



WORLD TRADE  
ORGANIZATION

WT/DS442/AB/R

5 September 2017

(17-4709)

Page: 1/68

Original: English

---

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

AB-2017-1

*Report of the Appellate Body*

---

**Table of Contents**

<b>1 Introduction.....</b>	<b>12</b>
<b>2 Arguments of the Participants.....</b>	<b>15</b>
<b>3 Arguments of the United States as a Third Participant.....</b>	<b>15</b>
<b>4 Issues Raised in This Appeal.....</b>	<b>16</b>
<b>5 Analysis of the Appellate Body.....</b>	<b>16</b>
<b>5.1 Indonesia's claims of error regarding the Panel's findings under Article 2.4 of the Anti-Dumping Agreement.....</b>	<b>16</b>
5.1.1 Background and the measure at issue.....	17
5.1.2 The Panel's findings.....	19
5.1.3 Interpretation of Article 2.4.....	20
5.1.4 Whether the Panel erred in its interpretation of Article 2.4.....	22
5.1.5 Whether the Panel erred in its application of Article 2.4.....	26
5.1.5.1 Whether the Panel erred in its review of the EU authorities' treatment of the mark-up.....	28
5.1.5.2 Whether the Panel erred in its analysis of whether the EU authorities incorrectly deducted ICOF-S' selling, general and administrative costs and profit.....	29
5.1.6 Whether the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU.....	31
5.1.6.1 Whether the Panel improperly concluded that the EU authorities had complied with Article 2.4 before it addressed Indonesia's arguments.....	32
5.1.6.2 Whether the Panel engaged in a <i>de novo</i> review of the record evidence.....	34
5.1.6.3 Whether the Panel ignored or summarily dismissed key evidence and arguments by Indonesia.....	38
5.1.7 Conclusion.....	40
<b>5.2 The European Union's claims of error regarding the Panel's findings under Article 6.7 of the Anti-Dumping Agreement.....</b>	<b>40</b>
5.2.1 The Panel's findings.....	41
5.2.2 Interpretation of Article 6.7.....	43
5.2.3 Whether the Panel erred in its interpretation of Article 6.7.....	45
5.2.4 Whether the Panel erred in finding that the EU authorities failed to make available or disclose the results of the on-the-spot investigations to PT Musim Mas.....	48
5.2.5 Conclusion.....	50
<b>5.3 The European Union's claims under Articles 3 and 19 of the DSU.....</b>	<b>51</b>
5.3.1 The European Union's request to dismiss Indonesia's appeal as inconsistent with Article 3 of the DSU.....	51
5.3.1.1 Procedural background.....	51
5.3.1.2 Claims and arguments on appeal.....	51
5.3.1.3 Whether Indonesia's appeal is inconsistent with Article 3.....	52
5.3.1.4 Conclusion.....	54
5.3.2 The European Union's claim that the Panel erred in making a recommendation with respect to an expired measure (Article 19.1 of the DSU).....	54
5.3.2.1 The Panel's findings.....	55

---

5.3.2.2	Claims and arguments on appeal .....	55
5.3.2.3	Whether the Panel erred in making a recommendation pursuant to Article 19.1 with respect to an expired measure.....	56
5.3.2.4	Conclusion .....	58
<b>5.4</b>	<b>The European Union's claim under Article 12.12 of the DSU.....</b>	<b>58</b>
5.4.1	Factual background.....	59
5.4.2	The Panel's findings .....	59
5.4.3	Interpretation of Article 12.12 .....	60
5.4.4	Whether the Panel erred in finding that its authority had not lapsed pursuant to Article 12.12 .....	62
5.4.5	Conclusion .....	64
<b>5.5</b>	<b>The European Union's claim that the Panel erred in its treatment of certain information as BCI .....</b>	<b>64</b>
<b>6</b>	<b>Findings and conclusions .....</b>	<b>66</b>

## ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Ecogreen	PT Ecogreen Oleochemicals
EU Basic Anti-Dumping Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, published in <i>Official Journal of the European Union</i> , L Series, No. 343 (22 December 2009), p. 51 ff (Panel Exhibit EU-3)
Final Determination	Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , L Series, No. 293 (11 November 2011), pp. 1-18 (Panel Exhibit IDN-4)
GATT 1994	General Agreement on Tariffs and Trade 1994
General Court	European Union's General Court
General Disclosure Document	European Commission, General Disclosure Document dated 26 August 2011, AD563, Proposal to impose definitive anti-dumping duties on Imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia (Panel Exhibit IDN-39)
ICOF-S	Inter-Continental Oils & Fats Pte Ltd (Singapore)
Interpipe Judgment	Court of Justice, Judgment of 16 February 2012 in joined Cases C-191/09 P and C-200/09 P, Council of the European Union (C-191/09 P) / European Commission (C-200/09 P) v. Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT) (concerning Judgment of the Court of First Instance of the European Union, Case T-249/06, Interpipe Niko Tube ZAT and Interpipe NTRP VAT v. Council of the European Union [2009] ECR II-383) (Panel Exhibit IDN-49)
Notice of initiation of the investigation	European Commission, Notice of initiation of an anti-dumping proceeding concerning imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , C Series, No. 219 (13 August 2010), pp. 12-16 (Panel Exhibit IDN-12)
P&L	profit and loss statement
Panel Report	Panel Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , <a href="#">WT/DS442/R</a>
Panel's BCI Procedures	Additional Working Procedures Concerning Business Confidential Information of 13 July 2015, contained in Annex A-2 of the Panel Report
Preliminary Determination	Commission Regulation (EU) No. 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , L Series, No. 122 (11 May 2011), pp. 47-62 (Panel Exhibit IDN-3)

Abbreviation	Description
PT Musim Mas	Indonesian producer PT Perindustrian dan Perdagangan Musim Semi Mas
PT Musim Mas Judgment	Judgment of the General Court (seventh Chamber), 25 June 2015, in Case T-26/12, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas) v. Council of the European Union (Case C-468/15P) ECLI:EU:T:2015:437 (Panel Exhibit EU-4)
Revised Determination	Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 amending Implementing Regulation (EU) No. 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , L Series, No. 352 (21 December 2012), pp. 1-5 (Panel Exhibit IDN-5)
SG&A	selling, general and administrative costs
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

## PANEL EXHIBITS CITED IN THIS REPORT

Exhibit Number	Description
IDN-2	Email correspondence of 10 and 11 July 2013
IDN-3	Commission Regulation (EU) No. 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , L Series, No. 122 (11 May 2011), pp. 47-62
IDN-4	Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , L Series, No. 293 (11 November 2011), pp. 1-18
IDN-5	Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 amending Implementing Regulation (EU) No. 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , L Series, No. 352 (21 December 2012), pp. 1-5
IDN-8	Email correspondence of 12, 19, and 22 September 2014 between the WTO Secretariat and the parties
IDN-12	European Commission, Notice of initiation of an anti-dumping proceeding concerning imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, <i>Official Journal of the European Union</i> , C Series, No. 219 (13 August 2010), pp. 12-16
IDN-17	Excerpt from the company-specific definitive disclosure to PT Musim Mas, dated 26 August 2011 (BCI)
IDN-18	PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A-3.4: Corporate structure of the Musim Mas group (BCI)
IDN-19	PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A: List of PT Musim Mas' shareholders (BCI)
IDN-22	PT Musim Mas response to Commission questionnaire AD563 (2010) (excerpt – response to question H-2.4) (BCI)
IDN-24	Sale and Purchase Agreement between PT Musim Mas and Inter-Continental Oils & Fats Pte Ltd (1 January 2009) (BCI)
IDN-25	Sale and Purchase Agreement between PT Musim Mas and Inter-Continental Oils & Fats Pte Ltd (1 January 2010) (BCI)
IDN-26	PT Musim Mas, "Impact of the Interpipe judgment on the fatty alcohol anti-dumping investigation (AD563): PTMM situation", PowerPoint presentation at the DG Trade hearing on 16 August 2012 (BCI)
IDN-27	CMS Hasche Sigle, Company-internal memorandum dated 22 November 2010 concerning "Inspection Visit Medan 22-25.11.2010" (BCI)
IDN-33	Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (BCI)
IDN-34	PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011 (BCI)
IDN-38	CMS Hasche Sigle, Company-internal memorandum dated 18-19 November 2010 concerning "Minutes Inspection Visit Singapore 18.11.2010" (verification of ICOF-S) (BCI)

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

## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , <a href="#">WT/DS189/R</a> , adopted 5 November 2001, DSR 2001:XII, p. 6241
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , <a href="#">WT/DS121/AB/R</a> , adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , <a href="#">WT/DS241/R</a> , adopted 19 May 2003, DSR 2003:V, p. 1727
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , <a href="#">WT/DS332/AB/R</a> , adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , <a href="#">WT/DS339/AB/R</a> / <a href="#">WT/DS340/AB/R</a> / <a href="#">WT/DS342/AB/R</a> , adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – HP-SSST (EU)</i>	Appellate Body Report, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015
<i>China – HP-SSST (EU)</i>	Panel Report, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS460/R</a> , Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Report <a href="#">WT/DS460/AB/R</a>
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , <a href="#">WT/DS431/AB/R</a> / <a href="#">WT/DS432/AB/R</a> / <a href="#">WT/DS433/AB/R</a> , adopted 29 August 2014, DSR 2014:III, p. 805
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , <a href="#">WT/DS302/R</a> , adopted 19 May 2005, as modified by Appellate Body Report <a href="#">WT/DS302/AB/R</a> , DSR 2005:XV, p. 7425
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/AB/R</a> , adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC – Bananas III (Article 21.5 – Ecuador II)</i> / <i>EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , <a href="#">WT/DS27/AB/RW2/ECU</a> , adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS27/AB/RW/USA</a> and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , <a href="#">WT/DS141/AB/RW</a> , adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/AB/R</a> , adopted 28 July 2011, DSR 2011:VII, p. 3995

Short Title	Full Case Title and Citation
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/R</a> and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , <a href="#">WT/DS397/AB/RW</a> and Add.1, adopted 12 February 2016
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , <a href="#">WT/DS397/RW</a> and Add.1, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/AB/R</a> , adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/R</a> , adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , <a href="#">WT/DS211/R</a> , adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , <a href="#">WT/DS473/AB/R</a> and Add.1, adopted 26 October 2016
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , <a href="#">WT/DS405/R</a> , adopted 22 February 2012, DSR 2012:IX, p. 4585
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , <a href="#">WT/DS50/AB/R</a> , adopted 16 January 1998, DSR 1998:I, p. 9
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , <a href="#">WT/DS312/R</a> , adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS132/AB/RW</a> , adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , <a href="#">WT/DS371/R</a> , adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/AB/R</a> , adopted 5 April 2001, DSR 2001:VII, p. 2701

Short Title	Full Case Title and Citation
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , <a href="#">WT/DS379/AB/R</a> , adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , <a href="#">WT/DS436/AB/R</a> , adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , <a href="#">WT/DS192/AB/R</a> , adopted 5 November 2001, DSR 2001:XII, p. 6027
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , <a href="#">WT/DS99/R</a> , adopted 19 March 1999, DSR 1999:II, p. 521
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/AB/R</a> , <a href="#">WT/DS178/AB/R</a> , adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , <a href="#">WT/DS343/AB/R</a> / <a href="#">WT/DS345/AB/R</a> , adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773
<i>US – Shrimp II (Viet Nam)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , <a href="#">WT/DS429/AB/R</a> , and Corr.1, adopted 22 April 2015
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/AB/R</a> , adopted 31 August 2004, DSR 2004:V, p. 1875
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/R</a> , adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS277/AB/RW</a> , adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , <a href="#">WT/DS267/AB/R</a> , adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117

---

Short Title	Full Case Title and Citation
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , <a href="#">WT/DS294/AB/R</a> , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , <a href="#">WT/DS294/R</a> , adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**European Union – Anti-Dumping Measures  
on Imports of Certain Fatty Alcohols from  
Indonesia**

Indonesia, *Appellant/Appellee*  
European Union, *Other Appellant/Appellee*

Korea, *Third Participant*  
United States, *Third Participant*

AB-2017-1

Appellate Body Division:

Ramírez-Hernández, Presiding Member  
Kim, Member  
Zhao, Member

## 1 INTRODUCTION

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

1.2. Additional factual aspects of this dispute are set forth in the Panel Report<sup>6</sup>, and in subsequent sections of this Report.<sup>7</sup>

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

1.4. Before the Panel, Indonesia claimed that the European Union acted inconsistently with several provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Specifically, Indonesia claimed that the European Union acted inconsistently with: (i) Articles 2.3 and 2.4 of the Anti-Dumping Agreement because the European Union made an improper adjustment to the export price of an Indonesian producer for a factor that did not affect price comparability; (ii) Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the European Union failed to conduct a proper non-attribution analysis with respect to two relevant factors – namely, the "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials";

<sup>1</sup> WT/DS442/R, 16 December 2016.

<sup>2</sup> Request for the Establishment of a Panel by Indonesia, WT/DS442/2.

<sup>3</sup> Fatty alcohols are intermediary products produced from natural or synthetic sources, such as natural fats and oils, crude oil, natural gas, natural gas liquids, and coal. Fatty alcohols are mainly used as inputs for the production of surfactants, which are used to produce detergents and household, cleaning, and personal care products. (See Commission Regulation (EU) No. 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, *Official Journal of the European Union*, L Series, No. 122 (11 May 2011), pp. 47-62 (Preliminary Determination) (Panel Exhibit IDN-3), recital 11; and Indonesia's first written submission to the Panel, para. 1.2 and fn 1 thereto)

<sup>4</sup> Panel Report, para. 2.1 (referring to Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, *Official Journal of the European Union*, L Series, No. 293 (11 November 2011) pp. 1-18 (Final Determination) (Panel Exhibit IDN-4)).

<sup>5</sup> Panel Report, paras. 1.3 and 2.1.

<sup>6</sup> Panel Report, paras. 2.1-2.2, 7.64-7.71, 7.113-7.114, 7.131-7.136, 7.231, and 7.233.

<sup>7</sup> See *infra*, section 5.1.1 and paragraphs 5.117, 5.169-5.170, 5.212-5.213, and 5.245-5.249.

<sup>8</sup> Panel Report, para. 1.7 and Annexes A-1 and A-2.

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

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

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

- a. with respect to the European Union's request for a preliminary ruling:
  - i. the European Union had not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU<sup>13</sup>;
  - ii. the work of the Panel had not been suspended<sup>14</sup>; and
  - iii. the authority for the establishment of the Panel had not lapsed<sup>15</sup>;
- b. with respect to Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement:
  - i. Indonesia had not demonstrated that the EU authorities<sup>16</sup> acted inconsistently with Article 2.4 by making an improper deduction for a factor that did not affect price comparability<sup>17</sup>; and
  - ii. Indonesia had therefore not demonstrated that the EU authorities consequently acted inconsistently with Article 2.3<sup>18</sup>;
- c. with respect to Indonesia's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement:
  - i. Indonesia had not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 in their analysis of the "economic crisis" factor<sup>19</sup>; and
  - ii. Indonesia had not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 in respect of the alleged "access to raw materials and price fluctuations" factor<sup>20</sup>; and

---

<sup>9</sup> Panel Report, para. 3.1.

<sup>10</sup> Panel Report, para. 3.2.

<sup>11</sup> Panel Report, para. 7.10.

<sup>12</sup> Panel Report, para. 7.13.

<sup>13</sup> Panel Report, para. 8.1.a.i. See also para. 7.29.a.

<sup>14</sup> Panel Report, para. 8.1.a.ii. See also para. 7.29.b.

<sup>15</sup> Panel Report, para. 8.1.a.iii. See also para. 7.29.c.

<sup>16</sup> We understand the Panel and the parties to have used the term "EU authorities" to refer either to the European Commission, or to the European Council, or both. We do the same in this Report.

<sup>17</sup> Panel Report, para. 8.1.b.i. See also para. 7.160.

<sup>18</sup> Panel Report, para. 8.1.b.ii. See also para. 7.161.

<sup>19</sup> Panel Report, para. 8.1.c.i. See also para. 7.189.

<sup>20</sup> Panel Report, para. 8.1.c.ii. See also para. 7.205.

- d. with respect to Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement, the EU authorities failed to make available or disclose the "results" of the on-the-spot investigations to the Indonesian producer, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas), and therefore acted inconsistently with Article 6.7.<sup>21</sup>

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

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

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

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

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

<sup>21</sup> Panel Report, para. 8.1.d. See also para. 7.236.

<sup>22</sup> Panel Report, para. 8.3.

<sup>23</sup> WT/DS442/5.

<sup>24</sup> WT/AB/WP/6, 16 August 2010.

<sup>25</sup> WT/DS442/6.

<sup>26</sup> Pursuant to Rules 22 and 23(4), respectively, of the Working Procedures.

<sup>27</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>28</sup> Korea submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For purposes of this appeal, we have interpreted Korea's action to be a notification expressing the intention of Korea to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures. Having notified the DSB of their interest in the matter before the Panel, pursuant to Article 10.2 of the DSU, India, Korea, Malaysia, Thailand, Turkey, and the United States reserved their right to participate as third parties. (Panel Report, para. 1.6) India, Malaysia, Turkey, and Thailand are not third participants in these appellate proceedings as none of them filed a written submission pursuant to Rule 24(1) of the Working Procedures or appeared at the oral hearing.

<sup>29</sup> WT/DS442/5/Corr.1, in English and Spanish only. The corrected version of Indonesia's Notice of Appeal is contained in Annex A-1 of the Addendum to this Report, WT/DS442/AB/R/Add.1.

<sup>30</sup> WT/DS442/7.

<sup>31</sup> WT/DS442/8.

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

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

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

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

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

## **2 ARGUMENTS OF THE PARTICIPANTS**

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

## **3 ARGUMENTS OF THE UNITED STATES AS A THIRD PARTICIPANT**

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

---

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

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

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

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

## 4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. whether the Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement, and acted inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement, in finding that Indonesia had not demonstrated that the EU authorities made an improper deduction for a factor that did not affect price comparability (raised by Indonesia);
- b. whether the Panel erred in its interpretation and application of Article 6.7 of the Anti-Dumping Agreement in finding that the EU authorities failed to make available or disclose the results of the on-the-spot investigations to PT Musim Mas, and that the European Union therefore acted inconsistently with Article 6.7 (raised by the European Union);
- c. whether, in appealing the Panel Report concerning an expired measure, Indonesia acted inconsistently with the provisions of Article 3 of the DSU, and whether the Appellate Body should, for this reason, find it unnecessary to rule on the claims raised on appeal by Indonesia (raised by the European Union);
- d. whether the Panel acted inconsistently with Articles 19 and 11 of the DSU in making a recommendation with respect to an expired measure (raised by the European Union);
- e. whether the Panel erred, and failed to make an objective assessment of the matter under Article 11 of the DSU, in finding that the authority for the establishment of the Panel had not lapsed pursuant to Article 12.12 of the DSU (raised by the European Union); and
- f. whether the Panel erroneously treated certain information as BCI, and consequently erred by redacting that information from five paragraphs of the Panel Report (raised by the European Union).

## 5 ANALYSIS OF THE APPELLATE BODY

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

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

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

<sup>36</sup> Indonesia's appellant's submission, para. 6.1 (referring to Panel Report, paras. 7.160 and 8.1.b.i).

<sup>37</sup> In its Notice of Appeal and appellant's submission, Indonesia contended that the Panel also acted inconsistently with Article 17.6(ii) of the Anti-Dumping Agreement. However, at the oral hearing, Indonesia clarified that its claim regarding the standard of review applied by the Panel was limited to Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU.

<sup>38</sup> Panel Report, paras. 7.160 and 8.1.b.i.

<sup>39</sup> Indonesia's appellant's submission, para. 6.3.

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

### 5.1.1 Background and the measure at issue

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

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

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

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

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

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

<sup>41</sup> Panel Exhibit IDN-3 (see *supra*, fn 3).

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

<sup>43</sup> Panel Report, para. 7.64 (referring to Preliminary Determination (Panel Exhibit IDN-3), recitals 20-21 and 37-38).

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

<sup>45</sup> Panel Report, para. 7.84.

<sup>46</sup> Panel Report, para. 7.63 (referring to Preliminary Determination (Panel Exhibit IDN-3), recital 38). As the Panel explained, the EU authorities used the terms "commission" and "mark-up" to denote the amount referred to in the Sale and Purchase Agreement between ICOF-S and PT Musim Mas as the "ICOF Margin". (*Ibid.*, fn 218 thereto)

<sup>47</sup> Panel Report, para. 7.61 and fn 213 thereto.

<sup>48</sup> Preliminary Determination (Panel Exhibit IDN-3), recitals 128-129.

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

<sup>50</sup> Panel Report, para. 7.66 (quoting PT Musim Mas comments on the Preliminary Determination, 10 June 2011 (Panel Exhibit IDN-34 (BCI)), p. 3). In particular, PT Musim Mas contended that ICOF-S and PT Musim Mas form a "single economic entity" because ICOF-S is "merely the sales department of [PT Musim Mas]", which in turn suggested that no adjustment should have been made. (*Ibid.*, para. 7.67 (quoting

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

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

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

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

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

---

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

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

<sup>52</sup> Panel Exhibit IDN-4 (see *supra*, fn 4).

<sup>53</sup> Panel Report, para. 7.68 (quoting Final Determination (Panel Exhibit IDN-4), recital 31).

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

<sup>55</sup> Panel Report, para. 7.68 (referring to Final Determination (Panel Exhibit IDN-4), recitals 31-33).

<sup>56</sup> Panel Report, para. 7.69 (referring to Final Determination (Panel Exhibit IDN-4), recital 35).

<sup>57</sup> Panel Report, para. 2.1.

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

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

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

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

<sup>62</sup> Panel Report, para. 7.134.

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

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

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

5.13. On 25 June 2015, the General Court rejected the action for annulment introduced by PT Musim Mas, ruling that the EU authorities had not erred in finding that ICOF-S had functions similar to those of "an agent working on a commission basis". The General Court also found that the EU authorities had not breached the principle of equality and non-discrimination in distinguishing PT Musim Mas' situation from that of Ecogreen as regards the application of Article 2(10)(i) of the EU Basic Anti-Dumping Regulation.<sup>68</sup>

### 5.1.2 The Panel's findings

5.14. Before the Panel, Indonesia claimed that the EU authorities acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by making an improper allowance for a factor that did not affect price comparability.<sup>69</sup> Indonesia emphasized that its main contention was that the EU authorities should not have made any adjustment to the export price in relation to the mark-up, and not that the EU authorities erred "because the amount of the adjustment was improper".<sup>70</sup> On this basis, the Panel observed that the amount of the allowance was not at issue in this dispute.<sup>71</sup>

5.15. The Panel considered the principal question before it to be whether the EU authorities had correctly characterized the mark-up that PT Musim Mas paid to ICOF-S as a difference affecting price comparability within the meaning of Article 2.4 of the Anti-Dumping Agreement. The Panel first set out its understanding of the legal standard under Article 2.4.<sup>72</sup> The Panel then reviewed the EU authorities' explanation and relevant record evidence with a view to determining whether an unbiased and objective investigating authority could have treated the mark-up as a difference affecting price comparability.<sup>73</sup> Thereafter, the Panel addressed each of the three lines of argument put forward by Indonesia, namely: (i) that the EU authorities mischaracterized the mark-up as a commission, instead of an internal transfer of funds within a "single economic entity", and that this existence of a single economic entity precluded the EU authorities from

---

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

<sup>64</sup> Panel Report, para. 7.134.

<sup>65</sup> Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 amending Implementing Regulation (EU) No. 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, *Official Journal of the European Union*, L Series, No. 352 (21 December 2012), pp. 1-5 (Revised Determination) (Panel Exhibit IDN-5).

<sup>66</sup> Panel Report, para. 7.135 (referring to Revised Determination (Panel Exhibit IDN-5), recital 12).

<sup>67</sup> Panel Report, para. 2.2.

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

<sup>69</sup> Panel Report, para. 7.30 (referring to Indonesia's second written submission to the Panel, para. 5.1).

<sup>70</sup> Panel Report, para. 6.10 (quoting Indonesia's request for review of the Panel's interim report, para. 2.4).

<sup>71</sup> Panel Report, paras. 6.10-6.12, 6.83-6.85, 7.38, and 7.123.

<sup>72</sup> Panel Report, paras. 7.55-7.61.

<sup>73</sup> Panel Report, paras. 7.63-7.98.

making an allowance for the mark-up<sup>74</sup>; (ii) that the downward adjustment made by the EU authorities to PT Musim Mas' export price created an asymmetry between the ex-factory export price and the normal value<sup>75</sup>; and (iii) that the EU authorities failed to provide a reasoned and adequate explanation for eventually treating the two Indonesian exporting producers (PT Musim Mas and Ecogreen) differently in relation to the mark-up received by their respective related traders.<sup>76</sup>

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

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

### 5.1.3 Interpretation of Article 2.4

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

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

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.<sup>7</sup> 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

<sup>74</sup> Panel Report, paras. 7.99-7.111.

<sup>75</sup> Panel Report, paras. 7.112-7.130.

<sup>76</sup> Panel Report, paras. 7.131-7.159.

<sup>77</sup> Panel Report, paras. 7.160-7.161.

<sup>78</sup> Indonesia's appeal is limited to the Panel's findings under Article 2.4, and does not address the Panel's consequential finding under Article 2.3 of the Anti-Dumping Agreement. In addition, Indonesia does not appeal the Panel's rejection of Indonesia's argument that the EU authorities failed to provide a reasoned and adequate explanation for eventually treating PT Musim Mas and Ecogreen differently in relation to the mark-ups paid to their respective traders.

<sup>79</sup> Before the Panel, and in its appellant's submission, Indonesia interchangeably used the terms "single economic entity", "very closely related companies", "closely affiliated companies", and "two entities that are closely intertwined". In response to questioning at the hearing, Indonesia confirmed that it had used these terms synonymously.

<sup>80</sup> Panel Report, paras. 7.103-7.106.

to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

<sup>7</sup> It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

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

5.21. The requirement to make a fair comparison, set out in the first sentence of Article 2.4, presupposes that the component elements of the comparison - i.e. the normal value and the export price - have already been established. The focus of Article 2.4 is not merely on a comparison between the normal value and the export price, but predominantly on the means to ensure the *fairness* of that comparison.<sup>83</sup> For a comparison to be fair, it must be unbiased, objective, and even-handed.<sup>84</sup> The second sentence of Article 2.4 identifies basic parameters that further the goal of achieving a fair comparison, requiring investigating authorities to make the comparison at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.<sup>85</sup>

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

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

<sup>81</sup> Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.204.

<sup>82</sup> Appellate Body Reports, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.163; *EC – Fasteners (China)*, para. 487; *US – Hot-Rolled Steel*, para. 178.

<sup>83</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.333.

<sup>84</sup> Appellate Body Report, *US – Softwood Lumber V* (Article 21.5 – Canada), para. 138.

<sup>85</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 168; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.235.

<sup>86</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 157.

<sup>87</sup> Appellate Body Report, *US – Zeroing (EC)*, paras. 156-157.

<sup>88</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 176.

<sup>89</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 157.

<sup>90</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

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

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

#### 5.1.4 Whether the Panel erred in its interpretation of Article 2.4

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

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

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

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

<sup>91</sup> See e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 168; and Panel Reports, *Korea – Certain Paper*, para. 7.147; and *US – Softwood Lumber V*, para. 7.357.

<sup>92</sup> Emphasis added.

<sup>93</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.87. See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 179.

<sup>94</sup> Indonesia's appellant's submission, para. 3.114.

<sup>95</sup> Indonesia's appellant's submission, paras. 2.54 and 3.91 (quoting Panel Report, para. 7.103 (fns omitted); and referring to paras. 7.54-7.62).

<sup>96</sup> Indonesia's appellant's submission, para. 3.110 (referring to Panel Report, paras. 7.102-7.107).

<sup>97</sup> European Union's appellee's submission, para. 93 (quoting Appellate Body Report, *India – Patents (US)*, para. 45).

<sup>98</sup> European Union's appellee's submission, paras. 111 and 139.

<sup>99</sup> United States' third participant's submission, para. 8.

<sup>100</sup> Indonesia's appellant's submission, para. 3.91 (referring to Panel Report, paras. 7.54-7.62).

<sup>101</sup> Panel Report, paras. 7.55-7.61.

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

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

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

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

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

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

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

<sup>102</sup> Panel Report, paras. 7.63-7.98.

<sup>103</sup> Panel Report, paras. 7.99-7.111.

<sup>104</sup> Panel Report, paras. 7.112-7.130.

<sup>105</sup> Panel Report, paras. 7.131-7.159.

<sup>106</sup> Panel Report, para. 7.54.

<sup>107</sup> Panel Report, paras. 7.55-7.61.

<sup>108</sup> We note that Article 2.3 of the Anti-Dumping Agreement, which concerns construction of the export price, recognizes that an "association" between an exporter and another company may be relevant to the determination of the export price and may make the price paid between these two entities "unreliable". The fourth and fifth sentences of Article 2.4 identify additional factors that are to be taken into consideration when the situation contemplated in Article 2.3 arises. However, these provisions are not relevant to the issues raised in this appeal.

<sup>109</sup> Panel Report, para. 7.56 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 177).

<sup>110</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.87.

<sup>111</sup> Panel Report, paras. 7.103-7.107.

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

We are not convinced that the existence of what Indonesia denotes as a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. This is because we consider it possible that two entities could transact for goods and services at arms-length, regardless of how closely intertwined their control and ownership might be.<sup>113</sup>

5.36. Thus, the Panel did not find the relationship between entities to be irrelevant to an investigating authority's assessment under Article 2.4. The Panel found that such a relationship was not "dispositive" of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. This is in keeping with the Panel's earlier statement that "[t]here are ... no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."<sup>114</sup> Moreover, the Panel explicitly recognized that "it is possible that a transaction between two entities within what Indonesia denotes as a 'single economic entity' could reflect an expense that must be recovered and thus would impact price comparability."<sup>115</sup> The Panel explained that, in its view, the "dividing line" between (a) an internal allocation of funds within a single economic entity which is not reflected in the producer's pricing decision and (b) an expense that is linked to either the export side or the domestic side or to both sides but with different amounts such that price comparability is affected, is dependent on the particular situation and evidence before the investigating authority in a given case where the proper characterization of the payment in question is at issue.<sup>116</sup> We do not understand the Panel's reasoning to stand for the proposition that the nature and degree of affiliation between related companies are irrelevant to the issue of whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price. Rather, we consider that the Panel properly emphasized the case-specific nature of an investigating authority's assessment under Article 2.4.

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

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

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

<sup>112</sup> Indonesia's appellant's submission, para. 3.132 (quoting Panel Report, para. 7.103).

<sup>113</sup> Panel Report, para. 7.103. (fn omitted)

<sup>114</sup> Panel Report, para. 7.56 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 177).

<sup>115</sup> Panel Report, para. 7.103.

<sup>116</sup> Panel Report, paras. 7.105-7.106.

<sup>117</sup> Indonesia's appellant's submission, para. 3.110 (quoting Panel Report, para. 7.103).

<sup>118</sup> Indonesia's appellant's submission, para. 3.17.

<sup>119</sup> Indonesia's appellant's submission, paras. 3.18-3.21.

<sup>120</sup> European Union's appellee's submission, paras. 68-72.

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

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

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

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

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

<sup>122</sup> Indonesia's appellant's submission, paras. 2.33-2.35, 3.18, 3.21-3.23, and 3.79.

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

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

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

<sup>126</sup> Indonesia's appellant's submission, fn 111 to para. 3.67.

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

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

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

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

#### 5.1.5 Whether the Panel erred in its application of Article 2.4

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

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

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

<sup>128</sup> Panel Report, para. 6.10 (referring to Indonesia's request for review of the Panel's interim report, para. 2.4).

<sup>129</sup> Panel Report, paras. 6.10-6.12, 6.83-6.85, 7.38, and 7.123.

<sup>130</sup> Panel Report, paras. 7.54-7.61.

<sup>131</sup> Panel Report, para. 7.103. (fn omitted)

<sup>132</sup> Panel Report, paras. 7.63-7.98.

<sup>133</sup> Panel Report, paras. 7.99-7.111.

<sup>134</sup> Panel Report, paras. 7.112-7.130.

<sup>135</sup> Panel Report, paras. 7.131-7.159.

<sup>136</sup> European Union's appellee's submission, paras. 105 and 312.

<sup>137</sup> Indonesia's appellant's submission, para. 3.114.

<sup>138</sup> European Union's appellee's submission, paras. 105-110.

<sup>139</sup> European Union's appellee's submission, para. 139.

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

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

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

5.50. In response to questioning at the hearing, Indonesia identified what it considered to be examples of the independent bases for its claim that the Panel erred in its application of Article 2.4, beyond its assertion that the Panel articulated and applied an incorrect legal standard under Article 2.4. Indonesia referred to the Panel's statement that the Panel considered "it possible that two entities could transact for goods and services at arms-length, regardless of how closely intertwined their control and ownership might be."<sup>143</sup> According to Indonesia, having made this statement, the Panel erred by not scrutinizing whether the EU authorities had properly examined whether the relevant transactions were at arm's length.

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

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

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

<sup>140</sup> Indonesia's appellant's submission, para. 3.83.

<sup>141</sup> Indonesia's appellant's submission, para. 3.114.

<sup>142</sup> See e.g. Indonesia's appellant's submission, paras. 3.97, 3.115, 3.119, 3.129-3.131, 3.137, 3.148, 3.152, 3.168, and 3.182.

<sup>143</sup> Panel Report, para. 7.103.

<sup>144</sup> Panel Report, para. 7.103.

<sup>145</sup> Panel Report, paras. 7.106-7.107.

<sup>146</sup> Indonesia's appellant's submission, para. 3.165 (referring to Panel Report, paras. 7.126-7.130).

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

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

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

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

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

The term "commissions" shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.<sup>150</sup>

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

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

5.58. Following its review, the Panel concluded:

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

<sup>147</sup> Panel Report, paras. 7.63-7.98.

<sup>148</sup> Panel Report, paras. 7.112-7.130.

<sup>149</sup> Indonesia's appellant's submission, paras. 3.201-3.213.

<sup>150</sup> Panel Exhibit EU-3.

<sup>151</sup> Panel Report, para. 7.92 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 146; and *US – Softwood Lumber V*, para. 175; and Panel Report, *China – HP-SSST (EU)*, para. 7.78; *EC – Fasteners (China)*, para. 7.297; *EC – Tube or Pipe Fittings*, para. 7.178; *US – Zeroing (EC)*, para. 7.260; and *US – Softwood Lumber V*, para. 7.167).

<sup>152</sup> Panel Report, para. 7.92.

<sup>153</sup> Panel Report, para. 7.93.

<sup>154</sup> Panel Report, para. 7.94 (referring to PT Musim Mas Judgment (Panel Exhibit EU-4), para. 54).

<sup>155</sup> Panel Report, para. 7.95 (referring to Sale and Purchase Agreement between PT Musim Mas and Inter-Continental Oils & Fats Pte Ltd (ICOF-S) (1 January 2009) (Panel Exhibit IDN-24 (BCI)), Section 7.3).

exclusively to the export side, therefore constituting a difference which affects price comparability under Article 2.4.<sup>156</sup>

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

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

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

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

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

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

<sup>156</sup> Panel Report, para. 7.97.

<sup>157</sup> Panel Report, para. 7.96.

<sup>158</sup> Panel Report, para. 7.93.

<sup>159</sup> Panel Report, paras. 7.96-7.97. See also paras. 7.73-7.88.

<sup>160</sup> Indonesia's appellant's submission, para. 3.93.

<sup>161</sup> Panel Report, paras. 7.112-7.130.

<sup>162</sup> Panel Report, para. 7.125.

<sup>163</sup> Panel Report, para. 7.130.

<sup>164</sup> Panel Report, para. 7.119 (referring to Excel file "PTMM definitive disclosure.xls" (Panel Exhibit EU-12 (BCI)), spreadsheet 2.3 (TABLE G - PL - (Profit and Loss) - of the exporting producer and each related company), row 45 columns F and G).

<sup>165</sup> Panel Report, para. 7.120.

<sup>166</sup> Panel Report, para. 7.121 (referring to Excel file "PTMM definitive disclosure.xls" (Panel Exhibit EU-12 (BCI)), spreadsheet 2.3 (TABLE G - PL - (Profit and Loss) - of the exporting producer and each related company), row 44 columns F and G).

<sup>167</sup> Panel Report, paras. 7.84, 7.93, and 7.120.

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

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

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

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

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

<sup>168</sup> Panel Report, para. 7.88.

<sup>169</sup> Panel Report, para. 7.113.

<sup>170</sup> We recall that PT Musim Mas' P&L reflected similar amounts for SG&A and profit for both PT Musim Mas' domestic sales in Indonesia and for PT Musim Mas' export sales through ICOF-S that were destined for the European Union. (See *supra*, para. 5.62) Hence, we understand the EU authorities to have considered that ICOF-S' P&L reflected the additional amounts that corresponded only to export sales.

<sup>171</sup> Panel Report, paras. 7.113-7.114.

<sup>172</sup> Panel Report, fn 340 to para. 7.114 (quoting European Union's second written submission to the Panel, para. 69).

<sup>173</sup> Panel Report, para. 7.114.

<sup>174</sup> Indonesia's appellant's submission, para. 2.42.

<sup>175</sup> Indonesia's appellant's submission, para. 3.168 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 160).

<sup>176</sup> Panel Report, para. 7.32.

<sup>177</sup> Indonesia's appellant's submission, paras. 3.168-3.169. The European Union contests Indonesia's assertion, stating that the EU authorities did not impose a single anti-dumping duty for PT Musim Mas and ICOF-S together. The European Union explained that, were ICOF-S to export to the European Union Indonesian fatty alcohols manufactured by another company, it would have faced the duty applicable to that manufacturer. (European Union's appellee's submission, para. 154)

<sup>178</sup> Panel Report, fn 366 to para. 7.130.

<sup>179</sup> Indonesia's appellant's submission, para. 3.165 (referring to Panel Report, paras. 7.126-7.130).

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

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

For these reasons, we do not accept Indonesia's argument that the EU authorities were precluded from deducting an allowance that was calculated based on ICOF-S' P&L and what they considered to be a reasonable profit margin for this particular sector.<sup>182</sup>

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

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

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

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

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

<sup>180</sup> Panel Report, para. 7.128 (referring to Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (Panel Exhibit IDN-33 (BCI)), p. 4).

<sup>181</sup> Panel Report, para. 7.129.

<sup>182</sup> Panel Report, paras. 7.129-7.130 (referring in fn 365 to PT Musim Mas response to Commission questionnaire AD563 (2010) (excerpt – response to question H-2.4) (Panel Exhibit IDN-22 (BCI)), pp. 43-44). (other fns omitted)

<sup>183</sup> Indonesia's appellant's submission, para. 3.165 (referring to Panel Report, paras. 7.126-7.130).

<sup>184</sup> Panel Report, para. 7.129.

<sup>185</sup> Indonesia's appellant's submission, para. 4.3.

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

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

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

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

5.74. To us, Indonesia's arguments seem to take issue with how the Panel structured its analysis. Indonesia's claims under Articles 2.4 and 2.3 of the Anti-Dumping Agreement are addressed in section 7.3 of the Panel Report. The Panel characterized the "principal question" in that section as "whether the EU authorities correctly characterized the mark-up paid by PT Musim Mas to ICOF-S as a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement."<sup>191</sup>

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

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

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

<sup>186</sup> Indonesia's appellant's submission, paras. 4.43-4.44 and 4.52 (referring to Panel Report, paras. 7.88 and 7.95-7.98).

<sup>187</sup> Indonesia's appellant's submission, para. 4.47. See paras. 4.45-4.48.

<sup>188</sup> Indonesia's appellant's submission, para. 4.42.

<sup>189</sup> Indonesia's appellant's submission, para. 4.49.

<sup>190</sup> European Union's appellee's submission, paras. 231-263.

<sup>191</sup> Panel Report, para. 7.33.

<sup>192</sup> The Panel outlined its order of analysis at paragraph 7.33 of its Report.

<sup>193</sup> Panel Report, paras. 7.55-7.61.

<sup>194</sup> Panel Report, paras. 7.63-7.98.

<sup>195</sup> *Supra*, para. 5.29.

<sup>196</sup> Panel Report, subsection 7.3.5.1, paras. 7.63-7.98.

<sup>197</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

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

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

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

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

On the basis of the foregoing, we consider that the EU authorities did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement by considering whether "ICOF-S had functions similar to an agent working on a commission basis" ...

In light of the foregoing, we conclude that the EU authorities had a sufficient evidentiary basis – encompassing both of the factual findings and their attendant evidence as discussed in the foregoing sections – for establishing that the mark-up was a factor that impacts the prices of the product and that was linked exclusively to the export side, therefore constituting a difference which affects price comparability under Article 2.4.<sup>203</sup>

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

<sup>198</sup> Indonesia's appellant's submission, para. 4.37.

<sup>199</sup> Panel Report, para. 7.54.

<sup>200</sup> Panel Report, para. 7.56 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 177).

<sup>201</sup> The exhibits referred to throughout this section of the Panel's analysis were submitted by Indonesia. Additionally, the Panel made explicit references to certain of Indonesia's arguments. (See e.g. Panel Report, para. 7.83 and fn 272 thereto, para. 7.91 and fn 285 thereto, and para. 7.95)

<sup>202</sup> Indonesia's appellant's submission, paras. 4.7, 4.37, and 4.41.

<sup>203</sup> Panel Report, paras. 7.96-7.97.

<sup>204</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.205 (quoting Appellate Body Report, *US – Shrimp II (Viet Nam)*, para. 4.36).

not failed to assess all the relevant elements, and had therefore complied with its duty under Article 11 of the DSU.<sup>205</sup>

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

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

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

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

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

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

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

<sup>205</sup> Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.209; and *US – Shrimp II (Viet Nam)*, paras. 4.50-4.51.

<sup>206</sup> Panel Report, paras. 7.160-7.161.

<sup>207</sup> Indonesia's appellant's submission, paras. 4.56-4.125.

<sup>208</sup> Indonesia's appellant's submission, paras. 4.126-4.152.

<sup>209</sup> Indonesia's appellant's submission, paras. 4.153-4.170.

<sup>210</sup> Indonesia's appellant's submission, paras. 4.171-4.192.

<sup>211</sup> Appellate Body Reports, *US – Steel Safeguards*, para. 299; *Argentina – Footwear (EC)*, para. 121; *US – Anti-Dumping and Countervailing Duties (China)*, para. 379; and *US – Cotton Yarn*, para. 74.

<sup>212</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>213</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>214</sup> Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 516.

<sup>215</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

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

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

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

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

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

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

<sup>217</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

<sup>218</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178; *EC – Hormones*, para. 135.

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

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

<sup>221</sup> Verification Exhibit PTMM-18 (Panel Exhibit IDN-47 (BCI)).

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

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

<sup>224</sup> Indonesia's appellant's submission, para. 4.69 (referring to Verification Exhibit PTMM-18 (Panel Exhibit IDN-47 (BCI))).

<sup>225</sup> Indonesia's appellant's submission, paras. 4.73-4.94 (referring to Panel Report, para. 7.85).

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

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

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

5.93. The Panel stated, in relevant part:

We understand the only piece of evidence indicating any involvement by ICOF-S in PT Musim Mas' domestic sales was the document submitted to the EU authorities as "Attachment 18" pertaining to an email. In our view, it was not unreasonable for the EU authorities to ascribe limited probative value to this document. The document does not reveal the nature, extent, or scope of ICOF-S' alleged involvement in domestic sales generally. ... We cannot see how this demonstrates that ICOF-S undertakes all sales, marketing, and negotiating work on behalf of PT Musim Mas for domestic sales, nor how this demonstrates that PT Musim Mas has no active sales department.<sup>229</sup>

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

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

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

---

<sup>226</sup> Indonesia's appellant's submission, para. 4.62; Indonesia's opening statement at the first Panel meeting, para. 15; Panel Report, para. 7.42.

<sup>227</sup> Indonesia's appellant's submission, paras. 4.73-4.94.

<sup>228</sup> Appellate Body Report, *Thailand – H-Beams*, para. 118.

<sup>229</sup> Panel Report, para. 7.85. (fn omitted)

<sup>230</sup> Article 17.6(i) of the Anti-Dumping Agreement.

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

5.97. Indonesia is correct in stating that the EU authorities made no explicit reference to the document illustrating the corporate structure of the Musim Mas Group<sup>232</sup>, or to the list of PT Musim Mas' shareholders.<sup>233</sup> However, we note that the EU authorities responded to the information concerning ownership and control of PT Musim Mas and ICOF-S contained in the documents submitted to the Panel as Exhibits IDN-26 and IDN-34.<sup>234</sup> We agree with the Panel that, in their Final Determination, "the EU authorities responded to PT Musim Mas' arguments in this regard and provided further explanation of why they considered that the adjustment was warranted."<sup>235</sup> Accordingly, it is not accurate for Indonesia to assert that the EU authorities "never responded to these arguments".<sup>236</sup>

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

In Indonesia's own framework, the nature and extent of overlap in this regard appear to be important to identifying whether a payment can be said to affect price comparability. Therefore, even assuming evidence of commonality in ownership, operational management and control is "critical", the evidence before the EU authorities did not, in our view, demonstrate the precise nature of the relationship between PT Musim Mas and ICOF-S as alleged by Indonesia.<sup>240</sup>

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

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

---

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

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

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

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

<sup>235</sup> Panel Report, para. 7.68 (referring to Final Determination (Panel Exhibit IDN-4), recitals 31-33).

<sup>236</sup> Indonesia's appellant's submission, para. 4.128.

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

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

<sup>239</sup> Indonesia's appellant's submission, paras. 4.132-4.133 (quoting Panel Report, para. 7.109).

<sup>240</sup> Panel Report, para. 7.109. (fns omitted)

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

<sup>242</sup> See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

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

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

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

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

5.102. The European Union does not agree. In its view, the Panel properly addressed and rejected these arguments.<sup>248</sup>

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

In our view, it was not unreasonable for the EU authorities to have relied on the terms of the Sale and Purchase Agreement in their assessment of "whether the functions of a trader are not those of an internal sales department but comparable to those of an agent working on a commission basis". ... These aspects [of the Sale and Purchase Agreement] suggest that ICOF-S has a functional capacity to provide certain services as an international trader that is lacking in PT Musim Mas. Further, the Sale and Purchase Agreement stipulates that the services provided by ICOF-S – namely, the assumption of certain "functions, obligations, and risks" – are to be remunerated on individual sales through the "ICOF Margin", i.e. the mark-up. Together, these aspects plausibly suggest that ICOF-S performs "functions ... similar to those of an agent working on a commission basis". Other aspects of the Sale and Purchase Agreement also militate against the inference that ICOF-S operates as the "internal sales department" of PT Musim Mas. For instance, whereas PT Musim Mas engages in domestic sales, the Sale and Purchase Agreement explicitly refers only to export sales and stipulates that it "constitutes the entire agreement and understanding between the Parties in respect of its subject matter". Moreover, the provision that "[n]othing in this Agreement shall create any partnership, joint venture or relationship of principal

---

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

<sup>244</sup> Indonesia's appellant's submission, paras. 4.155-4.157 (quoting Panel Report, para. 7.84 and fn 277 thereto).

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

<sup>246</sup> Indonesia's appellant's submission, paras. 4.221-4.290.

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

<sup>248</sup> European Union's appellee's submission, paras. 303-312.

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

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

5.105. The Panel also highlighted that its interim report had addressed in detail why the Panel had found that the existence of transfer prices does not exclude the characterization of a payment as an expense rather than as a mere allocation of funds between two related entities.<sup>252</sup>

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

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

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

<sup>249</sup> Panel Report, para. 7.95. (fns omitted)

<sup>250</sup> Panel Report, paras. 6.30-6.47.

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

<sup>252</sup> Panel Report, para. 6.36.

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

<sup>254</sup> Panel Report, para. 7.95.

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

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

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

<sup>258</sup> See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170.

### 5.1.7 Conclusion

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

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

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

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

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

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

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

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

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

---

<sup>259</sup> European Union's other appellant's submission, para. 163 (referring to Panel Report, para. 8.1.d).

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

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

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

### 5.2.1 The Panel's findings

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

5.120. In response, the European Union submitted that it had complied with Article 6.7 by either "making available" or "disclosing" the results of the verification visits to the investigated producers and, in particular, by informing the Indonesian interested parties beforehand about the information that was going to be verified, providing a list of exhibits collected during on-the-spot investigations, and providing the results of the verification visits as part of the general disclosure of essential facts to Indonesian exporters and through the communication of a company-specific report.<sup>270</sup>

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

<sup>260</sup> European Union's other appellant's submission, para. 82.

<sup>261</sup> Letter dated 5 November 2010 from European Commission to CMS Hasche Sigle concerning AD563 and PT Musim Mas (Panel Exhibit EU-1).

<sup>262</sup> See CMS Hasche Sigle, Company-internal memorandum dated 22 November 2010 concerning "Inspection Visit Medan 22-25.11.2010" (Panel Exhibit IDN-27 (BCI)) and CMS Hasche Sigle, Company-internal memorandum dated 18-19 November 2010 concerning "Minutes Inspection Visit Singapore 18.11.2010" (verification of ICOF-S) (Panel Exhibit IDN-38 (BCI)).

<sup>263</sup> Letter dated 11 May 2011 from the European Commission to CMS Hasche Sigle concerning AD563 Disclosure of provisional findings and PT Musim Mas (Panel Exhibit EU-2 (BCI)).

<sup>264</sup> Letter dated 26 August 2011 from the European Commission to CMS Hasche Sigle concerning AD563 Definitive Disclosure and PT Musim Mas (PTMM) (Disclosure of definitive findings dated 26 August 2011) (Panel Exhibits EU-10 (BCI) and IDN-17 (BCI) (excerpt)).

<sup>265</sup> Panel Report, para. 2.1.

<sup>266</sup> Panel Report, para. 2.2.

<sup>267</sup> Panel Report, para. 7.209 (referring to Indonesia's first written submission to the Panel, para. 6.50; and second written submission to the Panel, para. 4.3).

<sup>268</sup> Indonesia's first written submission to the Panel, paras. 6.6-6.12 and 6.52-6.54.

<sup>269</sup> Panel Report, para. 7.213 (referring to Indonesia's first written submission to the Panel, para. 6.60).

<sup>270</sup> Panel Report, para. 7.216 (referring to European Union's first written submission to the Panel, paras. 190-195; and second written submission to the Panel, para. 168 and fns 121 and 123 thereto).

is to enable the investigating authorities to confirm the accuracy of the information supplied by the investigated firms.<sup>271</sup>

5.122. Furthermore, the Panel considered that on-the-spot investigations involve a specific means by which investigating authorities request the exporter to supply evidence demonstrating the accuracy of the information supplied by the entities subject to verification. For the Panel, therefore, the "results" of the verification visit, in the sense of Article 6.7, should reflect the outcome of this process. The Panel held that, at a minimum, the authorities should disclose the part of the questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities. Further, the results of the verification should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire responses.<sup>272</sup>

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

5.124. The Panel then turned to assess whether the European Union had complied with Article 6.7 in this case. The Panel noted the European Union's argument that it had satisfied the obligation in Article 6.7 by providing information to PT Musim Mas in the following three documents: (i) the Disclosure of definitive findings dated 26 August 2011<sup>276</sup>; (ii) the provisional company-specific disclosure concerning PT Musim Mas of May 2011<sup>277</sup>; and (iii) the list of exhibits collected on site by the EU authorities during the on-the-spot investigations conducted at the headquarters of PT Musim Mas.<sup>278</sup>

5.125. The Panel examined each of these documents in order to assess whether they contain, individually or in combination, information that could be characterized as the "results" of the verification visits conducted by the EU authorities. Ultimately, the Panel concluded that the EU authorities had not made available or disclosed the "results of any such investigations" to PT Musim Mas, as required by Article 6.7, because they failed to explain those parts of the questionnaire response or other information supplied for which supporting evidence was requested and because they also failed to explain: (i) whether further information was requested; (ii) whether PT Musim Mas and its related companies had made available the evidence and additional information requested; and (iii) whether the EU authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire responses.<sup>279</sup>

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

<sup>271</sup> Panel Report, para. 7.222.

<sup>272</sup> Panel Report, para. 7.224.

<sup>273</sup> Panel Report, para. 7.209 (quoting Panel Report, *Korea – Certain Paper*, para. 7.192) (emphasis added by the Panel).

<sup>274</sup> Panel Report, para. 7.226.

<sup>275</sup> Panel Report, para. 7.226.

<sup>276</sup> Panel Report, para. 7.231 (referring to AD563 Disclosure of definitive findings dated 26 August 2011 (Panel Exhibit EU-10 (BCI))).

<sup>277</sup> Panel Report, para. 7.231 (referring to European Union's response to Panel question No. 49, para. 44; second written submission to the Panel, para. 166; and Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (Panel Exhibit IDN-33 (BCI))).

<sup>278</sup> Panel Report, para. 7.231 (referring to List of exhibits provided by the Commission to PT Musim Mas at the conclusion of three verification visits (Panel Exhibit EU-14 (BCI))).

<sup>279</sup> Panel Report, para. 7.236.

### 5.2.2 Interpretation of Article 6.7

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

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

*Article 6*

*Evidence*

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

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

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

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

<sup>280</sup> European Union's other appellant's submission, paras. 106-107.

<sup>281</sup> Indonesia's appellee's submission, para. 2.18 (referring to Panel Report, para. 7.226).

<sup>282</sup> See also Panel Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191; *Argentina – Ceramic Tiles*, fn 65 to para. 6.57; *Egypt – Steel Rebar*, paras. 7.326-7.327; and *US – DRAMS*, para. 6.78. At the same time, we note that Article 6.7 does not grant an unlimited right for investigating authorities to carry out investigations in the territory of another Member. Rather, Article 6.7 provides that the authorities must obtain the agreement of the firms concerned, and they must notify the representatives of the government of the Member in question. Moreover, investigating authorities cannot carry out an on-the-spot investigation in the territory of another Member if that Member objects.

<sup>283</sup> Appellate Body Report, *China – HP-SSST (EU)*, para. 5.70.

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

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

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

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

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

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

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

---

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

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

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

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

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

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

### 5.2.3 Whether the Panel erred in its interpretation of Article 6.7

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

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

<sup>286</sup> Appellate Body Report, *China – HP-SSST (EU)*, para. 5.73.

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

<sup>288</sup> European Union's other appellant's submission, para. 82.

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

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

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

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

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

These statements support the view that on-the-spot verifications involve a specific means by which the authorities request the exporter to supply evidence of the accuracy of the information supplied by the entity or entities subject to verification. The "results" of the verification should thus reflect the outcome of this process. At a minimum, the authorities should disclose the part of the questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities. Further, the results of the verification should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire responses.<sup>294</sup>

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

<sup>289</sup> European Union's other appellant's submission, para. 125.

<sup>290</sup> European Union's other appellant's submission, paras. 106-107.

<sup>291</sup> Indonesia's appellee's submission, para. 2.63.

<sup>292</sup> Indonesia's appellee's submission, para. 2.18 (referring to Panel Report, para. 7.226).

<sup>293</sup> United States' third participant's submission, para. 74.

<sup>294</sup> Panel Report, para. 7.224.

of information supplied and that the "results", in the sense of Article 6.7, should reflect the outcome of that verification process.<sup>295</sup>

5.148. However, the European Union appeals the Panel's further statement that, "at a minimum", the authorities should disclose the part of the questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities.<sup>296</sup> The European Union argues that the reference in the text of Article 6.7 to the disclosure of essential facts pursuant to Article 6.9 suggests that the scope of the "results" of the on-the-spot investigation is limited to the essential factual outcomes of the verification, which may have a bearing on the authorities' decision to impose an anti-dumping measure.<sup>297</sup>

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

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

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

5.152. The European Union also challenges the Panel's statement that the results of the verification should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies.<sup>299</sup> We recall that the purpose of on-the-spot investigations is the verification of the information provided by the

<sup>295</sup> Panel Report, para. 7.224.

<sup>296</sup> European Union's other appellant's submission, para. 162 (referring to Panel Report, paras. 7.224 and 7.228).

<sup>297</sup> European Union's other appellant's submission, paras. 106-107.

<sup>298</sup> Panel Report, para. 7.226.

<sup>299</sup> European Union's other appellant's submission, para. 162 (referring to Panel Report, paras. 7.224 and 7.228).

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

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

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

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

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

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

<sup>300</sup> Panel Report, para. 7.224.

<sup>301</sup> European Union's other appellant's submission, paras. 117-118.

<sup>302</sup> Letter dated 5 November 2010 from the European Commission to CMS Hasche Sigle concerning AD563 and PT Musim Mas (Panel Exhibit EU-1); CMS Hasche Sigle, Company-internal memorandum dated 22 November 2010 concerning "Inspection Visit Medan 22-25.11.2010" (Panel Exhibit IDN-27 (BCI)); and CMS Hasche Sigle, Company-internal memorandum dated 18-19 November 2010 concerning "Minutes Inspection Visit Singapore 18.11.2010" (verification of ICOF-S) (Panel Exhibit IDN-38 (BCI)).

<sup>303</sup> Disclosure of definitive findings dated 26 August 2011 (Panel Exhibit EU-10 (BCI)).

<sup>304</sup> Panel Report, para. 7.231 (referring to Disclosure of definitive findings dated 26 August 2011 (Panel Exhibit EU-10 (BCI))). The Panel noted that the Disclosure of definitive findings sent to PT Musim Mas on 26 August 2011 included three annexes: the General Disclosure Document, which was attached as Panel Exhibit IDN-39; the Definitive dumping calculation; and the company-specific reply to arguments not addressed in detail in the General Disclosure Document.

Mas of May 2011<sup>305</sup>; and (iii) the list of exhibits collected on site by the EU authorities during the on-the-spot investigations conducted at the headquarters of PT Musim Mas.<sup>306</sup>

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

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

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

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

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

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

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

<sup>307</sup> Panel Exhibit IDN-39.

<sup>308</sup> Panel Report, para. 7.232.

<sup>309</sup> Panel Report, para. 7.233 (referring to Excel file "PTMM definitive disclosure.xls" (Panel Exhibit EU-12 (BCI))).

<sup>310</sup> Panel Report, para. 7.235.

<sup>311</sup> Panel Report, para. 7.235.

<sup>312</sup> Panel Report, para. 7.235.

<sup>313</sup> European Union's other appellant's submission, para. 159.

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

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

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

## 5.2.5 Conclusion

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

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

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

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

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

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

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

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

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

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

##### 5.3.1.1 Procedural background

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

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

##### 5.3.1.2 Claims and arguments on appeal

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

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

<sup>317</sup> European Union's other appellant's submission, para. 4.

<sup>318</sup> European Union's other appellant's submission, para. 23.

<sup>319</sup> European Commission, Notice of the expiry of certain anti-dumping measures, *Official Journal of the European Union*, C Series, No. 418 (12 November 2016), p. 3.

<sup>320</sup> European Union's other appellant's submission, paras. 4 and 21.

<sup>321</sup> European Union's other appellant's submission, para. 21.

<sup>322</sup> European Union's other appellant's submission, para. 6.

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

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

### 5.3.1.3 Whether Indonesia's appeal is inconsistent with Article 3

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

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

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

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

<sup>323</sup> Indonesia's appellee's submission, para. 4.61.

<sup>324</sup> Indonesia's appellee's submission, paras. 4.19 and 4.21.

<sup>325</sup> United States' third participant's submission, para. 21.

<sup>326</sup> United States' third participant's submission, para. 28.

<sup>327</sup> Indonesia's appellee's submission, para. 4.15; European Union's other appellant's submission, para. 3.

<sup>328</sup> Appellate Body Reports, *China – Auto Parts*, para. 209. See also Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.89; and *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 285.

<sup>329</sup> European Union's opening statement and response to questioning at the oral hearing.

<sup>330</sup> Article 3.2 of the DSU provides:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of

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

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

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

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

---

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

<sup>331</sup> European Union's other appellant's submission, para. 10.

<sup>332</sup> Article 3.4 of the DSU provides:

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

<sup>333</sup> European Union's other appellant's submission, para. 12.

<sup>334</sup> European Union's other appellant's submission, para. 15.

<sup>335</sup> Appellate Body Report, *US – Upland Cotton*, para. 270.

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

<sup>337</sup> Appellate Body Report, *EC – Bananas III*, para. 135.

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

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

<sup>340</sup> Article 3.3 of the DSU provides:

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

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

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

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

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

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

#### 5.3.1.4 Conclusion

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

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

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

---

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

<sup>341</sup> European Union's other appellant's submission, para. 11.

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

<sup>343</sup> European Union's other appellant's submission, para. 16.

<sup>344</sup> Article 3.9 of the DSU provides:

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

<sup>345</sup> European Union's other appellant's submission, para. 17.

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

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

### 5.3.2.1 The Panel's findings

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

### 5.3.2.2 Claims and arguments on appeal

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

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

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

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

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

<sup>347</sup> European Union's other appellant's submission, para. 23.

<sup>348</sup> Indonesia's appellee's submission, para. 4.51.

<sup>349</sup> Panel Report, para. 8.1.d.

<sup>350</sup> Panel Report, para. 8.3.

<sup>351</sup> European Union's other appellant's submission, para. 23 (referring to Appellate Body Report, *US – Certain EC Products*, para. 81).

<sup>352</sup> European Union's other appellant's submission, para. 23.

<sup>353</sup> Indonesia's appellee's submission, para. 4.60.

<sup>354</sup> Indonesia's appellee's submission, para. 4.52.

<sup>355</sup> Indonesia's appellee's submission, para. 4.54 (referring to Panel Report, *China – GOES (Article 21.5 – US)*, paras. 6.20–6.25).

<sup>356</sup> Indonesia's appellee's submission, para. 4.54 (referring to Panel Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 6.18).

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

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

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

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

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

#### *Article 19*

##### *Panel and Appellate Body Recommendations*

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.<sup>361</sup>

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

#### *Article 6*

##### *Establishment of Panels*

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

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

<sup>357</sup> Indonesia's appellee's submission, para. 4.55.

<sup>358</sup> Indonesia's appellee's submission, para. 4.57 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 9).

<sup>359</sup> United States' third participant's submission, paras. 46-50.

<sup>360</sup> United States' third participant's submission, para. 24.

<sup>361</sup> Footnotes omitted.

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

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

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

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

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

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

---

<sup>362</sup> Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 268.

<sup>363</sup> Appellate Body Report, *US – Upland Cotton*, para. 272.

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

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

<sup>366</sup> Appellate Body Report, *US – Certain EC Products*, para. 81.

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

<sup>368</sup> Appellate Body Reports, *China – Raw Materials*, para. 264.

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

5.205. In addition, we note that paragraph 7 of the Panel's Working Procedures provides that each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions and comments on answers provided by the other party. The Working Procedures further provide that exceptions to this procedure shall be granted only upon a showing of good cause, and that, where such an exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

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

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

#### 5.3.2.4 Conclusion

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

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

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

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

<sup>369</sup> Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 149; *Argentina – Textiles and Apparel*, para. 79; and *US – FSC (Article 21.5 – EC)*, para. 240.

<sup>370</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259.

<sup>371</sup> Appellate Body Report, *EC – Sardines*, para. 301. See also Panel Reports, *EC – IT Products*, paras. 6.47–6.48; and *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 6.18.

iii. the authority for the establishment of this Panel had not lapsed.<sup>372</sup>

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

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

#### 5.4.1 Factual background

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

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

#### 5.4.2 The Panel's findings

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

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

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

<sup>372</sup> European Union's other appellant's submission, paras. 24 and 79 (referring to Panel Report, paras. 7.29 and 8.1.a).

<sup>373</sup> European Union's other appellant's submission, para. 80.

<sup>374</sup> WT/DS442/2.

<sup>375</sup> Email correspondence of 10 and 11 July 2013 between the WTO Secretariat and the parties (Panel Exhibit IDN-2).

<sup>376</sup> Email correspondence of 12, 19, and 22 September 2014 between the WTO Secretariat and the parties (Panel Exhibit IDN-8).

<sup>377</sup> WT/DS442/3.

<sup>378</sup> Panel Report, para. 7.10.

<sup>379</sup> Panel Report, para. 7.14 (referring to European Union's request for a preliminary ruling, para. 13).

<sup>380</sup> Panel Report, para. 7.14 (referring to European Union's request for a preliminary ruling, para. 35).

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

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

5.218. The Panel then turned to the facts of this dispute and assessed Indonesia's communication of 11 July 2013. In this respect, the Panel referred to the Appellate Body reports in *EC - Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, highlighting that the Appellate Body had held that, because the relinquishment of rights granted by the DSU cannot be lightly assumed, the language in any documents alleged to waive such rights must "reveal clearly that the parties intended to relinquish their rights".<sup>384</sup> The Panel considered this to be relevant, because the practical effect of Article 12.12 is that a complainant is deprived of the right to continue with a claim in the event that 12 months pass following the suspension of a panel's work.

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

#### 5.4.3 Interpretation of Article 12.12

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

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

#### Article 12

##### Panel Procedures

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

<sup>381</sup> Panel Report, para. 7.15.a (referring to Indonesia's response to European Union's request for a preliminary ruling, paras. 4.5 and 4.7-4.8).

<sup>382</sup> Panel Report, para. 7.15.b (referring to Indonesia's response to European Union's request for a preliminary ruling, paras. 4.16 and 4.40-4.41).

<sup>383</sup> Panel Report, para. 7.20.

<sup>384</sup> Panel Report, para. 7.22 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 217).

<sup>385</sup> Panel Report, para. 7.24.

<sup>386</sup> Panel Report, para. 7.29.

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

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

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

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

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

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

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

---

<sup>387</sup> Indonesia's appellee's submission, paras. 3.42-3.57; United States' third participant's submission, para. 56.

<sup>388</sup> European Union's other appellant's submission, para. 41.

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

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

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

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

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

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

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

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

<sup>389</sup> European Union's other appellant's submission, para. 61.

<sup>390</sup> European Union's other appellant's submission, para. 79 (referring to Panel Report, para. 7.29).

<sup>391</sup> European Union's other appellant's submission, para. 69 (referring to Panel Report, para. 7.22).

<sup>392</sup> European Union's other appellant's submission, para. 75 (referring to Panel Report, para. 7.26.a).

<sup>393</sup> European Union's other appellant's submission, para. 75 (referring to Panel Report, para. 7.26.b).

<sup>394</sup> Indonesia's appellee's submission, para. 3.104.

<sup>395</sup> Indonesia's appellee's submission, para. 3.27.

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

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

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

5.236. In the circumstances of this case, the WTO Secretariat's response to Indonesia's request to "suspend" a meeting to discuss panel composition was equally irrelevant.<sup>399</sup> Because the Panel had not yet been composed, the response sent by the WTO Secretariat could not have constituted any decision by the Panel to suspend proceedings pursuant to Article 12.12 of the DSU. In light of these considerations, the first of the three findings made by the Panel was not pertinent to the question of whether the Panel's authority had lapsed. We therefore declare moot and of no legal effect the Panel's first finding, namely, that "the European Union ha[d] not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of DSU Article 12.12."<sup>400</sup> Furthermore, as we have explained above, the Panel proceedings could not have been suspended at that point, because the Panel had not yet been composed. For this reason, the Panel did not err in making its second and third findings, namely, that the Panel's work had not been suspended and that its authority had not lapsed.<sup>401</sup>

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

---

<sup>396</sup> Indonesia's appellee's submission, para. 3.25 (referring to Interpipe Judgment (Panel Exhibit IDN-49)).

<sup>397</sup> Indonesia's appellee's submission, para. 3.28 (quoting European Union's other appellant's submission, paras. 35, 36, 42, 51 and 61).

<sup>398</sup> United States' third participant's submission, para. 60.

<sup>399</sup> Email correspondence of 10 and 11 July 2013 between the WTO Secretariat and the parties (Panel Exhibit IDN-2), p. 1.

<sup>400</sup> Panel Report, paras. 7.29.a and 8.1.a.i.

<sup>401</sup> Panel Report, paras. 7.29.b and c, and 8.1.a.ii and iii.

<sup>402</sup> European Union's other appellant's submission, para. 73 (referring to Panel Report, para. 7.25).

<sup>403</sup> European Union's other appellant's submission, para. 74 (referring to Panel Report, paras. 7.27 and 7.29.a).

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

5.239. We observe that the European Union's claims of error under Article 11 of the DSU relate to the Panel's analysis of whether the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU. We have declared the finding of the Panel based on this analysis to be moot and of no legal effect. Accordingly, we find it unnecessary to rule on the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in its analysis under Article 12.12 of the DSU.

#### 5.4.5 Conclusion

5.240. We have found that only a composed panel can take the decision to suspend panel proceedings. We therefore concluded that the first of the three findings made by the Panel was not pertinent to the question of whether the Panel's authority had lapsed. Having so found, we declare moot and of no legal effect the Panel's finding, in paragraphs 7.29.a and 8.1.a.i of its Report, that the European Union had not demonstrated that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU.

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

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

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

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

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

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

<sup>404</sup> Indonesia's appellee's submission, para. 3.101.

<sup>405</sup> Panel Report, paras. 7.29.b and c, and 8.1.a.ii and iii.

<sup>406</sup> European Union's other appellant's submission, para. 182 (referring to Panel Report, paras. 7.64, 7.74, 7.80, 7.82, and 7.83).

<sup>407</sup> European Union's other appellant's submission, paras. 171-180 (referring to PT Musim Mas Judgment (Panel Exhibit EU-4)).

<sup>408</sup> Indonesia's appellee's submission, paras. 5.15-5.16.

<sup>409</sup> Panel Report, para. 1.7. The BCI Procedures are contained in Annex A-2 to the Panel Report.

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

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

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

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

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

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

<sup>410</sup> European Union's comments on the interim report.

<sup>411</sup> European Union's comments on the interim report (referring to Final Determination (Panel Exhibit IDN-4); PT Musim Mas Judgment (Panel Exhibit EU-4)).

<sup>412</sup> Indonesia's comments on the European Union's comments on the interim report, para. 3.2.

<sup>413</sup> Indonesia's comments on the European Union's comments on the interim report, paras. 3.3-3.10.

<sup>414</sup> Letter dated 23 September 2016 from the Chairman of the Panel to Indonesia and the European Union.

<sup>415</sup> Letter dated 23 September 2016 from the Chairman of the Panel to Indonesia and the European Union.

<sup>416</sup> This is because, while the challenged references in paragraphs 7.74 and 7.83 are distinct, the sentence that first appears in paragraph 7.64 is reproduced with only slight modifications in paragraphs 7.80 and 7.82 of the Panel Report.

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

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

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

## 6 FINDINGS AND CONCLUSIONS

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

### Article 2.4 of the Anti-Dumping Agreement

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

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

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

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

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

---

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

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

#### Article 6.7 of the Anti-Dumping Agreement

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

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

#### Article 3 of the DSU

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

#### Article 19 of the DSU

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

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

#### Article 12.12 of the DSU

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

- a. Having so found, we declare moot and of no legal effect the Panel's finding, in paragraphs 7.29.a and 8.1.a.i of the Panel Report, that the European Union had not demonstrated that the correspondence sent by the Permanent Mission of Indonesia to

the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU.

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

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

#### **The Panel's treatment of certain information as BCI**

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

#### **Recommendation**

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

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

---

Ricardo Ramírez-Hernández  
Presiding Member

---

Hyun Chong Kim  
Member

---

Hong Zhao  
Member

---