indonesia has made a *prima facie* case that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to establish the existence of significant price undercutting with regard to Indonesian imports. This *prima facie* case has not been rebutted by the European Union.

7.6.5 Conclusions

7.162. As indicated above, we find that Indonesia failed to establish that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by relying on prices of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports. We further find that Indonesia made a *prima facie* case that the EU authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to establish the existence of significant price undercutting with regard to Indonesian imports. Since that *prima facie* case has not been rebutted, we uphold Indonesia's claim accordingly.

7.7 Whether the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing and levying anti-dumping duties in excess of the margins of dumping

7.7.1 Introduction

7.163. Indonesia claims that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement. Indonesia submits that this results from the fact that the European Union acted inconsistently with Articles 2.2, 2.2.1.1, 2.2.2(iii), and 2.3 of the Anti-Dumping Agreement when constructing the normal value for Indonesian exporters and establishing the constructed export price for one Indonesian exporter. Indonesia submits that, if the dumping margins had been correctly calculated in conformity with Article 2, this would have resulted in negative dumping margins in certain cases, or the margins of dumping would have been significantly lower than the duties imposed by the European Union.³³⁵ The European Union

³³³ Indonesia's second written submission, para. 167; opening statement at the second meeting of the Panel, para. 80.

³³⁴ In its second written submission, Indonesia takes issue with the fact that the price undercutting analysis only covered the period from 1 July 2011 to 30 June 2012. Indonesia submits that the EU authorities failed to provide data on the price of CFPP 0 biodiesel during the entire period considered for the injury assessment, i.e. from 1 January 2009 to 30 June 2012, and instead only provided data on average prices of the EU industry during this period. (Indonesia's second written submission, paras. 157-159). We note that similar to Indonesia's arguments discussed in paras. 7.139. -7.141. above, Indonesia did not raise the issue of period considered for the price undercutting analysis in its first written submission. This allegation appears to relate to Indonesia's broader claim that the EU authorities failed to perform a dynamic assessment of price developments and trends over the entire period of investigation. Nevertheless, the specific factual allegations are new and were not raised by Indonesia in its first written submission. We therefore consider it inappropriate to address this new allegation in our report. In any event, it is well-established that panels do not need to address all arguments made by the parties. (See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.233). We do not need to address this argument in order to resolve the dispute before us, since we have already found that the EU authorities' price undercutting analysis was flawed.

³³⁵ Indonesia's first written submission, paras. 271-272; second written submission, paras. 170-174.

has acknowledged the factual description provided by Indonesia, but has not responded to the substance of Indonesia's claim.³³⁶

7.7.2 The EU authorities' imposition of definitive anti-dumping duties

7.164. We recall that, on 29 May 2013, the EU authorities imposed individual provisional anti-dumping duties on four sampled Indonesian producers ranging between zero and 9.6%.³³⁷ At the provisional stage, the dumping margins for the producers were based on the decision of the EU authorities to construct the normal value based on the recorded costs of production of Indonesian producers during the investigation period, the SG&A expenses incurred and a 15% profit margin.³³⁸ In the Definitive Disclosure, the European Union revised its methodology for establishing the cost of production of biodiesel by replacing the recorded costs of CPO of Indonesian producers with an international reference price published by the Indonesian government. The EU authorities based their decision to replace the recorded costs of production on the finding that the Indonesian DET system distorted the costs of production of biodiesel producers.³³⁹ As a result of this adjustment, the anti-dumping duty rates for Indonesian producers increased significantly. Definitive dumping margins were calculated ranging from 8.8% to 23.3% and definitive anti-dumping duties were applied corresponding to the calculated injury margins, which ranged from 8.8% to 20.5%.³⁴⁰ The duties were applied in the form of specific duties expressed as a fixed amount in euro/tonne.

7.7.3 Whether Indonesia has established that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.165. The *chapeau* of Article 9.3 of the Anti-Dumping Agreement provides that:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.166. Article VI:2 of the GATT 1994 provides that:

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

7.167. Indonesia submits that, in order to demonstrate a violation of Article 9.3 of the Anti-Dumping Agreement, it is required to demonstrate, first, that the margin of dumping calculated by the EU authorities was determined in violation of the disciplines prescribed in Article 2 of the Anti-Dumping Agreement, and second, that the anti-dumping duties were imposed at a rate that is higher than the dumping margin that would have been established had the EU authorities acted consistently with Article 2.³⁴¹ Indonesia submits that a similar approach may be taken to establish a violation of Article VI:2 of the GATT 1994.³⁴²

7.168. Similar claims were raised by Argentina in *EU – Biodiesel (Argentina)*. In addressing Argentina's Article 9.3 claim, the panel considered that the term "margin of dumping" in Article 9.3 "relates to a margin [of dumping] that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines".³⁴³ The panel additionally

³³⁶ European Union's first written submission, paras. 110-111; second written submission, para. 62.

³³⁷ Provisional Regulation, (Exhibit IDN-1), recital 179.

³³⁸ Provisional Regulation, (Exhibit IDN-1), recital 63.

³³⁹ Definitive Disclosure, (Exhibit IDN-7), recitals 57-62.

³⁴⁰ Definitive Regulation, (Exhibit IDN-2), recital 215. The injury margins for two Indonesian producers were determined to be higher than the corresponding dumping margins. Anti-dumping duty rates were assessed at the rate of the dumping margins for those producers.

³⁴¹ Indonesia's first written submission, para. 274.

³⁴² In order to demonstrate a violation of Article VI:2 of the GATT 1994, Indonesia submits that a complainant must demonstrate that: (a) the dumping margin was not determined in accordance with the disciplines laid out in Article VI:1 of the GATT 1994; and (b) that the anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article VI:1 of the GATT 1994. (Indonesia's first written submission, para. 281).

³⁴³ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.359.

observed that Article 9.3 also sets the maximum level at which anti-dumping duties may be levied.³⁴⁴ With these considerations in mind, the panel recalled its finding that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 in establishing the dumping margins in the Definitive Regulation due to the use of surrogate input prices in the construction of normal value for investigated Argentine producers.³⁴⁵ The panel considered whether this finding could provide a basis to establish an inconsistency with Article 9.3. The panel observed that an error or inconsistency under Article 2 of the Anti-Dumping Agreement "does not necessarily or automatically mean that the anti-dumping duty actually applied will exceed the correct margin of dumping".³⁴⁶ The panel recalled that the EU authorities had used actual input prices when constructing the normal value and calculating the dumping margins at the provisional stage. While it was not possible to infer the exact dumping margins that would have been established had the determinations been done in accordance with Article 2, the panel considered that "the dumping margins established in the Provisional Regulation provide a reasonable approximation of what margins calculated in accordance with Article 2 of the Anti-Dumping Agreement might have been".³⁴⁷

7.169. The panel recalled that the margins of dumping calculated in the Provisional Regulation ranged from 6.8% to 10.6%, while the duties imposed by the EU authorities in the Definitive Regulation ranged from 22.0% to 25.7%, an amount that was "two to three times higher".³⁴⁸ The panel considered this to be a "substantial difference" which "suggests that the anti-dumping duties imposed by the European Union in the Definitive Regulation exceeded what the dumping margins could have been had they been established in accordance with Article 2".³⁴⁹ On this basis, the panel concluded that Argentina had made a *prima facie* case that the European Union had acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement.³⁵⁰

7.170. The panel further considered this "substantial difference" gave rise to a violation of Article VI:2 of the GATT 1994. The panel noted that Article VI:2 of the GATT 1994 provides that a WTO Member "may levy ... an anti-dumping duty not greater in amount than the margin of dumping in respect of such product", further specifying that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with [Article VI:1]". The panel in *EU – Biodiesel (Argentina)* considered that the terms "in accordance with" makes clear that Article VI:2 prohibits the levying of anti-dumping duties in excess of the dumping margin *determined consistently* with Article VI:1 of the GATT 1994 in the same way as the phrase "as established under Article 2" operates in Article 9.3.³⁵¹ Therefore, the reasoning applied under Article 9.3 applies *mutatis mutandis* to Argentina's claim under Article VI:2 of the GATT 1994.³⁵²

7.171. The Appellate Body upheld the panel's reliance on the margins calculated in the Provisional Regulation as appropriate in light of the specific circumstances.³⁵³ The Appellate Body also agreed with the panel that the same considerations that guided its assessment of Argentina's Article 9.3 claim apply to its assessment under Article VI:2 of the GATT 1994.³⁵⁴

7.172. We have found in Sections 7.3.3 and 7.3.4 above that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 in establishing the dumping margins in the Definitive Regulation due to the use of surrogate input prices in the construction of normal value for investigated Indonesian producers. As Indonesia has indicated, the margins calculated in the Provisional Regulation ranged from zero to 9.6%, while the duties imposed by the EU authorities in the Definitive Regulation ranged from 8.8% to 20.5%, amounts which are twice as high or greater

³⁴⁴ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.360.

³⁴⁵ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.364.

³⁴⁶ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.363.

³⁴⁷ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

³⁴⁸ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

³⁴⁹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

³⁵⁰ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

³⁵¹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.366.

³⁵² Panel Report, *EU – Biodiesel (Argentina)*, para. 7.366.

³⁵³ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.110.

³⁵⁴ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.112.

in the case of each Indonesian producer/exporter.³⁵⁵ The difference is attributable to the change in the basis for constructing the normal value between the Provisional Regulation and the Definitive Regulation. In our view, this difference is significant. As the panel did in *EU – Biodiesel (Argentina)*, we therefore consider it appropriate to rely on the margins calculated in the Provisional Regulation as a basis to finding that the definitive anti-dumping duties imposed on Indonesian producers/exporters exceeded what the dumping margins might have been had they been established in accordance with Article 2 of the Anti-Dumping Agreement.

7.173. For the foregoing reasons, we uphold Indonesia's claim that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement. We further consider it appropriate to follow the approach taken by the panel in *EU – Biodiesel (Argentina)* in respect of Indonesia's claim under Article VI:2 of the GATT 1994.³⁵⁶ Accordingly, we find that the same considerations that informed our assessment of Indonesia's claim under Article 9.3 therefore apply *mutatis mutandis* to our assessment of its Article VI:2 claim. We therefore also uphold Indonesia's claim that the European Union acted inconsistently with Article VI:2 of the GATT 1994.

7.7.4 Conclusions

7.174. As indicated above, we consider that "margin of dumping" referred to in Article 9.3 of the Anti-Dumping Agreement relates to a margin of dumping that is established in a manner subject to the disciplines of Article 2 of the Anti-Dumping Agreement and which is therefore consistent with those disciplines. We find that Indonesia has made a *prima facie* case that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement. In addition, we find that the same considerations that informed our assessment of Indonesia's claim under Article 9.3 apply *mutatis mutandis* to our assessment of its Article VI:2 claim. We therefore also conclude that that the European Union acted inconsistently with Article VI:2 of the GATT 1994.

7.8 Whether the European Union acted inconsistently with Articles 7 and 9 of the Anti-Dumping Agreement through the application and definitive collection of provisional anti-dumping duties

7.8.1 Introduction

7.175. Indonesia submits that the European Union committed several errors in calculating a provisional margin of dumping of 2.8% for the sampled Indonesian producer, P.T. Musim Mas, which led to an inflated provisional dumping margin that otherwise would have been negative.³⁵⁷ Indonesia claims that the European Union acted inconsistently with a number of provisions of the Anti-Dumping Agreement because it applied and definitively collected provisional anti-dumping duties on imports from P.T. Musim Mas. Specifically, Indonesia requests the Panel to find that the European Union acted inconsistently with³⁵⁸:

- a. Article 7.1 of the Anti-Dumping Agreement because it applied provisional measures to P.T. Musim Mas based on a WTO inconsistent preliminary determination of the existence of dumping for P.T. Musim Mas;
- b. Article 7.2 of the Anti-Dumping Agreement because it applied to P.T. Musim Mas a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for P.T. Musim Mas;
- c. Article 9.2 of the Anti-Dumping Agreement because the provisional anti-dumping duty that was applied to P.T. Musim Mas and definitively collected was not in an "appropriate amount" within the meaning of Article 9.2; and

³⁵⁵ Indonesia's first written submission, table following para. 276. See also Provisional Regulation, (Exhibit IDN-1), recital 179; and Definitive Regulation, (Exhibit IDN-2), recital 215.

³⁵⁶ The approach of the panel in *EU – Biodiesel (Argentina)* is set out in para. 7.170. above.

³⁵⁷ Indonesia's first written submission, para. 286.

³⁵⁸ Indonesia's first written submission, para. 285.

- d. Article 9.3 of the Anti-Dumping Agreement by applying to P.T. Musim Mas and definitively collecting a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for this exporting producer.

7.8.2 The EU authorities' determination of a provisional margin of dumping for P.T. Musim Mas and the definitive collection of provisional duties

7.176. We begin by recalling the relevant facts related to the European Union's determination of a provisional margin of dumping for P.T. Musim Mas before addressing the substance of Indonesia's claims. On 29 May 2013, the EU authorities imposed an individual provisional anti-dumping duty of 2.8% on the sampled Indonesian producer, P.T. Musim Mas, based on a 2.8% provisional dumping margin and a 23.3% provisional injury margin.³⁵⁹

7.177. In its comments on the Provisional Disclosure, P.T. Musim Mas alleged that the EU authorities made three "mathematical and accounting errors"³⁶⁰ in calculating the normal value and export price, as follows:

- a. a mathematical error in calculating P.T. Musim Mas' domestic SG&A expenses by adding to the amount of SG&A for domestic sales the amount of the export tax payable on exports of biodiesel, in constructing the normal value³⁶¹;
- b. inconsistent accounting treatment of income tax expenses of two related importers, [[**]] and [[**]], by treating income tax expenses for both importers as an SGA expense, in addition to deducting an amount for income tax expenses as part of a 5% reasonable profit margin based on turnover, in constructing the export price³⁶²; and
- c. inconsistent accounting treatment of gasoil hedging gains and losses, by deducting gasoil hedging losses from the resale prices of a related importer [[**]] as an allowance while failing to include hedging gains of another related importer [[**]] in its resale prices, in constructing the export price.³⁶³

7.178. The EU authorities acknowledged these comments in the 1 October 2013 Definitive Disclosure and indicated that necessary corrections were made.³⁶⁴ Specifically, with regard to the constructed normal value, the EU authorities excluded the export tax from the SG&A based on the fact that the export tax was not paid on domestic sales.³⁶⁵ With regard to the constructed export price, the EU authorities excluded income tax expenses from SG&A amounts³⁶⁶ and addressed the

³⁵⁹ Provisional Regulation, (Exhibit IDN-1), recital 179.

³⁶⁰ P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), p. 1.

³⁶¹ P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), pp. 1-2.

³⁶² P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), p. 3.

³⁶³ P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), pp. 3-4; Specific Definitive Disclosure for [[**]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 4; and Specific Provisional Disclosure for [[**]], annex 2 A, (Exhibit IDN-19 (BCI)), p. 4.

³⁶⁴ The Definitive Regulation notes that one interested party (P.T. Musim Mas) claimed that some "clerical mistakes" had been made in the calculation of the dumping margins at the provisional stage. (Definitive Regulation, (Exhibit IDN-2), recital 227). In the Definitive Disclosure, the EU authorities referred to "overstated SG&A", "an inconsistent accounting treatment of biodiesel hedging gains and losses" and "claims for data changes in the calculations", indicating in each case that "corrections" were made. (Definitive Disclosure, (Exhibit IDN-7), recitals 64, 73, 75, and 80).

³⁶⁵ Definitive Disclosure, (Exhibit IDN-7), recital 64 ("One party claimed that in relation to recital (63) of the provisional Regulation an overstated SG&A was used for that party. After having examined this claim, it appeared that the SG&A for both domestic and export sales was included in the construction of normal value. The necessary corrections to use the SG&A for only the domestic sales were accordingly made.") Four specific disclosures were issued to importing companies of P.T. Musim Mas explaining the change. (Specific Definitive Disclosure for [[**]], Annex 2 A (1 October 2013), (Exhibit IDN-28 (BCI)), p. 2; Specific Definitive Disclosure for [[**]], Annex 2 B (1 October 2013), (Exhibit IDN-29 (BCI)), p. 2; Specific Definitive Disclosure for [[**]], Annex 2 C (1 October 2013), (Exhibit IDN-30 (BCI)), p. 2; and Specific Definitive Disclosure for [[**]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 2).

³⁶⁶ Definitive Disclosure, (Exhibit IDN-7), recital 80 ("Several exporting producers came also forward with claims for data changes in the calculations. Where these claims were substantiated with the necessary evidence, corrections were made"); Specific Definitive Disclosure for [[**]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 4; and Specific Definitive Disclosure for [[**]], Annex 2 C (1 October 2013), (Exhibit IDN-30 (BCI)), p. 4. Indonesia submits that SG&A expenses for [[**]] were decreased by 0.05% and

inconsistent treatment of hedging gains and losses by re-adding the amount of hedging losses from the resale prices of [[***]] that had been deducted as an allowance.³⁶⁷

7.179. In its comments on the Definitive Disclosure, P.T. Musim Mas argued that the collection of provisional duties should only be done on the basis of the corrections that were made.³⁶⁸ Based on the above corrections, P.T. Musim Mas submitted that the dumping margin at the provisional stage "would be *de minimis*" and therefore no provisional duties should be collected.³⁶⁹ In the Definitive Regulation, the EU authorities confirmed the corrections.³⁷⁰ Notwithstanding, the EU authorities rejected the request by P.T. Musim Mas and ordered the definitive collection of the provisional duty that had been provisionally secured on the basis that "the definitive anti-dumping duty is clearly higher than the provisional duty".³⁷¹ The definitive anti-dumping duty rate determined for P.T. Musim Mas was 16.9%, based on a dumping margin of 18.3% and an injury margin of 16.9%.³⁷²

7.8.3 Whether Indonesia has established violations of Articles 7 and 9 of the Anti-Dumping Agreement related to the definitive collection of provisional anti-dumping duties on imports from P.T. Musim Mas

7.180. Indonesia's claims under Articles 7.1(ii), 7.2, 9.2, and the *chapeau* of Article 9.3 of the Anti-Dumping Agreement relate to the decision of the EU authorities to definitively collect the provisional anti-dumping duties on imports from P.T. Musim Mas.³⁷³

7.181. Article 7.1 provides in relevant part:

Provisional measures may be applied only if:

...

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; ...

7.182. The first sentence of Article 7.2 provides:

Provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping.

7.183. The first sentence of Article 9.2 provides:

When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be

for [[***]] by 0.18% to address the overstatement of income tax expenses. (Indonesia's first written submission, paras. 295-298).

³⁶⁷ The EU authorities recognized that hedging losses of [[***]] had been deducted as an allowance, while hedging gains of [[***]] were not taken into account, in constructing the export price. The EU authorities determined that the export price should reflect the price actually paid or payable for the product when sold for export exclusive of any gain or loss related to hedging practices. Therefore, the EU authorities increased the export price of [[***]] by the amount of hedging losses that were treated as an allowance. (Definitive Disclosure, (Exhibit IDN-7), recitals 74-75; Specific Definitive Disclosure for [[***]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 4 ("The hedge allowance was not considered part of the export price. As stated in Article 2(8) of the Basic Regulation, the export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the EU. Therefore the hedge allowance as indicated in the column 'other allowances' was now eliminated from the dumping calculation."))

³⁶⁸ P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), paras. 2.2 and 21-22.

³⁶⁹ P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), paras. 2.2 and 23.

³⁷⁰ Definitive Regulation, (Exhibit IDN-2), recitals 76, 96, and 102.

³⁷¹ Definitive Regulation, (Exhibit IDN-2), recital 227.

³⁷² Definitive Regulation, (Exhibit IDN-2), recital 215.

³⁷³ See paras. 7.177. -7.178. above.

dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.

7.184. The *chapeau* of Article 9.3 reads: "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".

7.185. In addressing Indonesia's claims, we consider it necessary to first clarify the precise nature of the findings sought by Indonesia. In its first submission, Indonesia framed its claims in respect of the fact that the EU authorities improperly *applied* provisional measures to P.T. Musim Mas, and thereafter definitively *collected* the provisional anti-dumping duty.³⁷⁴ Indonesia argued, for instance, that an investigating authority cannot simply disregard the disciplines contained in Article 2 of the Anti-Dumping Agreement and impose and subsequently collect duties that exceed a provisionally estimated margin of dumping. In this respect, Indonesia argued that the language "provisionally estimated" in Article 7.2 cannot be understood as permitting an investigating authority to make "clear cut and apparent" violations of Article 2.³⁷⁵ Indonesia submits that, if this were the case, this would defeat the purpose of imposing a limitation that provisional measures should not exceed the provisionally estimated margin of dumping.³⁷⁶ Indonesia argues that corrections must be retroactive because, if investigating authorities were allowed to definitively collect provisional duties in excess of the actual provisional dumping margin, investigating authorities could circumvent the requirements of Article 7.2 (and Articles 9.2 and 9.3) by making errors when calculating the provisional dumping margin and thereafter collect those duties at the definitive stage.³⁷⁷

7.186. Following its first written submission, Indonesia made several subsequent clarifications regarding its claims. At the first substantive meeting with the Panel, for instance, Indonesia indicated that it does not challenge the provisionally estimated dumping margin and the imposition of the provisional duties "*as such*", but explained rather that Indonesia "does not agree with the definitive determination made in the Definitive Regulation to collect a provisional duty which the EU *knew* was erroneous and in excess of the real dumping margin that should have been determined at the provisional stage".³⁷⁸ Indonesia further indicated that it does not seek to challenge the Provisional Regulation but "rather that part of the Definitive Regulation that ordered the definitive collection of the provisional duties".³⁷⁹ Subsequently, in response to a question from the Panel, Indonesia specified that it "only seeks a finding of the Panel with respect to the definitive collection of [the provisional duties applied to P.T. Musim Mas] in the Definitive Regulation".³⁸⁰

7.187. From the outset, the European Union has maintained that Indonesia's claims under Articles 7 and 9 are misconceived in light of Indonesia's clarification that its challenge is directed at the definitive collection of provisional duties as opposed to any findings related to the imposition of provisional measures contained in the Provisional Regulation. The European Union considers that this is confirmed by the fact that Indonesia has identified as the pertinent measure the Definitive Regulation that ordered the definitive collection of the provisional duties. The European Union submits that the relevant obligations governing the definitive collection of provisional anti-dumping duties are contained in Articles 10.3 and 10.5 of the Anti-Dumping Agreement. The European Union contends that the EU authorities respected the obligation contained in Article 10.3 when collecting provisional duties that were secured for P.T. Musim Mas and therefore, Indonesia's claims should be rejected.³⁸¹

7.188. In light of the clarifications by Indonesia, we understand that Indonesia's challenge is limited to whether the definitive collection of provisional duties applied to P.T. Musim Mas was in any way inconsistent with the cited provisions of Article 7 or 9 of the Anti-Dumping Agreement. As

³⁷⁴ See, e.g. Indonesia's first written submission, para. 285.

³⁷⁵ Indonesia's first written submission, paras. 323-324.

³⁷⁶ Indonesia's first written submission, para. 326.

³⁷⁷ Indonesia's first written submission, para. 340.

³⁷⁸ Indonesia's opening statement at the first meeting of the Panel, para. 59. (emphasis original)

³⁷⁹ Indonesia's opening statement at the first meeting of the Panel, para. 59.

³⁸⁰ Indonesia's response to Panel question No. 61, para. 95.

³⁸¹ European Union's first written submission, para. 129; opening statement at the first meeting of the Panel, para. 48; response to Panel question No. 50, para. 78; and second written submission, paras. 63-64 (referring to Indonesia's responses to Panel question No. 55, para. 89, and No. 61, para. 95). See also responses to Panel question Nos. 112, 114, 115, 117, 118, 120, and 121.

Indonesia has clarified that it is not challenging the fact that the EU authorities imposed provisional duties on P.T. Musim Mas pursuant to findings contained in the Provisional Regulation – nor has Indonesia challenged in any way the right of the European Union to impose provisional measures – we need not address issues related to the *application*, or *imposition* of provisional measures. In this regard, it follows therefore, that Indonesia may establish its claims to the extent that the cited provisions in Articles 7 and 9 are pertinent to the definitive collection of provisional duties.

7.189. It is evident on the face of its various subparagraphs that Article 7 addresses the imposition, or application of provisional measures. Article 7.1 expressly refers to situations in which provisional measures may be *applied* (stating that "Provisional measures may only be applied if:"). In turn, Article 7.2 addresses the form which provisional measures that are applied may take, including provisional duties or security equal to the amount of the duty provisionally estimated, subject to the requirement that any duty or security taken does not exceed the provisionally estimated margin of dumping. Articles 7.3 and 7.4 address the period of *application* of provisional measures. Article 7.3 states that "[p]rovisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation". Article 7.4 indicates that "[t]he application of provisional measures shall be limited to as short a period as possible ..." Finally, Article 7.5 indicates that "[t]he relevant provisions of Article 9 shall be followed in the *application* of provisional measures".³⁸²

7.190. At the provisional stage, the EU authorities calculated a 2.8% provisional dumping margin for P.T. Musim Mas and subsequently ordered the imposition of provisional measures in respect of imports by P.T. Musim Mas.³⁸³ This determination is contained in the Provisional Regulation, which Indonesia has indicated that it does not challenge. We recall that Indonesia has requested us to make findings only in respect of the *definitive collection* of those duties. Article 7.2 addresses the form and amount that provisional measures that are imposed may take, but does not address the definitive collection of those duties. As this is the case, we agree with the view of the European Union that Indonesia's claim under Article 7.2 as concerning the definitive collection of duties is misplaced. We therefore find that there is no basis to consider Indonesia's claims under Article 7.2 of the Anti-Dumping Agreement as concerns the definitive collection of provisional anti-dumping duties on imports from P.T. Musim Mas.

7.191. In addition, we find there is no basis for Indonesia's claim under Article 7.1(ii) of the Anti-Dumping Agreement because we consider that Indonesia's claim under Article 7.1(ii) is also dependent on the findings contained in the Provisional Regulation. The EU authorities' determination that a preliminary affirmative determination has been made of dumping for P.T. Musim Mas is based on those same findings.

7.192. We next consider the relevance of Indonesia's claims under Article 9.2 and the *chapeau* of Article 9.3 of the Anti-Dumping Agreement. Indonesia first claims that the European Union acted inconsistently with Article 9.2 of the Anti-Dumping Agreement because the EU authorities did not definitively collect provisional anti-dumping duties in the "appropriate amounts", as required by the first sentence of Article 9.2.

7.193. According to Indonesia, the term "appropriate amounts" in Article 9.2 is informed by the provisions of Articles 7.2, 9.3, and 10.3 of the Anti-Dumping Agreement. An appropriate amount that is collected may not exceed the amount of the provisionally estimated margin of dumping that is determined consistently with Article 2 of the Anti-Dumping Agreement. Indonesia acknowledges that, once the definitive findings have been made, the amount of the provisional duty that is definitively collected must comply with the requirement in Article 10.3 of the Anti-Dumping Agreement. In particular, in cases where the definitive duty is lower than the provisional duty paid or payable, or the amount established for the purpose of the security that is taken, the difference shall be reimbursed or the duty recalculated, as relevant to the circumstances.³⁸⁴ However, Indonesia argues that the requirement to definitively collect provisional anti-dumping duties in appropriate amounts cannot be set aside due to the fact that an investigating authority made calculation errors that led to a higher provisionally estimated margin

³⁸² Emphasis added.

³⁸³ Provisional Regulation, (Exhibit IDN-1), recitals 60-79 and 173-182.

³⁸⁴ Indonesia's first written submission, paras. 353-354.

of dumping at the provisional stage, or the fact that the definitive duty is ultimately higher than the provisional duty.³⁸⁵

7.194. Indonesia considers that the appropriateness of the duty in the context of provisional measures can be inferred from the requirement in the first sentence of Article 7.2 that the provisional duty cannot be greater than the provisionally estimated margin of dumping.³⁸⁶ In addition, Indonesia cites the definition of "appropriate" that was referred to by the panel in *EC – Salmon (Norway)*, as "specially suitable (for to); proper fitting".³⁸⁷ Thus, an "'appropriate' amount of anti-dumping duty must be an amount that results in offsetting or preventing dumping".³⁸⁸

7.195. Indonesia also claims that the European Union acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement. Indonesia argues that the *chapeau* of Article 9.3 is equally applicable to the imposition and definitive collection of provisional anti-dumping duties, and a violation results from the fact that the provisional anti-dumping duty that was applied to and definitively collected from P.T. Musim Mas was in fact higher than the provisionally estimated margin of dumping determined consistently with Article 2 of the Anti-Dumping Agreement.³⁸⁹ Indonesia submits that the *chapeau* of Article 9.3 sets the ceiling for the imposition and collection of anti-dumping duties.³⁹⁰

7.196. The European Union argues that Indonesia's claims under Article 9.2 and the *chapeau* of Article 9.3 should fail. The European Union contends that the EU authorities' preliminary determination of dumping in respect of P.T. Musim Mas was not based on a "flawed calculation" but was in fact a provisional estimate within the meaning of Article 7.2.³⁹¹ Therefore, the European Union argues that Indonesia has not established that the amount of the anti-dumping duty provisionally estimated was greater than the provisionally estimated margin of dumping and Indonesia cannot establish that the duties that were collected were not in an appropriate amount.³⁹² In addition, the European Union argues that Indonesia has failed to take into account that the definitive duty has been found to be higher than the provisional duty paid or payable, which triggers the obligations contained in Articles 10.3 and 10.5. According to the first sentence of Article 10.3, the European Union submits that any amount estimated for the purpose of the security need not be released if the definitive duty is higher than the provisional duty paid or payable.³⁹³ The European Union submits that it respected this obligation by not collecting the difference between the definitive and provisional duties.³⁹⁴

7.197. We note that Article 9 is entitled "Imposition and Collection of Anti-Dumping Duties". We recall that Article 7.5 of the Anti-Dumping Agreement provides that "[t]he relevant provisions of Article 9 shall be followed in the application of provisional measures". Thus, according to Article 7.5, we understand that certain provisions of Article 9 concerning either the imposition or collection of anti-dumping duties may be relevant in respect of the *application of provisional measures*. This may include, for instance, the decision whether or not to impose anti-dumping duties in cases where all requirements for imposition have been fulfilled, or the decision whether the amount of the duty to be imposed shall be the full margin of dumping or less, as set out in Article 9.1. Article 9.2 indicates that anti-dumping duties that are imposed shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from

³⁸⁵ Indonesia's first written submission, para. 357.

³⁸⁶ Indonesia's first written submission, para. 355.

³⁸⁷ Indonesia's first written submission, para. 356 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.704).

³⁸⁸ Panel Report, *EC – Salmon (Norway)*, paras. 7.704-7.705.

³⁸⁹ Indonesia's first written submission, paras. 349-350.

³⁹⁰ Indonesia's first written submission, para. 348 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 130; and *US – Continued Zeroing*, para. 315).

³⁹¹ See, e.g. European Union's first written submission, paras. 131-133.

³⁹² European Union's first written submission, paras. 143-148; response to Panel question No. 57, para. 84.

³⁹³ Article 10.3 of the Anti-Dumping Agreement provides:

If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

³⁹⁴ European Union's second written submission, para. 65; responses to Panel question No. 47, para. 74, and No. 49, para. 77. See also response to Panel questions Nos. 51 and 52.

all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings have been accepted.³⁹⁵ The *chapeau* of Article 9.3 provides that the amount of anti-dumping duties shall not exceed the margin of dumping as established under Article 2. The European Union does not dispute that Article 9.2 and the *chapeau* of Article 9.3 may be relevant in respect of provisional measures.³⁹⁶

7.198. In our view, the definitive collection of the provisional duties paid or payable is governed under either Article 10.3 or 10.5 of the Anti-Dumping Agreement. Pursuant to the first sentence of Article 10.3 if the definitive anti-dumping duty is higher than the provisional duties paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. It may be inferred from this provision that any provisional duty or security that has been collected or otherwise secured by a cash deposit or bond is confirmed. On the other hand, the second sentence of Article 10.3 provides that where the definitive duty is lower than the provisional duties or security collected or secured, the difference must be reimbursed or the duty recalculated, as the case may be. As to Article 10.5, it states that any cash deposit made or bonds collected must be released expeditiously in cases where a final determination is negative.

7.199. In the circumstances of this dispute, the EU authorities ordered the definitive collection of the provisional duty that had been provisionally secured on the basis that the definitive duty calculated was higher than the provisional duty.³⁹⁷ We agree with the European Union's argument that this approach is consistent with the obligation contained in Article 10.3 of the Anti-Dumping Agreement.

7.200. We disagree with Indonesia's argument that the EU authorities failed to collect duties in "appropriate amounts" within the meaning of Article 9.2 of the Anti-Dumping Agreement. We recall that, pursuant to Article 7.5 of the Anti-Dumping Agreement, certain provisions of Article 9 may be relevant to "the application of provisional measures". Yet, when referring to Article 9.2 we note that the provision indicates that anti-dumping duties shall be imposed and collected in the "appropriate amounts" in each case while Article 7 governs the application of provisional measures.³⁹⁸ At the time of the *application* of provisional measures, Article 7.2 specifically allows for the collection of a provisional duty or otherwise the collection of security in the form of a cash deposit or bond. In either case, the amount that is collected shall not exceed the provisionally estimated margin of dumping. In this case, the EU authorities collected security equal to the margin of dumping that had been calculated at the provisional stage. In this sense, we do not see how the European Union failed to impose or collect duties in the appropriate amount *at the time of the application of provisional measures*. Article 9.2 cannot be interpreted without regard to Article 10.3 of the Anti-Dumping Agreement. The definitive collection of provisional duties occurred at the definitive stage following the correction of the errors that had been identified by P.T. Musim Mas. In the Definitive Regulation, the EU authorities ordered the definitive collection of the provisional duty consistently with the obligation in the first sentence of Article 10.3 of the Anti-Dumping Agreement, i.e. the EU authorities confirmed the provisional measures and did not collect the difference between the amount estimated for the purpose of the security and the definitive duty that was determined to be higher. We therefore reject Indonesia's claim under Article 9.2 of the Anti-Dumping Agreement.

7.201. We further disagree with Indonesia's argument that the definitive collection of provisional duties is inconsistent with the obligation in the *chapeau* of Article 9.3 of the Anti-Dumping Agreement that the amount of the anti-dumping duty shall not exceed the margin of dumping as

³⁹⁵ A panel previously found that the provision "sources found to be dumped" in Article 9.2 is applicable in respect of provisional measures. (Panel Report, *Canada – Welded Pipe*, para. 7.77).

³⁹⁶ See, e.g. European Union's first written submission, para. 144 ("Indonesia also raises consequential claims under Articles 9.3 and 9.2 of the Anti-Dumping Agreement, which apply *mutatis mutandis* to provisional measures as per Article 7.5 of the Anti-Dumping Agreement".) We note that the European Union has argued that Indonesia should have brought a claim with respect to the provisional determination under Article 2 of the Anti-Dumping Agreement. (European Union's response to Panel question No. 49, para. 77; second written submission, para. 68). We do not exclude that a party may choose to bring a claim directly under Article 2 in relation to provisionally estimated dumping margin or the imposition of the provisional duties. However, we do not consider the fact that Indonesia did not bring a claim under Article 2 prevents us from addressing its claims under Article 9 in relation to the provisional measures imposed on P.T. Musim Mas.

³⁹⁷ Definitive Regulation, (Exhibit IDN-2), recital 227.

³⁹⁸ We recall that Articles 7.1, 7.3, 7.4, and 7.5 all refer to the application of provisional measures, while Article 7.2 addresses the form which provisional measures that are applied may take.

established under Article 2.³⁹⁹ We consider that the *chapeau* of Article 9.3 is relevant in respect of the *application of provisional measures*, by virtue of Article 7.5 of the Anti-Dumping Agreement. This means the obligation is relevant at the time of the *application of provisional measures*. We understand Indonesia's claim under the *chapeau* of Article 9.3 is based on the same issue underlying its claim under Article 9.2, specifically, that the provisional anti-dumping duty applied to and definitively collected from P.T. Musim Mas was in fact higher than the provisional margin of dumping determined consistently with Article 2 of the Anti-Dumping Agreement. As noted above, at the time of imposition of provisional measures, pursuant to the first sentence of Article 7.2, the amount of provisional duty that is imposed, or security that is taken shall not exceed the provisionally estimated margin of dumping. The EU authorities collected security equal to the margin of dumping that had been estimated at the provisional stage, and in this sense, the provisional duty amount did not exceed the margin of dumping at the time of application of the provisional measures. We therefore reject Indonesia's claim under the *chapeau* of Article 9.3 of the Anti-Dumping Agreement.

7.202. Finally, in the context of addressing Indonesia's claims, we recall our findings in Sections 7.3.3 and 7.3.4 above that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 in establishing the dumping margins in the Definitive Regulation. This was due to the use of surrogate input prices in the construction of normal value for investigated Indonesian producers. We have observed that the substantial difference between the provisional and definitive duties is attributable to the change in the basis for constructing the normal value at the definitive stage of the investigation.⁴⁰⁰ Had the European Union not substituted the recorded costs of producers the definitive duties for affected producers would not have been substantially higher than the provisional duties, if at all. Indonesia has submitted evidence in this proceeding to demonstrate that the provisional dumping margin for P.T. Musim Mas would have been negative, - 0.42%, had the EU authorities not committed the errors that are the subject of the present claim. The European Union has not contested this evidence.⁴⁰¹ This evidence before us thus supports the conclusion that the definitive anti-dumping duty rate for P.T. Musim Mas would have been negative had the European Union not changed the basis for constructing the normal value at the definitive stage. This in turn presumably would have had implications for the implementation of the relevant provision under Article 10.3 of the Anti-Dumping Agreement. We therefore note that our findings made in respect of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 are relevant to Indonesia's claims.

7.8.4 Conclusions

7.203. We have addressed claims raised by Indonesia under Articles 7.1(ii), 7.2, 9.2, and the *chapeau* of Article 9.3 of the Anti-Dumping Agreement, in relation to the European Union's determination of a provisional margin of dumping for P.T. Musim Mas that led to the subsequent application of provisional duties to P.T. Musim Mas and the definitive collection of those duties. As set out above, we find that Indonesia has failed to establish a basis for its claims under Articles 7.2

³⁹⁹ We note that Indonesia has argued that the "basis" of its claim is that the provisional dumping margin was not calculated in compliance with the disciplines set out in Article 2 of the Anti-Dumping Agreement. (Indonesia's response to Panel question No. 61, para. 95). However, Indonesia has not identified particular provisions in Article 2 in respect of its claim, nor has Indonesia presented arguments in this proceeding in respect of how the errors made in constructing the normal value and export price violated particular obligations contained in the provisions of Article 2 of the Anti-Dumping Agreement.

⁴⁰⁰ See para. 7.172. above.

⁴⁰¹ Indonesia's first written submission, paras. 286 and 288; response to Panel question No. 119; P.T. Musim Mas dumping margin calculation by the European Union at the time of the final disclosure in the original investigation, (Exhibit IDN-37 (BCI)); and P.T. Musim Mas dumping margin calculation by Indonesia, (Exhibit IDN-38 (BCI)). Indonesia's calculation is additionally confirmed in the disclosure that was submitted as Exhibit IDN-36 in this proceeding. We recall that the European Commission initiated a review of the anti-dumping measures imposed on imports of biodiesel originating in Argentina following the adoption of the panel and Appellate Body reports in the *EU – Biodiesel (Argentina)* dispute. In its notice of initiation of the review, the European Commission indicated that it also considered it appropriate to review the anti-dumping measures imposed on imports of biodiesel from Indonesia. (See para. 2.3. above). In the disclosure, the EU authorities recalculated the normal value for Argentine and Indonesian producers, including P.T. Musim Mas based on the actual costs of the main raw materials as contained in the producer/exporter records. Although the content of this disclosure does not constitute a final determination, recitals 40 and 87 confirm that the final definitive anti-dumping duty rate for P.T. Musim Mas would have been *de minimis* or zero. (See also European Union's response to Panel question No. 120).

and 7.1(ii) of the Anti-Dumping Agreement as concerns the definitive collection of provisional anti-dumping duties on imports from P.T. Musim Mas, in the view that Indonesia does not challenge findings related to the imposition of provisional measures contained in the Provisional Regulation. In addition, we reject Indonesia's claims that the European Union acted inconsistently with Article 9.2 or the *chapeau* of 9.3 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers; we do not reach findings as to whether, as a consequence, the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994;
- b. the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" for the main input that was not the cost prevailing "in the country of origin", Indonesia;
- c. the European Union acted inconsistently with Articles 2.2.2(iii) and 2.2 of the Anti-Dumping Agreement by failing to determine "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin"; we reject Indonesia's request that we find that the European Union additionally acted inconsistently with Article 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement;
- d. the European Union acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by failing to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by P.T. Musim Mas was first resold to independent buyers in the European Union;
- e. Indonesia has not established that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by relying on prices of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports;
- f. the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to establish the existence of significant price undercutting with regard to Indonesian imports;
- g. the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively;
- h. Indonesia has not established that the European Union acted inconsistently with Article 7.1(ii) of the Anti-Dumping Agreement because it applied provisional measures to P.T. Musim Mas based on a WTO inconsistent preliminary determination of the existence of dumping for P.T. Musim Mas;
- i. Indonesia has not established that the European Union acted inconsistently with Article 7.2 of the Anti-Dumping Agreement because it applied to P.T. Musim Mas a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for P.T. Musim Mas;
- j. Indonesia has not established that the European Union acted inconsistently with Article 9.2 of the Anti-Dumping Agreement because the provisional anti-dumping duty that was applied to P.T. Musim Mas and definitively collected was not in an "appropriate amount", within the meaning of Article 9.2; and

- k. Indonesia has not established that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by applying to P.T. Musim Mas and definitively collecting a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for this exporting producer.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Indonesia under these agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994. Indonesia requests that we use our discretion under the second sentence of the same article to suggest ways in which the European Union should bring its measures into conformity with the Anti-Dumping Agreement and the GATT 1994. Indonesia considers that the measures at issue in this dispute should be withdrawn. We decline to exercise our discretion under the second sentence of Article 19.1 of the DSU in the manner requested by Indonesia.



**EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL
FROM INDONESIA**

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS480/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

**EUROPEAN UNION — ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA
(DS480)**

Adopted on 13 December 2016

1. In its proceedings, the Panel shall follow the **relevant** provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Indonesia requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Indonesia shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this

procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by Indonesia could be numbered IDN-1, IDN-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5, the first exhibit of the next submission thus would be numbered IDN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 12h00 (noon) the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the other party questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Indonesia. If the European Union chooses not to avail itself of that right, the Panel shall invite Indonesia to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 of the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the other party questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 12h00 (noon) the previous working day.

17. The third-party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 17h00 of the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
- d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive section

18. The description of the arguments of the parties and third parties in the descriptive section of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an executive summary of the facts and arguments as presented to the Panel in its first written submission, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file three paper copies of all documents it submits to the Panel. Exhibits may be filed in two copies on CD-ROM or DVD and two paper copies. The DS Registrar shall stamp the documents with the date and time of the filing.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to xxx@wto.org, with a copy to xxx@wto.org and xxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry. The paper version of documents shall constitute the official version for the purposes of the record of the dispute.

- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 17h00 (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.
- f. The Panel shall provide the parties with an electronic version of the descriptive section, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

**ADDITIONAL WORKING PROCEDURES ON BUSINESS
CONFIDENTIAL INFORMATION**

**EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA
(WT/DS480)**

Adopted on 13 December 2016

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.
2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated as confidential within the meaning of Article 6.5 of the Anti-dumping Agreement by the investigating authorities of the European Union in the anti-dumping investigation, unless the person who provided the information in the course of those investigations agrees in writing to make the information publicly available. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned proceedings agrees in writing to make the information publicly available.
3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.
4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or of a third party, or an outside advisor to a party or third party for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures.
5. An outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigations at issue in this dispute, or an officer or employee of an association of such enterprises.
6. Third parties' access to BCI shall be subject to the terms of these procedures. The Panel expects that all parties and third parties to this dispute will comply with the requirements of Article 18.2 of the DSU and the Panel's working procedures and these additional procedures concerning BCI. A party objecting to a third party having access to specific BCI it is submitting shall inform the Panel of its objection and the reasons therefor and the Panel will resolve the matter. Any request to limit third party access to BCI shall:
 - (i) be submitted to the Panel at least 10 working days prior to filing the document containing such BCI;
 - (ii) indicate the particular third party or parties concerned, and the specific BCI at issue with respect to each third party concerned; and

- (iii) set out the reason(s) demonstrating why access by a particular third party to specific BCI would pose a risk of serious harm to the interests of the originator of the specific BCI in question.

The Panel will endeavour to inform the parties of its decision no later than three working days before the deadline to file the document containing such BCI. If the Panel finds the request justified, it will direct both parties to redact the specific BCI from documents served on that particular third party, and to provide a non-confidential version, sufficient to allow a reasonable understanding of the specific BCI, to that third party. The Panel's decision to grant a request to limit a particular third party's access to specific BCI shall govern treatment by both parties of that specific BCI with respect to that particular third party throughout the proceeding.

7. Submission of BCI:

- (i) The party or third party submitting BCI shall indicate the presence of such information in any document submitted to the Panel, as follows: the first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific business confidential information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit IDN-1 (BCI)).
- (ii) Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".
- (iii) In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7(i).

8. Where a party submits a document containing BCI to the Panel, the other party or third party, when referring to that BCI in its documents, including written submissions, and written copies of their oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 7.

9. Any person authorized to have access to BCI under the terms of these procedures shall store all documents or other media containing BCI in such a manner as to prevent unauthorized access to such information.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the report of the Panel.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1**FIRST EXECUTIVE SUMMARY OF THE
ARGUMENTS OF INDONESIA****Executive summary of the first written submission of Indonesia****1. INTRODUCTION AND GENERAL FACTUAL BACKGROUND**

1. On 29 August 2012, the European Commission initiated an anti-dumping investigation against imports of biodiesel from Indonesia and Argentina with the publication of the notice of initiation of the investigation in the European Union's Official Journal.¹

2. On 28 May 2013, provisional measures were imposed against Indonesian imports through the publication of the Provisional Regulation in the European Union's Official Journal.² The measures came into effect the following day. For the sampled Indonesian exporting producers, the provisional measures ranged between zero and 9.6%:

Company	Provisional anti-dumping duty
PT. Ciliandra Perkasa, Jakarta	0.0%
PT. Musim Mas, Medan	2.8%
PT. Pelita Agung Agrindustri, Medan	5.3%
PT. Wilmar Bioenergi, Indonesia, Medan; PT Wilmar Nabati, Indonesia, Medan	9.6%
Other cooperating companies	6.5%
All other companies	9.6%

3. At the provisional stage, the dumping margin for the four Indonesian producers was based on a comparison of the constructed normal value with the export price. The constructed normal value was based on the recorded costs of production of biodiesel of the Indonesian exporting producers, their respective selling, general and administrative costs ("SG&A") plus a 15% profit margin.

4. On 1 October 2013, the European Commission proposed the imposition of definitive measures.

5. At this stage, while the European Commission retained its finding of injurious dumping but drastically revised its methodology of establishing the cost of production of biodiesel. In particular, the European Commission rejected the recorded and verified cost of production of biodiesel of the Indonesian producers and replaced it with an out-of-country/international benchmark resulting in a significant inflation of the dumping margins for all exporting producers.

6. The European Commission justified its replacement of the cost of production of the Indonesian exporting producers and the use of an out-of-country/international benchmark for the adjustment on the basis of the existence of a differential export tax system in Indonesia. The European Commission found that, by virtue of this system, the export tax on PME was lower than that on palm oil and palm oil derivatives, thereby "distort[ing] the cost of production of biodiesel producers" and resulting in crude palm oil ("CPO") prices in Indonesia to be depressed.

7. On this basis, the European Union definitively imposed anti-dumping duties³ ranging between 8.8% and 20.5% on the Indonesian exporting producers:

¹ Notice of initiation of an anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, OJ C 260, 29.8.2012, p. 8.

² Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ L 141, 28.5.2013, p. 6 ("Provisional Regulation").

³ Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013, p. 2 ("Definitive Regulation").

Company	Anti-Dumping Duty
PT. Ciliandra Perkasa, Jakarta	8.8%
PT. Musim Mas, Medan	16.9%
PT. Pelita Agung Agrindustri, Medan	16.8%
PT Wilmar Bioenergi Indonesia, Medan; PT Wilmar Nabati Indonesia, Medan	20.0%
Other cooperating companies	18.9%
All other companies	20.5%

2. CLAIMS REGARDING THE DUMPING DETERMINATION

2.1. The European Union failed to act consistently with the obligation laid down in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement since it did not calculate the costs of production of the Indonesian exporting producers on the basis of the records kept by these producers. As a result, in failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union failed to properly construct the normal value and thus also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.

8. Indonesia submits that the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement calls for an assessment of whether the costs set out in a producer's records correspond – within acceptable limits – in an accurate and reliable manner to all the costs incurred by the particular producer or exporter for the product under consideration, as confirmed by both the Panel and the Appellate Body in *EU – Biodiesel*.⁴ The second condition of the first sentence of Article 2.2.1.1 does not allow an investigating authority to reject the records of the investigated producer or exporter simply because the cost, although accurately reflected in the records, are "unreasonable" or "artificially low" due to state intervention in the market.

9. The European Union decided to not use the recorded costs of the main raw material in the production of biodiesel – CPO – because "the domestic price of CPO is artificially low as compared with international prices [as] a result of a distortion by virtue of the DET".⁵ On that basis, the European Union disregarded the price actually paid by Indonesian producers for CPO and replaced it with "the [reference] price at which those companies would have purchased the CPO in the absence of such a distortion". This reference price was in turn based on published international prices (Rotterdam, Malaysia and Indonesia). This reference price is also referred to by the European Union as the "HPE".⁶

10. In other words, the European Union found the domestic prices of the main raw material used by biodiesel producers in Indonesia to be "artificially lower" than international prices due to the distortion created by the Indonesian export tax system.

11. As this justification does not constitute a legally sufficient basis for rejecting the costs of Indonesian biodiesel producers as recorded in their accounting records, the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

12. As a result, in failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union failed to properly construct the normal value and thus also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.

2.2. Indonesia submits that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the (b)(ii) GATT 1994 in failing to construct the normal value of biodiesel on the basis of the cost of production in the country of origin.

13. The European Union substituted the cost of CPO in the records of the investigated producers and exporters with a reference export price for CPO published by the Indonesian Authorities. This

⁴ See Panel Report, *EU – Biodiesel*, para. 7.247; and Appellate Body Report, *EU – Biodiesel*, para. 6.56.

⁵ Definitive Regulation, *op. cit.* at rec. 74.

⁶ Definitive Regulation, recital 70.

reference price was in turn based on published international prices (Rotterdam, Malaysia and Indonesia).

14. Indonesia submits that in replacing the costs of CPO reported in the records of the exporting producers with the reference export price, the European Union constructed the normal value of Indonesian investigated producers on the basis other than the cost of production in the country of origin, *i.e.* Indonesia. Consequently, Indonesia submits that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in failing to construct the normal value of biodiesel on the basis of the cost of production in the country of origin.

2.3. The European Union acted inconsistently with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement by (1) failing to establish a cap for the profits when constructing the normal value for the Indonesian producers under investigation and (2) by not basing the amounts for profits established on a reasonable method

2.3.1. Factual background

15. Considering the prevailing market conditions in Indonesia, the European Union concluded that the amount for profits could not be based on the actual data of the Indonesian producers and proceeded to determine the amount for profits "pursuant to Article 2(6)(c) of the basic Regulation on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve, that is 15% based on turnover".

2.3.2. Legal claims

a. Under Article 2.2.2(iii) an investigating authority is obliged to establish a "ceiling" or "cap"

16. Indonesia submits that the statements of the European Union in the Provisional Regulation, Definitive Disclosure and Definitive Regulation with regard to the determination of the profit margin unequivocally demonstrate that the European Commission:

- a. Did not establish the "cap" as required under Article 2.2.2(iii) of the Anti-Dumping Agreement;
- b. Did not demonstrate that it attempted to establish such a cap; and
- c. Did not provide any explanation as to why it would be impossible or inappropriate to establish such a cap.

b. The European Union did not apply a reasonable method to calculate the profit margin

17. The European Union's failure to establish the amount of the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin not only in itself constitutes a violation of Article 2.2.2(iii) Anti-Dumping Agreement (see above) but also requires a more detailed analysis as to whether the profit amount established by an investigating authority is arrived at pursuant to a reasonable methodology.

2.3.3. Conclusion

18. As a result of these violations of Article 2.2.2(iii) of the Anti-Dumping Agreement, the European Union also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement when determining the profit margin.

2.4. Erroneous determination export price

19. The European Commission decided that for one of the sampled Indonesian exporting producers for whom an individual dumping margin and individual anti-dumping duty was calculated the "premium" paid for "double counting" did not form part of the export price.

20. The European Commission considered that "double counting" premiums did not form part of the export price because they "were not linked to the product concerned as such", but instead were linked to "provision of documents by the related importer in order to obtain a government certificate which enables the related importer's client to fulfil the necessary conditions to blend only half the biodiesel quantity (given that this biodiesel can be counted 'double')".

21. The "premium" for "double counting" was therefore not included in the export resale price.

2.4.1. Legal claims

a. Article 2.3 requires the investigating authority to use the price paid or payable by the first independent buyer as a starting point for the construction of the export price

22. As is clear from the language of Article 2.3 and subsequently confirmed in WTO jurisprudence, "the price charged to the first independent buyer is a starting-point for the construction of an export price".⁷ If an investigating authority decides to construct the export price, it is obliged to base itself on the price at which the products are first re-sold to an independent buyer in the investigating country and has to work "backwards from the price at which the imported products are first resold to an independent buyer".

23. Indonesia notes that the only permitted deductions from the export price to arrive at the constructed export price are the deductions mentioned in the fourth sentence of Article 2.4, that is, "allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing". The "double counting premium" is not a "costs, including duties and taxes, incurred between importation and resale, and for profits accruing", nor was it alleged by the European Union that the "double counting premium" could be deducted under the fourth or fifth sentence of Article 2.4 of the Anti-Dumping Agreement.

24. Thus, the relevant question is whether the "double counting premium" constitutes a part of the amount of money or "price" for which the PFAD-based biodiesel "is sold".

b. The "double counting premium" constitutes part of the price of the PFAD-based biodiesel

25. At the outset, Indonesia notes that the related importer of the Indonesian company and the Italian customers contractually agreed that the "premium" is payable for the biodiesel sold.

26. As confirmed by the European Union itself in the Provisional Regulation, the amount of the "premium" was intrinsically connected to the product sold by the related importer. Indeed, customers were willing to pay a higher price for that biodiesel because it was made from PFAD and thus was eligible for "double counting".

c. The European Union cannot rely on rules regarding differences that affect price comparability in Article 2.4 to justify the derogation from the rules in Article 2.3 and the fourth and fifth sentences of Article 2.4

27. Indonesia notes that it has been well established in WTO jurisprudence that Article 2.3, along with the fourth and fifth sentences in Article 2.4, on one hand, and the "fair comparison" rules and rules regarding differences that affect price comparability in Article 2.4 have a different subject matter.

28. Article 2.3 and the fourth and fifth sentence in Article 2.4 establish the rules for the construction/determination of the export price. The rest of Article 2.4 is concerned, however, with the issue of a proper comparison between the normal value and the export price (which has been established pursuant to provisions of Article 2.3 and the fourth and fifth sentences in Article 2.4). Article 2.4, except for the fourth and fifth sentences, does not contain any rules for the establishment of the export price.

⁷ Panel Report, *US – Stainless Steel (Korea)*, para. 6.91.

2.4.2. Conclusion

29. Indonesia submits that the European Union violated Article 2.3 and the fourth and fifth sentences of Article 2.4 of the Anti-Dumping Agreement by failing to properly construct the export price as the starting point for the construction of the export price was incorrect. The European Union failed to take into account and in fact artificially excluded the "double counting premium" from the resale prices charged by a related importer to independent customers in Italy for the sales of PFAD-based biodiesel. This resulted in the unreasonable rejection of the actual resale price of the related importer and the use of a deflated starting point for the construction of the export price which, in turn, resulted in an artificial reduction of the constructed export price.

3. CLAIMS REGARDING THE INJURY ASSESSMENT: THE FINDINGS OF THE EUROPEAN UNION IN RESPECT OF PRICE UNDERCUTTING IN VIOLATION OF ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

3.1. Factual background

30. As determined by the European Union, biodiesel manufactured and sold by the Indonesian, Argentine and European Union producers was produced from different feed stock and had a different CFPP:

- a. The Indonesian exporting producers exported PME to the European Union with a CFPP of +10°C and above;
- b. The Argentine exporting producers exported SME to the European Union with a CFPP of 0°C; and
- c. European Union producers "mainly manufactured RME" with a CFPP of -10°C and below. At the same time, the European Commission noted that "the Union industry does not sell biodiesel made from one feedstock, but blends several feedstocks together to produce the final biodiesel that is sold".

3.2. Claim 1: The European Union's analysis of the price effects of "dumped" biodiesel on the prices of the European Union industry sales of biodiesel at CFPP 0°C is analytically and factually flawed

31. Indonesia recalls that, as per the European Union's findings, all imports of biodiesel from Indonesia were of PME with CFPP +13°C or above. For the sake of factual completeness, Indonesia notes that in fact not "all imports of biodiesel from Indonesia were of PME with CFPP +13°C or above", the CFPP of PME from Indonesia in fact ranged from CFPP +7°C to CFPP +15°C.

32. Further, as per the statement of the European Union, the Union producers either did not sell at all biodiesel with CFPP +13°C or sold it in "very small volume". Indeed, the European Union stated that "a direct comparison" between PME export prices and the sales by the Union producers' of biodiesel with CFPP +13°C "was not considered reasonable" "given the very small volume of sales of Union producers at this CFPP". The European Union, therefore, decided to compare export prices of PME with "all sales of the Union industry at CFPP 0".

33. Indonesia understands that the European Union found the price of Union producers' sales of biodiesel with CFPP +13°C unreliable for the purpose of the price effects analysis as such price was not comparable to the price of PME due to the significant differences in the sales volumes. In that respect, Indonesia notes that, for the purpose of price comparison, significant differences in quantities are indeed likely to have an impact on comparability, and thus, if there are such differences, they must be looked into in considering price effects.⁸

34. Recognizing the physical differences between PME and biodiesel with CFPP 0°C, the European Union made an upward adjustment to the PME price on account of physical differences. The mechanism for the calculation of such adjustment was as follows: the European Union calculated the price difference between CFPP +13°C (albeit in small quantities) and CFPP 0°C sales of the Union industry. The upward adjustment amounted to 17.35%.

⁸ See, for example, Panel Report, *China — HP-SSST (Japan)*, para. 7.113.

35. Indonesia submits that by making such an adjustment to the PME price and thereafter comparing adjusted PME prices to the weighted average price of "all sales of the Union industry at CFPP 0°", the European Union in fact did not resolve the issue of the lack of comparability due to different volumes between PME prices and the sales prices of the Union industry because the starting point for the adjustment is an unreliable and non-comparable price of Union producers' sales of biodiesel with CFPP +13°C.

36. If the sale price of the Union produced biodiesel at CFPP +13°C is considered by the European Union to be not comparable and unreliable for the purpose of a direct comparison, such a price should also be considered as not comparable and unreliable for the purpose of the calculation of the adjustment for physical differences. As the European Union industry (as per the European Union's statement in recital (96) Provisional Regulation) does not have representative sales of the Union produced biodiesel at CFPP +13°C, such prices may not serve as the basis for a price comparison under Articles 3.1 and 3.2 either for the purpose of a direct comparison or for the calculation of the amount of adjustment on account of physical differences.

37. Indonesia considers that the comparison between PME and CFPP 0°C sales of the Union industry suffers from the same defect as the comparison between PME and CFPP +13°C sales, had the later been made, namely a lack of price comparability in light of the differences in quantities. The only difference is that in case of the PME - CFPP 0°C biodiesel comparison this defect manifests itself through a defective adjustment on account of physical differences.

38. For the above reasons, Indonesia submits that the European Union's failure to properly account for differences in quantities when comparing the price of PME and Union industry sales of biodiesel at CFPP 0°C, which manifested itself through a distorted calculation of an allowance on account of physical differences, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

3.3. Claim 2: The European Union failed to consider the existence of "significant price undercutting" in respect of the domestic product

39. As explained above, the European Union based its "significant price undercutting" finding by relying on a simple mathematical price difference between the export prices of PME with the European Union's industry sales prices of biodiesel at CFPP 0°C.

40. Instead, the price comparison under Article 3.2 contemplates "a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI."⁹ In that respect Indonesia notes, that the European Union's "price undercutting analysis" consisted of a simple mathematical comparison between the export price of PME and the price of the Union industry sales of CFPP 0°C. The European Union did not provide any explanation as to the mechanism through which such a mathematical price difference could have had an impact on the price of CFPP 0°C. The lack of this explanation is of a particular importance in the present case because PME is not generally used in a pure form and, instead, blended with other types of biodiesel to produce a CFPP 0°C biodiesel.

41. Second, by comparing export prices of PME solely with the European Union's industry sales prices of biodiesel at CFPP 0°C, the European Union failed to analyze the impact of the prices of the allegedly dumped imports on a large portion of the Union industry as the sales of biodiesel at CFPP 0°C constituted only around 42% of the sales of biodiesel of the sampled European Union producers.

42. Price undercutting calculations were made based on sales representing around 42% of total sales in the sample (i.e., 993,860 MT/2,342,567 MT) or 11% of all European Union industry sales. The majority of sales by the sampled European Union producers was therefore not taken into account to determine whether there was price undercutting.

3.4. Conclusion

43. In light of the foregoing, Indonesia submits that the findings of the European Union in respect of the price effects of allegedly dumped Indonesian and Argentine imports and in

⁹ Appellate Body Report, *China — HP-SSST (Japan)*, para. 5.180.

particular, the findings of the European Union in respect of the price undercutting, were not based on an objective examination of positive evidence as mandated by Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

4. THE EUROPEAN UNION ACTED INCONSISTENTLY WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994 IN IMPOSING AND LEVYING ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN OF DUMPING THAT SHOULD HAVE BEEN ESTABLISHED IN ACCORDANCE WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

44. Indonesia's claims in this Section are consequential to Indonesia's claims set out in Section 4 above. In that Section, Indonesia demonstrated that, in determining the amount of the dumping margin, the European Union acted inconsistently with Articles 2.2, 2.2.1.1, 2.2.2(iii), 2.3 and 2.4 of the Anti-Dumping Agreement and with Article VI:1 of the GATT 1994.

45. Indonesia submits that, through these violations, the European Union imposed on Indonesian producers an anti-dumping duty exceeding the margin of dumping established in compliance with Article 2 of the Anti-Dumping Agreement. This constitutes a violation of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

5. INCONSISTENT APPLICATION AND DEFINITIVE COLLECTION OF PROVISIONAL ANTI-DUMPING DUTIES: ARTICLES 7.1, 7.2, 9.2 AND 9.3 (CHAPEAU) OF THE ANTI-DUMPING AGREEMENT

5.1. The application of provisional measures for one exporter, and the definitive collection of the provisional anti-dumping duties are in violation of Articles 7.1 and 7.2 of the Anti-Dumping Agreement

46. Indonesia submits that the European Union acted (1) inconsistently with Article 7.1 of the Anti-Dumping Agreement because it applied provisional measures for one company based on an inconsistent finding of dumping and (2) acted inconsistently with Articles 7.2, 9.2 and 9.3 (chapeau) of the Anti-Dumping Agreement because it applied and definitively collected a provisional anti-dumping duty on imports from that company in excess of the provisionally estimated margin of dumping for this exporting producer.

47. Article 7.1 of the Anti-Dumping Agreement provides that provisional measures can be applied only if all three conditions listed in Article 7.1 are complied with. One of these conditions, which is of particular importance for this claim, is that the provisional measures may be applied only if a "preliminary affirmative determination" of "dumping" has been made.

48. It follows, that the "preliminary affirmative determination" of "dumping" should be made in compliance with the rules set out in Article 2 of the Anti-Dumping Agreement and, in particular, with reliance on a margin of dumping calculated in compliance with the disciplines in Article 2 of the Anti-Dumping Agreement.

49. Article 7.2 of the Anti-Dumping Agreement unequivocally restricts the extent of the provisional measures, if applied, to the 'margin of dumping' calculated for the investigated producer/exporter. A plain reading of Article 7.2 indicates that it expressly establishes a mandatory ceiling – as opposed to a preference – for the level of the provisional measures that can be imposed, *i.e.* the provisional duty may not exceed the provisionally estimated 'margin of dumping'. Moreover, as explained above "any 'margin of dumping' calculated or relied upon by an investigating authority in the context of the application of the disciplines of the Agreement must be calculated consistently with Article 2 and its various paragraphs".

50. Therefore, as per Article 7.2 of the Anti-Dumping Agreement, the provisional duty may not exceed the provisionally estimated margin of dumping determined in compliance with the rules set out in Article 2 of the Anti-Dumping Agreement.

51. As pointed out by the Appellate Body, "Article 9.3 prohibits the amount of the anti-dumping duties from exceeding a dumping margin that is determined consistently with Article 2 of the Anti-Dumping Agreement".¹⁰

52. Article 7.5 of the Anti-Dumping Agreement provides that "the relevant provisions of Article 9 shall be followed in the application of provisional measures". Indonesia therefore considers that by virtue of Article 7.5, Article 9.3 (chapeau) is equally applicable to the imposition and definitive collection of the provisional anti-dumping duties, i.e. provisional anti-dumping duties may not exceed the provisional margin of dumping.

53. Indonesia demonstrated that, in violation of Article 9.3 of the Anti-Dumping Agreement, the provisional anti-dumping duty applied to, and definitively collected from the company in question was in fact higher than the provisional margin of dumping determined consistently with Article 2 of the Anti-Dumping Agreement.

5.2. The application and definitive collection of the provisional anti-dumping duty for the exporter in question is in violation of Article 9.2 of the Anti-Dumping Agreement

54. Article 9.2, establishes a ceiling in respect of the amount of the anti-dumping duties that can be collected by the investigating Member. Indonesia recalls that Article 7.5 of the Anti-Dumping Agreement provides that "the relevant provisions of Article 9 shall be followed in the application of provisional measures". Indonesia submits that by virtue of Article 7.5, the first sentence of Article 9.2 is equally applicable to the collection of provisional anti-dumping duties.

55. Taking into account the mechanism for the collection of the provisional duties, i.e. that such duties are provisionally collected or secured pending the definitive findings and definitively collected once the definitive findings are issued, when applied to the provisional measures, the meaning of the term "appropriate amount" is informed by the provisions of Articles 7.2, 9.3 and 10.3 of the Anti-Dumping Agreement. Thus, an "appropriate amount" under Article 9.2 may not exceed:

- a. The amount of the provisionally estimated margin of dumping, determined consistently with Article 2 of the Anti-Dumping Agreement – in line with Articles 7.2 and 9.3 of the Anti-Dumping Agreement; and
- b. Once the definitive findings have been made, the amount of the provisional duty definitively collected must comply with Article 10.3 of the Anti-Dumping Agreement. In particular, if the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

56. In case of the provisional anti-dumping duties collected from the exporter in question, both of these aspects have been violated.

¹⁰ Appellate Body Report, *EU – Biodiesel*, para. 6.101.

Executive summary of statement of Indonesia at first meeting of the Panel

I Claims concerning normal value

I.1 Failure to calculate the cost of production on the basis of the records kept by the producers

1. As pointed out in its First Written Submission, Indonesia submits that the EU acted inconsistently with the obligation laid down in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement (and therefore also with Article 2.2 and with Article VI:1(b)(ii) of the GATT 1994) since it did not calculate the costs of production of the Indonesian exporting producers on the basis of the records kept by these producers. In particular, the costs of CPO reflected in the records of the exporting producers were substituted with the reference export price for CPO published by the Indonesian Authorities.

2. Indonesia notes that the substance of this first claim – the European Union's decision to disregard the costs of CPO reflected in the producers' records and the resulting violation of Article 2.2.1.1 of the Anti-Dumping Agreement – is indistinguishable from the EU's decision to disregard Argentine exporting producers' recorded costs of soybeans found by the Panel and the Appellate Body to be in violation of Article 2.2.1.1 of the Anti-Dumping Agreement in *EU – Biodiesel*.

I.2 Failure to calculate the cost of production on the basis of the cost of production in Indonesia

3. As a second claim, Indonesia posits that in replacing the costs of CPO reported in the records of the exporting producers with the reference export price, the European Union constructed the normal value of Indonesian investigated producers on the basis other than the cost of production in the country of origin, i.e. Indonesia. Consequently, Indonesia submits that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI: (b)(ii) GATT 1994 in failing to construct the normal value of biodiesel on the basis of the cost of production in the country of origin.

4. This second claim is similar to Indonesia's first claim under Article 2.2.1.1 of the Anti-Dumping Agreement and is based on a set of circumstances essentially identical to the factual circumstances of Argentina's claim under Article 2.2 of the Anti-Dumping Agreement with respect to the European Union's decision to substitute the cost of soybeans in the records of the Argentine exporting producers by an average of the FOB reference price. Indonesia recalls that both the Panel¹ and the Appellate Body² found the European Union's approach in that respect to be inconsistent with Article 2.2 of the Anti-Dumping Agreement. Indonesia considers that the European Union's approach to substitute the CPO costs in the records of the Indonesian exporting producers with the reference price should be likewise found to be inconsistent with Article 2.2 of the Anti-Dumping Agreement.

I.3 Incorrect determination of the profit

5. As a third claim, Indonesia has explained that the method applied by the EU to calculate profits for the Indonesian exporting producers was inconsistent with Article 2.2 and Article 2.2.2(iii) of the Anti-Dumping Agreement.

6. In particular, the EU failed to calculate the cap for profits as required by Article 2.2.2(iii) and, consequently, ensure that the profit margin did not exceed such a cap. In addition, the amounts of profits established were not determined on the basis of a reasonable method.

II Claims regarding the determination of the export price

7. Indonesia submits that the EU acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by failing to construct the export price for one exporter on the basis of the price at which the imported biodiesel was first resold to an independent buyer in the EU.

¹ Panel Report, *EU – Biodiesel*, para. 7.260.

² Appellate Body Report, *EU – Biodiesel*, paras. 6.81 and 6.83.

8. The EU supported its decision to not include the "double counting" premium in the export price by arguing that it would in any event be deducted under as a difference that affects price comparability.

9. The argument focuses on the question as to what properly constitutes the export price. The relevant question is whether the "double counting premium" constitutes a part of the amount of money or "price" for which the PFAD-based biodiesel "is sold".

III Claims regarding the injury assessment

10. Indonesia claims that the EU determination with respect to injury is inconsistent with Article 3 of the Anti-Dumping Agreement, in particular Articles 3.1 and 3.2. In the view of Indonesia, these determinations do not stem from an objective evaluation, based on positive evidence, and they do not satisfy all of the requirements of those provisions.

11. In particular, as a first observation, the EU's analysis of the price effects of biodiesel on the prices of the Union sales of biodiesel at CFPP 0°C is analytically and factually flawed: the EU did not properly ensure price comparability between the imported and domestic biodiesel in terms of physical characteristics and model-matching.

12. Notably if the sales price and quantities of the Union produced biodiesel at CFPP +13°C is considered by the EU to be not comparable and unreliable for the purpose of a direct comparison, such a price should also be considered as not comparable and unreliable for the purpose of the calculation of the adjustment for physical differences to bring the Indonesian CFPP +13°C to CFPP 0°C.

13. As a second observation, the EU failed to consider the existence of "significant price undercutting" in respect of the domestic product EU. Instead, the EU based its "significant price undercutting" finding on a simple mathematical price difference between the export prices of PME with the EU industry's sales prices of biodiesel at CFPP 0°C.

14. However, the price comparison under Article 3.2 contemplates "a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI".³ In that respect Indonesia notes, that the EU's "price undercutting analysis" merely consisted of a simple mathematical comparison between the export price of PME and the price of the Union industry sales of CFPP 0°C.

15. The EU did not provide any explanation as to the mechanism through which such a mathematical price difference could have had an impact on the price of CFPP 0°C. The lack of this explanation is of particular importance in the present case because PME is not generally used in a pure form and, instead, blended with other types of biodiesel to produce a CFPP 0°C biodiesel.

16. By comparing export prices of PME solely with the EU industry's sales prices of biodiesel at CFPP 0°C, the EU failed to analyse the impact of the prices of the allegedly dumped imports on a large portion of the Union industry as the sales of biodiesel at CFPP 0°C constituted only around 42% of the sales of biodiesel of the sampled EU producers.

17. In light of the foregoing, Indonesia submits that the findings of the EU in respect of the price effects of allegedly dumped Indonesian and Argentine imports and in particular, the findings of the EU in respect of the price undercutting, were not based on an objective examination of positive evidence as mandated by Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

IV Consequential violations

18. Indonesia submits that, through these violations, in determining the amount of the dumping margin, the EU imposed on Indonesian producers an anti-dumping duty exceeding the margin of dumping established in compliance with Article 2 of the Anti-Dumping Agreement. This constitutes a violation of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

³ Appellate Body Report, *China — HP-SSST (Japan)*, para. 5.180.

V Collection of duties that were never owed

19. The EU ordered the definitive collection of the provisional duty of for one company, while the EU knew that the actual provisional dumping margin was lower than % provisional duty it ordered to be definitively collected. Indonesia therefore submits that by definitively collecting that provisional duty while being aware that the provisional dumping margin was lower the EU violated Articles 7.1, 7.2, 9.2 and 9.3 chapeau of the Anti-Dumping Agreement.

VI Conclusions

20. For the reasons set out above, Indonesia submits that the EU has acted inconsistently with Articles 2.2.1.1, 2.2, 2.2.2(iii), 2.3 and 2.4 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in the determination of the dumping margin as well as Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing a duty above the dumping margin calculated in accordance with Article 2 of the Anti-Dumping Agreement.

21. In addition, Indonesia submits that the EU acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in its injury determination as well as with Articles 7.1, 7.2, 9.2 and the chapeau of Article 9.3 of the Anti-Dumping Agreement by ordering the definitive collection of a provisional duty that is in excess of a correctly calculated dumping margin.

ANNEX B-2**SECOND EXECUTIVE SUMMARY OF THE
ARGUMENTS OF INDONESIA****Executive summary of the second written submission of Indonesia****1. INTRODUCTION**

1. In its Second Written Submission, Indonesia further explains why it respectfully requests the Panel to find that the European Union's anti-dumping measures on biodiesel imports from Indonesia are manifestly inconsistent with the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and Article VI of the GATT 1994.

2. FAILURE TO CALCULATE THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS: VIOLATION OF ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994

2. Indonesia notes that the substance of this first claim – the European Union's decision to disregard the costs of CPO reflected in the producers' records and the resulting violation of Article 2.2.1.1 of the Anti-Dumping Agreement – is indistinguishable from the EU's decision to disregard Argentine exporting producers' recorded costs of soybeans found by the Panel and the Appellate Body to be in violation of Article 2.2.1.1 of the Anti-Dumping Agreement in *EU – Biodiesel*.¹

3. In response to this claim, the European Union has remained silent. Accordingly, where one party files a claim and meets the requirement of the working procedures and due process, establishing a *prima facie* case, and the other party does not respond, a panel must find in favour of the complaining party. A failure to engage with and be responsive to a point raised by the other party is conceptually equivalent to a failure to appear.

3. FAILURE TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION OF BIODIESEL IN THE COUNTRY OF ORIGIN, I.E. INDONESIA: VIOLATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994

4. This second claim is based on a set of circumstances essentially identical to the factual circumstances of Argentina's claim under Article 2.2 of the Anti-Dumping Agreement with respect to the European Union's decision to substitute the cost of soybeans in the records of the Argentine exporting producers by an average of the FOB reference price. Both the Panel² and the Appellate Body³ found the European Union's approach in that respect to be inconsistent with Article 2.2 of the Anti-Dumping Agreement.

5. In response to this claim, the European Union has remained silent. Accordingly, where one party files a claim and meets the requirement of the working procedures and due process, establishing a *prima facie* case, and the other party does not respond, a panel must find in favour of the complaining party. A failure to engage with and be responsive to a point raised by the other party is conceptually equivalent to a failure to appear.

¹ Indonesia FWS, para. 45.

² Panel Report, *EU – Biodiesel*, para. 7.260.

³ Appellate Body Report, *EU – Biodiesel*, paras. 6.81 and 6.83.

4. THE EUROPEAN UNION ACTED INCONSISTENTLY WITH ARTICLES 2.2 AND 2.2.2(III) OF THE ANTI-DUMPING AGREEMENT BY (1) FAILING TO ESTABLISH A CAP FOR THE PROFITS AND (2) BY NOT BASING THE AMOUNTS FOR PROFITS ON A REASONABLE METHOD

6. Indonesia wishes to emphasize that Article 2.2.2(iii) of the Anti-Dumping Agreement imposes two separate obligations, namely that (1) the amount for profits is determined on the basis of "any other reasonable method"; and (2) that this amount for profits must not exceed the ceiling defined under this subparagraph, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".⁴ Therefore, the failure to calculate the cap in itself constitutes a violation of Article 2.2.2(iii) of the Anti-Dumping Agreement as the Panel held in *EU – Footwear (China)*.⁵

4.1. Failure by the European Union to calculate the cap mandated by Article 2.2.2(iii) of the Anti-Dumping Agreement

7. The European Union claims that it was not able to calculate the cap as the sampled companies did not have domestic sales in the ordinary course of trade of the same general category⁶ and there "cannot be an obligation on an investigating authority to calculate the profit cap when the necessary information for such calculation does not exist".⁷

8. First, the Panel held in *EU – Footwear (China)* that it not being possible to establish the profit cap does not excuse a WTO Member from complying with the requirements of Article 2.2.2(iii) of the Anti-Dumping Agreement. In this connection, Indonesia considers that, as explained in Indonesia's reply to Question 5 by the Panel, the reference to "profit normally realized" in Article 2.2.2(iii) of the Anti-Dumping Agreement has no bearing on the obligation to calculate the cap. At most, the reference to "normally" qualifies the profit realized but not the obligation to calculate the profit cap itself.

9. Second, Indonesia notes that it was only during the present Panel proceeding that the European Union advanced the argument that it was not possible to establish the profit cap. Therefore, the European Union's justification for its failure to calculate the cap – i.e. that sampled companies did not have domestic sales in the ordinary course of trade of the same general category – needs to be rejected as *a post factum* justification.

10. Third, Indonesia does not consider that it was not possible to establish the profit cap in the present investigation. Even assuming that the sampled Indonesian exporting producers did not have any sales of the same general category of products, Indonesia notes that there is nothing in the Anti-Dumping Agreement that prevents an investigating authority to seek to obtain the necessary data from other producers in the exporting country. In this regard, Indonesia explained in its reply to Question 68 by the Panel that even if an investigating authority is unsuccessful in obtaining the data necessary to calculate the cap from other exporters or producers, it can still seek to obtain this information from publicly available sources.

11. In the present case, however, there is no information on the record at all that the European Union even attempted to contact (other) Indonesian companies to provide information that would enable the European Union to calculate the cap. Likewise, there is no information on the record that the European Union has otherwise made any efforts to obtain data on the profits obtained by producers of the same general category of products. As noted by Indonesia in its replies to Questions 64 and 68 by the Panel, there is instead evidence on the record that the European Union did have the necessary data to calculate the cap but opted not to use this information.

12. Finally, Indonesia submits that the European Union's claimed impossibility to calculate the profit cap is due to the European Union's own unwarranted limitation of the same general category of products to "other fuels". As Indonesia noted in its reply to Question 69 by the Panel, the

⁴ See Panel Report, *EU – Biodiesel*, para. 7.331. See also Panel Report, *EC – Bed Linen*, para. 6.97; Panel Report, *Thailand – H-Beams*, para. 7.124 and ft.151 to para. 7.124; and Panel Report, *EU – Footwear (China)*, para. 6.52.

⁵ Panel Report, *EU – Footwear (China)*, para. 7.301.

⁶ See EU FWS, paras. 39 and 50-51. See also EU Oral Statement, para. 26.

⁷ See EU Oral Statement, para. 25. See also EU Reply to Panel Questions, paras. 2, 5 and 7.

European Union is defining the same general category of products in such a way that – in the end – no products are left within the same general category of products. This limitation has not only resulted in the illogical result that the scope of the product concerned is broader than the scope of the same general category of products but also, if one were to follow the European Union's interpretation that an investigating authority is not under an obligation to calculate the profit cap when the necessary data are not available, in a situation where the European Union escaped its obligations under Article 2.2.2(iii) of the Anti-Dumping Agreement.

4.2. The European Union did not apply a reasonable method to calculate the profit margin

13. Indonesia submits that by not considering all the available evidence before it and by not taking into account the factual differences between Argentine and Indonesian producers (although the European Union has now acknowledged these differences), the European Union failed to determine the amount of profit based on a reasonable method as mandated by Article 2.2.2(iii) of the Anti-Dumping Agreement.

14. The European Union argues that using a profit margin obtained by the same industry in another country during a different period as a starting point to determine the reasonable profit margin pursuant to Article 2.2.2(iii) of the Anti-Dumping Agreement is allowed as the Appellate Body held in *EU – Biodiesel* that data from outside the country of origin can be used. However, while the profits obtained by the European Union industry during the years 2005-2006 may possibly constitute a relevant starting point to determine the reasonable profit margin for Indonesian biodiesel producers, it may also be necessary to adapt this information/evidence obtained from a third country to approximate the profit margin that would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country.⁸

4.3. Conclusion

15. The European Union did not establish "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin" as required under Article 2.2.2(iii) of the Anti-Dumping Agreement and, consequently, did not ensure that the profit margin of 15% used for the calculation of the normal value for Indonesian producers did not exceed this level of profit.

16. As a result of these violations of Article 2.2.2(iii) of the Anti-Dumping Agreement, the European Union also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement when determining the profit margin.

5. FAILURE TO CONSTRUCT THE EXPORT PRICE ON THE BASIS OF THE PRICE AT WHICH THE IMPORTED BIODIESEL WAS FIRST RESOLD TO INDEPENDENT BUYERS IN THE EUROPEAN UNION: VIOLATION OF ARTICLES 2.3 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

17. The European Union did not include the premium on account of double counting for sales made by a related importer of the Indonesian company in the European Union, of biodiesel produced from Palm Fatty Acid Distillate ("PFAD") to the first independent customer in the European Union.

18. The European Union considered that even if the premiums were included in the export price, they would subsequently need to be deducted as a difference that affects price comparison under Article 2(10)(k) Basic Regulation (i.e. Article 2.4 of the Anti-Dumping Agreement).⁹ In this connection, it is important to note that the European Union in fact did not first include the "double counting premium" in the export price and did not thereafter deduct it from the export price to ensure price comparability.

⁸ See in this connection Panel Report, *EU – Biodiesel*, para. 7.347.

⁹ Definitive Regulation, Exhibit IDN-2, recital 100.

5.1. Interplay between Article 2.3 and 2.4 of the Anti-Dumping Agreement

19. Indonesia considers that the European Union's treatment of the "double counting premium" is an issue regarding the determination of the export price and thus falls under the disciplines of Article 2.3 of the Anti-Dumping Agreement as well as the rules set out in the fourth and fifth sentences of Article 2.4 of the Anti-Dumping Agreement. Therefore, the legality of the European Union's decision to exclude the "double counting premium" from the export price cannot, in principle, be assessed from the perspective of the rules applicable to allowances for differences affecting price comparability under Article 2.4 of the Anti-Dumping Agreement.

5.2. The "double counting premium" constitutes part of the price of the PFAD-based biodiesel

20. The European Union has focused its defense under the present claim on the fact that Article 2.3 of the Anti-Dumping Agreement refers to the price of the product (and not the premium), the price of what is imported (i.e. the product and not the premium) and the price of what is resold (which is the product and not the premium).¹⁰ However, the European Union ignores that the related importer and the Italian customers contractually agreed that the premium is payable for the biodiesel sold. In addition, as the European Union itself confirmed in the Provisional Regulation, the amount of the premium was intrinsically connected to the physical and technical characteristics of the product sold by the related importer. As specified in its reply to Question 78 by the Panel, Indonesia submits that given that the "double counting premium" was actually paid for the concerned transactions and is intrinsically linked to what was sold, the premium should be included in the price at which the product was first resold.

21. The only permitted deductions from the export price to arrive at the constructed export price are the deductions mentioned in the fourth sentence of Article 2.4 of the Anti-Dumping Agreement, that is, "allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing". As Indonesia explained in its reply to Question 33 by the Panel, the "double counting premium" is not "a cost, including duty and taxes, incurred between importation and resale". Likewise, the "double counting premium" cannot be taken into consideration as an allowance for "profits accruing" as the European Union had already deducted a notional 5% profit margin as an allowance.¹¹

5.3. The European Union cannot rely on rules regarding differences that affect price comparability in Article 2.4 to justify a derogation from the rules in Article 2.3 and the fourth and fifth sentences of Article 2.4

22. Indonesia submits that the legality of the European Union's decision to not include the "double counting premium" as part of the export price cannot be assessed from the perspective of the rules regarding differences that affect price comparability as set out in Article 2.4 of the Anti-Dumping Agreement as the European Union did not exclude the double counting premium from the export price on this basis.

23. For the sake of argument, Indonesia notes that even if the "double counting premium" could be deducted from the export price on the basis of Article 2.4 of the Anti-Dumping Agreement, the inclusion of the "double counting premium" in the export price and then its possible subsequent deduction under Article 2.4 of the Anti-Dumping Agreement could still have an impact on the final duty. Indonesia hereby explained in response to Question 81 by the Panel that under the practice of the European Union, this impact entails that the inclusion of the premium results in a higher export price, which will in turn result in a lower injury margin and, therefore, possibly in a lower duty.

5.4. Conclusion

24. Indonesia submits that the European Union violated Article 2.3 and the fourth and fifth sentences of Article 2.4 of the Anti-Dumping Agreement by failing to properly construct the export price as the starting point for the construction of the export price was incorrect. The European Union failed to take into account and in fact artificially excluded the "double counting

¹⁰ EU Reply to Panel Questions, para 45.

¹¹ Provisional Regulation, Exhibit IDN-1, recital 68 and Definitive Regulation, Exhibit IDN-2, recital 98.

premium" from the resale prices charged by the related importer to independent customers in Italy for the sales of PFAD-based biodiesel. This resulted in the unreasonable rejection of the actual resale price of the related importer and the use of a deflated starting point for the construction of the export price for the related importer which, in turn, resulted in an artificial reduction of the constructed export price.

6. CLAIMS REGARDING THE INJURY ASSESSMENT: THE FINDINGS OF THE EUROPEAN UNION IN RESPECT OF PRICE UNDERCUTTING ARE IN VIOLATION OF ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT

6.1. Price comparability

6.1.1. The European Union's two-step approach for the price effects analysis is internally incoherent and does not solve the problem of non-comparability of prices on account of physical differences and significant volume differences

25. The European Union identified that the price of Indonesian PME was not comparable to the price of the Union sales of CFPP 13°C biodiesel because of significant differences in volumes. To account for differences in volumes, the European Union used a "two-step" approach:

- The European Union calculated the price difference between CFPP 13°C and CFPP 0°C sales of the Union industry. The price difference amounted to 17.35%;
- The European Union made an upward adjustment of 17.35% to the price of the Indonesian PME and compared the adjusted PME price to the average prices of the Union sales of CFPP 0°C biodiesel.

26. This methodology is in breach of Articles 3.1 and 3.2 of the Anti-Dumping Agreement because (1) through the use of "two-step" approach the European Union did not mitigate the problem of non-comparability of PME and Union biodiesel sales prices on account of significant differences in volume and (2) the calculation of the adjustment on account of physical differences between PME and CFPP 0°C biodiesel is internally incoherent and unreasonable.

6.1.2. Prices of Union sales of CFPP 13°C biodiesel cannot serve as the basis for the calculation of the adjustment on account of physical differences

27. A price effects analysis should have been performed in respect of all or substantively all sales of the sampled Union producers. Such comparison would necessitate both an adjustment on account of physical differences and substitutability and price correlation analysis, as explained in more detail below. However, the price of the Union sales of CFPP 13°C biodiesel is not an appropriate starting point for calculating such adjustment on account of *significant differences in quantities*.

28. There are additional reasons that disqualify the price of the Union sales of 13°C biodiesel from being used as the basis for calculating the adjustment on account of physical differences. First, the European Union confirmed that it did not investigate the origin of the feedstock used to produce Union CFPP 13°C biodiesel.¹² Second, the European Union itself acknowledged that the production of PME and SME in the European Union is uneconomical because of the high feedstock prices (inclusive of additional costs) and that it is much more economical to import the products.¹³

6.1.3. Failure to account for different CFPP values of the imported Indonesian PME

29. Indonesia notes that the CFPP values of PME from Indonesia in fact ranged from CFPP 7°C to CFPP 17°C. Around 19% of PME imports from Indonesia in the IP had CFPP values, other than CFPP 13°C. Yet all the prices of all imports of PME from Indonesia were adjusted by the same amount (17.35%) without regard to the actual CFPP values of the imported product.

¹² See EU Reply to Indonesia Questions, para. 5.

¹³ Provisional Regulation, Exhibit IDN-1, recital 134.

6.1.4. Availability of alternative methods for the calculation of the adjustment on account of physical differences

30. The European Union claims that it calculated the adjustment on account of physical differences based on the price of the Union sales of CFPP 13°C biodiesel because it had no other data on the basis of which such adjustment could have been calculated. Indonesia maintains, however, that such adjustment could have been made on the basis of the feedstock prices, as was the case in the *US – Biodiesel* investigation.

6.2. Finding of "significant price undercutting"**6.2.1. The European Union's finding of "significant price undercutting" even in respect of Union sales of CFPP 0°C biodiesel is limited to a simple mathematical comparison**

31. The European Union's "price undercutting analysis" consisted of a simple mathematical comparison between the export price of PME and the price of the Union industry sales of CFPP 0°C biodiesel. The European Union did not provide any explanation as to the mechanism through which such a mathematical price difference could have had an impact on the price of CFPP 0°C biodiesel and failed to analyze the price trends over the period of investigation.

32. The argument of the European Union that it complied with the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it analyzed the market share of the subject imports from Indonesia¹⁴ is off the point. Indonesia's argument is concerned with the lack of a price correlation and substitutability analysis between two different products: Indonesian PME and Union industry CFPP 0°C biodiesel. Without such analysis, the finding of the European Union in respect of the price difference between PME and Union produced CFPP 0°C biodiesel is limited to a mathematical comparison as opposed to a determination as to whether PME prices had any *effects* on the prices of the Union produced CFPP 0°C biodiesel.

33. In Indonesia's opinion, considering that the price comparison was made between different types of biodiesel, the price effects analysis should have involved at the very least the following aspects:

- a. a discussion of the substitutability (including the extent of substitutability) between PME and CFPP 0°C biodiesel;
- b. a discussion of the price correlation between these two products; and
- c. the degree of the impact that movement of prices of imported PME might have on the Union sales of CFPP 0°C biodiesel.

6.2.2. The European Union's finding of "significant price undercutting" of Union sales of CFPP 0°C biodiesel is contradicted by the evidence on the investigation record

34. The Union industry imported up to 60% of all imports in the IP of biodiesel from Argentina and Indonesia. Considering that the vast majority of Indonesian PME is bought by the Union producers and that the blends produced by the Union industry are priced at the same level, irrespective of whether Indonesian PME is incorporated in the blend or not, the evidence on the investigation record shows that there is no price undercutting by PME of the prices of the Union sales of CFPP 0°C biodiesel.

6.2.3. The European Union failed to perform a dynamic assessment of price developments and trends in the relationship between the prices of imported PME and Union sales of CFPP 0°C biodiesel over the duration of the POI

35. As confirmed by the Appellate Body in *China – HP-SSST (Japan)*, the investigating authority must undertake a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over

¹⁴ EU Oral Statement, para. 43.

the duration of the POI.¹⁵ Indonesia specified in its reply to Question 106 by the Panel that the term "period of investigation" in this finding refers to the whole period of investigation in respect of injury.

36. In the investigation at issue the period of investigation in respect of injury covered the period from 1 January 2009 to 30 June 2012. Yet, the European Union's price undercutting analysis only covered the period of 1 July 2011 to 30 June 2012. In this regard, Indonesia explained in its reply to Question 107 by the Panel that the European Union's price undercutting analysis refers to the price comparison between PME and CFPP 0°C biodiesel for the period of 1 July 2011 to 30 June 2012 only and, therefore, does not constitute an analysis of price trends over the entire period of investigation in respect of injury.

6.2.4. The European Union "price effects" analysis was limited to a mere 37% of the sales of the sampled Union producers and did not assess the significance of price undercutting for the remaining 63% of the sales of the Union industry

37. In its responses to the questions posed by the Panel, the European Union confirmed that its price effects analysis concerned only 37% of the sales of the sampled Union companies. As confirmed by the Appellate Body, for the purpose of the price effect analysis and the consideration of "significant price undercutting", an investigating authority is obliged to assess the significance of price undercutting by the dumped imports in relation also to the proportion of the domestic production, in respect of which no strict mathematical price comparison has been made. The European Union should have, therefore, assessed the "significance" of the price undercutting also in relation to the remaining 63% of the sales of the Union industry.

6.2.5. Conclusion

38. In light of the foregoing, Indonesia submits that the findings of the European Union in respect of the price effects of allegedly dumped Indonesian and Argentine imports and in particular, the findings of the European Union in respect of the price undercutting, were not based on an objective examination of positive evidence as mandated by Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7. THE EUROPEAN UNION ACTED INCONSISTENTLY WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994 IN IMPOSING AND LEVYING ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN OF DUMPING THAT SHOULD HAVE BEEN ESTABLISHED IN ACCORDANCE WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

39. Indonesia demonstrated that, in determining the amount of the dumping margin, the European Union acted inconsistently with Articles 2.2, 2.2.1.1, 2.2.2(iii), 2.3 and 2.4 of the Anti-Dumping Agreement and with Article VI:1 of the GATT 1994. Indonesia submits that, through these violations, the European Union imposed on Indonesian producers an anti-dumping duty exceeding the margin of dumping established in compliance with Article 2 of the Anti-Dumping Agreement. This constitutes a violation of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

40. The European Union did not provide any defence or explanations with respect to these claims. Accordingly, where one party files a claim and meets the requirement of the working procedures and due process, establishing a *prima facie* case, and the other party does not respond, a panel must find in favour of the complaining party. A failure to engage with and be responsive to a point raised by the other party is conceptually equivalent to a failure to appear.

¹⁵ Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.161. In *China – HP-SSST (Japan)*, the period of investigation (POI) for the determination of dumping was from 1 July 2010 to 30 June 2011, and the POI for the determination of injury was from 1 January 2008 to 30 June 2011. See *ibid.*, ft. 20.

8. INCONSISTENT APPLICATION AND DEFINITIVE COLLECTION OF PROVISIONAL ANTI-DUMPING DUTIES: ARTICLES 7.1, 7.2, 9.2 AND 9.3 (CHAPEAU) OF THE ANTI-DUMPING AGREEMENT

41. Indonesia has explained that it does not challenge the provisionally estimated dumping margin and the imposition of the provisional duties *as such* but rather that part of the Definitive Regulation that ordered the definitive collection of the provisional duties.¹⁶ In its reply to Question 111 by the Panel, Indonesia clarified that it does not seek any findings in respect of the Provisional Regulation but instead seeks a finding that the European Union incorrectly (imposed and) definitively collected a provisional anti-dumping duty in excess of the actual provisional margin of dumping in the Definitive Regulation.

42. This does not mean, however, that Article 7 of the Anti-Dumping Agreement is irrelevant. Indeed, Indonesia does challenge that part of the Definitive Regulation that ordered the collection of the provisional duties. Those provisional duties were established pursuant to Article 7 of the Anti-Dumping Agreement and, therefore, Article 7 of the Anti-Dumping Agreement remains relevant.

8.1. Legal claims

43. As confirmed by various panels and the Appellate Body, the basic rules for all aspects of the determination of dumping are set out in Article 2 of the Anti-Dumping Agreement.¹⁷ Furthermore, as noted by the panel in *US – Shrimp (Viet Nam)*, "any 'margin of dumping' calculated or relied upon by an investigating authority in the context of the application of the disciplines of the Agreement must be calculated consistently with Article 2 and its various paragraphs".¹⁸

44. It follows that, both the "preliminary affirmative determination" of "dumping" and the calculation of the "provisionally estimated margin of dumping" should be made in compliance with the rules set out in Article 2 of the Anti-Dumping Agreement. Therefore, as per Article 7.2 of the Anti-Dumping Agreement, the provisional duty may not exceed the provisionally estimated margin of dumping determined in compliance with the rules set out in Article 2 of the Anti-Dumping Agreement.

8.2. Interpretation of "provisionally estimated margin of dumping" in Article 7.2

45. In interpreting the terms "provisionally estimated margin of dumping" in Article 7.2 of the Anti-Dumping Agreement, the European Union solely focuses on the "provisionally estimated" part of that phrase.

46. Indonesia acknowledges that the phrase "provisionally estimated" reflects the fact that the burden of proof on an investigating authority at the provisional stage may be different and less onerous than the burden of proof which an investigating authority should meet in order to impose definitive anti-dumping duties. However, the provisionally estimated margin of dumping should still be calculated in compliance with the disciplines set out in Article 2, albeit on the basis of the totality of evidence before the investigating authority at the time when the provisional measures are imposed. Had this not been the case, Article 7.1(ii) and the condition in Article 7.2 that "provisional measures" should not exceed "the provisionally estimated margin of dumping" would be rendered inutile.

8.3. Relevance of Article 10.3 of the Anti-Dumping Agreement

47. The European Union has argued that the relevant provision is Article 10.3 (as well as Article 10.5) of the Anti-Dumping Agreement.

48. Indonesia does not dispute that Article 10.3 of the Anti-Dumping Agreement is of relevance to the present claim. However, the fact that Indonesia did not claim a violation of Article 10.3 of

¹⁶ See Indonesia Oral Statement, para. 59. See also Indonesia Reply to Questions, paras. 95-96.

¹⁷ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.139; Panel Report, *US – Hot-Rolled Steel*, paras. 7.115, 7.116.

¹⁸ Panel Report, *US – Shrimp (Viet Nam)*, para. 7.213. (emphasis added).

the Anti-Dumping Agreement does not mean that the European Union did not violate Articles 7.1, 7.2, 9.2 and 9.3 of the Anti-Dumping Agreement.

49. In this connection, Indonesia notes that by relying on Article 10.3 of the Anti-Dumping Agreement, the European Union is reading into Article 7.2 an exception that does not exist, namely that if the definitive anti-dumping duty is higher than the provisional duty based on an inconsistent determination of the margin of dumping, such an erroneously calculated provisional anti-dumping duty may still be definitively collected. However, there is nothing in Article 10.3 of the Anti-Dumping Agreement to suggest that Article 10.3 can serve as an exception to the obligations in Article 7.2, i.e. that the provisional duty cannot exceed the provisionally estimated margin of dumping in the first place.

8.4. The relevance of an Article 2 claim for claiming a violation of Article 7.2

50. In its replies to the Panel's Questions, the European Union repeatedly argues that a party wishing to make a representation about some element of the provisional determination, would have to invoke Article 2 of the Anti-Dumping Agreement and that Indonesia did not do so.¹⁹

51. Indonesia does not consider that it was necessary to include a violation of Article 2 of the Anti-Dumping Agreement in its request for consultations and the request for the establishment of the Panel, because Indonesia requests findings that the European Union violated Articles 7.1, 7.2, 9.2 and 9.3 of the Anti-Dumping Agreement.

8.5. Conclusion

52. In light of the foregoing, Indonesia submits that the European Union acted inconsistently with Articles 7.1, 7.2, 9.2 and 9.3 (chapeau) of the Anti-Dumping Agreement because it applied and definitively collected a provisional anti-dumping duty on imports from one exporting Indonesian producer in excess of the provisionally estimated margin of dumping for this exporting producer.

¹⁹ See EU Reply to Panel Questions, paras. 77, 79, 80, 84 and 86.

Executive summary of statement of Indonesia at second meeting of the Panel**I Failure to calculate the cost of production on the basis of the records kept by the producers**

1. Indonesia submits that the EU acted inconsistently with the obligation laid down in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement (and therefore also with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994) since it did not calculate the costs of production of the Indonesian exporting producers on the basis of the records kept by these producers.

2. As of today, the European Union has not rebutted this claim by Indonesia and has remained silent. The EU has neither put forward a defence nor has it contested the factual description of Indonesia. This claim by Indonesia must therefore succeed.

II Failure to construct the normal value on the basis of the cost of production in Indonesia

3. This second claim is similar to Indonesia's first claim under Article 2.2.1.1 of the Anti-Dumping Agreement and is based on a set of circumstances essentially identical to the factual circumstances of Argentina's claim under Article 2.2 of the Anti-Dumping Agreement with respect to the European Union's decision to substitute the cost of soybeans in the records of the Argentine exporting producers by an average of the FOB reference price. Indonesia recalls that both the Panel¹ and the Appellate Body² found the European Union's approach in that respect to be inconsistent with Article 2.2 of the Anti-Dumping Agreement. Indonesia considers that the European Union's approach to substitute the CPO costs in the records of the Indonesian exporting producers with the reference price should be likewise found to be inconsistent with Article 2.2 of the Anti-Dumping Agreement.

4. Again, the European Union has remained silent. Accordingly, where one party files a claim and meets the requirement of the working procedures and due process, establishing a *prima facie* case, and the other party does not respond, a panel must find in favour of the complaining party.³ A complete failure to engage with and be responsive to a point raised by the other party is conceptually equivalent to a failure to appear.

III Incorrect determination of the profit

5. As a third claim, Indonesia has previously explained that the method applied by the European Union to calculate profits for the Indonesian exporting producers was inconsistent with Article 2.2 and Article 2.2.2(iii) of the Anti-Dumping Agreement in that the European Union failed to calculate the cap for profits and, consequently, ensure that the profit margin did not exceed such a cap. In addition, the amounts of profits established were not determined on the basis of a reasonable method.

6. Indonesia wishes to emphasize that Article 2.2.2(iii) of the Anti-Dumping Agreement imposes two separate obligations, namely that (1) the amount for profits is determined on the basis of "any other reasonable method"; and (2) that this amount for profits must not exceed the ceiling defined under this subparagraph, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".⁴ Therefore, the failure to calculate the cap in itself constitutes a violation of Article 2.2.2(iii) of the Anti-Dumping Agreement as the panel held in *EU – Footwear (China)*.⁵

¹ Panel Report, *EU – Biodiesel*, para. 7.260.

² Appellate Body Report, *EU – Biodiesel*, paras. 6.81 and 6.83.

³ See for example *US – Wool Shirts and Blouses*.

⁴ See Panel Report, *EU – Biodiesel*, para. 7.331. See also Panel Report, *EC – Bed Linen*, para. 6.97; Panel Report, *Thailand – H-Beams*, para. 7.124 and ft.151 to para. 7.124; and Panel Report, *EU – Footwear (China)*, para. 6.52.

⁵ Panel Report, *EU – Footwear (China)*, para. 7.301.

III.1 Failure to calculate the cap mandated by Article 2.2.2(iii) of the Anti-Dumping Agreement

7. Indonesia notes that the European Union's position is that it was not possible to calculate the cap and that, therefore, there was no obligation to comply with this obligation. Indonesia disagrees with the European Union's position for the following reasons.

8. First, Indonesia considers that an alleged impossibility to establish the profit cap does not excuse a WTO member from complying with the requirements of Article 2.2.2(iii) of the Anti-Dumping Agreement. In *EU – Footwear*, the panel explicitly held that "even assuming it to be the case that relevant data on the basis of which the cap could be calculated was not available to the Commission in this case, we fail to see how this discharges the Commission from complying with the requirements of the AD Agreement".⁶ In this respect, Indonesia notes that the reference to "profit normally realized" in Article 2.2.2(iii) has no bearing at all on the obligation on an investigating authority to calculate the cap.

9. Second, Indonesia does not agree it was not possible to calculate the profit cap in the present investigation and, in any event, prior to the present Panel proceeding, the European Union never made this argument. Even assuming that the sampled exporting producers did not have any sales of the same general category of products – which Indonesia denies – there is nothing in the Anti-Dumping Agreement that prevents an investigating authority to seek to obtain the necessary data elsewhere.

10. Finally, the European Union's claimed impossibility to calculate the profit cap is due to the European Union's own limitation of the same general category of products to "other fuels" and its disregard of data of sales of blends of biodiesel and mineral diesel. Indonesia considers that limiting the scope of the same general category of products to only "other fuels" was biased and subjective and resulted in a (intended or not) non-compliance with Article 2.2.2(iii) of the Anti-Dumping Agreement.

III.2 The European Union did not apply a reasonable method to calculate the profit margin

11. As the presence of the cap in Article 2.2.2(iii) of the Anti-Dumping Agreement is the only objective criterion to measure the reasonability of the method used to determine the profit margin and the European Union failed to calculate this cap, Indonesia submits that whether the method used by the European Union to determine the profit margin is a reasonable method warrants extra scrutiny.

12. Indonesia hereby concludes that by failing to consider all the available evidence before it, particularly taking into account the now acknowledged factual differences (and especially the lower short and medium term borrowing rate) between Argentine and Indonesian producers, the European Union failed to determine the amount of profit based on reasonable method.

IV Claims regarding the determination of the export price

13. Indonesia submits that the European Union acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by failing to construct the export price for one exporter on the basis of the price at which the imported biodiesel was first resold to an independent buyer in the EU.

14. During the course of the present proceedings, it has become clear that although the European Union suggested that the "double counting premium" would have to be deducted again had it been included in the export price as an allowance necessary in order to take account for differences that affect price comparability, the European Union in fact did not include the "double counting premium" in the export price in the first place as opposed to deducting it from the export price to ensure price comparability.⁷

15. Considering the different subject matter of Articles 2.3 (including the fourth and fifth sentences of Article 2.4) and Article 2.4, the rules regarding differences that affect price comparability in Article 2.4 cannot serve as a justification for a derogation from the rules of Article 2.3 as held by the panels in *EU – Biodiesel* and *EU – Footwear*.

⁶ Ibid., para. 7.300.

⁷ See EU's reply to question 34 of the Panel.

16. The European Union has now focused its defense under the present claim on the fact that Article 2.3 of the Anti-Dumping Agreement refers to (1) the price of the product (and not the premium); (2) the price of what is imported (i.e. the product and not the premium) and; (3) the price of what is resold (which is the product and not the premium).⁸ Indonesia submits, however, that the "double counting premium" is part of the "price at which the imported products are first resold" and that, therefore, the European Union's non-inclusion of the "double counting premium" as part of the resale price was neither proper nor reasoned and adequate and hence entirely inconsistent with Article 2.3 of the Anti-Dumping Agreement.

V Claims regarding the injury assessment

17. Indonesia submits that the European Union's price effects analysis falls foul of the requirements in Articles 3.1 and 3.2 of the Anti-Dumping Agreement principally for two main reasons. First, the European Union did not establish significant price undercutting by the PME imports of the Union industry sales. Instead, the European Union's analysis was confined to a mathematical comparison between the price of the imported biodiesel and the sale price of one type of biodiesel sold by the Union industry. Second, even this mechanical comparison was riddled with internal inconsistencies and errors.

V.1 Price comparability

18. Instead of comparing the PME prices directly with the prices of the Union industry sales of biodiesel with CFPP 13°C, the European Union used its so-called two-step approach. The cornerstone of this approach is that the European Union compared the prices of the Union producer's sales of biodiesel of CFPP 13°C and CFPP 0°C and determined that the observed difference would be used as an adjustment on account of physical differences.

19. Indonesia submits that the issue of price comparability also arises when comparing the price of Union producers' sales of CFPP 13°C biodiesel with CFPP 0°C biodiesel. If anything, the two-step approach taken by the European Union exacerbated the problem of price comparability. First, it did not solve the problem of price comparability on account of differences in volumes. Second, it necessitated making an adjustment on account of physical differences.

V.2 Price undercutting

20. As confirmed by the Appellate Body in *China – HP-SSST (Japan)*, the investigating authority's finding of the "significant" price undercutting is that of an *effect* of the dumped imports on the domestic prices.⁹ Thus, Indonesia understands this requirement to necessitate a thoughtful and thorough analysis of the impact of the price of the imported product on the price of the domestic product taking into account the specifics of the case.

21. Contrary to this requirement, the finding of the European Union in respect of the price difference between PME and Union produced CFPP 0°C biodiesel is limited to a mathematical comparison as opposed to a determination as to whether PME prices had any *effects* on the prices of the Union produced CFPP 0°C biodiesel or Union produced biodiesel generally.

22. As explained in Indonesia's written submission, the two products, PME and Union industry biodiesel with CFPP 0 have noticeably different physical characteristics, considerable price differences and different modes of use. Considering that the price comparison was made between different types of biodiesel, the price effects analysis should have involved at the very least the following aspects:

- a discussion of the substitutability (including the extent of substitutability) between PME and CFPP 0°C biodiesel;
- a discussion of the price correlation between these two products; and
- the degree of the impact that movement of prices of imported PME might have on the Union producers' sales of CFPP 0°C biodiesel.

⁸ EU Reply to Panel Questions, para 45.

⁹ Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.180.

VI Consequential violations

23. Indonesia submits that, through these violations, the European Union imposed on Indonesian producers an anti-dumping duty exceeding the margin of dumping established in compliance with Article 2 of the Anti-Dumping Agreement. This constitutes a violation of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The European Union did not provide any defence or explanations with respect to these claims.

VII Collection of duties that were never owed

24. The European Union ordered the definitive collection of the provisional duty for one company even though the European Union knew at that time that the correct provisional dumping margin was lower than the provisional duty it ordered to be definitively collected.

25. Although Indonesia has previously explained that it does not challenge the provisionally estimated dumping margin and the imposition of the provisional duties *as such*, that does not mean that Article 7 of the Anti-Dumping Agreement is irrelevant. Indeed, Indonesia does challenge that part of the Definitive Regulation that ordered the collection of the provisional duties, which were established pursuant to Article 7 of the Anti-Dumping Agreement. Therefore, Article 7 of the Anti-Dumping Agreement remains relevant.

26. Article 7.2 of the Anti-Dumping Agreement states that the provisional duty cannot be higher than the provisionally estimated margin of dumping. By virtue of the opening phrase of Article 2.1 of the Anti-Dumping Agreement and as confirmed in WTO jurisprudence, the definition of "margin of dumping" applies in the same manner throughout the Anti-Dumping Agreement and does not vary under the various provisions of the Agreement.¹⁰ Furthermore, as noted by the panel in *US – Shrimp (Viet Nam)*, "any 'margin of dumping' calculated or relied upon by an investigating authority in the context of the application of the disciplines of the Agreement must be calculated consistently with Article 2 and its various paragraphs".¹¹

27. In this connection, Indonesia also submits that, contrary to the newly raised claim by the European Union, it was not necessary to include a violation of Article 2 of the Anti-Dumping Agreement because Indonesia requests findings that the European Union violated Articles 7.1, 7.2, 9.2 and 9.3 of the Anti-Dumping Agreement.

28. Finally, in reply to the European Union's claim that the relevant article in this context is Article 10.3 (and 10.5) of the Anti-Dumping Agreement, Indonesia does not dispute that Article 10.3 of the Anti-Dumping Agreement is of relevance to the present claim. However, the fact that Indonesia did not claim a violation of Article 10.3 of the Anti-Dumping Agreement does not mean that the European Union did not violate Articles 7.1, 7.2, 9.2 and 9.3 of the Anti-Dumping Agreement.

VIII Conclusions

29. For the reasons set out above, Indonesia submits that the European Union has acted inconsistently with Articles 2.2.1.1, 2.2, 2.2.2(iii), 2.3 and 2.4 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in the determination of the dumping margin as well as Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing a duty above the dumping margin calculated in accordance with Article 2 of the Anti-Dumping Agreement.

30. In addition, Indonesia submits that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in its injury determination as well as with Articles 7.1, 7.2, 9.2 and the chapeau of Article 9.3 of the Anti-Dumping Agreement by ordering the definitive collection of a provisional duty that is in excess of a correctly calculated dumping margin.

¹⁰ See Appellate Body Report, *US – Continued Zeroing*, para. 286. See also Appellate Body Report, *US – Zeroing (Japan)*, para.109 and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 94 and 96.

¹¹ Panel Report, *US – Shrimp (Viet Nam)*, para. 7.213. (emphasis added).

ANNEX B-3**FIRST EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE EUROPEAN UNION****I. INTRODUCTION**

1. The European Union notes that Indonesia has maintained in its first written submission only certain as applied claims raised in the panel request and it has completely abandoned its as such claims. Accordingly, the European Union considers that there is no longer any basis for the Panel to rule on the substance of those claims.

II. INDONESIA'S CLAIMS REGARDING THE ANTI-DUMPING MEASURES ON BIODIESEL**1. INDONESIA'S CLAIMS REGARDING THE CALCULATION OF THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS (ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994)**

2. Indonesia claims that in the biodiesel investigation the IA incorrectly rejected, for the purposes of constructing the normal value, the data included in the records of the producers, although these records were in accordance with the generally accepted accounting principles and reasonably reflected the costs associated with the production and sale of biodiesel. Indonesia submits that this is inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.

3. However, the European Union does not agree with Indonesia's presentation of the legal assessment in *EU – Biodiesel*, and reminds the Panel that it has requested in *EU – Biodiesel* that other aspects in Article 2.2.1.1 not pertaining to that case should not be subject to a legal assessment. The Appellate Body took note of that request and it mentioned in *EU – Biodiesel* **that for the purpose of resolving the dispute it is the meaning of this condition that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 would not apply.**

4. For similar reasons, the European Union submits that the respective interpretative question is not within the scope of the present proceedings.

5. The European Union recalls that the IA decided the re-opening of the investigation also with respect to Indonesia through the Commission Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473). That Notice expressly provides that "the legal interpretations contained in the Reports appear to be also relevant for the investigation concerning Indonesia".

2. INDONESIA'S CLAIMS REGARDING THE CONSTRUCTION OF THE NORMAL VALUE FOR THE INDONESIAN PRODUCERS UNDER INVESTIGATION ON THE BASIS OF THE COST OF PRODUCTION OF BIODIESEL IN THE COUNTRY OF ORIGIN (ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994)

6. Indonesia claims that the European Union constructed the normal value of the Indonesian investigated producers by replacing the costs of CPO inscribed in the records of the exporting producers with the reference export price, which is different from the cost of production in the country of origin.

7. With respect to the legal standard, the European Union highlights that the **Appellate Body has found that** Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 **do not contain additional words or qualifying language limiting the sources of evidence to only those sources inside the country of origin.** The reference to "in the country of origin", in turn, suggests that **information or evidence from outside the country of origin**

may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin". It recalled that Article 2.2.1.1 of the Anti-Dumping Agreement identifies the "records kept by the exporter or producer under investigation" as the preferred source for cost of production data to be used in such calculation.

8. The European Union does not consider that the first sentence of Article 2.2.1.1 *precludes* information from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the country of origin. While such documents, information, or evidence are from outside the country of origin, they would, nonetheless, be relevant to the calculation of the cost of production *in the country of origin*.

9. The European Union reiterates that the IA decided the re-opening of the investigation also with respect to Indonesia through the Commission Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473). In these circumstances the European Union makes the same comments as are set out above with respect to the preceding claim.

3. THE EUROPEAN UNION DID NOT ACT INCONSISTENTLY WITH ARTICLES 2.2 AND 2.2.2(III) OF THE ANTI-DUMPING AGREEMENT WHEN REASONABLY ESTABLISHING PROFITS IN CONSTRUCTING THE NORMAL VALUE FOR THE INDONESIAN PRODUCERS UNDER INVESTIGATION

10. Indonesia disputes the fact that the respective profit margin was not established in relation to a ceiling taking into account the "profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

11. Indonesia errs. Article 2.2.2 addresses two different scenarios. In a first scenario, the amounts for profits shall be based on actual data pertaining to "the production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" (the preferred method). When there are no such sales in the ordinary course of trade, then there are several alternatives (the second scenario), of which the last one refers to "any other reasonable method".

12. There is no doubt that we are in the second scenario in the present case. The third alternative method is different from the preferred method and from the first two alternative methods. The third alternative method does not mention the source of the data that may be used. Instead, it permits an IA to calculate profit amounts based on "any other reasonable method."

13. The European Union agrees that Article 2.2.2 does not limit the application of "any other reasonable method" to data from any particular market (a particular country), but the constructed normal value must be representative of the price of the like product (biodiesel).

14. The European Union will start, *first*, by recalling that the first two possibilities mentioned in Article 2.2.2 were not available in the investigation at issue.

15. **Second**, the European Union will analyse whether the amounts for profits were determined on the basis of "**any other reasonable method**" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement.

16. Under Article 2.2.2(iii) it is not necessary to search for a particular methodology, as it is sufficient to follow a reasonable approach. Indeed, Article 2.2.2(iii) does not state that only one single method is suitable to calculate the profit margin.

17. In this respect, the IA's findings regarding the profit margin of the Indonesian producers are explained in the Definitive Regulation at recital 84.

18. The European Union submits that the method on which the determination of the profit margin was based took into account **the following elements**.

19. *First*, the figure was appropriate on the basis of the reasonable amount of profit that a relatively young, capital-intensive industry of this type under normal conditions of competition in a free and open market could achieve in Indonesia.

20. *Second*, each assessment is made on a case-by-case basis and on its own merits; the economic situation of Indonesian palm oil producers is different from that of Argentinian soya bean producers.

21. *Third*, the 15% figure was not out of line with that adopted in other investigations.

22. *Fourth*, the short and medium term borrowing rate in Indonesia was around 12%, and it was reasonable to expect biodiesel producing companies to obtain a profit margin that exceeded this level. The medium-term borrowing rate has not been used by the IA to construct a profit margin, but simply as an additional tool to verify *ex post* the reasonableness of the profit margin. This is precisely what is required by Article 2.2.2(iii). The simple fact that the World Bank indicator for short and medium-term borrowing rates was lower for Indonesia (12%) than for Argentina (14%) cannot invalidate the reasonableness of testing the profit margin against such a benchmark and the reasonableness of the profit margin as such.

23. The European Union posits that this represents a "method" for the calculation of the profits that is "reasonable".

24. The interested parties' analysis of profit margins did not provide any further information that would have allowed the IA to reasonably reconsider its own analysis. Credit cost adjustments of an individual company cannot be used to establish a reasonable profit margin.

25. Even if it was not explicitly mentioned in the measure at issue, the profit realized by three of the Indonesian producers was actually higher than 15%, while for the fourth producer it was only slightly lower.

26. The European Union reiterates that the World Bank data on the short and medium-term borrowing rate in Indonesia was only used in order *to confirm* the reasonableness of the 15% profit margin, *rather than to determine* that margin. As the panel has found in *EU – Biodiesel*, the European Union used a reasonable method with respect to determining the profit margin in that case. Similarly, in the present case the Panel should also find that the European Union used a reasonable method with respect to determining the profit margin regarding the products under investigation from Indonesia.

27. *Third*, with regard to Indonesia's claim that the IA failed to calculate the cap for profits and ensure that the profit margin did not exceed such a cap, the European Union recalls that Article 2.2.2(iii) requires that the amount for profit "shall not exceed" the cap. The provision does not require the express explanation for calculating such a cap, as Indonesia contends in its first written submission. In that respect, an IA may in fact not exceed such a cap even absent any express references to its calculations in the measure at issue.

28. Indonesia agrees, so there is no dispute between the parties, that there may be instances when it is impossible to establish a cap. Defending Members cannot be required to do something that is impossible. This is informed by the *chapeau* to Article 2.2.2 and the phrase "cannot be determined on this basis".

29. "Normally" means that there may be circumstances which are not normal, in which some or all of the data should not and, indeed, cannot be used. One example can be a statistical outlier – that is, something that would be aberrational and abnormal, and therefore could not be used. The European Union believes that there might be other circumstances which are not normal. For example, all of the data might be obviously distorted by some act of the State – such as, for example, an act artificially deeming a particular profit without any basis in fact. Conceptually, there is little if any difference between the situation in which the data set is entirely populated with data that is abnormal and therefore must be rejected and the situation in which there is no data at all. Thus, the term "normally" confirms that, in such a situation, an IA does not have to calculate a profit cap – because it does not have to do something that is impossible.

30. The same data point could be, as a matter of fact, simultaneously not in the ordinary course of trade, and not "normal" within the meaning of Article 2.2.2(iii), a proposition with which Indonesia agrees. Accordingly, data which is not "normal" within the meaning of Article 2.2.2(iii) should not be taken into account by an IA when considering "the same general category of products". Only this way the method can be deemed "reasonable" within the meaning of the same provision.

31. The approach of the IA is explained in particular in recital 9 et seq. of the Provisional Regulation. The IA announced in the notice of initiation that it might limit to a reasonable number the exporting producers in Indonesia, by selecting a sample in accordance with Article 17 of the Basic Regulation.

32. In accordance with Article 17(1) of the Basic Regulation, the IA selected a sample of four exporting producers based on the largest representative volume of exports of the product concerned to the European Union.

33. It could be argued that the IA could have looked for data from other exporters or producers of the same general category of products in the domestic market of the country of origin that were not subject to the investigation. On the other hand, how could the IA have asked for data on profit margins from exporters or producers of products of the same general category in Indonesia that were not subject to the investigation? No producers of products of the same general category came forward and provided data.

34. Indonesia claims that "*the same general category of products*" was construed too narrowly by the IA and that it should include other oleochemicals.

35. While the text of Article 2.2.2 does not provide any elaboration as to the definition of "the same general category of products," its *chapeau* and overall structure provide certain guidance. The European Union recalls that the panel in *Thailand – H-Beams* has found that the broader "the same general category of products", the more products other than the like product will be included, and thus there will be more potential for the constructed normal value to be unrepresentative of the price of the like product. Therefore, "the use even of the narrowest general category that includes the like product is permitted".

36. A range of factors are relevant to the determination that a product does or does not belong to "the same general category of products" for the purpose of Article 2.2.2. An IA is entitled to focus on the demand side – this is a classic approach to such issues.

37. The European Union does not agree with the broad approach proposed by Indonesia. For the purpose of the investigation at issue, "the same general category of products" with biodiesel may not be other oleochemicals, irrespective of their end uses, which may constitute a different market and have a different profit margin. The evidence provided by the Wilmar Group proves that the profit margin for those oleochemicals is much smaller than the profit margin for biodiesel and thus it is not relevant for biodiesel products.

38. It is perfectly possible for the product scope of an investigation to include A and B (such as salmon and fillets) without that necessarily meaning that A and B are in the same general category of products.

39. It is logic, as the case-law mentions, that "the same general category of products" is narrowly defined, as the very rationale of employing this method is to construct a representative profit, as close to the one achieved in normal market conditions. To the contrary, the prevention of circumvention requires a broader approach to the similarities of different products. The narrowest approach possible in this case would leave aside products which may be used so as to circumvent the duties imposed (Definitive Regulation, recitals 23-24). This approach is similar to the Appellate Body's finding that '[t]he accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied'.

40. Finally, please also be mindful of the standard of review under Article 17(6)(i). Indonesia has not demonstrated that the IA's establishment of the facts was improper or that its evaluation of those facts was biased and lacked objectivity. Pursuant to the standard of review in

Article 17(6)(i) the Panel must therefore reject the claim, even if the Panel considers that it might have reached a different conclusion. The Panel must not attempt to step into the shoes of the IA.

41. Accordingly, the IA was not able to calculate a cap for profits and then ensure that the profit margin did not exceed such a cap. Thus, the reasonable profit margin of 15% fulfils the conditions laid down in Article 2.2.2(iii).

4. INDONESIA'S CLAIMS IN RELATION TO THE EXPORT PRICE (DOUBLE COUNTING)

42. Indonesia claims that with respect to one Indonesian exporting producer, the IA acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by failing to construct the export price on the basis of the price at which the imported biodiesel was first resold to an independent buyer in the European Union.

43. Responding to comments by the Musim Mas Group, the IA explained that, adding the premium to the export price under Article 2.3 would then require an un-adjustment to be made pursuant to Article 2.4, as the European Union will further explain.

44. The European Union submits that the IA correctly did not include the double counting premium in the export price, as the respective amount would in any event have to be deducted as a difference that affects price comparability.

45. *First*, the premium has no link to the export price, and it is not part of the price charged to the first independent buyer within the meaning of Article 2.3. The double counting premium is a separate allowance and not part of the export price. It is because of the Italian State intervention that the respective product is double counted and thus subject to a premium on the Italian market. The respective premium is a consequence of state intervention and not part of the price within the meaning of Article 2.3. The existence of the premium is determined by the State, while the amount (that is, the price of the premium) is calibrated by the market through negotiation.

46. Indonesia is obviously aiming for a higher number for the export price, which is why it is saying that the IA should have looked not only at the first invoice, which states the price of the imported product being resold, but that the IA should have added in the second invoice, which states the price of the premium. However, Indonesia has not demonstrated that the IA's establishment of the facts was improper or that its evaluation of those facts was biased and lacked objectivity.

47. The European Union would welcome clarifications from Indonesia with respect to the Musim Mas Group reporting the supposed increase in the value of the exported product to Italian customs.

48. *Second*, according to Article 2.4 of the Anti-Dumping Agreement, due allowance shall be made in each case for differences which affect price comparability, including differences in conditions and terms of sale, and any other differences which are also demonstrated to affect price comparability. Such adjustments may be made for cases when customers consistently pay different prices on the domestic market because of differences in factors affecting price comparability.

49. Indonesia has a claim under Article 2.3. This centres on the phrase: "the price at which the imported products are first resold". The fourth and fifth sentences of Article 2.4 refer to Article 2.3, so could in principle also be relevant to Indonesia's claim under Article 2.3. However, they relate to a constructed export price, whereas the legal issue before the Panel is a live one with respect to any export price (even if this particular case involves a constructed export price). The European Union's point has always been that it was correct in its interpretation and application of Article 2.3; and that this is confirmed by the observation that adding the second invoice with the price of the premium in Article 2.3 would have meant that it would have to be taken out again under Article 2.4, in order to ensure a fair comparison. This is confirmed by the third and fourth sentences, which refer to taxes – the State intervention here creating the premium being in the nature of a negative tax.

50. In sum, and to put the matter in terms of a concrete example, if one starts from a situation, in which the normal value and export price are both 100, and then the exporting country provides export subsidisation of 20 (pushing the export price down to 80), all other things being equal, there is dumping. In this scenario, the only pertinent rule is the rule against double-counting in Article VI:5 of the GATT 1994. This means that it is not permissible for the importing Member to impose, at the same time, a dumping duty of 20% and a countervailing duty of 20%. However, in referring to "the same situation of *dumping* or export subsidization" Article VI:5 of the GATT 1994 precisely confirms that the above scenario *is dumping*. That is why no adjustment under Article 2.4 would be appropriate – such an adjustment would simply mask the dumping that is occurring.

5. INDONESIA'S CLAIMS IN RELATION TO THE INJURY ASSESSMENT (ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT)

51. Indonesia claims that the IA's analysis of the price effects of dumped biodiesel on the prices of the EU industry sales of biodiesel at CFPP 0°C is analytically and factually flawed. Indonesia also maintains that the IA failed to consider the existence of "significant price undercutting" in respect of the domestic product.

52. The European Union submits that both contentions must be rejected.

53. In the case at hand the IA based its injury determination on "positive evidence", as the European Union will explain in detail. It involved an "objective examination" of both (i) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of these imports on domestic producers of such products.

54. First, the IA's analysis of the price effects of dumped biodiesel on the prices of the EU industry sales of biodiesel at CFPP 0°C is not analytically and factually flawed.

55. The European Union confirms that the IA compared EU industry prices with imports from Indonesia on the basis of the Cold Filter Plugging Point (CFPP). Differently from the investigation in the US - Biodiesel case, in the present investigation it was not appropriate to do the comparison on the basis of the feedstock. The reason is because the feedstock from which the biodiesel was made was not directly relevant to the price paid, as the biodiesel sold in the European Union was a *blend of various feedstocks*.

56. The Indonesian cooperating exporters did sell CFPP +13°C to the European Union during the IP. The IA calculated the injury on the basis of the following two analytical steps:

- (i) the Indonesian import price of CFPP +13°C was not compared to the EU price of CFPP +13°C, as the EU volumes were very small.
- (ii) the IA therefore compared the Indonesian import price to the EU industry price of biodiesel with a CFPP of 0°C, as this represented 993,860 MT of the sales in the sample. This was done by increasing the Indonesian price to the level of CFPP 0°C by using the difference in price in the sampled EU data.

57. The IA did not use the biodiesel with CFPP +13°C price directly because it was not representative (there was a very small domestic volumes of sales). However, the IA used the respective price in order to calculate the difference between CFPP +13°C and CFPP +0°C, as no other data was available.

58. Indeed, the IA has found that the biodiesel imported from Indonesia and EU-produced biodiesel were like products. The claim of the Wilmar Group, according to which the IA should have compared the import price of one CFPP to the average price of all production of the sampled Union producers, regardless of the CFPP, was rejected. The IA took into account the sales of the Union's industry at CFPP 0 because that was the highest and thus the most relevant volume, which was analysed during the available timeframe.

59. Indonesia also claims that the IA deprived interested parties of any meaningful opportunity to verify independently whether the European Union industry's sales of CFPP 0°C biodiesel. The IA did not include imported biodiesel in the EU industry data. What Indonesia requires, namely an independent verification of the data, amounts in fact to inspecting the respective EU companies

and analysing their confidential data, which is not possible. In addition, provided that the EU industry both produces and imports the same feedstock biodiesel, disclosing the content of their sales would not be of any help in itself.

60. Contrary to what Indonesia asserts, the IA did not find the price of the EU producers' sales of biodiesel with CFPP +13°C "unreliable". Instead, it was explained that a direct comparison was not considered reasonable.

61. Accordingly, Indonesia's argument that the two-step approach used by the IA is not appropriate in ensuring price comparability must fail.

62. The European Union recalls that the IA referred to "the very small volume of sales of Union producers at this CFPP" (sales of biodiesel with CFPP +13°C). The IA did not refer to "small quantities per transaction"; that was a misrepresentation on the part of one Indonesian exporting producer. The IA only confirmed that "a similar quantity per transaction" served as a basis for comparison. The IA compared the EU industry sales of biodiesel at CFPP +13°C and the EU industry sales of biodiesel at CFPP 0°C based on transactions of similar volumes and it did not find differences in prices per ton.

63. At the time of the investigation of biodiesel from the United States the Union industry did not sell FAME 0. The situation is very different in the investigation at issue, as the EU industry manufactures and sells predominantly FAME 0 (37% of the volumes sold by the sampled producers). As FAME 0 results in the European Union from a mix of different feedstocks (including feedstock from Indonesia) and the proportions may be very different from one case to another, it was considered reasonable to apply a method based on the CFPP of the highest volume of sales of the EU industry. It is to be noted that regardless of the proportions of the feedstocks in the blend, the price was the same based on the CFPP.

64. In light of the above, the European Union submits that Indonesia failed to demonstrate that the IA's analysis of the price effects of dumped biodiesel on the prices of the EU industry sales of biodiesel at CFPP 0°C is analytically and factually flawed. The IA based its injury determination on "positive evidence", by conducting an "objective examination" within the meaning of Article 3.1 of the Anti-Dumping Agreement.

65. The European Union also submits that the IA did not fail to consider the existence of "significant price undercutting" in respect of the domestic product.

66. As per the Appellate Body's guidance in *China – HP-SSST*, the IA made an assessment of injurious dumped imports during the investigation period *not* limited to an isolated instance of dumped imports sold at lower prices than the domestic like product.

67. In *China – HP-SSST* the panel found that differences in quantities between the respective imports and domestic like products should be taken into account under Articles 3.1 and 3.2 when comparing prices of the two categories of products. Mindful of these considerations, the IA used a two-step approach, so as to account for the differences in quantities and to properly ensure price comparability.

68. The Provisional Regulation provides in Table 2 an analysis of the evolution of the market share of the imports from Indonesia. It is subsequently explained in the Definitive Regulation how the price undercutting analysis was conducted, in recitals 121- 129.

69. **Accordingly, the IA based its injury determination on "positive evidence", involving an "objective examination" of both** (i) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of these imports on domestic producers of such products, as required by Article 3.1 of the Anti-Dumping Agreement.

70. In addition, the IA also complied with the requirements in Article 3.2 of the Anti-Dumping Agreement.

71. Article 3.2 first sentence refers to the volume of the dumped imports, while Article 3.2 second sentence makes reference to the effect of the dumped imports on prices. Thus, a

significant increase in volumes is relevant when the effect of the dumped imports results in a significant price undercutting, depresses prices or prevents price increases.

72. The European Union recalls that the IA found that import volumes from Argentina and Indonesia increased significantly from 2009 to the IP, imports from Indonesia increasing at a faster rate than imports from Argentina.

73. Indeed, as explained in Table 2 of the Provisional Regulation, relevant imports from Indonesia had a market share of 1,4% in 2009, 4,3% in 2010, 9,7% in 2011 and 8,5% during the investigation period.

74. The data on the significant increase in the dumped imports of biodiesel from Indonesia was confirmed in the Definitive Regulation.

75. It follows that the IA complied with the requirements in Article 3.2 first sentence of the Anti-Dumping Agreement.

76. Similarly, the European Union has already explained that, with regard to the effect of the dumped imports on prices, the IA considered whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product in the European Union. That was the case in the investigation at issue, as explained in particular in recitals 126-127 of the Provisional Regulation.

77. It follows that the IA complied with the requirements in Article 3.2 second sentence of the Anti-Dumping Agreement.

78. Please also be mindful of the standard of review under Article 17(6)(i). Indonesia has not demonstrated that the IA's establishment of the facts was improper or that its evaluation of those facts was biased and lacked objectivity.

79. In light of the above, the European Union submits that the Panel should reject Indonesia's claims with regard to the injury assessment.

6. INDONESIA'S CONSEQUENTIAL CLAIMS UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

80. Indonesia's claims under Article 9.3 of the Anti-Dumping Agreement are consequential to Indonesia's claims relating to the IA's determination of the amount of the dumping margin, considered inconsistent with Articles 2.2, 2.2.1.1, 2.2.2(iii), 2.3 and 2.4 of the Anti-Dumping Agreement and with Article VI:1 of the GATT 1994. Thus, Indonesia alleges that the European Union imposed on biodiesel from Indonesia anti-dumping duties exceeding the margin of dumping established in compliance with Article 2.

81. The European Union recalls its observations regarding the facts and the legal assessment as presented in sections 1 and 2 above.

7. ARTICLES 7.1, 7.2, 9.2 AND 9.3 OF THE ANTI-DUMPING AGREEMENT VIS-À-VIS CERTAIN ESTIMATIONS AT PROVISIONAL STAGE

82. Indonesia maintains that the European Union violated Articles 7.1, 7.2, 9.2 and 9.3 of the Anti-Dumping Agreement because it allegedly incorrectly imposed and collected *provisional* anti-dumping duties with respect to the imports from one Indonesian producer under investigation.

83. As stated in the Provisional Regulation of 27 May 2013, the IA found that the Musim Mas Group's exports were dumped with a dumping margin of 2,8%, causing injury to the EU industry, with an injury margin of 23,3%. The IA **reviewed and revised** its calculations as set out in the Definitive Disclosure which was sent to the interested party on 1 October 2013.

84. Indonesia argues that by taking these **changes** into account and assuming that all other factors would have remained the same, the anti-dumping duty applied to the Musim Mas Group would have been lower.

85. With regard to the **second estimation adjustment, related to the hedging gains and losses**: those were not considered part of the export price paid or payable. However, while for one legal entity within a group, the IA did not take into account a hedging gain, it had omitted to disregard a hedging loss for another legal entity within the same group. This estimation was adjusted.

86. Finally, with regard to the **third estimation** which was subsequently adjusted, concerning SG&A of the two related importers in the construction of the export price and the income tax, recital 80 of the definitive disclosure mentions that several exporting producers came also forward with claims for data changes in the calculations. Where these claims were substantiated with the necessary evidence, corrections were made.

87. **Indonesia's claim is misconceived.** This issue subject to the present proceedings is governed by Articles 10.3 and 10.5 of the Anti-Dumping Agreement. The measure at issue is not inconsistent with any obligation imposed on the European Union by those provisions. That is why Indonesia has not even attempted to make such a claim under those governing provisions, and thus why such a matter is not within the Panel's terms of reference.

88. If an interested party wishes to make representations about some element of the provisional determination such as those made by Indonesia in this case, it would have to invoke Article 2 of the Anti-Dumping Agreement. Indonesia agreed during the hearing that this would be the relevant provision. However, with respect to this specific issue, Indonesia has no claim under Article 2 of the Anti-Dumping Agreement (as well as having no claim under Article 10.3). The fact that Indonesia has other claims under Article 2 is of no assistance to Indonesia. Such an issue is therefore not within the Panel's terms of reference.

89. Interested parties may challenge definitive measures before the EU courts in Luxembourg. If an interested party wishes to make representations with respect to some element of a provisional determination fixing a provisional duty of, for example, 5%, arguing that, in fact, it should be 4%, it has ample opportunity to draw that to the attention of the IA before the adoption of definitive measures. If the authority agrees with such representations, such that the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, it has an obligation, pursuant to Article 10.3, second sentence, of the Anti-Dumping Agreement, to reimburse the difference or re-calculate the duty. The measure at issue in this case is not inconsistent with this obligation. In particular, the definitive duty was not found to be lower than the provisional duty. Since the condition was not fulfilled, the obligation was not applicable and in any event was not breached.

90. *First*, there is no treaty language in the Anti-Dumping Agreement that refers, in the context of Article 7.2, to "clerical errors", or seeks to distinguish "clerical errors" from matters arising from "incomplete or unverified information". The dispute must be determined by reference to the terms actually used in the treaty. *Second*, in this respect, the language in Article 7 ("provisional"/"preliminary"/"estimated") (eleven references) is used with respect to the measure as a whole, not with respect to some particular element of the measure, as Indonesia would have it. *Third*, such language tolerates and permits a certain margin of estimation at the level of the measure as a whole, which Indonesia has not demonstrated was breached in this case. *Fourth*, Indonesia has confirmed that it is not challenging the provisional measure, which is what would be governed by the provisions of Article 7, but rather a particular aspect of the definitive measure, which is governed by the provisions of Articles 10.3 and 10.5 (which the European Union has not breached). Therefore, Article 7 is irrelevant.

91. In any event, the European Union notes that Article 7.2 speaks of anti-dumping duties and dumping margins *provisionally estimated*. The "calculation errors" in the Provisional Regulation to which Indonesia refers to are in fact provisional *estimations* within the meaning of Article 7.2 of the Anti-Dumping Agreement. The Provisional Regulation was adopted on the basis of the information that the IA had at its disposal at that moment in time; the dumping margin and the corresponding anti-dumping duties are mere estimates.

92. The very definition of "provisional" is that it is temporary, existing only until permanently or properly replaced. After the adoption of a provisional regulation, the IA discloses its findings to interested parties and receives comments that may lead – or not – to a revision of those provisional findings (estimates). This is inherent to all anti-dumping investigations.

93. The European Union's understanding of the phrase "provisionally estimated" is confirmed by the panel's findings in *Canada — Welded Pipe* at para 7.64, which states that Article 7.2 makes it clear that the preliminary determination of dumping is no more than a provisional estimate.

94. Furthermore, in the present case the amount of the anti-dumping duty provisionally estimated is not greater than the provisionally estimated margin of dumping. The case at hand is different from the *US — Customs Bond Directive*.

95. It follows that Indonesia's arguments in this respect must be rejected.

96. With respect to Indonesia's claim under Article 7.1(ii) of the Anti-Dumping Agreement, the European Union submits that Indonesia failed to meet the burden of proof with respect to the alleged failure by the IA to make a preliminary affirmative determination of dumping. The IA's "preliminary affirmative determination" of dumping in respect of the Musim Mas Group was not based on a "flawed calculation" of the provisional dumping margin. In fact, the IA's "preliminary affirmative determination" of dumping was based on *provisional estimates* within the meaning of Article 7.2 of the Anti-Dumping Agreement.

97. **Indonesia also raises consequential claims under Articles 9.3 and 9.2 of the Anti-Dumping Agreement**, which apply *mutatis mutandis* to provisional measures as per Article 7.5 of the Anti-Dumping Agreement.

98. In particular, Indonesia contends that the amount of the provisional anti-dumping duties exceeds the dumping margin, contrary to Article 9.3 of the Anti-Dumping Agreement. The European Union has already explained that in the present case the amount of the anti-dumping duty provisionally estimated is not greater than the provisionally estimated margin of dumping.

99. Indonesia then maintains that the provisional anti-dumping duties were not collected in an *appropriate amount* within the meaning of Article 9.2 of the Anti-Dumping Agreement.

100. Article 9 does not apply to the matter at issue, and in any event is of no assistance to Indonesia, because at most the term "appropriate" in Article 9.2 simply re-directs the Panel to the terms "preliminary"/"provisional"/"estimate" in Article 7; and Indonesia has no relevant claim under Article 2.

101. Thus, the European Union submits that the Panel should reject Indonesia's claims in this section.

III. CONCLUSIONS

102. Indonesia has failed to make a *prima facie* case on its claims. The European Union has shown that the claims pursued and developed in Indonesia's first written submission and during the first substantive meeting are unfounded and based on erroneous arguments. Therefore, the European Union respectfully requests the Panel to reject Indonesia's claims.

ANNEX B-4**SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION****1. INTRODUCTION**

1. As a complainant in these proceedings, Indonesia failed to meet its burden with respect to several claims (e.g. profit cap), has significant difficulties in explaining its position (e.g. double-counting premium in separate contracts during the IP), has silently dropped claims (e.g. oleochemicals in "the same general category of products") or has made claims under the wrong legal provisions (e.g. it has no proper claim under Article 2 with respect to the definitively collected provisional duties). Indonesia has not demonstrated that the IA's establishment of the facts with respect to injury assessment was improper or that its evaluation of those facts was biased and lacked objectivity.

2. INDONESIA'S CLAIMS REGARDING THE ANTI-DUMPING MEASURES ON BIODIESEL

2.1. INDONESIA'S CLAIMS REGARDING THE CALCULATION OF THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS (ARTICLES 2.2 AND 2.2.1.1 OF ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF GATT 1994)

2. The European Union takes note of the factual description by Indonesia, while not entirely agreeing on what Indonesia describes as the legal standard pursuant to the adoption of the panel and Appellate Body reports in *EU – Biodiesel*.

3. In particular, the European Union reminds the Panel that it has specifically requested in *EU – Biodiesel* that other aspects in Article 2.2.1.1 not pertaining to that case should not be subject to a legal assessment, request of which the Appellate Body took note.

2.2. INDONESIA'S CLAIMS REGARDING THE CONSTRUCTION OF THE NORMAL VALUE FOR THE INDONESIAN PRODUCERS UNDER INVESTIGATION ON THE BASIS OF THE COST OF PRODUCTION OF BIODIESEL IN THE COUNTRY OF ORIGIN (ARTICLE 2.2 OF ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF GATT 1994)

4. Similarly to the preceding claim, the European Union takes note of the factual description by Indonesia, while highlighting certain aspects pertaining to the legal standard, in light of the Appellate Body Report in *EU – Biodiesel*.

2.3. THE EUROPEAN UNION DID NOT ACT INCONSISTENTLY WITH ARTICLES 2.2 AND 2.2.2(III) OF ANTI-DUMPING AGREEMENT WHEN REASONABLY ESTABLISHING PROFITS IN CONSTRUCTING THE NORMAL VALUE FOR THE INDONESIAN PRODUCERS UNDER INVESTIGATION

5. One of the essential aspects to be clarified with respect to Indonesia's claims under Article 2.2.2(iii) is whether a method is necessarily not reasonable if *a profit cap is not established*, due to *the objective impossibility of establishing such a cap*. In fact, Indonesia repeatedly agrees with the proposition that there may be circumstances when it is not possible to establish a profit cap. So there is no dispute among the parties with regard to the fact that there may be circumstances when it is impossible for the IA to establish a profit cap.

6. *First*, the European Union recalls that Indonesia mentioned in its first written submission that "the European Commission at no point alleged that such a cap was established; that it attempted to establish this cap; *or that it was impossible to establish such a cap*" (emphasis added).

7. *Second*, Indonesia also agrees that "a failure to establish the profit cap does not necessarily mean the method is unreasonable".

8. *Third*, the European Union highlights that Article 2.2.2(iii) is a norm of general application, which by definition has to be applied to a multitude of individual situations. There are instances in practice when a profit cap cannot be established.

9. *Fourth*, the European Union recalls that third parties like the United States also agree with this proposition. If such a calculation is not possible because information does not exist, then the proviso is not operative.

10. In light of the above, the European Union concludes that a method is not necessarily not reasonable within the meaning of Article 2.2.2(iii) if a cap for profits is not established, when it is not objectively possible to establish a profit cap.

11. The term "*normally*" in Article 2.2.2(iii) confirms that, where there is no data at all, the IA does not have to calculate a profit cap, because it cannot be required to do something that is impossible.

12. *First*, consistent with the principle of effective treaty interpretation, the term "normally" must be given meaning; it cannot be simply ignored. Indonesia provided as an example a statistical outlier – that is, something that would be aberrational and abnormal, and therefore could not be used. The European Union agrees with this example, but one example does not exhaust the concept. The European Union believes that there might be other circumstances which are not normal. For example, all of the data might be obviously distorted by some act of the State – such as, for example, an act artificially deeming a particular profit without any basis in fact. Conceptually, there is little if any difference between the situation in which the data set is entirely populated with data that is abnormal and therefore must be rejected (a proposition with which Indonesia agrees) and the situation in which there is no data at all. *Second*, the European Union notes that the United States agrees with this interpretation.

13. The data provided by Wilmar on sales of blends of biodiesel and mineral diesel could not be used as the related party [[]] did not provide data on blended fuel which could be used for the purposes of Article 2.2.2(iii). The related party [[]] sold blends of biodiesel with mineral diesel. The profit margin the Wilmar Group claimed should be used was not the profit for a product in the same general category. In the Anti-Dumping Questionnaire reply [[]] claimed that it only sold diesel fuel and marine fuel oil during the years 2010, 2011 and the investigation period (IP) and it did not keep track of the content of the biodiesel content incorporated in the sold diesel or marine fuels. Therefore, this company was not further investigated as it was not involved in domestic sales of biodiesel since 2010. Finally, in any event [[]]'s possible sales of biodiesel would have been tainted by the same distortions and did not constitute a "profit normally realized" within the meaning of Article 2.2.2(iii).

14. The European Union disagrees with Indonesia to the extent that Indonesia is arguing that "normally" has a meaning distinct from "in the ordinary course of trade" in all cases. The "ordinary course of trade" referred to in Article 2.2 is a concept capturing situations such as when a product is sold at a price below production costs or where transactions take place between parties which are associated or have a compensatory arrangement with each other.

15. The Appellate Body in *US – Hot-Rolled Steel* has offered several examples of situations which may fall under the category of transactions "not in the ordinary course of trade". "Normally" in Article 2.2.2 (iii) may also cover a variety of situations and not just a statistical outlier. The relationship between "not in the ordinary course of trade" and "normal" in the context of Article 2.1 was explained by the Appellate Body in *US – Hot-Rolled Steel*.

16. Thus, the objective of excluding such sales in constructing the normal value is to ensure that normal value is the "normal" price of the like product, in the home market of the exporter. Similarly, the rationale of providing for a cap for profits which is used in constructing the profit is to ensure that the respective profit is "normal" in the domestic market of the country of origin.

17. As there was no dispute with regard to the fact that the respective sales were not in the ordinary course of trade, this conclusion also informs the analysis under "normally" in Article 2.2.2(iii) in this particular case.

18. In particular, the IA found that sales of biodiesel were not in the ordinary course of trade because the Indonesian domestic market of biodiesel is heavily regulated by the State. The fully State-owned oil and gas company Pertamina is by far the biggest company active on the domestic market (more than 90% of the domestic biodiesel purchases from the sampled producers).

19. Finally, this proposition is also consistent with the Appellate Body's interpretation of Article 2.2.2(ii) in *EC — Bed Linen*. Indeed, in contrast to Article 2.2.2(ii), Article 2.2.2(iii) contains an explicit reference to "normally", in a similar way that the *chapeau* of Article 2.2.2 contains a reference to "in the ordinary course of trade". The European Union is not arguing that it should be understood that "ordinary course of trade" is included in Article 2.2.2(iii). The European Union merely observed that the same data point could be, as a matter of fact, simultaneously not in the ordinary course of trade, and not "normal" within the meaning of Article 2.2.2(iii). Accordingly, data which is not "normal" within the meaning of Article 2.2.2(iii) should not be taken into account by an IA when considering "the same general category of products". Only this way can the method be deemed "reasonable" within the meaning of the same provision.

20. The European Union further recalls that an IA is not under an obligation to provide in an act like the Definitive Regulation details about the calculation of the cap, as the relevant obligation in Article 2.2.2(iii) is to not exceed such a cap. Furthermore, the burden of proof is on the complainant (*onus probandi incumbit actori*), a principle well confirmed by the Appellate Body.

21. The European Union also recalls that the panel in *Thailand — H-Beams* has found, in the context of Article 2.2.2(i) that the notion of "*the same general category of products*" should be rather narrowly construed. Against this background, Indonesia and the Indonesian producers under investigation did not meet their burden of proof, failing to explain why other oleochemicals, irrespective of their end uses and the specific markets, might nevertheless constitute the same category of products with biofuels within the meaning of Article 2.2.2(iii).

22. Furthermore, the European Union disagrees with Indonesia, which considers that the European Union's limitation of the same general category of products to "other fuels" is inconsistent with its decision in recital 24 of the Definitive Regulation. The European Union sees no contradiction in the narrow approach in the case-law with respect to "the same general category of products", while the prevention of circumvention requires a broader approach to the similarities of different products. Similarly, the Appellate Body has already found in *Japan — Alcoholic Beverages II* that "[t]he accordion of 'likeness' stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied".

23. An IA is entitled to look on the demand side when determining whether a product does or does not belong to "the same general category" for the purpose of Article 2.2.2.

24. *First*, in understanding the concept of "the same general category of products" one may look into how market definitions and like products operate. Markets are normally defined by taking into account the demand side, namely the substitutability of the products from a consumer's perspective. It is already settled case-law in the framework of the GATT 1994 according to which the establishment of likeness boils down to the examination of the nature and the extent of the competitive relationship between and among products, which will depend on the market where these products compete.

25. *Second*, the demand side is even more important in a factual situation like the present case, when the IA seeks to establish the profits of a relatively new, innovative, capital-intensive industry in Indonesia. Relatively new and innovative industries usually have more demand for their products, as they are contributing to creating and developing new markets.

26. *Third*, on the facts of the present case Wilmar itself has sales of oleochemicals with a profit margin initially claimed at [[]], then revised downwards to [[]], while the very same company claimed a profit of [[]] for PSME (Palm Stearin Methyl Ester), referred to as "the product concerned". This clearly shows that demand plays a significant role and that other oleochemicals are not in "the same general category of products" with biodiesel within the meaning of Article 2.2.2(iii).

27. CN codes are not necessarily relevant for the determination of "the same general category of products".

28. *First*, the European Union recalls that the product concerned is defined as "fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, in pure form or as included in a blend originating in Argentina and Indonesia, currently falling" within the mentioned CN codes. The CN codes provided in the regulations facilitate the work of the customs authorities in the collection of the anti-dumping duties.

29. *Second*, there may very well be situations when two products sharing the same CN code are not in "the same general category of products", while the opposite may also be true - two products belonging to different CN Codes may be in "the same general category of products". This is a case-by-case assessment.

30. *Third*, the European Union recalls that customs classification is only one of the criteria developed in the case-law concerning likeliness of the products, while end uses, consumers tastes and preferences and physical and chemical characteristics have also to be taken into account. Again, as already explained, the establishment of likeliness boils down to the examination of the nature and the extent of the competitive relationship between and among products, which will depend on the market where these products compete.

31. In conclusion, the fact that a method is not necessarily not reasonable within the meaning of Article 2.2.2(iii) if a cap for profits is not established, when it is not possible to establish a profit cap, is instrumental in the present case, because there were no sales of products in the same general category and there was no profit "normally" realized by other exporters or producers. Thus, Indonesia's claims that the IA failed to calculate a profit cap and that the method is unreasonable as a consequence should be dismissed by the Panel.

32. With regard to the *reasonableness of the method used by the IA*, irrespective of the profit cap debate, the European Union briefly recalls that recital 84 of the Definitive Regulation states that: "15 % profit is a reasonable amount that can be achieved by a *relatively* new, capital-intensive industry in Indonesia" (emphasis added), reflecting in other words recital 65 of the Provisional Regulation, which refers to what "a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve".

33. The European Union has explained that the actual profits of the Indonesian companies under investigation were in fact higher than 15% and that the IA disclosed the respective excel pivot tables to the interested parties on 28 May 2013 and on 1 October 2013. Indonesia is totally unreasonable (i) to claim that "normally" in Article 2.2.2(iii) refers only to a statistical outlier, implying that a non-normal market on which actual profits are in the range of [[]] would be just fine, and, at the same time, (ii) claim that the IA did not contact other producers and was in the end unreasonable by establishing a profit at 15%. There is clearly a contradiction in this approach!

34. The Indonesian and Argentine industries were at a similar stage of development at the time of the investigation. The European Union considers that the start years, the production volumes, the pace of increase/ stagnation of production volumes, the number of producers and the respective level of competition on that market, as well as the size of the country/market may be helpful elements in assessing the stage of development of a biodiesel industry.

35. With respect to the stage of development of the Indonesian and Argentinian biodiesel industries, the European Union notes that in both countries the biodiesel industry started in 2006/2007 at small volumes, basically due to policy initiatives to promote biofuels/biodiesel as a source of fuel. The pace of development in both countries the following years was very high, confirming that it was a relatively new, innovative industry. Some reports in the public domain indicate 50 000 MT in Indonesia and 30 000 MT in Argentina in 2006 which by 2008 was 500 000 MT in Indonesia and 230 000 MT in Argentina. By 2012 the annual production had risen to 2,2 million MT in Indonesia and 2,8 million MT in Argentina. Thus, there was a very similar development in both countries in terms of production.

36. The Indonesian biodiesel industry was not at a more advanced stage of development in the investigation period as the EU industry was in the 2005-2006 period. Information in the public domain abundantly shows that the EU biodiesel industry started already in the 90's. In 2004 the EU production was already almost 2 million MT, in 2005 over 3 million MT and in 2006 almost 5 million MT. It is in this context that recital 65 of Commission Regulation No 193/2009 should be understood.

37. With respect to different claims made by Indonesia concerning the reasonableness of the 15% profit margin, the European Union requests the Panel to be mindful of the standard of review under Article 17(6)(i) of the Anti-Dumping Agreement. Indonesia has not demonstrated that the IA's establishment of the facts was improper or that its evaluation of those facts was biased and lacked objectivity. Pursuant to the standard of review in Article 17(6)(i) the Panel must therefore reject the claim, even if the Panel thinks that it might have reached a different conclusion. The Panel must not attempt to step into the shoes of the IA.

38. In light of the above, Indonesia's claims under Articles 2.2.2(iii) and 2.2 of Anti-Dumping Agreement must be rejected.

2.4. INDONESIA'S CLAIMS IN RELATION TO THE EXPORT PRICE (DOUBLE COUNTING)

39. Indonesia claims that with respect to the Musim Mas Group the IA acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by failing to add the premium in the construction of the export price. This is understandable, as Indonesia tries to obtain an export price as high as possible, and to mask the existence of dumping by reducing the difference between the normal value and the export price.

40. The European Union has clarified the following aspects.

41. *First*, while the amount of the premium is determined by market forces, a point on which the parties agree, the mere existence of the premium is determined by State intervention, namely by the fact that PFAD-based biodiesel can be double-counted for the purpose of compliance with the European Union's mandatory biodiesel blending targets. Absent any State intervention on the part of the Italian government, there will be no incentive for such an additional payment for this type of biodiesel and the premium would not exist at all. In countries where there is no similar State intervention there is simply no premium for this type of biodiesel. In its response to Panel question no. 38 Indonesia dismisses the importance of the fact that the double counting premium is a unique feature of the Italian market, but not of the Indonesian market. This asymmetrical situation confirms that what the IA did in this case was in line with Article 2.4 (and that it was reasonable and consistent with the standard in Article 17(6)(i) of Anti-Dumping Agreement).

42. *Second*, the European Union notes that Indonesia has difficulties in explaining why there is a need for a special premium provision in the contract between the importer and the first independent buyer in Italy, when the exporter/importer knows before exporting the biodiesel if it will be considered as double counting biodiesel. The European Union recalls that "the price charged to the first independent buyer is a starting-point for the construction of an export price". The premium has no link to the export price, and it is not part of the price charged to the first independent buyer within the meaning of Article 2.3. The premium is a distinct element, provided separately in the contract and made the object of a different invoice. The product can be sold/resold without a premium.

43. This understanding is further confirmed by the way in which separate contracts concerning the premium are drafted. Accordingly, the supplementary agreement submitted as an example by Indonesia is clearly distinct from the initial agreement, which stipulated the price at which biodiesel was first resold to an independent buyer in the European Union. By the time the supplementary agreement was signed the delivery already took place and the price was paid.

44. The European Union does not understand Indonesia's logic according to which it was uncertain whether the double counting certificate would be issued and yet it was not uncertain whether the premium would be paid. Of course it was uncertain if the premium would be paid, as the premium was linked to the issuance of the certificate by the Italian authorities, not to the product.

45. Thus, the European Union notes that Indonesia confirms that there was a high level of uncertainty with respect to the premium during the IP. The exhibit containing a contract dated 30 March 2012 is relevant for the present proceedings. Other exhibits refer to contracts and invoices well after the IP (March and October 2014). As Indonesia explains, the practice of charging the "double counting" premium through a separate invoice apparently ceased only in February 2014. This confirms that during all the IP, the relevant timeframe for the purpose of the present proceedings, the "double counting" premium was subject to a different invoice.

46. *Third*, the comparison with the issuance of debit or credit notes after the invoice had been issued (and after delivery took place) is misplaced. Indeed, in that case the respective prices or currency fluctuations are normal dynamics of the markets, while the State intervention leading to the existence of the premium is of a different nature. As already explained, State intervention such as that in the present case, that creates a limited number of special or exclusive rights (the ultimate price of which is to be calibrated by the market) is specifically designed to encourage one type of activity and discourage another – that is, it is functionally equivalent to a decision to tax one element but not another.

47. *Fourth*, Indonesia misrepresents the European Union's statements in paragraph 74 of its first written submission. The European Union has never claimed that the premium is a tax. As already explained several times, the premium is a form of *state intervention* which is in the nature of a negative tax. Even if one would take as a starting point the export price plus the premium (which would be a mistake) there would still be a problem, because one would have introduced an asymmetry rendering the normal value and the export price non-comparable – that is, one would simply have *masked* the dumping. Therefore, in order to ensure a fair comparison between the normal value and the export price, that is, in order to unmask the dumping, it would be necessary to re-adjust under Article 2.4 of Anti-Dumping Agreement. Thus, contrary to what Indonesia alleges, the premium affects price comparability.

48. *Fifth*, while Indonesia acknowledges that the double-counting premium is an indirect result of the general regulatory framework, it adds "as any other government measure". This is not what the European Union is arguing. The European Union does not believe that any government measure which may have indirect effects on the export price would need to be excluded under Article 2.3 or otherwise deducted under Article 2.4 of Anti-Dumping Agreement.

49. In this context, the European Union has explained that, although not all forms of State intervention that give rise to additional costs or premiums are to be excluded from the export price or otherwise deducted under Article 2.4 of Anti-Dumping Agreement, the Panel should bear in mind the applicable standard of review in Article 17(6)(i). Indonesia has not demonstrated that the IA's establishment of the facts was improper or that its evaluation of those facts was biased and lacked objectivity. Pursuant to the standard of review in Article 17(6)(i) the Panel must therefore reject the claim, even if the Panel considers that it might have reached a different conclusion. The Panel must not attempt to step into the shoes of the IA.

50. Therefore, the Panel must reject Indonesia's allegation of a calculation error regarding the premium obtained as a result of State intervention on the Italian market.

51. *Sixth*, according to Article 2.4 of the Anti-Dumping Agreement, due allowance shall be made in each case for differences which affect price comparability, including differences in conditions and terms of sale, and any other differences which are also demonstrated to affect price comparability. Article 2.4 is concerned with making a fair comparison between the normal value and the export price, providing for appropriate adjustments to the extent that they have not already been taken into account pursuant to Article 2.3 in the case of the export price.

52. In light of the above, the European Union submits that the Panel should reject Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement.

2.5. INDONESIA'S CLAIMS IN RELATION TO THE INJURY ASSESSMENT (ARTICLES 3.1 AND 3.2 OF ANTI-DUMPING AGREEMENT)

53. The European Union starts by recalling that the IA performed a cumulative assessment of the effects of the imports as per Article 3.3 of Anti-Dumping Agreement and Indonesia did not maintain that the conditions in Article 3.3 were not met.

54. Biodiesel from Indonesia and biodiesel from the European Union were in competition, as explained in Recital 18 of Definitive Regulation: "PME produced in Indonesia is in competition with biodiesel produced in the Union, which is not just RME but also biodiesel made from palm oil and other feedstocks". The regulation does not state that Indonesian imports of PME and blends or EU industry CFPP 0 biodiesel are in competition with each other.

55. Indonesia's arguments seem contradictory. On the one hand Indonesia claims that Indonesian biodiesel and EU biodiesel are not in direct competition, for the purpose of its injury claims, but on the other hand it considers that not only biodiesel but other oleochemicals (irrespective of their end uses and different markets!) and (possibly) any other fuel could be in "the same general category of products" with biodiesel for the purpose of its Article 2.2.2(iii) claims.

56. One of Indonesia's main arguments is that in the injury analysis the IA should have considered the feedstock and not the CFPP. On this basis, Indonesia alleges that the IA's analysis of the price effects of dumped biodiesel on the prices of the EU industry sales of biodiesel at CFPP 0°C is analytically and factually flawed. However, Indonesia is *not* able to explain whether the outcome of the price undercutting analysis would have changed had the EU authorities considered price undercutting based on the feedstock.

57. Indeed, the European Union has explained that the IA could not find out the percentage of each feedstock in the blends sold by the EU industry, as the EU industry was blending biodiesel with different CFPP in order to obtain mainly CFPP 0 (the most sold blend), which is the most suitable to the climatic conditions in the European Union. The result of a blend with the final CFPP 0 could be achieved in multiple ways and by blending different quantities of biodiesel with lower and higher CFPP. Accordingly, the IA decided that it is reasonable and unbiased to perform the undercutting analysis on the basis of the CFPP.

58. The European Union briefly recalls that the IA calculated the injury on the basis of the following two analytical steps:

- (i) the Indonesian import price of CFPP +13°C was not compared to the EU price of CFPP +13°C, as the EU volumes were very small.
- (ii) the IA therefore compared the Indonesian import price to the EU industry price of biodiesel with a CFPP of 0°C, as this represented 993,860 MT of the sales in the sample. This was done by increasing the Indonesian price to the level of CFPP 0°C by using the difference in price in the sampled EU data.

59. Furthermore, the European Union does not consider that using only the sales of biodiesel with CFPP 0 affects the reasonableness of the IA's undercutting analysis. To the contrary, the European Union has explained that EU industry sales of biodiesel with the CFPP 0 represent 37% of the total sales of the sampled producers. The IA relied on 37% of the sampled producers' sales because sales of biodiesel of CFPP 0 were by far the most important sales of the sampled EU industry by volume, while other sales were mainly at lower CFPP.

60. The European Union notes that if adding imports from Indonesia of CFPP 12 and CFPP 14 (the closest values to CFPP 13), then the total will represent about 94% of all biodiesel imports from Indonesia.

61. Climatic conditions influence the suitable CFPP of the blend in different parts of the European Union. The European Union recalls that the IA calculated the injury elimination margin over 12 consecutive months (the IP) and analyzed the price of imports of biodiesel from both Argentina and Indonesia over a period spanning from 1 January 2009 to 30 June 2012. The method based on the CFPP is appropriate in the context of different climatic conditions in the European Union.

62. Recital 128 of Definitive Regulation provides that "imported biodiesel and Union-produced biodiesel were blended together and sold at the same price as blends that did not include any imported biodiesel". The fact that regardless of the proportions of the feedstocks in the blend, the price was the same based on the CFPP only means that the price for CFPP 0 was dictated by the CFPP itself. It does not say anything about the fact that the EU biodiesel price was undercut by the dumped biodiesel imports from Indonesia and Argentina, which is the issue in the present case.

63. The burden is on Indonesia to substantiate its claims. Similarly to the preceding claims, Indonesia has failed to demonstrate that the IA's establishment of the facts was improper or that its evaluation of those facts was biased and lacked objectivity. Pursuant to the standard of review in Article 17(6)(i) of the Anti-Dumping Agreement the Panel must therefore reject this claim, even if the Panel considers that it might have reached a different conclusion.

64. Indonesia also submits that the IA failed to consider the existence of "significant price undercutting" in respect of the domestic product. Contrary to what Indonesia alleges, the European Union complied with the obligations in Article 3.1 and Article 3.2 first and second sentences. In the case at hand the IA based its injury determination on "positive evidence", involving an "objective examination" of both (i) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of these imports on domestic producers of such products.

65. Article 3.2 first sentence refers to the volume of the dumped imports, while Article 3.2 second sentence makes reference to the effect of the dumped imports on prices. A significant increase in volumes is relevant when the effect of the dumped imports results in a significant price undercutting, depresses prices or prevents price increases. That was the case in the investigation at issue, as explained in particular in recitals 126-127 of the Provisional Regulation. The Definitive Regulation refers to the price undercutting analysis in recitals 121-129.

66. One of Indonesia's key contentions is its reliance on the Appellate Body Report in *China – HP-SSST (Japan)* in support of the proposition that the IA was under an obligation to make a "dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI", whereas the period of investigation for the determination of injury includes the years 2009, 2010 and the first half of 2011.

67. The European Union recalls the particular facts of *China – HP-SSST*. In that case, the domestic price in China of Grade C HP-SSST increased by 112.80% from 2009-2010, while the price of the imports fell during that period. The Appellate Body thus completed the analysis.

68. However, the present case is different. The present case is not about domestic prices in the European Union increasing and exceeding the prices of the imports and thus leading to undercutting by the prices of imported biodiesel. There are no such evolutions in the present case.

69. Thus, the IA took into account the period comprising the years 2009, 2010 and the first half of 2011 for establishing price trends but only the IP (1 July 2011 until 30 June 2012) for the purpose of establishing the price undercutting (recitals 93 – 94 of Provisional Regulation). Then the IA analysed the effect of the dumped imports on prices and market share in recitals 123 – 128 of Provisional Regulation with respect to the period 2009- IP. The European Union also refers in this respect to recitals 121-129 and 144-147 of Definitive Regulation.

70. Finally, the European Union considers that each provision should be given effect and that there are differences in the analysis of injury (Article 3.2) and of the causal relationship (Article 3.5). To that effect, it is instructive the Appellate Body's statement in *China – GOES*, according to which the inquiry under Article 3.2 does not duplicate the different and broader examination regarding the causal relationship between the dumped imports and injury to the domestic industry pursuant to Article 3.5.

71. In light of the above, the European Union submits that Indonesia's claims with regard to the injury assessment should be rejected by the Panel.

2.6. INDONESIA'S CONSEQUENTIAL CLAIMS UNDER ARTICLE 9.3 OF ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF GATT 1994

72. The European Union refers to its observations regarding the facts and the legal assessment as presented in sections 2.1 and 2.2 above.

2.7. ARTICLES 7.1, 7.2, 9.2 AND 9.3 OF ANTI-DUMPING AGREEMENT VIS-À-VIS CERTAIN ESTIMATES AT PROVISIONAL STAGE

73. Indonesia has clarified during the meetings with the Panel and subsequently confirmed in its responses to the Panel's questions that it does not challenge the provisional measure as such but only the fact that the definitive measure ordered the definitive collection of a provisional duty that was in excess of the correctly calculated provisional dumping margin for the Musim Mas Group.

74. Accordingly, the European Union considers that Indonesia's claims under Articles 7.1, 7.2, 9.2 and 9.3 (*chapeau*) of Anti-Dumping Agreement are misplaced. While Article 7 concerns provisional measures, certain aspects of the definitive measure have to comply with the provisions of Articles 10.3 and 10.5 of Anti-Dumping Agreement.

75. *First*, the European Union considers that there is no obligation under the Anti-Dumping Agreement not to definitively collect, in whole or in part, provisional security in cases where errors were made in calculating the provisional duty rate that resulted in the imposition of a provisional measure in excess of the amount that should otherwise have been collected. According to Article 10.3 first sentence, if the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. The European Union respected this provision and did not collect the difference between the definitive and the provisionally estimated duties.

76. There is no need to correct demonstrated errors in the calculation of the provisionally estimated margin of dumping and then adjust the provisional margin of dumping in cases where the definitive anti-dumping duty is determined to be higher than the provisional duty, like in the present case.

77. Thus, the European Union did not breach any obligation in Articles 10.3 and 10.5 of Anti-Dumping Agreement and this explains why Indonesia attempted to place its claims under different provisions, which, however, do not govern the matter at issue. Those provisions (Articles 7.1, 7.2) govern only provisional measures and the Provisional Regulation is not challenged by Indonesia.

78. *Second*, Indonesia's claims with respect to the provisional determination in this case should have been made under Article 2 of Anti-Dumping Agreement. Indonesia agreed during the hearings that this would be the relevant provision. However, with respect to this specific issue, Indonesia has no claim under Article 2 of the Anti-Dumping Agreement, and it also has no claim under Article 10.3 of the Anti-Dumping Agreement. The fact that Indonesia has other claims under Article 2 is of no assistance to Indonesia. Such an issue is therefore not within the Panel's terms of reference.

79. The *chapeau* of Article 9.3 provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This means that a violation of Article 2 can have as a consequence a violation of Article 9.3. Thus, a claim under Article 2 is required in the first place. As Indonesia has consequential claims in the present proceedings under Article 9.3, but with respect to a different matter, it should have followed the same path in the case of the definitively collected provisional duties: Indonesia should have had a claim under Article 2 in the first place.

80. Were the Panel to find that Indonesia's claims are properly placed under Articles 7.1, 7.2, 9.2 and 9.3 (*chapeau*) of Anti-Dumping Agreement, the European Union submits that the very conditions provided in those provisions are not met.

81. *First*, the European Union recalls that Article 7.2 speaks of anti-dumping duties and dumping margins *provisionally estimated*. Article 7.2 addresses those provisional determinations which are in the nature of estimates of approximate magnitudes of the dumping margin and of the corresponding anti-dumping duty to be imposed and collected.

82. Thus, the "calculation errors" in the Provisional Regulation to which Indonesia refers to are in fact provisional *estimates* within the meaning of Article 7.2 of Anti-Dumping Agreement. This interpretation is in line with the existing case law, such as the panel reports in *Canada — Welded Pipe* and in *US — Customs Bond Directive*. Third parties like the United States agree with the EU's understanding of Articles 7.1 and 7.2 of the Anti-Dumping Agreement.

83. Indonesia fails to take into account the fact that the purpose of a provisional anti-dumping duty, as provided by the respective provisions of the Anti-Dumping Agreement, is to be a preliminary *estimate*, of a provisional character.

84. With regard to the contextual relevance of the detailed obligations in Article 2 of Anti-Dumping Agreement to the interpretation of the term "provisionally estimated margin of dumping" the European Union notes that Article 2.2 contains obligations with respect to the establishment of

the normal value, Article 2.3 refers to the export price and Article 2.4 provides that a fair comparison shall be made between the normal value and the export price. These obligations apply to both provisional estimates of the margin of dumping and definitive determinations. In other words, in making a provisional estimate an IA will take into account the same elements- normal value, export price, fair comparison- as in the case of a final determination of the margin of dumping.

85. However, the difference is that by its very nature a provisional estimate cannot be expected the same degree of precision as a definitive determination. Even if in its practice the European Commission conducts verifications at provisional stage, the provisional estimates are still provisional in nature and can and may suffer changes till the definitive stage.

86. The European Union explained that the Provisional Regulation was adopted on the basis of the information that the IA had at its disposal at that moment in time; the dumping margin and the corresponding anti-dumping duties are mere estimates, as required by the Anti-Dumping Agreement. After the adoption of a provisional regulation, the IA discloses its findings (estimates) to interested parties and receives comments that may lead – or not - to a revision of those provisional findings (estimates). This is inherent to all anti-dumping investigations.

87. The European Union also notes that differences between provisional and definitive measures exist under other agreements. For instance, in the framework of the SPS Agreement provisional measures may be taken under Article 5.7, while Article 5.1 requires a "more objective" risk assessment. The *category* of information or data (defined in abstract terms) to be considered in a risk assessment is the same under Article 5.1 and Article 5.7. In both cases, it is contextually informed by the language of Articles 5.1, 5.2 and 5.3 and the definition of risk assessment in Annex A(4). The difference between an Article 5.1 situation and an Article 5.7 situation does not relate to the abstract delimitation of the category of data that might be relevant, but rather relates to the extent to which the category is *populated by data*.

88. *Second*, the European Union is not aware of any treaty language in the Anti-Dumping Agreement that refers, in the context of Article 7, to "*clerical errors*", or seeks to distinguish "clerical errors" from matters arising from "incomplete or unverified information". The dispute must be determined by reference to the terms actually used in the treaty and a panel cannot read something into the Anti-Dumping Agreement that is not there.

89. *Third*, the language in Article 7 ("provisional"/"preliminary"/"estimated") (eleven references) is used with respect to *the measure as a whole*, not with respect to some particular element of the measure, as alleged by Indonesia.

90. *Fourth*, Articles 9.2 and 9.3 are of no assistance to Indonesia, because at most the term "appropriate" in Article 9.2 simply re-directs the Panel to the terms "preliminary"/"provisional"/"estimate" in Article 7 and Article 9.3 re-directs the Panel to Article 2, whereas Indonesia has no respective claims under Article 2. "Appropriate" in the context of a provisional measure is different from "appropriate" in the context of a definitive measure.

91. With respect of the re-opening of the investigation, the European Union notes that the IA provided the interested parties with a general disclosure document on 3 July 2017. However, that is not a final determination.

92. In the light of the above, the European Union submits that the Panel should reject Indonesia's claims with respect to the definitive collection of the provisional anti-dumping duties imposed on the products at issue from the Musim Mas Group.

3. CONCLUSION

93. Indonesia has failed to make a *prima facie* case on its claims. The European Union has shown that the claims pursued and developed in Indonesia's submissions in these proceedings are unfounded and based on erroneous arguments. The European Union respectfully requests the Panel to reject Indonesia's claims.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

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ANNEX C-1**EXECUTIVE SUMMARY OF THE ARGUMENTS
OF ARGENTINA****EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF ARGENTINA****Introduction**

1. Argentina set forth its views because of its systemic and trade interest in the correct interpretation of certain obligations contained in the legal provisions of the Anti-Dumping Agreement and the GATT 1994.

Claims under Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement

2. With regard to the claims related to Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina agrees with Indonesia¹ that the facts which constitute the basis for the Indonesian claim are identical to the facts that formed part of the *EU – Biodiesel* case. Consequently, Argentina considers that the Panel should find that the European Union acted inconsistently with:

- Article 2.2.1.1 of the Anti-Dumping Agreement by having failed to calculate the normal value of the product under consideration in accordance with costs actually incurred by the investigated companies, even when the actual costs were recorded in accordance with generally accepted accounting principles in the exporting country and were reasonably reflected in the accounting records of the companies investigated; and
- Article 2.2 of the Anti-Dumping Agreement by having failed to construct the normal value of biodiesel in Indonesia on the basis of the cost of production in the country of origin.

Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement

3. With regard to Indonesia's claim relating to Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement, although the use of "any other method" to determine the amounts for profits of the producers and/or exporters under investigation grants some margin of discretion to the investigating authority, the method chosen for calculating the amount for profits must be "reasonable" under the terms of Article 2.2.2(iii) of the Anti-Dumping Agreement.

4. Argentina considers that the amount calculated for profits through the application of the reasonable method selected shall always be limited by "... the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", as provided in subparagraph (iii) of Article 2.2.2 of the Anti-Dumping Agreement.²

Articles 2.3 and 2.4 of the Anti-Dumping Agreement

5. Concerning the claim linked to Articles 2.3 and 2.4 of the Anti-Dumping Agreement³, there is no indication in those articles that the double counting premium can be deducted from the export price, even where the "monetary consideration" therefor is transferred at a later time in accordance with the payment conditions and modalities agreed by the parties. In Argentina's view, the European Union's analysis of the facts and legal treatment of the "double counting premium" would not appear to be consistent with the obligations under those articles.

¹ Indonesia's first written submission, paras. 45 and 100.

² Indonesia's first written submission, paras. 143-145.

³ Ibid, paras. 205 to 215.

Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

6. In respect of the claims relating to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the facts forming the basis of the Indonesian claim⁴ are identical to the facts at issue in *EU – Biodiesel*. Consequently, the Panel should reach the same conclusions and make the same recommendations as the Panel and Appellate Body in that dispute.

Articles 7.1, 7.2, 9.2 and 9.3 of the Anti-Dumping Agreement

7. Argentina, like Indonesia, argues that provisional measures in the form of provisional anti-dumping duties are conditional on a preliminary affirmative determination of dumping – in accordance with the provisions of Articles 7.1 and 7.2 of the Anti-Dumping Agreement – and of injury in accordance with Articles 9.2 and 9.3 of the Anti-Dumping Agreement. Furthermore, the provisional anti-dumping duty determined may not exceed the margin of dumping calculated in accordance with Article 2 of the Anti-Dumping Agreement.

8. Argentina takes the view that there is no provision in the Anti-Dumping Agreement that permits investigating authorities to fulfil their obligation to objectively examine positive evidence with different levels of stringency.

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF ARGENTINA

1. PRELIMINARY OBSERVATIONS

9. Following the *EU – Biodiesel* case⁵, the present dispute has legal importance in relation to two central articles of the Anti-Dumping Agreement, Articles 2.2.1.1 and 2.2, particularly as regards whether these rules, when applied to the construction of normal value, authorize WTO Members to (1) not take into account actual costs incurred by the producer simply because the investigating authority disregarded them as a result of government intervention; (2) replace those costs with other costs in the country of origin that are presumably not affected by such distortion; and (3) determine the existence of dumping and the imposition of anti-dumping duties on a basis other than the individual behaviour of the producers and exporters under investigation.

10. To begin with, Argentina would like to emphasize that the arguments set out by Indonesia in relation to the calculation of production costs under Article 2.2.1.1 and the construction of such costs in the country of origin under Article 2.2 of the Anti-Dumping Agreement are in essence indistinguishable from those made by Argentina in *EU – Biodiesel*.⁶ The European Union does not appear to challenge Indonesia's characterization of the facts presented, nor does it rebut the substantive arguments put forward by Indonesia in the light of those provisions.⁷

11. Argentina agrees with Indonesia and other third parties⁸ in this dispute that Article 11 of the DSU requires the Panel to make an objective assessment of the matter before it. However, Indonesia's arguments in respect of Articles 2.2 and 2.2.1.1 merited the same findings of inconsistency with the Anti-Dumping Agreement as those made in the *EU – Biodiesel* case.⁹

2. INDONESIA'S SUBSTANTIVE CLAIMS REGARDING THE DUMPING DETERMINATION

1. Indonesia's claims relating to the calculation of the cost of production on the basis of the records kept by the producer under investigation (Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994)

12. In its first written submission, Indonesia argues that the European Union acted inconsistently with the obligations set forth in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because it failed to calculate the cost of production on the basis of the

⁴ Indonesia's first written submission, paras. 45 and 100.

⁵ *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (DS473).

⁶ Indonesia's first written submission, paras. 45 and 100.

⁷ European Union's first written submission, paras. 5–16.

⁸ United States' third party written submission, paras. 4–5.

⁹ Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, paras. 6.19, 6.20, 6.22, 6.25, footnote 130, 6.30, 6.39, 6.56, 6.81 and 6.82.

records kept by the Indonesian producers/exporters under investigation, given that the costs reflected in the accounting records were distorted as a result of the application of the "differentiated export tax (DET) system".¹⁰

13. Argentina recalls that in *EU – Biodiesel*, the Appellate Body found that the second condition in the first sentence of Article 2.2.1.1 "... relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".¹¹

14. Thus, the second condition in the first sentence of Article 2.2.1.1 clearly rules out any interpretation that might allow the investigating authority to examine the hypothetical costs that should have been incurred by producers/exporters in normal circumstances, that is, in the absence of the alleged distortion caused by government intervention, as opposed to an investigation of the costs actually incurred by the producer/exporter under investigation.¹² Secondly, it also rules out any interpretation that might allow the investigating authority to conclude that the costs actually incurred are not reasonably reflected in the accounting records and thus to reject them in order to address the economic effect of the governmental intervention on the alleged distortion of costs.¹³

2. Failure of the European Union to construct the normal value for the Indonesian products under investigation on the basis of the cost of production of biodiesel in the country of origin, i.e. Indonesia: violation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

15. Indonesia argues that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by not using production costs in the country of origin to construct normal value and by replacing the costs of raw materials reported in the producers' records, i.e. the cost of production in the domestic market, with the reference export price, by virtue of which the differentiated export tax system distorts the cost of the input.¹⁴

16. Argentina recalls that, according to the Appellate Body in *EU – Biodiesel*, in calculating the cost of production under Article 2.2, the investigating authority is not prohibited from resorting to information other than costs contained in the records of exporters or producers, including in-country and out-of-country evidence. However, this does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin".¹⁵

3. The European Union acted inconsistently with Articles 2.2 and 2.2.2(ii) of the Anti-Dumping Agreement by failing to establish a cap for profits when calculating the normal value for the Indonesian producers under investigation

17. In its first written submission, Indonesia claimed that the European Union failed to calculate the cap for profit normally realized for other producers. Consequently, it also failed to ensure that the profit margin calculated in constructing the normal value did not exceed that cap, which meant that the anti-dumping measures in this dispute were inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement.¹⁶

18. Argentina recalls that Article 2.2.2(iii) uses the term "shall not exceed"; therefore, that calculation is mandatory for the investigating authorities.¹⁷ In consequence, Members are obliged not only to establish a cap, but also to guarantee that the profit thus determined will not exceed the cap, that is, the profits normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

¹⁰ Indonesia's first written submission, paras. 44, 45 and 51.

¹¹ Appellate Body Report, *EU – Biodiesel*, para. 6.21.

¹² Japan's third party written submission, paras 12 -13.

¹³ Brazil's third party written submission, para. 11.

¹⁴ Indonesia's first written submission, paras. 99-100 and 107.

¹⁵ Appellate Body Report, para. 6.73.

¹⁶ Indonesia's first written submission, paras. 118, 130, 131, 136 and 145.

¹⁷ Panel Report, *EC – Bedlinen*, para. 6.97, cited in Indonesia's first written submission, para. 138.

19. Argentina maintains that the above-mentioned obligation exists in each and every case. In fact, it observes that this provision does not establish any exception or qualification.¹⁸ Earlier panel reports support this position.¹⁹

4. Inconsistent application and final collection of provisional duties: Articles 7.1, 7.2, 9.2 and 9.3 (chapeau) of the Anti-Dumping Agreement

20. Indonesia contends, first of all, that the European Union acted inconsistently with Article 7.1 of the Anti-Dumping Agreement because it applied provisional measures to Indonesian producers based on a finding of dumping inconsistent with Articles 7.2, 9.2 and the chapeau of Article 9.3, insofar as it imposed a provisional measure on imports from one Indonesian producer in excess of the provisionally estimated margin of dumping for that producer.²⁰

21. Argentina agrees with the European Union that a provisional determination could be subject to changes in accordance with the subsequent findings reached by the investigating authority in the final determination.²¹ However, in order for a Member to apply a provisional measure consistent with the Anti-Dumping Agreement, it must be as a result of a provisional dumping determination in accordance with Article 2, otherwise the provisional anti-dumping duties will be collected in excess.

22. Argentina considers that it would be incorrect to interpret paragraphs 1 and 2 of Article 7 of the Anti-Dumping Agreement in such a way as to permit Members to apply provisional measures based on a provisional margin of dumping that has been established in violation of Article 2 of the Anti-Dumping Agreement, using the argument that the amount of the definitive anti-dumping duty would ultimately be higher or that the "lesser duty" rule would be applicable.²²

23. The latter interpretation finds additional support in the text of Article 12.2 of the Anti-Dumping Agreement, which requires the investigating authorities to provide sufficiently detailed explanations for the preliminary determinations on dumping, including "... the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2".

¹⁸ United States' third party written submission, para. 18.

¹⁹ Panel Report, *EU – Footwear (China)*, para. 6.52, cited in Indonesia's first written submission, para. 140.

²⁰ Indonesia's first written submission, para. 285.

²¹ European Union's first written submission, paras. 132-139.

²² European Union's first written submission, paras. 126 and 142.

ANNEX C-2EXECUTIVE SUMMARY OF THE
ARGUMENTS OF AUSTRALIA**I. INTRODUCTION**

1. Australia welcomes the opportunity to present its views on the issues raised in this proceeding.
2. In its oral submission, Australia would like to briefly comment on the interpretation and application of Articles 2.2, 3 and 7.2 of the *Anti-Dumping Agreement*, in the context of the current dispute.

II. CALCULATING NORMAL VALUE UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

3. First, I turn to the calculation of normal value under Article 2.2 of the *Anti-Dumping Agreement*. Australia observes that many of Indonesia's arguments in this dispute rest on the findings in the *EU – Biodiesel* dispute.¹ Yet in Australia's view, Indonesia's claims do not accurately reflect the outcomes of that dispute. In particular, Indonesia contends the findings in *EU – Biodiesel* preclude any departure from the records of the producer for the purposes of the calculation of normal value under **Article 2.2.1.1**.² However, in Australia's view, the Appellate Body in that dispute took a more nuanced approach.³ For example, when endorsing the Panel's view regarding the application of the second condition in the first sentence of Article 2.2.1.1, the Appellate Body noted:

...the Panel explained that its understanding of this condition does not imply that "what is recorded in the records of the producer or exporter must be automatically accepted."⁴

4. Thus, the Appellate Body has made clear, an Investigating Authority is free to examine other sources, for example to determine "whether all costs incurred are captured; whether the costs incurred have been over- or understated; and whether non-arms-length transactions or other practices affect the reliability of the reported costs".⁵

5. Further, in this dispute the EU has asked, as it did in the *EU – Biodiesel* dispute, that the phrase "shall normally be calculated" in Article 2.2.1.1 not be subject to legal assessment by the Panel in this dispute.⁶ Australia regards this request as appropriate in the context of this dispute, as it was in the prior dispute. Australia observes that this is consistent with the view taken by the Appellate Body in *EU – Biodiesel*, which stated:

Thus, for the purposes of resolving this dispute, it is the meaning of [the second condition in Article 2.2.1.1] that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply.⁷

6. Thus, Australia respectfully encourages the Panel to take a similar view and to confine its examination of Article 2.2.1.1 to those interpretive questions which are within the scope of the current dispute.

¹ Indonesia's First Written Submission, paras. 45-46, 91-95.

² Indonesia's First Written Submission, para. 78.

³ Appellate Body Report, *EU – Biodiesel*, paras. 6.41 and 6.56.

⁴ Appellate Body Report, *EU – Biodiesel*, para. 6.41.

⁵ Appellate Body Report, *EU – Biodiesel*, para. 6.41.

⁶ EU's First Written Submission, para. 10.

⁷ Appellate Body Report, *EU – Biodiesel*, footnote 120.

7. In relation to the Panel's consideration of the EU's calculation of profits under **Article 2.2.2 (iii)** of the *Anti-Dumping Agreement*, Australia observes that the Panel in *EU – Biodiesel* said:

The reasonableness of the method used under Article 2.2.2(iii) for determining the profit margin turns on whether it is rationally directed at approximating what that margin would have been if the product under consideration were sold in the ordinary course of trade in the domestic market of the exporting country.⁸

8. Thus, it is not a question of specifying a particular methodology, but rather to assess the method applied by an Investigating Authority in any given case to determine whether it is "rationally directed at approximating what the margin would have been".

9. In Australia's view, the EU has demonstrated in paragraphs 25 – 38 of its first written submission that its approach was "rationally directed" at approximating a product's profit margin in this particular set of circumstances. Australia further recalls that in *EU – Biodiesel*, the EU used a consistent methodology to construct a profit margin around relevant credit costs, comparable industry profit rates, and local biodiesel producer profits. On that basis, the Panel in that dispute found the resulting 15% profit rate attributed to Argentinean producers was reasonable.⁹ Similarly, Australia considers that the EU's calculation of profits in the current dispute was determined by "any other reasonable method", as provided for under Article 2.2.2 (iii) of the *Anti-Dumping Agreement*.

III. CALCULATING INJURY UNDER ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

10. In respect of the EU's injury assessment under **Article 3** of the *Anti-Dumping Agreement*, Indonesia contends that the EU's treatment of biodiesels with different melting points, and the subsequent measurement of which parts of the EU's domestic industry suffered injury, was inconsistent with the EU's WTO obligations.

11. However, in Australia's view, the EU's approach was appropriate and consistent with Article 3 of the *Anti-Dumping Agreement*. Under Article 3, Investigating Authorities are required to make an "objective examination" of "positive evidence" when investigating whether injury can be attributed to dumping.¹⁰ The Appellate Body found in *US – Hot Rolled Steel* that the Investigating Authority must investigate the impact on domestic industry in an "unbiased manner, without favouring the interests of any particular party".¹¹ Where choices are made that require the exercise of discretion, the Investigating Authority "should provide a satisfactory explanation" to justify its approach.¹²

12. The EU has satisfactorily explained its approach to considering the differences between the melting points of EU and Indonesian biodiesels when completing its price undercutting calculations.¹³ In Australia's view, in doing so, the EU has met the objectivity requirements in Article 3 of the *Anti-Dumping Agreement* as set out by the Appellate Body in *US – Hot Rolled Steel*.

IV. CALCULATING PROVISIONAL REMEDIES UNDER THE ANTI-DUMPING AGREEMENT

13. Finally, in the calculation of provisional remedies under the *Anti-Dumping Agreement*, Australia is of the view that **Article 7.2**, which defines how provisional measures may be levied during an anti-dumping investigation, makes clear that provisional duties are to be based on the "provisionally estimated margin of dumping". Therefore, Australia submits that the word "estimated", unlike subsequent references in the *Anti-Dumping Agreement* to "final determinations", implies a degree of variation from final determinations is permitted.

⁸ Panel Report, *EU – Biodiesel*, para 7.337.

⁹ Panel Report, *EU – Biodiesel*, paras. 7.349–7.351.

¹⁰ *Anti-Dumping Agreement*, Article 3.1.

¹¹ Appellate Body Report, *US – Hot Rolled Steel*, para. 204.

¹² Appellate Body Report, *US – Hot Rolled Steel*, para. 204.

¹³ EU's First Written Submission, paras. 81-97.

V. CONCLUSION

14. Australia thanks the Panel for the opportunity to address these issues at today's meeting.

ANNEX C-3**EXECUTIVE SUMMARY OF THE
ARGUMENTS OF BRAZIL****I. Introduction**

1. Brazil welcomes the opportunity to present its views on the legal matters at issue in this dispute. In this Third Party Submission, Brazil will address the legal standard for constructing the normal value under Article 2.2.1.1 of the Antidumping Agreement (ADA), with focus on the Appellate Body's jurisprudence in *EU – Biodiesel (Argentina)*. It will also briefly address whether the European Union's price undercutting analysis is in line with the requirements under Articles 3.1 and 3.2 of the ADA.

II. The legal standard under Article 2.2.1.1 of the ADA

2. Indonesia relied heavily on the Appellate Body jurisprudence in *EU – Biodiesel (Argentina)* to argue its case. There is no question that the Appellate Body ruling in *EU – Biodiesel (Argentina)* is relevant to this dispute. In both cases, the European Union (EU) considered that export tariffs applied to soybeans (inputs in the production of biodiesel) resulted in domestic prices for this product being artificially lower than international prices. Accordingly, when calculating the normal value for biodiesel, the EU found it proper to disregard the records kept by the producers and resort to a "surrogate price for soybeans" (an external benchmark).

3. Brazil would like to recall, however, that the Appellate Body's ruling in *EU – Biodiesel (Argentina)* is circumscribed to the factual circumstances of that case. In this sense, if indeed the factual circumstances are the same (or practically the same) as in *EU – Biodiesel (Argentina)*, it is only logical that the Panel should follow the Appellate Body's guidance in interpreting the obligation under Article 2.2.1.1 of the ADA.

4. Brazil, however, would caution the Panel against overstretching the boundaries of the Appellate Body's ruling in *EU – Biodiesel (Argentina)*. The way Brazil sees it, in these proceedings, Indonesia's reasoning seems to be based on the same flawed premises that "no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do" as the European Union has put it in its appeal in *EU – Biodiesel (Argentina)*.¹

5. Yet the Appellate Body has made it clear that its reading of the legal standard under Article 2.2.1.1 of the ADA is more nuanced than that.²

6. Firstly, in paragraph 6.33 of its report on *EU – Biodiesel (Argentina)*, the Appellate Body referred to several instances in which investigating authorities are authorized to depart from the records kept by producers when calculating the normal value. It explained that:

"[R]ecords that are GAAP-consistent may nonetheless be found not to reasonably reflect the costs associated with the production and sale of the product under consideration. This may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records, or where transactions involving such inputs are not at arm's length."³

¹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.40.

² *Ib.*, para. 6.41.

³ *Ib.*, para. 6.33.

7. The Appellate Body further clarified that there may be circumstances where the obligation to calculate the cost on the basis of the record kept by the exporter or producer does not apply. Please note that the Appellate Body did not limit those circumstances, nor established an exhaustive list, but merely mentioned transfer pricing as an example of such instances. In such cases,

"an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence."⁴

8. Moreover, it is important to note that the Appellate Body considered that the phrase "the cost of production in the country of origin" does not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin".⁵ This means that there may be circumstances when it would be appropriate for the investigating authority to rely on an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA.

9. Secondly, as previously pointed out, the Appellate Body's ruling in *EU – Biodiesel (Argentina)* is circumscribed to the specific factual circumstances of that case. One should recall that the EU based its determination that the producer's records do not reasonably reflect the cost of soybeans on the fact that the export tariff applied to soybean was around 20% higher than that applied to the exportation of biodiesel – export tariffs on soybean were 35% while export tariffs on biodiesel had a nominal rate of 20%, with an effective rate of 14.58% taking into account a tax rebate.

10. For the Appellate Body, however,

"the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel."⁶

11. Brazil understands that while the Appellate Body considered that the mere existence of an export tariff difference between the export tariffs to soybeans and biodiesel may not be "sufficient basis" for disregarding producers' records in calculating normal value, it did not state that the economic effects of export tariffs over the cost of inputs can never be a sufficient basis for concluding that the producers' records do not reasonably reflect the cost of production. While the economic effects of a 20% export tariff may not be deemed "sufficient" to modify production conditions in the domestic market, the impact of a 200% export tariffs on the market could arguably be found "sufficient". In other words, whether an export tariff or any other governmental measure that affect prices is a "sufficient basis" for disregarding producers' records needs to be assessed on a case-by-case basis, according to the actual effect of this restriction in the product at issue.

12. Furthermore, Brazil would like to recall that in *EU – Biodiesel (Argentina)*, the Appellate Body did not make any findings regarding how Article 2.2.1.1 should apply to situations

⁴ *Ib.*, para 6.73. The Appellate Body has further clarified that, while the investigating authority may resort to alternative bases for calculating the cost of production, "[t]his, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin". Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects. It is in this sense that we understand the Panel to have stated that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 "require that the costs of production established by the authority reflect conditions prevailing in the country of origin". For Brazil, this passage makes it clear that the investigating authority can resort to an external benchmark as long as such benchmark is an appropriate proxy for the cost of production in the country of origin.

⁵ *Ib.*, para. 6.74.

⁶ *Ib.*, para. 6.55.

where the prices of inputs are subject to other restrictions, such as price controls. Indeed, in paragraph 60 of its First Written Submission, Indonesia itself specifically distinguishes the situation "where the State interferes directly on the market by setting or regulating the prices at an artificially low level" from that where domestic prices are lower than international prices "as a side-effect of the export tax system". While the Appellate Body in *EU – Biodiesel (Argentina)* has ruled on the latter, it made no findings whatsoever on the former.

13. Brazil considers that, depending on the magnitude of the intervention, a State interfering in the market to set or regulate the prices of raw materials at artificially low levels could be considered "sufficient basis" for investigating authorities disregarding producers' records under Article 2.2.1.1 of the ADA.

14. In sum, Brazil considers that the jurisprudence in *EU – Biodiesel (Argentina)* offers only limited guidance when assessing whether investigating authorities can resort to an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA. In deciding the present dispute, the Panel should be conscious of these limitations.

III. The EU's price undercutting analysis

15. Indonesia argues that the EU's price undercutting analysis was not based on the examination of positive evidence as provided in Articles 3.1 and 3.2 of the ADA. Indonesia notices that, for the purpose of the price undercutting analysis, the EU decided to make a price comparison between the imported and domestic biodiesel on the basis of the "cold filter plugging point" (CFPP). More specifically, because of the "very small volume" of sales of Union producers at CFPP +13°C, the European Commission compared prices of Indonesian imports at CFPP +13°C with the sales of Union producers of biodiesel at CFPP 0°C.

16. Although Brazil does not take a position on the factual aspects of this case, it understands that what is at stake in the Panel's assessment of Articles 3.1 and 3.2 of the ADA is the internal coherence in the EU's price undercutting analysis. In this regard, Brazil notices that, on the one hand, the EU understood that its product with CFPP +13°C could not be used for comparison with the subject product containing the same characteristics because of the "very small volume" of sales of this EU product. However, on the other hand, the same "very small volume" was considered to be sufficient when proposing the amount of adjustment in the prices of the Indonesian product. It seems to Brazil that if CFPP +13°C was disregarded from the first calculation because of its low volume, it should also have been disregarded from the second as well.

ANNEX C-4**EXECUTIVE SUMMARY OF THE
ARGUMENTS OF CHINA****I. INTRODUCTION**

1. China welcomes the opportunity to file this submission in the dispute *European Union – Anti-Dumping Measures on Biodiesel from Indonesia* (DS480) ("*EU – Biodiesel (Indonesia)*"). China intervenes because of its systemic interest in the correct interpretation of the relevant provisions of the covered agreements, in particular the provisions of Article 2.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "*Anti-Dumping Agreement*"), and would like to present its view.

II. ARTICLE 2.2.1.1 STIPULATES TO CALCULATE THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS

2. Article 2.2.1.1 governs the calculation of a producer's costs of production for the purpose of constructing normal value. Specifically, an investigating authority must calculate the producer's costs on the basis of the producer's records, provided that these records: (i) are in accordance with the generally applicable accounting principles ("GAAP") of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under investigation.

3. The Appellate Body stressed in *EU – Biodiesel* that the term "reasonably reflect the costs associated with the production and sale of the product" in Article 2.2.1.1 refers to whether "the records kept by the exporter or producer suitably and sufficiently correspond or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the *specific product under consideration*".¹

4. Namely, Article 2.2.1.1 does not permit an authority to reject a producer's properly recorded costs through a comparison with *hypothetical* costs that might prevail in a *hypothetical* market not available to the investigated producer in the country of origin.

5. Furthermore, the requirement under Article 2.2 to use the costs of production "in the country of origin" demonstrates that the relevant production costs are not hypothetical costs derived from a hypothetical market. Rather, they are the costs incurred "in the country of origin".

6. Therefore, the ordinary meaning of the first sentence of Article 2.2.1.1, considered in the light of its context, allows an authority to reject a producer's GAAP-compliant records if those records fail to reflect the "actual" costs incurred to produce the product under consideration. An interpretation in line with the customary rules of interpretation does not support the assertion that recorded costs may be benchmarked against the hypothetical costs that would be borne by a producer in a theoretical market where the price of relevant inputs was not affected by governmental policy interventions.

III. ARTICLE 2.2 STIPULATES TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN

7. Article 2.2 of the *Anti-Dumping Agreement* sets forth how an investigating authority should establish normal value. It requires that domestic prices normally be used for the purpose of establishing normal value. In some circumstances, however, Article 2.2 recognizes that domestic prices may be unsuitable, for example, if such sales are not in the ordinary course of trade. In such a situation, an investigating authority has two options: it may base normal value on "a comparable price of the like product when exported to an appropriate third country", or, it may construct normal value on the basis of the "cost of production in the country of origin" plus administrative, selling and general costs and profit. Each of these methods aims to achieve a proxy

¹ Appellate Body Report, *EU – Biodiesel*, para. 6.26.

normal value as close as possible to the would-be domestic selling price:² sales must be to an "appropriate" third country at a "comparable" price and the costs of production must be the producer's costs in the "country of origin".

8. Furthermore, this is confirmed by the immediate and broader context of the term "cost of production" in Article 2.2. The immediate context sets forth that the "cost of production" is the "cost of production *in the country of origin*". This sets forth clearly that the cost *cannot* be a hypothetical cost that the producer "would have" incurred, if they bought the relevant input *outside* the country of origin. The context provided by Article 2.2.1.1 makes clear that the determination of costs "for the purpose of paragraph 2" is focused on describing the true costs of the producer of the *product under consideration*. Together, these contextual elements leave no doubt that the "cost of production" described in Article 2.2 is the *producer's* cost and not a *hypothetical* cost that does not reflect the true cost incurred by the producer to produce the product under consideration.

9. China recognizes that situations arise where a producer's true costs to produce the product are not reflected in its records, meaning that the "cost of production in the country of origin" must be determined through evidence other than the producer's own accounts. This may be the case, for example, where the producer's records cannot be used because the transaction is influenced by a non-arm's length pricing transfer with a related party, in which case the recorded cost may appear to be unreliable. To be clear, in such a case, the investigating authority may reject the producer's *records*, but may not deny the *true costs* of the producer of the product under consideration. The authority may look for evidence other than the producer's records, but, at the end of the day, it must determine or calculate the *true costs* of the producer of the product under consideration and not a *hypothetical* cost. To determine costs in such a case, the authority must clearly look for evidence *in the country of origin* because this evidence is the best evidence of the true cost to the producer "in the country of origin".

10. The Appellate Body also stressed in *EU – Biodiesel* that an investigating authority may not, when using out-of-country evidence, "simply substitute costs from outside the country of origin for the 'cost of production in the country of origin'"; rather "the investigating authority [is required] to adapt the information that it collects" [to the conditions of the country of origin].³

11. Thus, if no in-country evidence were available and out-of-country evidence had to be used, the out-of-country costs would have to be adjusted to ensure that the "cost of production" ascertained by the authority is a reflection of the producer's true costs to produce the product *in the country of origin*. Such necessary adjustments would include accounting for any differences in regulatory policies and any other factors exogenous to the producer than affect the cost of production. Ignoring such factors would mean that the external costs taken into consideration reflect conditions *outside* the country of origin and therefore could not be reflective of the producer's cost of production "in the country of origin".

IV. CONCLUSION

12. China thinks the legal issue in this case, in particular the legal interpretation of Article 2.2 of the *Anti-Dumping Agreement*, is highly relevant to that contained in the *EU – Biodiesel*, and requests the Panel to attach great importance to the rulings in that dispute, in order to keep the predictability and consistence of the dispute settlement system.

13. China thanks the Panel for its consideration of these comments.

² Panel Report, *Thailand – H-Beams*, para. 7.112.

³ Appellate Body Report, *EU – Biodiesel*, para. 6.73.

ANNEX C-5**EXECUTIVE SUMMARY OF THE
ARGUMENTS OF JAPAN**

1. In this proceeding, Japan addresses the interpretation of Articles 2.2, 2.2.1.1, 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA") and Article VI: 1(b) (ii) of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

I. INTERPRETATION OF ARTICLES 2.2.1.1 AND 2.2 OF THE ADA AND ARTICLE VI:1(B)(II) OF THE GATT 1994**i. The context for the interpretation of Articles 2.2.1.1 and 2.2 of the ADA and Article VI: 1(b) (ii) of the GATT 1994**

2. At the beginning, Japan would like to briefly touch on the overall structure of Article VI: 1 of the GATT 1994 and Articles 2.1, 2.2 and 2.2.1.1 of the ADA to the extent they pertain to the definition and calculation of "normal value". The first sentence of Article VI: 1 of the GATT 1994 provides that "dumping" is found to exist if products of one country are introduced into the commerce of another country at less than "the normal value" of the products. Article VI: 1(a) of the GATT 1994 and Article 2.1 of the ADA provide that a product is to be considered as being introduced into the commerce of another country at less than its normal value if the export price of the product is less than "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article VI:1(b) and Article 2.2 provide that, in the absence of the comparable domestic price, an investigating authority may rely on the alternative bases for establishing normal value, including, *inter alia*, "the cost of production [of the product] in the country of origin" plus a reasonable addition for selling cost and profit. Further, Article 2.2.1.1 sets forth a specific guidance for determining "the cost of production in the country of origin" for the purpose of Article 2.2.

3. As regards the calculation of normal value pursuant to Article 2.1 of the ADA, the Appellate Body explained in *US – Hot-Rolled Steel* that "Article 2.1 requires investigating authorities to exclude sales not made 'in the ordinary course of trade', from the calculation of normal value, precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with 'normal' commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value".¹ Thus, the Appellate Body understands the "normal value" calculated pursuant to Article 2.1 as the "'normal' price" of the like product "in the home market of the exporter". In particular, such normal price must be calculated based on sales prices that properly reflect "'normal' commercial practice" for sales of the like product "in the market in question". As such, if a sales price does not properly reflect normal commercial considerations, e.g. due to a non-arm's length transaction, such a price "is not an appropriate basis" for calculating normal value and must therefore be excluded.

4. With respect to the alternative methodologies set forth in Article 2.2, the Appellate Body in *EU – Biodiesel* has confirmed the interpretation adopted by the panels in prior disputes that the role of this provision is to generate an "appropriate proxy" for the price of the like product in the ordinary course of trade in the home market. The Appellate Body further explained that the costs calculated pursuant to Article 2.2.1.1 must also be "capable of generating such a proxy".² Accordingly, the proper interpretation of Article 2.2 and Article 2.2.1.1 should take into account the role of Article 2.2 to provide "an appropriate proxy" for "the price of the like product in the ordinary course of trade in the domestic market".

¹ Appellate Body Report, *US – Hot Rolled Steel*, para. 140. (underline added)

² Appellate Body Report, *EU – Biodiesel*, para. 6.24.

ii. Interpretation of Article 2.2.1.1 of the ADA

5. As evident from the text, the first sentence of Article 2.2.1.1 requires an investigating authority to "normally" calculate costs on the basis of records kept by the exporter or producer, "provided that" such records (1) are in accordance with the generally accepted accounting principles ("GAAP") of the exporting country; and (2) reasonably reflect the costs associated with the production and sales of the product under investigation.

6. With respect to the interpretation of "reasonably reflect the costs associated with the production and sale of the product under investigation" in the second condition (above (2)), Japan understands that the adverb "reasonably" modifies the verb "reflect", and there is no express requirement that "the costs" themselves be "reasonabl[e]".³ Further, as confirmed by the phrase "[f]or the purpose of paragraph 2" in the first sentence of Article 2.2.1.1 and the text of Article 2.2, "the costs" in Article 2.2.1.1 refers to the costs of production "in the country of origin" and not the costs in some other markets.⁴

7. Having said that, Japan would like to make three additional observations as regards the interpretation of the first sentence of Article 2.2.1.1. First, Japan notes the Appellate Body's interpretation of Article 2.2.1.1 in *EU – Biodiesel* that the GAAP-consistent records may nonetheless be found not to "reasonably reflect the costs associated with the production and sales of the product under consideration" in certain circumstances.⁵ The Appellate Body stated that such a situation may occur, "for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sales of the product under consideration are spread across different companies' records, or where transactions involving such inputs are not at arm's length".⁶ The Appellate Body further noted that "[t]o the Panel, an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated and whether non-arms-length transactions or other practices affect the reliability of the reported costs".⁷

8. It is notable that there may be situations other than the instances specifically mentioned above where an investigating authority may find that the reported costs do not "reasonably reflect the costs associated with the production and sales of the product under consideration", as the Appellate Body referred to these instances as only "example[s]", and there might be "other practices" that affect the reliability of the reported costs.

9. Second, Japan submits that "the costs" in the first sentence of Article 2.2.1.1 may not always be limited to the costs actually incurred by the exporter or producer. Japan finds support for this interpretation in the context of this provision. Specifically, given that Article 2.2.1.1 (in conjunction with Article 2.2) pertains to a methodology for obtaining an "appropriate proxy" for the price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market", "the costs associated with the production and sale of the product" under Article 2.2.1.1 must be of the kind that is capable of serving as an appropriate basis for estimating the would-be market price of the final product. Accordingly, in a case where, for example, the cost of an input actually incurred by the exporter or producer does not reflect normal commercial behaviours in the market for that particular input, such cost cannot be "the costs associated with the production and sale of the product" in the sense of Article 2.2.1.1, as the use of such a price would distort, rather than contribute to, the proper estimation of the market price of the final product.

10. Japan disagrees with Indonesia's reading of the Appellate Body report in *EU – Biodiesel* that the Appellate Body "in no unclear terms" confirmed that "the plain meaning of the terms of Article 2.2.1.1 [...] precludes any enquiry into 'reasonableness' of the recorded costs". In any event, in Japan's view, while Article 2.2.1.1 does not contain express reference to the general standard of "reasonableness", "the costs associated with the production and sale of the product"

³ See Appellate Body Report, *EU – Biodiesel*, para. 6.37.

⁴ See Appellate Body Report, *EU – Biodiesel*, para. 6.23.

⁵ Appellate Body Report, *EU – Biodiesel*, para. 6.33.

⁶ *Ibid.* (emphasis added)

⁷ Appellate Body Report, *EU – Biodiesel*, para. 6.41. (emphasis added)

under this Article must at least be a reflection of the normal functioning of the market in the country of origin, i.e. a cost capable of serving as an appropriate basis for estimating the would-be market price of the final product.

11. Third, Japan notes that the first sentence of Article 2.2.1.1 provides that an investigating authority shall "normally" use costs calculated on the basis of records kept by the exporter or producer, "provided that" the two prescribed conditions are met. The term "normally" is interpreted to mean "under normal or ordinary conditions; as a rule". Thus, the use of the term "normally" suggests that even where the two conditions contemplated in the "provided" clause in the first sentence are met, use of an exporter's or producer's records is not necessarily mandatory in every case, and an investigating authority may consider other available evidence in certain circumstances. Indeed, if the drafters of the first sentence of Article 2.2.1.1 had intended otherwise, they would have had no need to insert the word "normally", which would appear totally redundant.

12. Although we refrain from going into a detailed discussion on specific circumstances under which an investigating authority may be allowed not to rely on the recorded costs and instead may seek other evidence, we would like to highlight, again, that the costs calculated pursuant to Article 2.2.1.1 "must be capable of generating [an appropriate] proxy" to the normal value calculated pursuant to Article 2.1, which in turn is characterised by the Appellate Body as the "'normal' price" of the product that is compatible with "'normal' commercial practice" in the market of the country of origin. In other words, calculation of normal value under these provisions appears to presume that prices and/or costs used are reflective of a functioning market.

iii. Interpretation of Article 2.2 of the ADA and Article VI: 1(b) (ii) of the GATT 1994

13. With respect to the phrase "the cost of production [of the product] in the country of origin" in Article 2.2 of the ADA and Article VI: 1(b) (ii) of the GATT 1994, the Appellate Body in *EU – Biodiesel* explained that this phrase "may be understood as a reference to the price paid or to be paid to produce something within the country of origin".⁸ While Japan agrees with this statement, Japan submits that, as with the interpretation of Article 2.2.1.1, the phrase "the cost of production [of the product] in the country of origin" in Article 2.2 and Article VI: 1(b) (ii) should be interpreted in light of the role of these provisions to provide an "appropriate proxy" for the price of the like product if it were sold in the ordinary course of trade in the home market. Thus, "the cost of production [of the product] in the country of origin" under Article 2.2 and Article VI: 1(b) (ii) must serve as an appropriate basis for estimating the would-be market price of the product under investigation.

14. In this context, Japan notes that neither Article 2.2 nor Article VI: 1(b) (ii) contains additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin, as confirmed by the Appellate Body in *EU – Biodiesel*.⁹ As such, an investigating authority has the ability to use any out-of-country information including an international price as evidence, if doing so is necessary to properly determine "the cost of production [of the product] in the country of origin". In particular, Japan agrees with the Appellate Body's finding in *EU – Biodiesel* that an investigating authority may use international prices as evidence for establishing the cost of domestic production when, for example, domestic prices reflect international prices.¹⁰

15. To note, Japan is aware that an investigating authority is required under Article 2.2 to use out-of-country information in order to obtain the cost of production "in the country of origin" and not the cost in some other places. Thus, as the Appellate Body in *EU – Biodiesel* explained, "an investigation authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'" and "[c]ompliance with this obligation may require the investigating authority to adapt the information that it collects".¹¹ In essence, Japan understands that out-of-country information may be used to calculate the cost of production in the country of origin under Article 2.2 as long as an investigating authority ensures that such information is used

⁸ Appellate Body Report, *EU – Biodiesel*, para. 6.69. (emphasis added)

⁹ Appellate Body Report, *EU – Biodiesel*, para. 6.70.

¹⁰ Appellate Body Report, *EU – Biodiesel*, para. 6.81.

¹¹ Appellate Body Report, *EU – Biodiesel*, para. 6.73.

to "arrive at" the cost of production in the country of origin, which may require certain adaptation depending on the specific circumstances of each case.

II. INTERPRETATION OF ARTICLES 3.1 AND 3.2 OF THE ADA

16. Japan would like to make two brief comments as regards the price effects analysis, in particular the analysis of "significant price undercutting", under Articles 3.1 and 3.2 of the ADA. First, as confirmed by the Appellate Body in *China – GOES*, although there is no explicit requirement in Articles 3.1 and 3.2 of the ADA, an investigating authority must ensure price comparability when it compares prices for purposes of Articles 3.1 and 3.2.¹² For example, as the panel in *China – HP-SSST* found, when there are differences in quantities between the subject imports and the domestic like products, an investigating authority is required under Articles 3.1 and 3.2 to properly account for such differences in quantities when comparing the prices of subject imports and the like domestic products.¹³ Japan respectfully requests that the Panel carefully assess whether the European Union authorities ensured price comparability by properly addressing the purported differences in quantities of the products in question, in particular the "very small volume" of sales of the European Union producers at CFPP +13°C.

17. Second, as stated by the Appellate Body in *China – GOES*, the paragraphs of Article 3 of the ADA contemplate a "logical progression" of inquiry leading to an investigating authority's ultimate injury and causation determination.¹⁴ As such, the outcome of the price effects inquiry under Article 3.2 must be one that enables the investigating authority to advance its analysis so as to serve as "a meaningful basis" for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry.¹⁵ With respect to the interpretation of "price undercutting" contemplated in Article 3.2, in particular, the Appellate Body established in *China – HP-SSST* that a simple mathematical comparison between the prices of the dumped imports and the like domestic products does not suffice for the purpose of Article 3.2. Instead, the price comparison under Article 3.2 contemplates "a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI)".¹⁶

18. Japan considers that these statements by the Appellate Body mean that an investigating authority must not consider the price trends of the subject import *in isolation* from those of the like domestic products, but objectively examine any positive evidence pertaining to *interaction in the market* between the price of the subject imports and that of the like domestic products. In Japan's view, this interaction can be examined based upon the consideration of the degree of the *competitive relationship* between the subject imports and the domestic like products in conjunction with the dumping margin of dumped imports. For such examination, it does not suffice to examine separately whether there is any such competitive relationship in the abstract, detached from any consideration of the dumping margin.

19. Furthermore, the Appellate Body in *China – HP-SSST* found that, in order to assess whether the observed price undercutting is "significant", an investigating authority may, depending on the case, be required to "rely on all positive evidence relating to the nature of the product or product types at issue, how long the price undercutting has been taking place and to what extent, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting".¹⁷

20. Thus, with respect to Indonesia's allegation that the European Union industry sales of biodiesel at CFPP 0°C (with respect to which the European Union authorities found "significant price undercutting") constituted only around 42% of the sales of biodiesel of the sampled European Union producers, Japan submits that the Panel should carefully evaluate the relevant facts in this case and apply appropriate legal interpretations as established through the Appellate Body jurisprudence.

¹² Appellate Body Report, *China – GOES*, para. 200.

¹³ Panel Report, *China – HP-SSST*, para. 7.111-115.

¹⁴ Appellate Body Report, *China – GOES*, para. 128.

¹⁵ Appellate Body Report, *China – GOES*, para. 154.

¹⁶ Appellate Body Report, *China – HP-SSST*, para. 7.159. (emphasis added)

¹⁷ Appellate Body Report, *China – HP-SSST*, para. 5.161. (emphasis added)

ANNEX C-6EXECUTIVE SUMMARY OF THE
ARGUMENTS OF NORWAY

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. Without taking any position on the facts of this dispute, I will in this oral statement take the opportunity to offer some views on the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

2. Indonesia submits that the European Union acted inconsistently with the obligation laid down in the sentence referred to above since it did not calculate the costs on the basis of the records kept by the exporting producers under investigation.¹ Emphasizing the Appellate Body's interpretation of the first sentence of Article 2.2.1.1 in *EU – Biodiesel*, Indonesia submits that the said Article obliges the investigating authorities to calculate the costs based on the records kept by the exporter or producer when the two conditions set forth in the article are met. Furthermore, Indonesia submits that the test of reasonableness set forth in the second condition in the first sentence of Article 2.2.1.1 relates to the quality of the records as such, and does not include a general standard of reasonableness that allows investigation authorities to disregard the records in situations where the authorities find that the costs reflected in the records are "abnormally or artificially low", in comparison with hypothetical costs that might prevail in a hypothetical market.

3. As we know, the first sentence of Article 2.2.1.1 provides that

[f]or the purposes of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

4. A legal analysis of a WTO provision starts, of course, with an inquiry into the ordinary meaning of the terms. Article 2.2.1.1 uses the word "*shall*", which indicates that it establishes an obligation of some sort. In this case, the word "*shall*" is qualified by the terms "*normally*" and "*provided that*". We understand "*normally*" in this context to point to the existence of conditions, rather than to "*alter the characterization of [the] obligation as constituting a 'rule'*".²

5. The obligation on the investigating authorities, according to Article 2.2.1.1, is subject to two cumulative conditions:

- i) that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and
- ii) that such records reasonably reflect the costs associated with the production and sale of the product under consideration.

6. If these two conditions are fulfilled, the investigative authorities "shall normally" calculate the costs on the basis of records kept by the exporter or producer under investigation.

7. Regarding the meaning of the second condition in the first sentence of Article 2.2.1.1, Norway notes that the question regarding whether the test of reasonableness is related to the quality of the records as such was accurately clarified in the Appellate Body Report in *EU – Biodiesel*.

8. In our view the Appellate Body precisely stressed in *EU - Biodiesel* that "in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the Anti-Dumping Agreement, we understand this condition as referring to whether the records kept

¹ First Written Submission of Indonesia, para. 44.

² See Appellate Body Report, *United States – Clove Cigarettes*, para. 273.

by the exporter or producer sustainably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".³

9. Namely, the Appellate Body clearly underlines that the second condition of Article 2.2.1.1 relates to the quality of the records. It is the records that have to pass the test of reasonableness in regards to the costs incurred by the exporter or producer, not the costs as such.

10. Furthermore, Norway notes that the Appellate Body on this issue fully upheld the Panel Report in *EU – Biodiesel*, which clarified that *"the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical cost that might have been incurred under different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred"*.⁴

11. Norway recalls that the conclusions set forth in both the Panel Report and the Appellate Body Report in *EU – Biodiesel* are circumscribed to the facts of that case. The very basis of the system is that reports are binding only on the parties to the dispute. The Appellate Body has however underlined *"that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system."*⁵ Norway would add that by following previous Appellate Body reports, panels also contribute to ensuring fewer disputes and preserve both the system and the systemic function of the Appellate Body.

12. Madam Chair, Members of the Panel,

13. This concludes Norway's statement here today. Thank you.

³ Appellate Body Report, *EU – Biodiesel*, para. 6.26.

⁴ Panel Report, *EU – Biodiesel*, para. 7.242.

⁵ Appellate Body Report, *United States – Continued Zeroing*, para. 362.

ANNEX C-7**EXECUTIVE SUMMARY OF THE ARGUMENTS
OF RUSSIA****I. Introduction**

1. In this executive summary, the Russian Federation summarizes the views presented to the Panel in its third party written submission and its oral statement at the third party session of the first substantive meeting with the parties.

II. Costs of production used for construction of normal value under Article 2.2 of the Anti-Dumping Agreement

2. The Russian Federation is of a strong view that the costs under Article 2.2.1.1 of the Anti-Dumping Agreement are the costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the product under consideration.

3. The Appellate Body in *EU – Biodiesel (Argentina)* stated that "the context of Article 2.2 suggests that the second condition in the first sentence of Article 2.2.1.1 should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin".¹ If the investigating authority has to depart from the general obligation to calculate costs on the basis of records kept by the investigated producer, the costs used for the construction of normal value shall correspond to the price paid or to be paid to produce the product under consideration within the country of origin. It follows that the costs of production in no circumstances can be adjusted, established or refuted with a reference to information that does not have a genuine relation with the product under consideration produced in the country of origin.

4. An investigating authority should be extremely cautious with any costs data from sources other than the records kept by the exporter or producer under investigation to ensure that there is a genuine relation between such costs data, such as the input price paid, and the production of the product under consideration in the country of origin. It follows that, if in the construction of normal value an investigating authority includes an input price that has no genuine relation with the production of the product under consideration in the country of origin, such action will be inconsistent with Article 2.2 of the Anti-Dumping Agreement.

III. Evidence and costs for calculating the costs of production

5. The Russian Federation agrees with Indonesia that "there is an important distinction between the source of information, on the one hand, and the content of such information, on the other hand".² In this regard the Russian Federation disagrees with excessively broad interpretation suggested by Japan with respect to Article 2.2 of the Anti-Dumping Agreement that, if it "is necessary to properly determine "the cost of production [of the product] in the country of origin", an investigating authority can use "any out-of-country information including an international price".³

6. It would appear that for Japan, a situation where domestic prices reflect international prices is just one example of a situation when international prices may be used, i.e. in Japan's view the list of such situations is unlimited. Furthermore, Japan has stated that "an investigating authority is *required* (emphasis added) under Article 2.2 of the Anti-Dumping Agreement to use out-of-country information in order to obtain the cost of production "in the country of origin" and not the cost in *some other places*".⁴ The Russian Federation cannot agree with such reading of the applicable provisions.

¹ Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October (hereinfter – "*EU – Biodiesel (Argentina)*"), para. 6.23.

² Indonesia's first written submission, para. 115.

³ Japan's written submission, para. 17.

⁴ Japan's written submission, para. 19.

7. The records of the investigated exporters and producers are the main source of information for calculating the costs of production under Article 2.2.1.1 for the purposes of Articles 2.2.1 and 2.2 of the Anti-Dumping Agreement.⁵ The Appellate Body in *EU-Biodiesel (Argentina)* indicated that an investigating authority may have recourse to alternative basis to calculate costs for construction of normal value under Article 2.2 of the Anti-Dumping Agreement in two circumstances: where the obligation in the first sentence of Article 2.2.1.1 does not apply, or where relevant information from investigated exporter or producer is not available because of non-cooperation⁶. At the same time, the Appellate Body stressed: "[t]his, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin'".⁷

8. Furthermore, the Appellate Body indicated that if domestic prices in the exporting country happen to be the same as world prices, in such circumstances they can be simultaneously characterized as both international and domestic. So, contrary to Japan's proposition, the use of "international prices" as "domestic prices" in the country of origin is very limited. In all cases, where an investigating authority relies on information other than the records of investigated exporters and producers, it "has *to ensure* that such information is used to arrive at the 'cost of production [of the product] in the country of origin'".⁸

9. In addition, the Russian Federation would like to stress that through the adaptation of out-of-country information an investigating authority shall determine the producer's *true* costs to produce the like product in the country of origin. Necessary adjustments should account for any differences in regulatory policies and any other factors exogenous to the producer that affect the cost of production. Ignoring such factors would mean that the requirements of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 with respect to "the costs of production [of the product] in the country of origin" cannot be satisfied.

10. In this vein, the Russian Federation shares Indonesia's view that:

[T]he HPE was specifically selected to remove the perceived distortion in the domestic price of CPO caused by the Indonesian export tax system. This is because the prices prevailing in Indonesia were considered to be artificially lower than international prices. The European Union selected the HPE precisely because it was not the cost of CPO in Indonesia.⁹ (emphasis original)

11. However, the wording of Article 2.2 of the Anti-Dumping Agreement precludes the WTO Members to construct the normal value on the basis of anything other than "the cost of production in the country of origin", i.e. "the price paid or to be paid to produce something within the country of origin".¹⁰ The phrase "to be paid" under no circumstances can be interpreted as entitling the investigating authority to determine at its sole discretion the price of inputs the investigated producers would have pay in order for this price to be included as the cost of production in constructed normal value.

IV. Definition and calculation of normal value

12. The Russian Federation expresses strong concerns regarding the concept of "normal commercial considerations" proposed by Japan in its third party submission as a benchmark for the evaluation of costs reflected in the producer's records. According to Japan, "if a sales price does not properly reflect normal commercial considerations, ... such a price 'is not an appropriate basis' for calculating normal value and must therefore be excluded".¹¹ Similarly, Japan proposed estimating "the would-be market price" of the product under investigation for the purposes of calculation of costs of production under Article 2.2.1.1 and for calculating the constructed normal value under Article 2.2. The Russian Federation has a number of concerns with this interpretation.

⁵ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.46.

⁶ *Ibid*, para. 6.73.

⁷ *Ibid*.

⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

⁹ Indonesia's first written submission, para. 114.

¹⁰ Appellate Body Report, *EU – Biodiesel*, para. 6.69.

¹¹ Japan's written submission, para. 5.

13. The Russian Federation recalls that Article VI:1 of the GATT 1994 and provisions of Article 2 of the Anti-Dumping Agreement do not contain the phrase "normal commercial considerations". The test suggested by Japan cannot be incorporated or read into these provisions since there is no specific treaty language that would warrant, let alone support, such far-reaching interpretation. It seems the reference to the said test is solely based on the Appellate Body's observations in *US – Hot-Rolled Steel* mentioned in the course of its analysis regarding the "arm's length test" that was applied by the United States.¹²

14. At the same time, the Appellate Body clearly stated in the same report that according to Article 2.1 of the Anti-Dumping Agreement the "normal value" of a product is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".¹³ In other words, the "normal value" is the price of the like product in the home market of the investigated exporter or producer.

15. Moreover, in the view of the Russian Federation, the Panel should exercise caution when using or referring to the phrase "normal commercial considerations" in these proceedings. This phrase appears in Article XVII:1(b) the GATT 1994 which is aimed at preventing certain types of discriminatory behaviour by state trading enterprises (STEs). Even this provision, as the Appellate Body explained in *Canada – Wheat Exports and Grain Imports*, "does not give panels a mandate to engage in a broader inquiry into whether, in the abstract, STEs are acting 'commercially'".¹⁴ Moreover, the Appellate Body emphasized that there is "no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs". Any spill-over effect of Article XVII and related case law interpretations of Article VI:1 of the GATT 1994 and provisions of Article 2 of the Anti-Dumping Agreement should be avoided.

V. Interpretation of the first sentence of Article 2.2.1.1 of the Anti-dumping Agreement

16. The Russian Federation also disagrees with suggestion made by Japan that the word "normally" used in Article 2.2.1.1 of the Anti-Dumping Agreement implies that only prices and/or costs that meet "normal commercial considerations" could be used for calculation of production costs.¹⁵ According to this interpretation, an investigating authority will need to examine whether the cost of an input actually incurred by the investigated exporter or producer "reflect normal commercial behaviours in the market for that particular input".¹⁶ However, there is no legal basis for such a test in Article 2.2.1.1 of the Anti-Dumping Agreement. The Russian Federation fails to see how the "context" constructed through heavy reliance on selective extracts from the case law can constitute or help to establish "the context" of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement within the meaning of Article 31 of the Vienna Convention on the Law of Treaties.

17. The Russian Federation recalls the Appellate Body's explanation that the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement "identifies the records of the investigated exporter or producer as the preferred source for cost of production data, and directs the investigating authority to base its calculations of costs on such records when the two conditions are met".¹⁷

18. In the words of the Appellate Body, the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement calls for an assessment of "whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".¹⁸ This

¹² 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, 4697, (hereinafter – "US – Hot Rolled Steel") para. 140.

¹³ *Ibid.*, para. 164.

¹⁴ Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739 (hereinafter – "*Canada – Wheat Exports and Grain Imports*"), para. 145.

¹⁵ Japan written submission, paras. 11-15.

¹⁶ Japan written submission, para. 12.

¹⁷ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18.

¹⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

assessment establishes clear boundaries of what the investigating authority needs to examine when applying the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

19. Moreover, in the same paragraph the Appellate Body reflected its agreement with the Panel that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement does not include a general standard of "reasonableness". In particular, there is no legal basis for an investigating authority to use an additional or abstract standard to assess whether the recorded costs are "reasonable" or "representative" through a comparison with *hypothetical costs* that might have been incurred in a different set of circumstances. While such hypothetical costs may be created in theory, they are *not* available to the investigated producers in the country of origin of the product under consideration.

20. For the same reasons the Russian Federation disagrees with Japan's proposal for the estimation of "the would-be market price of the final product" in the course of application of Article 2.2.1.1 as well as Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.¹⁹ In addition, the Russian Federation recalls that "dumping is the result of the pricing behaviour of individual exporters or foreign producers". On the basis of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, the Appellate Body also confirmed in *EU – Biodiesel (Argentina)* that "this sentence is concerned with establishing the cost for *the specific exporter or producer* under investigation".²⁰ In the view of the Russian Federation, Japan's abstract concept of "would-be market price" does not correspond to the Appellate Body's reading of the relevant provisions of the Anti-Dumping Agreement.

21. The Russian Federation also disagrees with Brazil's suggestion for conducting the evaluation of the effect of a governmental measure on input prices and weighing its magnitude as part of the analysis under the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement. In particular, Brazil stated that "depending on the magnitude of the intervention, a State interfering in the market to set or regulate the prices of raw materials at artificially low levels could be considered 'sufficient basis' for investigating authorities to disregard producers' records under Article 2.2.1.1 of the Anti-Dumping Agreement".²¹

22. First, the Appellate Body in *EU – Biodiesel (Argentina)* clarified that under the second condition of the first sentence of Article 2.2.1.1 investigating authorities need only to check whether the records of investigated exporters or producers "suitably and sufficiently correspond to or reproduce" their costs incurred in connection with the production and sale of the product under consideration.²²

23. Secondly, neither the text nor the context of Article 2.2.1.1 of the Anti-Dumping Agreement authorizes an investigating authority to examine if a governmental measure of the exporting country is capable of distorting raw material prices and, as a result, influencing the prices of the product under investigation. Furthermore, the Appellate Body in *EU – Biodiesel* excluded "an examination of the 'reasonableness' of the reported costs themselves" if the second condition of Article 2.2.1.1 is satisfied.²³

VI. Conclusion

24. The Russian Federation hopes that its views will be useful to the Panel.

¹⁹ See Japan written submission, paras. 13,16.

²⁰ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.17.

²¹ Brazil's written submission, para. 13.

²² Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

²³ Appellate Body Report, *EU – Biodiesel (Argentina)* para. 6.37.

ANNEX C-8**EXECUTIVE SUMMARY OF THE
ARGUMENTS OF TURKEY****I. INTRODUCTION**

1. The Republic of Turkey (hereinafter Turkey) would like to thank the Panel for the opportunity to share its views as a Third Party in the current proceedings. Turkey makes this oral submission due to its systemic interest in the correct and coherent interpretation of the Agreement on Implementation of Article VI of GATT 1994 (hereinafter Anti-Dumping Agreement).

2. Turkey will not elaborate on the particular facts presented by the Parties. Rather, Turkey would like to share its views on issues addressed by the European Union (hereinafter referred to as EU) and the Republic of Indonesia (hereinafter referred to as Indonesia) in their first written submissions pertaining to Article 2.2.2 of the AD Agreement.

II. CLAIMS AND RESPONSES OF THE PARTIES CONCERNING ARTICLE 2.2.2 OF THE ANTI-DUMPING AGREEMENT

3. In its first written submission Indonesia claims that the EU investigating authority acted inconsistently with the rules stipulated in Article 2.2.2 of the AD Agreement by using a profit margin calculated in line with Article 2.2.2 (iii) of the AD Agreement in which the methodology of calculation used by the investigating authority is claimed to have fallen short of satisfying legal requirements.¹

4. Indonesia further asserts that the EU investigating authority failed to establish the profit by using a reasonable method. Furthermore, the data used by the EU investigating authority to test the reasonableness of the profit was inappropriate considering the facts and records evaluated in this investigation.²

5. Finally, Indonesia points out that the EU investigating authority failed to determine a profit "ceiling" or "cap" as required in Article 2.2.2 (iii) of the AD Agreement within profit range realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.³

6. In its first response, the EU underlines that Article 2.2.2 (iii) of the AD Agreement does not dictate a particular methodology to be followed. The EU underscores that the profit can be calculated in numerous reasonable ways which should be subject to an evaluation depending on the merits of each investigation.⁴

7. As regards to the second allegation of Indonesia, the EU submits that the sampled Indonesian producers/exporters constituted almost all of the Indonesia's exports during the period of investigation which is claimed to have left a 1% of producer/exporters to be evaluated in the profit cap examination.⁵ Moreover, the EU stressed that the lack of domestic sales in the ordinary course of trade of the same general category of products in the country of origin foreclosed the determination of the profit cap in light of the required data.⁶

III. OBSERVATIONS OF TURKEY

8. Turkey opines that the interpretation of rules governing the determination of administrative, selling and general costs (hereinafter referred to as SG&A) and profits of the product under investigation is one of the legally contentious issues of the AD Agreement directly and significantly

¹ Indonesia's First Written Submission, para. 145.

² Indonesia's First Written Submission, paras. 158-176.

³ Indonesia's First Written Submission, paras. 136-157.

⁴ EU's First Written Submission, para. 26.

⁵ EU's First Written Submission, para. 45.

⁶ EU's First Written Submission, para. 50.

influencing the level of the dumping margin. Turkey will only share its approach on how Article 2.2.2 (iii) should be legally construed if the required data to calculate the profit cap is absent.

9. Article 2.2.2 of the AD Agreement directs that the investigating authority is obliged to base the SG&A and profit margin of the investigated producer or exporter on actual data pertaining to production and sales of the like product in ordinary course of trade. Perceiving differently, the drafters clarify the qualitative aspect of a SG&A and/or profit margin which should be built on actual data deriving from the records of the producer or exporter pertaining production and sales in the ordinary course of trade. If, however, the investigating authority cannot ascertain the level of profit and/or SG&A on this qualitative basis, it has the full discretion to resort to one of the three methods, lacking any kind of hierarchy, stipulated in Article 2.2.2.⁷

10. Turkey notices that, on its face, the selection of the words used by the drafters of the text marks a gradual shift from using "actual" information, as directed in subparagraph (i) and (ii), to a reasonably attained profit margin not exceeding a profit ceiling established by profit margin *normally* realized by other exporters or producers on sales of products of the *same general category* in the *domestic market of the origin*.

11. Understanding that the existence of a profit ceiling is a central component of the subparagraph (iii) of Article 2.2.2, Turkey considers that the presence of this upper limit is one of the factors to probe whether the methodology used by the investigating authority was in fact "reasonable".⁸

12. From a contextual point of view, however, the structure of Article 2.2.2 (iii) provides no guidance on how the investigating authority may act if the profit cap cannot be established through the use of profit margin *normally* realized by other exporters or producers on sales of products of the same general category in the *domestic market of the origin*. As raised in some third party submissions⁹, Turkey opines that construing conceptual borders of the data, to be used to establish the profit cap, in such strict manner may profoundly limit the use of Article 2.2.2 (iii) if the required data practically does not exist.

13. In Turkey's understanding, however, Article 2.2.2 (iii) should not be viewed in such a constraining manner. Notwithstanding the case law approach that "*Article 2.2.2 directs a preference for the actual data of the exporter and like product in question with an incremental progression away from these principles before reaching any reasonable method in Article 2.2.2 (iii)*"¹⁰, Turkey opines that the investigating authority should, nevertheless, have the legal leeway to resort to Article 2.2.2 (iii) even if the profit cap is not established through the use of profit margin normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the origin.

14. Keeping in mind that, that Article 2.2.2 (iii) operates to reach a reasonable approximation of the profit margin that would have realized if the product under consideration had been sold in the ordinary course of trade¹¹, Turkey is in the view that the investigating authority may use out-of-country data to establish the profit cap, provided that the out-of-country information is apt to or capable of yielding results reflecting market conditions in the investigated country. Accordingly, the profit cap determined through the use of out-of-country data may need to be adapted to ensure that it is versatile to attain a profit margin to be employed together with the cost of production aiming to reach a constructed normal value in the country of origin.¹²

15. In light of the points we have addressed, it is reasonable to expect that the investigating authority adheres to the legal discipline concerning the profit ceiling or at least provides an explanation as to why the authority was not able to determine the "cap" under the legal requirements of Article 2.2.2 (iii).

⁷ Panel Report, *EC – Bed Linen*, para. 6.59.

⁸ Panel Report, *Thailand H-Beams*, para. 7.125.

⁹ US' Third Party Written Submission, para. 18.

¹⁰ Panel Report, *EU – Biodiesel*, para. 7.236.

¹¹ Panel Report, *EU – Biodiesel*, para. 7.338.

¹² Appellate Body Report, *EU – Biodiesel*, para. 6.70.

IV. CONCLUSION

16. With these comments, Turkey expects to contribute to the legal debate in this case, and would like to express again its appreciation for this opportunity to share its points of views.

ANNEX C-9**EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE UNITED STATES**EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION**I. INDONESIA'S CLAIMS REGARDING ARTICLES 2.2.1.1 AND 2.2 OF THE AD AGREEMENT**

1. Indonesia's claims under Article 2.2.1.1 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994 – related to the determination of the European Union to reject reported costs of crude palm oil (CPO) by Indonesian exporting producers of biodiesel – rely heavily upon the recent findings of the Appellate Body in *EU – Biodiesel*. Indonesia contends that the substance of its claims are "indistinguishable from the European Union's decision to disregard Argentine exporting producers' recorded costs of soybeans found by the Panel and the Appellate Body to be in violation of Article 2.2.1.1 of the Anti-Dumping Agreement in *EU – Biodiesel*". Accordingly, "Indonesia ... submits that given the identical fact pattern and decisions made by the European Union, this claim warrants the same finding of inconsistency with the [AD] Agreement".

2. The European Union does not appear to contest Indonesia's characterization of the facts. Nor does the EU present a rebuttal to Indonesia's substantive legal arguments.

3. Although the substantive issues do not appear to be contested, the United States notes that Article 11 of the DSU nonetheless requires the Panel to make an objective assessment of the matter before it, including an objective assessment of the facts, and an objective assessment of the applicability of and conformity of those facts with the relevant covered agreements. Indeed, panels consistently have made their own objective assessments in situations involving uncontested claims. For example, in *US – Zeroing (Korea)*, the Panel concluded that, notwithstanding uncontested claims, it was nevertheless obliged to "reach our own conclusion on the matter before us, in accordance with Article 11 of the DSU".

4. Accordingly, and given that the EU has not presented a rebuttal to Indonesia's substantive arguments, in this dispute the Panel should make an objective assessment of whether Indonesia has made a *prima facie* case that the EU measure breaches the EU's obligations under Article 2.2.1.1 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994.

5. Indonesia likewise relies upon the Appellate Body's recent findings in *EU – Biodiesel* to support its claim that the European Union acted inconsistently with Article 2.2 of the AD Agreement when it replaced the reported costs of CPO by Indonesian exporting producers of biodiesel with the reference export price. Indonesia specifically alleges that "the substance of the present claim, similar to its claim under Article 2.2.1.1 of the Anti-Dumping Agreement, is based on a set of circumstances essentially identical to the factual circumstances of Argentina's claim under Article 2.2 of the Anti-Dumping Agreement with respect to the European Union's decision to substitute the cost of soybeans in the records of the Argentine exporting producers by an average of the FOB reference price".

6. In these circumstances as well, the European Union does not appear to dispute the relevant facts, nor does the EU present a rebuttal to Indonesia's substantive legal arguments. As noted above, in these circumstances the Panel should make an objective assessment of whether Indonesia has made a *prima facie* case. This should entail an objective assessment of the facts, as well as an objective assessment of the applicability of and conformity of those facts with the relevant covered agreements.

II. INDONESIA'S CLAIMS REGARDING PROFIT UNDER ARTICLES 2.2 AND 2.2.2(III) OF THE AD AGREEMENT

7. The United States would like to offer the following observations with respect to Indonesia's claims under Articles 2.2 and 2.2.2(iii) of the AD Agreement. Indonesia contends that the European Union acted inconsistently with Article 2.2.2(iii) of the AD Agreement because (1) the

European Union's method for determining profit in the investigation was unreasonable, and (2) the European Union failed to calculate a profit cap.

8. First, with respect to the issue of whether the methodology for determining the constructed value (CV) profit is consistent with Article 2.2.2(iii) of the AD Agreement, the United States agrees with the European Union that Article 2.2.2(iii) does not prescribe a particular methodology and that the methodology used by the investigating authority must be reasonable.

9. Article 2.2.2 provides four methodologies for the calculation of CV profit – one preferred method and three alternative methods. It states that, "[f]or the purpose of paragraph 2, the amounts [to construct value] ... shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" (referred to below as the "preferred method").

10. Article 2.2.2 establishes no hierarchy among the three alternative methodologies. Therefore, if the preferred method is not available, the investigating authority may determine which of these alternatives is appropriate in a given investigation.

11. The introductory clause of Article 2.2.2 – "[f]or the purpose of paragraph 2" – indicates that the calculation of CV profit relates to the obligations established by Article 2.2. In this way, each of the methodologies is intended to create a reasonable proxy for the profit amount from the sales of the like product in the ordinary course of trade in the domestic market.

12. The preferred method and alternatives (i) and (ii) specify the source of the data that can be used to calculate the profit amount for each method. That is, the preferred method requires the use of actual amounts pertaining to production and sales in the ordinary course of trade *of the like product by the exporter or producer under investigation*. Alternative (i) permits the authority to calculate profit based on actual amounts in respect of production and sales *of the same general category of products in the domestic market*. Alternative (ii) permits the authority to average the actual amounts of *other* exporters or producers *of the like product in the domestic market*. In contrast, alternative (iii) does not specify the source of the data that may be used. Instead, alternative (iii) allows the authority to calculate profit amounts based on "any other reasonable method".

13. In the context of Article 2.2.2, whether a methodology is reasonable must be determined in light of the aim of that article, *i.e.*, to approximate the profit from the sales of the like product in the domestic market. The "any other reasonable method" alternative thus permits the investigating authority to calculate profit using a wide range of methods so long as the selected methodology is reasonable in light of evidence in the record of the relevant investigation.

14. Accordingly, the Panel should examine the facts and circumstances of this case and determine whether the methodology used by the European Union's investigating authority is a "reasonable method," *i.e.*, in accordance with reason; not irrational or absurd. In the United States' view, the European Union's methodological approach of using a profit margin from a prior investigation of biodiesel (*i.e.*, substantially the same product, albeit from a different country) and testing it against several benchmarks is reasonable.

15. Second, with respect to the issue of profit cap, the United States observes that both Indonesia and the European Union appear to accept the common sense proposition that an investigating authority is not required to calculate the profit cap when necessary information for calculating the profit cap is unavailable. For example, Indonesia contends that "the European Commission at no point alleged that such a cap was established; that it attempted to establish this cap; or *that it was impossible to establish such a cap*". In turn, the European Union contends that "none of the sampled Indonesian companies had sales in the ordinary course of trade of the same general category of products", that "all sampled companies did not have domestic sales in the ordinary course of trade of the same general category of products", and, therefore, "no 'cap' could be established".

16. The United States likewise considers that there cannot be an obligation on an investigating authority to calculate the profit cap when the necessary information for such calculation does not exist. The United States recalls that the so-called profit cap represents "the profit *normally* realized by other exporters or producers on sales of products of the same general category in the domestic

market of the country of origin". The word "normally" means "in a regular manner; ... under normal or ordinary conditions; as a rule, ordinarily [; or] ... in a normal manner, in the usual way". By linking the profit cap to "profit normally realized", Article 2.2.2(iii) foresees situations when there may be no information about the profits in question, because there are no other exporters or producers of sales of products of the same general category in the domestic market, or because this information simply does not appear in the record of the proceeding. Article 2.2.2(iii) thus should be applied as the word "normally" suggests: If information exists to calculate the profit cap, the proviso is operative. If such a calculation is not possible because information does not exist, then the proviso is not operative. In either case, an investigating authority remains bound under Article 2.2 to calculate "a reasonable amount ... for profits".

17. Indonesia further contends that "*the same general category of products*" was construed too narrowly by the European Union's investigating authority and that it should include "oleochemicals" and not only "any other fuel". The European Union argues that "Indonesia does not meet its burden of proof, failing to explain why other oleochemicals, irrespective of their end uses and the specific markets, may nevertheless constitute the same category of products with biofuels within the meaning of Article 2.2.2 (iii)". The European Union contends that "the 'same general category' of products with biodiesel are other fuels and not any oleochemicals, irrespective of their end uses, which may constitute a different market and have a different profit margin".

18. In the United States' view, Article 2.2.2 does not limit the application of "any other reasonable method" to data from any particular market (*i.e.*, a particular country), but the constructive normal value must be representative of the price of the like product (here, biodiesel). In this regard, when an investigating authority constructs normal value, it is required by Article 2.2 to include "a reasonable amount for ... profits". The panel in *Thailand – H-Beams* understood that, under Article 2.2.2(i), "[t]he broader the [same general] category [of products], the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product". The European Union's finding that biodiesel is within the same general category with any other fuel, but not with non-fuel chemicals, does not appear to be unreasonable in light of the facts before the investigating authority, especially given the European Union's finding that non-fuel products may be sold in different markets from biodiesel and other fuels and have a different profit margin. From this perspective, then, the European Union's definition of the "same general category of products" was reasonable and produced a more accurate proxy for profit than the Indonesian respondents' more expansive definition, which included highly dissimilar products.

19. Indonesia also contends that the European Union breached Articles 2.2 and 2.2.2(iii) of the AD Agreement by failing to provide an explanation in its determination as to why it had not established a cap, and, accordingly, that any arguments now advanced by the European Union would be "irrelevant" because they would be "*post factum*".

20. As discussed above, Article 2.2.1(iii) sets out substantive obligations regarding the calculation of profit. In contrast, a different AD Agreement provision – namely, Article 12 – sets out the obligations pertaining to the explanation of determinations. For example, under Article 12.2, authorities must make available "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". And under Article 12.2.1(iii), the authorities must provide "a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 ...". In the view of the United States, Indonesia's allegations regarding the adequacy of the European Union's explanation should have been lodged pursuant to the AD Agreement provision addressed to this issue, namely, Article 12.2.1(iii). Indonesia, however, chose not to present any claims under Article 12. Accordingly, Indonesia's claims about the adequacy of the European Union's explanation appear to be outside the terms of reference of the dispute.

21. Indonesia also errs in contending that any explanation provided in these proceedings is irrelevant for purposes of the Panel's assessment of the European Union's compliance with Article 2. The inquiries into whether an investigating authority has complied with Article 2 and Article 12 are separate. Failure to comply with Article 12 (which, as noted, is not an issue within the scope of this proceeding) does not *ipso facto* mean that an investigating authority has failed to comply with other provisions of the AD Agreement.

III. INDONESIA'S CLAIMS REGARDING ARTICLES 7.1 AND 7.2 OF THE AD AGREEMENT

22. With respect to Indonesia's claims under Articles 7.1 and 7.2 of the AD Agreement concerning provisional measures, the United States takes no position concerning the specific errors in the Provisional Regulation alleged by Indonesia.

23. The United States would note, however that the relevant text of Article 7.2 of the AD Agreement, which also informs the interpretation of Article 7.1, states as follows: "Provisional measures may take the form of a provision duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty *provisionally estimated*, being not greater than the *provisionally estimated* margin of dumping". As posited by the European Union, the term "provisionally estimated" connotes an approximate magnitude for which some imprecision is to be expected. In this regard, the panel in *Canada – Welded Pipe* found that the concept of a "provisional estimate" reflects the fact that "the provisional determination may be based on data that is incomplete, or that the investigating authority has not yet satisfied itself is accurate". Accordingly, a proper interpretation of Articles 7.1 and 7.2 of the AD Agreement should give appropriate meaning to the term "provisionally estimated".

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES*Question 3 regarding Article 3.2 of the AD Agreement*

24. Article 3.1 of the AD Agreement provides that a determination of injury "shall be based on positive evidence and involve an objective examination of", *inter alia*, "the effect of dumped imports on prices in the domestic market for like products". In turn, the second sentence of Article 3.2 provides specific considerations related to price effects, including the examination of "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member". In order to examine whether price undercutting has an effect on price, the examination would normally encompass price comparisons over the period of investigation. As the Appellate Body found in *China – GOES*, "an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices".

25. In some investigations, undercutting trends may be significant; in other investigations, the sheer number of comparisons in which undercutting is present may be probative. With regard to the overall examination of the effects of dumped imports for the purposes of examining whether there has been price depression or suppression, and the role of any price undercutting in depressing or suppressing domestic prices, this examination should encompass a "dynamic assessment of price developments and trends". In performing such an assessment, an investigating authority may ascertain whether subject imports depressed or suppressed domestic like product prices to a significant degree, or whether subject import underselling led to a shift in market share from the domestic industry to subject imports. Factors other than underselling – for example, the existence of a "cost-price squeeze" or evidence from purchasers confirming declines or foregone increases in prices offered by domestic producers in response to subject import competition – may also be used to demonstrate that subject imports significantly depressed or suppressed prices of the domestic like product.

Question 4 Regarding Article 7.2 of the AD Agreement

26. Article 7.2 of the AD Agreement provides that "[p]rovisional measures may take the form of a provisional duty ... being not greater than the provisionally estimated margin of dumping". The term "provisionally estimated margin of dumping" in Article 7.2 is not expressly defined nor is the method for performing such estimation prescribed. The term "provisional" means "of the nature of a temporary provision or arrangement; provided or adopted for present needs or temporarily; supplying the place of something regular, permanent, final, or better; tentative". The United States therefore generally understands the term "provisionally estimated margin of dumping" in Article 7.2 to refer to the "margin of dumping" provisionally estimated as part of the preliminary affirmative determination of dumping and consequent injury to a domestic industry, as referenced in Article 7.1(ii) of the AD Agreement.

27. The United States agrees with the observations of the European Union that the term "provisionally estimated" as used in Article 7.2 connotes an approximate magnitude that is temporary, not yet final and for which some imprecision is to be expected. The text of Article 7.1 states that provisional measures may be applied if an investigation has been initiated and interested parties have been given opportunities to provide information and comments, and if a preliminary – but not final – determination has been made of dumping and consequent injury. Article 7.4 also indicates that provisional measures will be applied on a temporary basis, requiring that such measures "shall be limited to as short a period as possible".

28. However, Article 7.5 goes on to require that the duty comply with the relevant provisions of Article 9 of the AD Agreement, which in turn requires, in Article 9.3, that the amount of the duty "shall not exceed the margin of dumping as established in Article 2". Therefore, although provisionally estimated, any duties applied during the provisional period must nonetheless conform to Article 2. Where the provisional duty applied is higher than it might have been due to an error, but is still lower than the definitive duty calculated according to Article 2, it would not be appropriate for the provisional duty to be reduced where doing so would lead to a re-estimated provisional duty that is not consistent with the final margin of dumping calculated under Article 2 and Article 9. The nature of the error – whether clerical or arising from incomplete or unverified information on the record – similarly would not appear material to an assessment of the accuracy of the estimate pursuant to Article 2.

29. This is consistent with Article 10, which provides further guidance regarding the anticipated difference between the amounts "provisionally estimated" and those based on a final, definitive dumping determination. Specifically, Article 10.3 provides that if the definitive duty is higher than the provisional duty, the difference "shall not be collected"; and if the definitive duty is lower than the provision duty, "the duty shall be reimbursed or the duty recalculated, as the case may be". That is, a provisional duty shall only be reimbursed or recalculated where it exceeds the definitive anti-dumping duty. Where the provisional duty is higher than it might have been, but lower than the final duty, no reimbursement or recalculation would be required or warranted.

ANNEX D

PROCEDURAL RULINGS OF THE PANEL

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ANNEX D-1**DECISION OF THE PANEL CONCERNING INDONESIA'S REQUEST TO LIMIT THIRD PARTY ACCESS TO SPECIFIC BUSINESS CONFIDENTIAL INFORMATION (BCI)**

The Panel adopted the Additional Working Procedures of the Panel Concerning Business Confidential Information (Additional BCI Procedures) on 13 December 2016 after consulting with the parties. Paragraph 6 of the Additional BCI Procedures provides that third parties' access to BCI shall be subject to the terms set out therein. The Additional BCI Procedures seek to balance the parties' rights to due process (including the protection of BCI), the rights of the third parties (including the right under Article 10.3 of the DSU to "receive the submissions of the parties to the dispute to the first meeting of the panel"), and the rights and systemic interests of other WTO Members.¹ As noted by the Appellate Body, it is for the requesting party to justify any request for additional confidentiality, since Article 18.2 of the DSU already requires parties and third parties to treat submissions as confidential.² This burden of justification will increase the more the proposed arrangements affect the exercise by parties and third parties of their rights.³

In its communication dated 6 January 2017⁴, Indonesia requested the Panel to limit third party access to specific BCI pursuant to paragraph 6 of the Additional BCI Procedures. In written comments provided on 12 January 2017⁵, the European Union objected to the request, submitting that Indonesia's request is inconsistent with the DSU and fails to comply with the terms of paragraph 6 of the Additional BCI Procedures.

The Panel considers that Indonesia has failed to set out sufficient reasons demonstrating why access by any or each of the thirteen third parties participating in this proceeding to the specified BCI would pose a risk of serious harm to the interests of the originator of the BCI in question, as required by the Additional BCI Procedures, and therefore denies Indonesia's request.

The Panel directs that all third parties to this dispute receive the submissions of the parties to the dispute to the first meeting of the panel, including information designated as BCI, as submitted to the Panel. The Panel expects that all parties and third parties will comply with the requirements of Article 18.2 of the DSU and the Panel's working procedures and Additional BCI Procedures.

¹ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling dated 10 August 2010, paras. 8-9.

² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling dated 10 August 2010, paras. 8, 10, and 15.

³ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling dated 10 August 2010, para. 10.

⁴ Communication from Indonesia dated 6 January 2017, 03/ITN/1/2017.

⁵ Communication from the European Union dated 12 January 2017.

ANNEX D-2**DECISION OF THE PANEL CONCERNING REQUESTS BY RUSSIA AND THE EUROPEAN UNION FOR ENHANCED THIRD PARTY RIGHTS****Introduction**

In a communication dated 12 December 2016, Russia requested the Panel to exercise its discretion under Article 12.1 of the DSU to modify its Working Procedures and grant enhanced third party rights in this proceeding. Russia requests the Panel to grant third party rights additional to those provided in Article 10 of the DSU, in particular: (a) to be present in all substantive meetings of the Panel with the parties; (b) to receive electronic copies of the Panel's written questions to the parties, all submissions and statements of the parties, including responses to the Panel questions, up to the issuance of the interim report; and (c) to respond to written questions from the Panel during the proceedings, up to immediately prior to the issuance of the Interim Report.¹

On 13 January 2017, the European Union, as the responding party, requested the Panel to rule on the matter raised by Russia. The European Union indicated that it does not agree with the reasons set out in Russia's communication, but agrees with the relief requested for different reasons than those contained in Russia's request.² The European Union submits that the Working Procedures adopted by the Panel modify Appendix 3 of the DSU in a manner that risks diminishing the rights of third parties. The European Union requests modifications of the Working Procedures in order to allow third parties: (a) to receive all submissions by the parties to the Panel; (b) to be present during the entirety of the first and second substantive meetings of the Panel; and (c) to have the opportunity to respond to questions from the Panel to the parties and other third parties.³

On 20 January 2017, the Panel invited Indonesia and third parties to comment in relation to the requests by Russia and the European Union. Indonesia expressed its opposition to both Russia's request and the European Union's request. Brazil expressed support for granting access to all documents and the right to be passively present in hearings as a manner to ensure that the interests of all members are taken into account.⁴ India considers that the Panel's adopted Working Procedures sufficiently balance the efficiency of dispute settlement proceedings and protect third party rights.⁵ Among other reasons, the United States submits that the Panel should reject Russia's request, as Articles 3.2 and 19.2 of the DSU preclude a panel from altering the balance of rights and obligations of parties and third parties agreed to in the DSU, in the absence of the consent of both parties.⁶ Japan did not comment on Russia's request, but asked that all third parties be accorded similar rights, should the Panel decide to grant Russia's request.⁷ Brazil, Japan, and the United States submit that the Panel should not rely upon the reasoning provided by the European Union. No other third party provided comments.

As we explain below, the requests by Russia and the European Union are predicated on fundamentally different reasons. Russia has referred to its participation in a separate dispute, and the possibility that the outcome of the present dispute could affect the measures at issue in that dispute, as the reason to grant its request. The European Union has requested modifications to the Panel's Working Procedures as a manner to preserve the rights of third parties, which it argues are at risk of being diminished due to language appearing in paragraph 8 of the Working Procedures. In light of these differences, we consider it appropriate to address the two requests separately. We first address Russia's request before turning to the request by the European Union.

¹ Communication from Russia dated 12 December 2016, p. 2.

² Communication from the European Union dated 13 January 2017, p. 1.

³ Communication from the European Union dated 13 January 2017, p. 2.

⁴ Communication from Brazil dated 27 January 2017.

⁵ Communication from India dated 27 January 2017.

⁶ Communication from the United States dated 27 January 2017, pp. 2-4.

⁷ Communication from Japan dated 27 January 2017.

Russia's request for enhanced third party rights

Article 10.2 of the DSU provides that Members may participate in panel proceedings as third parties if they have a "substantial" interest in the matter before the Panel. A panel may exercise its discretion to grant "enhanced" third-party rights in a dispute, provided that third party's interest in the proceeding extends beyond the "substantial" interest and those additional rights are consistent with the provisions of the DSU and the principles of due process.⁸ Previous panels have granted additional third party rights in limited circumstances for specific reasons only, including in situations where measures were considered to have a significant and direct economic effect on certain third parties⁹, or where practical considerations arise from a third party's involvement as a complaining party in a parallel proceeding.¹⁰

Russia asserts that it has a "substantial legal and significant economic interest" in this dispute, given what it describes as a challenge to "similar" EU measures in a separate dispute¹¹ that are affecting Russian exporters.¹² We understand Russia's interest in this dispute relates to the Panel's interpretation of certain of the WTO provisions at issue and the Panel's assessment of the EU measures at issue, and implications this could have on the outcome in DS494. Russia asserts that the granting of the requested additional rights would allow Russia to attain a better understanding of the issues, arguments, and evidence before the Panel to ensure that its interests can be fully taken into account in accordance with Article 10.1 of the DSU.¹³ Russia considers that the regular rights granted to third parties alone do not ensure that Russia will receive access to arguments and evidence that will be presented in the course of the entire panel proceeding.¹⁴ Although Russia has not specified which measures are at issue in DS494, we understand that Russia has requested a panel to review "as such" claims concerning Articles 2(3) and 2(5) of the Council Regulation (EC) No. 1225/2009 of 30 November 2009 and a number of claims with respect to the extension of anti-dumping measures on welded tube and pipe exports and ammonium nitrate.¹⁵

We do not consider the fact that there may be an overlap in respect of WTO provisions or certain measures or claims at issue in this dispute and DS494 on its own provides a sufficient basis to justify the granting of enhanced third party rights. The similarity of legal issues between disputes, or the possibility that the outcome in one dispute could affect the measures at issue in another dispute, are not unusual and have not been criteria to grant enhanced third party rights to a third party in one case that is also complainant in a separate case. While we accept that Russia has a "substantial" interest in the matter at issue before the Panel, we fail to see how its interest or that of other third parties merits the granting of enhanced rights in this dispute. Finally, the Panel also notes that there is no agreement between the disputing parties to grant Russia's request.

The European Union's request for enhanced third party rights

The European Union submits that the Working Procedures adopted by the Panel modify Appendix 3 of the DSU in a manner that risks diminishing the rights of third parties. The European Union requests modifications of the Working Procedures to fully preserve the rights of third parties provided for in the DSU and DSU Appendix 3 Working Procedures.¹⁶

The European Union submits that the Working Procedures set forth in Appendix 3 of the DSU contemplate two distinguishable stages in a panel proceeding. The first stage involves the parties setting out their case in chief, including a full presentation of claims, facts, evidence, and arguments, which should normally take place in the context of the submissions of the parties to

⁸ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 243. See also Appellate Body Reports, *EC – Hormones*, para. 154; and *US – 1916 Act*, para. 150.

⁹ Panel Reports, *EC – Bananas III*, para. 7.8; *EC – Tariff Preferences*, Annex A, para. 7; and *EC – Export Subsidies on Sugar*, paras. 2.5-2.9.

¹⁰ Panel Report, *EC – Hormones (Canada)*, para. 8.17.

¹¹ DS494 *European Union – Cost Adjustment Methodologies II (Russia)*. That panel was established on 16 December 2016 but has not yet been composed.

¹² Communication from Russia dated 12 December 2016, p. 1.

¹³ Communication from Russia dated 12 December 2016, p. 2.

¹⁴ Communication from Russia dated 12 December 2016, p. 1.

¹⁵ This information is contained in the request for establishment of a panel in that dispute: see *European Union – Cost Adjustment Methodologies II (Russia)*, request for the establishment of a panel by Russia, WT/DS494/4, 11 November 2016, pp. 2-3.

¹⁶ Communication from the European Union dated 13 January 2017, p. 2.

the dispute to the first meeting of the panel.¹⁷ The second stage involves rebuttals and refinement of arguments and questions for soliciting explanations. The European Union argues that paragraph 6 of Appendix 3 grant third parties a right to be "fully implicated"¹⁸ in the first stage and Articles 10.1 and 10.2 of the DSU require that third parties have a full view of the cases presented by both the complainant and the responding party before filing their written submissions and exercising their right to be heard. The European Union argues that paragraph 8 of the Panel's Working Procedures modifies the Appendix 3 Working Procedures by "facilitating the admission of factual assertions and evidence (and associated argument) filed after the first hearing, notably in rebuttals or responses to questions".¹⁹ The European Union submits that this modification "permits to some extent the shifting of fact, evidence and associated argument from the first stage to the second stage", which "risks to diminish" the rights of third parties.²⁰

The European Union requests the Panel to modify its Working Procedures to allow third parties: (a) to receive all submissions by the parties to the Panel, including first written submissions, rebuttals, preliminary or interim ruling requests and responses thereto, responses to questions and comments thereon, and opening and closing statements; (b) to be present during the entirety of the first and second substantive meetings of the Panel with the parties; and (c) to have the opportunity to respond to questions from the Panel to the parties and other third parties. The European Union submits that the Panel is under an obligation to ensure that the rights guaranteed to third parties by the DSU are not diminished.²¹ The European Union supports its request by referring to prior WTO cases "in which appropriate steps"²² have been taken in relation to third party rights.

We note that the European Union made a similar request in its third party submission in the previous dispute, *US – Washing Machines*.²³ The European Union took issue with the identical language in the working procedures in that dispute to that contained in the first two sentences of paragraph 8 of the Working Procedures at issue in this proceeding. The European Union also based its request in that proceeding on virtually identical reasons as to what has been argued in this dispute, and asked the panel to make the same modifications to the working procedures.²⁴ We recall that the first two sentences of paragraph 8 of the Panel's adopted Working Procedures provide:

Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause.

We agree with the reasons set out by the panel in rejecting the European Union's request in *US – Washing Machines* and adopt them as our own in rejecting the European Union's request in this dispute.²⁵ In that dispute, the panel relied upon the observation of the Appellate Body in *Argentina – Textiles and Apparel* that the Working Procedures in Appendix 3 of the DSU do not establish precise deadlines for the presentation of evidence by parties as the basis to reject the European Union's argument that third party rights should be tied to the timing of the submission of factual evidence by the parties. Accordingly, there is no basis under the DSU to allege that the adopted working procedures diminish the rights of third parties by allowing the submissions of factual evidence by the parties after the first substantive meeting.²⁶ The panel further considered that there was no basis for the European Union's concern that the panel's Working Procedures allow for "associated argument" to be submitted in a second stage of the proceeding.²⁷ Finally, the

¹⁷ Communication from the European Union dated 13 January 2017, p. 2.

¹⁸ Communication from the European Union dated 13 January 2017, p. 2.

¹⁹ Communication from the European Union dated 13 January 2017, p. 3.

²⁰ Communication from the European Union dated 13 January 2017, p. 3.

²¹ Communication from the European Union dated 13 January 2017, p. 4.

²² Communication from the European Union dated 13 January 2017, p. 4.

²³ Panel Report, *US – Washing Machines*, para. 1.13.

²⁴ Panel Report, *US – Washing Machines*, para. 1.14 at quoted communication from the panel, paras. 1.2-1.11.

²⁵ Panel Report, *US – Washing Machines*, para. 1.14 at quoted communication from the panel, paras. 1.11-1.16.

²⁶ Panel Report, *US – Washing Machines*, para. 1.14 at quoted communication from the panel, para. 1.14 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 79-80).

²⁷ Panel Report, *US – Washing Machines*, para. 1.14 at quoted communication from the panel, para. 1.15.

panel rejected the European Union's argument that third parties are "fully implicated" in the first stage of the panel process, owing to the fact that paragraph 6 of Appendix 3 establishes that third parties only attend a separate third party session of the panel's first meeting with the parties.²⁸ We therefore reject the European Union's request to modify our Working Procedures.

Conclusion

For the foregoing reasons, the Panel rejects Russia's request for the Panel to exercise its discretion under Article 12.1 of the DSU to modify its Working Procedures and grant enhanced third party rights in this proceeding, as well as the European Union's request to modify our working Procedures to provide for enhanced third party rights in this proceeding. The Panel also notes Indonesia's opposition to grant the requests by Russia and the European Union, as well as the European Union's opposition to the reasons set out in Russia's request.

²⁸ Panel Report, *US – Washing Machines*, para. 1.14 at quoted communication from the panel, para. 1.16.