



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

REPORT OF THE PANEL

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

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<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
<i>China – Broiler Products</i>	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
<i>China – GOES</i>	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
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	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
<i>China – X-Ray Equipment</i>	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
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China)</i>	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
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016
<i>EC – Hormones</i>	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
<i>EC – Salmon (Norway)</i>	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
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>EU – Biodiesel (Argentina)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/R and Add.1, circulated to WTO Members 29 March 2016
<i>EU – Footwear (China)</i>	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

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<i>Japan – Alcoholic Beverages II</i>	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
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Thailand – H-Beams</i>	Appellate Body 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/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<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 – 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 – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521
<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 – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<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 – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Steel Safeguards</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273
<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
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521

EXHIBITS REFERRED TO IN THIS REPORT

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

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

ABBREVIATIONS USED IN THIS REPORT

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

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 27 July 2012, Indonesia requested consultations with the European Union pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (the GATT 1994) with respect to anti-dumping measures imposed on imports of certain fatty alcohols from Indonesia, as well as to certain aspects of the investigation underlying those measures.¹

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

1.2 Panel establishment and composition

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

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

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

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

Chairperson: Mr Paul O'Connor

Members: Mr Greg Tereposky
Mr Mateo Diego Fernández

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

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures⁵, Additional Working Procedures Concerning Business Confidential Information (BCI), and timetable on 13 July 2015.

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

¹ See *EU – Fatty Alcohols (Indonesia)*, Indonesia's request for consultations, 1 August 2012, WT/DS442/1 (Indonesia's request for consultations).

² Request for the establishment of a panel by Indonesia, WT/DS442/2 (Indonesia's panel request).

³ See Minutes of meeting held in the Centre William Rappard on 25 June 2013, WT/DSB/M/333.

⁴ *EU – Fatty Alcohols (Indonesia)*, constitution note of the Panel, WT/DS442/3, 19 December 2014.

⁵ See the Panel's Working Procedures in Annex A-1 and Additional Working Procedures Concerning Business Confidential Information in Annex A-2.

1.3.2 Request for a preliminary ruling

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

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

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

2 FACTUAL ASPECTS

2.1 The measures at issue

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

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

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

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

- a. Articles 2.3 and 2.4 of the Anti-Dumping Agreement because the European Union made an improper adjustment to the export price of an Indonesian producer for a factor that did not affect price comparability;
- b. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the European Union failed to conduct a proper non-attribution analysis with respect to the factors "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials"; and
- c. Article 6.7 of the Anti-Dumping Agreement because the European Union failed to disclose to either of the investigated Indonesian producers the results of the verification visits.

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

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

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

6 INTERIM REVIEW

6.1 Introduction

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

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

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

6.2 The purpose and scope of the interim review

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

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

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

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

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

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

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

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

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

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

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

6.3.1 Requests for review submitted by Indonesia

Paragraph 7.38

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

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

⁸ See for example Indonesia's request for review of the Interim Report, paras. 7.84 and 7.85 and fn 156.

⁹ European Union's comments on Indonesia's request for review of the Interim Report, pp. 1 and 2.

¹⁰ Emphasis original, fns omitted.

¹¹ Indonesia's request for review of the Interim Report, para. 2.4.

¹² European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

6.12. We have decided not to grant Indonesia's request because we consider that Indonesia's position on this issue was clarified through a question posed by the Panel¹³ and that Indonesia's response is adequately reflected in paragraph 7.38 of the Interim Report.

Paragraph 7.39

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

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

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

Footnote 90

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

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

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

Paragraph 7.65

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

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

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

¹³ See Indonesia's response to Panel question No. 38, para. 1.108. The Panel asked Indonesia if it agreed with the statement made by the European Union that "in the present case the difference in view is not about the amount of the adjustment, but rather about the fact that any adjustment was made". Indonesia responded "[i]n effect, yes".

¹⁴ Indonesia's request for review of the Interim Report, para. 2.5.

¹⁵ European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

¹⁶ Indonesia's request for review of the Interim Report, paras. 2.6-2.11.

¹⁷ European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

¹⁸ Indonesia's request for review of the Interim Report, para. 2.12.

¹⁹ European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

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

Paragraph 7.77

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

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

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

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

Paragraph 7.82

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

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

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

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

Paragraph 7.83

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

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

²⁰ Indonesia's request for review of the Interim Report, para. 2.15.

²¹ European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

²² Indonesia's request for review of the Interim Report, paras. 2.16-2.18.

²³ European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

²⁴ Indonesia's request for review of the Interim Report, para. 2.19.

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

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

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

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

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

Exhibit 53 contains a similar disclaimer.

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

Paragraph 7.84

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ Indonesia's request for review of the Interim Report, para. 2.22.

³¹ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

³² Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia, Official Journal of the European Union, L Series, No. 293/1 (11 November 2011) (Final Determination), (Exhibit IDN-4), recitals 31 and 35; and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 amending Implementing Regulation (EU) No. 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia, Official Journal of the European Union, L Series, No. 352/1 (21 December 2012) (Revised Determination), (Exhibit IDN-5), recitals 24 and 27.

³³ Emphasis original, fns omitted.

³⁴ Indonesia's request for review of the Interim Report, para. 2.23.

³⁵ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

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

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

6.46. With regard to this argument, we explained at paragraph 7.103 of the Interim Report why we did not agree with Indonesia's argument that a single economic entity is dispositive of whether a given mark-up qualifies as a difference affecting price comparability. We considered that the "ICOF-Margin" could be reasonably treated by the EU authorities as the remuneration of certain functions, incurred only on export sales, rather than as a simple transfer of funds between related entities. In paragraph 7.88 of the Interim Report, we explained why we were convinced by the arguments put forward by the European Union in this regard. Moreover, we do not consider that, in order to reach their determination, the EU authorities were obliged to determine that "revenue to ICOF-S with respect to sales activities for the investigated export sales was not part of the [export] price" of the product concerned. Rather, in order to make an adjustment to the export price, the EU authorities had to determine that the mark-up was a difference affecting price comparability. We concluded that they did so by demonstrating, on the basis of facts on the record, that the mark-up was a component of the price of exports to the European Union representing the payment for a service and that there was no concomitant pricing or expense component on the domestic side. Contrary to what Indonesia suggests in its comments on this paragraph³⁷, the Panel does not "consider that because some SG&A [selling, general and administrative costs] and profit expenses are included in the export price, ICOFS' SG&A and profit can be deducted from the export price without creating an unfair comparison". As explained in paragraphs 7.86 and 7.129 of the Interim Report, we considered that the ICOF Margin "could reasonably be understood to reflect an additional cost, for which there is no equivalent on the domestic side ..." and that ICOF-S' SG&A and profit represented a reasonable basis for calculating the actual value of this service. We also recalled at paragraph 7.123 of the Interim Report that our task in this dispute was not to assess whether the value of the allowance calculated by the EU authorities was correct and led to a "fair comparison".

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

Paragraph 7.85

6.48. Indonesia requests the Panel to³⁸:

- a. identify precise passages in the EU's published determination indicating that the EU authorities ascribed limited probative value to Exhibit P.T. Musim Mas (PTMM)-18 and that this exhibit does not reveal the nature, extent or scope of ICOF-S alleged involvement in domestic sales;
- b. reflect that there is no evidence on the record as to whether the EU authorities requested additional information from the company on the involvement of ICOF-S in domestic sales; and
- c. indicate how it treated the EU authorities' alleged failure to seek additional evidence on this issue.

³⁶ Indonesia's request for review of the Interim Report, para. 2.24.

³⁷ Indonesia's request for review of the Interim Report, para. 2.25.

³⁸ Indonesia's request for review of the Interim Report, paras. 2.26 and 2.27.

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

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

6.51. We note that the record does not indicate whether the EU authorities requested further evidence of ICOF-S' involvement in domestic sales. We also note that although Indonesia did refer during the proceedings to the failure of the EU authorities to request additional evidence⁴⁰, it did not develop a claim under Article 2.4 of the Anti-Dumping Agreement on this basis: there was therefore no need to address the EU authorities' alleged failure to seek additional evidence in order to resolve the dispute. For the same reason, we consider that there is no reason to amend our Report on this point, and have thus decided not to grant Indonesia's request.

Footnote 156

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

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

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

Paragraph 7.90

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

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

³⁹ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁴⁰ Indonesia's response to Panel question No. 35, para. 1.83; and comments on European Union's response to Panel questions, para. 4.15.

⁴¹ Indonesia's request for review of the Interim Report, paras. 2.28 and 2.30.

⁴² European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁴³ Indonesia's request for review of the Interim Report, paras. 2.31 and 2.35.

⁴⁴ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

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

Paragraph 7.92

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

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

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

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

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

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

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

Paragraph 7.93

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

⁴⁵ Indonesia's request for review of the Interim Report, para. 2.33. (emphasis original)

⁴⁶ Indonesia's request for review of the Interim Report, paras. 2.37-2.40.

⁴⁷ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁴⁸ Indonesia's request for review of the Interim Report, paras. 2.41-2.43.

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

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

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

6.66. PT Musim Mas explains⁵² that "some countries do not accept the ICOF-S issued certificate of origin that product is made in Indonesia. In such cases PTMM must contract directly (China, Japan) so that PTMM can issue a certificate of origin." This explanation is also developed by Indonesia before the Panel, as direct export sales made by PT Musim Mas are described as a mere formality⁵³ and "the undisputed evidence on the record is that all sales involve the participation of the sales and marketing arm in Singapore".⁵⁴ We disagree that these statements amount to "undisputed evidence". On the contrary, we found that the evidence on the record does not support the argument that sales formally made by PT Musim Mas are, in reality, made by ICOF-S.

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

Paragraphs 7.99-7.104

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

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

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

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

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

⁴⁹ Indonesia's request for review of the Interim Report, paras. 2.44 and 2.45.

⁵⁰ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁵¹ Emphasis added.

⁵² Company-internal note concerning verification of ICOF-S, (Exhibit IDN-38) (BCI), p. 3.

⁵³ See for example, Indonesia's first written submission, para. 4.7.

⁵⁴ Indonesia's first written submission, para. 4.169.

⁵⁵ Indonesia's request for review of the Interim Report, paras. 2.48 and 2.49.

⁵⁶ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁵⁷ Indonesia's request for review of the Interim Report, para. 2.50.

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

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

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

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

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

Footnote 201

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

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

6.79. We have decided not to grant Indonesia's request because we see some ambiguity in Indonesia's argument on this issue and footnote 201 is intended to acknowledge this ambiguity. In particular, we have difficulty reconciling Indonesia's initial argument that the mark-up is a mere allocation of sales proceeds between related entities⁶⁴, and Indonesia's responses to Panel questions following the second meeting of the Panel with the parties, which do not exclude that a transaction between two related entities may involve an actual expense.⁶⁵ The fact that the

⁵⁸ Emphasis added.

⁵⁹ Emphasis added.

⁶⁰ Indonesia's request for review of the Interim Report, para. 2.61..(emphasis original)

⁶¹ Indonesia's request for review of the Interim Report, para. 2.63.

⁶² Indonesia's request for review of the Interim Report, paras. 2.66 and 2.67.

⁶³ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁶⁴ See for example Indonesia's first written submission, paras. 4.4, 4.94, and 4.100; and second written submission, paras. 2.8-2.12. See also Indonesia's response to Panel question No. 15, para. 1.71: "[t]hus, the mark-up is an allocation of revenues between closely-related companies (or within a single economic entity). It is not an expense."

⁶⁵ See for example Indonesia's response to Panel question No. 31, para. 1.36: "the amount of any expense for selling/trading services is not the amount transferred between the two companies, but instead is the amount of the actual expenses incurred in making the sales" and "these actual expenses can be identified and verified – as they were in this case – from ICOFS' financial statements". See also Indonesia's response to

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

Paragraph 7.109

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

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

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

Paragraph 7.123

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

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

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

Paragraph 7.128

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

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

⁶⁶ Indonesia's request for review of the Interim Report, paras. 2.68 and 2.69.

⁶⁷ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁶⁸ Indonesia's request for review of the Interim Report, paras. 2.70-2.75.

⁶⁹ European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

⁷⁰ Indonesia's response to Panel question No. 38, para. 1.108.

⁷¹ Indonesia's request for review of the Interim Report, paras. 2.74 and 2.75.

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

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

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

Paragraph 7.129

6.89. Indonesia asks the Panel to address in the Final Report certain arguments which, according to Indonesia, were insufficiently considered by the Panel⁷⁵:

- a. whether it was permissible for the EU authorities to deduct the SG&A and profit of the related trader;
- b. whether and in which situations the relationship between a producing entity and an affiliated sales entity affects the type and nature of the expenses incurred;
- c. whether it is appropriate to deduct from the export price the "profit" of a related sales entity where that sales entity is a 100% subsidiary of the group holding company.

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

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

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

Footnote 244

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

⁷² Indonesia's request for review of the Interim Report, paras. 2.78 and 2.79.

⁷³ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

⁷⁴ Emphasis added.

⁷⁵ Indonesia's request for review of the Interim Report, para. 2.82.

⁷⁶ Indonesia's request for review of the Interim Report, paras. 2.85-2.92.

⁷⁷ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

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

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

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

Footnote 246

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

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

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

Paragraph 7.139

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

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

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

⁷⁸ Indonesia's request for review of the Interim Report, paras. 2.93 and 2.94.

⁷⁹ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

⁸⁰ Indonesia's request for review of the Interim Report, paras. 2.98-2.104.

⁸¹ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

⁸² Indonesia's request for review of the Interim Report, paras. 2.105-2.107.

⁸³ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

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

Paragraph 7.140

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

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

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

Paragraph 7.141

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

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

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

Paragraph 7.148

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

6.109. The European Union objects to the proposed changes for the reasons already explained above in respect of Indonesia's requests for review of paragraph 7.90.⁸⁹

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

⁸⁴ Indonesia's request for review of the Interim Report, paras. 2.108 and 2.109.

⁸⁵ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

⁸⁶ Indonesia's request for review of the Interim Report, paras. 2.110-2.113.

⁸⁷ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

⁸⁸ Indonesia's request for review of the Interim Report, paras. 2.114 and 2.115.

⁸⁹ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

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

Paragraph 7.150

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

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

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

Paragraph 7.153

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

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

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

Paragraph 7.159

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

⁹⁰ Emphasis added.

⁹¹ Indonesia's request for review of the Interim Report, paras. 2.116 and 2.117.

⁹² European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

⁹³ Emphasis added.

⁹⁴ Emphasis added.

⁹⁵ Indonesia's request for review of the Interim Report, para. 2.218.

⁹⁶ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

⁹⁷ Para. 7.137 of the Interim Report.

⁹⁸ Indonesia's request for review of the Interim Report, paras. 2.122-2.124.

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

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

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

6.3.2 Requests for review submitted by the European Union

Paragraphs 7.37(b) and 7.112-7.130

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

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

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

Paragraph 7.58

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

Paragraph 7.65

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

Paragraph 7.71

6.125. The European Union requests that the phrase "[i]n line with the specific requirements of EU law" be added to the first sentence of paragraph 7.71.¹⁰⁵ Indonesia did not express a view on this request.

⁹⁹ European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

¹⁰⁰ Emphasis added.

¹⁰¹ European Union's request for review of the Interim Report, p. 4.

¹⁰² Indonesia's comments on the European Union's request for review of the Interim Report, para. 2.2. (emphasis original)

¹⁰³ European Union's request for review of the Interim Report, p. 4.

¹⁰⁴ European Union's request for review of the Interim Report, p. 4.

¹⁰⁵ European Union's request for review of the Interim Report, p. 4.

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

Paragraph 7.80

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

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

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

Paragraph 7.158

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

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

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

¹⁰⁶ European Union's request for review of the Interim Report, p. 5.

¹⁰⁷ Indonesia's comments on the European Union's request for review of the Interim Report, paras. 2.6 and 2.9-2.12.

¹⁰⁸ Final Determination, (Exhibit IDN-4), recital 35; and Revised Determination, (Exhibit IDN-5), recitals 24 and 27.

¹⁰⁹ European Union's first written submission, para. 46 (emphasis added). See also European Union's second written submission, paras. 76 and 81-83.

¹¹⁰ See PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), p. 13.

¹¹¹ European Union's request for review of the Interim Report, p. 5.

¹¹² Indonesia's comments on the European Union's request for review of the Interim Report, para. 2.16.

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

Paragraph 7.166

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

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

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

Paragraphs 7.166 and 7.180

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

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

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

Paragraph 7.177 and footnote 327

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

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

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

Paragraph 7.190

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

¹¹³ Indonesia's request for review of the Interim Report, paras. 2.125 and 2.126.

¹¹⁴ European Union's request for review of the Interim Report, p. 4.

¹¹⁵ Indonesia's request for review of the Interim Report, paras. 2.127-2.134.

¹¹⁶ European Union's request for review of the Interim Report, p. 4.

¹¹⁷ Indonesia's request for review of the Interim Report, paras. 2.135-2.141 (referring to Appellate Body Reports, *US – Hot-Rolled Steel*, para. 227; *US – Line Pipe*, paras. 213 and 214; and *EC – Tube or Pipe Fittings*, paras. 188 and 189; and Panel Report, *US – Steel Safeguards*, paras. 329-332).

¹¹⁸ European Union's request for review of the Interim Report, p. 5.

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

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

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

Paragraph 7.198

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

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

Paragraphs 7.200 and 7.201

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

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

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

Footnote 388

6.150. Indonesia requests that the Panel delete the word "manifestly" in footnote 388.¹²⁵ The European Union considers the proposed change unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.¹²⁶

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

¹¹⁹ Indonesia's request for review of the Interim Report, paras. 2.142-2.148.

¹²⁰ European Union's request for review of the Interim Report, p. 5.

¹²¹ Indonesia's request for review of the Interim Report, paras. 2.149-2.152.

¹²² European Union's request for review of the Interim Report, p. 5.

¹²³ Indonesia's request for review of the Interim Report, para. 2.166.

¹²⁴ European Union's request for review of the Interim Report, p. 5.

¹²⁵ Indonesia's request for review of the Interim Report, paras. 2.169-2.171.

¹²⁶ European Union's request for review of the Interim Report, p. 5.

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

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

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

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

7 FINDINGS

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

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

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

7.1.1 Treaty interpretation

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

7.1.2 Standard of review

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

[A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.¹³⁰

¹²⁷ Indonesia's request for review of the Interim Report, paras. 2.172-2.175.

¹²⁸ European Union's request for review of the Interim Report, p. 5.

¹²⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10, section D.

¹³⁰ Emphasis added.

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

- (i) [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

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

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

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

7.1.3 Burden of proof

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

¹³¹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

¹³² Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; and *US – Lamb*, paras. 106 and 107.

¹³³ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

¹³⁴ See Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.

¹³⁵ See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.

¹³⁶ Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.

¹³⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

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

7.2 European Union's request for a preliminary ruling

7.2.1 Procedural background

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

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

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

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

7.2.2 Main arguments of the parties

7.2.2.1 European Union

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

- a. First, the European Union submits that Indonesia sent a "request" to the WTO Secretariat on 11 July 2013 with a view to suspending the work of the Panel in the sense of the first sentence of Article 12.12 of the DSU. According to the European Union, the fact that this request took the form of a simple email did not affect its nature or validity because "a request in this sense is simply an indication from the complaining member that it seeks suspension of the work of the panel".¹⁴⁰
- b. Second, the European Union considers that the term "work of the panel" in Article 12.12 refers to any task performed by a panel or by the WTO Secretariat, on behalf of the panel, "from the moment when the panel is established".¹⁴¹ Therefore, the fact that Indonesia's request occurred before panel composition did not affect its validity.
- c. Third, pending panel composition, the European Union considers that a request to suspend the work of the panel can be disposed of by the WTO Secretariat as part of its right to exercise "reasonable executive action"¹⁴² on behalf of the panel. In particular, the European Union submits that "the suspension may be communicated to the parties and third parties by any natural person properly acting in the name of the panel, including a duly authorized member of the Secretariat assisting the panel pursuant to Article 27 of the DSU."¹⁴³

¹³⁸ Appellate Body Report, *EC – Hormones*, para. 104.

¹³⁹ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

¹⁴⁰ European Union's request for a preliminary ruling, para. 13.

¹⁴¹ Ibid. para. 14.

¹⁴² Ibid. para. 35.

¹⁴³ Ibid. para. 15.

- d. Fourth, according to the European Union, Indonesia's request to suspend panel composition had the consequence of either effectively suspending the work of the Panel as of the date of the request, or – if the Panel finds that the work of the Panel had not yet started – of suspending the "future work" of the Panel.¹⁴⁴
- e. Finally, the European Union submits that its interpretation of the provisions of Article 12.12 of the DSU is consistent with the purpose of the DSU, which aims *inter alia* at the prompt settlement of disputes.¹⁴⁵

7.2.2.2 Indonesia

7.15. Indonesia presents two main arguments in response:

- a. First, Indonesia argues that the email correspondence from the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 was not intended as a request to suspend the work of the panel under Article 12.12.¹⁴⁶ Indonesia notes that the wording of the email in question does not explicitly refer to the "suspension" of the Panel's "work", nor does it refer explicitly or implicitly to Article 12.12 of the DSU.¹⁴⁷ Further, the email correspondence did not take the form of an official communication from a party to the Panel.¹⁴⁸ In fact, according to Indonesia, this email was simply a response to an invitation to attend a preferences meeting for Panel composition: it was addressed to the WTO Secretariat rather than the Panel and it merely sought to postpone the "preferences meeting" in respect of the composition of the Panel rather than the "work of the panel" generally.¹⁴⁹
- b. Second, Indonesia considers that the work of the panel cannot be suspended before panel composition, since Article 12.12 calls for a panel to take a decision as to whether or not a suspension should be granted.¹⁵⁰ This discretion conferred on the panel, in turn, presupposes that panelists have been appointed in order to be able to deliberate and decide on the request.¹⁵¹

7.2.3 Main arguments of the United States as third party

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

7.2.4 Evaluation by the Panel

7.2.4.1 Introduction

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

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

¹⁴⁴ European Union's request for a preliminary ruling, para. 32.

¹⁴⁵ Ibid. para. 20.

¹⁴⁶ Indonesia's response to European Union's request for a preliminary ruling, para. 4.8.

¹⁴⁷ Indonesia's response to European Union's request for a preliminary ruling, para. 4.5.

¹⁴⁸ Ibid. paras. 4.9 and 4.10.

¹⁴⁹ Ibid. paras. 4.7 and 4.8.

¹⁵⁰ Ibid. para. 4.16.

¹⁵¹ Ibid. paras. 4.40 and 4.41.

¹⁵² United States' third-party submission, para. 7.

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

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

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

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

- a. the complaining party must have submitted a request to suspend the work of the Panel;
- b. the Panel must have suspended its work; and
- c. the work of the Panel must have been suspended for more than 12 months.

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

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

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

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

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

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

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

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

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

- a. While the use of the term "suspend" in the email could evoke Article 12.12, the absence of any attendant reference to "the work of the panel" or to "Article 12.12 of the DSU" suggests that the wording of the alleged request is, at best, ambiguous.
- b. Indonesia's request to "suspend the meeting" rather than "the work of the panel" militates against a reading that Indonesia made a request pursuant to Article 12.12. Rather, the fact that the request was made in response to an invitation from the WTO Secretariat to attend a meeting in respect of Panel composition and that it was addressed to the WTO Secretariat rather than to "the Panel" suggests to us that Indonesia's intention was to make a request to the WTO Secretariat, acting in its capacity of assisting the parties during panel composition under Article 8 of the DSU, to postpone the proposed meeting.

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

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

7.2.4.3 Conclusion

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

- a. the European Union has not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of DSU Article 12.12;
- b. the work of the Panel was not suspended; and
- c. the authority for the establishment of this Panel has not lapsed.

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

7.3.1 Introduction

7.30. Indonesia claims that the EU authorities acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by making an improper allowance for a factor that did not affect price comparability.¹⁵⁵ This allowance was made on the basis of Article 2(10)(i) of the Basic Anti-Dumping Regulation, which specifically addresses the treatment of trading commissions in the calculation of dumping margins. This provision¹⁵⁶ states:

(i) Commissions

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

¹⁵⁵ Indonesia's second written submission, para. 5.1.

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

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

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

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

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

7.3.2 Relevant provisions of the covered agreements

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

A fair comparison shall be made between the export price and the normal value. ... Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[*] ... The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

[*fn original]⁷ It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

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

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

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

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

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

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

7.3.3 Main arguments of the parties

7.3.3.1 Indonesia

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

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

- a. the Indonesian producer (PT Musim Mas) and its Singapore-based trader (ICOF-S) formed a single economic entity such that the mark-up granted on the transfer price of the product under investigation should not be treated as an expense and as a difference which affects price comparability¹⁶²;
- b. by calculating the value of the adjustment on the basis of the indirect selling costs and profit of ICOF-S, the EU authorities created an asymmetry between the export price and the normal value¹⁶³; and
- c. the determination made by the EU authorities was arbitrary because no adjustment for a commission paid to a related trader was made to the export price of the second Indonesian exporting producer (Ecogreen) of fatty alcohols despite it being in the same factual circumstances.¹⁶⁴

7.38. Indonesia contends that these arguments, jointly and independently, support its claim that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an improper deduction for a factor that did not affect price comparability.¹⁶⁵ We note that Indonesia does not dispute that commissions can be the subject of an adjustment under Article 2.4 when paid to an independent trader¹⁶⁶, and further, that Indonesia does not take issue with the amount of the adjustment that was made in the present case.¹⁶⁷

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

¹⁶⁰ Indonesia's first written submission, para. 4.57.

¹⁶¹ Indonesia's first written submission, para. 4.57.

¹⁶² Indonesia's second written submission, paras. 2.8-2.10.

¹⁶³ Indonesia's response to Panel question Nos. 6, para. 1.32, and 14, para. 1.69.

¹⁶⁴ Indonesia's first written submission, paras. 4.43 and 4.47.

¹⁶⁵ See Indonesia's first written submission, para. 4.48; and second written submission, para. 5.1.

¹⁶⁶ Indonesia's first written submission, paras. 4.67 and 4.68.

¹⁶⁷ Indonesia's response to Panel question No. 38, para. 1.108.

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

7.40. In light of the importance of the existence of a single economic entity to determining whether an adjustment is warranted, Indonesia contends that investigating authorities are "implicitly require[d]" under Article 2.4 to assess whether such an entity exists in a given case.¹⁷³ For Indonesia, the criteria for making this determination pertain primarily to the corporate and structural links between the entities in question, such as whether there is common ownership, control, and management.¹⁷⁴ Indonesia draws on Article 6.10 of the Anti-Dumping Agreement¹⁷⁵ in this regard, pointing to the use of these criteria by panels and the Appellate Body in the context of that provision in *Korea – Certain Paper* and in *EC – Fasteners (China)*¹⁷⁶ to determine the existence of a single economic entity. Turning to the present case, Indonesia submits that, contrary to the "implicit requirement" under Article 2.4 of the Anti-Dumping Agreement, the EU authorities did not assess whether PT Musim Mas and ICOF-S formed a single economic entity by reference to their corporate and structural links, but rather focused on the "functions" of the related trader in order to determine whether the mark-up granted to ICOF-S should be treated as a difference which affects price comparability.¹⁷⁷

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

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

¹⁶⁸ See Indonesia's first written submission, para. 4.67; and response to Panel question No. 1, para. 1.3.

¹⁶⁹ Indonesia's first written submission, para. 4.71. See also Indonesia's second written submission, para. 2.8.

¹⁷⁰ See Indonesia's second written submission, para. 2.9.

¹⁷¹ Indonesia's first written submission, para. 4.67.

¹⁷² Indonesia's response to Panel question Nos. 1, para. 1.11, 8, para. 1.41, 10, paras. 1.48 and 1.49, and 42(ii), para. 3.5; opening statement at the second meeting of the Panel, para. 5; and second written submission, paras. 2.6-2.8.

¹⁷³ Indonesia's first written submission, para. 4.120.

¹⁷⁴ Indonesia's first written submission, para. 4.127.

¹⁷⁵ Article 6.10 provides that the authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".

¹⁷⁶ Indonesia's first written submission, paras. 4.123-4.130.

¹⁷⁷ The "functions" of the related trader is the key criterion in Article 2(10)(i) of the European Basic Anti-Dumping Regulation. It provides that "[t]he term 'commissions' shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis."

¹⁷⁸ Indonesia's first written submission, para. 4.169.

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

- b. PT Musim Mas and ICOF-S concluded a "Sale and Purchase Agreement" which pertains only to the exportation of goods manufactured by PT Musim Mas, and which sets out the rules for determining the transfer price of these goods through a margin (or mark-up) granted by the producer to the trader. Indonesia argues that this Agreement is merely a master agreement, or "a tool to approximate on paper ... a relationship that would exist between two unrelated entities"¹⁸⁰; and
- c. ICOF-S purchases and resells third-party products, which, according to Indonesia, "per se says essentially nothing about the relationship between a producer (like PT Musim Mas) and a selling department (ICOF-S)".¹⁸¹

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

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

¹⁷⁹ Indonesia's first written submission, para. 4.170.

¹⁸⁰ Indonesia's first written submission, para. 4.192.

¹⁸¹ Indonesia's first written submission, para. 4.246.

¹⁸² Indonesia's response to Panel question No. 2, para. 1.25.

¹⁸³ Indonesia's response to Panel question No. 17, para. 1.81.

¹⁸⁴ See Indonesia's first written submission, paras. 4.69-4.71, 4.78, and 4.114; response to Panel question Nos. 1, paras. 1.10 and 1.13, 2, para. 1.25, 6, para. 1.32, 9, para. 1.44, 14, para. 1.69, and 31, paras. 1.37-1.39; second written submission, para. 2.39; and comments on the European Union's response to Panel question No. 41, para. 3.1.

¹⁸⁵ Indonesia's response to Panel question No. 7, para. 1.36.

¹⁸⁶ Indonesia's response to Panel question Nos. 9, para. 1.44, and 31, para. 1.37.

¹⁸⁷ Indonesia's first executive summary, para. 2.25.

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

7.45. Finally, Indonesia makes a consequential claim under Article 2.3 of the Anti-Dumping Agreement. Indonesia's claim is based on the close relationship between this provision and the third and fourth sentences of Article 2.4. Indonesia contends that if an allowance with respect to a constructed export price violates Article 2.4, then it may also be said that the export price was constructed in a way which is inconsistent with Article 2.3.¹⁹⁰

7.3.3.2 European Union

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

7.47. In relation to Indonesia's argument concerning the existence of a single economic entity, the European Union submits that whether or not two companies form such an entity is not a relevant consideration under Article 2.4.¹⁹¹ Rather, for the European Union, the determinative question is whether there exists evidence of a difference which affects price comparability that requires an adjustment to be made.¹⁹²

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

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

¹⁸⁸ Indonesia's second written submission, para. 2.62.

¹⁸⁹ Indonesia's first written submission, para. 4.270.

¹⁹⁰ Indonesia's first written submission, paras. 4.282-4.285.

¹⁹¹ European Union's second written submission, para. 17.

¹⁹² European Union's second written submission, para. 26.

¹⁹³ European Union's first written submission, para. 69.

¹⁹⁴ European Union's response to Panel question No. 7, para. 1.34.

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

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

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

7.3.4 Main arguments of the third parties

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

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

7.3.5 Evaluation by the Panel

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

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

¹⁹⁵ European Union's first written submission, para. 95.

¹⁹⁶ European Union's second written submission, paras. 68 and 69.

¹⁹⁷ European Union's response to Panel question No. 41, p. 9.

¹⁹⁸ European Union's second written submission, paras. 90 and 101; response to Panel question No. 18, pp. 16-20.

¹⁹⁹ Turkey's third-party submission, para. 9.

²⁰⁰ United States' third-party response to Panel question No. 1, para. 1.

²⁰¹ United States' third-party response to Panel question No. 2a, paras. 7-9.

²⁰² Indonesia's second written submission, para. 5.1.

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

[T]he ordinary meaning of making an "allowance" connotes "mak[ing] [an] addition or deduction corresponding to ... tak[ing] into account mitigating or extenuating circumstances", and "due" connotes what is "just, proper, regular, and reasonable". That is, additions or deductions in appropriate amounts to the export price or normal value may be required to account for "differences" between the two if they affect price comparability, thereby ensuring the "fairness" of the comparison under Article 2.4.²⁰³

7.56. The third sentence of Article 2.4 contains an illustrative list of factors that could potentially affect price comparability. Although the alleged factor in the present case, namely a mark-up²⁰⁴, is not included in this list, we note that the Appellate Body has construed this list as non-exhaustive:

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

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

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

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

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

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

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

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

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

question is linked exclusively either to the domestic sales or to relevant export sales subject to comparison, or to both sides of the comparison but in different amounts.²⁰⁸ Conversely, if an alleged factor does not represent a difference affecting the comparability between the normal value and export prices, no allowances are permitted pursuant to the third sentence of Article 2.4.²⁰⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.63. We recall that the EU authorities treated the mark-up²¹⁸ paid to ICOF-S on export sales to the European Union as a difference which affects price comparability for which a downward adjustment to the export price was warranted.²¹⁹ We begin with an overview of relevant aspects of the EU authorities' determinations, including as they evolved over the course of the investigation. We then assess the relevant evidence on the record to determine whether, in arriving at their conclusion, the EU authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.

7.3.5.1.1 Treatment of the mark-up in the Preliminary Determination

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

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

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

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

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

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

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

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

²²² [***]

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

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

7.3.5.1.2 Treatment of the mark-up in the Final Determination

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

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

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

²²³ In particular, this conclusion was reached in response to PT Musim Mas's claim that there was no difference in respect of ICOF-S' involvement in its sales as between domestic and export sales. (See Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44).

²²⁴ These are documents authored by the interested parties but not placed on the record of the anti-dumping investigation at issue.

²²⁵ PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), p. 9.

²²⁶ PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), p. 9.

²²⁷ PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), pp. 9, 13, and 15.

²²⁸ PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), pp. 3 and 4.

²²⁹ PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), p. 19.

²³⁰ PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), pp. 14 and 15.

²³¹ PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), p. 14.

²³² Final Determination, (Exhibit IDN-4), recitals 31-33.

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

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

7.3.5.1.3 Treatment of the mark-up in the Revised Determination

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

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

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

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

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

²³³ Final Determination, (Exhibit IDN-4), recitals 31-33.

²³⁴ Final Determination, (Exhibit IDN-4), recital 35.

²³⁵ Final Determination, (Exhibit IDN-4), recital 33.

²³⁶ Revised Determination, (Exhibit IDN-5), recital 5.

²³⁷ Revised Determination, (Exhibit IDN-5), recital 12.

²³⁸ Revised Determination, (Exhibit IDN-5), recitals 24-32.

²³⁹ Revised Determination, (Exhibit IDN-5), recitals 24 and 27.

²⁴⁰ Revised Determination, (Exhibit IDN-5), recitals 29-32.

7.3.5.1.4 Analysis of the EU authorities' determination

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

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

7.73. The EU authorities' explanations relied principally upon the Sale and Purchase Agreement between PT Musim Mas and ICOF-S to determine the existence of a mark-up on sales of the product at issue to the European Union. This agreement²⁴² provides for a "Transaction Price" between ICOF-S and PT Musim Mas based on the following formula:

[***]

The "Rebased Final Price" refers, in relevant part²⁴³, to the final price paid by the buyer of the product. The "ICOF Margin" refers to either [***] or 5% of the "Rebased Final Price" depending on [***²⁴⁴]

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

7.75. These elements of the Sale and Purchase Agreement support the conclusion that the mark-up paid to ICOF-S is a factor that impacts the price of the product under consideration, which we recall can be one step in determining whether a given factor constitutes a difference which affects price comparability under Article 2.4.²⁴⁹ In particular, it appears to represent a discrete, numerical portion of the price that reflects payment for certain "functions, obligations and risks" – and their associated expenses – assumed by ICOF-S in respect of the product under consideration. This understanding comports with PT Musim Mas' questionnaire response, in which PT Musim Mas stated that "ICOF Singapore *inter alia* assumes the financing, trading and customer default risk", and in which PT Musim Mas framed the "ICOF Margin" as "the value of the sales service rendered from ICOF to PT Musim Mas" and "the service fee ICOF Singapore receives for its sales services".²⁵⁰ This corroborates the provisions of the Sale and Purchase Agreement that

²⁴¹ See above, para. 7.8.

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

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

²⁴⁴ [***]

²⁴⁵ [***]

²⁴⁶ [***]

²⁴⁷ [***]

²⁴⁸ [***]

²⁴⁹ See above, para. 7.58.

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

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

7.76. During the investigation, PT Musim Mas argued against the EU authorities' reliance on the Sale and Purchase Agreement between PT Musim Mas and ICOF-S as the basis for making a downward adjustment for the mark-up paid to ICOF-S on exports to the European Union²⁵¹, arguing that it was, in reality, a master agreement to regulate transfer prices between related entities. In other words, the function of the Sale and Purchase Agreement was to comply with tax rules on matters related to transfer pricing.²⁵² In that regard, PT Musim Mas drew the EU authorities' attention to, *inter alia*, OECD guidelines on transfer pricing.²⁵³ For PT Musim Mas, this characteristic of the Sale and Purchase Agreement suggested that ICOF-S acted as a sales and marketing department for PT Musim Mas, rather than as a trader or agent.²⁵⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.80. We now turn to the EU authorities' evidentiary basis for determining that the mark-up represented a "difference" between the sales to be compared, namely, that it was linked to export sales only. In particular, the EU authorities noted that [***²⁶²] that the Sale and Purchase Agreement between PT Musim Mas and ICOF-S covered export sales only²⁶³; and that PT Musim Mas invoiced domestic sales directly.²⁶⁴ We understand the EU authorities to have inferred from this evidence that ICOF-S was not involved in domestic sales, and that its involvement in export sales to the European Union represented an additional expense as compared with the normal value.²⁶⁵

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

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

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

²⁶² [***]

²⁶³ Final Determination, (Exhibit IDN-4), recitals 31 and 35.

²⁶⁴ Final Determination, (Exhibit IDN-4), recital 35.

²⁶⁵ Final Determination, (Exhibit IDN-4), recital 35; and Revised Determination, (Exhibit IDN-5), recitals 24 and 27.

²⁶⁶ Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44. According to PT Musim Mas, ICOF-S incurred the same costs for domestic sales, and the cost of having an effective marketing arm for both domestic and export sales was absorbed within ICOF-S.

²⁶⁷ Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44; and Final Determination, (Exhibit IDN-4), recital 35.

²⁶⁸ See, e.g. Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), p. 43.

²⁶⁹ PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), pp. 9, 13, and 15.

²⁷⁰ [***]

²⁷¹ See Final Determination, (Exhibit IDN-4), recitals 31 and 33-35; and Revised Determination, (Exhibit IDN-5), recitals 24 and 27.

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

7.84. Further, we do not consider it unreasonable for the EU authorities to have inferred from PT Musim Mas' direct invoicing of domestic sales that PT Musim Mas possessed its own sales and marketing capacity.²⁷⁶ Such an understanding is corroborated by the charts in PT Musim Mas' questionnaire response indicating that it had a marketing branch²⁷⁷, as well as entries in its P&L for [***²⁷⁸] suggests that PT Musim Mas incurred internally the same type of costs for both categories of sales.²⁷⁹ From this, it could be reasonably inferred that PT Musim Mas incurred the same costs for selling and marketing expenses for both its direct sales to domestic customers and its sales (or transfers) to ICOF-S. It follows that the pricing component referred to as the "ICOF Margin" in the Sale and Purchase Agreement between PT Musim Mas and ICOF-S could reasonably be understood to reflect an additional cost, for which there is no equivalent on the domestic side, thereby giving rise to a difference for which an adjustment was required.

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

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

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

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

²⁷³ [***]

²⁷⁴ [***]

²⁷⁵ [***]

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

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

²⁷⁸ [***]

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

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

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

7.88. On the basis of the foregoing, we consider that the EU authorities' factual finding of a mark-up and associated expenses linked to export sales only was proper and provided a sufficient basis for concluding that the factor at issue constituted a difference which affects price comparability. In particular, the EU authorities' explanation reveals an evidentiary basis for considering that the mark-up was a component of the price of exports to the European Union representing the payment for a service (i.e. for assuming certain risks, obligations, and functions), and that there was no concomitant pricing or expense component on the domestic side. We recall, in this regard, our view that the existence of a feature or characteristic of the prices to be compared that is linked exclusively either to domestic sales or to relevant export sales, or to both sides of the comparison but in different amounts, can demonstrate the existence of a difference which affects price comparability under Article 2.4.²⁸²

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

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

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

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

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

²⁸² See above, para. 7.58.

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

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

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

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

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

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

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

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

²⁸⁷ [***]

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

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

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

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

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

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

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

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

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

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

7.99. We understand Indonesia to argue that, "typically", an internal allocation of funds within a single economic entity (or between "closely related or intertwined" parties) which does not reflect an actual or genuine expense and is not reflected in the producer's pricing decision cannot be a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.²⁹⁸ We consider that the European Union agrees that if a difference does not affect price comparability, no adjustment is necessary under Article 2.4.²⁹⁹ We also understand the parties to agree that a component of the price of a transaction that is linked to either the export side or the

²⁹³ [***]

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

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

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

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

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

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

domestic side – or to both sides but with different amounts – will ordinarily qualify as a difference which affects price comparability under Article 2.4.³⁰⁰

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

- a. the "relationship" between PT Musim Mas and ICOF-S, namely, their common ownership and control [***³⁰³];
- b. the "fact" that ICOF-S undertook work on PT Musim Mas' domestic (and some export) sales for no remuneration³⁰⁴;
- c. the purchase by ICOF-S of PT Musim Mas' products for resale on risk and liability conditions that would be "highly unusual" for an unrelated, independent trader³⁰⁵;
- d. the nature of the written agreement between PT Musim Mas and ICOF-S as a "transfer pricing agreement", and the appropriate inferences to be drawn in that regard³⁰⁶; and
- e. the participation of ICOF-S staff in the onsite verifications by the EU authorities.³⁰⁷

7.101. For Indonesia, the EU authorities erred by either ignoring, or placing insufficient weight and drawing incorrect inferences from, this evidence.³⁰⁸ Indonesia further contends that the EU authorities erred in their reliance on ICOF-S' trade in the products of unrelated entities, PT Musim Mas' direct sales without the involvement of ICOF-S, and the modalities of the Sale and Purchase Agreement between ICOF-S and PT Musim Mas, in arriving at the conclusion that PT Musim Mas and ICOF-S do not form a single economic entity.³⁰⁹ The European Union rejects both the alleged relevance of the existence of a "single economic entity" to making allowances under Article 2.4³¹⁰, as well as Indonesia's assertions regarding the EU authorities' consideration of the evidence on the existence of a single economic entity between PT Musim Mas and ICOF-S.³¹¹

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

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

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

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

³⁰³ [***]

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

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

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

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

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

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

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

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

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

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

7.103. We are not convinced that the existence of what Indonesia denotes as a "single economic entity"³¹³ is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. This is because we consider it possible that two entities could transact for goods and services at arms-length, regardless of how closely intertwined their control and ownership might be. This is confirmed by the material before us on transfer pricing agreements³¹⁴, as well as relevant elements of the WTO *acquis*.³¹⁵ Moreover, even for non-arms-length transactions, expenses incurred in the provision of services normally need to be recovered through pricing and therefore could affect price comparability. Therefore, in our view, it is possible that a transaction between two entities within what Indonesia denotes as a "single economic entity" could reflect an expense that must be recovered and thus would impact price comparability. If this expense is linked to either the export side or the domestic side of a transaction, or to both sides but with different amounts, we would anticipate that it could be found to be a difference which affects price comparability in a given anti-dumping investigation. Indeed, our understanding is not inconsistent with Indonesia's argument that:

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

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

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

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

³¹⁵ In a number of disputes, panels and the Appellate Body have foreshadowed that related entities could transact goods or services between one another (for instance, as inputs in the production of a product). (See Appellate Body Report, *US – Hot-Rolled Steel*, paras. 141-143; and Panel Reports, *US – Softwood Lumber V*, paras. 7.322, 7.323, 7.328, and 7.329; and *EC – Salmon (Norway)*, paras. 7.593-7.599). Further, in the context of disciplines for determining the customs value of imported goods, Article 1.2(a) of the Customs Valuation Agreement provides in relevant part:

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

(emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.110. The arguments made by Indonesia in respect of the other evidence that it asserts were ignored or accorded undue weight by the EU authorities largely mirror those made by PT Musim Mas during the investigation.³³³ Based on our review of the EU authorities' explanation and the record evidence, we concluded that an unbiased and objective investigating authority could have found that ICOF-S was not involved in PT Musim Mas' domestic sales, and could have relied upon the Sale and Purchase Agreement between PT Musim Mas and ICOF-S in construing the mark-up as a difference which affects price comparability under Article 2.4.³³⁴ We also considered the EU authorities' factual finding that ICOF-S undertakes functions similar to those of an agent working on a commission basis was not inconsistent with Article 2.4, nor were their reliance on evidence of PT Musim Mas' direct sales, ICOF-S' trade in products of unrelated entities, and the terms of the Sale and Purchase Agreement, an inappropriate basis for that factual finding.³³⁵ Since Indonesia's arguments concerning this evidence are largely the same, we see no reason to set aside our earlier conclusions in that regard.

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

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

³²⁸ [***]

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

³³⁰ [***]

³³¹ [***]

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

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

³³⁴ See above paras. 7.79 and 7.82.

³³⁵ See above para. 7.96.

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

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

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

7.3.5.3.1 Factual background

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

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

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

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

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

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

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

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

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

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

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

7.3.5.3.2 Analysis of the Panel

7.115. Indonesia's argument consists of two parts.

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

- a. Since ICOF-S acts as the sales department of PT Musim Mas, the SG&A expenses for PT Musim Mas' export sales were, in fact, the SG&A expenses incurred by ICOF-S. Relatedly, the profit obtained from export sales of the product concerned was split between ICOF-S and PT Musim Mas. Therefore, by deducting ICOF-S' SG&A and profit from the export price, the EU authorities obtained an ex-factory export price for sales of the product under investigation which included no amount for SG&A and which included only a share of the profits accrued in respect of these sales.
- b. By contrast, the ex-factory normal value included both PT Musim Mas' full profits on sales of the product concerned and any indirect selling expenses relating to these sales.³⁴¹

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁴⁵ Indonesia's response to Panel question No. 2, para. 1.25.

³⁴⁶ [***]

³⁴⁷ We note however, that the SG&A figure ultimately used by the EU authorities for the normal value was slightly different, namely [***]. This was because, in order to exclude transport and insurance from the average cost of production, SG&A had to be reallocated. (See Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 2).

³⁴⁸ See above paras. 7.84 and 7.86.

³⁴⁹ Indonesia's response to Panel question No. 2, para. 1.25.

³⁵⁰ See above para. 7.84.

³⁵¹ Excel file "PTMM definitive disclosure.xls", (Exhibit EU-12) (BCI), spreadsheet 2.3 (TABLE G - PL - (Profit and Loss) - of the exporting producer and each related company), row 44 /columns F and G (indicating [***] for "DOMESTIC MARKET - PRODUCT CONCERNED - INDEPENDENT CUSTOMERS"), and row 44 /columns V, W, X and Y (indicating [***] for "EXPORT TO OTHER COUNTRIES - PRODUCT CONCERNED - INDEPENDENT CUSTOMERS" and "EXPORT TO OTHER COUNTRIES - PRODUCT CONCERNED - RELATED CUSTOMERS").

³⁵² [***]

³⁵³ Indonesia's comments on the European Union's response to Panel question No. 44, para. 4.13.

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

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

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

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

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

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

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

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

³⁵⁴ Indonesia's comments on the European Union's response to Panel question No. 44, para. 4.13. (fn omitted)

³⁵⁵ Indonesia's response to Panel question No. 31, para. 1.44.

³⁵⁶ Indonesia's response to Panel question No. 42, para. 3.8.

³⁵⁷ See Indonesia's response to Panel question No. 38, para. 1.108.

³⁵⁸ As noted by Indonesia, "the Commission made some adjustments to these figures". (Indonesia's comments on the European Union's response to Panel question No. 41, para. 3.4).

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

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

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

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

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

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

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

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

³⁶⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

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

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

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

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

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

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

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

7.3.5.4.1 Factual background

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

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

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

The EU authorities initially rejected this claim, concluding that:

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

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

7.133. In response to the imposition of anti-dumping duties following the Final Determination, Ecogreen filed an action for annulment³⁷⁰ before the General Court of the European Union, citing in particular the adjustment made to its export price for commissions paid to its related trader. PT Musim Mas filed a similar action for annulment before the Court on 20 January 2012.³⁷¹

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

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

³⁶⁷ Preliminary Determination, (Exhibit IDN-3), recitals 7 and 8.

³⁶⁸ Final Determination, (Exhibit IDN-4), recital 31.

³⁶⁹ Final Determination, (Exhibit IDN-4), recital 31.

³⁷⁰ General Court, Case T-28/12, *PT Ecogreen Oleochemicals and Others v Council* (2013).

³⁷¹ General Court, Case T-26/12, *PT Musim Mas v Council* (25 June 2015), (Exhibit EU-4).

³⁷² Court of First Instance, Case T-249/06, *Interpipe Niko Tube and Interpipe NTRP v Council* (2009) ECR II, (Exhibit IDN-49).

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

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

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

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

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

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

7.3.5.4.2 Main arguments of the parties

7.3.5.4.2.1 Indonesia

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

³⁷³ Court of Justice, Joined Cases C-191/09 and C-200/09, Council and Commission v Interpipe Niko Tube and Interpipe NTRP (2012).

³⁷⁴ Revised Determination, (Exhibit IDN-5), recital 5.

³⁷⁵ Revised Determination, (Exhibit IDN-5), recital 12.

³⁷⁶ Indonesia's first written submission, para. 4.11.

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

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

7.138. In its first written submission Indonesia submits that this lack of a reasoned and adequate explanation gives rise to a violation of Article 2.4 of the Anti-Dumping Agreement, "independently and jointly [with the argument that no adjustment for commission should be made in the context of a single economic entity]."³⁸⁰ Indonesia challenges in particular the relevance of the three main criteria³⁸¹ used by EU authorities to determine if ICOF-S had functions similar to those of a trader working on a commission basis:

- a. the importance of direct sales made by the exporting producer vs sales made through the related trader;
- b. the importance of third-party sales made by the related trader; and
- c. the existence of a "Sale and Purchase Agreement" between the exporting producer and the related trader.

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

7.139. First, in relation to the percentage of direct sales made by PT Musim Mas and Ecogreen, the EU authorities found that the volume of sales to third countries made directly by Ecogreen was less than 8% (1-5%) of all export sales³⁸², while "the level of direct export sales made by PTMM [was] higher than that of Interpipe NTRP VAT and ... this fact distinguishes PTMM from Ecogreen."³⁸³ Indonesia argues that this criterion is irrelevant to a determination of whether ICOF-S had the same functions as "an agent working on a commission basis" and of whether

³⁷⁷ Indonesia's first written submission, para. 4.270.

³⁷⁸ Indonesia's response to Panel question No. 42, para. 3.7.

³⁷⁹ Indonesia's first written submission, para. 4.37.

³⁸⁰ Indonesia's first written submission, para. 4.48.

³⁸¹ The General Court of the European Union mentions these three criteria at recital 50 of its Judgement in case T-26/12 (PT Musim Mas vs Council): "it is apparent from recital 31 of the contested regulation that the Council based its conclusion, in particular, that ICOF S did not carry out the functions of an internal sales department, on three factors, namely, first, on the fact that ICOF S also sold products manufactured by other producers, including by unrelated producers; secondly, on the fact that the applicant paid ICOF S a commission, mentioned in a contract, only on the export sales made by ICOF S; and, thirdly, on the fact that the applicant invoiced directly domestic sales and some export sales to third countries." (General Court, Case T-26/12, PT Musim Mas v Council (25 June 2015), (Exhibit EU-4)).

³⁸² Revised Determination, (Exhibit IDN-5), recital 5.

³⁸³ Revised Determination, (Exhibit IDN-5), recital 27. The relevant determinations made by the EU authorities during the investigation do not specify what is the exact level of PT Musim Mas' direct sales. But the General Court of the European Union in PT Musim Mas vs Council notes at recital 69 that: "it is apparent from the documents before the Court that the applicant acted as the contracting party in respect of 27.08% of export sales." In paragraph 42 of its opening statement at the first meeting of the Panel with the parties, the European Union indicated that "PT Musim Mas made a significant amount of export sales (about 20% of all export sales)".

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

- a. the EU authorities' reliance on a quantitative threshold to differentiate between PT Musim Mas and Ecogreen is "arbitrary".³⁸⁴ Indonesia adds that given the fluctuating level of these sales, the conclusion could differ for a given company from one year to the next, without any change in the underlying corporate structure. This would be an "absurd outcome"³⁸⁵; and
- b. in addition, according to Indonesia, it was established during the investigation that the invoicing of certain export sales by PT Musim Mas occurred only at the request of specific clients for reasons pertaining to the application of rules of origin; in spite of this, all sales were "'performed' from Indonesia", in the sense that the goods were manufactured and shipped from Indonesia.³⁸⁶

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

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

- a. The fact that one company provided such a "commission" on the basis of a written agreement and the other company without a written agreement "can hardly be the basis for drawing a bright line of distinction between the companies".³⁹¹ Indonesia considers that it was incumbent upon EU authorities to explain in which regard the relationship between PT Musim Mas and ICOF-S was different from the relationship between Ecogreen and EOS.³⁹²
- b. PT Musim Mas demonstrated during the investigation that the Sale and Purchase Agreement was merely a "master agreement" aimed at complying with applicable tax guidelines and internationally accepted guidelines on transfer pricing. As a consequence, this agreement was irrelevant for assessing whether the trader's functions were similar to those of an agent working on a commission basis.³⁹³

7.3.5.4.2.2 European Union

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

³⁸⁴ Indonesia's first written submission, para. 4.275.

³⁸⁵ Indonesia's first written submission, fn 211.

³⁸⁶ Indonesia's first written submission, para. 4.274

³⁸⁷ Revised Determination, (Exhibit IDN-5), recital 29.

³⁸⁸ Indonesia's first written submission, para. 4.246.

³⁸⁹ Indonesia's first written submission, para. 4.246.

³⁹⁰ See for example Final Determination, (Exhibit IDN-4), recital 31; and Revised Determination, (Exhibit IDN-5), recital 31.

³⁹¹ Indonesia's first written submission, para. 4.274.

³⁹² Indonesia's first written submission, para. 4.279.

³⁹³ Indonesia's second written submission, paras. 2.46 and 2.53; first written submission, para. 4.195.

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

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

- a. PT Musim Mas had more significant amounts of direct export sales as compared to Ecogreen;
- b. ICOF-S has no exclusive relationship with PT Musim Mas but also sells many other products from unrelated parties; and
- c. The relationship between PT Musim Mas and ICOF-S was governed by a comprehensive, formal Sale and Purchase Agreement which contemplates a mark-up for ICOF-S international activities, while no such contracts existed for Ecogreen.
- d. In light of these criteria, ICOF-S appeared to have functions similar to those of "an agent working on a commission basis", while Ecogreen did not.

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

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

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

7.3.5.4.3 Analysis of the Panel

7.145. In view of the European Union's assertion that Indonesia's argument varied in the course of the proceedings³⁹⁷, we consider useful to set out our understanding of Indonesia's argument in relation to Ecogreen.

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

³⁹⁴ European Union's second written submission, para. 103.

³⁹⁵ European Union's response to Panel question No. 43, para. 21 (lists the criteria reviewed by the EU authorities for PT Musim Mas and Ecogreen).

³⁹⁶ European Union's response to Panel question No. 43, para. 20.

³⁹⁷ European Union's response to Panel question No. 43, para. 20.

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

7.148. We recall, however, our conclusion that the explanation given by the EU authorities for their determination that an adjustment for the mark-up in question was warranted in the case of PT Musim Mas is reasoned and adequate. This conclusion was based on our finding that the EU authorities had a sufficient evidentiary basis for their factual findings that³⁹⁹:

- a. the mark-up was a factor that had an impact on the price to be compared and was granted on export sales but not on domestic sales; and
- b. ICOF-S had functions similar to an agent working on a commission basis in the sense of Article 2) 10) i) of the Basic Anti-Dumping Regulation.

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

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

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

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

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

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

³⁹⁸ See, e.g. Panel Report, *US – Softwood Lumber V*, para. 7.320; and Appellate Body Report, *US – Softwood Lumber V*, paras. 173 and 174.

³⁹⁹ See above, section 7.3.5.1.4.1.

⁴⁰⁰ See above, section 7.3.5.1.4.2.

⁴⁰¹ Indonesia's response to Panel question No. 43, para. 3.15.

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

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

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

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

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

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

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

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

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

⁴⁰² Revised Determination, (Exhibit IDN-5), recital 29.

⁴⁰³ Indonesia's response to Panel question No. 43, para. 3.11.

⁴⁰⁴ See for example, section 7.3.5.1.4.1 and section 7.3.5.1.4.2 above.

⁴⁰⁵ Final Determination, (Exhibit IDN-4), recital 31.

⁴⁰⁶ Final Determination, (Exhibit IDN-4), recital 33.

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

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

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

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

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

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

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

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

⁴⁰⁷ Revised Determination, (Exhibit IDN-5), recital 5.

⁴⁰⁸ Indonesia's response to Panel question No. 43, para. 3.15

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

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

7.4.1 Introduction

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

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

7.4.2 Relevant provisions of the covered agreements

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

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

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

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

7.4.3 The EU authorities' analysis of the economic crisis factor

7.4.3.1 Main arguments of the parties

7.4.3.1.1 Indonesia

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

⁴¹⁰ Indonesia's first written submission, paras. 5.1-5.3 and 7.1; second written submission, paras. 3.1 and 5.1.

⁴¹¹ Indonesia's first written submission, paras. 5.2 and 7.1; second written submission, paras. 3.1 and 5.1.

⁴¹² Indonesia's first written submission, paras. 5.32 and 5.34-5.43.

- a. the apparent central assumption (that the crisis began in 2009, as reflected in paragraph 96 of the Definitive Determination) is incorrect because this assumption is contradicted by record evidence and by evidence of which judicial notice can be taken;
- b. the EU authorities failed to explain in paragraph 96 of their Definitive Determination why, despite there being multiple pieces of evidence on the record that suggest that the crisis began and its effects were felt already in 2008, their central assumption that the crisis began in 2009 could nevertheless be sustained; and
- c. while paragraph 96 is premised on the assumption that the crisis began only in 2009, other statements by the EU authorities in other sections of their determinations suggest that they considered that the crisis began in 2008, which makes their analysis internally inconsistent, because the same crisis cannot start both in 2008 and in 2009.

7.167. Second, Indonesia contends that the EU authorities failed to separate and distinguish the injurious effects of the economic crisis – despite acknowledging expressly that the crisis had such effects – and thus did not properly conclude that a causal link existed between the dumped imports and injury within the meaning of Article 3.5.⁴¹³ For Indonesia, since the economic crisis injured both the domestic industry and the dumped imports contemporaneously in the same channels (namely prices and demand reduction), it was incumbent on the EU authorities to separate and distinguish the *extent* of the injurious effects of the two respective factors.⁴¹⁴ Third, Indonesia argues that the EU authorities failed to provide a reasoned and adequate explanation for their conclusion on injury because they failed to address interested parties' arguments and record evidence that contradicted their conclusion, including evidence on the temporal coincidence of an increase in imports and improvements in the domestic industry's profitability, and arguments concerning a decrease in captive demand.⁴¹⁵

7.4.3.1.2 European Union

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

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

⁴¹³ Indonesia's first written submission, paras. 5.32 and 5.44-5.58.

⁴¹⁴ Indonesia's opening statement at the first meeting of the Panel, paras. 77 and 78.

⁴¹⁵ Indonesia's first written submission, paras. 5.32 and 5.59-5.66; opening statement at the second meeting of the Panel, paras. 24 and 25.

⁴¹⁶ European Union's first written submission, para. 122.

⁴¹⁷ European Union's first written submission, para. 126.

⁴¹⁸ European Union's first written submission, paras. 131 and 146.

⁴¹⁹ European Union's first written submission, para. 146.

⁴²⁰ European Union's first written submission, para. 131.

⁴²¹ European Union's first written submission, para. 144 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 144).

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

7.4.3.2 Main arguments of the United States as third party

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

7.4.3.3 Evaluation by the Panel

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

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

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

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

⁴²² European Union's second written submission, para. 123.

⁴²³ United States' third-party submission, para. 36.

⁴²⁴ United States' third-party submission, para. 37.

⁴²⁵ Indonesia's opening statement at the first meeting of the Panel, paras. 74-76; opening statement at the second meeting of the Panel, para. 26.

⁴²⁶ European Union's second written submission, paras. 118-121.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴³⁵ Preliminary Determination, (Exhibit IDN-3), recitals 64-66 (confirmed in Final Determination, (Exhibit IDN-4), recital 62).

⁴³⁶ Preliminary Determination, (Exhibit IDN-3), recitals 70-73 and 80-82 (confirmed in Final Determination, (Exhibit IDN-4), recitals 65, 71, and 73).

⁴³⁷ Preliminary Determination, (Exhibit IDN-3), recitals 70-72 (confirmed in Final Determination, (Exhibit IDN-4), recital 65); Final Determination, (Exhibit IDN-4), recitals 72 and 73.

⁴³⁸ Final Determination, (Exhibit IDN-4), recitals 87 and 96. While the figures referred to in this and the next paragraph appear to relate principally to calendar years in the period of investigation, it is apparent from the determination that the EU authorities also evaluated these figures in view of the economic crisis. (See, in particular, Preliminary Determination, (Exhibit IDN-3), recitals 73, 77, 79, 87, and 108). We also observe that Indonesia does not take issue with the EU authorities' evaluation of movements in these figures *vis-à-vis* the economic crisis. (See Indonesia's opening statement at the first meeting of the Panel, para. 76).

⁴³⁹ Preliminary Determination, (Exhibit IDN-3), recitals 70, 71, 80, and 81 (confirmed in Final Determination, (Exhibit IDN-4), recitals 65 and 71).

⁴⁴⁰ Preliminary Determination, (Exhibit IDN-3), recitals 70, 73, 80, and 81 (confirmed in Final Determination, (Exhibit IDN-4), recitals 65 and 71).

⁴⁴¹ Preliminary Determination, (Exhibit IDN-3), recitals 64-66 (confirmed in Final Determination, (Exhibit IDN-4), recital 62).

⁴⁴² Preliminary Determination, (Exhibit IDN-3), recitals 70-72 (confirmed in Final Determination, (Exhibit IDN-4), recital 65); and Final Determination, (Exhibit IDN-4), recitals 72 and 73.

⁴⁴³ Final Determination, (Exhibit IDN-4), para. 96; and Preliminary Determination, (Exhibit IDN-3), recitals 104, 105, and 108.

⁴⁴⁴ Final Determination, (Exhibit IDN-4), para. 96.

⁴⁴⁵ See Preliminary Determination, (Exhibit IDN-3), recitals 87 and 104.

affected the domestic industry in the same manner, namely, lower prices and reduced demand.⁴⁴⁶ Indonesia's argument implies, in effect, that the failure to use "quantitative assessment tools" or a "basic quantitative method" in the present case leads to an inconsistency with Article 3.5.⁴⁴⁷ In Indonesia's view, by failing to examine the extent of injury caused by the economic crisis *vis-à-vis* the extent of injury caused by the dumped imports, the EU authorities failed to "separate and distinguish" these factors under Article 3.5 of the Anti-Dumping Agreement.⁴⁴⁸

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

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

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

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

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

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

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

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

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

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

⁴⁵³ See above para. 7.176.

⁴⁵⁴ See above para. 7.176.

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

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

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

7.182. The European Union points to a series of other references in the Provisional and Final Determinations that it contends demonstrate the EU authorities understood the economic crisis to have begun in 2008.⁴⁵⁷ As we have stated above, we do not consider it inappropriate to take into account passages of the determinations other than those in the section entitled "Causation" in evaluating the consistency of the determinations with the European Union's obligations.⁴⁵⁸ With that in mind, we consider that the following passages from the EU authorities' determination show that they understood that the injurious effects of the economic crisis on the domestic industry began at some point in 2008:

*The economic downturn has contributed to the decrease in consumption from 2008, during which users of the product concerned experienced a drop in demand for their products.*⁴⁵⁹

*The biggest increase [of market share of the countries concerned] took place between 2007 and 2008. There was a slight decrease of imports during the economic crisis, which reduced the market share of the countries concerned by 2%, between 2008 and 2009.*⁴⁶⁰

*Furthermore, starting from 2008, with the overall economic slowdown and Union consumption decrease, the exporters from the countries concerned managed to maintain their market share, by reducing prices, still undercutting Union price.*⁴⁶¹

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

⁴⁵⁵ Indonesia's first written submission, para. 5.34; opening statement at the first meeting of the Panel, paras. 63-71.

⁴⁵⁶ Indonesia's first written submission, paras. 5.35 and 5.41.

⁴⁵⁷ European Union's first written submission, paras. 140-142; second written submission, para. 115.

⁴⁵⁸ See above, para. 7.174.

⁴⁵⁹ Preliminary Determination, (Exhibit IDN-3), recital 66 (confirmed in Final Determination, (Exhibit IDN-4), recital 62). (emphasis added)

⁴⁶⁰ Preliminary Determination, (Exhibit IDN-3), recital 73 (confirmed in Final Determination, (Exhibit IDN-4), recital 65). (emphasis added)

⁴⁶¹ Preliminary Determination, (Exhibit IDN-3), recital 108 (confirmed in Final Determination, (Exhibit IDN-4), recital 102). (emphasis added)

⁴⁶² See Indonesia's first written submission, para. 5.35.

⁴⁶³ In the light of this conclusion, we do not consider it necessary, for the effective resolution of the dispute, to address other aspects of Indonesia's argument in this regard.

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

7.183. Indonesia argues that the EU authorities' analysis of the economic crisis failed to address two matters raised by the interested parties during the investigation, namely, the arguments and evidence presented on captive demand⁴⁶⁴ and improvements in Cognis' profitability.⁴⁶⁵

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

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

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

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

⁴⁶⁴ Indonesia's first written submission, para. 5.64.

⁴⁶⁵ Indonesia's first written submission, paras. 5.61 and 5.62.

⁴⁶⁶ Indonesia's first written submission, para. 5.74; European Union's second written submission, para. 112; and European Union's opening statement at the second meeting of the Panel, para. 36.

⁴⁶⁷ See Indonesia's first written submission, fn 288 (referring to Panel Report, *China – X-Ray Equipment*, paras. 7.276-7.280); and Panel Report, *China – X-Ray Equipment*, para. 7.279. (emphasis original) Paragraph 7.282 of the panel report in *Thailand – H-Beams* referred to by the panel in this passage of *China – X-Ray Equipment* states:

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

(emphasis original)

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

in line with increased domestic consumption⁴⁶⁹, and that economic recovery "allowed the ... [domestic] industry to reduce its losses with respect to turnover".⁴⁷⁰ However, the EU authorities found that the domestic industry was not able to benefit from the recovery of consumption and that its market share remained unchanged from the level to which it fell upon the onset of dumping prior to the crisis.⁴⁷¹ Further, the dumped imports outperformed the domestic industry with respect to market share and sales following the crisis.⁴⁷²

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

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

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

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

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

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

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

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

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

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

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

7.4.3.4 Conclusion on the economic crisis factor

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

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

7.4.4.1 Main arguments of the parties⁴⁷⁸

7.4.4.1.1 Indonesia

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

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

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

⁴⁷⁷ See Indonesia's first written submission, para. 5.66.

⁴⁷⁸ The arguments made by the United States as a third party pertaining to this factor are summarized above in section 7.4.3.2. The other third parties did not make submissions on this point.

⁴⁷⁹ Indonesia's first written submission, paras. 5.75 and 5.76 (quoting Final Determination, (Exhibit IDN-4), recitals 97 and 98). (emphasis original)

⁴⁸⁰ Indonesia's first written submission, para. 5.78.

⁴⁸¹ Indonesia's first written submission, paras. 5.78 and 5.79.

⁴⁸² Indonesia's first written submission, paras. 5.82 and 5.91.

⁴⁸³ Indonesia's response to Panel question No. 24, para. 1.101; second written submission, para. 3.5.

⁴⁸⁴ Indonesia's response to Panel question No. 20, para. 1.89.

⁴⁸⁵ Indonesia's response to Panel question No. 20, para. 1.91.

⁴⁸⁶ Indonesia's response to Panel question No. 20, para. 1.91.

⁴⁸⁷ Indonesia's response to Panel question No. 24, para. 1.96.

7.4.4.1.2 European Union

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

7.194. The European Union also argues that PT Musim Mas did not provide sufficient argumentation and evidence on this factor to warrant examination by the investigating authorities.⁴⁹² In that regard, the European Union points to the brevity of PT Musim Mas' submissions on this point⁴⁹³, the fact that a time lag between ordering raw materials and actual delivery would not have had a determining impact on the profitability of the domestic industry since raw materials are traded at world market prices⁴⁹⁴, and the fact that differing sources of raw material are substitutable but their prices did not correlate or develop in parallel over time.⁴⁹⁵

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

7.4.4.2 Evaluation by the Panel

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

⁴⁸⁸ European Union's first written submission, paras. 118-121.

⁴⁸⁹ European Union's first written submission, para. 155.

⁴⁹⁰ European Union's first written submission, para. 158.

⁴⁹¹ European Union's first written submission, para. 157.

⁴⁹² European Union's response to Panel question No. 22, p. 23; second written submission, paras. 112 and 127-129.

⁴⁹³ European Union's response to Panel question Nos. 21, p. 22, and 23, pp. 25-27.

⁴⁹⁴ European Union's response to Panel question No. 22, pp. 24 and 25.

⁴⁹⁵ European Union's response to Panel question No. 22, pp. 23-25; first written submission, para. 156.

⁴⁹⁶ European Union's response to Panel question No. 23, pp. 26 and 27; second written submission, para. 133.

⁴⁹⁷ European Union's response to Panel question No. 45, para. 28.

⁴⁹⁸ See Panel Report, *China – X-Ray Equipment*, para. 7.267; Indonesia's first written submission, para. 5.74; European Union's second written submission, para. 112; and European Union's opening statement at the second meeting of the Panel, para. 36.

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

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

7.198. The question of whether "known factors" can encompass "structural disadvantages" in conditions of competition between the domestic industry and the producers/exporters under investigation was recently addressed by the panel in *EU – Biodiesel (Argentina)*. The panel in that case reached the following conclusion⁵⁰⁵:

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

[*fn original]⁵⁰⁶ This is particularly clear from the text of Article 3.4, which requires consideration of the evolution of the state of the domestic industry and calls upon the authority to consider, inter alia, "declines" in various factors or indices.

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

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

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

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

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

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

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

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

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

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

7.200. We recall, however, that PT Musim Mas' argument concerning "access to raw materials" was augmented by evidence and argumentation concerning "significant fluctuations in [the main input] prices" paid by the domestic industry.⁵¹⁰ In particular, PT Musim Mas asserted that the main input material accounts for between 80% and 90% of the price of the product under consideration, and that the price of the main input material dropped from USD 1241/MT in July 2008 to USD 899/MT in September 2008 before reaching USD 465/MT in December 2008.⁵¹¹ We do not exclude the possibility that this kind of price collapse could conceivably represent a "development[]" in the situation of the domestic industry⁵¹² and could thus qualify as a "known factor" under Article 3.5, particularly where it leads to negative effects for the domestic industry. However, even assuming that this could qualify as a factor under Article 3.5, we recall that an investigating authority need only examine such factors upon the presentation of sufficient evidence and argumentation by an interested party, and further, that an investigating authority need not use the precise terminology or framing used by an interested party, nor explicitly address certain evidence or argumentation where it has been implicitly considered in the determination.⁵¹³ On that basis, as we explain below, we consider that the EU authorities did not act inconsistently with Articles 3.1 and 3.5 by failing to explicitly address fluctuations in the price of the main input material as a standalone factor.

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

⁵⁰⁶ Indonesia's second written submission, para. 3.19; opening statement at the first meeting of the Panel, para. 85.

⁵⁰⁷ Indonesia's response to Panel question No. 20, para. 1.91.

⁵⁰⁸ Indonesia's response to Panel question No. 24, para. 1.101; opening statement at the first meeting of the Panel, para. 87.

⁵⁰⁹ This flows from the text of Article 3.5, which states, in relevant part, "[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" (emphasis added). While it is implicit that an investigating authority would need to assess, at first instance, whether an alleged factor qualifies as a "known factor" within the meaning of Article 3.5, the only requirement under Article 3.5 is to examine "known factors". There is no requirement to examine anything other than "known factors", such as inherent features of the domestic industry affecting conditions of competition. We therefore disagree with Indonesia's assertion that the third sentence of Article 3.5 imposes duties on investigating authorities regarding matters that do not qualify as a "known factor". (See Indonesia's opening statement at the second meeting of the Panel, para. 32).

⁵¹⁰ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 13.

⁵¹¹ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 13.

⁵¹² Panel Report, *EU – Biodiesel (Argentina)*, para. 7.522. (emphasis original)

⁵¹³ See above para. 7.184.

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

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

7.203. Our review of the evidence and argumentation provided by PT Musim Mas on price fluctuations reveals that it was not sufficient to require their consideration as a separate other known factor allegedly causing injury. PT Musim Mas asserted that many investigated producers of the product under consideration enjoy a "formidable advantage as they are often integrated producers with supply chain links all the way to oil palm plantation", without providing evidence for that assertion.⁵¹⁸ PT Musim Mas also stated that "[t]ypically, the complainants would purchase their raw material in Q1 for production in Q2 and subsequent FOH sales in Q3", which formed the basis of their exposure to "greater market risk" – again without any supporting evidence substantiating this assertion.⁵¹⁹ PT Musim Mas further mentioned "the fact that [the complainants] have to buy [the main input material] from FOH producers in Indonesia and Malaysia who have controls over [its] supply" – again without any supporting evidence substantiating this assertion⁵²⁰, and contrary to the complainants' assertion that crude palm kernel oil is not the only source of the main input for the product under consideration.⁵²¹

7.204. Therefore, a number of key aspects of PT Musim Mas' argument concerning price fluctuations were not accompanied by the kind of evidence and data that we would expect an interested party to adduce in order to warrant an explicit examination of an alleged known other factor causing injury and explanation in the authorities' determination. Indeed, it is questionable whether PT Musim Mas' argumentation and evidence on this point sufficed to warrant *any* consideration by the EU authorities. We need not resolve that question, since it is evident from the explanation in the present case that the injurious effects of price fluctuations during the economic crisis were considered by the EU authorities, at least implicitly. In particular, the EU authorities stated that⁵²²:

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

⁵¹⁴ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 13. (emphasis added)

⁵¹⁵ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 17. (emphasis added)

⁵¹⁶ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), pp. 12 and 13. (emphasis added)

⁵¹⁷ European Union's first written submission, para. 153; second written submission, para. 130; response to Panel question No. 46, para. 34; and Indonesia's first written submission, para. 5.76.

⁵¹⁸ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 12.

⁵¹⁹ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 12.

⁵²⁰ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 17.

⁵²¹ Anti-Dumping Complaint before the European Commission against imports of Fatty Alcohol originating in India, Indonesia and Malaysia, submitted by Cognis GmbH, Sasol Olefins & Surfactants GmbH, 25 June 2010, (Exhibit IDN-58), p. 30; and Sasol letter to the EU Commission, 28 January 2011, (Exhibit IDN-60), p. 2.

⁵²² Preliminary Determination, (Exhibit IDN-3), recital 87 (confirmed in Final Determination, (Exhibit IDN-4), recital 78). (emphasis added)

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

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

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

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

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

7.5.1 Relevant provisions of the covered agreements

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

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

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

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

⁵²³ PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 12. (emphasis added)

⁵²⁴ Indonesia's first written submission, para. 7.1.

7.5.2 Main arguments of the parties

7.5.2.1 Indonesia

7.208. For Indonesia, the information communicated by the EU authorities to the two Indonesian producers under investigation (PT Musim Mas and Ecogreen) following the verifications conducted at their premises, does not meet the standard set out in Article 6.7 of the Anti-Dumping Agreement. Indonesia's claim focuses on "the substance of the EU's reporting of the results – rather than on the manner in which the results were disclosed – that is, the procedural means by which the EU complied with its obligation".⁵²⁵

7.209. Indonesia first contends that the term "results of any such investigations" in the context of Article 6.7 must be interpreted consistently with the objective of on-the-spot investigations, which is "to verify the information provided or to obtain further details".⁵²⁶ In this regard, Indonesia submits that the panel in *Korea – Certain Paper* set out an appropriate standard for the scope of the disclosure obligation contained in Article 6.7. That panel stated that the information communicated by the authorities to the respondents must include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".⁵²⁷ In the case at hand, Indonesia submits that EU authorities failed to meet this standard because:

- a. No separate report was made available to the Indonesian producers following the verification visit⁵²⁸; and
- b. no disclosure of the verification results was made as part of the disclosure of essential facts, which instead contained only general and cursory statements that did not properly disclose these "results".⁵²⁹

7.210. In particular, for Indonesia, the EU authorities failed to disclose properly:

- a. Which specific types of information, documents, or issues were addressed in the verifications;
- b. which particular documents were examined; and
- c. what questions were asked by the EU authorities' officials or what answers were provided by the producers under investigation.⁵³⁰

7.211. Further, Indonesia considers that the European Union conflates the obligations contained in Article 6.9 ("to inform all interested parties of the essential facts under consideration which form the basis for t[heir] decision") with the obligation contained in Article 6.7 (to "make the results [of the verification visits] available or to provide disclosure thereof pursuant to [Article 6.9]"). Indonesia contends that disclosing the essential facts consistently with Article 6.9 is not sufficient to comply with the "separate and distinct" obligation under Article 6.7 to disclose the results of the on-the-spot investigation.⁵³¹ Indonesia specifically requests the Panel "[i]n its legal analysis, therefore, bearing in mind the ordinary meaning, purpose, and context of the terms ... [to] take care to define the 'results' separately from the 'essential facts'".⁵³²

7.212. Indonesia points to specific issues which were allegedly not disclosed by the EU authorities to interested parties although they were addressed during the visits: these issues include "the close corporate, management, organizational and operational links between PT Musim Mas and

⁵²⁵ Indonesia's response to Panel question No. 27, para. 1.116.

⁵²⁶ Article 6.7 and Annex I(7) of the Anti-Dumping Agreement. See also Indonesia's first written submission, paras. 6.21 and 6.22.

⁵²⁷ Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added)

⁵²⁸ Indonesia's first written submission, para. 6.50; second written submission, para. 4.3.

⁵²⁹ Indonesia's first written submission, paras. 6.6-6.12 and 6.52-6.54.

⁵³⁰ Indonesia's second written submission, para. 4.24.

⁵³¹ Indonesia's first written submission, para. 6.62.

⁵³² Indonesia's second written submission, para. 4.5.

ICOF-S; transfer pricing policy; the so-called 'direct' export sales by PT Musim Mas; the manner in which ICOF-S and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the fact that ICOF-S was involved in negotiating, preparing and executing each and every sale of PT Musim Mas' products, including domestic sales".⁵³³

7.213. Finally, Indonesia submits that the lack of a proper disclosure prevented the investigated producers from defending their interests during the subsequent stages of the proceedings.⁵³⁴ In particular, PT Musim Mas was allegedly unable to defend its interests effectively on the issue of the existence of a single economic entity.⁵³⁵

7.5.2.2 The European Union

7.214. The European Union responds that Indonesia's assertions are based on an erroneous reading of the obligation contained in Article 6.7 of the Anti-Dumping Agreement and are not supported by the facts on the record.⁵³⁶

7.215. For the European Union, although Articles 6.7 and 6.9 set out two separate obligations, the context afforded by Articles 6.6, 6.8, and 6.9 indicates that the term "results" in Article 6.7 refers to the "essential factual outcome of the verification [visit]", and does not require a full report on everything that happened during the on-the-spot verification.⁵³⁷ According to the European Union therefore, the EU authorities were not required under Article 6.7 to prepare minutes of the verification or lengthy explanations and descriptions on aspects of the verification which had no further consequences.⁵³⁸

7.216. In fact, the European Union argues that it complied with both disclosure methods provided for by Article 6.7 to either "make available" or "disclose" the results of the verifications to the investigated producers⁵³⁹:

- a. by informing the Indonesian interested parties beforehand about the information that was going to be verified;
- b. by providing a list of exhibits collected during on-the-spot verifications; and
- c. by providing the results of the verification visits as part of the general disclosure of essential facts to Indonesian exporters and through the communication of a company-specific report.⁵⁴⁰

The European Union submits in particular that the company-specific disclosure contains evidence that "during the verification process mistakes and errors in the submission were corrected in agreement with the company".⁵⁴¹ The European Union considers that the "result" of the verification "is the corrected information that was agreed upon with the interested parties in the context of the on-site verification."⁵⁴²

7.217. Further, the European Union highlights that Indonesian producers were themselves present during the verifications. As a consequence, Indonesia cannot claim that the producers were unaware of the developments which took place during the on-the-spot verifications.⁵⁴³ The

⁵³³ Indonesia's second written submission, para. 4.25.

⁵³⁴ Indonesia's first written submission, paras. 6.34-6.39 and 6.46-6.48.

⁵³⁵ Indonesia's first written submission, para. 6.60.

⁵³⁶ European Union's first written submission, para. 165; second written submission, para. 198.

⁵³⁷ European Union's first written submission, para. 185; second written submission paras. 189 and 191.

⁵³⁸ European Union's first written submission, para. 167; response to Panel question No. 26, pp. 28-30.

⁵³⁹ European Union's second written submission, para. 196; response to Panel question No. 48, para. 38.

⁵⁴⁰ Paras. 190 to 195 of the European Union's first written submission and para. 168 and fn 121 and 123 of the European Union's second written submission refer to specific recitals which allegedly aim at complying with the obligation contained in Article 6.7.

⁵⁴¹ European Union's first written submission, para. 174.

⁵⁴² European Union's response to Panel question No. 49, para. 43; second written submission, para. 169 and fn 125.

⁵⁴³ European Union's second written submission, para. 171.

European Union notes that, throughout the proceedings, the investigated producers never complained about a lack of transparency concerning the results of the verifications. On the contrary, they engaged in a dialogue with the EU authorities in relation to all key aspects of their determinations. The written and oral comments made by PT Musim Mas in its responses demonstrate that the information provided by the EU authorities was sufficient to allow PT Musim Mas to defend its interests.⁵⁴⁴

7.5.3 Main arguments of the United States as third party

7.218. The United States submits that the ordinary meaning of the term "results" in Article 6.7 refers to the "outcomes" of the verification process.⁵⁴⁵ While the United States does not believe that trivial or immaterial aspects of what occurred at the verification must be included in the report, at a minimum it should include discussion of information that was verified, not verified, or corrected with respect to the essential facts referenced in Article 6.9.⁵⁴⁶ The United States agrees with Indonesia that failing to disclose information under Article 6.7, particularly as it relates to the "essential facts" of an investigation under Article 6.9, would deprive parties of the full opportunity to defend their interests.⁵⁴⁷

7.5.4 Evaluation by the Panel

7.219. We begin by setting out our understanding of the legal standard under Article 6.7 of the Anti-Dumping Agreement as relevant to the claim before us, before applying our understanding in this regard to the relevant evidence on the record in the underlying investigation.

7.5.4.1 Legal standard under Article 6.7 of the Anti-Dumping Agreement: the "results" of the on-the-spot investigations

7.220. We recall that the Anti-Dumping Agreement does not impose an obligation on investigating authorities to conduct verification visits in the territory of other WTO Members.⁵⁴⁸ However, when authorities do so, they are required by Article 6.7 to communicate the "results of any such investigations" to "the firms to which they pertain", that is, the companies subject to verification visits. On its face, Article 6.7 provides for two possible methods to satisfy this disclosure obligation. An investigating authority can decide to either:

- a. make the results of the verification visit(s) available to the companies concerned, or
- b. include the results of the verification in the disclosure of essential facts provided for under Article 6.9.

7.221. The main point of contention between the parties in the present dispute concerns the meaning of the term "results of any such investigations", which is common to both disclosure methods provided for by Article 6.7. We thus begin our analysis with the ordinary meaning of the term "results" in the context of Article 6.7. Black's Law Dictionary defines the term "result" as⁵⁴⁹:

1. A consequence, effect, or conclusion.
2. That which is achieved, brought about, or obtained, esp. by purposeful action.

Similarly, the Oxford English Dictionary defines the term "result" as⁵⁵⁰, *inter alia*:

⁵⁴⁴ European Union's first written submission, para. 196; second written submission, para. 172; and response to Panel question No. 49, para. 50.

⁵⁴⁵ United States' third-party submission, para. 41.

⁵⁴⁶ United States' third-party submission, para. 42.

⁵⁴⁷ United States' third-party submission, para. 46.

⁵⁴⁸ See for example: Panel Report, *Argentina – Ceramic Tiles*, fn 65.

⁵⁴⁹ *Black's Law Dictionary*, 10th edn, B. A. Garner (ed.) (Rhomson Reuters, 2004), p. 1509.

⁵⁵⁰ Oxford English Dictionary, definition of "result", available at:

<<http://www.oed.com/view/Entry/164061?isAdvanced=false&result=1&rskey=UhqxfU&>>, accessed 14 July 2016.

- a. The effect, consequence, or outcome of some action, process, or design, etc.

We thus understand the term "results" as used in Article 6.7 to refer to what is achieved, brought about or obtained in the course of the on-the-spot verifications. The meaning of the term "results" in this context is therefore directly connected to the purpose of such verifications, which is described by the Anti-Dumping Agreement as: "to verify information provided or to obtain further details."⁵⁵¹

7.222. We turn next to the meaning of the term "verify", which is defined in Black's Law Dictionary as⁵⁵²:

1. To prove to be true; to confirm or establish the truth or truthfulness of; to authenticate.

and in the Oxford English Dictionary as⁵⁵³:

2. To show to be true by demonstration or evidence; to confirm the truth or authenticity of; to substantiate.

- 3.a. *In passive*: To be proved true or correct by the result or event, or by some confirming fact or circumstance; to be fulfilled or accomplished in this way.

In view of the ordinary meaning of the term "verify", we consider that the purpose of the verification is therefore to enable the investigating authorities to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire response.

7.223. We find support for this view in the immediate context of Article 6.7. In particular, we consider Article 6.6 highly relevant in this regard. While Article 6.6 is not at issue in this dispute, we note that it establishes a general obligation on investigating authorities, except where facts available are relied upon, to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." Article 6.7⁵⁵⁴ is immediately preceded by this general obligation, and in our view elaborates upon it by setting out more specific guidance in the particular context of on-the-spot investigations in the territory of other Members. As the panel in *US – DRAMS* stated:

Members could "satisfy themselves as to the accuracy of the information" in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information. Indeed, we consider that anti-dumping investigations would become totally unmanageable if investigating authorities were required to actually verify the accuracy of all information relied on.⁵⁵⁵

Further, the panel in *Argentina – Ceramic Tiles* stated⁵⁵⁶:

Article 6.6 of the AD Agreement thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying ... We believe that if no on-the-spot verification is going to take place but certain documents are required for verification purposes, the authorities should in a similar manner inform the exporters of the nature of the information for which they require such evidence and of any further documents they require.

⁵⁵¹ Article 6.7, first sentence and Annex I(7) of the Anti-Dumping Agreement.

⁵⁵² Black's Law Dictionary, 10th edn, B. A. Garner (ed.) (Rhomson Reuters, 2004), p. 1793.

⁵⁵³ Oxford English Dictionary, definition of "verify", available at:

<<http://www.oed.com/view/Entry/222511?redirectedFrom=verify&>>, accessed 14 July 2016.

⁵⁵⁴ Including Annex 1 of the Anti-Dumping Agreement.

⁵⁵⁵ Panel Report, *US – DRAMS*, para. 6.78.

⁵⁵⁶ Panel Report, *Argentina – Ceramic Tiles*, para. 6.57.

7.224. These statements support the view that on-the-spot verifications involve a specific means by which the authorities request the exporter to supply evidence of the accuracy of the information supplied by the entity or entities subject to verification. The "results" of the verification should thus reflect the outcome of this process. At a minimum, the authorities should disclose the part of the questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities. Further, the results of the verification should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire responses.

7.225. We find support for our understanding in this regard in the report of the panel in *Korea – Certain Paper*, in which the panel stated that:

[T]he purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results. It is therefore important that such disclosure contain adequate information regarding *all aspects of the verification*, including a description of the information which was not verified as well as of information which was verified successfully. This is because, in our view, information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties' cases.⁵⁵⁷

Although – as pointed out by the European Union⁵⁵⁸ – this statement must be read in the light of the specific dispute between Korea and Indonesia in that case, we are of the view that it provides a correct assessment of the obligation contained in Article 6.7 in two important respects.

7.226. First, by referring to "information regarding *all aspects of the verification*", the panel made clear that the scope of the results which must be made available or disclosed to the interested parties is not limited. We read this to mean that the only limitation is that the information must relate to the results of the verification. This is in contrast to the scope of the disclosure obligation in Article 6.9 of the Anti-Dumping Agreement, which is limited to the "*essential facts* under consideration which form the basis for the decision whether to apply definitive measures".⁵⁵⁹ The term "results" in Article 6.7 is only qualified by the term "of any such investigations". This implies that the obligation to make available the results of the on-the-spot investigations is not limited to the "essential" results of such investigations. Nor is it limited to facts which will eventually form the basis of the decision to impose anti-dumping measures. With respect to the cross-reference "shall provide disclosure thereof pursuant to paragraph 9", we read "disclosure thereof" as referring to the "results" of the on-the-spot verification and the phrase "pursuant to paragraph 9" as referring to the date by which the disclosure must have been made, i.e. "before a final determination is made" and with "sufficient time for the parties to defend their interests". We thus disagree with the European Union that the cross reference to Article 6.9 suggests that the term "results" refers only to the essential factual outcome of the verification.⁵⁶⁰

7.227. Second, the panel in *Korea – Certain Paper* describes the disclosure obligation of Article 6.7 as an important aspect of the due process rights of interested parties. In the present dispute, Indonesia also submits that⁵⁶¹:

It is in the light of this knowledge that the firm may subsequently decide to focus its submissions on other issues, for instance, on topics for which information may not have been successfully verified. This will enable the firm effectively to allocate its scarce resources in the course of the investigation.

⁵⁵⁷ Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added)

⁵⁵⁸ European Union's response to Panel question No. 48, para. 36.

⁵⁵⁹ Emphasis added. The "essential facts" contemplated in Article 6.9 were described by the Appellate Body in *China – GOES* as "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures". (Appellate Body Report, *China – GOES*, para. 240).

⁵⁶⁰ European Union's first written submission, para. 185.

⁵⁶¹ Indonesia's first written submission, para. 6.38.

We agree. However, we consider that the disclosure obligation of Article 6.7 serves more than the due process rights of the investigated firm. Indeed, as pointed out by the European Union in the present case, the representatives of the investigated firm are normally present during the on-the-spot verification and may therefore be presumed to be aware of the developments which took place during the visit.⁵⁶² However, Article 6.7 specifically provides that the results of verifications may be made available to the applicants, that is, the domestic producers seeking the imposition of anti-dumping measures. These interested parties may well have an interest in the results of the on-the-spot verification, for instance with respect to allowances that might be made under Article 2.4 of the Anti-Dumping Agreement.

7.228. We do not mean to suggest that investigating authorities must address each argument or each piece of evidence presented by the respondent during the verification. Nor do we mean to suggest that "Article 6.7 require[s] the [investigating authorities] to prepare minutes of the verification ... or to prepare lengthy explanations and descriptions on aspects of the verification which had no further consequences or to draft a document setting out the verification team's evaluation of the evidence and explanations that the company provided on the spot."⁵⁶³ The results made available or disclosed must nevertheless be sufficiently specific for the interested parties to understand at a minimum those parts of the questionnaire response or other information supplied for which supporting evidence was requested and whether:

- a. any further information was requested;
- b. the producer made available the evidence and additional information requested;
- c. the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies, *inter alia* in their questionnaire response.

7.229. Finally, we note that the disclosure obligation in Article 6.7 is unqualified and rests entirely on the investigating authorities. The fact that the exporter did not request access to the results of the investigation, or the absence of a demonstrated impact on the due process rights of the exporter, are irrelevant to an evaluation of whether the authorities have complied with Article 6.7. Compliance with the provisions of Article 6.7 must be assessed solely on the basis of actions taken by the investigating authorities to comply with this provision throughout the anti-dumping investigation.

7.230. We now turn to the facts on the record in order to assess whether the information provided by the EU authorities following the on-the-spot investigations was sufficient to comply with Article 6.7 of the Anti-Dumping Agreement.

7.5.4.2 Whether the information provided to the producers under investigation complies with Article 6.7

7.231. The European Union does not assert that a verification report was provided to the Indonesian companies investigated.⁵⁶⁴ In response to Indonesia's argument that the EU authorities provided to the interested parties only "one general statement in the Disclosure of Provisional Findings"⁵⁶⁵, the European Union has drawn our attention to three documents:

- a. The final disclosure document of August 2011.⁵⁶⁶

⁵⁶² European Union's second written submission, para. 171.

⁵⁶³ European Union's second written submission, para. 159.

⁵⁶⁴ The Panel understands that this is consistent with the practice of EU authorities. See Committee on Anti-Dumping Practices, Working Group on Implementation, Article 6.7, *Conduct of Verification*, Paper by the European Communities, G/ADP/AHG/W/156 (10 March 2004), p. 3: "It is not the Commission's practice to provide the companies with specific reports on verification visits. Rather, parties concerned receive, in accordance with the last sentence of Article 6.7 of the Anti-Dumping Agreement and Article 20 of the Basic Regulation the results of the verification visits as part of the disclosure of the findings of the investigation."

⁵⁶⁵ Indonesia's first written submission, para. 6.61.

⁵⁶⁶ Letter regarding disclosure of definitive findings, 2 August 2011, (Exhibit EU-10) (BCI). The Final Disclosure sent to PT Musim Mas on 2 August 2011 included three annexes: The General Disclosure Document, which is attached as Exhibit IDN-39 (General Disclosure Document, 26 August 2011, (Exhibit IDN-39)); the

- b. The (provisional) company-specific disclosure concerning PT Musim Mas of May 2011.⁵⁶⁷
- c. The list of exhibits collected on site by the EU authorities during the on-the-spot investigations conducted at the headquarters of PT Musim Mas.⁵⁶⁸

The European Union submits that the information contained in these three documents reflects the "results" of the investigations in the sense of Article 6.7. We note at the outset that, although Indonesia's arguments pertain to both PT Musim Mas and Ecogreen, it only submitted evidence in respect of PT Musim Mas. We therefore confine our analysis to the evidence relating to PT Musim Mas. We will examine each of these three documents in turn and assess whether they contain (individually or in combination) information which can be characterized as the results of the verifications of PT Musim Mas.

7.232. We begin with the General Disclosure Document of August 2011. We note first that this document contains very little information about the verifications carried out at the premises of respective producers under investigation, including PT Musim Mas. During the panel proceedings, the European Union drew the Panel's attention to specific sections of this document⁵⁶⁹ which allegedly demonstrate compliance with the obligation to disclose the results of the verification visits. However the specific recitals cited by the European Union do not refer to the verification visits conducted at the premises of Indonesian producers and exporters – which are the focus of Indonesia's claim. Only one of these recitals refers, in passing, to the verification of PT Musim Mas. Instead, they refer to the verifications conducted in other countries (Malaysia and India) and to the verifications conducted at the premises of the domestic branch of industry.⁵⁷⁰ We consider therefore that this evidence is either unrelated to the claim made by Indonesia in this case or insufficient to satisfy the requirements of Article 6.7.

7.233. We turn next to the company-specific disclosure documents provided to PT Musim Mas at the provisional stage of the investigation and to the list of exhibits agreed with PT Musim Mas at the end of the verification visit. The European Union explains that the results of the verification visit were provided to PT Musim Mas, *inter alia*, in the form of a list of exhibits collected during the verification visit at the company's premises and in the form of a confidential appendix attached to the Provisional Disclosure of essential facts.⁵⁷¹ This confidential appendix comprises two parts:

- a. The first part is an explanation of the calculation of PT Musim Mas' dumping margin.
- b. The second part is a CD-Rom containing an electronic copy of the company's response to the anti-dumping questionnaire.⁵⁷² This copy reflects the corrections made to PT Musim Mas' electronic response during and following the verification by PT Musim Mas itself and by the EU authorities. The precise content of the CD-Rom is reflected in a table of contents ("List of electronic files") attached to the company-specific disclosure.⁵⁷³

Definitive dumping calculation; and Company specific reply to arguments not addressed in detail in the General Disclosure Document. See also European Union's response to Panel question No. 49, paras. 51 and 52; and second written submission, paras. 167 and 168.

⁵⁶⁷ European Union's response to Panel question No. 49, para. 44; second written submission, para. 166; and Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI).

⁵⁶⁸ List of exhibits provided to PTMM at the conclusion of the verification visit, (Exhibit EU-14) (BCI).

⁵⁶⁹ European Union's second written submission, para. 168 and fns 121 and 123.

⁵⁷⁰ Recital 20 of the General Disclosure Document attached as Exhibit IDN-39 refers to the verification of Indian exporters; recital 36 refers to a claim made by Indonesian exporters after the on-the-spot investigation; recitals 41 and 48 refer to Malaysian exporters; recitals 59, 65, and 66 refer to the verification of domestic producers and importers; recital 99 refers to a product not covered by the investigation and recital 117 refers to the profit target claimed by the complainants. In fact, only recital 29 refers to the verification of Indonesian exporters at issue in this case. (General Disclosure Document, 26 August 2011, (Exhibit IDN-39)).

⁵⁷¹ European Union's response to Panel question Nos. 28, p. 31, and 49, paras. 43-53.

⁵⁷² Excel file "PTMM definitive disclosure.xls", (Exhibit EU-12) (BCI).

⁵⁷³ Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 5.

The European Union further explains that the corrected response of the company must be read in conjunction with the list of exhibits collected during the verification.⁵⁷⁴

7.234. Indonesia does not dispute that this information was made available to the Indonesian producers under investigation by the EU authorities. However, Indonesia asserts that the European Union attempts to "piece together a WTO-consistent disclosure of the results of the verification visits from scattershot sources and references in the record of the investigation".⁵⁷⁵ We recall in this regard that Article 6.7 prescribes no particular format for the disclosure of the verification results. As stated by the panel in *Korea – Certain Paper*, Article 6.7 "requires that the verification results be disclosed to the ... [producers] without specifying the format in which such disclosure is to be made".⁵⁷⁶ The fact that the information provided by the authorities appears in separate documents does not matter as long as the information supplied allows interested parties to understand the results of the verification.

7.235. We agree with the European Union that the corrections made to original response and the lists of exhibits collected on-the-spot are "outcome[s]"⁵⁷⁷ of the verification visit. Taken together however, these documents do not comprise the full extent of the "results" of the on-the-spot investigation, as they fail to put the investigated producer (PT Musim Mas) – and this Panel – in a position to understand in respect of which part of the questionnaire response or other information supplied supporting evidence was requested, whether any further information was requested, whether the exporter made available the evidence and additional information requested, and whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified producers in, *inter alia* their questionnaire responses. By looking at the "List of electronic files" attached to the confidential company-specific disclosure one can understand that some of the original worksheets provided by PT Musim Mas were corrected during the verification visit.⁵⁷⁸ However, we are unable to relate the corrections made to any evidence that was verified or not verified by the EU authorities during on-the-spot verifications.⁵⁷⁹

7.236. We consider that the EU authorities did not make available or disclose the "results of any such investigations" to PT Musim Mas, as required by Article 6.7, because they failed to explain those parts of the questionnaire response or other information supplied for which supporting evidence was requested and they also failed to explain whether:

- a. any further information was requested;
- b. the producer made available the evidence and additional information requested;
- c. the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified company, *inter alia* in its questionnaire response.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

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

⁵⁷⁴ European Union's response to Panel question No. 49, paras. 48 and 49.

⁵⁷⁵ Indonesia's comments on the European Union's response to Panel question No. 49, para. 6.14.

⁵⁷⁶ Panel Report, *Korea – Certain Paper*, para. 7.188.

⁵⁷⁷ European Union's response to Panel question No. 49, para. 43.

⁵⁷⁸ We understand that worksheets 2.2, 2.3, 2.4, 2.9, 2.12, and 2.13 were amended on the basis of "Exhibit 1", which is described in Exhibit EU-14 as "Corrections to Tables (hard copy + CD-ROM with 6 Excel files)". We also understand that "Exhibits 8, 17 and 21" collected during the on-the-spot verifications are the corrected versions of PT Musim Mas original response for worksheets 2.6, 2.4, and 2.2 respectively. (List of exhibits provided to PTMM at the conclusion of the verification visit, (Exhibit EU-14) (BCI)).

⁵⁷⁹ For example, worksheet 2.2 of Exhibit EU-12, which is the Cost of Production table for PT Musim Mas shows corrections made "from the combined exhibits 1 + 21": we cannot discern however if these corrections were made by the company itself, or if they result from the verification by EU authorities of the company's cost of production, or from the correction of mathematical errors made in the original submission. The same is true for other worksheets included in Exhibit EU-12. (Excel file "PTMM definitive disclosure.xls", (Exhibit EU-12) (BCI)).

- i. the European Union has not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of DSU Article 12.12;
 - ii. the work of the Panel was not suspended; and
 - iii. the authority for the establishment of this Panel has not lapsed.
- b. With respect to Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement:
- i. Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 2.4 by making an improper deduction for a factor that did not affect price comparability; and
 - ii. Indonesia has therefore not demonstrated that the EU authorities consequently acted inconsistently with Article 2.3.
- c. With respect to Indonesia's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement:
- i. Indonesia has not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 in their analysis of the economic crisis factor; and
 - ii. Indonesia has not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 in respect of the alleged "access to raw materials and price fluctuations" factor.
- d. With respect to Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement, the EU authorities failed to make available or disclose the "results of any such investigations" to PT Musim Mas, and therefore acted inconsistently with of Article 6.7 of the Anti-Dumping Agreement.

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

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement.
