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

REPORT OF THE PANEL

Addendum

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

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS442/R.

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WORKING PROCEDURES OF THE PANEL

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WORKING PROCEDURES OF THE PANEL

Adopted on 13 July 2015

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

General

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

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

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

Submissions

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

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

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this

procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

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

10. Each party and third party should make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1.

Questions

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

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

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

a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first.

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

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Indonesia. If the European Union chooses not to avail itself of that right, the Panel shall invite Indonesia to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any,

preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

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

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

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

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

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

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

Interim review

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

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

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

Service of documents

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

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 2 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx@wto.org, xxxxx@wto.org and xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance

of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 13 July 2015

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS442.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as confidential within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 by the Commission of the European Union in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. As required by Article 18.2 of the DSU, a party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these working procedures to protect BCI. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party under the terms specified in these procedures, or an outside advisor to a party or third party for the purposes of this dispute.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

7. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

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

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

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE EUROPEAN UNION

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. Introduction

1. Indonesia has presented three sets of legal claims in respect of the EU's anti-dumping duty on fatty alcohols from Indonesia, which was imposed in 2011. Indonesia considers that the European Union acted inconsistently with several obligations under the *Anti-Dumping Agreement* when adopting the measure relating to (1) the requirement to make adjustments for differences affecting price comparability in order to make a fair comparison between the normal value and the export price; (2) the establishment of causal link between the dumped imports and the injury to the domestic industry; and (3) the procedural requirement to inform interested parties of the results of a verification.[1]

2. The European Union considers that Indonesia's claims are without merit and constitute an unwarranted attempt at obtaining from the Panel a *de novo* review of the facts. They are not supported by the text of the *Anti-Dumping Agreement* and relevant jurisprudence and they are based on an inaccurate reflection of the facts on the record. Therefore, all of the claims must be rejected.

3. Indonesia is effectively asking the Panel to re-do the investigation based on legal concepts that are nowhere to be found in the *Anti-Dumping Agreement.* However, the standard of review of panels in relation to anti-dumping measures is limited to examining whether the EU's interpretation of the relevant provisions is permissible, whether the investigating authority's establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. It is equally well-established in WTO jurisprudence that a panel's analysis of the legal obligations imposed on Members of the WTO is to be based on the text of the Agreement, and that panels may not read into the WTO Agreements words or concepts that are not there.[2]

2. Indonesia's erroneous interpretation and application of Article 2.4 of the *Anti-Dumping Agreement*

4. Indonesia argues that the European Union violated Article 2.4 of the *Anti-Dumping Agreement* when adjusting PT Musim Mas' export price for the sales commissions received by the related trading company in Singapore, ICOF-S, through which its export sales to the EU were made, on the basis (i) that no adjustment was warranted because ICOF-S and PT Musim Mas formed a single economic entity, and (ii) that the European Union's adjustment was inconsistent with Article 2.4 because it treated two Indonesian exporters in identical situations differently and that this distinction was legally unfounded and unsupported by the facts.

A. The relevant consideration of Article 2.4 is whether there is a difference affecting price comparability

5. Article 2.4 of the *Anti-Dumping Agreement* requires adjustments to be made for differences affecting price comparability in order to make a fair comparison between normal value and export price. The purpose of this provision is to ensure that the ultimate determination identifies whether or not there is international price discrimination. If the starting domestic and export prices are different for some other objective reason, then it is that other reason or countervailing explanation

[1] It is important to remember that PT Musim Mas has brought proceedings on most of the issues raised in the present dispute also in the courts of the European Union and lost. The General Court of the EU in its judgment of June 2015 made a number of relevant findings that Indonesia seeks to have re-litigated, notably in relation to the existence of a single economic entity and the alleged discrimination between two Indonesian producers. Although the EU Court made its findings based on EU law, many of its factual findings rejecting provide important context for a number of the claims and assertions made in the present dispute (See in particular paras. 40–84, 92-97, 115-118 and 123–138 of the EU General Court's judgment, Exhibit EU–4).

[2] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 11–12; see also Appellate Body Report, *India – Patents (US)*, para. 45.

that explains what is happening – not the existence of international price discrimination by the producer. Indonesia shares this understanding of Article 2.4.[3]

6. The main obligation in Article 2.4 is therefore for investigating authorities to adjust for any difference which affects the price comparability of the export price and normal value. Failing to make such adjustments could result either in a false positive (a finding of dumping when none exists) or a false negative (a finding of no dumping when it is in fact occurring). Indonesia correctly acknowledges that "the ultimate litmus test"[4] of Article 2.4 is whether a factor affects price comparability and that, if there is such a factor, Article 2.4 requires that the investigating authority makes an adjustment to ensure a fair comparison. Following the same line of reasoning, Indonesia admits that if a sales commission is paid by an exporting producer to a trading company through which it sells the goods, an adjustment is due.[5]

7. However, for commissions paid to trading companies, Indonesia argues that Article 2.4 contains an implicit obligation to consider whether or not a single economic entity exists between the producer and a related trading company, or whether the producer/exporter and the trader can be regarded as two economically independent entities operating at arm's length. Where a single economic entity exists, Article 2.4 would not allow the authority to make any adjustments for a commission paid even when, for example, there is evidence that such commissions were paid only in relation to export sales and not for domestic sales transactions.[6] Indonesia also proposes to read into Article 2.4 the principle it calls "follow the money", i.e. what ultimately goes into the pocket of the exporting producer when it sells to the importing country compared to what it gets into the pocket when selling the same product domestically. There is of course no textual basis for Indonesia's propositions and none has been referred to by Indonesia.

8. First, Article 2.4 does not mention "related parties" or a "single economic entity". The concept of a single economic entity is nowhere to be found in the *Anti-Dumping Agreement*. In any case, even Indonesia agrees that within a single economic entity adjustments must be made for costs which objectively are generated by specific transactions.[7] A commission, which by contractual arrangement is paid in relation only to export sales and not in relation to domestic sales, is such a cost that must be adjusted for irrespective of the relationship. Second, the AD Agreement concerns the "product", not the producer. Article 2.1 provides that there is dumping if the product "is introduced" into the commerce of another country at a price that is less than its normal value and states that this is the case "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The concept of dumping is not about "following the money" and is not about establishing who ultimately benefits from certain sales transactions or the profitability of those transactions; it is about ensuring a fair and correct comparison between two types of transactions that are comparable or that are made comparable such that it can be determined whether the product was introduced into the commerce of another country at less than its normal value.[8] The EU also considers that the fourth sentence of Article 2.4 is evidence of the fact that Article 2.4 does not embody the "follow the money principle".[9]

9. Indonesia also argues that the European Union violated Article 2.4 for treating two Indonesian producers in similar situations in different ways. However, also this argument is divorced from the text of Article 2.4 which contains the general obligation to make a fair comparison and to adjust for factors affecting price comparability. In any case, the differences in the situation of the two Indonesian exporters justified a different treatment.

10. The essential question under Article 2.4 is whether there is an objective difference affecting price comparability between the export price and the normal value. It is immaterial whether the difference affecting price comparability is, for example, a cost of additional material sourced from a related or integrated company or from a third party supplier.[10] Thus, the question is not whether the commission is paid to a related party or not. The focus of Article 2.4 is on the price

[3] Indonesia's first written submission, paras. 4.51–4.52.
[4] Indonesia's first written submission, para. 4.57.
[5] Indonesia's first written submission, para. 4.67.
[6] Indonesia's first written submission, paras. 4.67–4.71.
[7] Indonesia's first written submission, paras. 4.119 and 4.278.
[8] See European Union's response to Panel Question 7.
[9] See European Union's response to Panel Question 13.
[10] See European Union's response to Panel Question 10.

discrimination and the need to ensure a proper apples-to-apples comparison between the export price and the normal value, adjusted for differences that affected the prices paid by the consumer in one context that were not affecting the price in another context.

11. The European Union, like many other Members, considers that sales commissions can constitute an objective difference affecting price comparability and has included "commissions" in the list of factors that may require an adjustment.[11] In that sense, the EU Basic Anti-Dumping Regulation goes beyond Article 2.4 that does not expressly refer to commissions. The interference of a sales agent in the export sale of a product may introduce an element that can affect price comparability. This is particularly the situation where there is no sales commission paid for the like product on the domestic market, but a commission is paid in relation to export sales, or *vice versa* of course. Just like differences between domestic sales and export sales in terms of insurance or credit costs need to be adjusted, a difference in commissions paid to trading companies that are involved in the sale of the product require an adjustment if the commission is lower or non-existent on either the normal value or the export price side, regardless of the degree of closeness between the trading company and the producer.

12. In the present dispute, the European Union examined all the relevant facts in relation to PT Musim Mas' export of the product concerned and domestic sales of the like product and concluded that the commission paid to ICOF–S for export sales affected price comparability as no similar expense was incurred by PT Musim Mas for the domestic sales. The record evidence clearly shows that PT Musim Mas and ICOF–S signed a Sale and Purchase Agreement, a contract that undisputedly only concerns export sales and which stipulated that ICOF–S receives a commission (in the form of a mark-up) for every export sale it intervenes in.[12] Neither the contract nor any other piece of evidence presented to the European Union showed that a similar direct selling expense was incurred for the domestic sales made by PT Musim Mas.[13] All other things being equal, if there were no export sales, ICOF–S would receive neither a commission nor other forms of remuneration from PT Musim Mas that could be equated to that commission.

13. However, Indonesia argues that the Sale and Purchase Agreement, despite its name and terms, was drafted for complying with tax laws in Singapore and Indonesia and in order to show that transfer prices between the two entities reflect the arm's length principle.[14] Indonesia invites the Panel to ignore what the contract says in clear terms, and suggests that the Panel should conduct a *de novo* review. Indonesia logically fails to show that by accepting the terms of the Sale and Purchase Agreement, the European Commission acted in an unreasonable and biased manner.

14. In summary, Indonesia has failed to establish a *prima facie* case that the adjustment is inconsistent with Article 2.4. In fact, the European Union was not only entitled to reach this reasonable and reasoned conclusion that the ICOF–S' sales commission affected price comparability, it was "required" by Article 2.4 to adjust for this difference.

B. The existence of a single economic entity is not a relevant consideration under Article 2.4

15. Indonesia acknowledges that a commission paid to a trader may warrant an adjustment because it may affect price comparability.[15] It disputes instead the adjustment because of the European Union's failure to recognize the single economic entity allegedly formed by PT Musim Mas and ICOF–S. The European Union has already demonstrated that whether or not a single economic entity exists is not the relevant question for the application of Article 2.4. In fact, the claim that no adjustment is warranted where a single economic entity exists between the producer and its trader lacks a legal basis in Article 2.4.

16. The lack of a legal basis in the *Anti-Dumping Agreement* is evident from Indonesia's first written submission where, in over 50 pages, it is unable to substantiate a relevant legal obligation that the European Union would have violated when making the adjustment. Indeed, the "single economic entity" concept does not even exist in the *Anti-Dumping Agreement* and it certainly is not part of Article 2.4. Indonesia duly acknowledges that "there is no provision of the

[11] This is reflected in Article 2(10)(i) of the EU Basic Anti-Dumping Regulation, Exhibit EU–3.
[12] Exhibit IDN–25; see also Indonesia's first written submission, para. 4.201.
[13] See Exhibit IDN-21, pp. 2 and 3.
[14] Indonesia's first written submission, para. 4.227.
[15] Indonesia's first written submission, para. 4.67.

Anti-Dumping Agreement that explicitly references or defines a [single economic entity]".[16] Indonesia merely cites to WTO jurisprudence in relation to Article 6.10 of the *Anti-Dumping Agreement* to argue that the concept of a single economic entity is "well-engrained in WTO case law".[17] It also loosely argues that "several provisions in the Anti-Dumping Agreement – in particular Articles 2.4 and 6.10 – implicitly require consideration whether two or more formally separate entities form an [single economic entity]".[18]

17. Indonesia is wrong for many reasons. First of all, the fact that Indonesia has to rely from the beginning on an "implicit" requirement is telling. It is undisputed in the WTO that a panel's analysis of the legal obligations imposed on Members of the WTO is to be based on the text of the Agreement. We recall the Appellate Body's statement in *India – Patents* that "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[19]

18. Second, Indonesia's reference to the WTO jurisprudence on Article 6.10 of the *Anti-Dumping Agreement* does not suggest that authorities are "implicitly required" to examine whether companies form a single economic entity. The question addressed in the two cases referred to by Indonesia, *Korea – Certain Paper* and *EC – Fasteners (China)*, considered whether the authorities could deviate from the general rule in Article 6.10 of calculating separate dumping margins when several companies can be considered as a single "exporter" because of the corporate and functional links between them. At no point in these two cases did the panels or the Appellate Body impose a "requirement" to examine this relationship. They merely considered whether the language of Article 6.10 allowed investigating authorities to impose a single dumping margin on closely related entities.

19. Third, in neither *Korea – Certain Paper* nor *EC – Fasteners (China)* did the panels or the Appellate Body consider the existence of a single economic entity in relation to the application of Article 2.4. It was only considered in relation to Article 6.10 and for obvious reasons given that the calculation of individual dumping margins for entities that are actually part of the same economic entity could lead to circumvention and avoidance of the payment of duties thus undermining the protection to be afforded to the domestic industry. The willingness to entertain this concept in both cases made perfect sense in the logic of Article 6.10; it does not make sense in the price comparability logic of Article 2.4.

20. The European Union notes with particular interest Indonesia's frequent references to the *Korea – Certain Paper* dispute in support of its single economic entity argument. What is interesting about the panel's findings in that dispute is that, in so far as the panel dealt with claims under Article 2.4 of the *Anti-Dumping Agreement*, its findings actually go against Indonesia's arguments in this dispute.

21. First, the panel acknowledged in the context of its Article 6.10 analysis that the trading company and the relevant Indonesian producers formed a single economic entity, the "Sinar Mas Group".[20] However, this fact played no role in the panel's analysis under Article 2.4 as to whether any adjustments were required to ensure price comparability. Instead, the panel rightly focused solely on whether evidence had been presented of a difference between normal value sales and export sales that required an adjustment. So, the very same panel that for the first time discussed the concept of a single economic entity in the context of Article 6.10 and made findings that such a single economic entity existed between the trader and the producing companies in Indonesia did not even refer to this relationship when examining whether adjustments under Article 2.4 were warranted. Under Article 2.4, the existence or not of a single economic entity was a completely irrelevant consideration for the panel. It should be the same in the current dispute.

22. Second, the panel in *Korea – Certain Paper* rejected Indonesia's claim that an adjustment was required because Indonesia had failed to present evidence of such a difference affecting price comparability.[21] The panel expressly rejected the notion that the intervention of a trading company

[16] Indonesia's first written submission, para. 4.120.
[17] Indonesia's first written submission, para. 4.120.
[18] Indonesia's first written submission, para. 4.120.
[19] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 11 – 12; see also Appellate Body Report, *India – Patents (US)*, para. 45.
[20] Panel Report, *Korea – Certain Paper*, paras. 7.165–7.168.
[21] Panel Report, *Korea – Certain Paper*, para. 7.147.

was relevant as such but rather focused on whether there was evidence of any difference affecting price comparability. It was not convinced that there were sales-related services rendered by the trading company in the Indonesian market which were not rendered in the context of export sales to Korea and thus considered that Indonesia had failed to make a *prima facie* case that adjustments were necessary. In the Fatty Alcohol investigation, the European Union did have such evidence before it, notably in the form of the Sale and Purchase Agreement that refers to the payment of commissions only for export sales. No evidence was presented by Indonesia or the Indonesian producers that similar commissions were also paid for domestic sales related support by the trading company.

23. Third, the dispute in *Korea – Certain Paper* is also interesting because Indonesia was one of the disputing parties and it is striking to note that its position in that dispute is the exact opposite of what it argues in the present dispute. In *Korea – Certain Paper*, Indonesia argued that an adjustment was required for the interference of the trader that formed a single economic entity with the producing company because the trader was only involved in the domestic sales and not in the export sales. Thus, Indonesia considered that an adjustment should have been made for the costs of the additional sales-related services of the trader in the domestic market. However, because the Korean authority failed to adjust for lack of evidence of such a difference, Indonesia alleged a violation of Article 2.4 of the *Anti-Dumping Agreement*.[22]

24. Indonesia's argument in the present dispute is the exact opposite where it considers that no adjustment shall be made because of the existence of a single economy entity between PT Musim Mas and ICOF–S. Although these positions on the same issue are diametrically opposed to each other, the European Union understands the reason for this opportunistic shift in position:

In *Korea – Certain Paper*, Indonesia wanted to reduce the normal value to avoid a dumping determination and thus argued for a downward adjustment of the normal value because of the involvement of the related trader in the domestic sales; and

In the present dispute, Indonesia wants to maintain the export price as high as possible to avoid a dumping determination by arguing that no adjustment is required for the involvement of the related trader in the export sales.

25. The opportunistic shift in positions is strategically understandable but does at the same time reveal the weakness of Indonesia's present claim under Article 2.4.

26. In sum, the European Union considers that Indonesia has not demonstrated any legal basis for its claim that the European Union violated Article 2.4 by failing to account for the alleged single economic entity between PT Musim Mas and ICOF–S. Indonesia opportunistically attempts to create an obligation in Article 2.4 that simply does not exist in the text of the *Anti-Dumping Agreement* and that is not supported by the WTO jurisprudence it refers to. For this reason as well, Indonesia's claim under Article 2.4 as well as its purely consequential claim of violation of Article 2.3 should be rejected.

C. Even accepting *arguendo* the relevance of a single economic entity in Article 2.4, Indonesia has failed to demonstrate that the European Union failed to take this into consideration

27. Even accepting *arguendo* Indonesia's argument that it is necessary to consider whether a single economic entity exists under Article 2.4, Indonesia has failed to demonstrate that the European Union violated such an (non-existing) obligation. The facts on the record did not lead the European Commission to the conclusion that PT Musim Mas and ICOF–S constituted a single economic entity. Indonesia fails to demonstrate that the facts were not properly established or were examined in a biased and non-objective manner. It simply disagrees with the European Commission's findings of fact and inappropriately invites the Panel to review the facts as if it was the trier of fact and not the Commission. The EU General Court already found against PT Musim Mas on this very factual question.[23] The Panel may not reject a determination simply because it would have arrived at a different outcome assessing the same facts.[24]

[22] Panel Report, *Korea – Certain Paper*, para. 7.132.
[23] See in particular paras. 123–138 of the EU General Court's judgment, Exhibit EU–4.
[24] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

28. In any case, Indonesia argues that the EU's determination lacked a sufficient basis in the record evidence and that it improperly focused on the *functions* of ICOF–S as opposed to its *corporate and structural links* to PT Musim Mas. These arguments are unfounded and should be rejected because the European Union's determination to make an adjustment was proper, unbiased and objective.

29. First, there is no basis in the text of the relevant provisions to consider that only corporate and structural links are relevant for determining the existence of a single economic entity. Functions of a related company would appear to be much more relevant given the focus on the actual services rendered. So, this approach is entirely reasonable. Indonesia points merely to WTO jurisprudence developed in relation to Article 6.10 of the *Anti-Dumping Agreement* which is wholly unrelated to the present dispute, as noted earlier. In any case, the focus on corporate and structural links makes sense in that context of Article 6.10 for determining whether to calculate individual dumping margins for related entities given the risk of circumvention and avoidance of duties. There is no reason, however, to apply only that same test under Article 2.4.

30. Second, the EU's determination to make an adjustment was based on record evidence presented by PT Musim Mas[25], namely: (i) that a very significant portion of ICOF–S' overall sales related to products of producers other than PT Musim Mas; (ii) that the commercial relationship between PT Musim Mas and ICOF–S were governed by a Sale and Purchase Agreement containing several provisions which clearly negate that ICOF–S was merely an internal sales department of PT Musim Mas[26]; and (iii) that all domestic sales and a significant portion of export sales were invoiced directly by PT Musim Mas.

31. These factual circumstances, which Indonesia fails to disprove, led the European Union to reasonably reject the contention that ICOF–S was the internal sales department of PT Musim Mas with which it allegedly formed a single economic entity. The determination that ICOF–S acted like an agent was reasonable as it was based on the totality of the facts on the record which were evaluated in an unbiased and objective manner. This determination was therefore one that a reasonable investigating authority could have made, and should therefore be upheld by the Panel. Moreover, the European Commission revisited these facts and revised the adjustment determination for Ecogreen, but not for PT Musim Mas, following a development in the case law of the EU Courts. The conclusion that the new case law of the EU Courts did not require repealing the adjustment for PT Musim Mas' was, subsequently, upheld by the Court in PT Musim Mas' domestic challenge.[27]

32. Finally, in relation to the alleged discrimination between PT Musim Mas and the other Indonesian producer, Ecogreen, Indonesia has not pointed to any legal obligation in the *Anti-Dumping Agreement* that the European Union allegedly violated by treating these producers differently. At the first hearing of the Panel, Indonesia ultimately confirmed that it did not claim that such differential treatment violated Article 2.4.[28] Even if there was such an obligation (*quod non*), the 2012 Amending Regulation[29] demonstrates that the European Union engaged in an extensive discussion of the main arguments and factual circumstances on the basis of which the decision was taken to adjust PT Musim Mas' export price and for distinguishing its situation from Ecogreen.[30] There were three main differences in factual circumstances that led to this determination: (i) that PT Musim Mas made a significant amount of export sales (about 20% of all export sales) directly while Ecogreen only sporadically engaged in export transactions (not more than 5% of all export sales)[31], using its trading company for almost all sales; (ii) that the relationship between PT Musim Mas and ICOF–S was governed by a comprehensive and formal Sale and Purchase Agreement and that ICOF–S traded many products from unrelated parties while Ecogreen had no contract with its trader, who almost exclusively sold Ecogreen's products; and (iii) that the contract between PT Musim Mas and ICOF–S stipulated that the trader was to receive a mark-up on all export sales in which it intervened and this was circumstantial evidence that the

[25] See, e.g. European Union's first written submission, para. 95.
[26] See Exhibit IDN–25.
[27] See Exhibit EU–4.
[28] See European Union's response to Panel Question 18.
[29] Amending Regulation, Exhibit IDN–5.
[30] See, e.g. European Union's first written submission, paras. 97–99.
[31] Amending Regulation, Exhibit IDN–5, para. 5 and EU General Court's judgment, Exhibit EU–4, para 134.

trader acted on a commission basis. On the other hand, there was no such contractual provision for a commission to be paid by Ecogreen to its trader.

33. For these reasons, the European Union considered that the situation of PT Musim Mas could be distinguished from that of Ecogreen. This determination was reasonable as it was based on the totality of the facts on the record which were evaluated in an unbiased and objective manner. Leaving aside the lack of legal relevance of the fact that no adjustment was made to Ecogreen, the European Union's determination was one that a reasonable investigating authority could have made. It should therefore be upheld by the Panel.

34. Finally, for the claim of violation of Article X:3(a) of the GATT 1994, which Indonesia orally added during the hearing even though it was not included in its first written submission and not even in the written version of the oral statement that was circulated at the time of the first hearing of the Panel, Indonesia has failed to make a *prima facie* case that the conditions for its application are fulfilled. Clearly, merely treating differently-situated producers differently in a specific anti-dumping investigation is not a violation of Article X:3(a) concerning the uniform and reasonable administration of laws and regulations.

35. In sum, all of Indonesia's claims under Article 2.4 and its consequential claim under Article 2.3 are to be rejected as well as the claim under Article X:3(a) of the GATT 1994.

3. Indonesia's erroneous approach to the legal standard in Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*

36. Indonesia's second claim argues that the European Union violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* because it allegedly failed to conduct a proper non-attribution analysis. In particular, the European Union allegedly failed properly to examine two "known factors" other than dumped imports, namely (1) the impact of the economic and financial crisis of 2008/2009, and (2) the impact of the difficulties faced by the EU domestic industry to source raw materials and the fluctuations in prices of these raw materials. Indonesia's claim, however, is based on an erroneous approach to the legal standard of these provisions. It is also based on an inaccurate presentation of the facts on the record and of the European Union's analysis.

37. First, with respect to the economic and financial crisis, Indonesia errs when it argues that the European Union simply rejected its relevance and that the assessment of the role of the crisis was not supported by the facts on the record. In fact, the European Union acknowledged that the crisis was a factor. This factor was examined in light of the evidence on the record and involved an examination of the coincidence in developments in the injury factors, the financial crisis, and other demand-related developments. The European Union carried out a proper correlation analysis which is central to the causation analysis as indicated by the Appellate Body.[32] Based on this analysis, the European Union reached the reasonable and reasoned conclusion that although the economic crisis may have contributed to the injury caused by the dumped imports, it was not of such impact that it broke the causal link.

38. Indonesia makes a big issue of the fact that the European Commission seemed to consider that the financial crisis only started in 2008 and asserts that this vitiates the whole reasoning of the Commission.[33] However, the Commission acknowledged that the economic downturn started in 2008, whilst it cannot be disputed that the effects for the real economy only became manifest in 2009. In any case, irrespective of when exactly the crisis started, when demand increased again reflecting a general economic recovery, the Union industry did not recover due to the massive presence of dumped imports.[34] The Panel should therefore reject Indonesia's attempt at seeking a *de novo* review of the facts as established and properly examined during the original investigation.

39. Moreover, Indonesia acknowledges that the *Anti-Dumping Agreement* provides "considerable latitude" to investigating authorities to carry out the non-attribution analysis.[35] Yet, Indonesia attempts to impose a heightened standard on the European Union by pointing to one panel report that noted a preference for use of economic models. However, this attempt to impose an obligation to conduct a quantitative as opposed to a qualitative non-attribution analysis should be

[32] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.
[33] Indonesia's first written submission, paras. 5.34–5.43.
[34] European Union's first written submission, paras. 133, 146–147.
[35] Indonesia's first written submission, para. 5.94.

rejected. The proper standard remains whether the European Union properly established the facts with respect to the other "known factors" and evaluated the evidence in an objective and unbiased manner.

40. Second, with respect to the claim that access to raw materials was a separate cause of injury to the domestic industry and that this was not properly examined, Indonesia also errs both on the law and on the facts. Indonesia fails to substantiate the importance of this issue to elevate it to a "known factor".[36] It is not an obligation of investigating authorities to examine every factor alleged to have caused injury to the domestic industry, but only those "known factors … which at the same time are injuring the industry". Article 3.5 requires an interested party to provide sufficient argument and evidence of the injurious effect of this factor and not merely to mention a factor in passing among many others as the Indonesian producers did at the start of the investigation only. In any case, Indonesia itself appears to admit that the price volatility of raw materials was closely connected to the economic crisis which was properly examined by the European Union. Indeed, Indonesia's argument is artificial because it separates the economic crisis from its concrete effects. It seeks to elevate to the position of "other factors causing injury" a possible aspect of the crisis. Furthermore, the argument that the domestic industry in the European Union has greater difficulties to source raw materials is simply not a factor causing injury but merely a structural aspect of the conditions of competition. There was no evidence to suggest that this was a separate cause of injury to the domestic industry; rather it appears to be part of the conditions of competition which existed also before the dumping.[37] The European Union's conclusion was reasonable and supported by the facts on the record.[38]

41. For these reasons, Indonesia's claim under Articles 3.1 and 3.5 should be rejected by the Panel.

4. Indonesia's claim that the European Union failed to disclose verification results is in error

42. Finally, Indonesia's third claim that the European Union violated Article 6.7 of the *Anti-Dumping Agreement* by failing to provide any meaningful information about the results of the verification visits to Indonesia is in error. As the record evidence demonstrates, the European Union provided full disclosure of the essential facts relating to its final determination to the relevant Indonesian firms, including the results of the verification visits. Moreover, Article 6.7 does not impose an obligation on investigating authorities to prepare a detailed report of a verification visit or of the reasons why certain information was requested during verification. It only requires that the "results" of the verification be communicated. This was clearly done by the European Union after the verification in the specific disclosures, in the General Disclosure Document and the Provisional and Definitive Regulations.

43. The *Anti-Dumping Agreement* provides no definition or guidance regarding the exact content of the disclosure obligation relating to the "results" of the verification, however the ordinary meaning of the term "results" is "an effect, issue, or outcome from some action, process or design".[39] The evaluation of the evidence by the investigating authority is not part of the "results" of the verification visit. Instead, it refers to the essential factual outcome of the verification. This could include the list of exhibits that were provided during verification. It could also include, where relevant, other relevant outcomes such as refusals to provide certain information. The purpose is to inform parties of verification-related developments that could potentially have consequences for the final determination. Article 6.7 does not impose a "reporting" obligation, as Indonesia seems to suggest, but a mere obligation to "make available" or "disclose" the results to the relevant interested parties.[40]

44. Moreover, the Commission underlined that during the verification visit mistakes and errors were corrected in agreement with the company. A list of exhibits that were provided by the Indonesian producers at the time of the verification was also made available. Indonesia does not deny that such discussions took place and that such an agreement was reached. Nor does Indonesia argue that PT Musim Mas made comments concerning the disclosures as explicitly

[36] See European Union's response to Panel Questions 21 and 23.
[37] See European Union's response to Panel Question 22.
[38] See European Union's response to Panel Question 21.
[39] Appellate Body Report, *US – Steel Safeguards*, para. 315.
[40] See European Union's response to Panel Question 26.

invited by the Commission[41], in order to point out omissions or other errors, but that those comments went unheard. It is also striking that Indonesia cannot point to any information, data or behaviour whose absence from the disclosure documents might have affected the position of PT Musim Mas. Basically, it is clear from its first written submission that rather than the "results" of the verification, Indonesia would like this Panel to blame the Commission not to have disclosed the "minutes" of the verification.[42] However, that is not what the language of Article 6.7 requires.[43] Indonesia's claim of a violation of Article 6.7 is therefore without merit.

[41] See Exhibit EU–1.
[42] Indonesia's first written submission, paras. 6.55 and 6.64.
[43] See European Union's response to Panel Question 26.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. Legal Analysis

1. Indonesia raised three sets of claims against the European Union's AD measure on fatty alcohols. As demonstrated in the European Union's first written submission, all three sets of claims are based on an erroneous interpretation of the relevant provisions of the *Anti-Dumping Agreement* and in fact request the Panel to make a de novo assessment of the facts on the record. Indonesia fails to rebut the arguments presented by the European Union in its first written submission.

1.1. *Claim 1: Indonesia's claim that the European Union's adjustment for commissions paid to ICOF-S violated Articles 2.3 and 2.4 of the Anti-Dumping Agreement is without merit*

2. Indonesia argues that the European Commission made an allegedly inappropriate adjustment for the sales commissions paid to a trading company based in Singapore, ICOF-S, when calculating the export price of PTMM, the producer of the product under consideration. Indonesia fails to respond to the arguments developed by the European Union under Article 2.4 of the *Anti-Dumping Agreement*.

3. Indonesia fails to rebut the argument of the European Union that the notion of a Single Economic Entity ("SEE") is foreign to Article 2.4 of the *Anti-Dumping Agreement* and that the existence of a relationship between certain entities does not preclude making adjustments for differences affecting price comparability. The determinative question is not whether two entities are related but whether there exists evidence of a difference affecting price comparability which requires that an adjustment be made. Without addressing the European Union's legal arguments under Article 2.4 of the *Anti-Dumping Agreement*, Indonesia simply asserts that its position is "obvious as a matter of common sense." It argues that "splitting up a previously integrated company … cannot be an automatic reason for treating them as independent so as to justify imputing a "commission" adjustment under Article 2.4." This argument is purely theoretical and does not reflect the facts of the case. ICOF-S is simply not a spinoff of the internal sales department of PTMM. In addition, it is based on a flawed legal interpretation of Article 2.4 of the *Anti-Dumping Agreement*.

4. In fact, in its answers to the Panel questions, Indonesia contradicts its own claim. It provides an example that contradicts the main argument on which its case rests. Its example suggests that it does not contest the fact that an adjustment was made for the intervention of the related trader in Singapore, but that it takes issue solely with the amount of the adjustment. However, its legal claim is not about the amount of the adjustment but about the fact that an adjustment was made to a transaction between related parties. Indonesia has consistently argued that the key issue is that no adjustments can be made for transactions between affiliated parties because these do not affect the price of the transaction. According to Indonesia, no adjustment can be made at all if the two entities involved are related parties. Thus Indonesia's legal claim in the present case is contradicted by the very example Indonesia provides.

5. In any case, the European Union considers that Indonesia's approach is entirely misguided and not supported by the text of Article 2.4 or its context. Indonesia's legal argument is not based on the text of Article 2.4 of the *Anti-Dumping Agreement* and the "follow the money" principle that it seeks to read into this provision is simply an invention of Indonesia that is contradicted by the context of this provision. First, Article 2.4 is silent on the relevance of any relationship between the parties. This contrasts with other provisions of the *Anti-Dumping Agreement* that expressly concern the treatment of "related parties" (such as Articles 4.1 and footnote 11 of the AD Agreement on the definition of the domestic industry or Article 9.5 on the determination of an individual margin of dumping for new shippers). Second, neither in Article 2.4 nor in any other provision of the *Anti-Dumping Agreement* is the concept of a SEE used, let alone defined in any way. Third, the notion of an SEE was used only in two instances in WTO disputes, in an entirely

different context relating to the possibility to apply the same dumping margin to closely related entities. Fourth, in neither of these disputes was the investigating authority required to examine whether companies formed an SEE, as the question was merely whether an authority was permitted to consider this relationship in light of the requirement of Article 6.10 of the *Anti-Dumping Agreement* to determine an individual margin of dumping for each producer or exported under examination. Fifth, in the WTO dispute in which this notion of an SEE was first addressed in the context of Article 6.10 of the *Anti-Dumping Agreement*, *Korea – Certain Paper*, this very same concept was completely ignored in the context of the Article 2.4 discussion of the panel in that dispute. There is therefore no basis for Indonesia's focus on the existence of an SEE under Article 2.4 and none has been offered by Indonesia in this dispute. In fact, as noted before, even Indonesia agrees that it is possible to make an adjustment for payments made between related parties, and that the only question concerns the amount of the adjustment which may be affected by the relationship.

6. Indonesia's failure to respond to the argument of the European Union based on the Panel's findings in *Korea – Certain Paper*, the one relevant WTO precedent in which Indonesia was directly involved as a complaining party, is also telling. Indonesia tries to avoid the obvious conclusion that the panel in that dispute did not consider the existence of a "single economic entity" to be a relevant factor for purposes of determining whether an adjustment was warranted. And neither did Indonesia in that case. In fact, it appears that Indonesia was arguing in favour of making an adjustment for the services rendered by the related trading company with respect to domestic sales in an effort to lower the normal value, thus arguing that an adjustment was required to reflect the involvement of the "closely related" trading company.

7. In any event, Indonesia's legal argument lacks any textual basis and is fundamentally flawed.

8. Article 2.4 does not set forth a "follow the money"- principle. Indonesia confuses the *suggestion* in Article 2.4 to make the comparison "at the same level of trade, normally at the ex-factory level" with a *requirement* to determine how much of the money paid by the buyer of the goods stays with the producer. Furthermore, the "ex factory" recommendation is not a suggestion that an investigating authority is to pierce the corporate veil to look into the pockets of the producer to see how much money he was really making on the sale. The recommendation to compare transactions "ex factory" is simply a way of ensuring a comparison that is not affected by differences in transportation costs, insurance costs, distribution costs, etc. and reflects the fact that prices of sales to a distributor can be expected to be different from prices of sales to a wholesaler and different from prices of sales to a consumer. It is merely a recommendation but there is no obligation (as Indonesia suggests) to compare prices at the "ex factory" level. Nothing stops an authority from adding the cost of distribution in order to fairly compare a sale to a distributor with a domestic sale that is made directly to the end consumer for example. The comparison must not necessarily be made at the "ex factory" level in order to be fair.

9. Indonesia tries to read legal distinctions into the text of Article 2.4 that are simply not there. Indonesia is making a semantic argument based on terms like "commissions" "direct selling expenses" and "notional" versus "objective" expenses that are not even used in Article 2.4 of the *Anti-Dumping Agreement*.

10. Article 2.4 requires that due allowance shall be made for any difference affecting price comparability. The payment of commissions to a trader in relation to export sales and not domestic sales (or *vice versa*) is a relevant feature of the transactions that are compared and account should be taken of this feature. It may be qualified as a "commission" or "direct selling expense" for which it is well accepted that an adjustment can be made. The artificial separation that Indonesia seeks to draw between "direct selling expenses" and "commissions" is irrelevant and baseless. Similarly baseless is Indonesia's distinction between "objective" costs and other expenses of the related trader and why an adjustment for such "objective costs" would be warranted between related parties but no other adjustments for what can be assumed to be "un-objective" costs? There is nothing in Article 2.4 of the *Anti-Dumping Agreement* that Indonesia can point to in support of its constructed legal argument that is completely divorced from the text of Article 2.4 of the *Anti-Dumping Agreement*. There is simply no basis in Article 2.4 or any other provision of the Anti-Dumping Agreement for Indonesia's legal conclusion that "in the case of payments made between closely-related entities, the requirement of "price comparability" under Article 2.4 requires an investigating authority to examine whether a particular flow of funds

reflects either an "objective" expense (that does "affect price comparability" and should be adjusted for); or instead a mere shifting of funds (allocation of profits) between related parties (that does not affect price comparability and must not be adjusted for)". This lifting of the corporate veil that Indonesia claims is "required" under Article 2.4 does not make legal or economic sense and raises more questions than it answers, given the absence of any textual guidance in the Anti-Dumping Agreement. In contrast, the legal position of the European Union is text-based and straightforward: is there a difference between the export transactions and the domestic transactions and, if so, is this a difference that affects price comparability.

11. In any case, Indonesia's legal argument is also based on a misunderstanding of the facts and findings in this case.

12. Indonesia makes a number of assertions about the European Union's findings in this case which are factually incorrect and misrepresent the conclusions of the investigating authority. The European Union never stated that ICOF-S was an "independent trader" and this dispute does not concern the imposition of a "notional" commission where there was "no actual expense". The evidence on the record confirms that an expense was made in the form of a commission/mark-up accorded to ICOF-S for its involvement in PTMM's export sales. The adjustment that was made to reflect the fact that this commission/mark-up related to export sales only, did not mean that the investigating authority deducted PTMM's profits and SG&A from the export price. The record clearly shows that the European Commission acknowledged that ICOF-S was a related trader. The Commission did not "change reality" in any way. Nor was the price adjustment made for an "imputed, not actual, commission" given that the Sale and Purchase Agreement between ICOF-S and PTMM clearly showed that a commission/mark-up was paid by PTMM to ICOF-S and that the actual "payment" of that mark-up to ICOF-S was never put into question. Based on the dictionary definition of the relevant terms, a "notional" adjustment is an adjustment "based on a suggestion, estimate, or theory; not existing in reality". But, in this case, the Sale and Purchase Agreement makes this adjustment anything but "notional". It is an adjustment based on a valid contract that both companies relied on. This contract was provided to the investigating authorities and the companies were expecting the tax and customs authorities to rely on this contract as well. It is thus simply not correct to refer to a "notional" adjustment in the current situation. The fact that the investigating authority did not accept the amount of the commission at face value but decided to construct the amount of the commission, does not turn the adjustment into an adjustment that is not based on reality. It is simply a matter of ensuring that the amount of the adjustment is not affected by the relationship between the parties.

13. Furthermore, Indonesia is not correct to assert that the Commission "rejected the transaction price" between PTMM and ICOF-S and "calculated the export price on the basis of the sale to an "independent" customer in the EU". Indonesia is confusing the two sales channels and thus the two ways in which the export price was determined. All export sales to the EU were made via ICOF-S, the related trader in Singapore. Some of the sales went from ICOF-S to the related importer in the EU, ICOF-E, and some other sales went directly from ICOF-S to unrelated buyers in the EU. For sales made by ICOF-S to the related importer in the EU (ICOF-E), the export price was constructed on the basis of the first sale by ICOF-E to an independent customer in the EU in accordance with Article 2.3 of the *Anti-Dumping Agreement*. For sales that were made via ICOF-S to independent buyers in the EU, the export price was not constructed. This means that for sales made to unrelated importers in the EU, the price at which the product was introduced into the commerce of the European Union, i.e. the price paid by the unrelated importer in the European Union was used as the export price. In order to ensure a fair comparison with the normal value, adjustments were subsequently made pursuant to Article 2.4 of the *Anti-Dumping Agreement*/Article 2(10) of the EU Basic AD Regulation for differences affecting price comparability, including for the commissions paid to ICOF-S.

14. Indonesia keeps suggesting in its replies that the European Commission acknowledged that PTMM and ICOF-S were "related" parties and that it thus treated both as a "single entity" for purposes of making the dumping determination. Indonesia argues that "[i]n this case, it is clear that the EU defined the producer/exporter for which it was calculating dumping margins as PT Musim Mas/ICOFS as a whole". According to Indonesia, this confirms the correctness of Indonesia's approach to both companies as being an SEE and it implies that no adjustment should have been made for payments made inside this "single seller". Indonesia is wrong. Indonesia is clearly reading too much into the European Commission's acknowledgement of the relationship between PTMM and ICOF-S. A "relationship" exists in the European Union's practice in many

different situations and even when there is only a 5% direct or indirect shareholding. So, even for entities that are not more closely related than that, the reliability of the pricing may be questioned and another basis may be used for determining the price. It is therefore simply not so that the European Commission first considered PTMM and ICOF-S to be a "single seller" and then treated them as "unrelated" parties when making an adjustment. The margin of dumping was determined for PTMM and not, as Indonesia wrongly asserts, for PTMM and ICOF-S "as a whole", whatever that may mean.

15. It is correct that the investigating authority decided not accept at face value the *amount* of the mark-up as shown in the Sale and Purchase Agreement. But Indonesia makes an unjustified leap of logic by asserting that the European Union's examination of the amount of the commission meant that a commission was simply assumed or "imputed" when none actually existed. That is not correct. A commission was "paid" in the form of mark-up. The Sale and Purchase Agreement is direct evidence of this agreed payment. An allowance is therefore due given that, according to the Sale and Purchase Agreement that was submitted by PTMM during the investigation, this payment was made only for export sales, and no evidence exists of similar payments being made for the alleged involvement of ICOF-S in domestic sales. However, the amount of the mark-up "payment", and thus the level of the allowance, may be subject to review and verification given the relationship between the two entities.

16. In addition, it is not so that the European Union adjusted the export price of PTMM by removing the SG&A and profit of PTMM with respect to its export sales but not with respect to its domestic sales as Indonesia asserts. The Commission did not deduct any amount of profits for PTMM. In fact, this is confirmed by Indonesia in para. 1.69 of its replies in which it states that the amount of the export price "includes PT Musim Mas's profits". Rather, the investigating authority made an adjustment to the export price of PTMM for the direct selling expense of PTMM given that PTMM was obliged by contract to pay a commission/mark-up to ICOF-S, just like it used to pay a commission to the independent trader it used before.

17. Indonesia is wrong to equate the SG&A of ICOF-S with those of PTMM. PTMM has its own SG&A and no adjustment was made for the SG&A expenses of PTMM. The Sale and Purchase Agreement makes clear that ICOF-S existed already before PTMM decided to use it as a trading company. PTMM agreed on a commission/mark-up to be paid for the involvement of ICOF-S. There was no distinction between the part of the mark-up that would cover costs and the part that would cover the profit margin of ICOF-S, just like you would expect in a normal trading relationship. There is no indication that ICOF-S was required to subsequently transfer the profits back to PTMM or that PTMM was covering the costs of ICOF-S. There is no basis for the suggestion that simply because of their shareholding relationship, commissions paid to ICOF-S become part of the SG&A of PTMM. And even then, the commission was paid only for export sales. This suggests that there was a difference in costs affecting price comparability given that such cost was not borne for domestic sales activities.

18. Indonesia also seeks to draw the Panel into a big discussion about "transfer pricing agreements". But this dispute does not require the Panel to opine on what constitutes a transfer pricing agreement and what does not. The WTO Agreements do not refer to transfer pricing agreements and there is no agreed definition of a "transfer pricing agreement". Most relevantly, however, the Commission did not simply ignore the argument that the Sale and Purchase Agreement was a transfer pricing agreement. Rather, it addressed the argument and rejected the alleged legal consequences that the Indonesian producer tried to draw. The investigating authority referred among others to the name and "modalities" of the Agreement and explained that even if this agreement can also be used for purposes of calculating arm's length prices in accordance with applicable tax guidelines, this does not contradict the finding that pursuant to this same agreement the trader received a commission. Even if the agreement were a transfer pricing agreement or had the regulation of transfer pricing as its main objective, it would not mean that it is a useless or fraudulent document that investigating authorities could not rely on as part of the totality of the evidence. Transfer pricing agreements are put in place precisely to ensure that, despite the relationship between the parties, their transactions are carried out at arm's length just as if they were unrelated parties. Tax authorities are expect to rely on those agreements for tax purposes as those agreements should genuinely reflect the financial relations taking place between related parties. The same holds for Anti-Dumping investigation authorities, unless it is proven that the transfer pricing agreement in question is a sham document, which Indonesia has never claimed in the present case.

19. Therefore, it is not unreasonable or biased of an investigating authority in an Anti-Dumping investigation to also attach importance to this agreement and to consider its provisions to be trustworthy.

20. Finally, Indonesia appeared to make a separate claim of violation of Article 2.4 of the *Anti-Dumping Agreement* as a result of the alleged discrimination in treatment between PTMM and Ecogreen. The European Union rebutted that claim by pointing to the lack of legal basis of Indonesia's claim. As explained at length in the EU's answers to the questions of the Panel, there were a number of differences that led to the conclusion that the factual circumstances of Ecogreen were similar to those present in the *Interpipe* case that led the European General Court to find that no adjustment was justified. Indonesia is unable to rebut these conclusions and simply tries to re-litigate the argument it already lost before the European General Court where this argument about discriminatory treatment and the application of the European jurisprudence more properly belongs.

21. First, Indonesia does not deny that, as correctly found by the investigating authority, PTMM invoices directly more than 20% of its export sales while Ecogreen only invoices a very small number of export sales directly, as was the case for *Interpipe*. For a number of export sales, PTMM "must contract directly" and therefore no mark-up is being paid to ICOF-S. Such direct contracts were concluded in a relatively significant number of cases, different from the situation that prevailed for Ecogreen. Nothing in Indonesia's reply suggests otherwise.

22. Second, Indonesia merely repeats its view that no weight should be ascribed to any of the provisions of this contract because it is merely a transfer pricing agreement, but it does not deny the fact that a contract exists between PTMM and ICOF-S when no such contract exists governing the relationship between Ecogreen and its related trader, EOS. That is a matter of fact that further distinguishes the factual situation of both companies.

23. Third, with respect to the significance of the trader's activities and the fact that the trader's supplies originate to a significant extent from unrelated companies (similar to the activities of an agent working on a commission basis) Indonesia again "fails to see the relevance of the trader's activities with respect to products outside of the scope of the investigation", but does not deny that those factual findings are correct. The relevance of course is that these were important factual considerations that led the European Court in *Interpipe* to reach a certain conclusion. Indonesia simply tries to minimize the importance of this factual aspect by consistently trying to portray ICOF-S as an internal sales department of PTMM which was simply spun off to Singapore for tax reasons, while in fact ICOF-S **[***]**; ICOF-S was not created as the internal sales department of PTMM at all; and has significant trading activities that are unrelated to the product concerned and to PTMM's activities. If that is put in the context of all of the other evidence and is contrasted with the situation for EOS, the trading company of Ecogreen, it is clear why this factual aspect differentiates the situation of PTMM and ICOF-S from that of Ecogreen and EOS.

24. In sum, although Indonesia disagrees with the weight given by the investigating authority to some of the above stated facts and considerations, it fails to demonstrate that those facts are incorrect and as a consequence that the investigating could not reasonably have concluded that Ecogreen and PTMM were in a factually different situation, taking into account the relevant factors highlighted in the *Interpipe* judgment.

25. In addition, Indonesia has completely failed to indicate which legal provision of the *Anti-Dumping Agreement* would be violated as a result of this alleged error to treat Ecogreen and PTMM in the same manner. There is none.

26. In sum, Indonesia failed to rebut the legal arguments made by the European Union and has not been able to establish a *prima facie* case that the European Union's reasonable and reasoned decision to make due allowances for commissions paid to ICOF-S for export sales only violated Article 2.4 of the *Anti-Dumping Agreement*. Indonesia's consequential claim under Article 2.3 must also fail. In its answers to questions of the Panel, Indonesia confirmed that it only added this claim because it "considered it prudent" to include a reference to Article 2.3 given that certain export transactions for which an adjustment was made for the involvement of ICOF-S also involved the construction of an export price due to the involvement of the related importer ICOF-E in the European Union. Its Article 2.3 claim is thus entirely consequential and fails, just like its principal claim under Article 2.4. Finally, Indonesia did not even begin to develop a *prima facie* case under

its allegedly consequential claim under Article X.3 of the GATT 1994 and any continued allegation of violation of this provision must therefore be rejected.

1.2. *Claim 2: Indonesia's claim that the Commission failed to Separate and distinguish known factors other than the dumped imports causing injury in violation of articles 3.1 and 3.5 of the Anti-Dumping Agreement is in error*

27. Indonesia argues that the Commission's determination that dumped imports caused injury to the domestic industry is inconsistent with Articles 3.5 and 3.1 of the *Anti-Dumping Agreement* because the Commission allegedly failed to conduct a proper non-attribution analysis. In particular, Indonesia claims that the Commission failed to adequately separate and distinguish the effects of the economic/financial crisis of 2008/2009 and that it did not properly examine the effects of the alleged difficulties faced by the domestic industry concerning access to raw materials and the fluctuations in the prices of these raw materials. In its first submission, the European Union demonstrated that Indonesia's arguments with respect to both factors are flawed.

28. Indonesia does not present any new arguments in its answers to the questions of the Panel, or in its rebuttal submission. It merely repeats its erroneous assertions about the alleged lack of a proper causation and non-attribution analysis by the European Union. Indonesia's unsubstantiated and formalistic arguments are without merit and do not establish a prima facie case of violation of Articles 3.1 and 3.5 of the AD Agreement.

29. First, on the evaluation of the effect of the economic crisis, it is clear that the Commission was well aware of the commonly known fact that the global economic crisis started around the second half of 2008. The global economic/financial crisis is a complex phenomenon which develops its effects over time and it is simplistic to turn the debate about its effects on injury factors that are examined by the investigating authority on a year by year basis into a debate about the exact starting point of this crisis. The European Union also disagrees with Indonesia that the injury analysis is an "unrelated section" for purposes of examining the effects of other factors on injury. Article 3.5 of the *Anti-Dumping Agreement* that sets forth the non-attribution requirement is one paragraph of Article 3, entitled "Injury". The text of Article 3.5 refers directly to "the effects of dumping as analysed under paragraphs 2 and 4" of Article 3, which form the heart of any investigating authority's injury analysis. The causation and non-attribution analysis of Article 3.5 is part and parcel of the injury analysis to be undertaken under Article 3 of the Anti-Dumping Agreement. Indonesia's contrary suggestion that it is not appropriate to refer to analysis and conclusions in an investigating authority's injury determination, simply because not all of this analysis is provided under the heading "non-attribution" is not supported by the text of the Anti-Dumping Agreement, WTO jurisprudence or, put simply, common sense. The European Union referred to the findings and reasoning of the investigating authority as included in the relevant determinations dealing with the economic crisis, both in the specific section dealing with causation and non-attribution and in the overlapping section dealing with the evaluation of the injury factors.

30. Second, with respect to the alleged effect of the domestic producers' access to raw materials and price fluctuation in raw materials, Indonesia confirms that it "accepts that an interested party that raises a particular non-attribution factor must provide some evidence that this factor contributed to the injury, thereby triggering the requirement to perform a non-attribution analysis". As demonstrated in the European Union's first written submission and in the answers to the questions of the Panel, that is precisely what the Indonesian interested parties failed to do. Indonesia is unable to present any new arguments or evidence to rebut the European Union's position.

31. It is telling that both in the submissions and in its answers to questions, Indonesia decided to quote the entire paragraph of the October 2010 comments on the application of PTMM in which it raised this factor, trying to increase its importance. In fact, if the Panel goes to the exhibit of Indonesia from which this quote is taken, IDN-35, it will see that these two paragraphs are buried amidst many other equally unsubstantiated assertions and claims. It is for the interested parties to adduce sufficient evidence of the effects of another factor such that this factor becomes a factor that is known to cause injury, requiring the authority to separate and distinguish its effects. It does not suffice to simply make a blunt statement at the start of the investigation without adducing any evidence and then to expect the authority to actively seek to obtain the evidence to substantiate these assertions.

32. In its replies to the Panel's questions, Indonesia argues that PTMM produced evidence showing that the fluctuations in the price of raw material was a factor causing injury distinct from the economic crisis. Indonesia is wrong. In particular, Indonesia refers in alleged support of its argument to page 30 of the Complaint, which it files as Exhibit IDN-58. However, page 30 of the complaint (Exhibit IDN-58) discusses a phenomenon that is precisely the opposite of what Indonesia considers to have been proven by PTMM, i.e. it discusses the increase of raw material prices. It explains that the increase of raw material prices cannot be a separate injury factor since all raw materials for fatty alcohols are traded at world market prices and therefore price fluctuations affect all producers. It explains that integrated producers can shift profits between the internal profit centres, but cannot avoid the effect of a raw material price increase. Then it adds that because the prices of synthetic raw materials and natural raw materials for fatty alcohols have not evolved in parallel (which is exactly the opposite of what PTMM argued in subsection 4.9 of its comments to the complaint), price development in natural raw materials cannot explain the injury suffered by all EU producers that use different manufacturing process. Thus the complaint cannot constitute even an indicator (let alone full evidence) of the claim according to which access to raw materials constituted a separate cause of injury. Indonesia was not able to point to any other valid evidence that could have supported that claim and had been submitted during the investigation by the interested parties. In light of these circumstances, it is clear that it was reasonable of the investigating authority to conclude that PTMM did not produce any evidence to substantiate its assertion, made only at the very beginning of the investigation, that raw material price fluctuation constituted a separate cause of injury to the EU industry so as to deserve further investigation. Indonesia's argument that, as an active "investigating" authority, the Commission should have actively sought for the additional evidence of such a causal impact is without merit. It is telling that Indonesia refers to the panel report in *Mexico – Rice* on the need for an active investigating authority. However, the finding that Indonesia refers to is in fact one of the few findings of that panel that the Appellate Body reversed. The Appellate Body rejected this specific conclusion that Indonesia is relying on and found that the Panel's "extensive interpretation" requiring an "active investigating authority" imposed too high a burden on the authority.

33. In the context of its discussion of the European Union's rebuttal on the factor "raw material prices", Indonesia repeatedly asserts that the European Union is making "a series of ex post arguments, none of which is reflected anywhere in the Commission's determinations". The European Union objects to the repeated allegation that any assistance offered by the European Union to the Panel in the context of these proceedings to allow it to better understand the information provided and to address novel arguments made by Indonesia for the first time in this WTO proceeding would constitute undue "ex post" reasoning. The European Union participated in these proceedings in good faith and provided answers to the questions of the Panel that related to certain evidence on the record that was not further developed by the interested parties and which therefore did not need to be further analysed by the investigating authority. The European Union offered its views to the Panel to explain why from an economic and legal point of view the statements about the existing conditions of competition between Indonesian producers and European producers of fatty alcohols were not relevant and were inaccurate.

34. The Indonesian producers never developed any of the arguments now made by Indonesia in this proceeding and it is thus not surprising that the investigating authority did not provide all of the reasonable explanation that the European Union has offered to the Panel in search of a better understanding of the facts. It is not correct that, as the defendant in this proceeding, the European Union cannot provide any explanation that is not expressly provided by the investigating authority when rebutting arguments that the determination made by the authority was biased and not reasonable. If that were the case, there would be no point in having a contradictory debate in these panel proceedings.

35. In sum, Indonesia has failed to rebut the European Union's argument that effects of the economic crisis were properly separated and distinguished and that access to raw materials or the impact of raw material prices was not a known factor causing injury that the investigating authority was required to examine further as the interested parties failed to present arguments and evidence to this effect, as required. Indonesia's claims under Articles 3.1 and 3.5 are thus to be rejected.

1.3. *Claim 3: Indonesia's claim that the Commission allegedly failed to disclose the results of the verification to the verified producers in violation of article 6.7 of the Anti-Dumping Agreement is in error*

36. Indonesia claims that the European Union violated the obligation under Article 6.7 of the *Anti-Dumping Agreement* to make available the results of the verification visit it made to the Indonesian interested parties. In the first written submission, the European Union demonstrated that Indonesia's claim is based on a misrepresentation of the facts and a misreading of the legal obligation imposed by Article 6.7 of the *Anti-Dumping Agreement*. Indonesia fails to respond to both the factual and legal rebuttal arguments of the European Union. Instead, it simply repeats its broad reading of what it would have ideally liked the obligation under Article 6.7 of the *Anti-Dumping Agreement* to be, ignoring that the requirements it reads into Article 6.7 are nowhere to be found in the text of that provision.

37. First, on the facts, it is important to re-state what the European Union explained in the first written submission. Contrary to Indonesia's assertions, it is clearly from the provisional and final disclosure documents that the European Union provided "discussion of information that was verified, not verified or corrected with respect to essential facts referenced in Article 6.9" as Indonesia seems to suggest is required under Article 6.7 of the *Anti-Dumping Agreement*. In addition, at the end of each verification visit, the Commission and the verified producer agreed on a list of exhibits collected during the verification.

38. Indonesia tries to support its argument by referring to two documents provided during verification. But it suffices to look at the agreed list of exhibits taken at the time of the verification, submitted by the European Union as Exhibit EU-14, to see that both documents are clearly referenced in this list. Furthermore, this alleged lack of information on these two exhibits shared during verification never stopped PTMM from raising the arguments that these exhibits were supposed to support. There is no basis in the record to claim that the interested parties' due process rights were in any way affected by the fact that they allegedly did not receive a detailed report explaining that these documents were provided during verification. In fact PTMM made express reference to these documents in the context of the proceedings before the investigating authorities. It was thus able to defend its interests and develop comments based on the information submitted during verification. Other "examples" of Indonesia relate to statements that were made by PTMM or ICOF-S personnel or representative during the verification and that according to Indonesia were not contested on the spot. However, a statement or an oral explanation provided during a verification visit and which is not confirmed by any concrete evidence does not become a result of the verification or an essential fact just because the verification team did not consider it necessary to rebut it on the spot or to put it in the context of other evidence on the record.

39. Furthermore, in terms of the legal standard, Indonesia is responding to an argument the European Union never made. It is not the position of the European Union that complying with Article 6.9 automatically means that Article 6.7 has been complied with. The ordinary meaning of the term "results" is "the effect, consequence, issue, or outcome of some action, process or design." This suggests that what needs to be made available is not the process as such but rather the "outcome" of that process. Again, Indonesia seems to acquiesce in the correctness of the ordinary meaning of the term as offered by the European Union. It refers to the Appellate Body reading of this term in *US – Steel Safeguards* as "an effect, issue, or outcome from some action, process, or design" and concludes that the results referred to in Article 6.7 are the "effect" or "outcome" of the verification visit. The European Union agrees. However, the European Union does not understand on what basis Indonesia jumps from this definition to its assertions that "in this context [of a verification] the "results" would mean both a simple recital of the evidence obtained during the visit *and the evaluation of the evidence*". The European Union clearly complied with the first suggested requirement by exchanging the lists of exhibits and by correcting the data provided by the interested parties in agreement with them (which is uncontested) but sees no basis for the second requirement, at least not as part of the verification results. Clearly, to evaluate the evidence is not the task of the investigators conducting the verification and it cannot be what is to be provided in terms of the report of the verification. But, to the extent that the verified results relate to the essential facts, the European Union would agree that, pursuant to the obligation to disclose the essential facts, such an evaluation will be provided by the investigating authority with respect to these facts at that time. It will be for the interested parties to make comments, with possible reference to the questionnaire information or to information provided during verification.

Indonesia only confirms everything the European Union has said about the close relationship between Article 6.7 and 6.9 of the *Anti-Dumping Agreement*.

40. Furthermore, Indonesia keeps citing to one obiter dictum in *Korea – Certain Paper*, in which the panel said that "[i]t is therefore important that such disclosure [under Article 6.7] contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully". This statement, which was not essential to the panel's finding and was not appealed, must be read in its context. First, in that investigation, the Indonesian exporters had expressly requested to see the results of the verification but their request had been denied. Second, the real reason why the panel found a violation was because the authority "did not inform the two Sinar Mas Group companies of the verification results in a manner that would allow them to properly prepare their case for the rest of the investigation". There is no basis for a similar conclusion in this case, as demonstrated above. The European Union sent a list of information to be verified before the visit and agreed on a list of exhibits taken at the time of concluding the verification. The interested parties never complained about a lack of information on the results of the verification, despite frequent references to the verification visits in the provisional and final determinations

41. In addition, as confirmed by the lack of claims by Indonesia under Articles 6.2, 6.4 or 6.9 of the *Anti-Dumping Agreement*, Indonesia does not consider that its due process rights were violated or that the disclosure of essential facts was deficient. Again this contrasts with the claims and arguments made in *Korea – Certain Paper*.

42. Indonesia continues to seek to raise the profile of the last sentence of Article 6.7 as if this "verification results"-disclosure obligation is the alpha and omega of due process. It asserts that "exporters must know what information was not verified — so that they can make further efforts to put the investigating authority in a position to ultimately verify that information — as well as what information was verified. This information is important for the exporter given that verified information must in principle be used by the investigating authority, and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information". Indonesia's approach to on-site verification and the alleged consequences of verification is entirely misguided and it grossly over-states the importance of the last sentence of Article 6.7.

43. First of all, exporters of course do know what information is verified as they are present throughout the on-site verification process, as is clear from the legal counsel's notes on which Indonesia relies. So, the premise of Indonesia's argument is once again flawed. Second, there is no obligation on Members to conduct an on-site verification. That is clear from the text of Article 6.7 (using the term "may") and has been confirmed in WTO jurisprudence. Third, in most cases verification is a documentary process that the investigating authority undertakes on the basis of the information provided and based on any additional information it requests the interested parties to provide. Therefore, interested parties do not really know how the investigating authority will appreciate those documents until they see the disclosure of the essential facts. Yet, this does not pose a problem from a due process perspective. Fourth, it is simply not the case that because information has been verified it is necessarily relevant and probative such that it must be used by the investigating authority, contrary to what Indonesia seems to suggest. It simply means that the authority checked whether that piece of information is correct. But this piece of information still needs to be placed in the context of all of the other information. Its relevance and weight is still to be reasonably determined by the authority, irrespective of whether it was verified or not. Fifth, Indonesia errs in its reliance on Article 6.8 and Annex II. These provisions concern a different situation: if the necessary information has not been provided within a reasonable period of time or if the producer has impeded the investigation, Annex II provides that information that is "verifiable" should still be used by the investigating authority as part of its reliance on the best information available. Annex II does not require an on-site verification and does not state that information provided during verification – and only such verified information – can and must be used. In any event, this issue does not arise in the present case as the interested parties cooperated with the investigating authority to the extent that during the verification visits they agreed on the corrections to be made to the data previously submitted to the investigating authority.

44. Indonesia completely over-states the importance both of the on-site verification process and of the fact that information was verified. Its suggestion that exporters will continue to use their

"scarce resources" to get the authority to further analyse certain information as long as they do not know whether such information was verified, is not what happens in practice and is not required by the text of the Anti-Dumping Agreement. Indonesia is simply inventing these systemic concerns

45. Indonesia has failed to rebut the European Union's factual and legal arguments.

46. Indonesia's claim is not supported by the facts on the record and is based on an erroneous reading of the obligation contained in Article 6.7 of the *Anti-Dumping Agreement*. The European Union respectfully requests the Panel to reject Indonesia's claim under Article 6.7 of the *Anti-Dumping Agreement* relating to the results of the verification visits.

2. Conclusions

47. For the reasons stated in this submission, the European Union respectfully requests the Panel to reject all of Indonesia's claims.

ANNEX C

ARGUMENTS OF INDONESIA

ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

1. INTRODUCTION AND OVERVIEW

1.1. In this dispute, Indonesia challenges certain anti-dumping measures imposed by the European Union on so-called fatty alcohols imported into the European Union from Indonesia.

1.2. At the heart of this dispute lies an improper deduction that the EU made when calculating the ex-factory export price for the Indonesian exporter PT Musim Mas. That deduction accounted for practically the entire dumping margin. In addition, the Commission failed to conduct a proper non-attribution analysis, thereby improperly attributing the injury to the Union's industry to the allegedly dumped imports. The Commission also failed to disclose to the exporters the results of the verification conducted at their premises.

1.3. The Commission's determinations and the EU's arguments before the Panel are incorrect as a matter of substance, on both the relevant legal and on factual issues. In addition, the EU relies on extensive ex post rationalisations, that is, reasoning that was not contained in the Commission's determinations and that the EU has developed for purposes of these WTO proceedings. Needless to say, the applicable standard of review requires the Panel to determine the EU's compliance with its obligations under the Anti-Dumping Agreement exclusively in the light of the published determination and the reasoning contained therein.

2. INDONESIA'S CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

2.1 Introduction

2.1. When calculating the export price for the Indonesian exporter PT Musim Mas, the Commission made an adjustment under a provision of European Union (EU) law that, broadly speaking, corresponds to Article 2.4 of the Anti-dumping Agreement. Under Article 2.4, an investigating authority is required to ensure a "fair comparison" between the export price and normal value. The investigating authority is entitled - and required - to adjust for any difference that "affect[s] price comparability". Conversely, the investigating authority may not adjust for any difference that does not "affect price comparability".

2.2. The EU erroneously adjusted for what it termed "Commission ICOFS markup". This deduction allegedly reflected the activities of PT Musim Mas' sales entity, which is located in Singapore. The key issue before the Panel is whether, in doing so, the EU correctly adjusted for a factor that "affect[ed] price comparability" within the meaning of Article 2.4 and conducted a "fair comparison" at the same level of trade.

2.3. In Indonesia's view, the answer to this question is manifestly "no". This is because the Commission ignored that any transfer of funds between PT Musim Mas and the sales entity ICOFS are simply transfers within a single economic entity (SEE)/between two closely-related companies; because the Commission ignored or distorted relevant record evidence; and because it relied on internally-inconsistent reasoning. Moreover, the Commission treated PT Musim Mas differently from the second Indonesian exporter Ecogreen, even though Ecogreen was in an identical situation as PT Musim Mas, and differentiated between the two companies on the basis of irrelevant or inconsistent criteria. This differential treatment of the two exporters further highlights the improper nature of the Commission's deduction when calculating PT Musim Mas' export price, highlighting the violation of Article 2.4.

2.2 The Commission ignored the nature of transactions within a single economic entity

2.4. The Commission made an adjustment on the basis of transactions between PT Musim Mas and ICOFS. However, the Commission failed properly to consider whether these transactions and the conditions in which they occurred "affect[ed] price comparability". The Commission therefore failed to consider whether the adjustment was consistent with the requirement to conduct a "fair comparison", within the meaning of Article 2.4. The existence of a close relationship – or a "single

economic entity" formed by two or more formally separate entities – falls within the scope of the terms "affect price comparability" and "fair comparison", under Article 2.4.

2.5. The evidence before the Commission clearly indicated, both generally as well as with respect to the sales in question, that the producer/exporter and its Singapore sales affiliate were closely related or intertwined – put another way, that they were part of an SEE. Therefore, it was improper to make an adjustment to the export price on the basis of transactions between the two arms of the same entity that amounted, in fact, to nothing more than moving money from one pocket of the same body to another.

2.6. The question of the relationship between producer/exporter and an affiliated trading company has not yet arisen in WTO panel proceedings in the context of an adjustment under Article 2.4. However, it has arisen in the context of Article 6.10, where panels have – like the European courts and the Commission itself in the present and other anti-dumping investigations – found it convenient to use the phrase "single economic entity" to describe a closely-intertwined relationship.

2.7. Moreover, whether one uses the term "single economic entity" or any other label, the obligation remains for the investigating authority to examine and to ensure that adjustments – including those in the context of related companies – be only made for factors that "affect price comparability". The Commission's own reasoning in its determinations reveals that the Commission accepts that the degree and nature of the relationship between two companies can be crucial for determining whether a particular item or expense "affect[s] price comparability" and therefore is highly relevant for a "fair comparison", within the meaning of Article 2.4.

2.8. The Commission's reasoning confirms that the Commission accepts – as Indonesia argues in this dispute – that payments made between related parties, at least in some circumstances, do not justify an adjustment. To recall, the Commission recognized that Ecogreen paid "commissions" to its Singapore trading department EOS. Initially, the Commission determined that these commissions "affect[ed] price comparability" and that an adjustment was warranted in order to ensure a "fair comparison". However, subsequently, the Commission reconsidered certain criteria concerning the relationship between Ecogreen and EOS and determined that the required "fair comparison" required not making the adjustment, because the "commissions" paid by Ecogreen did not "affect price comparability".

2.3 The Commission's adjustment for the activities of PT Musim Mas' selling department was improper and resulted in a non-"fair comparison"

2.9. The Commission failed to acknowledge, let alone to properly factor into its reasoning, the fact that ICOFS is PT Musim Mas' selling department, and that the two companies are integral parts of a single economic entity, characterized by common ownership and a common managerial and operational control structure. The entire SEE is a **[***]**

2.10. PT Musim Mas repeatedly reminded the Commission, and supported through record evidence, that it does not have a sales department, and that all of its sales – whether export or domestic sales – are negotiated, organized and arranged by ICOFS.

2.11. Given this closely intertwined structure, transfers of financial resources between the companies – for instance the "mark-up" or "margin" retained by ICOFS on some export sales – are not expenses to be adjusted for, but rather the shifting of money from one pocket into another pocket of a single economic entity. The "mark-up" or "margin" is simply a way, within an SEE, to allocate profit generated by that entity and to ensure adequate financing of the selling department located in a different jurisdiction.

2.12. The need to finance the selling department arises also because, as PT Musim Mas repeatedly pointed out to the Commission during the investigation, ICOFS does not receive any funds from PT Musim Mas for its involvement in domestic sales as well as for its involvement in the so-called "direct" export sales. Moreover, the fact that ICOFS does not receive any remuneration for its involvement in those sales further underscores the closely-integrated nature of the two companies' relationship. Of course, an independent trader would never accept to perform sales and trading services for free.

2.4 The Commission's argument that, prior to the creation of ICOFS, PT Musim Mas used independent traders for its sales precisely serves to highlight the issue at hand and demonstrates the exact opposite of the Commission's conclusion

2.13. During the Panel's first meeting with the parties, the EU referred to the fact that the preamble to the transfer pricing agreement between PT Musim Mas and ICOFS states that PT Musim Mas previously used an independent trader to make its sales. For the EU, this is a confirmation of its position. However, quite to the contrary, this fact clearly illustrates the issue before the Panel and demonstrates why Indonesia's position is correct.

2.14. If PT Musim Mas made its European sales of the investigated product through an independent trader in Singapore, it would pay that independent trader a commission. This was indeed PT Musim Mas' situation several years ago, before the Musim Mas Group chose to create ICOFS as its sales and trading office. In an anti-dumping investigation, it would be appropriate to deduct that commission from the invoice price in order to arrive at the net ex factory price to be used in the fair comparison under the first, second, and third sentences of Article 2.4. This is because the commission represents an expense for which an adjustment may – indeed must – be made under Article 2.4. Of course, an exporter such as PT Musim Mas may decide to stop using an independent trader for these sales, and instead decide to establish its own affiliated sales company in Singapore to perform the same functions. PT Musim Mas would do so in order to save money and to increase its profits on the sales. Doing so will change the way in which PT Musim Mas does business; it will change the expenses that the company incurs; and this change in expenses must be reflected in the anti-dumping calculations. The Commission's position amounts to a denial of this very basic principle.

2.15. For example, assume that an exporter sells to an independent European customer at € 100 per unit and pays a commission of € 10 per unit on each sale to an independent trader in Singapore. The ex factory price – or, put another way, the net return to the exporter – is € 90 per unit.

2.16. The exporter may decide that the independent trader is charging too much as a commission. Therefore, the exporter may set up its own trading company in Singapore. Assume that the costs of maintaining the trading company in Singapore are € 4 per unit. In this case, the exporter can maintain its price to the independent customer in Europe, reduce its expenses, and increase its profits. The ex factory price or net return to the exporter now is €100 - € 4 = € 96 per unit. Profit has increased by € 6 per unit.

2.17. For the purposes of a dumping analysis, two things have changed. First, the nature of the expense has changed: it is now a selling expense, not a commission. Second, the amount of the expense has changed: it is now € 4 per unit, not € 10. These changes can be illustrated in the following table:

	Sales Through Independent Trader	Sales Through Affiliated Trading Company
Invoice Price	€ 100	€ 100
Commission	€ 10	€ 0
Selling Expenses	€ 0	€ 4
Ex Factory Price	€ 90	€ 96

2.18. The EU's position before the Panel is that these changes do not affect the dumping analysis. In other words, for the EU, the ex factory price in the second scenario is not € 96, but € 90, just like in the first scenario. Even though the exporter has changed how it does business – resulting in a change in both the type and amount of expenses it incurs, as well as in the net revenue it receives – the EU contends that it is entitled to disregard these changes and to conduct the same dumping analysis as if the exporter was still selling through an independent trader.

2.19. Indonesia disagrees. Indonesia does not consider that the EU can correctly calculate the ex factory price and make a fair comparison between export price and normal value within the meaning of Article 2.4 where it ignores the actual facts. The EU cannot ignore how the exporter structures its business, the expenses it actually incurs in making the investigated sales, and the net revenue it receives. It cannot instead replace those amounts with imputed expenses that may have been incurred based on a notionally-different means whereby the exporter could have structured, or used to structure, its sales.

2.5 The Commission's adjustment for "profit" and for indirect selling expenses was improper and resulted in a non-"fair comparison"

2.20. Above and beyond the fundamentally improper nature of the Commission's deduction, the very items (and the labels applied to these items) deducted by the Commission demonstrate that this adjustment violates Article 2.4.

2.21. To recall, the Commission's deduction consists of two elements: "profit" and "indirect selling expenses". Both items are improper elements to be deducted in determining the ex factory price (whether on the export or normal value side).

2.22. First, profit is not an item to be adjusted for. It is not customary for investigating authorities to deduct "profit" when determining the ex factory price, whether on the normal value or on the export side. This is because dumping is international price discrimination, and "price" includes profit. Indeed, the conventional theory is that dumping is "unfair", because the exporter is using "high profits" from the domestic market to finance "low profits" (or losses) in the export market. Profit is also not deducted because, after deducting profits, only costs would remain. However, costs should be the same no matter where the product is subsequently sold.

2.23. Hence, the items to be adjusted for under Article 2.4 are expenses. However, "profit" is not an expense; "profit" is a residual amount, after all costs and expenses have been deducted from the price.

2.24. Further proof that profits are not to be deducted is the fact that a constructed normal value includes an amount for profit, as per Articles 2.2 and 2.2.2 of the Anti-dumping Agreement. (The only exception to the rule that profits are not to be deducted is in the context of a constructed export price, which was a controversial topic in the Uruguay Round and is not at issue in this dispute).

2.25. Second, the Commission deducted ICOFS' indirect selling expenses. Indirect selling expenses (items such as sales department staff salaries, advertising, office expenses of sales departments, etc.), as opposed to *direct* selling expenses (such as freight, insurance, etc.), are normally not deducted when determining the ex factory price. This is also supported by the fact that, in the construction of normal value, indirect selling expenses are included. In the case at hand, however, the Commission – without any explanation – deducted ICOFS' indirect selling expenses when calculating the ex factory export price. However, the Commission proceeded entirely differently when calculating normal value. It did not deduct any indirect selling expenses when determining the ex factory normal value; and, correspondingly, it included indirect selling expenses when constructing normal value for certain product models. Hence, the Commission deducted items on the export price side that it did not deduct on the normal value side. This asymmetry further vitiates the Commission's comparison, renders it unfair, and contributes to the violation of Article 2.4.

2.6 The criteria relied on by the Commission for justifying the adjustment are irrelevant, factually incorrect or involve ignoring or distorting record evidence

2.26. In the Amending Regulation, in which it justified its differential treatment of PT Musim Mas from that of Ecogreen, the Commission highlighted certain criteria as supporting its determination. In Indonesia's view, none of these criteria has any relevance in determining whether the involvement of ICOFS "affect[s] price comparability". Moreover, in its treatment of these criteria, the Commission repeatedly ignored or distorted record evidence.

2.6.2 The Commission improperly relied on "direct" export sales

2.27. The Commission relied on the fact that PT Musim Mas, rather than ICOFS, featured as the official selling party on a certain proportion of export sales (the so-called "direct" export sales). This, in the Commission's view, meant that certain export sales were "performed" by PT Musim Mas "from Indonesia"[1] and that PT Musim Mas was not "using" its sales department in Singapore for these export sales.[2]

2.28. This characterization is demonstrably incorrect and highly misleading. PT Musim Mas explained repeatedly during the investigation, and supported by evidence, that, with respect to these "direct" export sales, ICOFS handles all contact with the client, as well as negotiates and arranges the sale, just as it does for all other export sales. However, in certain instances, the client (typically Asia-based clients) prefer for PT Musim Mas to feature on the contract as the formal selling party, in order for the client to obtain an Indonesian certificate of origin. In order to accommodate this client preference, as the final step in the standard formal sales process, ICOFS sends PT Musim Mas a **[***]**. (No client ever contacts PT Musim Mas directly). Subsequently, PT Musim Mas ships the products, as it does for all other export sales.

2.29. Hence, **all** (export) sales are negotiated and arranged by ICOFS; and **all** (export) sales are physically "performed" (shipped) out of Indonesia. It therefore amounts to a distortion of the record evidence when the Commission found that the "direct" export sales are somehow different due to being "performed" out of Indonesia. Moreover, Indonesia fails to understand why the mere formality of PT Musim Mas appearing on the contract, rather than ICOFS (a difference driven entirely by client preferences), should be one of the decisive criteria for considering that PT Musim Mas and ICOFS operate at arm's length and are fundamentally different from Ecogreen (which also has "direct" export sales, for the same reason as PT Musim Mas). If anything, the flexibility of adapting one formal aspect of the sale depending on what the client communicates to ICOFS is further evidence of the tightly knit relationship and cooperation between the two companies.

2.30. In any event, and leaving aside all of the above, the Commission failed to explain the significance of the "direct" export sales for the key issue at hand; namely, why, with respect to the sales under investigation, the involving of ICOFS and any transfer of funds from PT Musim Mas to ICOFS should be regarded as a sales expense that affects price comparability.

2.6.3 The Commission improperly relied on ICOFS' other trading activities

2.31. As another criterion for distinguishing PT Musim Mas from Ecogreen, the Commission stated in the December 2012 Amending Regulation that, because "the trader's overall activities [are] based to a significant extent on supplies originating from unrelated companies", the "trader's functions are therefore similar to those of an agent working on a commission basis."[3]

2.32. Indonesia fails to see the relevance of the activities of the trader's office that involve products outside of the scope of investigation. The Commission's task was to decide whether, with respect to the sales under investigation, the allocation of funds between PT Musim Mas and ICOFS is an expense that affects price comparability. For Indonesia, it is clear that transactions between ICOFS and unrelated third parties, of products outside the scope of investigation, have nothing to do with the transactions between PT Musim Mas and ICOFS.

2.33. To the extent that these third party sales can shed any useful light on the question before the Commission, they would have to relate to the overall relationship between ICOFS and PT Musim Mas, for instance, regarding corporate control, management and operational decision-making such as pricing decisions. However, the Commission made no attempt to examine such circumstances and merely looked at the quantities of these sales (which, in any event, it did not disclose or otherwise discuss).

2.34. By way of example, had the Commission examined these "third party" purchases and sales in more detail, it could have found that these sales are oftentimes an integral part of how PT

[1] Amending Regulation, para. 27. Exhibit IDN-5.
[2] EU's First Written Submission, para. 98.
[3] Amending Regulation, para. 29. Exhibit IDN-5.

Musim Mas interacts with ICOFS and how ICOFS closely coordinates such purchases and sales with PT Musim Mas. Specifically, for a number of products (although not including the product under investigation), ICOFS may sometimes purchase from third parties in order to sell to clients that normally purchased PT Musim Mas-produced products. This will occur when, on any given occasions, **[***]** Had the Commission properly investigated the issue, it would have been informed about these matters.

2.6.4 The Commission improperly considered that the existence of a sales and purchasing agreement as well as certain clauses of that agreement support the contested deduction

2.35. As the third criterion, the Commission relied on the fact that a sales and purchase agreement ("S&P Agreement" or "transfer pricing agreement") existed between PT Musim Mas and ICOFS. It also relied on unspecified elements of the content of this agreement, in rejecting PT Musim Mas' explanation that this contract was a "master agreement to regulate transfer prices between [the] related parties".[4]

2.36. The contract governs sales from PT Musim Mas and ICOFS. It was concluded in order to demonstrate to both Singaporean and Indonesian tax authorities arm's length pricing practices applied by the companies. Such transfer pricing agreements (or intercompany agreements) are a daily occurrence in business practices. In its Answers to the Panel's first set of questions, Indonesia presented several exhibits to support this point, including general advice to private companies from a reputed law firm about intercompany/transfer pricing agreements and how to conclude them; as well as two templates for intercompany/transfer pricing agreements that contain clauses identical or very similar to those of the S&P Agreement between PT Musim Mas and ICOFS.

2.37. It is nonsensical to argue that two related companies become arm's length companies because they conclude an intercompany agreement that looks like, or seeks to imitate, an agreement between unrelated companies. As demonstrated by Indonesia's evidence above, it is the very purpose of intercompany agreements to structure commercial interaction in a manner that reflects practices between unrelated companies.

2.38. The Commission also relied in its determinations on certain aspects of the S&P Agreement. For instance, it relied on the fact that the trading office "was involved in a range of different palm oil-based products".[5] Indonesia does not understand what relevance this criterion has for the issue at hand and why the Commission thinks this point proves anything. The Commission also claimed that ICOFS bought products from PT Musim Mas under "one single contract without distinguishing among products".[6] This statement is factually incorrect, because the transfer pricing agreement does differentiate between products. Moreover, even if true, lack of, or limited, differentiation would suggest – if anything – that the two companies do not deal at arm's length.

2.39. The Commission left unanswered – as does the EU in these proceedings – the simple fact that this type of transfer pricing agreement/intercompany agreement reflects international practice and is recommended by international transfer pricing guidelines, including those issued by the OECD and the United Nations. Such recommendations also exist in transfer pricing guidelines at the national level in numerous jurisdictions, including in the EU's own legal order.

2.40. During the panel proceedings, the EU has also provided certain ex post rationalisations concerning other specific clauses of that agreement, not mentioned in the Commission's determinations. Besides being procedurally inadmissible, the EU's reliance on these elements is also misplaced as a matter of substance. For instance, the allocation of risk between PT Musim Mas and ICOFS is customary for this kind of agreement. PT Musim Mas even highlighted this risk allocation, on its own initiative, to the Commission during the investigation, to argue that – contrary to the Commission's view – this risk allocation demonstrated that ICOFS did not act as an "agent working on a commission basis", as stated by the Commission. During the investigation, the Commission ignored these arguments. Now, in the WTO proceedings, the Commission impermissibly relies on them *to argue the opposite*. Besides being incorrect on substance, this is procedurally unfair and arbitrary.

[4] Amending Regulation, para. 30. Exhibit IDN-5.
[5] Amending Regulation, para. 28. Exhibit IDN-5.
[6] Amending Regulation, para. 29. Exhibit IDN-5.

2.41. As another example, the Commission's reliance on the clauses concerning the manner of communication between the contracting parties and the clause concerning dispute resolution makes no sense. These clauses are entirely consistent with how related parties structure intercompany/transfer pricing agreements. Indonesia has submitted evidence to this effect.[7]

2.7 The Commission ignored or distorted further evidence that suggests that PT Musim Mas and ICOFS are closely intertwined and closely cooperate, including on the sales at issue

2.42. Although it purported to analyse the relationship and the mutual "functions" of PT Musim Mas and ICOFS, the Commission ignored relevant evidence of how closely the two companies are related and operate. For instance, as part of its Questionnaire Response, PT Musim Mas submitted highly confidential cost data pertaining to ICOFS. Needless to say, a producer would never have access to such confidential data of an independent trader. The tight relationship between PT Musim Mas and ICOFS is even implied in how the Commission initially treated the two companies. Indeed, in a pre-verification visit letter addressed to PT Musim Mas' lawyers, the Commission referred to ICOFS as "the company's premises in Singapore ([ICOF-S])".[8]

2.43. Furthermore, ICOFS staff assisted PT Musim Mas throughout the anti-dumping investigation. During verification, ICOFS staff was present at the PT Musim Mas' verification and answered questions on PT Musim Mas domestic sales and on technical issues concerning PT Musim Mas' plant in Indonesia.

2.44. Finally, ICOFS is involved in PT Musim Mas' domestic sales in the same manner as it is involved in export sales (the only exception being that it is formally PT Musim Mas that signs all domestic sales agreements). However, ICOFS does not **[***]** for its involvement on domestic sales. The Commission did not contest this evidence during the investigation. The involvement of ICOFS **[***]** in the domestic sales process (as well as its involvement **[***]** in certain export sales) demonstrates that the two companies do not deal with each other at arm's length.

2.8 The Commission's proffered logic for the adjustment is internally inconsistent

2.45. The lack of principled reasoning underpinning the contested adjustment is also discernible from how the EU explained its logic during the first panel hearing: According to the Commission, PT Musim Mas pays a "commission" to ICOFS on export sales, but not on domestic sales. Consequently, the EU explained, the Commission made the adjustment for ICOFS' "commission" on export sales, but not on domestic sales. However, because the two companies are related, the Commission did not use the amount/percentages actually paid by PT Musim Mas to ICOFS, but rather changed the amounts to be deducted. The EU cannot contest that ICOFS negotiated and arranged PT Musim Mas' domestic sales in the same manner as it negotiated and arranged PT Musim Mas' export sales. However, the EU argues, ICOFS did not **[***]** on the domestic sales, no money changed hands and therefore no adjustment was warranted.

2.46. However, inconsistently with the above explanation, the EU made the adjustment on **all** export sales, including the "direct export sales", even though **[***]** Thus, the Commission violated its own approach and its own logic. To be consistent with its own logic, the Commission should have made the adjustment only for those export sales in which ICOFS featured as the formal contracting party and on which ICOFS retained a mark-up, and it should not have made the adjustment for the "direct" export sales.

2.47. In addition to highlighting the internally inconsistent approach of the EU, the fact that ICOFS did not **[***]** on the "direct" export sales further demonstrates the non-arm's length nature of the dealings between the companies. It bears repeating that ICOFS negotiates and arranges all export and all domestic sales. However, ICOFS receives **[***]** Clearly, an independent trader would never do so.

[7] See Indonesia's exhibits IDN-52, IDN-53, and IDN-54.
[8] Letter from the European Commission to PT Musim Mas, 5 November 2010, p. 1. Exhibit IDN-41.

2.9 The EU's incorrectly argues that the Panel should reject Indonesia's arguments in case it disagrees with the label "single economic entity"

2.48. As part of its legal argument, the EU has stated that, if the Panel does not consider the "single economic entity" or "closely related parties" terminology or criteria for addressing this issue to be the optimum, the Panel should reject Indonesia's claim. According to the EU, if Indonesia has not guessed precisely how the Panel would interpret and articulate the meaning of the Article 2.4, including the phrase "to affect price comparability", in the context of transactions between related parties, Indonesia's claim should be rejected.

2.49. This, of course, is incorrect. Indonesia's claim is that the EU has violated Article 2.4 because it has made an adjustment for something that does not "affect price comparability" within the meaning of Article 2.4, thereby failing to conduct a "fair comparison" under that provision. Indonesia's argument as to why the transactions, or the transfers between PT Musim Mas and ICOFS, do not affect price comparability is expressed through the term "single economic entity" or "closely related parties" test. However, even if the Panel does not wish to rely on the "single economic entity" or "closely related parties" language or test proposed by Indonesia, the Panel has to provide what it considers to be the correct interpretation of, or the correct legal standard under, the phrase "to affect price comparability" in the context of transactions between closely related parties under Article 2.4. The Panel must then apply that legal standard to the facts before it. Indonesia's claim would not fail simply because the Panel might articulate the relevant legal standard in different words or using different concepts than the complainant.

2.50. This is because no party bears the burden of providing the correct legal interpretation to a WTO dispute settlement body. This principle – also known as "iura novit curia" – has been affirmed by the Appellate Body in several decisions, including in *EC – Tariff Preferences,*[9] *EC - Hormones*[10] *and EC – Export Subsidies on Sugar.*[11]

2.51. Therefore, in summary, it is for the Panel in this dispute to decide what the phrase "to affect price comparability" means in the context of transfers of funds between closely related parties and non-arm's length transactions. Should the Panel consider pertinent Indonesia's proposed legal standard of "single economic entity" or "close relationship", the Panel can rely on this standard. Should the Panel disagree with this articulation of the legal standard, the Panel is bound by Article 11 of the DSU to enunciate its own version and to apply it to the facts before it.

2.10 The Commission's differential treatment of PT Musim Mas and Ecogreen further highlights the unjustified character of the Commission's adjustment

2.52. Another arbitrary aspect of the Commission's adjustment for PT Musim Mas is the different treatment of that company from the treatment of the second Indonesian exporter, Ecogreen. Specifically, the Commission relied on the existence of direct export sales; the existence of the written S&P Agreement; as well as the type and extent of other activities of the sales department to justify the differential treatment between PT Musim Mas and Ecogreen. This reasoning is flawed and further demonstrates the arbitrary nature of the Commission's determination.

2.53. Indonesia submits that the Panel should bear in mind that the Commission initially determined that the companies should be treated the same, because they were in an identical position. Subsequently, the Commission turned around and determined the exact opposite, arguing that the two companies were situated so fundamentally differently as to warrant an entirely different treatment. Indonesia acknowledges that an investigating authority enjoys a degree of discretion in its assessment of the facts. However, the required "reasoned and adequate explanation" is seriously undermined where the investigating authority, within a span of a few months, goes from emphasizing the commonality between two companies for purposes of an adjustment to arguing that these companies are so fundamentally differently situated that they should be treated in diametrically opposite fashion. Where the investigating authority has itself, merely a few months earlier, espoused an entirely different explanation and interpretation of the same record evidence, it is particularly important to explain, in compelling terms, the plausibility of its now diametrically opposed conclusions.

[9] Appellate Body Report, *EC – Tariff Preferences*, footnote 220 to para. 105.
[10] Appellate Body Report, *EC – Tariff Preferences*, footnote 220 to para. 105.
[11] Panel Report, *EC – Export Subsidies on Sugar*, para .7.121.

2.54. In any event, the Commission's reasoning in the Amending Regulation is flawed. With respect to "direct" export sales, the Commission initially relied on the fact that both companies had "direct" export sales; and that for both companies these "direct" export sales" were "structural" and "permanent".[12] The Commission subsequently treats the initial criterion as irrelevant and decides that what matters is the quantity of these sales. This shift in reasoning is not explained.

2.55. In any event, the Commission has failed to provide any further context or description of the circumstances of these sales and what light these sales, or their respective quantities, might shed on question why amounts of money shifted between Ecogreen and EOS *should not* be considered an expense; and the amounts shifted between PT Musim Mas and ICOFS *should* be considered an expense.

2.56. With respect to the written S&P Agreement, the Commission fails to explain why the existence of such a written master transfer pricing agreement between PT Musim Mas and ICOFS should place PT Musim Mas in such a different position from Ecogreen. It stands to reason that, even in the absence of a written master agreement, some form of agreement and agreed-upon terms of sale – perhaps transaction-specific contracts or discernible from invoices – must have existed between Ecogreen and its trading department EOS. After all, the Commission found that Ecogreen also paid "commissions" to EOS. However, the Commission has made no reference to, nor has it analysed, any evidence submitted by Ecogreen on this point. Such evidence must, nevertheless, be part of the record, given that it would have been part of Ecogreen's response to its Questionnaire.

2.57. Moreover, Indonesia has presented evidence that demonstrates that some related companies choose to conclude intercompany/transfer-pricing agreements in order to facilitate their interaction with tax authorities, whereas other related companies choose not to do so. This type of choice, however, cannot influence the analysis of an anti-dumping investigating authority as to whether an adjustment between two related companies is warranted. In addition, unrelated companies may choose to use or not to use written agreements similar to the S&P Agreement. Contrary to the EU's assumption, how parties choose to memorialize their relationship is not as important as the substance or nature of that relationship.

2.58. Furthermore, the Commission's reliance on individual clauses of the written agreement is also misplaced. For instance, the Commission's reliance on the risk allocation between PT Musim Mas and ICOFS suggests that Ecogreen and ICOFS did not allocate risk between themselves or allocated that risk differently. However, the Commission has not pointed to any evidence whatsoever to substantiate this implied assertion. However, relevant information must be contained in the investigation record, in particular, in Ecogreen's Questionnaire Response.

2.59. With respect to other activities of the selling office, the Commission confirmed in the Definitive Regulation that EOS traded products from companies other than Ecogreen. Hence, the only difference appears to be the extent of such third-party sales. As noted above, the Commission has not explained why the extent of such sales should have any bearing on the determination whether, with respect to the investigated sales, PT Musim Mas and ICOFS should be considered as an SEE or closely related.

2.11 The Commission also acted inconsistently with Article 2.3

2.60. The EU also violated Article 2.3 of the Anti-Dumping Agreement, because the dumping margins for several sales were calculated using the constructed export price methodology of Article 2.3 and the third and fourth sentences of Article 2.4. Given this tight nexus between the two provisions, and the overarching role of Article 2.3 for the construction of the export price, an adjustment with respect to a constructed export price that violates Article 2.4 may also be said to mean that the constructed export price under Article 2.3 was also calculated improperly.

3. INDONESIA'S CLAIMS UNDER ARTICLES 3.5 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

3.1. The EU's determination is inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement, because the EU Commission failed to conduct a proper non-attribution analysis for two

[12] Definitive Determination, para. 33. Exhibit IDN-4.

"known factors". These two factors are (i) the "economic/financial crisis of 2008/2009", and (ii) "the effects of the difficulties faced by the EU domestic industry with access to raw materials and of the fluctuations in the prices of these raw materials".

3.2 The Commission failed to conduct a proper non-attribution analysis of the factor "financial crisis"

3.2. It is undisputed – and the EU accepts in these proceedings – that the financial crisis was a "known factor" other than dumped imports, in that it caused injury to the EU industry at the same time as the dumped imports. Nevertheless, the Commission's analysis of this factor is entirely inadequate and flawed for the following reasons.

3.3. First, the Commission's finding of causation is premised on the unexplained assumption that 2009 was the year in which the financial crisis started or the year in which its effects could first be felt. This is explicit in the Commission's reference to the year 2008 as "the year before the financial crisis" in paragraph 96 of its Definitive Regulation. The Commission thus relied on 2008 as a baseline period (counterfactual) during which the EU industry was unaffected by the financial crisis and during which injury reflected the effects of dumped imports only.

3.4. However, the assumption that the Union industry in 2008 was unaffected by the financial crisis, and that the financial crisis started only the following year, is contradicted by evidence in the record as well as by commonly known facts of which judicial notice can be taken. At the very least, the Commission should have provided a reasoned and adequate explanation for its view that the year 2008 could serve as evidence of a year in which dumped imports were the only injurious factor. However, it failed to do so.

3.5. The EU relies on various unrelated statements in the Commission's Provisional Regulation. It argues that the Commission did not find that the financial crisis began in 2009, but rather acknowledged that the crisis began showing some effects already in 2008. This argument, however, contradicts the explicit words of the Commission in paragraph 96 of the Definitive Regulation – the same factor cannot begin both in 2008 and also in 2009. Moreover, the passages from the Provisional Regulation to which the European Union refers paint a confusing picture. Some suggest that the crisis started in 2008; others imply that the crisis started in 2009; in its first written submission, the European Union seems to adopt an intermediary position, suggesting that the crisis existed in some fashion, but was not "clearly felt in 2008". All of these explanations are ex post rationalisations that may not be taken into account by the Panel. Moreover, the EU draws on the statements that, by their very nature, do not address the issue of causation/non-attribution, but instead deal with a description of injury indicators. An investigating authority does not satisfy the requirements of Articles 3.1 and 3.5 when its explanation is poorly structured, incoherent, illogical, and requires interested parties to piece together various disjointed statements scattered across the record.

3.6. Second, the Commission failed to "separate" and "distinguish" the injurious effects of the factor financial crisis from those of dumped imports. It may be recalled that the non-attribution analysis requires the investigating authority to examine the nature and the extent of the injurious effects of other factors.[13] The Commission accepted that the crisis affected the Union industry *through the same channels* as did the (allegedly) dumped imports, namely by reducing the demand for the Union industry's product and lowering sales prices. In other words, the Commission found that the *nature* of the effects of the financial crisis was the same as that of dumped imports. Thus, without knowing the *extent* to which the financial crisis affected the Union industry, the Commission was unable to distinguish between the injurious effects of dumped imports and the financial crisis, respectively, and therefore could not make its causation and non-attribution finding in a manner consistent with Article 3.5.

3.7. Third, the Commission failed to address the parties' arguments and record evidence that contradicted its conclusion. For example, the Commission failed to address Musim Mas' explanation that, in late 2009 and early 2010, imports from the countries concerned increased, but, at the same time, the profit of some EU companies as a whole and for the care chemicals segment in particular improved considerably. This casts in serious doubt the Commission's narrative that dumped imports, and their increased amounts, were responsible for the domestic industry's injury.

[13] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405.

In light of this argument, an entirely plausible (if not compelling) interpretation of the record evidence is that the injury to the domestic industry in 2008 was caused by the financial crisis, rather than dumped imports. The applicable standard of review requires an investigating authority to address alternative explanations of record evidence. Nevertheless, the Commission left this argument unaddressed.

3.8. Fourth, in its first written submission, the EU invoked the "correlation/coincidence" approach approved by the Appellate Body in *Argentina – Footwear (EC)*. However, both the panel and the Appellate Body in that dispute – just as the case law ever since then – treated "correlation/ coincidence" and "non-attribution" as separate elements of the causation analysis. In any event, the European Union's argument constitutes ex post rationalization, which should be rejected.

3.9. Finally, the Commission's conclusion with respect to the financial crisis, in paragraph 109 of the Provisional Regulation, is that the economic crisis "does not break the causal link established in relation to the low-priced dumped imports from the countries concerned". Indonesia submits that this "breaking the causal link" analytical framework and language is inappropriate to satisfy the non-attribution requirement. It is not methodologically possible to first establish a causal link for dumped imports and only then enquire about the injurious effects of other factors, by determining whether these factors "break" an already established causal link. This amounts to putting the cart before the horse. An investigating authority cannot determine a causal link between injury and dumped imports without looking at the effects of other injurious factors. Rather, an initial determination of the effects of other injurious factors is the logical basis for a determination whether the link between dumped imports and injury satisfies the standard for "causal link" of Article 3.5; it is also the logical prerequisite for ensuring that the effect of other factors is not improperly attributed to the dumped imports.

3.3 The Commission failed to conduct a proper non-attribution analysis of the factor "raw materials"

3.10. The Commission failed to conduct any analysis for the factor "raw materials". At the very outset of the investigation, interested parties provided argument and evidence that the domestic industry experienced injury due to insufficient access to raw materials and fluctuations in raw material prices. PT Musim Mas provided extensive explanations that the EU industry faces a structural disadvantage vis-à-vis Indonesian exporters, because Indonesian exporters have their own sources of raw materials. The EU domestic industry is, therefore, exposed to greater potential price fluctuations for these raw materials. This risk of price fluctuations materialized in particular during the financial crisis, starting in mid-2008; during this period, the price of the raw material decreased by over 60 per cent just between July and December 2008. The significantly longer lead-times for the EU industry, and the resulting greater exposure to price fluctuations, can leave the EU industry severely limited in its ability to compete with foreign producers.

3.11. In support, PT Musim Mas relied on raw material pricing data, as well as on other documents and record evidence submitted to the Commission. The accuracy of the price data was not disputed, nor was the fact that the raw materials account for "a substantial part of the overall production costs" in the fatty alcohols production process. It was similarly demonstrated, undisputed and verified that some EU companies depend on the supplies of raw materials by their Indonesian competitors, and that the long duration of raw material shipments from Indonesia/Malaysia to the EU exposes the industry to price fluctuations.

3.12. The Commission rejected PT Musim Mas' extensive explanation and evidence on the grounds that it was allegedly unsubstantiated. This was the entirety of the Commission's explanation for its decision in paragraph 98 of the Definitive Regulation. This one-sentence finding is entirely inadequate and is inconsistent with the requirements of Articles 3.5 and 3.1. The extent of PT Musim Mas' arguments and evidence required the Commission to investigate whether the alleged factor was indeed an injurious factor for which a non-attribution analysis should have been performed.

3.13. To the extent that, notwithstanding the amount of argument and evidence placed before it, the Commission considered that it required further evidence, it was incumbent on it to gather such evidence. As an investigating authority, in these circumstances, the Commission was not permitted to remain passive, but rather had an active duty to investigate.

3.14. Indonesia also emphasizes that the violation of Article 3.5 does not reside in the Commission's failure to find that this factor was causing injury at the same time as dumped imports. Rather, the violation of Article 3.5 arises from the Commission's refusal to engage in any analysis at all.

3.15. The EU's defense in these proceedings is that the factor "raw materials" is part of the "conditions of competition", and was subsumed in the factor "economic crisis". This is in manifest contradiction to the Commission's determination. Both interested parties and the Commission treated the factor "economic crisis" as a separate factor, acknowledged its injurious effects and analysed (albeit inadequately) it. In contrast, the factor "raw materials" is treated in subsequent paragraphs of the determination; and the Commission stated explicitly that, with respect to this particular factor, the interested parties had failed to "substantiate" their assertions. Hence, the EU's defense is not only an ex post rationalisation, but is in direct contradiction to the content and structure of the Commission's determinations.

4. THE EU VIOLATED ARTICLE 6.7 BECAUSE IT FAILED TO REVEAL TO THE INTERESTED PARTIES THE RESULTS OF THE VERIFICATION VISIT

4.1. Indonesia's final claim is that the EU violated Article 6.7, because it failed to disclose the results of the verification visit, as required by this provision.

4.2. Article 6.7 requires the investigating authority to disclose the results of the verification either in a separate report or as part of its disclosure of the essential facts under Article 6.9 of the Anti-Dumping Agreement. In this case, however, contrary to Article 6.7, the EU did not disclose any meaningful information about the results of the verification visits to the premises of the Indonesian exporters and their affiliates.

4.3. It is undisputed that the Commissio0n did not issue a separate disclosure document. Instead, in the Provisional and Definitive Disclosures issued pursuant to Article 6.9, the Commission in essence only stated that verification had taken place and that unspecified information had been verified, unspecified errors had been corrected and additional unspecified information had been collected.

4.4. This is insufficient to comply with the requirements of Article 6.7. Article 6.7 requires the investigating authority to disclose the "results" of the verification visits, by means of one or other of two different avenues: the investigating authority may either (i) "make available" a separate report containing the results of the verification visits, or (ii) "provide disclosure" of the results as part of the disclosure of the essential facts under Article 6.9. Regardless of which avenue is chosen, the investigating authority must disclose the same thing – the "results" of the verification visit.

4.5. The "result" referred to in Article 6.7 is the "effect" or "outcome" of the verification visit. As with the "result" of any activity, the "result" of a verification visit is closely linked to the *conduct, content and purpose* of that verification visit. Indeed, the Appellate Body in *US – Steel Safeguards* stated that the term "result" is to be read as "an effect, issue, or outcome *from* some action, process or design".[14] Annex I(7) of the Anti-Dumping Agreement defines the purpose of a verification visit as to "verify the information provided or to obtain further details". The purpose, conduct, and content of a verification visit is thus to verify the information provided by the investigated firms in their questionnaire responses and to enable the investigating authority to obtain, and the investigated exporter to provide, additional information or explanations regarding the exporter's submitted questionnaire responses.

4.6. In the normal course of events, during a verification visit, an investigating authority will request the investigated company to provide access to its accounting system and other records, including all of the worksheets and source documents used to prepare the questionnaire responses. During the verification visits, the investigating authority normally reviews these documents and cross-checks them against the data provided in the questionnaire responses. The investigating authority also uses the opportunity to clarify any areas of doubt regarding the contents of the questionnaire responses. As part of this process, the investigating authority may,

[14] Appellate Body Report, *US – Steel Safeguards*, para. 315. (original emphasis).

for instance, request access to an entire category of documents or data or focus on certain specific documents.

4.7. Normally, therefore, a verification visit involves a quasi-audit of all information relevant to the company's operations with respect to the investigated product as explained in its questionnaire responses. There may be several "results" of the verification, for instance, the investigating authority will have collected additional documents, worksheets, copies of invoices, financial statements, etc. A proper listing/description of these documents and their contents, therefore, forms part of the "results" of the verification. The investigating authority may also have satisfied itself as to the accuracy of certain facts and figures contained in the exporter's questionnaire responses. The questions posed and answers received by which the investigating authority satisfied itself of this accuracy forms part, therefore, of the results of the verification. The investigating authority may have received corrections or additional explanations regarding matters in the exporter's questionnaire responses. These corrections or explanations are part of the "results" of the investigation. Next, the investigating authority may discover errors in the questionnaire responses. The ability or inability to correct these errors is also part of the "results" of the investigation. The "results" also include any reasons why a particular piece of information was not verified, including, for instance, because the exporter refused to provide the required information and did not provide access to the relevant documents.

4.8. This is precisely the conclusion reached by the panel in *Korea – Certain Paper*, which stated that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".[15]

4.9. It is also important to keep in mind the due process-purpose of the disclosure requirement under Article 6.7. As noted by the panel in *Korea – Certain Paper*:

> The purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results.[16]

4.10. In other words, the purpose of Article 6.7 is, inter alia, to enable exporters to safeguard their rights in an anti-dumping investigation and "structure their cases for the rest of the investigation in light of those results".[17] For this purpose, exporters must know what information *was not* verified – so that they can make further efforts to put the investigating authority in a position to ultimately verify that information – as well as what information *was* verified, since verified information must in principle be used by the investigating authority and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information.

4.11. Throughout these proceedings, the EU has sought to blur or even eliminate the difference between the disclosure of the *results of the verification*, pursuant to Article 6.7, and the disclosure of *essential facts*, pursuant to Article 6.9 of the Anti-Dumping Agreement. In its First Written Submission, the EU argues that the term "results" refers to the "essential factual outcome of the verification" or the "essential facts under consideration as established through the on-the-spot investigation".[18]

4.12. This is of course incorrect. Even if the investigating authority has the option of disclosing the "results" of the verification at the same time as disclosing the essential facts, the subject of these two sets of disclosures is different: "Results" of the verification visit, on the one hand, and "essential facts", on the other hand. The difference between these two terms is obvious not only as a matter of treaty interpretation – since the drafters used two different terms, they must have meant two different things. It is also obvious from the structure and the unfolding of an

[15] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added).
[16] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added).
[17] Panel Report, *Korea – Certain Paper*, para. 7.192.
[18] EU's First Written Submission, paras. 185.

anti-dumping investigation. More specifically, whereas the results of the verification become part of the investigation record, the essential facts are merely a subset of the facts on the record.

4.13. The verification team normally cannot or does not take any final decisions on how the verification will affect the investigating authority's determinations of dumping and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have *not* been gathered or checked. However, the results of the verification do not include any *subsequent determinations* by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate dumping margins for the exporter in accordance with the Anti-Dumping Agreement. The subsequent decision how to determine the dumping margins is the result of the *investigation* – and disclosed inter alia in the disclosure under Article 6.9 – and not the result of the *verification* that must be disclosed under Article 6.7.

4.14. The respective objects of the disclosure under Article 6.7 and 6.9 must also be clearly distinguished because disclosure pursuant to Article 6.7 may occur at a point in time well before the disclosure under Article 6.9. The investigating authorities of numerous WTO Members provide a separate "verification report"; in the chronology of anti-dumping investigations, this report is typically issued well before these authorities have decided on what constitutes essential facts. Indonesia of course accepts that an investigating authority may choose to disclose the results of the verification visit simultaneously with the essential facts, as reflected in the text of Article 6.7. However, that choice of the investigating authority may under no circumstances modify the type of information to be disclosed or otherwise result in an impairment of the procedural rights and position of the investigated parties. Otherwise, the term "results" would refer to different matters depending on when the authority decided to satisfy its obligation under Article 6.7. This interpretative outcome would be alien to basic principles of treaty interpretation and would subject the due process rights of investigated companies to discretionary choices by the investigating authority.[19]

4.15. Thus, the *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter but that the investigating authority did not immediately consider relevant to its final determination.

4.16. Yet another consideration is that Article 6.7 is also intended to provide domestic courts (using their own standard of review) and WTO panels (using the standard of review pursuant to Article 17.6(i)) with the ability to review the determinations of investigating authorities. This ability depends on the existence of a proper disclosure of the "results" of the verification visit under Article 6.7 of the Anti-Dumping Agreement.

4.17. WTO case law – such as *Korea – Certain Paper* and *US – Steel Plate* – demonstrates that information contained in the disclosure of the verification results (whether through a verification report or with the disclosure of essential facts) – concerning the type of information verified; the authority's decision whether the information was verifiable, verified or not; as well as any attendant circumstances, such as behaviour of the investigated firm – plays an important role for a panel's ability to examine whether the investigating authority complied with Article 17.6(i) of the Anti-Dumping Agreement. A failure to disclose the results of the verification, or an incomplete disclosure, will thus significantly undermine a panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority.[20] Similarly, only a proper reporting of the results of the verification visit will enable the appropriate judicial review within a WTO Member's domestic legal system, as required by Article 13.

4.18. Moreover, a failure by the investigating authority to describe accurately and in detail events during the verification visit is a failure to permit interested parties to see information that is relevant to the presentation of their cases. This is contrary to Article 6.2 - which requires that all

[19] Indonesia's Opening Statement at the First Panel Hearing, para. 98.
[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

interested parties have a "full opportunity for the defence of their interests"— as well as Article 6.4, which requires authorities, whenever practicable, to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … that is used by the authorities … and to prepare presentations on the basis of this information".

4.19. In this case, the EU argues that the Commission provided the results of the verification visits as part of the disclosure of the findings of the investigation. However, these efforts were, at best, cursory and cannot be considered to have met the standard required under Article 6.7. For instance, the Commission failed to set out

- which specific types of information, documents, or issues were addressed in the verifications.
- which particular documents (e.g. sales invoices, rebate notes, etc.) were examined; and
- what questions were asked by the Commission officials or what answers were provided by the exporters.

4.20. The extent of the Commission's failure to disclose the results of the verification is clearly visible from a reading of the contemporaneous notes taken by PT Musim Mas' counsel during the verifications at that exporter's premises in Singapore, Medan, and Hamburg. These notes contain the kinds of basic information that are entirely absent from the Commission's purported disclosure of the verification results, namely, who attended the verifications, what documents were reviewed, what questions were asked, and what answers were given. There are several issues of critical importance to the Commission's subsequent adjustment of PT Musim Mas' export price and to Indonesia's related claim under Article 2.4 of the Anti-Dumping Agreement. As the counsel notes demonstrate, the issues at hand were discussed during verification, but were not subsequently disclosed by the Commission. These issues include the close corporate, management, organizational and operational links between PT Musim Mas and ICOFS; transfer pricing policy; the so-called "direct" export sales by PT Musim Mas; the manner in which ICOFS and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the fact that ICOFS was involved in negotiating, preparing and executing each and every sale of PT Musim Mas' products, including domestic sales. The Commission's conclusion that ICOFS is not the sales department of PT Musim Mas, but rather stands in a commission-agent relationship with PT Musim Mas is in direct contradiction with this information.

5. CONCLUSION AND REQUEST FOR FINDINGS

5.1. For the above reasons, Indonesia respectfully requests that the Panel find that the European Union.

- Acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement, by making an improper deduction for the activities of PT Musim Mas' trading arm ICOFS and disregarded the fact that the two entities are part of an SEE;
- Acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by failing to conduct a proper non-attribution analysis with respect to the factors "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials"; and
- Acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, by failing to disclose to either of the investigated Indonesian exporters the results of the verification visit.

5.2. Indonesia thanks the Panel and the Secretariat team for its work so far. Indonesia looks forward to assisting the Panel in the subsequent stages of this dispute.

ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

1 INTRODUCTION AND OVERVIEW

1.1. The key issue regarding Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement is that adjustments may be made only for actual/genuine expenses incurred by the seller that affect the price and therefore affect price comparability, within the meaning of Article 2.4. In this case, the EU's adjustment for internal transfers between the two arms of the seller, PT Musim Mas and ICOFS did not reflect an actual expense that was incurred by the seller. Therefore, the internal transfer did not reduce the net price received by the seller for the goods. The EU has failed to address this issue or to explain how this was any other than a purely notional adjustment, based on what might have happened had the producer/exporter structured its business differently.

1.2. Regarding Indonesia's claim under Article 3.5 of the Anti-Dumping Agreement, the EU has failed to show where the Commission provided a reasoned and adequate explanation of the factors raised by Indonesia. Instead, the EU relies on *ex post* explanations, which in any event, frequently contradict record evidence or are internally inconsistent. Finally, the EU's arguments under Article 6.7 of the Anti-Dumping Agreement cannot surmount the fact that the Commission simply failed to provide the investigated companies with any meaningful "results" of the verification visit.

2 INDONESIA'S CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

2.1 Indonesia's claim does not hinge on the label "single economic entity"

2.1. The EU continues to argue that Indonesia's claim stands and falls on whether the Panel's decision adopts the terminology of a "single economic entity". Indonesia has explained at length that its legal claim is that the EU has acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an adjustment for an item that does not affect the price received by the seller and therefore does not affect price comparability, resulting in an "unfair comparison", within the meaning of Article 2.4.

2.2. In Indonesia's view – and in keeping with prior WTO case law and the EU's own domestic legal terminology – a suitable terminology for the process of considering whether transactions between related parties affect price comparability is to ask whether the two entities form a "single economic entity". However, the term "single economic entity" is nothing but a phrase intended to operationalize, in the context of related parties, the concept of "affect[ing] price comparability", within the meaning of Article 2.4. Needless to say, other labels are perfectly possible, e.g. whether two companies are sufficiently closely related or, to paraphrase the EU Commission, whether an adjustment is "appropriate". This is the term the Commission used when examining transactions between Ecogreen and EOS. The choice of the most appropriate label, as decided by the Panel, does not affect either the substance of the analysis or Indonesia's claim that the "mark-up" at issue is not an item that affects price comparability. If the companies at issue are sufficiently closely related or intertwined as to operate as a single entity, transfers between them do not affect the price they receive for the goods.

2.2 The EU's adjustment under Article 2.4 does not reflect an actual or genuine expense incurred by the seller

2.3. The central question under Article 2.4 is whether the adjustment is required to ensure price comparability. An adjustment is <u>required</u> for any item that affects price comparability; and, conversely, an adjustment is <u>prohibited</u> for any item that does <u>not</u> affect price comparability. Hence, the key issue is whether transactions between ICOFS and PT Musim Mas and the "mark-up" discussed in these proceedings affects the price received by the seller and hence price comparability. However, both the Commission and now the EU have failed to explain how the "mark-up" can be regarded as an actual or genuine expense incurred by the seller of the investigated goods.

2.4. Indonesia has explained in detail how a company's cost structure will be impacted by the different ways in which it may organize its business activities. For instance, if a producer uses an in-house sales department to conduct sales activities or an in-house transportation department to provide transportation services to its customers (or if a single economic entity uses separate legal entities within its structure for that purpose), the producer's expenses will be the financial outlay required to operate these departments or legal entities. In contrast, if the producer uses independent third party entities (traders or a transportation company) to provide these services for its customers, the producer's expenses will be the actual fees paid to these independent third party service providers. The difference between in-house expenses and actual fees paid to independent third parties cannot be blurred by pretending, for instance, that a producer that in reality is using an in-house sales department is actually relying on an independent trader. The difference between these two scenarios has significant implications for the nature of the expense (cost vs. a commission) and the amount (one may be higher than the other, which is the very reason why companies choose one option over the other).

2.5. Indonesia has provided multiple examples – along with numerical values in table format – to illustrate this point. The EU has not addressed any of these arguments or examples directly. The EU cannot make notional or fictitious adjustments as if PT Musim Mas were using (or were continuing to use) an independent trader, if the company in reality is relying on a sales department with which it is tightly integrated and with which it jointly sells the investigated product.

2.6. Moreover, there is not a shred of evidence in the record of the investigation to suggest that the "mark-up" represents the amount of an actual commission paid by the seller on these sales. Even the Commission did not consider that the "mark-up" was an actual commission. Instead, it decided that the actual "mark-up" was not reliable "in order to avoid any distorting effects that may arise from the transfer prices".[1] Consequently, instead of relying on the transfer prices, the Commission used "a reasonable profit margin" based on "a reasonable profit for the activities carried out by trading companies in the chemical sector". Thus, even in the Commission's view, the amount of the "mark-up" appears to be irrelevant: the Commission would, it seems, use a reasonable profit margin of other companies regardless of whether the "mark-up" was zero, the percentage amount set out in the S&P Agreement or some other (higher) amount. This makes clear that the Commission did not consider that the "mark-up" was an actual commission or expense, but merely the justification for making a *notional* adjustment.

2.7. It is clear also that even the Commission does not consider that either the actual "mark-up" between PT Musim Mas and ICOFS or the "reasonable profit" it used instead represents the actual selling, general and administrative expenses (SG&A) incurred by either ICOFS or PT Musim Mas for these sales. As Indonesia has explained, the Commission *also* deducted ICOFS' SG&A, suggesting that this adjustment was intended to represent profit (which is, indeed, the term used by the Commission – "a reasonable profit margin", "actual profit margins" etc). The EU now argues that this case concerns a direct selling expense in the form of a commission that is related to export sales only. There is, however, no suggestion in the Commission's determinations that the "mark-up" was an actual selling expense actually incurred by the seller – ICOFS and PT Musim Mas – in this case. Instead, it is clear that the Commission decided that the "mark-up" was *not* reliable but that it was nevertheless entitled to make a "notional" adjustment *as if* ICOFS and PT Musim Mas had used a different structure and process.

2.8. Moreover, the audited financial statements of PT Musim Mas and ICOFS provide *no evidence whatsoever* that the "mark-up" was an actual expense incurred by the seller – ICOFS and PT Musim Mas – in making the investigated sales. If PT Musim Mas had used an independent trader – or an agent working on a commission basis – a corresponding entry would exist in its financial records. However, there is no such entry. Instead, the "mark-up" is simply an allocation of revenue between the two arms of the producer/exporter, and the actual selling expenses are clearly recorded as SG&A expenses in the financial statements of the two companies.

2.9. Throughout this dispute, the EU has failed to establish that a commission was actually paid in this case. While the EU chooses to use the terms "commission" and "mark-up" interchangeably, and the EU's regulation defines "commission" to include a "mark-up", the EU has failed to show how a commission was actually paid in this case. Moreover, the EU has failed to explain the legal

[1] Definitive Regulation, para. 36. Exhibit IDN-4.

or economic justification for treating a "mark-up" as the same as an actual commission and imputing a notional expense to the seller in these circumstances. It has not explained how a transfer between two entities that form part of the investigated producer/exporter affects the price received by the producer/exporter for the investigated goods. It has not explained on what grounds it is permissible to ignore the actual sales structure and process, as well as the audited financial statements, of the producer/exporter in order to impute a notional expense in this case. The EU has not explained how the "mark-up" can be a cost to the "seller", when it is the party that actually sells the goods – ICOFS – that receives the "mark-up".

2.10. The EU has argued that Indonesia's argument is, in effect, that once two parties are related, there can be no adjustments for transactions between them. This is incorrect. Indonesia has made clear that there may be situations in which parties are related in the sense that there is some common stockholding but, overall, the relationship does not satisfy the *Korea – Certain Paper* criteria. In that case, it may be appropriate to treat the two parties as independent. In that case, however, several factors would be different than the present case: (i) it is unlikely that the investigating authority would reject the price charged by the producer to its not-closely-related affiliate as unreliable; (ii) if the not-closely-related affiliate was acting as an agent on commission basis, it would not take title to the goods and be treated as the "seller"; and (iii) any commission paid in those circumstances would likely be recorded as such in the audited financial statements of the seller.

2.11. Again, there is no evidence that this is an actual commission paid or actual expense incurred by the producer/exporter, even if the Commission considers that it has the right to proceed as if it is. The standard of review under Article 17.6(i) of the Anti-Dumping Agreement requires a panel to determine whether an investigating authority's "establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". In this investigation, the Commission ignored the actual facts regarding the expenses actually incurred by the producer/exporter and instead adjusted for a hypothetical, imputed commission that is based solely on the Commission's view of what expenses *would have been incurred if the producer/exporter used a different sales process* and determined that it is entitled to make an adjustment on that basis. In the absence of any evidence in the financial statements of either PT Musim Mas or ICOFS that the intra-company transfer of funds represented an actual expense to the producer/exporter as a whole, there is no basis for the Panel to find that the Commission's "establishment of the facts was proper".

2.12. Even assuming that the mark-up could be considered as a cost to PT Musim Mas, it is *revenue* to ICOFS. As explained in greater length in the next section, it is fundamental to note that the Commission treated both PT Musim Mas and ICOFS – taken together – as the seller. The export price on the basis of which an ex works price was calculated was the price charged by ICOFS to European customers, not the price at which PT Musim Mas sold to ICOFS. This means that both PT Musim Mas and ICOFS together were the seller. To the producer/exporter as a whole, therefore, the "mark-up" does not represent a cost: the cost to one entity and the revenue to the other cancel each other out. The EU has never addressed this point, nor provided any legal basis for a deduction for an amount which, under its own logic, is revenue to the very seller (ICOFS) on whose price it is basing its determination of export price.

2.3 The EU's determinations concerning the relationship between PT Musim Mas and ICOFS are contradictory

2.13. The starting point for the EU's determination of the export price was the price charged by ICOFS to the first unrelated customer in the EU. This means, in effect, that the Commission treated ICOFS as the seller of the investigated goods and PT Musim Mas/ICOFS together as the producer/exporter for whom a single dumping margin must be and was calculated in accordance with Article 6.10 of the Anti-Dumping Agreement.

2.14. The EU contends that there is no contradiction between the treatment of PT Musim Mas and ICOFS as a single entity for the purpose of identifying the starting price and as, in effect, separate entities for the purpose of adjustments. The EU argues that the use of ICOFS' price to the first unrelated customer in the EU merely flows from the reference in Article 2.1 to the price at which the investigated goods are "introduced into the commerce" of the investigating Member.

2.15. The EU omits, however, that the Commission's reliance on ICOFS' price to the first unrelated customer pre-supposes a finding by the Commission regarding the relationship between PT Musim Mas and ICOFS and the reliability of the transfer price between the two. Put another way, at the outset of the investigation, the Commission made a crucial choice to treat PT Musim Mas and ICOFS as a single entity. This choice entails logical consequences that the EU now seeks to avoid.

> In a number of cases the foreign producer will not sell directly to the Community. A trading house, for instance, may act as an intermediary between the foreign producer and the Community importer. … If the intermediate company is *independent* from the producer, provided that the producer knows when selling to the intermediate company, that the final destination of the goods is the EC, *the export price is normally the price charged by the foreign producer to the intermediate company for further resale* to the Community … In principle, *related sales subsidiaries* located in the country of the producer *will be treated as an export sales department* of the producer and *the export price will be determined on the basis of the prices charged by the related company to the first independent customer* in the Community … *The same approach may also be taken with respect to related sales subsidiaries located in a country other than the producer.* In *Welded Tubes*, the Commission acknowledged that the prices charged by a company located in a country other than that of the producer and performing the tasks of an export department (e.g., conclusion of export contracts, invoicing and collection of payments) had to be taken into account for the dumping calculation.[2]

2.16. The EU's decision to use the price charged by ICOFS to the first unrelated customer in the EU is, therefore, not simply a matter of applying the definitional provisions of Article 2.1 of the Anti-Dumping Agreement. It also involves a decision by the investigating authority regarding the relationship between PT Musim Mas and ICOFS that has important consequences for the rest of the Commission's analysis. If ICOFS were an independent "trading house", the Commission would have used the price charged by PT Musim Mas to ICOFS "for further resale to the [Union]" as the basis for the export price. Instead, the Commission drew the normal distinction "between intermediate companies that are independent from the producer and those that are related to the producer". The Commission treated the "related sales subsidiary" ICOFS as "an export sales department of the producer" that was "performing the tasks of an export department" and used ICOFS' price to the first unrelated customer as the starting point to determine the export price. Again, put another way, the Commission treated PT Musim Mas and ICOFS as a single entity.

2.17. In the words of the description quoted above, ICOFS was treated as the *export sales department* of the producer and *the export price was determined on the basis of the prices charged by the related company to the first independent customer* in the EU. As a result, PT Musim Mas and ICOFS were treated as a single "producer/exporter" or "seller" for the purposes of determining dumping margins. Again, contrary to the EU's arguments, this necessarily involved a determination by the Commission regarding the relationship between them.

2.18. To illustrate how all this works in practice, an investigating authority may be faced with three distinct sales structure and processes that are relevant to this determination. In a **Scenario 1,** the exporter sells to an independent trader, who then re-sells to the investigating Member. In this case, the investigating authority will ask the producer to report all sales to the independent trader for which the producer knows in advance that the destination is the investigating Member. Clearly, the Commission found that this is not the structure or process used by PT Musim Mas and ICOFS.

2.19. In a **Scenario 2,** the producer sells directly to customers in the importing Member, but pays a commission to an independent trader for arranging the sales. Here, the producer (but not the independent trader) would be the seller of the goods and would report its sales directly to the customers in the importing Member. The starting price for determining the net export price would be the price charged by the producer. The commission paid to the independent trader would be a direct selling expense. Again, the Commission clearly found that this is not the structure or process used by PT Musim Mas and ICOFS, as the starting price used was the price charged by ICOFS.

[2] Anti-Dumping and Other Trade Protection Laws of the EC, Van Bael & Bellis, pp. 87-89 (italics added). Exhibit IDN-69.

2.20. Finally, in a **Scenario 3,** the producer sells to a related trader who then sells to the importing Member. In this case, the investigating authority must determine whether the relationship between the producer and the related trader is such that the prices between them are unreliable. Once it makes this determination, it will ask them to report the sales by the related trader to the customer in the importing Member rather than the sales from the producer to the related trader as the starting point for the determination of the export price. Clearly, the Commission found that this is the sales structure and process that exists with respect to PT Musim Mas and ICOFS in this case. In effect, the related trader acts "as the export sales department of the producer", and the two entities are, for all relevant purposes, a single economic entity.

2.21. Contrary to the EU's assertion, therefore, there is a clear contradiction between the Commission's determination to treat PT Musim Mas and ICOFS as a single entity for the purpose of identifying the starting price for the calculation of dumping margins and for the purpose of determining a single margin of dumping within the meaning of Article 6.10, on the one hand, and deciding to treat them as if they operated independently for the purpose of determining adjustments to the export price, on the other. The Commission cannot, on the one hand, determine that PT Musim Mas and ICOFS are, together, the producer/exporter or seller of the goods and then, on the other hand, determine that their relationship is one of seller and independent trading company. At a minimum, the Commission has failed to provide a reasoned and adequate explanation of how this contradiction can be reconciled.

2.22. The EU has failed to address the implications of its finding – for this purpose at least – that PT Musim Mas and ICOFS are a single entity. The EU has not explained how money transfers between two pockets of a single producer/exporter – which PT Musim Mas and ICOFS undoubtedly are for the purposes of this case – affect the ex works price received by the producer/exporter for its export sales of the investigated producer.

2.23. Put another way, the "mark-up" represents part of the price that the seller, ICOFS and PT Musim Mas, receives for the sale. Their decision, as closely intertwined parties, on how to allocate that revenue between them, does not in any way affect the price received for the sale. The price received by the seller – ICOFS and PT Musim Mas taken together – would not change whether the amount of the "mark-up" were in a different amount or zero. To put this in practical terms, assume the price charged by PT Musim Mas/ICOFS to the first unrelated customer was increased by 20%. PT Musim Mas /ICOFS could decide – for tax or other internal reasons – that the additional 20% revenue would be split 50-50 between them. They could decide that all of the additional revenue could go to ICOFS. Or they could decide that it would all go PT Musim Mas. In all of these three scenarios, the actual price received by the seller remains the same, and the expenses actually incurred by the seller remain the same. Similarly, the amount of the expenses actually incurred by ICOFS and PT Musim Mas does not change regardless of whether the "mark-up" is a different amount or zero. Thus, the "mark-up" does not affect the price and, hence, price comparability.

2.24. However, under the Commission's approach, however, the choice between the 50-50 and the other options would have a decisive impact on the ex works price and on the dumping margins. This lacks logic under any scenario.

2.4 The EU has made deductions for items that are normally not deducted from the ex works price and that the EU did not deduct for the ex works price on the normal value side

2.25. First, the EU has not addressed that the ex works price normally *includes* SG&A expenses incurred by the seller in each of the domestic and export markets. The sole exception in this case is the deduction the Commission made for the SG&A incurred by ICOFS and deducted from the export price as part of the contested adjustment. Where the Commission seeks to establish the net price at an ex works level that normally includes the indirect selling expenses/SG&A incurred by the seller, and it includes indirect selling expenses/SG&A in the normal value, there is no legal basis to deduct any indirect selling expenses/SG&A of the seller from the export price. The same applies to any revenue that could be considered as part of the profit of the seller.

2.26. Secondly, the EU has not provided any justification for the deduction of any amount that is the "profit" of the seller (or that serves as a proxy for that "profit"). The determination of price discrimination involves a comparison of two prices (normal value and export price) in order to identify whether the seller is obtaining a lower return on sales in the export market than on sales in the domestic market. Deducting profit from the export price necessarily reduces the return achieved by the seller on the export sales and distorts the comparison unfairly. To the extent that the Commission purports to have deducted *profits made by the seller, ICOFS,* the EU has provided no justification for this deduction. Moreover, unless the Commission can establish that *the entire amount it deducted* represented an *actual expense* of the seller, Indonesia sees no legal basis for the adjustment.

2.5 The differential treatment of PT Musim Mas and Ecogreen

2.27. The EU continues to mischaracterize Indonesia's arguments concerning the differential treatment of PT Musim Mas and Ecogreen. Indonesia does not argue that the differential treatment *per se* amounts to discrimination. Rather, Indonesia argues that the Commission's reasoning explaining its differential treatment of the two companies is part and parcel of the Commission's explanation for why it made the adjustment for PT Musim Mas and must be measured against the benchmark of a "reasoned and adequate explanation".

2.28. Indonesia has previously explained that the three key criteria relied on by the Commission to differentiate between the PT Musim Mas/ICOFS and Ecogreen/EOS, respectively, are not meaningful and provide no insight into whether the allocation of income between the producer and the trading arm affected price comparability. The EU has failed to respond or explain why the three sets of criteria – "direct" export sales; the existence of a written as opposed to a verbal agreement; and third party sales – are relevant for determining whether a monetary transfer between two related parties affects price comparability. In Indonesia's view, none of these criteria has any relationship with the question at hand.

2.29. The Commission's determination is also undermined by the fact that it examined the existence of corporate and management links in the case of Ecogreen/EOS, but not in the case of PT Musim Mas/ICOFS. The silence of the Commission on this point for PT Musim Mas cannot be read – as the EU argues – that the Commission acknowledged that both companies were closely related to their sales entity, but that this criterion was not of any further relevance. A panel cannot take the defending Member at its word, but rather must find direct evidence in the record and in the investigating authority's reasoning that a particular analysis was undertaken. Any ambiguity in this regard must be interpreted to the detriment of the investigating authority, which is required to provide a reasoned and adequate explanation.

2.30. The absence of any reference or explanation in this case is compounded by the fact that the Amending Regulation does not make clear what weight the Commission attached to the "common ownership/control" criterion, relative to the other criteria, in its analysis of Ecogreen/EOS. Thus, even if the remaining criteria were meaningful and relevant, the Commission's reasoning would still be deficient, because it remains entirely unclear how the Commission weighted, in relative terms, the differences between the two producer/exporters versus the common, shared feature of "common ownership/control".

2.31. The EU erroneously claims that it did not change its criteria in response to the Interpipe judgment and that "[t]he only change that occurred was to examine the factual situation of the interested parties in the light of the factual situation" in the Interpipe case.[3]

2.32. This appears to be nothing but semantics and merely another way of saying that indeed the criteria did change. The criteria changed from those used in the Definitive Regulation to those reflected in the *Interpipe* judgment and applied in the Amending Regulation. The *Interpipe* judgment contained not merely a set of facts, but the Court's view as to how EU law should be applied to those facts. In the Amending Regulation, the Commission purported to apply the interpretation by the *Interpipe* court to the facts of the fatty alcohols investigation (and made other changes below).

[3] EU's response to Panel question No. 43, para. 17.

2.33. In any event, it is simple logic that the criteria changed. In the Definitive Regulation, Ecogreen and PT Musim Mas were treated identically. In the Amending Regulation, they were treated differently. The facts had not changed. The EU's criteria must, therefore, have changed. It is not clear why the EU feels compelled to suggest otherwise.

2.34. Although an investigating authority enjoys a certain degree of discretion, which may also entail a change in the analytical framework applied during the investigation, it must comply with certain key principles.

2.35. First, the authority must provide a reasoned and adequate explanation for its determination. Second, where the authority previously reached a certain conclusion on the basis of a given set of facts; and then subsequently reaches the exactly opposite conclusion, without any change in the underlying facts; the investigating authority must address this point in its explanation. In other words, whether the second (amended) explanation is sufficient is determined, in no small measure, on whether the authority has adequately explained why the authority chose to alter its assessment criteria after the initial determination; how the new assessment criteria differ from the old assessment criteria; why the new assessment criteria are preferable to the old assessment criteria; and how the amended conclusion is justified in the light of the new assessment criteria.

2.36. The Commission also failed to explain in the Amended Regulation how it viewed and weighed its previous determination that the two producers/exporters were identically situated. The investigating authority must also explain how it weighed the previously found similarities between the producers/exporters, and its conclusion that the two producers/exporters were identically situated and warranted identical treatment, against the new assessment criteria that point towards differences between the producers/exporters.

2.37. The EU appears to consider that the Commission was entitled to radically change the assessment criteria, and reach a diametrically opposite conclusion, simply because the European Court decided that the new criteria were appropriate. However, the EU is not entitled to deference simply because the Commission acted in the light of a decision of an EU court.

3 INDONESIA'S CLAIMS UNDER ARTICLES 3.5 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

3.1. The EU has failed to rebut Indonesia's claims that the Commission's non-attribution analysis of the factors "financial crisis" and "raw materials" is inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement.

3.2. As a general defence, the EU alleges that Indonesia seeks to heighten the standard under Article 3.5, by imposing an obligation on investigating authorities to conduct a quantitative rather than a qualitative analysis of the effects of other factors. However, Indonesia's arguments merely reflect the well-established legal principle that investigating authorities must provide a reasoned, adequate, and meaningful explanation for their injury and causation determination. Moreover, with respect to the "raw materials" factor, it is useful to recall that the Commission did not provide *any analysis at all*. It simply brushed aside PT Musim Mas' extensive arguments and evidentiary references as "unsubstantiated", without any explanation whatsoever.

3.3. Indonesia is not arguing that the Commission erred because it did not agree with PT Musim Mas that poor raw material access for the EU domestic industry was a main cause (or simply a cause) of the injury experienced by the domestic industry. Whatever the ultimate result the Commission may have reached, at the very least, PT Musim Mas' arguments and evidence required *some* degree of analysis.

3.4. The EU's arguments draw on random, unconnected statements and figures in sections of the determinations that the Commission never intended to be part of its non-attribution analysis. Indonesia is not arguing that the Panel cannot, as a matter of principle, look beyond the "non-attribution" heading in analysing the Commission's findings. In Indonesia's view, however, the fact that a particular statement is under a different heading is a good indication that the investigating authority did not intend this statement to be part of its causation analysis.

3.5. Measured against the well-established standard of review applicable in disputes involving anti-dumping matters, all of the EU's *ex post* arguments must be rejected.

3.1 The Commission failed to conduct a proper non-attribution analysis of the factor "financial crisis"

3.6. With respect to the "financial crisis" factor, the EU failed to explain why the Commission refused to address the exporter's argument concerning the EU industry's profits in late 2009 and early 2010. During that time period, imports from the countries concerned increased, but at the same time the profit of some EU companies as a whole and for the care chemicals segment improved considerably.

3.7. Furthermore, the Commission refused to address the issue of captive demand, raised by PT Musim Mas in Exhibit IDN-35 in support of its argument that the injury to the EU industry was caused by the factor "financial crisis", rather than by dumped imports. In a nutshell, the logic of this argument was that the financial crisis led to reduced captive demand for fatty alcohols (FOH)-downstream products, such as ethoxylate or surfactants. This, in turn, resulted in lower demand for FOH itself, especially for premium branded products produced by EU companies. Before the EU FOH-producers adjusted to this situation, their continued production at previous levels created an oversupply of FOH, which led to a decrease in the price of FOH in the EU market. Subsequently, there was lower capacity utilization by the EU companies. Both of these phenomena – price decreases and/or lower capacity utilisation – were relied upon by the Commission in its finding of injury, but improperly attributed to imports.

3.8. In Indonesia's view, at the very least, the EU Commission had a duty to investigate and analyse the EU industry's profits in late 2009 and early 2010, and the issue of captive demand. By ignoring entirely PT Musim Mas's arguments and evidence with respect to these issues, the EU Commission acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

3.2 The Commission failed to conduct a proper non-attribution analysis of the factor "raw materials"

3.9. With respect to the factor "raw materials", the EU alleges that Indonesia's entire case rests on a few paragraphs in PT Musim Mas's comments on the Complaint, and that, in all of the subsequent comments and communications, PT Musim Mas failed to repeat its arguments with respect to this factor.

3.10. However, PT Musim Mas' arguments and evidence constitute an extensive narrative contained in PT Musim Mas' Comments on the Complaint, which Indonesia quoted and described in its first written submission and its responses to Panel questions 20 and 24. Furthermore, as the EU acknowledges, after setting out its detailed arguments in its initial submission, PT Musim Mas referred consistently to the "raw materials" factor as an independent "known factor" throughout the remainder of the investigation, in particular in its Comments on the provisional determination.

3.11. The EU is also incorrect to suggest that, faced with the Commission's silence in the provisional determination, PT Musim Mas was somehow obliged subsequently to repeat *in extenso* these arguments and evidence in its comments on the provisional determination, and that the company's failure to do so somehow limits the Panel's analysis in this case. This argument is untenable. On the contrary, it is established case law that the right of an exporting WTO Member in a WTO dispute — Indonesia in this case — to raise particular arguments concerning a trade remedy determination does not depend on whether an investigated company raised that argument during the investigation. This applies, *a fortiori*, in a case where the argument *was* made by the investigated company and merely was not *repeated* in subsequent stages of the investigation. Finally, the EU's argument has far-reaching systemic implications. It means essentially that, in order to maintain their rights in a subsequent challenge to a dumping determination, investigated companies would have to repeat all of their arguments throughout all of their submissions during the entire investigation — simply because the investigating authority chooses not to address them in a provisional determination. This makes no sense, and, moreover, would impose a high burden on commercial operators, affecting in particular exporters from developing countries.

3.12. The EU's primary defence is that the factor "raw materials" is nothing but a part of the factor "financial crisis", or that access to "raw materials" is relevant to the conditions of competition between Indonesian and EU producers and, therefore, was analysed under a different rubric. This is incorrect. PT Musim Mas listed the factor "raw materials" among "various other factors" that injured the EU industry, separately from the factor "financial crisis", and *the Commission itself* treated it as an independent non-attribution factor in its final determination. The fact that "raw materials" may indeed be an element within the competitive relationship between the domestic and foreign producers does not preclude this factor from being a non-attribution factor in its own right within the meaning of Article 3.5. Indeed, several factors listed in Article 3.5 can be characterized as aspects of the conditions of competition.

3.13. The EU made a number of additional *ex post* arguments, all of which lack merit. For instance, in its response to Panel question 22, the EU alleged that EU FOH producers could easily switch from one raw-material source to another, depending on their market price, as prices for different raw materials do not develop in parallel. In its response to Panel question 45, the EU tried to develop this argument by relying on a very general statement in the EU domestic industry's Complaint that the EU producers have plants that use as inputs both synthetic and natural raw materials. Importantly, however, this statement lacks any evidentiary support, and does not explain whether a particular plant may use one or more types of raw materials. Indeed, it is clear from a letter from one of the complainants (submitted as an exhibit in this dispute) that some EU companies produce FOH based on natural oils, whereas others produce FOH products based on synthetic inputs. These raw materials are not substitutable and producers relying on one of these inputs cannot easily shift to the other raw material.

4 THE EU HAS FAILED TO REBUT INDONESIA'S CLAIMS UNDER ARTICLE 6.7

4.1. Indonesia claims that the EU acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, because it failed to make the results of the verification visit available or to disclose them pursuant to Article 6.9, as required by Article 6.7.

4.2. Article 6.7 requires the investigating authority to disclose the results of the verification either in a separate report or as part of its disclosure of the essential facts under Article 6.9 of the Anti-Dumping Agreement. In this case, the EU did not provide any meaningful disclosure of the results of the verification visits to the Indonesian exporters and their affiliates, either in the form of a stand-alone disclosure document containing the results of the verification or as part of the disclosure of the essential facts. Instead, in the Provisional and Definitive Disclosures issued pursuant to Article 6.9, the Commission stated only that verification had taken place and that unspecified information had been verified, unspecified errors had been corrected and additional unspecified information had been collected.

4.3. The EU's position in this dispute is, in essence, that these general boilerplate references — that could apply to any anti-dumping verification — satisfy the requirements of Article 6.7. Before the Panel, the EU has also relied on a list of exhibits that it provided to the Panel as Exhibit EU-14 as part of the verification results. Beyond these two elements, the EU in essence denies that the "results" of the verification are an independent concept, because it argues that the essential facts under consideration under Article 6.9 are co-extensive with the "results" of the verification and that, by disclosing essential facts under Article 6.9, the authority also complies with Article 6.7. Finally, as evidenced in particular in its later submission in this dispute, the EU has relied on what, in its view, the investigated company "knew", "should have known" or "must have known", that the verification did not happen "behind closed doors" and that the company never complained about insufficient information. As explained below, all these arguments are mistaken.

4.1 The "results" of the verification

4.4. In this dispute, Indonesia's primary legal argument is that the EU failed to make available the "results" of the verification. Indonesia does not dispute that, as provided in Article 6.7, the "results" may be provided in a separate document or in the disclosure of the essential facts.

4.5. It is clear from the text of Article 6.7 and of Article 6.9 that the "results" of the verification visits referred to in Article 6.7 are not the same as the "essential facts" referred to in Article 6.9.

In its legal analysis, therefore, bearing in mind the ordinary meaning, purpose, and context of the terms, the Panel should take care to define the "results" separately from the "essential facts".

4.6. The EU, however, appears to conflate these terms. Under the EU's practice and arguments before this Panel, the terms are interpreted so as to provide no separate meaning to "results" as compared to "essential facts". If endorsed by the Panel, this would render the obligation with respect to the "results" essentially meaningless. In accordance with the doctrine of *effet utile*, the Panel must ensure that its interpretation of these terms gives effect to the differences between these terms and gives substance to the requirement in Article 6.7 to make the "results" of the verification available.

4.7. Moreover, if the Panel agrees with Indonesia's legal interpretation that the term "results" in Article 6.7 means something different than the "essential facts" referred to in Article 6.9, the Panel should rule in Indonesia's favour. In its submissions to the Panel, the EU takes the position that by disclosing the essential facts it has *necessarily* disclosed the results of the verification. Hence, if the Panel disagrees with this legal position adopted by the EU, it can immediately find that the EU has acted inconsistently with Article 6.7.

4.8. Indonesia broadly agrees with the general definitions of the term "results" provided by the EU in its answers to the Panel's questions following the first meeting of the Panel with the parties. For example, the EU quotes the Appellate Body in *US – Steel Safeguards* to the effect that the ordinary meaning of "result" is "an effect, issue, or outcome from some action, process or design".

4.9. Indeed, the "results" referred to in Article 6.7 are the "effect" or "outcome" of the verification visit. As with the "result" of any activity, the "result" of a verification visit is closely linked to the *conduct, content and purpose* of that verification visit. In *Korea – Certain Paper*, the panel explained that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".

4.10. Although it provides a correct initial definition of the term "results", however, the EU errs when it subsequently defines the "results" *of a verification visit*. The EU's position appears to be that there is no practical difference between the results of the verification visit and the essential facts under Article 6.9, such that there is no necessity for separate disclosure and that a disclosure of essential facts automatically constitutes disclosure of the results of a verification visit. This erroneous view appears to be premised on the notion that "the evaluation of the evidence by the investigating authority is not part of the 'results' of the verification visit".[4] This is incorrect.

4.11. Under the EU's view, the "results" of the verification consist of nothing more than any facts that end up in the essential facts and a listing of the evidence collected during the verification. This is inconsistent with the definition of the word "results" to include the "effect" or "outcome", as noted above. It is also inconsistent with the *purpose* of the verification visits, as set out in Article 6.7, which is "to verify information or to obtain further information". It is axiomatic that information is not verified simply because the investigating authority collects additional exhibits during a verification visit. The dictionary definitions of "to verify" include "show to be true or correct by demonstration or evidence; confirm the truth or authenticity of; substantiate" and "ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc". A mere list of exhibits collected does not indicate whether those documents served to establish that an issue was "shown to be correct by demonstration or by a comparison of data" or even what the issue was.

4.12. The results of the verification visit are different than the essential facts because they are known before the essential facts are decided upon.[5] At the end of the verification visit, the results of the verification visit are known, even if the essential facts are not. This means that the results of the verification visit are different than the essential facts — even the investigating authority may later decide that some of the results of the verifications are also "essential facts", while other results of the verification may not, in the investigating authority's view, amount to "essential facts".

[4] EU's response to Panel question 26, p. 28.
[5] See Indonesia's Opening Statement at the first meeting of the Panel with the parties, para. 98.

4.13. Indonesia has previously provided the Panel with practical examples of results of the verification visits and of how these results may differ from the essential facts.[6] The EU has failed to address these examples or explained how the logic of Indonesia's analysis is inconsistent with the text of Article 6.7.

4.14. To give a further example, a situation that occurs with some frequency in practice during verifications is whether an exporter has cooperated within the meaning of Article 6.8 of the Anti-Dumping Agreement. As the Panel is aware, a determination by the investigating authority that an exporter has not cooperated within the meaning of Article 6.8 can lead to the exporter's information being rejected and determinations being made on the basis of the facts available, with adverse consequences for the exporter.

4.15. The question of whether an exporter actually cooperated to the best of its ability is frequently hotly contested. When controversies arise with respect to what occurred in the course of a verification visit, it can become a drawn-out "he said/she said" dispute between the investigating authority and the exporter as to what really happened at the verification visits: What did the investigating authority ask for? Did the exporter make its best efforts to provide documents and answers? Were there any problems with the documents — were they sourced from the company's ledgers or financial statements or could they otherwise be authenticated? Did the investigating authority fairly acknowledge the exporter's efforts to provide documents or, if requested documents were not realistically available, to provide reasonable alternative documents? These and other questions about the verification are relevant both to the investigating authority's decision as to whether the exporter was cooperative within the meaning of Article 6.8 as well as the exporter's ability to challenge that decision. Thus, while the <u>essential fact</u> may be that the investigating authority has determined that the exporter was not cooperative, the <u>results of the verification</u> would include the circumstances that gave rise to the investigating authority making that determination. In order to challenge that determination in either domestic courts or in WTO dispute settlement, the exporter or its government must have access to a record of what happened at the verification and the reasons relied on by the investigating authorities to deem that the exporter had been uncooperative.

4.16. Other potential "results" of the verification would include an explanation of issues that arose during the verification which the investigating authority might need to resolve on the verification team's return to capital. For example, an issue could arise during verification as to whether the exporter had properly allocated its freight expenses between investigated and non-investigated products. Based on the information reviewed during the verification, the verification team may have questions as to whether this allocation of expenses between investigated and non-investigated products should be accepted or revised.

4.17. In that scenario, the <u>results of the verification</u> would necessarily include the facts relating to how the freight expenses were incurred and the evidence both for and against the exporter's allocation of the expenses, as reviewed by the investigating authority and the exporter during the verification visit. In contrast, the <u>essential facts</u> would consist of the investigating authority's decision as to what freight expenses it intended to use in its calculation.

4.18. As the above examples demonstrate, it is necessary to distinguish between the results of the verification, on the one hand, and the essential facts, on the other hand. These examples also demonstrate that the EU's approach of collapsing the difference between these two concepts is incorrect.

4.19. It is also important to keep in mind the due-process purpose of the disclosure requirement under Article 6.7. This purpose further underlines the need to keep separate the two concepts "results of the verification" and "essential facts". As noted by the panel in *Korea – Certain Paper*:

> The purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, <u>are informed of the</u>

[6] Indonesia's Opening Statement, paras. 106-108. Indonesia's response to Panel question 26, paras. 1.106–1.115.

> verification results and can therefore structure their cases for the rest of the investigation in light of those results.[7] (emphasis added)

4.20. In other words, the purpose of Article 6.7 is, *inter alia*, to enable exporters to safeguard their rights in an anti-dumping investigation and "structure their cases for the rest of the investigation in light of those results".[8] For this purpose, exporters must know what information *was not* verified — so that they can make further efforts to put the investigating authority in a position to ultimately verify that information — as well as what information *was* verified. This information is important for the exporter given that verified information must in principle be used by the investigating authority, and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information.

4.21. There is yet another factor that supports the need for giving separate meaning to the terms "results of the verification" and "essential facts". This factor has to do with what kinds of decisions are or are not taken during a verification visit. Specifically, the verification team normally cannot or does not take any final decisions on how the verification will affect the investigating authority's determinations of dumping and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have *not* been gathered or checked. However, the results of the verification do not include any *subsequent determinations* by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate dumping margins for the exporter in accordance with the Anti-Dumping Agreement. The subsequent decision how to determine the dumping margins is the result of the *investigation* — and disclosed, inter alia, in the disclosure under Article 6.9. It is not the result of the *verification* that must be disclosed under Article 6.7.

4.22. WTO case law - such as *Korea – Certain Paper* and *Mexico – Steel Pipes and Tubes* - demonstrates that information contained in the disclosure of the verification results (whether through a verification report or with the disclosure of essential facts) plays an important role for a panel's ability to examine whether the investigating authority complied with Article 17.6(i) of the Anti-Dumping Agreement. This may include information concerning the type of information verified; the authority's decision whether the information was verifiable and whether it was actually verified, as well as any attendant circumstances, such as behaviour of the investigated firm. The case law reveals that a failure to disclose the results of the verification, or an incomplete disclosure, will significantly undermine a panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority. In addition, only a proper reporting of the results of the verification visit will enable the appropriate judicial review within a WTO Member's domestic legal system, as required by Article 13.

4.23. Moreover, the EU's interpretation of Article 6.7 in this case, if accepted, would automatically give rise to violations of Articles 6.2 and 6.4, at least in the circumstances in which the investigating authority chooses to disclose the verification results simultaneously with the essential facts. Specifically, conflating the verification "results" with the "essential facts" in the manner advocated by the EU would mean that the investigating authority would not disclose all those verification "results" that did not find their way into the "essential facts". This would be contrary to Article 6.2, which requires that all interested parties have a "full opportunity for the defence of their interests", as well as Article 6.4, which requires authorities, whenever practicable, to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … that is used by the authorities … and to prepare presentations on the basis of this information". This inevitable conflict with the requirements of Articles 6.2 and 6.4 is yet another reason why the EU's proposed interpretative approach, and the Commission's actions in this investigation, under Article 6.7 cannot be correct.[9]

4.24. In this case, the EU argues that the Commission provided the results of the verification visits as part of the disclosure of the findings of the investigation. However, these efforts were, at

[7] Panel Report, *Korea – Certain Paper*, para. 7.192.
[8] Panel Report, *Korea – Certain Paper*, para. 7.192.
[9] See Indonesia's Opening Statement at the first meeting of the Panel with the parties, para. 108. Indonesia's first written submission, paras. 6.46–6.48.

best, cursory and cannot be considered to have met the standard required under Article 6.7. For instance, assuming that the General Disclosure document was indeed intended to be the vehicle to disclose the "results" of the investigation, the Commission failed to set out:

- which specific types of information, documents, or issues were addressed in the verifications;
- which particular documents (e.g. sales invoices, rebate notes, etc.) were examined; and
- what questions were asked by the Commission officials or what answers were provided by the exporters.

4.25. The extent of the Commission's failure to disclose the results of the verification is clearly visible from a reading of the contemporaneous notes taken by PT Musim Mas' counsel during the verifications at that exporter's premises in Singapore, Medan, and Hamburg. These notes contain the kinds of basic information that are entirely absent from the Commission's purported disclosure of the verification results, such as who attended the verifications, what documents were reviewed, what questions were asked, and what answers were given. There are several issues of critical importance to the Commission's subsequent adjustment of PT Musim Mas' export price and to Indonesia's related claim under Article 2.4 of the Anti-Dumping Agreement. As the counsel notes demonstrate, the issues at hand were discussed during verification, but were not subsequently disclosed by the Commission.

4.26. These issues include: the close corporate, management, organizational and operational links between PT Musim Mas and ICOFS; transfer pricing policy; the so-called "direct" export sales by PT Musim Mas; the manner in which ICOFS and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the involvement of ICOFS in PT Musim Mas' sales, including Exhibit PTM-18.

4.27. The Commission's conclusion that ICOFS is not the sales department of PT Musim Mas, but rather stands in a commission-agent relationship with PT Musim Mas is in direct contradiction with this information.

4.28. The EU states that "the Commission underlined that during the verification visit mistakes and errors were corrected in agreement with the company".[10] This is, of course, a wholly generic assertion that could be made with respect to any verification in any investigation. It hardly constitutes the "results" of the specific verifications in this investigation, which involved specific companies, with their own features, data, and specific matters that were addressed during the respective verification visits. Presumably, the Commission officials, when they report back to their superiors after the verification, provide more detail than simply stating that "mistakes and errors were corrected". To the extent that the officials' reports to their colleagues and superiors address whether the verification team was able to *verify* information — to "ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc." — those reports could be said to contain "results" of the verification.

4.29. In arguing that the Commission disclosed the results of the verification visit, the EU also repeatedly refers to actions that occurred prior to the visits. However, events occurring prior to a verification visit cannot be relevant for assessing whether the Commission subsequently communicated the "results" of the verification exercise. Neither the exporter, nor a reviewing domestic court or WTO panel, can glean from a list of information that the investigating authority announces it will/may verify – but may end up not verifying – whether that information was successfully verified or not; whether additional information was requested; and what discussion around that information took place between the company and the investigating authority. Claiming that results of a verification visit can be disclosed by something that occurred prior to the visit is comparable to arguing that the investigating authority can satisfy its disclosure obligation under Article 6.9 by pointing to information requests contained in a blank questionnaire response.

[10] EU's Opening Statement, para. 52.

4.2 Alleged knowledge or awareness by the companies is not a workable standard for assessing an investigating authority's compliance with Article 6.7

4.30. The EU relies, as a crucial part of its argument, on alleged awareness on the part of the exporters of what information the Commission wanted to inspect; what information it did inspect; and what it concluded with respect to that information; and that the investigating parties never protested or complained about lack of information. This argument is flawed at a number of levels.

4.31. It is virtually impossible to verify or to ascertain what the companies were or were not aware of at the time of verification or subsequently. The EU would have the Panel guess, infer and rely entirely on the Commission's view as to what the Commission thinks the investigated parties knew or should have known. This is not a proper workable standard on which to conduct a coherent enquiry at the multilateral level. If adopted, it would leave less experienced or less sophisticated exporters at the mercy of what investigating authorities think they knew or should have known. This is precisely one of the reasons why the Anti-Dumping Agreement requires a proper disclosure of the results of the verification that can be examined by a WTO panel. In any event, even if the companies were aware of what the EU claims they were aware of, the EU has a duty also to the reviewing courts and WTO panels, as well as WTO Member governments, including Indonesia. Compliance with its WTO obligations vis-à-vis these other Members cannot depend on whether different entities – private investigated companies – were or were not aware of some fact that cannot be subsequently verified in domestic court or WTO proceedings.

4.3 The results of the verification must be "made available" or disclosed

4.32. In response to the Panel's question to the parties as to meaning of "make available", the EU quotes the Appellate Body in *EC and certain member States – Large Civil Aircraft* to the effect that to "make available" is part of the ordinary meaning of the verb "to provide" and, therefore, in the EU's words, the results of the verification may be made available to the relevant firms either "directly by sending them a report or by making the results available as part of the file or as an additional alternative through the disclosure of the outcome of the verification visit as part of the general obligation to disclose 'essential facts'". Indonesia agrees.[11] This, of course, does not address the key issue at hand — the failure of the Commission to actually convey the required information about the results of the verification visit, whatever the chosen procedural conduit.

4.4 The list of exhibits is not sufficient to satisfy Article 6.7

4.33. As a final issue concerning Indonesia's claim under Article 6.7, Indonesia addresses the list of exhibits. In its questions following the first meeting, the Panel asked the EU to provide the list of exhibits referred to in the first substantive meeting and asked Indonesia whether PT Musim Mas received this document. In its answers to questions, the EU provided certain lists of the exhibits collected by the Commission at the verifications as Exhibit EU-14.

4.34. Indonesia notes that the EU's exhibit is an undated and unsigned document that contains only a title of each exhibit without any indication of the content or purpose of each exhibit. Indonesia understands that PT Musim Mas was not provided with or asked to agree as to the content of these lists, although, however, PT Musim Mas agrees that these lists reflect the documents collected by the verification teams. Indonesia disagrees, however, that these lists of exhibits, either separately or read in conjunction with the disclosure documents, satisfy the requirements of Article 6.7.

4.35. First, the list of documents does not explain what topics were discussed at the verification visit or how the listed documents served to verify those topics. For example, as noted above, the EU asserts that the results of the verification were contained in the statement that "mistakes and errors were corrected in agreement with the company". However, the lists of exhibits, by themselves, shed no light whatsoever on what mistakes and errors were corrected or why. There is no indication that the unspecified "mistakes and errors" had anything to do with the content of the documents collected.

[11] See Indonesia's response to Panel question 27, paras. 1.116-1.122.

4.36. Second, the EU asserts that "the relevant results of the discussion reflected [in the counsel's notes submitted by Indonesia] are all included in the list of exhibits". The EU then argues that the relevant "result" of the verification is simply that the agreements were provided and that this is reflected fully in the list of exhibits. However, if the agreements were provided and reviewed at the verification "to provide further information on the relationship between PT Musim Mas and ICOF-S", the result of the verification must include some discussion of what the agreements actually said about the relationship between the two companies, whether the Commission team had any further questions about the companies' explanation of the relationship, and whether the Commission team was satisfied with the explanations provided by the company. A mere reference to the documents provided contains no information as to whether the Commission had to "ascertain[ed] or test[ed] the accuracy or correctness of [the information and explanations provided by the company], by examination or by comparison of data etc" on this point.

4.37. In addition, the list of documents does not indicate whether there were *other* topics addressed during the visit for which no additional documents were collected.

4.38. Moreover, the "results" of the verification must include also the *purpose* for which a particular document was provided or particular information requested.[12] The EU's list of documents does not specify this purpose. It is not obvious, from the face of the EU's list, what the purpose of providing each document was. For instance, a reader of the list would have had to be physically present at the verification to know the purpose for which the S&P Agreement was submitted. Moreover, the S&P Agreement was subsequently relied upon by the Commission for multiple purposes. Hence, a mere listing of the evidence as in the EU's list is entirely insufficient adequately to disclose the "results" of the verification visit.

4.39. Similarly, the EU notes that the counsel's notes refer to the Commission team examining the role of ICOFS in domestic sales in Indonesia and that PT Musim Mas provided "an email as alleged evidence that ICOFS is also involved in providing services for domestic sales of PTMM". The EU states that "the provision of this email was a result of the verification". Indonesia disagrees. Again, the mere provision of this email is only at most only a small part of the result of the verification. To the extent that the Commission was verifying the role of ICOFS in domestic sales, the result of the verification is whether the Commission was satisfied that the corroborating evidence provided by the company was consistent with the company's explanations. To the extent that it was not, the Commission should have requested additional information or explained how the explanations provided by the company were not satisfactory.

4.40. Finally, Indonesia rejects the EU's argument that PT Musim Mas should have urged the Commission to provide it with more detailed information about the results of the verification. Indonesia notes that nothing in Article 6.7 imposes on the investigated producers/exporters an obligation to request further information on the results of the verification from the investigating authority. Article 6.7 imposes a mandatory obligation on the investigating authority to make the results of the verification available. It cannot be a defence to a violation of this requirement that the producer/exporter did not push the investigating authority to comply.

4.41. To conclude, the EU has failed to show how the Commission disclosed the actual results of the verification in this case. The stand-alone obligation of Article 6.7 cannot be satisfied by a grab bag of generic and separate references sprinkled throughout the essential facts disclosures or by reference to lists of exhibits that contain nothing more than imprecise references to the documents examined during the verifications.

4.5 Conclusion

4.42. For these reasons, Indonesia respectfully requests that the Panel find that the EU has acted inconsistently with Article 6.7 by failing to make the results of the verifications available or otherwise provide disclosure thereof as required under Article 6.7.

[12] See Indonesia's first written submission, para. 6.42.

5 CONCLUSION AND REQUEST FOR FINDINGS

5.1. For all of the above reasons, Indonesia reiterates its request to the Panel that the Panel find that the European Union:

- Acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement, by making an improper deduction for a factor that did not affect price comparability;

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

- Acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, by failing to disclose to either of the investigated Indonesian exporters the results of the verification visit.

5.2. Indonesia once again thanks the Panel and the Secretariat team for their hard work and dedication to this dispute.

ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes this opportunity to be heard and to present its views as a third party in this case. Turkey's objective to make this third party submission is to contribute to the correct and consistent interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "ADA" or "Anti-Dumping Agreement").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining her systematic interest, Turkey would like to limit her third party submission to the discussion on the rights and obligation of an investigating authority within the legal context of Article 2.3 and 2.4 of the ADA.

II. LEGAL INTERPRETATION OF ARTICLE 2.3 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

3. At the outset Turkey would like to underline that the structure of the "fair comparison" between normal value and export price of the product under consideration is as significant as the methodology used by the investigating authority to calculate the normal value or export price itself. In this vein, the components of the fair comparison do have a potential to alter the outcome of the dumping margin calculation profoundly. Therefore, accurate interpretation of the Article 2.3 and 2.4 of the ADA is highly important in this regard.

4. Article 2.3 and 2.4 of the ADA reads as follows:

> *2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.*
>
> *2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.*

5. Turkey understands that the existence of two conditions is imperative to resort to constructed export price within Article 2.3 of the ADA. First, the presence of an association or compensatory arrangement between exporter and importer or a third party and second, the outcome of unreliable export prices due to this association or compensatory arrangement. Under this reading, the mere existence of an association or compensatory arrangement is not enough to conclude that the export prices between the exporter and importer or any other third party is unreliable. Equally, the fact that the provisions of the arrangement do not point out any kind of distortions of export price should not overshadow the possibility that the export prices can be

unreliable due to *de-facto* reasons. In light of these explanations, the investigating authority may undertake both a *de-jure* and *de-facto* examination to determine whether this arrangement warrants the use of constructed export prices.

6. The word "appear", however, indicates that the investigating authority is not under a strict obligation to reach an undisputable conclusion that the distortion of export prices is a direct outcome of the arrangement between the exporter and importer or a third party. Turkey understands that the drafters tended to keep the wording flexible considering the often loose nature of the arrangements between exporter and importer or trader. Nevertheless, Turkey understands that the investigating authority is still burdened to present an explanation on why the arrangement appeared to render the export prices unreliable.

7. The reference made in the second sentence of Article 2.4 requires the investigating authority to consider allowances for costs including but not limited to duties, taxes (incurred between importation and resale) and profits accrued by the trader and importer of the product under consideration. Similar to the comparison between the normal value and the ordinary export price, the investigating authority is obliged to make due allowances or to equal the level of trade if the price comparability is affected.

8. As rightly underlined by the EU[1], the investigating authority is obliged to evaluate and, if applicable, alter the elements of the normal value and (constructed) export price if the differences in components in these two data sets adversely affect the comparability of the normal value and export price.

9. In that context, as stressed in the panel report of US-Sheet/Plate form Korea "…[t]he requirement to make due allowances for differences that affect price comparability is intended to neutralize differences in a transaction that an exporter could be expected to have reflected in his pricing".[2]Thus, the analysis required in Article 2.4 of the ADA displays a fact based and case-by-case nature taking into consideration that the elements of due allowance may differ based on the merits of each case.[3]

10. As matter of legal interpretation, the interested party claiming that the legal discipline in Article 2.4 was violated by the investigating authority has to pass through three steps to bring a viable assertion. It has to show that (1) there was a difference between the elements of normal value and export price which (2) affected the price comparability between these data (3) that was not accepted by the investigating authority as an element of due allowance.[4] Turkey understands that the word "demonstrate" at the end of the first sentence of Article 2.4 of the ADA introduces a positive obligation *vis-à-vis* the interested parties requesting modification. The interested parties must bring their requests of fair comparison to the attention of the investigating authority by indicating the elements to be considered and to what extent these elements influence the comparability of the normal value and export price.

11. Turkey considers the elements listed in Article 2.4 to illustrate, *inter alia*, the possible examples of due allowance (conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics) are equally subject to the above-mentioned obligation incumbent on the interested parties requesting due allowance.

12. Turkey is in the same line with the case law that the investigating authority has discretion to reject the request of due allowance if it concludes that the difference is not affecting price comparability or such an adjustment lacks merits.[5] Furthermore, she equally agrees with the case law that the investigating authority cannot be legally compelled to conduct an *ex-officio* inquiry to identify non-requested elements of due allowance[6].

[1] EU's first written submission, para. 59 and 60.
[2] Panel Report, US-Sheet/Plate from Korea, para. 6.77.
[3] Panel Report, Egypt-Rebar, para. 7.352; Panel Report, EC-Pipe Fittings, para. 7.138.
[4] Panel Report, Korea-Certain Sheet, para. 7.138.
[5] Panel Report, EC-Fasteners, para. 7.298; Appellate Body Report, EC-Fastener, para. 488 and 528; Panel Report, EC-Tube or Pipe Fittings, para. 7.158.
[6] Panel Report, EC-Fastener, para. 7.298; Appellate Body Report, EC-Fastener, para. 517; Panel Report, China-HP-SSST, para. 7.77.

13. Finally as underlined in the Panel Report of Egypt-Rebar the dialogue between the interested parties and the investigating authority concerning the context of Article 2.4 is central to ensure that the dumping margin is calculated with necessary components compared in a fair manner.[7]

III. CONCLUSION

14. With these comments, Turkey expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of the ADA Agreement.

[7] Panel report, Egypt-Rebar, para. 7.352.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. U.S. VIEWS ON THE EUROPEAN UNION'S PRELIMINARY RULING REQUEST

1. While sympathetic to certain practical concerns expressed by the European Union, the United States respectfully disagrees with the understanding of Article 12.12 that underlies the European Union's PRR. The United States submits that the European Union wrongly interprets the relevant terms of Article 12.12, including its interpretation of "panel," and what it means in the context of this provision for a panel to "suspend" its "work."

2. Pursuant to DSU Article 11, the Panel's "function" is to assist the DSB by making an objective assessment of the matter before it, including the applicability of and conformity with the relevant covered agreements. DSU Article 3.2 establishes that such an assessment of the existing provisions of those covered agreements shall be made in accordance with customary rules of interpretation of public international law.

3. The ordinary meaning of "panel" (or "the panel") is not in dispute by either party. The United States agrees with the European Union that there is no express limitation imposed in the text of the DSU on the meaning of the term "panel," and that in some instances, "panel" may refer to a panel that has been composed and in others, it may refer to a panel that has been established but not composed. The United States also agrees with Indonesia, however, that it is precisely because "panel" refers to both circumstances in various places in the DSU that interpretation of "panel" as used in Article 12.12 does not end with a facial inquiry into the ordinary meaning of the term.

4. The last sentence of Article 12.12 describes a circumstance in which the work of the panel "has been suspended for more than 12 months." The first sentence sets out how such a suspension may arise: "at the request of the complaining party for a period not to exceed 12 months." The request is made to, and would be acted upon in its discretion, by the panel ("[t]he panel may suspend its work"). The second sentence confirms the "suspension" is one the panel decides upon at the complaining party's request ("[i]n the event of *such* a suspension"). Thus, the circumstance in Article 12.12 arises only when there is a panel to which the complaining party may direct its "request," and only if the panel has decided to exercise its discretion to accede to that request. Neither can occur before a panel has been composed.

5. The context of Article 12 as a whole also is instructive. The articles of the DSU proceed sequentially from the initial phases of the dispute settlement process to the final stages of that process. Depending on the stage of the process and the content of the relevant rules, the term "panel" in the various provisions may be interpreted differently.

6. Article 6, for example, governs the "establishment of panels," including the timing of their establishment and the method by which their establishment must be requested. As a matter of both timing and logic, these actions necessarily would precede the composition of a panel and therefore would refer to an uncomposed panel. Article 7, on the other hand, may refer to both composed and uncomposed panels when it describes the "terms of reference of panels." For example, Article 7.1 states that "[p]anels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel." Therefore, whether or not a panel has been composed, within 20 days of establishment the terms of reference are determined and govern thereafter the scope of the dispute for purposes of any panel that has been "established," including one that has subsequently been composed. Article 7.2, however, provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." By requiring panels to "address" certain provisions of the covered agreements, the use of the term "panel" in Article 7.2 necessarily refers to a panel that has been composed, for the obvious reason that a panel that has been established only cannot "address" anything.

7. With respect to the interpretation of "panel" in Article 12 as well, both the stage of the process and the specific rules it provides assist in interpreting the terms contained in Article 12.12.

Article 8, for example, which deals with panel composition, precedes Article 12, which deals with panel procedures. Therefore, given where it is situated in the DSU, Article 12 contemplates that, in the normal course, a panel already would have been composed when the "panel procedures" would apply. For example, Article 12.1 establishes that a panel shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties; a panel could neither "follow" those Procedures nor decide otherwise nor consult if it has not been composed. Article 12.3 even more explicitly refers to "panelists" when it describes a process and schedule for fixing the timetable during the panel process. Logically, there would be no "panelists" fixing the timetable if the panel had not yet been composed.

8. Based on the above, the "work" of the panel in the context of Article 12.12 refers to the examination by the panel, once composed, of the matter referred to it by the DSB under the procedures established in Article 12. Therefore, Indonesia's request *to the Secretariat* to suspend a meeting *to compose* the panel would not constitute a request *to the panel* that it "suspend its *work*" pursuant to Article 12.12. Nothing in the text of the DSU, or in the email correspondence from Indonesia to the Secretariat, supports the European Union's position to the contrary.

9. The European Union also raises a contextual argument regarding the interpretation of the term "panel" in Article 12.12 based on its relationship with Article 12.9. To bolster its argument that reference to the "panel" in Article 12.12 means only a panel that has been established, not necessarily composed, the European Union notes that Article 12.9 (governing timeframes to submit the panel report) and 12.12 both refer to the "establishment," not composition, of a panel. Because "composition" is used elsewhere in the DSU, the European Union argues, the use of "establishment" alone is significant.

10. The United States agrees that use of the term "establishment" in Article 12.12 is meaningful. Because a panel is established by the DSB (Article 6.1) to assist the DSB in discharging its responsibilities to make recommendations (Articles 7.1, 11, 19.1) through issuance of findings in a written report (Article 15), to terminate a panel's authority to undertake that work, the DSU removes the legal basis for the panel's establishment. That this legal authority relates to whether a panel is established does not imply that a panel that has not been composed may undertake any "work," much less "suspend" that work.

11. Second, with respect to the contention that the time limit in Article 12.9 would be rendered meaningless were the twelve month limitation in 12.12 read to apply only to composed panels, the United States observes that the language regarding the time limit imposed in Article 12.9 is precatory, not binding, providing that in no case "should" the proceedings exceed nine months. Therefore, the premise for the European Union's arguments in this respect – that in no case may the proceedings, including any 12 month suspension, exceed 21 months – fails. It is simply not the case that such a mandatory time limit is imposed by the DSU on panel proceedings.

12. For these reasons, the situation described in the last sentence in DSU Article 12.12 arises only once a panel has been composed, the complaining party makes a request to the panel to suspend its work, and the panel decides to exercise its discretion to accept that request and suspends its work accordingly.

13. The European Union raises several policy concerns which it considers support its interpretation of Article 12.12, including considerations relating to the reputational consequences of unresolved proceedings for a responding Member and the limited resources both Members and the Secretariat have to dedicate to a given dispute. While such policy considerations cannot lead to a different interpretation and application of DSU Article 12.12, the United States nonetheless considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

14. There does not seem to be any serious cause for concern about a "reputational stain" somehow adhering to a responding Member as a result of a dispute brought before the WTO. If Members have not, through consultations or other means, managed to resolve a trade issue between them, parties regularly request the establishment of panels in an effort to achieve formal resolution of the dispute. Not all of these disputes proceed to the circulation of a final panel report. Often, disputes are successfully resolved only after the establishment of a panel. Therefore, the European Union's suggestion that in all cases it would be in a responding party's interest to

expedite the panel process so that accusations against it can be resolved does not reflect the nature of dispute settlement under the DSU.

15. Regarding resource constraints and the burden imposed on Members and the Secretariat to devote resources indefinitely to a dispute, the United States understands the dilemma to which the European Union refers. However, we do not consider that dissolving the panel process would address these concerns. To the contrary, the likelihood that the same issue might be raised multiple times as formally "new" disputes would seem to risk exacerbating the strains on limited WTO resources rather than easing them. And should the European Union believe it is prejudiced by the length of time taken to compose a panel, the United States respectfully suggests that an adequate remedy may be found under the DSU. Pursuant to Article 12.4, the European Union could explain those circumstances to the Panel and, in light of those circumstances, the Panel must provide the parties with sufficient time to prepare their written submissions to the panel.

16. Finally, the United States considers that reading into Article 12.12 a limitation on the ability of a complaining party to pause in its use of dispute settlement procedures would undermine the aim of the dispute settlement system to secure a positive solution to the dispute (Article 3.7). Where a party may be actively engaged in trying to resolve a dispute through alternative means, even after panel establishment, such action would be consistent with the preference expressed under the DSU. Indeed, under DSU Article 11, a panel is charged with giving the parties an adequate opportunity to develop a mutually satisfactory solution. The understanding of Article 12.12 proposed in the PRR would rather appear to limit such opportunities.

II. INDONESIA'S CLAIMS REGARDING ARTICLE 2 OF THE AD AGREEMENT

17. Indonesia claims that the European Union acted inconsistently with Article 2.4 of the AD Agreement by failing to make allowances for differences affecting price comparability – namely, by subtracting sales commissions from the constructed export price for one of the participating producers.

18. Article 2.4 of the AD Agreement requires investigating authorities to conduct a comparison between the export price and normal value. As Indonesia correctly observes, such comparison "is typically made at the ex-factory level…a practice envisaged explicitly by Article 2.4." It appears that both the European Union and Indonesia share the U.S. view that the essential requirement for any adjustment under Article 2.4 is that a factor must affect price comparability. Thus, under Article 2.4, making a "fair comparison" requires a consideration of how differences in conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics impact price comparability.

19. In this respect, the Appellate Body has stated that under Article 2.4, the obligation to ensure fair comparison lies on the investigating authorities, and not the exporters. Although the investigating authority has the burden to ensure a fair comparison, the interested parties also have the burden to substantiate any requested adjustments for differences that affect price comparability. As the Appellate Body has found, an investigating authority does not have to accept a request for an adjustment that is unsubstantiated.

20. Indonesia and the European Union appear to agree that a sales commission can affect price comparability within the meaning of Article 2.4 because it may reflect a difference in conditions and terms of sale. However, the parties disagree on whether it is necessary to determine that a single economic entity ("SEE") does not exist in order to make a downward adjustment to export price for sales commissions.

21. While the United States agrees with the European Union that an analysis of whether an SEE exists is not required under Article 2.4, it may sometimes be relevant to consider the relationship between two entities as part of an evaluation of price comparability. In this respect, it would not be inappropriate to consider the various factors discussed by the panel in *Korea – Certain Paper* and referenced by the Appellate Body in *EC-Fasteners (China)*. While we recognize that, as stated by the European Union, the analyses in those cases arose in a different context – *i.e.*, for purposes of determining whether related companies should be assigned a single dumping margin – these factors may nonetheless be relevant to determining what, if any, adjustment should be made under Article 2.4.

22. In reviewing the investigating authority's determination, the Panel may wish to consider whether the evidence and explanation provided – regardless of the specific methodology applied – supports a finding that the sales entity did not form part of a single entity with PTMM and that, therefore, an adjustment was necessary to ensure a fair comparison under Article 2.4. If the Panel concludes that the facts support a finding that the producer and the trading company are not affiliated, there is no dispute that an adjustment for a commission paid to the trader was appropriate.

23. Finally, the United States considers that it is permissible for an investigating authority to make a price adjustment to address circumstances of sale, if the facts on the record support it. An investigating authority must ensure price comparability regardless of whether affiliated or non-affiliated parties are involved. As explained earlier, a comparison between normal value and export price is usually made at the ex factory level. If, for example, the producer sells in the home market directly to its customers, but sells through a trading company (affiliated or not) to its export market, the differences in the circumstances of sale may warrant an adjustment to ensure that comparison is made at the ex-factory level in both markets.

24. The views expressed by the United States in relation to Indonesia's claims under Article 2.4 are relevant to the substance of Indonesia's Article 2.3 claim. The United States agrees with the European Union that Indonesia's Article 2.3 claim is purely a consequential claim.

III. INDONESIA'S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

25. The third sentence of Article 3.5 provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports.

26. The Appellate Body has further stated that the AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis. In this regard, the United States disagrees with Indonesia that only a particular kind of analysis – e.g., quantitative analysis – meets the requirements of Article 3.5. The question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.

27. Article 3.5 further requires that "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." Hence, the authorities are obliged to consider all relevant evidence in the record. While the United States does not take a view on the weight the European Union gave to certain evidence, the European Union must demonstrate that it examined these factors in its analysis. Whether or not, as Indonesia claims, the European Union was required specifically to consider these factors under the third sentence of Article 3.5 would depend on whether these factors were known to the investigating authority and whether they were in fact contributing at the same time as the imports to any difficulties experienced by the domestic industry.

28. Thus, the panel must determine if the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an examination of all relevant evidence.

IV. INDONESIA'S CLAIM UNDER ARTICLE 6 OF THE AD AGREEMENT

29. Article 6.7 of the AD agreement requires investigating authorities conducting verification to "make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9 to the firms which they pertain and may make such results available to the applicants." Article 6.9 in turn provides that an investigating authority "shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The United States agrees with both Indonesia and the European Union that under its ordinary meaning, the term

"results" in Article 6.7 refers to "outcomes" of the verification process. The United States agrees with the European Union that Articles 6.7, 6.8, and 6.9 form a continuum of obligations under Article 6, and that each obligation is grounded in the context of the specific provision.

30. While the United States does not believe that trivial or immaterial aspects of what occurred at the verification must be included in the report, at a minimum the report should include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. The United States agrees with the European Union that the text of Article 6.7 contains no requirements on form or format. Articles 6.7 and 6.9 do require disclosure of verification "results" and the "essential facts under consideration." To the extent the European Union characterizes the lack of disclosure of results and essential facts as a question of form, not substance, the United States disagrees with that characterization. For example (without opining on the factual issues presented in this dispute), the United States believes that the term "essential facts," as defined in Article 6.9, relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, the United States believes that information verified or corrected at verification relating to these "essential facts" should be disclosed pursuant to Article 6.7 and Article 6.9.

31. These provisions of the AD Agreement promote transparency and procedural fairness by ensuring that "disclosure…take[s] place in sufficient time for the parties to defend their interests." Failure to provide such disclosure could prevent an interested party from effectively defending its interests in the proceeding, and potentially, before national courts. In this respect, the United States agrees with the panel in *Korea – Certain Paper*, which noted that disclosing both verified and unverified information could "be relevant to the presentation of the interested parties' cases."

32. Similarly, a basic tenet of the AD Agreement, as reflected in Article 6, is that the investigating authority "must provide timely opportunities for all interested parties to see all information … relevant to the presentation of their cases that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation," and "shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests…[and these opportunities] must take account of the need for confidentiality." Articles 6.4 and 6.2 have specific obligations which may apply to the disclosure of verification results. Therefore, bearing in mind the obligations of Article 6.5, the United States agrees with Indonesia that failing to disclose information under Article 6.7, particularly as it relates to the "essential facts" of an investigation under Article 6.9, would deprive parties of the full opportunity to defend their interests.

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