

**In the World Trade Organization  
Panel Proceeding**

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

**(DS442)**

**First Written Submission  
by the European Union**

**Geneva, 29 September 2015**

## TABLE OF CONTENTS

<b>1.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>2.</b>	<b>STANDARD OF REVIEW .....</b>	<b>1</b>
<b>3.</b>	<b>LEGAL ARGUMENT.....</b>	<b>3</b>
3.1.	<i>Claim 1: Indonesia’s claim that the European Union violated Articles 2.3 and 2.4 of the Anti-Dumping Agreement because of the adjustment made to the export price for the sales commissions paid to ICOF-S when calculating the ex-works export price of PT Musim Mas is without merit... 5</i>	
3.1.1.	<u>Indonesia’s argument.....</u>	<u>5</u>
3.1.2.	<u>Rebuttal by the European Union .....</u>	<u>7</u>
3.1.2.1	Factual background .....	9
3.1.2.2	Legal standard .....	21
3.1.2.3	Indonesia’s arguments that the European Union violated Article 2.4 of the <i>Anti-Dumping Agreement</i> by making an adjustment for the commission paid to a related trading company is without merit .....	25
3.1.2.3.1	Indonesia fails to demonstrate that the record evidence could not reasonably support a finding that a difference affecting price comparability existed as a result of the commission paid only with respect to export sales to a trading company. ....	25
3.1.2.3.2	Indonesia’s argument that the trading company and the Indonesian producer were part of a single economic entity is not a relevant consideration under WTO law .....	27
3.1.2.3.3	Even accepting in arguendo that investigating authorities must consider whether an SEE exist for the application of an adjustment under Article 2.4 of the <i>Anti-Dumping Agreement</i> , Indonesia has failed to demonstrate that the European Union failed to take this into consideration .....	31
3.1.3.	<u>Conclusion.....</u>	<u>36</u>
3.2.	<i>Claim 2: Indonesia’s claim that the Commission failed to undertake the required non-attribution analysis for factors other than the dumped imports causing injury in violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement is in error .....</i>	<i>36</i>
3.2.1.	<u>Indonesia’s argument.....</u>	<u>37</u>
3.2.2.	<u>Rebuttal by the European Union .....</u>	<u>38</u>
3.2.2.1	Factual Background.....	40
3.2.2.2	Legal Standard.....	41
3.2.2.3	Indonesia’s claim that the Commission failed to properly separate and distinguish the effects of the global economic crisis is flawed. ....	45
3.2.2.4	Indonesia’s claim that the Commission unduly rejected access to raw materials and fluctuations in the prices of raw	

materials as a known factor causing injury is without merit  
55

3.2.3.	<u>Conclusion</u> .....	57
3.3.	<i>Claim 3: Indonesia’s Claim that the Commission allegedly failed to disclose the results of the verification to the verified producers in violation of Article 6.7 of the Anti-Dumping Agreement is in error</i> .....	58
3.3.1.	<u>Indonesia’s argument</u> .....	58
3.3.2.	<u>European Union’s Rebuttal</u> .....	58
3.3.2.1	Factual Background.....	60
3.3.2.2	Legal Standard.....	62
3.3.2.3	Indonesia’s claim that the Commission failed to make available the results of the verification visits as required by Article 6.7 of the <i>Anti-Dumping Agreement</i> is flawed .....	64
3.3.3.	<u>Conclusion</u> .....	68
4.	<b>CONCLUSIONS</b> .....	<b>68</b>

**TABLE OF CASES CITED**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Argentina – Ceramic Tiles</i>	Panel Report, Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
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<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
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<i>EC – Fasteners (China)</i>	Panel Report, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
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<i>India – Patents (US)</i>	Appellate Body Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
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Short Title	Full Case Title and Citation
<i>Korea – Certain Paper</i>	Panel Report, Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
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<i>US – Hot-Rolled Steel</i>	Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
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<i>US – Steel Safeguards</i>	Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Zeroing (EC)</i>	Appellate Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (EC)</i>	Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521

**TABLE OF EXHIBITS**

<b>Exhibit No.</b>	<b>Title</b>
<b>EU-1</b>	Letter from the Commission to CMS Hasche Sigle dated 5 November 2010
<b>EU-2</b> (Contains BCI)	Letter regarding disclosure of provisional findings dated 11 May 2011
<b>EU-3</b>	Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community OJ L 343, 22.12.2009, p. 51
<b>EU-4</b>	Case T-26/12 <i>PT Musim Mas v Council</i> , Judgment of 25 June 2015
<b>EU-5</b> (Contains BCI)	PT Musim Mas Questionnaire Response, Attachment A-3.3.1, Table G
<b>EU-6</b> (Contains BCI)	PT Musim Mas Questionnaire Response, Attachment A-3.3.2, Table G
<b>EU-7</b>	General Disclosure document to the Amending Regulation dated 25 September 2012
<b>EU-8</b> (Contains BCI)	Provisional Disclosure document dated 11 May 2011, Annex 3
<b>EU-9</b> (Contains BCI)	Provisional Disclosure document dated 11 May 2011, Attachment “AD563 Annex 3_Calculations_PTM.xls”
<b>EU-10</b> (Contains BCI)	Letter regarding disclosure of definitive findings dated 2 August 2011

**1. INTRODUCTION**

1. Indonesia’s challenge concerns the definitive anti-dumping duties imposed on fatty alcohols from Indonesia.
2. The definitive anti-dumping measure challenged by Indonesia was imposed pursuant to Council Implementing Regulation (EU) No 1138/2011 of 8 November 2011 (“Definitive Regulation”).<sup>1</sup>
3. Indonesia brings three sets of claims relating to the European Union’s anti-dumping measure on fatty alcohols (the “AD measure”). Indonesia argues that the measure violates several provisions of the *Agreement on the Implementation of Article VI of the GATT 1947* (the “*Anti-Dumping Agreement*”) relating to the fair comparison between normal value and export price under Articles 2.3 and 2.4 of the *Anti-Dumping Agreement*, the establishment of causal link between dumped imports and the injury found to exist under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* and the procedural obligation to inform interested parties of the results of verifications under Article 6.7 of the *Anti-Dumping Agreement*.
4. The European Union considers that Indonesia’s legal claims are without merit and constitute an unwarranted attempt at obtaining from the panel a *de novo* review of the facts. Therefore, all of the claims must be rejected.
5. This submission starts with a brief reminder of the applicable standard of review in World Trade Organization (“WTO”) disputes involving the *Anti-Dumping Agreement*. Then, the European Union will address and rebut the three sets of claims that Indonesia brought against the European Union’s AD measure.

**2. STANDARD OF REVIEW**

6. The legal standard of review of WTO panels in proceedings concerning anti-dumping measures is set out in Article 11 of the *Understanding Governing the Rules and Procedures on the Settlement of Disputes* (the “DSU”) in combination

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<sup>1</sup> 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, OJ L 293, 11.11.2011, p. 1 (“Definitive Regulation”) (Exhibit IDN-4).

with Article 17.6(i) of the *Anti-Dumping Agreement*. Article 11 of the DSU provides that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

7. Moreover, Article 17.6(i) of the *Anti-Dumping Agreement* provides that:

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

8. It is well established that it is not the task of a panel to perform a *de novo* review of the evidence submitted in the challenged anti-dumping (“AD”) investigation and it shall not substitute its judgment for that of the investigating authority. This was confirmed by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*:

with respect to a panel’s review, in accordance with Article 11, of facts established by an investigating authority...a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.<sup>2</sup>

9. In the same dispute, the Appellate Body further clarified that “[a] panel may not reject an agency’s conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself”.<sup>3</sup> Therefore, in relation to AD investigations, a panel is limited to reviewing the particular

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<sup>2</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 183 (quoting Appellate Body Report, *US – Steel Safeguards*, para. 299).

<sup>3</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

determination of the investigating authority in question and to determine whether the establishment of the facts “was proper” and the evaluation of those facts “unbiased” and “objective”. In a review of an AD measure, the Panel is not the trier of fact. It is to review solely whether the investigating authority as the trier of fact properly established the facts and evaluated the facts in an objective and unbiased manner. This difference in roles of panels and investigating authorities was outlined by the Appellate Body in *US – Hot-Rolled Steel*:

[P]anels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities’ establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*.<sup>4</sup>

10. The task of the Panel, according to the Appellate Body, is to review whether the authority has provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.<sup>5</sup>
11. In sum, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgement for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.<sup>6</sup>
12. Of course, a panel must not simply defer to the conclusions of the investigating authority as a panel's examination of those conclusions must be "in-depth" and "critical and searching".<sup>7</sup>

### **3. LEGAL ARGUMENT**

13. Indonesia raises three sets of claims against the European Union’s AD measure on fatty alcohols.

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<sup>4</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 56. (emphasis original)

<sup>5</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

<sup>6</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187 – 188.

<sup>7</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

14. First, Indonesia claims that the European Union violated the obligation of Article 2.4 of the *Anti-Dumping Agreement* to make a fair comparison between normal value and export price by making an adjustment to the export price for commissions paid to a trading company, ICOF-S, with respect to export sales of the product under consideration to the European Union. Indonesia argues that the trading company was in fact operating as the sales department of PT Musim Mas, the Indonesian producer of fatty alcohols, and asserts that no adjustment was therefore warranted for the commissions paid by the producer to the trading company with which it formed a single economic entity (“SEE”). Indonesia also makes a purely consequential claim of violation of Article 2.3 of the *Anti-Dumping Agreement* given that the adjustment that was made related to the determination of the export price.
15. Second, Indonesia argues that the European Union failed to conduct a proper non-attribution examination of the effects of known factors other than the dumped imports and thus violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*. In particular, Indonesia argues that the European Commission (the “Commission”), the investigating authority of the European Union<sup>8</sup>, failed to separate and distinguish the injurious effects of the 2008 economic crisis and the difficulties of access to raw materials of producers in the European Union from the injury caused by the dumped imports.
16. Third, Indonesia alleges that the European Union violated Article 6.7 of the *Anti-Dumping Agreement* requiring that the results of on-site verifications be made available to the verified interested parties because the Commission failed to provide detailed information on the results of the on-site verification that would allow the verified interested parties to comment on the verification and the Panel to review the facts as established during verification.
17. All three sets of claims are based on an erroneous interpretation of the relevant provisions of the *Anti-Dumping Agreement* and Indonesia requests the Panel to make a *de novo* assessment of the facts on the record. An objective review of the

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<sup>8</sup> At the time of the imposition of the provisional and definitive antidumping duties in the present case, the competence for the adoption of those measures within the European Union was allocated between the European Commission and the Council. For the sake of simplicity in the present document we will simply make reference to the European Commission (the “Commission”).

determination of the Commission reveals that it properly established the facts, and examined the facts in an unbiased and objective manner. The Commission provided a reasoned and reasonable explanation that revealed that the facts on the record supported the factual findings that were made and that these factual findings supported the legal determination that led to the imposition of the AD measure on fatty alcohol from Indonesia.

3.1. CLAIM 1: INDONESIA’S CLAIM THAT THE EUROPEAN UNION VIOLATED ARTICLES 2.3 AND 2.4 OF THE ANTI-DUMPING AGREEMENT BECAUSE OF THE ADJUSTMENT MADE TO THE EXPORT PRICE FOR THE SALES COMMISSIONS PAID TO ICOF-S WHEN CALCULATING THE EX-WORKS EXPORT PRICE OF PT MUSIM MAS IS WITHOUT MERIT

**3.1.1. Indonesia’s argument**

18. Indonesia argues that the Commission made an allegedly inappropriate adjustment for the sales commissions paid to a trading company based in Singapore, ICOF-S, when calculating the ex-works export price of PT Musim Mas, the producer of the product under consideration. Indonesia alleges that by making an adjustment to the export price for a difference not affecting price comparability, the Commission violated Article 2.4 of the *Anti-Dumping Agreement* and consequentially Article 2.3 of the *Anti-Dumping Agreement* on the determination of the export price.
19. In its first written submission, Indonesia argues that the Commission’s decision to adjust the export price was based on “incorrect, arbitrarily- shifting and internally-inconsistent reasoning”.<sup>9</sup> Indonesia appears to develop two general sets of arguments on why it considers the Commission's determination to be inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.
20. First, it argues that the deduction is “legally incorrect in and of itself”,<sup>10</sup> because ICOF-S, as the alleged PT Musim Mas Group's sales department, cannot be considered as an independent trader (or as having that "function") operating at arm's length from the rest of the corporate group or from PT Musim Mas. According to Indonesia “to make an adjustment based on the contrived and artificial idea that the selling department is an independent trader or agent is

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<sup>9</sup> Indonesia’s first written submission, para. 4.5.

<sup>10</sup> Indonesia’s first written submission, para. 4.9.

simply incorrect.”<sup>11</sup> In addition, Indonesia alleges that when examining the relationship, the Commission “focused on the wrong criteria; failed to take into account record evidence that directly contradicted its findings; and was internally inconsistent, because it treated PT Musim Mas and ICOF-S as if they were simultaneously related and unrelated parties”.<sup>12</sup> It argues that the Commission thus failed to live up to the standard required of an investigating authority of providing a reasoned and adequate explanation of how the facts on the record supported its determination.

21. Second, Indonesia asserts that the Commission treated two Indonesian exporters differently in the calculation of the dumping margin. It refers to the treatment of another Indonesian exporter, Ecogreen, whose corporate and sales structure is, according to Indonesia, identical to that of PT Musim Mas. Indonesia argues that like for PT Musim Mas, Ecogreen's sales department – called Ecogreen Oleochemicals (Singapore) Pte Ltd – is based in Singapore and operates in essentially the same manner as ICOF-S. Indonesia asserts that the distinctions that the Commission has belatedly drawn between the two companies – thereby denying PT Musim Mas the same treatment as Ecogreen – are “legally unfounded and unsupported by the facts of this case”.<sup>13</sup>
22. So, the two sets of claims of Indonesia under Article 2.4 do not actually allege a violation of the “fair comparison” requirement. Indonesia rather asserts that there are two reasons why Article 2.4 has been violated:
  - First, because “the EU's reasoning behind the adjustment lacks economic logic and has no basis in the Anti-Dumping Agreement”<sup>14</sup> since the Commission “ignored the key criteria for determining the existence of a single economic entity”,<sup>15</sup> ignored record evidence and was “internally inconsistent”<sup>16</sup> in its

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<sup>11</sup> Indonesia’s first written submission, para. 4.9.

<sup>12</sup> Indonesia’s first written submission, para. 4.10.

<sup>13</sup> Indonesia’s first written submission, para. 4.14.

<sup>14</sup> Indonesia’s first written submission, para. 4.46.

<sup>15</sup> Indonesia’s first written submission, para. 4.46.

<sup>16</sup> Indonesia’s first written submission, para. 4.46.

reasoning by allegedly treating PT Musim Mas and ICOF-S simultaneously as both related and unrelated.

- Second, because it treated two companies in an allegedly identical situation differently and the EU's decision to make the adjustment for one company but not for the other “confirms the arbitrary nature of the EU's adjustment”.<sup>17</sup>

23. According to Indonesia “[b]oth of these reasons, independently and jointly, give rise to an inconsistency with Article 2.3 and 2.4 of the Anti-Dumping Agreement”.<sup>18</sup>

### 3.1.2. Rebuttal by the European Union

24. Indonesia’s claim of violation of Article 2.4 and its consequential claim of violation of Article 2.3 of the *Anti-Dumping Agreement* is fundamentally flawed and must be rejected. It is based on an inaccurate reflection of the facts on the record and is not supported by the text of the *Anti-Dumping Agreement* and relevant WTO jurisprudence. Indonesia seeks to turn an entirely factual issue into an academic legal argument about the existence or not of an SEE. Its confusing argument that the Commission should have treated PT Musim Mas and its Singapore sales company, ICOF-S, as an SEE is neither legally relevant for purposes of the fair comparison under Article 2.4 of the *Anti-Dumping Agreement* nor supported by the facts on the record.

25. Given the confusion that Indonesia created in its first written submission relating to the determination of the export price and the adjustments that were made to ensure a fair comparison between normal value and export price, the European Union first briefly sets out the facts on the record that led the Commission to make the challenged adjustment. Thereafter, the European Union will elaborate on the “fair comparison” requirement of Article 2.4 *Anti-Dumping Agreement* and the need to make adjustments for differences affecting price comparability between the export price and the normal value. Finally, the European Union will apply the legal standard under Article 2.4 to the facts on the record to demonstrate that the determination to adjust the export price was reasonable and reasoned. The sales

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<sup>17</sup> Indonesia’s first written submission, para. 4.47.

<sup>18</sup> Indonesia’s first written submission, para. 4.48.

- commissions paid by the Indonesian producer PT Musim Mas to the Singapore-based trading company ICOF-S for the export sales under consideration affected price comparability and the Commission adequately explained the reasons both for making the determination and for rejecting the arguments to the contrary of the Indonesian interested parties in the proceeding.
26. Indonesia's arguments to the contrary are without merit. The European Union considers that Indonesia's claims must be rejected for the following reasons that are developed further below.
27. First, Indonesia fails to present any evidence in support of its assertion that sales commissions were allegedly paid by the Indonesian producer PT Musim Mas to trading companies involved in domestic sales which would have required a similar adjustment on the normal value side, or no adjustment on either side. In fact, Indonesia does not dispute the fact that the record confirms that all domestic sales were made directly by PT Musim Mas and that the contractual Sale and Purchase Agreement between PT Musim Mas and ICOF-S that provided for the payment of sales commissions related to export sales only.
28. Second, Indonesia errs in its undue emphasis on whether or not the Commission should have treated ICOF-S and PT Musim Mas as an SEE. The concept of an SEE that Indonesia builds its entire Article 2.4 claim on is not a concept known in the *Anti-Dumping Agreement* and is of no relevance to the need to make a fair comparison under Article 2.4 of the *Anti-Dumping Agreement*. The limited WTO jurisprudence that Indonesia relies on in support of the importance of a determination of whether two companies are an SEE was developed in the context of Article 6.10 of the *Anti-Dumping Agreement*, an entirely different provision of the *Anti-Dumping Agreement* with a different focus and purpose.<sup>19</sup>
29. Third, and assuming *arguendo* that the nature of the relationship between the producer and the trading company was legally relevant in this case under Article

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<sup>19</sup> Article 6.10 of the *Anti-Dumping Agreement* relates to the obligation to make a determination of an individual margin of dumping, as a rule, for all producers and exporters. It is in this context that the question arose whether this rule requires an individual dumping margin determination even when certain producers or exporters are so closely related through common ownership and management as to constitute an SEE. This question is not at issue in the present case which relates to the entirely different issue of the comparison between export price and normal value under Article 2.4 of the *Anti-Dumping Agreement*.

2.4 of the *Anti-Dumping Agreement*, the Commission did not ignore the arguments and record evidence presented by PT Musim Mas concerning its relationship with ICOF-S, as Indonesia erroneously argues. The Commission reviewed the facts in light of the evidence presented by PT Musim Mas to conclude that an adjustment for the involvement of ICOF-S was warranted because this company performed functions similar to that of an agent working on a commission basis and did not function as the off-site, Singapore-based “internal sales department” of the Indonesian producer PT Musim Mas. The Commission discussed the contrary evidence (or rather the unsubstantiated assertions) presented by PT Musim Mas and evaluated the evidence in an objective and unbiased manner. It explained why the totality of the evidence before it led it to the reasonable conclusion that the two companies were not acting as an SEE. This factual finding supported the Commission’s determination to make an adjustment for the payments made to ICOF-S.

30. Fourth, the fact that, following judicial developments relating to the application of EU law, the Commission refined its definitive determination and favorably amended parts of the determination for one Indonesian producer to reflect differences in the factual situation of that producer, is not legally relevant for purposes of the consistency of the Commission’s determination with WTO law. It is not because a distinction is made between two factually different situations of two different exporters that the challenged measure becomes arbitrary or unreasonable, as Indonesia appears to argue. In any event, Indonesia fails to specify the legal obligation under the *Anti-Dumping Agreement* the European Union would have violated when it decided not to make an adjustment for the other Indonesian producer, Ecogreen.
31. In sum, the Commission’s determination to make an adjustment for the payments made to the trading company ICOF-S was reasonable and adequately explained and did not violate Articles 2.3 and 2.4 of the *Anti-Dumping Agreement*.

#### 3.1.2.1 Factual background

32. The Commission initiated the anti-dumping proceeding on 13 August 2010 by a notice published in the Official Journal of the European Union.<sup>20</sup> Questionnaires were sent to exporting producers, Union producers, importers and other stakeholders known to be concerned by the investigation. PT Musim Mas submitted its questionnaire response on 4 October 2010. The European Commission sought and verified all the information deemed necessary for its preliminary determination, and on-the-spot verification visits were organized to PT Musim Mas in Medan on 22 – 25 November 2010 and to ICOF-S in Singapore on 18 and 19 November 2010.<sup>21</sup>
33. On 11 May 2011, the Commission informed the parties of the essential facts and considerations on the basis of which provisional anti-dumping measures had been imposed.<sup>22</sup> The dumping margin calculations comparing the normal value and the export price to the European Union, were explained in Annex 2 to those provisional findings.<sup>23</sup>
34. The Commission found that the export price of PT Musim Mas to the European Union was unreliable because that was the price set by PT Musim Mas for its related importer company in the European Union, ICOF-E. In line with Article 2.3 of the *Anti-Dumping Agreement*, as reflected in Article 2(9) of the Basic Anti-Dumping Regulation of the European Union (the “Basic AD Regulation”),<sup>24</sup> the export price was therefore constructed on the basis of the first resale price invoiced by ICOF-E to independent customers in the European Union. The Commission then deducted from that value all costs incurred between importation and resale and a profit margin of 7.5% for the related European importer ICOF-E. The profit margin used to construct the export price pursuant to Article 2(9) of the Basic AD

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<sup>20</sup> Notice of initiation of an anti-dumping proceeding concerning imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, OJ C219, 13.08.2010, p. 12 (Exhibit IDN-12).

<sup>21</sup> Letter from the Commission to CMS Hasche Sigle dated 5 November 2010 (Exhibit EU-1).

<sup>22</sup> Letter regarding disclosure of provisional findings dated 11 May 2011 (Exhibit EU-2).

<sup>23</sup> Provisional Disclosure document dated 11 May 2011, Annex 2 (Exhibit IDN-33).

<sup>24</sup> Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community OJ L 343, 22.12.2009, p. 51 (the “Basic AD Regulation”) (Exhibit EU-3).

- Regulation was later reduced to 5%, as was suggested by PT Musim Mas in its observations on the provisional findings.
35. Indonesia does not take issue with the determination and construction of the export price on the above described basis.
36. The comparison between export price and normal value took place on an ex-works basis, in line with the suggestion in Article 2.4 of the *Anti-Dumping Agreement*.
37. In order to carry out a fair comparison between the normal value and the export price, a downward adjustment to the above described export price was made in order to take account of a commission paid to the trading company based in Singapore, ICOF-S, for export sales to the European Union. This adjustment was based on Article 2(10) of the Basic AD Regulation, which implements Article 2.4 of the *Anti-Dumping Agreement* into EU law. This provision requires that adjustments be made for differences in the level of trade and other differences affecting price comparability. In fact, the possibility of making an adjustment for commissions paid to intervening sales or trading companies is expressly listed in Article 2(10)(i) of the Basic AD Regulation.
38. As regards the normal value, the record shows that all domestic sales were invoiced directly by PT Musim Mas, and thus not by ICOF-S or any other trading company. By letter of 10 June 2011, PT Musim Mas made a request that, among others, an adjustment to the normal value identical to the adjustment to the export price be made pursuant to Article 2(10)(i) of the Basic AD Regulation. PT Musim Mas asserted that this was necessary because ICOF-S allegedly also handles the sales on the domestic market and forms an SEE with PT Musim Mas.
39. The European Union notes that the interested parties' focus on the relationship between PT Musim Mas and the trading company ICOF-S is understandable from the perspective of EU law given that Article 2(10)(i) of the Basic AD Regulations qualifies the possibility of making adjustment for commissions paid to trading companies in the following manner:

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. (emphasis added)

40. Given the qualification in Article 2(10)(i) that the adjustments relate only to commissions received by a trader “if the functions of such a trader are similar to those of an agent working on a commission basis”, the Indonesian interested parties logically tried to argue that ICOF-S was not performing such functions but rather acted as the sales department of PT Musim Mas. Given the relevance of this argument under EU law, the Commission examined the evidence in this respect and explained why it rejected the argument. There were several factors which prompted the Commission to make the determination that the relationship between PT Musim Mas and ICOF-S was similar to an agent working on a commission basis and not that of an internal sales department.
41. First, a significant proportion of ICOF-S’ sales concerned products of unrelated producers. In 2009, more than 50% of total sales concerned marketing and sales activities of products from unrelated producers.<sup>25</sup> It is very uncommon, to say the least, that internal sales departments engage in the marketing and the sale of products of other producers, especially at such substantial levels. On the contrary, it is very common for agents working on a commission basis to trade in products of different producers. Thus, this factor weighed heavily against a finding that ICOF-S was an internal sales department of PT Musim Mas.
42. Second, the commercial dealings between PT Musim Mas and ICOF-S were governed by a contract in the form of a Sale and Purchase Agreement (the “Agreement”) containing several provisions clearly negating a finding that ICOF-S was merely an internal sales department of PT Musim Mas.<sup>26</sup> The Agreement explicitly states that PT Musim Mas [...] The Agreement shows that the entities carried out their commercial activity under normal commercial terms, which included the payment of a sales commission of [...] or [...] to ICOF-S for the export sales it marketed and sold on behalf of PT Musim Mas.<sup>27</sup> The Agreement refers to export sales only and stipulates that [...]

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<sup>25</sup> See Case T-26/12 *PT Musim Mas v Council*, Judgment of 25 June 2015 (Exhibit EU-4), para. 54.

<sup>26</sup> Sale and Purchase Agreement for the sale and purchase of General Commodity Products, Specialty Products and other agreed products dated 1 January 2010 (“the Agreement”) (Exhibit IDN-25).

<sup>27</sup> PT Musim Mas’ Questionnaire Response dated 4 October 2010, Attachment D-1.1 Limited (Exhibit IDN-21), pp. 2 – 3.

43. Furthermore, the Agreement contains [...] This further confirms that ICOF-S was not just the internal sales department of PT Musim Mas.
44. The Agreement also makes clear that [...] as is common in case of sales through traders but not of course when sales are made through an internal sales department. It provides that [...] It further adds that any [...] Those arrangements and provisions make little sense in the context of the relations between the trade and the production department of the same entity.
45. So, both the mere existence of this Agreement as well as its specific contents supported the conclusion that ICOF-S was performing functions similar to that of an agent working on a commission basis and not that of an internal sales department.
46. Third, PT Musim Mas directly invoiced all of its domestic sales transactions without the apparent involvement of ICOF-S. Evidence on the record, such as the attachments to the original PT Musim Mas Questionnaire Response, show that [...] Even some part of the export sales were made directly by PT Musim Mas,<sup>28</sup> which further contradicts the assertion that ICOF-S performed the functions of an internal sales department of PT Musim Mas.
47. The record evidence thus demonstrated that the entities were only engaged in commercial dealings which were carried out under normal commercial terms. Leaving aside the relevance of these findings from the perspective of WTO law, it is clear that the evidence on the record supported the factual finding that was made and these factual findings reasonably supported the determination to adjust for the difference between export prices where a commission was paid for the involvement of the trading company, on the one hand, and normal value where there was no evidence of either the involvement of a trading company or commissions being paid, on the other hand.
48. The Commission communicated its determinations clearly and indicated the basis on which it reached its finding such that interested parties would be aware of the information they needed to present before the final determination as made.

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<sup>28</sup> General Disclosure document (Exhibit IDN-39), para. 31.

49. The following provides an overview of the most relevant communications relating to the above described determination.

50. First, on 11 May 2011 in the Provisional Disclosure document sent to PT Musim Mas, the European Commission explained, *inter alia*, that an adjustment for the commission for ICOF-S of [[...]] on turnover was made:

[[...]].<sup>29</sup>

51. Second, as explained in the Commission Regulation (EU) No 446/2011 (“Provisional Regulation”),<sup>30</sup> the Commission made an adjustment to the export price to ensure a fair comparison pursuant to Article 2(10) of the Basic AD Regulation due to the difference in commissions:

For the purpose of ensuring a fair comparison between the normal value and export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. On this basis, adjustments for differences in indirect taxes, transport, insurance, handling, loading and ancillary costs, packing costs, credit costs, and commissions have been made where applicable and justified.<sup>31</sup>

52. Third, on 26 August 2011 the Commission sent PT Musim Mas a letter including the General Disclosure document setting forth the main arguments and facts on the basis of which a definitive anti-dumping duty would be imposed, including information on the determination to adjust the export price:

Following provisional disclosure both Indonesian exporters pointed out that no adjustment should have been made for differences in commissions pursuant to Article 2(10)(i) for sales via the respective related traders in a third country. Both companies argued that their production companies in Indonesia and the respective related traders in Singapore form a single economic entity and that the traders in the third country act as the export department of their related Indonesian companies. However, in both cases domestic sales, as well as some export sales to third countries, are invoiced directly by the manufacturer in Indonesia, and the traders in Singapore receive a specific commission. For one of the Indonesian companies this

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<sup>29</sup> Provisional Disclosure document dated 11 May 2011, Annex 2 (Exhibit IDN-33), section 2.5.2.

<sup>30</sup> Commission Regulation (EU) No 446/2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, OJ L 122, 11 May 2011, p. 47 (“Provisional Regulation”) (Exhibit IDN-3).

<sup>31</sup> Provisional Regulation (Exhibit IDN-3), recital 38.

commission mentioned in a contract covering only export sales. Moreover, the traders in the third country also sell products manufactured by other producers, in one case also from unrelated producers. Both related traders in Singapore therefore clearly have functions which are similar to those of an agent working on a commission basis. The claim is therefore rejected.<sup>32</sup>

53. Fourth, an adequate and reasonable explanation for making the adjustment was provided in the Definitive Regulation of 11 November 2011. The Definitive Regulation addressed also the legal arguments made by some interested parties based on the jurisprudence under EU law relating to related parties and the determination of the existence of a single economic entity:

Following provisional disclosure both Indonesian exporters pointed out that no adjustment should have been made for differences in commissions pursuant to Article 2(10)(i) for sales via the respective related traders in a third country. Both companies argued that their production companies in Indonesia and the respective related traders in Singapore form a single economic entity and that the traders in the third country act as the export department of their related Indonesian companies. However, in both cases domestic sales, as well as some export sales to third countries, are invoiced directly by the manufacturer in Indonesia, and the traders in Singapore receive a specific commission. For one of the Indonesian companies this commission is mentioned in a contract covering only export sales. Moreover, the traders in the third country also sell products manufactured by other producers, in one case also from unrelated producers. Both related traders in Singapore therefore clearly have functions which are similar to those of an agent working on a commission basis. The claim is therefore rejected.

Following definitive disclosure, the Indonesian government and one Indonesian exporting producer reiterated the claim of single economic entity referred to in the previous recital. They argued that in *Matsushita v Council* (1) the Court had previously held that the fact that the producer performs certain sales functions does not mean that a manufacturing company and a trading company cannot constitute a single economic entity. Furthermore, they also claimed that sales to third countries that are carried out by the exporter directly without involving the trader in Singapore only represent a small percentage of export sales and that in the *Interpipe* judgement (2) the Court of First Instance held that small volumes of direct sales by the producer did not support the claim that there was no single economic entity. Finally, they brought forward that in *Canon v Council* (3) the fact that a sales subsidiary also acted as a distributor of products from other companies did not affect the finding of a single economic entity.

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<sup>32</sup> General Disclosure document (Exhibit IDN-39), para. 31.

Even though in *Matsushita v Council* the Court held that the institutions were in that case entitled to find that a manufacturer, together with one or more distribution companies which it controls, forms an economic entity even though it performs certain sales functions itself, it does not necessarily follow that there is an obligation to always consider a producer and its related sales companies as a single economic entity. Furthermore, unlike the Indonesian exporting producer, the manufacturer in *Matsushita v Council* did not make any direct sales itself. Secondly in the *Interpipe* judgement, the fact that direct sales by the exporting producer represented only a limited percentage of the total sales volume to the Union was only one element analysed by the Court of First Instance. More importantly, the Court stressed the fact that these direct sales were made to the new Member States for a transitional period only. In contrast, in this case, the available evidence indicates that the sales directly by the producer to certain third countries are not temporary but — at least in principle — structural, i.e. permanent. Moreover, for each producer concerned, those sales represent a considerable percentage of its domestic sales. Finally, in *Canon v Council* the sales of the sales subsidiary of the exporting producer on the domestic market included other products that were only sold under a different brand name but had nevertheless all been produced by the exporting producer itself. The claim is therefore again rejected.<sup>33</sup>

54. Fifth, on 25 September 2012 the European Commission sent a second disclosure letter to PT Musim Mas in relation to the Council Implementing Regulation (EU) No 1241/2012 of 11 December 2012 (“Amending Regulation”)<sup>34</sup> providing additional information to PT Musim Mas that demonstrates that the Commission’s gave it an adequate and reasonable explanation:

The interested parties concerned were informed of the proposal to revise the rates of anti-dumping duty, and were granted a period within which they could make representations subsequent to that disclosure in accordance with the provisions of the basic Regulation.

Comments were received from P.T. Musim Mas (PTMM), the second exporting producer in Indonesia, from one producer in the Union, and from one exporting producer in Malaysia. PTMM also asked for an opportunity to be heard by the Commission services and was granted such a hearing.

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<sup>33</sup> Definitive Regulation (Exhibit IDN-4), recitals 31 – 33.

<sup>34</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, OJ L 352, 11.12.2012, p. 1 (“Amending Regulation”) (Exhibit IDN-5).

PTMM, for which an adjustment under Article 2(10)(i) had also been made, argued that the Court judgment in joined cases *C-191/09 P* and *C-200/09 P* should result in a recalculation of its dumping margin, similar to that made for Ecogreen, without an adjustment being made pursuant to Article 2(10)(i) since once a single economic entity made up of the exporting producer and the trader is established, no adjustments under Article 2(10)(i) can be made. The company also claimed that the burden of proving that an adjustment should be made rests with the Institutions and they have not proved it in the case of PTMM. It further alleged that its circumstances were identical to those of Ecogreen, and any difference in treatment would therefore amount to discrimination.

As regards the comments made by PTMM, it should be noted that it does not follow from the Court judgment in joined cases *C-191/09 P* and *C-200/09 P* that as soon as the existence of a single economic entity is established no adjustment under Article 2(10)(i) of the basic Regulation can be made. The adjustment under Article 2(10)(i) is considered to be justified in the case of PTMM as has been explained in the definitive regulation, in communication with the company and herein below.

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

It is noted that PTMM also lodged an application (case T-26/12) before the General Court for the annulment of the definitive Regulation as far as the anti-dumping duty with regard to PTMM was concerned.<sup>35</sup>

55. Finally, the Commission provided in the Amending Regulation an extensive discussion of the main facts and arguments for adjusting PT Musim Mas' export price and for treating PT Musim Mas differently from the other Indonesian producer under investigation, Ecogreen. This regulation once again provides the reasoned and adequate explanation of why the arguments of PT Musim Mas were rejected:

As regards the comments made by PTMM, it should be noted that it does not follow from the Court judgment in joined Cases C-

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<sup>35</sup> General Disclosure document to the Amending Regulation dated 25 September 2012 (Exhibit EU-7), paras. 8 – 13.

191/09 P and C-200/09 P that as soon as the existence of a single economic entity is established no adjustment under Article 2(10)(i) of the basic Regulation can be made. The adjustment under Article 2(10)(i) is considered to be justified in the case of PTMM as has been explained in the definitive regulation, in communication with the company and below.

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...

PTMM has developed its comments based on its main claim that the existence of a Single Economic Entity (SEE) of PTMM and its trader excludes an adjustment under Article 2(10)(i) of the basic Regulation claiming that the Institutions shift the SEE doctrine laid down by the Courts to a functional approach where an analysis of the functions of the related trader would be required.

It is noted that this issue turns on a point of law that is a subject matter of a pending case.

Furthermore, PTMM claimed that the arguments in recital 12 above are not convincing and do not suffice to differentiate between the circumstances of Ecogreen and PTMM respectively.

In that regard it is sufficient to note that it is settled case-law that different treatment of companies that are not in an identical situation does not amount to discrimination. Against this background each individual case was assessed on its individual merits against the findings in the judgments of Case T-249/09 and joined Cases C-191/09 P and C-200/09 P.

First argument: *Level of direct export sales made by the producer.* PTMM submitted that it has no marketing and sales division and claimed that all the sales carried out directly by the producer in Indonesia (and not by the related trader) were only done so as to comply with legal requirements. The functions of marketing and sales were carried out by its trader in Singapore. For this reason, PTMM claimed that this argument does not justify the adjustment under Article 2(10)(i) of the basic Regulation nor the distinction

drawn between PTMM on the one hand and Interpipe NTRP VAT on the other.

Article 2(10) of the basic Regulation stipulates that a fair comparison shall be made between the export price and the normal value at the same level of trade with due account taken of differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis, due allowance in the form of adjustments shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability.

On this basis, and as explained in recital 38 of the provisional Regulation, adjustments for, inter alia, differences in commissions between export sales prices and domestic sales prices during the original investigations were considered warranted due to the differences in the sales channels between export sales to the European Union and domestic sales.

The arguments put forward by PTMM do not contradict the first argument, namely that the level of direct export sales made by PTMM is higher than that of Interpipe NTRP VAT and that this fact distinguishes PTMM from Ecogreen. Indeed, given the level of direct export sales, it can only be concluded that PTMM's export sales are performed not only from its related trader in Singapore, but also from Indonesia.

Second argument: *Significance of the trader's activities and functions concerning products sourced from non-related companies.* PTMM claimed that, whereas it did not deny that its related trader was involved in a range of different palm oil-based products, PTMM claimed that this argument was flawed, since it was based on activities beyond the scope of original investigation.

In order to assess 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 within the meaning of the judgement of the General Court in Case T-249/06, the trader's activities have to be assessed against the economic reality. There are similarities as regards the functions of the trader with regard to the product concerned and the other products traded. This is confirmed by the fact that, as discussed below in recitals 30 and 31, the relationship between PTMM and its related trader, including the functions of the latter, for most if not all products — including the product concerned — is governed by one single contract without distinguishing among products. It should be noted that the trader's overall activities were based to a significant extent on supplies originating from unrelated companies. The trader's functions are therefore similar to those of an agent working on a commission basis.

Third argument: *The existence of a contract between the trader and producer, which provided that the trader was to receive a commission for the export sales.* PTMM claimed that this contract

was a master agreement to regulate transfer prices between related parties to comply with applicable Indonesian/Singapore tax guidelines and internationally accepted guidelines on transfer pricing.

The fact that this agreement can also be used for calculating arm's length prices in accordance with applicable tax guidelines does not contradict the finding that pursuant to the agreement the trader received a commission in the form of a fixed mark-up only for its international and marketing sales activities. Indeed, the very name and the modalities of the agreement justify the finding that the contract was intended to govern the relationship between PTMM and the trader and was not limited to the transfer pricing or tax issues. The contract thus represents circumstantial evidence that the trader's functions are similar to those of an agent working on a commission basis.

In the light of the arguments presented above the Institutions have met the standard of proof required by the settled case-law: they based their findings on direct or at least circumstantial evidence. As regards PTMM, and for reasons explained above, the adjustment made to the export prices pursuant to Article 2(10)(i) of the basic Regulation is warranted and the present level of anti-dumping duty should therefore be kept.<sup>36</sup> (emphasis added)

56. Having clarified the factual background, the European Union next turns to the legal analysis from the point of view of WTO law of the claims raised by Indonesia.

#### 3.1.2.2 Legal standard

57. Article 2.4 of the *Anti-Dumping Agreement* requires that investigating authorities make a “fair comparison” between the normal value and the export price. In particular, investigating authorities shall make due allowances for any 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. Article 2.4 provides as follows:

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

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<sup>36</sup> Amending Regulation (Exhibit IDN-5), recitals 11 – 13, 20 – 32. (footnotes omitted; emphasis added)

price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

58. The Appellate Body in *EC – Bed Linen* held that Article 2.4 “sets forth a general obligation to make a fair comparison between export price and normal value”,<sup>37</sup> which is necessary in order to ensure that the methodology employed is a fair method of determining dumping.<sup>38</sup>
59. Article 2.4 of the *Anti-Dumping Agreement* requires that the comparison be made at the same level of trade, normally at the ex factory level, and with respect to sales made at as nearly as possible the same time. The requirement for a “fair comparison” is aimed at making sure that the authorities compare the prices of products that are in fact comparable. Article 2.4 therefore stipulates that the investigating authorities shall make “due allowance” for such differences that affect price comparability. Differences that affect price comparability may exist for various reasons, some of which are specifically cited in Article 2.4, i.e., conditions and terms of sale, taxation, levels of trade, quantities and physical characteristics. However, the list in Article 2.4 is not exhaustive, and the authorities must make due allowance for “any other differences which are also demonstrated to affect price comparability”.
60. There is no methodological guidance in Article 2.4 as to how due allowance for differences affecting price comparability is to be made. However, Article 2.4 sets out a number of steps that an investigating authority is to go through in order to ensure that a fair comparison is being made. In *EC – Fasteners*, the panel

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<sup>37</sup> Appellate Body Report, *EC – Bed Linen*, para. 59.

<sup>38</sup> See e.g. Panel Report, *US – Zeroing (EC)*, paras. 7.257 – 7.258.

addressed Article 2.4 of the *Anti-Dumping Agreement* and summarized the obligations contained therein as follows:

Although the obligation to make a fair comparison lies with the investigating authorities, it is for the exporters, who would be expected to have the necessary knowledge of the product in question, to make substantiated requests for adjustments in order to ensure such comparison. If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment. Moreover, the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited". If no adjustment is requested, or if an adjustment is requested with respect to a difference that is not demonstrated to affect price comparability, or if the authority determines that an adjustment is not merited, no adjustment need be made.<sup>39</sup>

61. The Appellate Body generally agreed with the legal standard adopted by the Panel. On the one hand, it noted that investigating authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited", but on the other hand it also found that:

[E]xporters bear the burden of substantiating, "as constructively as possible", their requests for adjustments reflecting the "due allowance" within the meaning of Article 2.4. If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment. Moreover, the fair comparison obligation does not mean that the authorities must accept each request for an adjustment.<sup>40</sup>

62. The Appellate Body explained that it was of the view that the last sentence of Article 2.4 adds "a procedural requirement" and requires a "dialogue" between the investigating authority and the interested parties:

The last sentence of Article 2.4 thus adds a procedural requirement to the general obligation of investigating authorities to ensure a fair comparison. The sentence imposes an obligation on the investigating authority to tell the parties what information the authority will need in order to ensure a fair comparison. Thus, whereas the exporters may be required to "substantiate their assertions concerning adjustments", the last sentence of Article 2.4 requires the investigating authorities to "indicate to the parties" what information these requests should contain, so that the interested parties will be in a position to make a request for

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<sup>39</sup> Panel Report, *EC – Fasteners*, para. 7.298.

<sup>40</sup> Appellate Body Report, *EC – Fasteners*, para. 488.

adjustments. This process has been described as a "dialogue" between the authority and the interested parties.<sup>41</sup>

63. In sum, only for differences that are demonstrated to affect price comparability should adjustments be made.<sup>42</sup> Due allowance must be made for differences between the product as sold for export and the product as sold on the domestic market such as those factors outlined in the illustrative list of Article 2.4 third sentence (e.g. conditions and terms of sale, taxation). Also any other difference which is demonstrated to affect price comparability shall be adjusted.<sup>43</sup> Accordingly, no adjustment shall be made when there is no difference affecting price comparability, i.e. factors which are unlikely to impact the price of the transaction.<sup>44</sup>
64. The interference of a sales agent in the export sale of a producer's products to a foreign market may introduce an element that can affect price comparability since it has an impact on the price of the exports when a comparable cost has not been incurred for the domestic sales, for example because no sales company was involved for the domestic sale. Commissions paid to trading companies for services rendered represent a direct selling expense that warrants an adjustment if no similar expense is demonstrated to exist on the domestic, normal value side. Given the reference in Article 2.4 to the need to make a comparison at the same level of trade and preferably at the ex-factory level, adjusting for commissions paid to sales companies for their involvement in domestic or export sales is entirely reasonable and in fact required. That is reflected in Article 2(10)(i) of the EU's Basic AD Regulation.<sup>45</sup>

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<sup>41</sup> Appellate Body Report, *EC – Fasteners*, para. 489.

<sup>42</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 156.

<sup>43</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 157 (“The elements of this list are all features, or characteristics, of the transactions that are compared. Although the list is illustrative and not exhaustive, it suggests that the adjustments, or allowances, covered by the third sentence are those that are made to take into account the differences relating to characteristics of the compared transactions (export transactions and domestic transactions.”).

<sup>44</sup> Appellate Body Report, *US – Zeroing (EC)*, paras. 156 – 157.

<sup>45</sup> Indeed, the Commission revised the adjustment determination for Ecogreen as a matter of EU law following EU jurisprudence on Article 2(10) of the Basic AD Regulation that was developed during the course of the investigation in question in Case T-249/06 *Interpipe Nikopolsky Tubes Plant Niko Tube ZAT v Council* [2009] ECR II-00383. The Commission's review of the adjustment to

65. With this in mind we turn to the specific claim of Indonesia that the adjustment made for the commission paid to the trading company ICOF-S for the sales made to the EU violated Article 2.4 of the *Anti-Dumping Agreement*.

3.1.2.3 Indonesia’s arguments that the European Union violated Article 2.4 of the *Anti-Dumping Agreement* by making an adjustment for the commission paid to a related trading company is without merit

66. Indonesia argues that the Commission made an improper deduction from the export price of PT Musim Mas and that by doing so it failed to make a fair comparison between its normal value and export price.<sup>46</sup> Indonesia does not take issue with the fact that commissions paid to trading companies may form the basis of adjustments but asserts that no such adjustments are warranted if the producer and the trading company are in such a close relationship that they form an SEE. Indonesia requests the Panel to find that the European Union has violated Article 2.4 of the *Anti-Dumping Agreement*.
67. The European Union submits that Indonesia’s claim should be rejected for a number of reasons.

*3.1.2.3.1 Indonesia fails to demonstrate that the record evidence could not reasonably support a finding that a difference affecting price comparability existed as a result of the commission paid only with respect to export sales to a trading company.*

68. Indonesia failed to establish a *prima facie* case that the commission paid to ICOF-S for its support in export sales only did not constitute a difference affecting price comparability.
69. The European Union submits that the only relevant question in this dispute is whether there was evidence on the record that allowed the Commission to reach the reasonable and reasoned conclusion that commissions were paid with respect

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Ecogreen based on this EU jurisprudence was, subsequently, found by the EU Court to be correct in Case T-26/12.

<sup>46</sup> Indonesia’s first written submission, para. 4.1.

to export sales in which a trading company was involved whereas no commissions were demonstrated to have been paid in relation to the domestic sales.

70. The answer to that question is yes, and for that reason alone Indonesia's claims must fail.
71. The evidence on the record was that there existed a contract between PT Musim Mas and ICOF-S that concerned only export sales. In that contract, it was stipulated that ICOF-S was entitled to a commission for its services.<sup>47</sup> On the domestic sales side, all sales were made directly by PT Musim Mas. There was no contract with ICOF-S for support in respect of domestic sales in Indonesia and no evidence that a commission was paid to ICOF-S with respect to the domestic sales transactions that formed the basis for the normal value determination.
72. This is clear from recitals 31 and 35 of the Definitive Regulation:

Following provisional disclosure both Indonesian exporters pointed out that no adjustment should have been made for differences in commissions pursuant to Article 2(10)(i) for sales via the respective related traders in a third country. Both companies argued that their production companies in Indonesia and the respective related traders in Singapore form a single economic entity and that the traders in the third country act as the export department of their related Indonesian companies. However, in both cases domestic sales, as well as some export sales to third countries, are invoiced directly by the manufacturer in Indonesia, and the traders in Singapore receive a specific commission. For one of the Indonesian companies this commission is mentioned in a contract covering only export sales.

...

The company further claimed that, in case the export price were to be adjusted for the commission of the related trader in the third country pursuant to Article 2(10)(i), an identical adjustment to the normal value should be made, since this trader would also coordinate domestic sales. However, the written contract between the trader and the producer in Indonesia only covers export sales. Moreover, domestic sales are invoiced by the company in Indonesia. The claim is therefore rejected.

73. It was therefore entirely reasonable of the Commission to make an adjustment to the export price for commissions paid to the trading company that related to export sales when there was no evidence of a similar commission being paid for domestic

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<sup>47</sup> Article 3 of the Agreement (Exhibit IDN-25).

sales transactions. Under Article 2.4 of the *Anti-Dumping Agreement*, it was for the Indonesian interested parties in the investigation to substantiate their claim that no adjustments were warranted or that a similar adjustment should be made to the normal value side. Similarly, it is for Indonesia as the complaining party in this dispute to carry the burden of proof. Despite all of its rhetoric, Indonesia has failed to present evidence to demonstrate that similar commissions were paid with respect to domestic sales and keeps on relying on mere assertions which remain unsubstantiated.

74. The European Union therefore did not violate Article 2.4 of the *Anti-Dumping Agreement*.

*3.1.2.3.2 Indonesia's argument that the trading company and the Indonesian producer were part of a single economic entity is not a relevant consideration under WTO law*

75. Indonesia's claim under Article 2.4 lacks a legal basis in the *Anti-Dumping Agreement*. This is strikingly obvious reading its first written submission where, in about 50 pages, Indonesia is unable to properly substantiate a relevant legal obligation in Article 2.4 that the Commission allegedly breached when adjusting PT Musim Mas' export price on the basis of the sales commission paid to ICOF-S.<sup>48</sup>
76. Indonesia has instead turned its Article 2.4 claim into an academic argument where it develops examples of different factual scenarios between two legally-separate entities from which it deduces legal criteria that it considers essential in determining whether an SEE exists and whether an adjustment under Article 2.4 is warranted. On the basis of those newly invented legal criteria, Indonesia re-states the arguments and evidence presented by PT Musim Mas in the course of the original and review investigations to argue that no deduction was warranted.
77. Before addressing Indonesia's argument, the European Union considers it useful to highlight the extent to which Indonesia actually agrees with the European Union's interpretation of Article 2.4 of the *Anti-Dumping Agreement*. For example,

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<sup>48</sup> Indonesia's first written submission, pp. 13 – 60.

Indonesia correctly notes that the key requirement for any adjustment under Article 2.4 is that a factor affects price comparability:

[t]he ultimate litmus test for any adjustment [under Article 2.4] is *that the factor being adjusted for must affect price comparability*. Only if it is “demonstrated” that a given factor “affect[s] price comparability”, an adjustment can be made.<sup>49</sup>

78. Indonesia also correctly states that the involvement of a trader in an export transaction may warrant an adjustment of the export price under Article 2.4 because it may reflect a difference in terms and conditions of sale:

Possible price adjustments under Article 2.4 of the Anti-Dumping Agreement include the commission paid to an independent trader. This adjustment would reflect differences "in conditions and terms of sale" and "levels of trade". ... This is because, in keeping with the legal standard identified above, the fee (commission) payable to the trader is a factor that affects the net ex-factory price for the product accruing to the producer/exporter.<sup>50</sup>

79. However, following its correct elucidation of relevant considerations under Article 2.4, including the acknowledgment that sales commissions may affect price comparability, Indonesia argues that whether an adjustment is warranted for a sales commission paid to a trader depends on whether that trading entity is independent.<sup>51</sup> At this point, Indonesia digresses into its convoluted scenarios to identify which criteria it considers to be important in determining whether a trader is independent, as opposed to forming an SEE with the producer of the product concerned.

80. The European Union fails to understand what the relevance is of a trader’s alleged independence for the question whether an adjustment is warranted under Article 2.4. This provision expressly provides that the determining criterion is whether a factor affects price comparability, which also Indonesia acknowledges and refers to as “[t]he ultimate litmus test for any adjustment”.<sup>52</sup>

81. The concept of an SEE does not feature in the *Anti-Dumping Agreement* or any of the WTO agreements for that matter. Indonesia fails to point to any legal basis in

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<sup>49</sup> Indonesia’s first written submission, para. 4.57. (emphasis original)

<sup>50</sup> Indonesia’s first written submission, para. 4.67.

<sup>51</sup> Indonesia’s first written submission, para. 4.69.

<sup>52</sup> Indonesia’s first written submission, para. 4.57. (emphasis original)

- Article 2.4 of the *Anti-Dumping Agreement* for requiring the authorities to examine, when making the fair comparison between normal value and export price, whether companies are related as an SEE. Nor of course would one know how to go about making such a determination in the absence of any reference even to this concept. In fact, Indonesia expressly acknowledges that “[t]here is no provision in the *Anti-Dumping Agreement* that explicitly references or defines an SEE”.<sup>53</sup>
82. Indonesia merely cites to two examples from the WTO jurisprudence in relation to Article 6.10 of the *Anti-Dumping Agreement* to argue that the concept of an SEE is “well-engrained in WTO case law”.<sup>54</sup> It considers that “several provisions in the *Anti-Dumping Agreement* – in particular Articles 2.4 and 6.10 – implicitly require consideration whether two or more formally separate entities form an SEE”.<sup>55</sup>
83. Indonesia is wrong for many reasons.
84. First of all, the fact that Indonesia has to rely from the beginning on an “implicit” requirement is telling. The Panel’s analysis of the legal obligations imposed on Members of the WTO is to be based on the text of the *Agreement*.<sup>56</sup> Indonesia’s reliance on “implied obligations” to examine a concept nowhere defined or even referenced in any of the WTO agreements reveals the weakness of its argument. The rights and obligations of Members are expressed in the text of the *Anti-Dumping Agreement* and do not include the requirement to examine whether separate legal entities are related as an SEE.
85. Second, Indonesia’s references to the two cases dealing with Article 6.10 of the *Anti-Dumping Agreement* do not stand for the proposition that authorities are “implicitly required” to examine whether companies are part of an SEE in Article

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<sup>53</sup> Indonesia’s first written submission, para. 4.120

<sup>54</sup> Indonesia’s first written submission, para. 4.120.

<sup>55</sup> Indonesia’s first written submission, para. 4.120. (emphasis added)

<sup>56</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 11-12 (“Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretive process: ‘interpretation must be based above all upon the text of the treaty’. The provisions of the treaty are to be given their ordinary meaning in their context.” (footnotes omitted)); see also Appellate Body Report, *India – Patents*, para. 45 (stating that “principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended”).

2.4 or even in Article 6.10 of the *Anti-Dumping Agreement*. Article 6.10 concerns the question whether an investigating authority is under a legal obligation to always calculate separate dumping margins which is what Article 6.10 of the *Anti-Dumping Agreement* appears to prescribe “as a rule”. The question addressed in the two cases that Indonesia refers to, *Korea – Certain Paper* and *EC – Fasteners (China)* considered the question whether authorities are allowed to deviate from that rule when legally separate producers are in fact part of an SEE. These cases do not concern the “requirement” to examine this SEE question but rather the permission to do so and the permission to calculate a single margin of dumping for those producers, despite the expressed rule of Article 6.10 of the *Anti-Dumping Agreement*. In the above referenced disputes, the panels and the Appellate Body considered it permissible for authorities to deviate from the rule given the risk of circumvention and lack of effectiveness of the measures when individual margins are determined for producers that are actually so related to one another that they could easily shift sales to those producers with lower margins. At no point in these two cases did the panels or the Appellate Body impose a “requirement” to examine this relationship.

86. Third, these two disputes on which Indonesia builds its argument that the concept of an SEE is “well-engrained” in WTO case law and which allegedly support its argument that “several provisions” of the *Anti-Dumping Agreement* and “in particular Articles 2.4 and 6.10 of the *Anti-Dumping Agreement*”, implicitly require consideration of the concept of an SEE dealt only with Article 6.10 of the *Anti-Dumping Agreement*, the one provision of the *Anti-Dumping Agreement* which expressly required authorities to calculate individual margins of dumping. The fair comparison question of Article 2.4 of the *Anti-Dumping Agreement* was completely absent from the discussion in these two cases in so far as the concept of an SEE was concerned. The jurisprudence related to SEEs that Indonesia refers to is thus irrelevant to the present dispute as these cases concern the interpretation of Article 6.10 and not Article 2.4 of the *Anti-Dumping Agreement*.
87. In sum, the European Union considers that Indonesia has not demonstrated any legal basis for its claim that the Commission violated Article 2.4 by failing to account for the alleged existence of an SEE between the Indonesian producer PT Musim Mas and the related trading company, ICOF-S. Indonesia attempts to create

an obligation in Article 2.4 that simply does not exist in the text of the Agreement and that is not supported by the WTO jurisprudence it refers to. For this reason as well Indonesia's claim under Article 2.4 and 2.3 of the *Anti-Dumping Agreement* is to be rejected.

3.1.2.3.3 *Even accepting in arguendo that investigating authorities must consider whether an SEE exist for the application of an adjustment under Article 2.4 of the Anti-Dumping Agreement, Indonesia has failed to demonstrate that the European Union failed to take this into consideration*

88. As demonstrated above, there is no legal requirement under Article 2.4 of the *Anti-Dumping Agreement* that investigating authorities must consider the existence of an SEE when making an adjustment. The only legal requirement is whether the adjustment that was made was reasonably based on a factor affecting price comparability, such as the payment of a sales commission for an agent intervening in an export transaction when there is no evidence of a similar intervention on the domestic sales side.
89. However, even accepting *in arguendo* Indonesia's argument that the relationship between companies including their status as an SEE must be considered under Article 2.4, Indonesia has failed to demonstrate that the EU authorities violated such an (non-existing) obligation in the *Anti-Dumping Agreement*.
90. In this respect, it is recalled that it is not the task of the Panel to perform a *de novo* review of the Commission's findings<sup>57</sup> and the Panel may not reject a determination simply because it would have arrived at a different outcome assessing the same facts.<sup>58</sup> However, this is essentially what Indonesia is requesting you to do.
91. In the below section, the European Union demonstrates that the determination to adjust PT Musim Mas' export price to take account of the profit made by ICOF-S was proper, unbiased and objective in light of the record evidence.

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<sup>57</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 183 (quoting Appellate Body Report, *US – Steel Safeguards*, para. 299.

<sup>58</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

92. Indonesia argues that the determination of the Commission lacked a sufficient basis in the record evidence and that it did “not justify the adjustment”.<sup>59</sup> Moreover, Indonesia considers that the Commission improperly focused on the *functions* of ICOF-S as opposed to its *corporate and structural links* to PT Musim Mas when considering that ICOF-S operated as an agent working on a commission basis.<sup>60</sup>
93. The argumentation by Indonesia demonstrates both its lack of legal basis in the *Anti-Dumping Agreement* and its inaccurate account of the record evidence in the original and review investigations.
94. First, accepting *in arguendo* that the existence of an SEE is a relevant consideration under Article 2.4, there is no basis in the text of the relevant provision for Indonesia to consider that only corporate links are the relevant criteria to determine whether an SEE exists, and not the functional relationship between the entities. In fact, the functions of the related company appear to be much more relevant given the focus on the actual services rendered. Indonesia points merely to WTO jurisprudence developed in relation to Article 6.10 of the *Anti-Dumping Agreement* which is unrelated to the present dispute, as noted earlier.<sup>61</sup> The focus on the corporate links makes perfect sense in the context of the determination of individual margins of dumping given the risk that, after the imposition of the duties, companies that are structurally linked may easily organize themselves in order to circumvent and avoid those of duties. But there is no reason to rely exclusively on this test when it comes to the fair comparison determination where the only relevant question is whether for example commissions were paid to a trading company on the export side (unlike for the domestic side) and which can be expected to be reflected in the export price. In order to make an ex-factory determination and ensure that the comparison is made at the same level of trade, the functional nature of the involvement of the trading company is a much more

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<sup>59</sup> Indonesia’s first written submission, para. 4.139.

<sup>60</sup> Indonesia’s first written submission, paras. 4.138 – 4.141.

<sup>61</sup> See paras. 85 – 86 above.

relevant consideration.<sup>62</sup> So, the EU approach reflects more closely economic reality than the exclusive focus on the corporate links advocated by Indonesia.

95. Second, the determination of the Commission to make an adjustment to PT Musim Mas' export price under Article 2.4 on the basis of ICOF-S' intervention in the export sale transactions of the product concerned to the European Union<sup>63</sup> was based on the record evidence presented by PT Musim Mas during the course of investigation. The decisive factual circumstances which led the Commission to conclude that ICOF-S acted as an agent working on a commission basis were outlined above. There were three main factual circumstances that led to the determination that ICOF-S was considered to perform functions similar to that of an agent working on a commission basis which we briefly recall here:

- First, a significant proportion of ICOF-S' overall sales related to products of producers other than PT Musim Mas. In 2009 more than 50% of total sales concerned marketing and sales activities of products from unrelated producers.<sup>64</sup> As it is very uncommon that an internal sales department would engage in commercial dealings with products of unrelated producers, especially at such substantial levels, this factor weighed heavily against a finding that ICOF-S was merely an internal sales department of PT Musim Mas;
- The commercial dealings between PT Musim Mas and ICOF-S were governed by a Sale and Purchase Agreement which contained several provisions clearly negating a finding that ICOF-S was merely an internal sales department of PT Musim Mas.<sup>65</sup> In fact, the dealings were carried out under normal commercial terms, which *inter alia* included the payment of a

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<sup>62</sup> Legal entities connected by similar corporate links can have very different functions in the context of the same industrial conglomerate, and operate with more or less independence or autonomy, depending on how intragroup relations are organized in each group.

<sup>63</sup> Amending Regulation (Exhibit IDN-5), recital 31.

<sup>64</sup> See Case T-26/12 *PT Musim Mas v Council*, Judgment of 25 June 2015 (Exhibit EU-4), para. 54.

<sup>65</sup> See the Agreement (Exhibit IDN-25).

sales commission of [...] or [...] to ICOF-S.<sup>66</sup> In addition, the Sale and Purchase Agreement included [...]; and

- All domestic sales and a significant portion of export sales were invoiced directly by PT Musim Mas without the involvement of ICOF-S. This corroborated the above mentioned factual circumstances that ICOF-S was not acting as the internal sales department of PT Musim Mas. Rather, the evidence on record demonstrated that the entities were engaged only in dealings which were carried out under normal commercial terms.

96. Thus, on the basis of the record evidence outlined above, the European Commission reasonably rejected the argument that an SEE existed and that ICOF-S operated simply as the internal sales department of PT Musim Mas. This determination was reasonable as it was based on the totality of the facts on the record which were evaluated in an unbiased and objective manner. The determination was therefore one that a reasonable investigating authority could have made.

97. Finally, the 2012 Amending Regulation engages in an extensive discussion of the main arguments and facts on the basis of which PT Musim Mas' export price was adjusted and the reasons for distinguishing the situation of PT Musim Mas from that of Ecogreen.<sup>67</sup> The decision to re-open the file and examine whether adjustments were required based on the latest EU jurisprudence is as such not relevant to the consistency of the measure with WTO law. Indonesia does not point to any legal obligation that the European Union would have violated by reducing the margin for one of its producers, in line with the arguments developed by that producer. Indonesia fails to explain what the relevance of the alleged "discriminatory treatment" from the perspective of WTO law is. The only relevant question that was addressed above is whether a reasonable and reasoned determination was made to adjust the export price of PT Musim Mas to reflect the commission paid to the trading company ICOF-S for its involvement in the export

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<sup>66</sup> PT Musim Mas' Questionnaire Response dated 4 October 2010, Attachment D-1.1 Limited (Exhibit IDN-21), pp. 2 – 3.

<sup>67</sup> See Amending Regulation (Exhibit IDN-5), recitals 9 – 13, 20 – 32.

sales when no evidence was adduced of similar costs or commissions on the domestic sales side. The answer to that question is yes.

98. In any case, and legally irrelevant as it may be, the distinction made between Ecogreen and PT Musim Mas at the time of the Amending Regulation in 2012 was not at all arbitrary. The relevant differences were explained at length and revealed a reasonable and reasoned approach to the question of adjustments in light of relevant standards of EU law. As the above quoted recitals 20-32 of the Amending Regulation explain, and as is clear from the earlier mentioned disclosure document in relation to the Amending Regulation, the following were some key differences in the situation between Ecogreen and PT Musim Mas which, on the basis of the Basic AD Regulation's reference to the functions of the trader in Article 2(10)(i) led the Commission to not making the adjustment for Ecogreen:

- *Level of direct export sales made by the producer* – PT Musim Mas had more significant amounts of direct export sales as compared to Ecogreen which only sporadically did so, using the trading company for almost all export sales;
- *Significance of the trader's activities and functions concerning products sourced from non-related companies.* The relationship between PT Musim Mas and ICOF-S is governed by a comprehensive, formal Sale and Purchase Agreement. In addition, ICOF-S has no exclusive relationship with PT Musim Mas but sells also many other products from unrelated parties. In contrast, there is no contract between Ecogreen and the trading company it relies on and the trading company sells almost exclusively products from Ecogreen;
- *The existence of a contract that provided for commissions for export sales between the trader and producer.* The contract supports the finding that pursuant to the agreement the trader received a commission in the form of a fixed mark-up only for its international and marketing sales activities. Indeed, the very name and the modalities of the agreement justify the finding that the contract was intended to govern the relationship between PT Musim Mas and the trader and was not limited to the transfer pricing or tax issues. The contract thus represents circumstantial evidence that the trader's functions are similar to those of an agent working on a commission basis. No such contract existed for Ecogreen.

99. For this reason, the European Union has demonstrated that even accepting *arguendo* that the existence of an SEE is relevant for an adjustment under Article 2.4 of the *Anti-Dumping Agreement*, the EU authorities made a proper, unbiased and objective determination when rejecting the argument that an SEE existed between PT Musim Mas and ICOF-S and when deciding to make an adjustment of the export price.
100. Leaving aside the lack of legal relevance of the fact that no adjustment was made for another Indonesian producer, the different treatment of a differently situated company was reasonable and reasoned.

### 3.1.3. Conclusion

101. Indonesia's claim under Article 2.4 of the *Anti-Dumping Agreement* must be rejected based on the law and the facts. In its first written submission, Indonesia hides behind convoluted academic arguments and a series of hypothetical scenarios which do nothing but confuse the matter and which in fact confirm the weakness of its factual and legal arguments. If one strips Indonesia's first written submission from the scenarios and the irrelevant background text, what remains is a weak factual and legal argument.
102. It was entirely justifiable and reasonable of the Commission to adjust PT Musim Mas' export price of the product concerned to the European Union to account for the commissions paid to the trading company ICOF-S which related only to export sales. This trading company provided a service similar to that of an independent agent and was paid a commission for doing so. No similar commission was paid to any trading company for domestic sales and comparing normal value and no evidence was adduced of similar expenses on the domestic sales side more generally. Whereas Indonesia may disagree with the determination of the Commission, it has failed to establish that this determination was made by a biased and un-objective authority that failed to make a reasonable and reasoned determination. For the same reason, the entirely consequential claim under Article 2.3 related to the determination of the export price must also fail.
103. For all of the above reasons, the European Union respectfully request the Panel to reject Indonesia's claims of violation of Articles 2.3 and 2.4 of the *Anti-Dumping Agreement*.

3.2. CLAIM 2: INDONESIA’S CLAIM THAT THE COMMISSION FAILED TO UNDERTAKE THE REQUIRED NON-ATTRIBUTION ANALYSIS FOR FACTORS OTHER THAN THE DUMPED IMPORTS CAUSING INJURY IN VIOLATION OF ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT IS IN ERROR

**3.2.1. Indonesia’s argument**

104. Indonesia argues that the Commission’s determination that dumped imports caused injury to the domestic industry is inconsistent with Articles 3.5 and 3.1 of the *Anti-Dumping Agreement* because the Commission allegedly failed to conduct a proper non-attribution analysis. In particular, it argues that the Commission failed properly to examine two “known factors” other than dumped imports within the meaning of the third and fourth sentences of Article 3.5, and therefore also acted inconsistently with the overarching provision of Article 3.1 and the requirement to conduct an “objective examination” on the basis of “positive evidence”. Indonesia’s claim concerns in particular the manner in which the Commission dealt with the economic/financial crisis of 2008/2009 and with the effects of the alleged difficulties faced by the domestic industry concerning access to raw materials and the fluctuations in the prices of these raw materials.<sup>68</sup>
105. With respect to the economic crisis Indonesia argues that the Commission’s analysis is inadequate to satisfy the requirements of Article 3.5 of the *Anti-Dumping Agreement*. Indonesia asserts that this is so because (1) the Commission incorrectly assumed that the effects of the financial crisis began only in 2009 and thus excluded the effects of the crisis from its 2008 analysis; (2) the Commission failed to “separate” and “distinguish” the injurious effects of the financial crisis – even though the Commission explicitly admitted the crisis had such effects – and thus could not properly conclude that a causal link existed between dumped imports and injury within the meaning of Article 3.5; and (3) the Commission failed to provide a reasoned and adequate explanation for its finding, because it failed to address the parties’ arguments and record evidence that contradicted its conclusion.<sup>69</sup>

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<sup>68</sup> Indonesia’s first written submission, paras. 5.1 – 5.3.

<sup>69</sup> Indonesia’s first written submission, para. 5.32.

106. With respect to access to raw materials, Indonesia appears to argue that the Commission’s treatment of the unsubstantiated assertion made by interested parties that alleged difficulties of access to raw materials was the real cause of injury was “inadequate”.<sup>70</sup> Indonesia points to statements on the record that the risk of price fluctuations materialized itself during the financial crisis, starting in mid-2008 as the price of the raw material decreased by over 60% between July and December 2008.<sup>71</sup>
107. According to Indonesia, PT Musim Mas provided detailed argument and evidence regarding the effects of raw material prices and of problems relating to the supply of raw materials such that this factor was “known” to the Commission and should therefore have been examined.<sup>72</sup> According to Indonesia, “once an interested party provides argument and evidence regarding a factor such that the factor becomes “known”, the investigating authority must explicitly address it”.<sup>73</sup> It claims that the Commission failed to do so as it stated merely that the interested parties failed to substantiate their arguments relating to the difficulties of access to raw materials.

### 3.2.2. Rebuttal by the European Union

108. Indonesia’s claim under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* is based on an error in its approach to the legal standard imposed by Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* and results from an inaccurate presentation of the facts on the record and of the Commission’s analysis.
109. First, with respect to the evaluation of the effect of the global financial crisis of 2008/2009, Indonesia errs when it argues that the Commission simply rejected the relevance of this “other factor” and that its assessment of the role of the crisis was not supported by the facts on the record. The Commission acknowledged that the crisis was a factor. It assessed this factor in light of the evidence on the record such as the evolution of injury factors when the crisis appeared to be over its peak to reach the conclusion that despite the economic recovery, the industry was still

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<sup>70</sup> Indonesia’s first written submission, para. 5.77.

<sup>71</sup> Indonesia’s first written submission, paras. 5.68 – 5.70.

<sup>72</sup> Indonesia’s first written submission, paras. 5.74 – 5.75.

<sup>73</sup> Indonesia’s first written submission, para. 5.74, referring to Panel Reports, *China – X-Ray Equipment*, para. 7.267; *EC – Salmon (Norway)*, para. 7.660.

- suffering injury. The Commission reviewed the evidence relating to the impact of the economic crisis and reached the conclusion that it was not such as to break the causal link between the dumped imports and the injury to the domestic industry. Indonesia is simply seeking the Panel to engage in an unwarranted *de novo* review of the facts.
110. As a legal matter, Indonesia would clearly like to read Article 3.5 as requiring the development and application of some quantitative methods for separating and distinguishing with more precision, for example, the effects of the crisis from those of the dumped imports.<sup>74</sup> However, as correctly pointed out by Indonesia, there is no legal obligation to do so and the discretion that authorities have in the context of their causation analyses is well established.<sup>75</sup> In fact, as Indonesia notes, almost all authorities apply a qualitative approach to the question of non-attribution requiring a reasoned and reasonable explanation of how the authorities separated and distinguished the injury from other factors.<sup>76</sup>
111. Second, with respect to the alleged access to raw materials as a cause of injury, Indonesia also errs both on the law and on the facts. The European Union first clarifies the manner in which this argument was addressed by the Commission before applying the correct legal framework under Article 3.5 to the facts of this case. The Commission examined the relevance of the problems in obtaining access to raw materials but could not find any evidence to confirm that this was a separate cause of injury. Rather, this difference in access to raw materials is part of the conditions of competition between imported products from Indonesia and domestic products and is reflected in the prices. No evidence was presented to support the argument that access to raw materials should have been treated as a separate cause of injury and the Commission's finding that the interested parties failed to

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<sup>74</sup> See e.g. Indonesia's first written submission, paras 5.52 ("An obvious way to separate and distinguish the extent to which the economic crisis contributed to the injury would be, for instance, to make at least a basic attempt to quantify or differentiate the decrease in demand for domestic industry products occasioned by the financial crisis and the competition from (dumped) imports, respectively. Similarly, the Commission should have attempted to quantify the price decrease brought about by the crisis and the extent of the price decrease brought about by dumped imports."); see also Indonesia's first written submission, para. 5.95.

<sup>75</sup> Indonesia's first written submission, para. 5.94.

<sup>76</sup> Indonesia's first written submission, para. 5.95.

substantiate the importance of the alleged “known factor” is thus supported by the facts on the record. It cannot be so that the authority is expected to examine every factor that is raised in the context of an investigation when no supporting evidence to substantiate the effect of this factor is provided. The very authority invoked by Indonesia clarifies that a factor becomes a “known factor affecting the domestic industry” such that the investigating authority must explicitly address it “once an interested party provides argument and evidence”<sup>77</sup> in respect of the injurious effect of that factor.

112. For all of these reasons which will further be developed below, Indonesia’s claims must be rejected.
113. The European Union first provides some factual background to the Commission’s causation and non-attribution analysis before briefly recalling the appropriate legal standard under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*. Then, the European Union addresses the two aspects of Indonesia’s erroneous claims in respect of the impact of the economic crisis and the access to raw materials.

#### 3.2.2.1 Factual Background

114. The Commission undertook a review of the effects of the dumped imports and separated and distinguished the effects of other known factors. The Commission’s causation and non-attribution analysis is developed in Section 5 of the Provisional Regulation,<sup>78</sup> and Section E of the Definitive Regulation.<sup>79</sup>
115. The Provisional Regulation indicated that “dumped imports from the countries concerned exerted pressure on the Union industry” both in terms of prices and market share, thus showing the clear impact of dumped imports to cause injury.<sup>80</sup> At the same time, the Commission analyzed other factors which could cause injury, specifically, “the imports from other countries, export performance of the Union industry and the effect of the economic crisis”.<sup>81</sup> Based on its analysis, the

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<sup>77</sup> Indonesia’s first written submission, para. 5.74, referring to Panel Report, *China – X-Ray Equipment*, para. 7.267. (emphasis added)

<sup>78</sup> Provisional Regulation (Exhibit IDN-3), recitals 94 – 110.

<sup>79</sup> Definitive Regulation (Exhibit IDN-4), recitals 86 – 102.

<sup>80</sup> Provisional Regulation (Exhibit IDN-3), recitals 94 – 98.

<sup>81</sup> Provisional Regulation (Exhibit IDN-3), recital 99.

Commission concluded that the effects of these other known factors “do not appear to be such as to break the causal link established between the dumped imports from the countries concerned and the injury suffered by the Union industry”.<sup>82</sup>

116. In the Definitive Regulation, the Commission revisited its conclusions in light of the arguments by interested parties.<sup>83</sup> Arguments related to the state of the Union industry, import trends, and others were considered and rejected by the Commission. Thus, the Commission confirmed its findings on the injury caused by dumped imports. Based on the comments and arguments of interested parties, the Commission also again considered other known factors including especially the financial crisis but also “imports from other third countries, the decrease in demand, the increased raw material prices and the lack of proper access to these raw materials, wrong strategic decisions taken by the Union industry, the competitive pressure in their downstream market, the decrease in the production of the product concerned destined for captive use, the general change in market conditions and the competitive situation in the Union market”.<sup>84</sup> However, the Commission found that “regardless of other factors”, dumped imports largely contributed to the material injury suffered by the domestic industry and thus confirmed the findings on causation in the Provisional Regulation.<sup>85</sup>

#### 3.2.2.2 Legal Standard

117. Article 3.5 of the *Anti-Dumping Agreement* provides certain obligations on an investigating authority in conducting the causation analysis in the determination of injury to the domestic industry of dumped imports. As such, determining the causal relationship between dumped imports and injury consists of two (related) parts – determining the injury caused by dumped imports, and separating and distinguishing the injury caused by “known factors other than the dumped imports”. Regarding this second “non-attribution” aspect of the analysis, the Appellate Body explained the requirements of Article 3.5:

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<sup>82</sup> Provisional Regulation (Exhibit IDN-3), recital 109.

<sup>83</sup> Definitive Regulation (Exhibit IDN-4), recitals 86 – 93.

<sup>84</sup> Definitive Regulation (Exhibit IDN-4), recitals 95 – 100.

<sup>85</sup> Definitive Regulation (Exhibit IDN-4), recital 96.

This provision requires investigating authorities, as part of their causation analysis, first, to examine all ‘known factors’, ‘other than dumped imports’, which are causing injury to the domestic industry ‘at the same time’ as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not ‘attributed to the dumped imports’.<sup>86</sup>

118. Article 3.5, however, only requires examination of other factors that are “known” – that is, those that were “clearly raised” to the authority during the investigation:

We consider that other ‘known’ factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case on *their own initiative* the effects of *all* possible factors other than imports that may be causing injury to the domestic industry under investigation....<sup>87</sup>

119. Importantly, it does not suffice to simply raise a factor for it to be examined in the context of a non-attribution analysis. The focus is on the injury caused by this “other known factor” which may not be attributed to the dumped imports. Only where evidence is adduced of such injury caused by this other factor does it become a relevant “known factor” that must be examined. This is clear from the Appellate Body’s findings in *EC – Tube or Pipe Fittings*:

Critical to the effective operation of the non-attribution obligation, and indeed, the entire causality analysis, is the requirement of Article 3.5 to “examine any known factors other than the dumped imports which at the same time are injuring the domestic industry”, for it is the “injuries” of those “known factors” that must not be attributed to dumped imports. In order for this obligation to be triggered, Article 3.5 requires that the factor at issue:

- (a) be “known” to the investigating authority;
- (b) be a factor “other than dumped imports”; and
- (c) be injuring the domestic industry at the same time as the dumped imports.<sup>88</sup>

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<sup>86</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 222.

<sup>87</sup> Panel Report, *Thailand – H-Beams*, para. 7.273. (emphasis added)

<sup>88</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

120. Based on this Appellate Body clarification, the Panel in its report on *China – X-Ray Equipment* confirmed that only those known factors other than the dumped imports for which evidence was adduced that they were causing injury must be examined by the authority as part of its non-attribution analysis:

As a general proposition, we agree with China that if there is no relevant evidence before an investigating authority to indicate that a factor is injuring the domestic industry, there is no requirement for the investigating authority to make a finding regarding whether the factor is indeed causing injury, and subsequently to proceed to conduct a non-attribution analysis. In our view, where an interested party has raised an "other factor", it would be preferable for an investigating authority to expressly state that the party has not presented evidence that the factor is injuring the domestic industry, rather than not mentioning the factor at all in its determination. However, where there is indeed no such evidence before the investigating authority, we agree that there can be no inconsistency with Article 3.1 and 3.5 in failing to conduct a non-attribution analysis.<sup>89</sup>

121. So, there is no requirement to examine a known factor for which there is no evidence that it is causing injury but it would be preferable for an investigating authority to expressly state that the party has not presented evidence that the factor is injuring the domestic industry, rather than not mentioning the factor at all in its determination. As will be explained below, that is exactly what the Commission did with respect to arguments relating to the effect of difficult access to raw materials and fluctuations in the prices of raw materials.
122. As part of the non-attribution analysis of other known factors of injury, Members are required to “separate and distinguish” the effects of other known factors from the effects of the dumped imports.<sup>90</sup> However, the Appellate Body has made it clear that there is no prescribed methodology by which the authority must separate and distinguish those other causal factors:

We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What

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<sup>89</sup> Panel Report, *China – X-Ray equipment*, para. 7.267. (emphasis added)

<sup>90</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.<sup>91</sup>

123. Indonesia correctly points this out in its first submission:

Traditionally, under WTO law, the injury and causation requirements under Article 3 of the Anti-Dumping Agreement have been interpreted as providing the investigating authority with considerable latitude as to the precise methodological approaches to be used.<sup>92</sup>

124. Indonesia thus agrees that “the Anti-Dumping Agreement does not specify a particular method for the non-attribution analysis or for ‘separat[ing] and distinguish[ing]’ the injurious effects of other factors, and inquiring into the ‘nature’ and ‘extent’ of these factors. Thus, the investigating authority enjoys a degree of discretion”.<sup>93</sup>

125. Similarly, Article 3.1 of the *Anti-Dumping Agreement* requires that injury is determined “based on positive evidence” and on “an objective examination” of the facts. However, as is clear from the text of Article 3.1, no particular method for conducting the injury analysis is prescribed with respect to Article 3.1 either. As highlighted by the Appellate Body, an investigating authority retains considerable discretion in conducting an objective examination based on positive evidence:

Mexico is correct in asserting that Articles 3.1 and 3.2 do not prescribe a methodology that must be followed by an investigating authority in conducting an injury analysis. Consequently, an investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, however, the investigating authority must ensure that its determinations are based on "positive evidence". Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.<sup>94</sup>

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<sup>91</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 223 – 224. (emphasis added)

<sup>92</sup> Indonesia’s first written submission, para. 5.94.

<sup>93</sup> Indonesia’s first written submission, para. 5.11.

<sup>94</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204 (emphasis added); see also Panel Reports, *EC – Salmon (Norway)*, paras. 7.128 – 7.129; and *EU – Footwear (China)*, para. 7.357 (citing Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 204 and *EC – Bed Linen (Article 21.5 – India)*, para. 113).

126. Indonesia does not take issue with the legal standard described above. It acknowledges the substantial degree of deference to the authorities in terms of the methodology for assessing the effects of other known factors. Yet, Indonesia attempts to heighten this standard by pointing to one panel report that noted that it “prefer[red]” the use of “economic constructs of models”.<sup>95</sup> Indonesia’s attempt to impose an obligation to conduct a quantitative rather than a qualitative analysis of the effects of other factors based on “easy-to-use quantitative analytical methods (many available in the form of simple software), such as regression analysis or basic modelling”<sup>96</sup> should be rejected. Such a quantitative approach is not required under the text of the *Anti-Dumping Agreement* and is not supported by WTO jurisprudence. The proper standard remains whether the authority properly established the facts with respect to other known factors and evaluated the evidence in an objective and unbiased manner.

3.2.2.3 Indonesia’s claim that the Commission failed to properly separate and distinguish the effects of the global economic crisis is flawed.

127. The facts on the record, as reflected in the communications and determinations of the Commission, show that the Commission separated and distinguished the effects of the global economic crisis and reached the reasonable conclusion that this factor did not break the causal link between the dumped imports and the injury found to exist.

128. Indonesia claims that the “real cause” of the injury to Union industry was the financial crisis<sup>97</sup> and argues that the Commission failed to take the effects of the crisis on domestic industry into account. Indonesia believes that the Commission did not fully and adequately examine the effects of the financial crisis. In particular, Indonesia alleges that the European Commission considered that the effects of the crisis began in 2009<sup>98</sup> and that it in any case failed to separate and distinguish the financial crisis’ effects from the effect of dumped imports as causes

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<sup>95</sup> See Indonesia’s first written submission, para. 5.15 (citing Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405) and para. 5.52.

<sup>96</sup> Indonesia’s first written submission, para. 5.95.

<sup>97</sup> Indonesia’s first written submission, para. 5.25.

<sup>98</sup> Indonesia’s first written submission, paras. 5.34 – 5.43.

of injury to the domestic industry.<sup>99</sup> According to Indonesia, the Commission failed to address PT Musim Mas’ arguments that cut against the Commission’s views.<sup>100</sup>

129. Indonesia’s claims are without merit. As is clear from the brief overview of findings below, the Commission adequately considered the effects of the financial crisis, and it found that separating and distinguishing these effects from the effects of the dumped imports did not change its conclusion that the dumped imports are a substantial cause of injury.
130. In the Provisional Regulation, the Commission recognized the economic crisis as a factor of injury. In Section 5.3.3. on “[t]he impact of the economic crisis”, the Commission provided the following analysis:

The economic crisis contributed to the contraction in consumption in the Union and to the price pressure. The reduced level of demand for the product investigated resulted in the decrease in production by the Union industry and contributed to part of the depression of sales prices.

Under normal economic conditions and in the absence of strong price pressure and increased import levels from the dumped imports, the Union industry might have had some difficulty in coping with the decrease in consumption and the increase in fixed costs per unit due to decreased capacity utilisation it experienced between 2007 and the IP. The dumped imports however have intensified the effect of the economic downturn and have made it impossible to sell above cost price.

Based on the above, it appears that the decrease in Union demand linked to the economic crisis contributed to the injury suffered by the Union industry. It is considered however that this does not break the causal link established in relation to the low-priced dumped imports from the countries concerned.<sup>101</sup>

131. The Commission acknowledged that the economic crisis was a known factor that contributed to the contraction in demand and to price pressure but that it was not such as to break the causal link established in relation to the low-priced imports. It thus reached the following conclusions on causation and non-attribution:

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<sup>99</sup> Indonesia’s first written submission, paras. 5.44 – 5.58.

<sup>100</sup> Indonesia’s first written submission, paras. 5.59 – 5.64.

<sup>101</sup> Provisional Regulation (Exhibit IDN-3), recitals 104 – 106.

The above analysis demonstrated that there was a substantial increase in the volume and market share of the low-priced dumped imports originating in the countries concerned over the period considered. In addition, it was found that these imports were made at dumped prices, which were below the prices charged by the Union industry on the Union market for similar product types.

This increase in volume and market share of the low-priced dumped imports from the countries concerned coincided with an overall and continuous decrease of consumption in the Union, during the period considered, but also with the negative development in the market share of the Union industry during the same period. Furthermore, starting from 2008, with the overall economic slowdown and Union consumption decrease, the exporters from the countries concerned managed to maintain their market share, by reducing prices, still undercutting Union price. At the same time, a further negative development in the market share of the Union industry and in the main indicators of its economic situation was observed. Indeed, over the period considered the surge in the low-priced dumped imports from India, Indonesia and Malaysia, which were constantly undercutting the prices of the Union industry, led to a drop in the Union industry's profitability, resulting in heavy losses in the IP.

The examination of the other known factors which could have caused injury to the Union industry revealed that these factors do not appear to be such as to break the causal link established between the dumped imports from the countries concerned and the injury suffered by the Union industry.

Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the dumped imports, it was provisionally concluded that the dumped imports from India, Indonesia and Malaysia have caused material injury to the Union industry within the meaning of Article 3(6) of the basic Regulation.<sup>102</sup>

132. It is also important to note that the Commission took into account the effects of the economic crisis throughout its entire investigation, including with respect to the determination of dumping as well as the injury and causation analysis. Thus, the Commission clearly recognized the impact of the crisis and separated and distinguished its impact throughout its entire analysis of dumping and injury:

*4.3.2. Volume, price and market share of dumped imports from the countries concerned*

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<sup>102</sup> Provisional Regulation (Exhibit IDN-3), recitals 107 – 110. (emphasis added)

The volume of imports from the countries concerned increased significantly by 57 % during the period considered. The biggest increase took place between 2007 and 2008 when imports increased by 58 %. ...

The market share of the countries concerned increased significantly, by 54 %, during the period considered. The biggest increase took place between 2007 and 2008. There was a slight decrease of imports during the economic crisis, which reduced the market share of the countries concerned by 2 %, between 2008 and 2009, but then they recovered again this market share by the end of the period considered.

...

#### 4.4.2. Production, production capacity and capacity utilisation

...

From 2007 to 2009, Union production decreased significantly by 23 % to improve slightly between 2009 and the end of the IP, resulting in an overall decrease of 17 % over the period considered. It should be noted that although Union consumption reduced by around 5 % between 2008 and 2009, the production of the Union industry fell much more, by 15 %, and that it failed to benefit from the recovery of the Union consumption experienced in the IP.

The production capacity of the Union industry decreased by around 2 % over the period considered. After increasing around 9 % in 2008, capacity was downsized in the following years, to result in an overall 2 % reduction over the period considered.

However, in line with the decreasing production volumes, the utilisation of the available capacity decreased by 15 % over the period considered. The main decrease occurred in 2009, during the general economic crisis, and improved slightly during the IP.

...

#### 4.4.3. Sales and market share

...

Sales volumes and market share declined between 2007 and the IP, by 18 % and 12 % respectively. At the beginning of the period considered, from 2007 to 2008, despite an increase in Union consumption, the sales volume of the Union industry decreased by 15 % and they lost 12 % of market share

4.4.7. Profitability, cash flow, investments, return on investment  
and ability to raise capital

...

Profitability of the Union industry was established by expressing the pre-tax net profit (in this case loss) of the sales of the like product as a percentage of the turnover of these sales. It was established that the profitability of the Union industry has been negative since the beginning of the period concerned in 2007 and during the period considered the losses increased significantly. After a reduction in losses in 2008, they increased again significantly in 2009, at the time of the general economic crisis. The economic recovery felt during the IP, however, allowed the Union industry to reduce its losses with respect to turnover, but it remained still far away from returning to positive profit levels.<sup>103</sup>

The trend shown by the cash flow, which is the ability of the industry to self-finance its activities, reflects to a large extent the trend of profitability. The cash flow was negative in 2007 and shows a substantial decrease during the period considered. The same comments can be made about the return on investments ...

133. Therefore, it was properly highlighted that the biggest increase in imports from the countries concerned took place between 2007 and 2008 and many economic indicators of the Union industry started to turn in the negative already in 2007, before the start of the economic crisis and continued to deteriorate over the period concerned.
134. Interested parties like PT Musim Mas raised the issue of the injury caused to the domestic industry by the economic crisis in written comments on the provisional disclosure by the Commission<sup>104</sup> and in the oral hearing. These comments were objectively considered and reviewed by the Commission, as reflected in the General Disclosure Document:

Several parties have argued that the real cause of any injury suffered by the Union industry should be attributed to the financial crisis, as the main harm to that industry occurred when imports from the countries concerned stabilized. It was also mentioned that the deterioration of the profitability of the Union

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<sup>103</sup> Provisional Regulation (Exhibit IDN-3), recitals 73, 77 – 79 and 87.

<sup>104</sup> PT Musim Mas comments on the Provisional Disclosure document (Exhibit IDN-34), pp. 31 – 37.

industry was similar to that observed for other companies operating in the chemical sector.

The crisis played a role in the performance of the Union Industry. Trends in injury factors such as capacity utilization and sales volume show that the situation of the Union Industry worsens with the crisis and somewhat improves with the recovery in the market. However, the investigation showed that the improvement did not allow the recovery of the Union industry which was far from its economic situation that prevailed at the beginning of the period considered. Furthermore, as mentioned in recital (88) above, 2008, just before the financial crisis started, was the year with the highest increase in dumped imports from the countries concerned and the sharpest decrease in sales volume of the Union industry. After that year the Union industry did not recover and the dumped imports continued to be massively present in the Union market. For these reasons it is clear that, regardless of other factors, dumped imports largely contributed to the material injury suffered by the Union Industry during the IP. This claim is therefore rejected.<sup>105</sup>

135. The Commission's company-specific disclosure to PT Musim Mas specifically addressed the claims raised by this interested party at the oral hearing:

In your presentation on 5 July you claimed that in the provisional Regulation it is not distinguished what part of the injury is attributed to the crisis and what part is due to the imports from the countries concerned. Please note that the Commission has assessed all factors that could break the causal link and has concluded that the dumped imports of the product concerned originating in the countries concerned caused injury to the Union industry to a degree that enables it to be classified as material. This material injury cannot be attributed to factors other than the dumped imports.<sup>106</sup>

136. The Commission's analysis of the impact of the financial crisis carries through to its final determination imposing definitive measures, as reflected in the Definitive Regulation:

Several parties have argued that the real cause of injury suffered by the Union industry should be attributed to the financial crisis, as the main harm to that industry occurred when imports from the countries concerned stabilised. It was also mentioned that the deterioration of the profitability of the Union industry was similar to that observed for other companies operating in the chemical sector.

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<sup>105</sup> General Disclosure document (Exhibit IDN-39), paras. 94 – 95.

<sup>106</sup> Provisional Disclosure document dated 11 May 2011, Annex 3 (Exhibit EU-8).

The crisis played a role in the performance of the Union industry. Trends in injury factors such as capacity utilisation and sales volume show that the situation of the Union industry worsened with the crisis and somewhat improved with the recovery in the market. However, the investigation showed that the improvement did not allow the recovery of the Union industry which was far from its economic situation that prevailed at the beginning of the period considered. Furthermore, as mentioned in recital 89, 2008, just before the financial crisis started, was the year with the highest increase in dumped imports from the countries concerned and the sharpest decrease in sales volume of the Union industry. After that year the Union industry did not recover and the dumped imports continued to be massively present in the Union market. For these reasons it is clear that, regardless of other factors, dumped imports largely contributed to the material injury suffered by the Union industry during the IP. This claim is therefore rejected.<sup>107</sup>

137. After analyzing and dismissing the effects of other known factors, the Commission confirmed its provisional findings on overall causation because the effects of other factors did not break the link in causation between dumped imports and injury:

The investigation did not point to the fact that there were factors other than the low-priced dumped imports from the countries concerned which were breaking the causal link between the material injury suffered by the Union industry and the dumped imports.

In the absence of any comments regarding conclusion on causation, recitals 107 to 110 of the provisional Regulation are hereby confirmed.<sup>108</sup>

138. Indonesia's argument that the economic crisis began in 2008 and that the Commission failed to adequately examine the effect of the crisis for 2008 is in error.
139. First, the period of investigation for injury covered a three and a half year period that started in January 2007 and ran through the end of June 2010.<sup>109</sup> The data that were gathered thus included the period before and after the start of the 2008/2009 economic crisis.
140. Second, it is not correct that the Commission ignored the start of the economic downturn in 2008 as it acknowledges that the economic downturn has contributed

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<sup>107</sup> Definitive Regulation (Exhibit IDN-4), recitals 95 – 96.

<sup>108</sup> Definitive Regulation (Exhibit IDN-4), recitals 101 – 102.

<sup>109</sup> Provisional Regulation (Exhibit IDN-3), recital 9.

to the decrease “from 2008”. This being said, the assertions of Indonesia that the effects of the economic crisis were already clearly felt in 2008 is contradicted by the facts on the record which show that demand was still increasing in 2008. This much is clear from the Provisional Regulation:

Consumption was established on the basis of the total sales on the Union market of the Union industry, the captive use, and the total imports (derived from Eurostat). Since the Eurostat data include also some products other than the product concerned, appropriate adjustments were made. The information is given in index numbers (2007 = 100) to preserve confidentiality.

Union consumption	2007	2008	2009	IP
tonnes	100	102	97	102
Annual Δ%		2,2 %	– 4,8 %	4,6 %

Source: Eurostat, complaint data and questionnaire replies.

During the period considered, Union consumption increased slightly by 2 %. First, from 2007 to 2008, consumption increased by 2,2 %, followed by a decrease from 2008 to 2009 by 4,8 %. From 2009 to the end of the IP, consumption recovered by 4,6 %.

The economic downturn has contributed to the decrease in consumption from 2008, during which users of the product concerned experienced a drop in demand for their products. At the start of the IP, the market situation started to improve slightly, resulting in an increase in demand for the product concerned compared to the first half of 2009.<sup>110</sup>

141. The facts on the record confirm that demand was still increasing in 2008 compared to 2007 suggesting that the economic crisis had not really hit the industry. Demand decreased by almost 5% in 2009 though, compared with the 2008 situation. This supports the Commission’s finding that 2009 is really the year in which the effects of the economic crisis were being felt by the industry. That is completely logical, as it takes some time for the effects of a financial crisis to fully translate into the “real” economy. Indeed, Indonesia admits that the financial crisis only started in the second half of 2008<sup>111</sup> (i.e. there was no crisis in the first half of 2008). Thus the Commission was not incorrect in stating that 2008 was, at least in part, “just

<sup>110</sup> Provisional Regulation (Exhibit IDN-3), recitals 64 – 66. (emphasis added)

<sup>111</sup> Indonesia’s first written submission, paras. 5.38 – 5.41.

before the financial crisis started” whilst the first whole year of the period of investigation which was entirely affected by the crisis was 2009.

142. At the same time, the Commission of course acknowledged that “from 2008” the economic downturn has contributed to the decrease in consumption. Indonesia’s argument that “the Commission's mistaken assumption that the financial crisis began only in 2009 renders the Commission's analysis inconsistent with Article 3.5” is thus simply based on a deliberately erroneous reading of the Commission’s determination.
143. Finally, as noted above, a reasonable and reasoned explanation was provided with respect to the effects caused by the economic crisis, as separated and distinguished from the injury caused by the dumped imports, supporting the determination that this factor may have contributed to the injury caused by the dumped imports but did not break the causal link.
144. The Commission examined the coincidence in developments in the injury factors and demand-related developments. Such a correlation/coincidence approach is very common in trade remedies investigations and was expressly upheld as a proper causation methodology by the Appellate Body in *Argentina – Footwear (EC)*:

We also agree with the Panel that, in an analysis of causation, "it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination." (emphasis added) Furthermore, with respect to a "coincidence" between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should "normally" occur if causation is present.<sup>112</sup>

145. Based on the information on the record that showed that demand declined significantly from 2008 to 2009 (by almost 5%) and increased again between 2009 and the period of investigation (again by almost 5%) bringing demand back to the 2007 level, the Commission examined developments in the different injury factors

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<sup>112</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 144. The Appellate Body stated it agreed with the panel’s causation analysis which the panel worded as follows: “While such a coincidence by itself cannot prove causation (because, inter alia, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present”. Panel Report, *Argentina – Footwear (EC)*, para. 8.238.

to examine whether and how they correlated with the developments in demand that were driven by the crisis.

146. The Commission acknowledged that the crisis played a role in the performance of the domestic industry as trends in injury factors such as capacity utilization and sales volume showed that the situation of the domestic industry worsened with the crisis and somewhat improved with the recovery in the market. However, the improvement of the economic situation, which saw demand going back to 2007 levels, did not bring the industry performance back to the same 2007 levels. The domestic industry's sales in volume (+ 4,3%) and value (+ 3,9%) recovered slightly, but "the Union industry was unable to benefit from the recovery of consumption, and its market share remained unchanged. In the meantime, imports from the countries concerned experienced a further increase in volume (6,6%) and market share (2%) during the IP".<sup>113</sup> So, the domestic industry did not recover when demand picked up again as the worst of the economic crisis was over.
147. Furthermore, it was found that "the biggest increase [in dumped imports] took place between 2007 and 2008 when imports increased by 58%".<sup>114</sup> So, in the period before the crisis, between 2007 and 2008, the highest increase in dumped imports from the countries concerned took place and the industry witnessed the sharpest decrease in sales volume of the Union industry. In addition, as noted in the Provisional and Definitive Regulation, in this period from 2007 to 2008, prices from the countries concerned were much lower than those of the domestic industry which resulted in a loss of market share of the Union industry of around 12%, whilst the countries concerned increased their market share by 54%. In order to respond to this pressure, the domestic industry reduced its prices in 2009. The Commission noted that although volume imports from the countries concerned decreased in volume (– 6,7%), in line with the economic downturn and the contraction in the EU market, the import price decreased more than the domestic industry's price, and this prevented the domestic industry from regaining its lost market share. The Commission found that during the period of investigation (July 2009 – June 2010), the domestic industry had to further reduce its prices whereby

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<sup>113</sup> Provisional Regulation (Exhibit IDN-3), recital 98.

<sup>114</sup> Definitive Regulation (Exhibit IDN-4), recital 71.

undercutting from the countries concerned, based on verified exporting figures, was still 3%. This is due to the fact that dumped imports continued to be massively present in the domestic market. For these reasons the Commission found that “regardless of other factors, dumped imports largely contributed to the material injury suffered by the Union industry during the IP”.<sup>115</sup>

148. Indonesia takes issue with this thorough, well-reasoned and reasonable correlation analysis but does not present any convincing arguments or evidence that suggests that this determination was not one that a reasonable and objective investigating authority could have made. This qualitative analysis based on the coincidence in developments separated and distinguished the injury caused by the economic crisis from the injury caused by the dumped imports and responded to all of the arguments presented by the Indonesian interested parties.
149. Indonesia’s claims that the European Union violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* is to be rejected.

3.2.2.4 Indonesia’s claim that the Commission unduly rejected access to raw materials and fluctuations in the prices of raw materials as a known factor causing injury is without merit

150. Indonesia quotes from PT Musim Mas’ 4 October 2010 comments on the complaint<sup>116</sup> that difficulties in having access to raw materials was a major cause of the domestic industry’s injury and an important element of Indonesian exporters’ comparative advantage.<sup>117</sup> Indonesia argues that PT Musim Mas has better (i.e. faster and cheaper) access to crude palm kernel oil (“CPKO”), which is a key input for natural (but not synthetic) fatty alcohols and that the price volatility of the economic crisis detrimentally impacted domestic producers’ access to this raw material.<sup>118</sup>

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<sup>115</sup> Definitive Regulation (Exhibit IDN-4), recital 96.

<sup>116</sup> PT Musim Mas’ Comments on the Complaint dated 4 October 2010 (Exhibit IDN-35), pp. 8 – 9.

<sup>117</sup> Indonesia’s first written submission, paras. 5.68 – 5.69.

<sup>118</sup> Indonesia’s first written submission, para. 5.70.

151. Indonesia asserts that the Commission failed to examine the effects on injury of this factor which was made “known” to the Commission by the interested parties and that by failing to examine this known factor, the Commission violated Article 3.5 of the *Anti-Dumping Agreement*. Indonesia’s argument is once again not supported by the facts on the record and based on an erroneous reading of Article 3.5 of the *Anti-Dumping Agreement*. In addition, this argument is derivative of the preceding argument regarding the overall impacts of the economic crisis.<sup>119</sup>

152. The Definitive Regulation responded to the arguments on this raw materials point in the following manner:

Several parties also claimed that the real cause of the alleged injury of the Union industry was the imports from other third countries, the decrease in demand, the increased raw material prices and the lack of proper access to these raw materials, wrong strategic decisions taken by the Union industry, the competitive pressure in their downstream market, the decrease in the production of the product concerned destined for captive use, the general change in market conditions and the competitive situation in the Union market.

It is worth mentioning that the above parties were not able to substantiate their claims and to demonstrate that factors other than the low-priced dumped imports from the countries concerned were breaking the causal link between the injury suffered by the Union industry and the dumped imports.<sup>120</sup>

153. The Commission did not separately examine the effects of this potential other factor that was raised by interested parties for several reasons.

154. First, Article 3.5 of the *Anti-Dumping Agreement* refers to “any known factors other than the dumped imports which at the same time are injuring the domestic industry” and not simply to “any factor that is made known” to the authorities

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<sup>119</sup> As an aside, it is important to note that the manner in which interested parties like PT Musim Mas referred to this question of difficult access to raw materials reveals that they did not actually consider it to be an independent, separate cause of injury or an “other factor”. Rather, it is referred to as an issue that “played a crucial role in the complainants’ competitiveness and profitability” and that confirms that the European producers are at a structural “disadvantage” compared with their Indonesian competitors. See PT Musim Mas’ Comments on the Complaint dated 4 October 2010, (Exhibit IDN-35), p. 8, as reflected in Indonesia’ first written submission, paras. 5.68 – 5.69. Therefore, the raw materials issues are not even presented as an independent cause of injury, but rather as a structural issue. That being the case, they cannot be a separate cause of injury because without the dumped imports the structural disadvantage should not logically cause injury as it has always been there.

<sup>120</sup> Definitive Regulation (Exhibit IDN-4), recitals 97 – 98.

without any evidence to support the assertion that this factor is one which “at the same time is injuring domestic producers”. As noted before, and as confirmed by the Appellate Body in *EC – Tube and Pipe Fittings*, the non-attribution focus in Article 3.5 is on the injury caused by the other factors. Therefore, absent evidence of injury caused by the other factor that is raised by an interested party, there is no requirement to examine such a factor.<sup>121</sup>

155. As Indonesia appears to have admitted, in so far as the price volatility of raw materials is concerned, the issue is closely linked to the economic crisis which clearly was examined by the Commission as a contributing factor. And, in so far as the argument is simply that European producers have greater difficulty obtaining access to raw materials than Indonesian producers do and that this is an important “comparative advantage” of Indonesian producers, it is not a factor causing injury but simply an aspect of the conditions of competition that may be reflected in price differences between the imported products from Indonesia and domestic products. The easier access to raw materials is a given, geographically determined constant that exists in general. As such it has a bearing on the cost of production but cannot be a cause of injury, as it was always there. The cause of injury should be a change that materializes at some point in time and not a structural characteristic of the market which is not subject to changes.
156. Finally, as Indonesia highlighted at point 1.2 of its FWS, “synthetic fatty alcohols” are very similar and entirely substitutable to “natural fatty alcohols”. Synthetic fatty alcohols are produced from petrochemical sources and not CPKO. Hence, any comparative advantage in accessing this raw material should not be overestimated as entirely substitutable products can be produced from other raw materials.
157. In sum, it is not so that the Commission ignored the arguments that were made. However, to the extent relevant, they were examined not as a cause of injury but as

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<sup>121</sup> As the Panel in *China – X-Ray Equipment* explained, there is no requirement to examine such a factor but it is preferable that the authority confirm that no evidence was adduced of the relevance of this factor in terms of its contribution to the injury rather than to simply omit making any reference to a factor that was raised in this respect. Panel Report, *China – X-Ray equipment*, para. 7.267. That is exactly what the Commission did when it referred to the raw materials-related factor and stated that “the above parties were not able to substantiate their claims”. Definitive Regulation (Exhibit IDN-4), recital 98.

part of the element of the conditions of competition that is addressed in the injury analysis, among others in the context of price developments. In addition, in so far as changes to the prices of raw materials are related to the economic crisis, as they were in this case, they are subsumed in the analysis of this known factor causing injury.

158. It does not suffice for interested parties to simply make any factor “known” to the authorities to expect that this factor will be examined in the non-attribution analysis. When it is so clear that this factor is actually an existing “condition of competition” and an element of the price of the product rather than a separate cause of injury, the authority is entitled to reject further evaluation of this factor for lack of substantiation. Indonesia has failed to establish that the Commission’s determination was not based on positive evidence, involved a biased examination of the evidence or failed to examine any known factors affecting the industry other than the dumped imports.
159. Indonesia’s arguments of violation of Article 3.1 and 3.5 are to be rejected.

### **3.2.3. Conclusion**

160. Indonesia’s claims under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* are based on an erroneous legal approach and are not supported by the facts on the record. Indonesia seeks to impose a legal obligation to conduct a quantitative analysis that is not required under the *Anti-Dumping Agreement*. The Commission properly evaluated all known factors causing injury and separated and distinguished their effects in a qualitative way that led to the reasonable and reasoned conclusion that these factors may have contributed to the injury but did not break the causal link between the dumped imports and the injury to the domestic industry.
161. The European Union therefore respectfully requests the Panel to reject Indonesia’s claims under Article 3.1 and 3.5 of the *Anti-Dumping Agreement*.

### **3.3. CLAIM 3: INDONESIA’S CLAIM THAT THE COMMISSION ALLEGEDLY FAILED TO DISCLOSE THE RESULTS OF THE VERIFICATION TO THE VERIFIED PRODUCERS IN VIOLATION OF ARTICLE 6.7 OF THE ANTI-DUMPING AGREEMENT IS IN ERROR**

#### **3.3.1. Indonesia’s argument**

162. Indonesia claims that the report of the results of the verification that the Commission provided together with its disclosure documents was not “sufficient” and did not actually present the “results” of the investigation thus violating Article 6.7 of the *Anti-Dumping Agreement*. It asserts that “contrary to Article 6.7, the EU did not disclose any meaningful information about the results of the verification visits to the premises of the Indonesian exporters and their affiliates”.<sup>122</sup> According to Indonesia, referring to the conclusion reached by the panel in *Korea – Certain Paper*, the “results” of verifications include “adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully”.<sup>123</sup>
163. It argues that the Commission was obliged to make the results of the verification available, or provide it under disclosure of essential facts under Article 6.9 and asserts that “the content of the disclosure of the verification results must provide detailed and adequate information regarding all aspects of the verification visits”.<sup>124</sup> Indonesia considers that the Commission’s disclosure of the verification results “through only one general statement in the Disclosure of Provisional Findings does not satisfy the EU’s obligation in Article 6.7”.<sup>125</sup>

### 3.3.2. European Union’s Rebuttal

164. Indonesia’s claim is based on a misrepresentation of the facts and a misreading of the legal obligation imposed by Article 6.7 of the *Anti-Dumping Agreement*.
165. The European Union first provides a more complete overview of the communications between the Commission and interested parties on the results of the verification visits to show that Indonesia’s assertions about the lack of disclosure of the results of on-site verifications are not supported by the facts on the record. It is not so that the Commission only made one general statement in the Disclosure of the Provisional Findings and that “this represents the sole statement

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<sup>122</sup> Indonesia’s first written submission, para. 6.1.

<sup>123</sup> Indonesia’s first written submission, paras. 6.30 – 6.31.

<sup>124</sup> Indonesia’s first written submission, para. 6.61

<sup>125</sup> Indonesia’s first written submission, para. 6.61.

- of the results of the verifications in the Commission's disclosures”<sup>126</sup> as asserted by Indonesia.
166. Thereafter, the European Union will turn to the errors of law and fact that vitiate Indonesia’s claim.
167. The requirement of Article 6.7 does not impose any standard of specificity but rather imposes a broadly worded obligation to “make available” the results of the verification or “provide disclosure” of the results “pursuant to” Article 6.9 of the *Anti-Dumping Agreement*. Article 6.9 in turn refers to the disclosure of the “essential facts under consideration which form the basis for the decision whether to apply definitive measures”. The requirement to make available the results of the verification is thus related to the need to inform the producers of the essential facts including any data-related concerns relating to the verification. The purpose is to inform parties of verification-related developments that could potentially have consequences for the final determination. Article 6.7 does not impose a “reporting” obligation, as Indonesia seems to suggest, but a mere obligation to “make available” or “disclose” the results to the relevant interested parties. Article 6.7 therefore clearly does not require the Commission to prepare minutes of the verification as Indonesia is suggesting to be required or to prepare lengthy explanations and descriptions on aspects of the verification which had no further consequences.
168. Before the Commission, the Indonesian verified producers did not complain about a lack of transparency concerning the disclosure of the results of the verification and actively engaged in the dialogue that the Commission initiated during and after verification on the material issues. The Commission therefore complied with its obligation under Article 6.7 of the *Anti-Dumping Agreement*.
169. Indonesia’s claim is based on an erroneous reading of the obligation of Article 6.7 and a misrepresentation of the facts on the record and must therefore be rejected.

### 3.3.2.1 Factual Background

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<sup>126</sup> Indonesia’s first written submission, para. 6.53.

170. The European Commission provided full disclosure of the essential facts relating to its final determination to the relevant Indonesian firms, including the results of the verification visits.
171. The on-the-spot verification of PT Musim Mas took place from 22 to 25 November 2010 in PT Musim Mas’s Medan offices and from 18 to 19 November 2010 in the Singapore offices of Besdale and ICOF-S. Prior to these visits, the European Commission provided by letter of 5 November 2010 an overview of the procedures for the planned visit and an extensive list of information and documentation to be prepared by the companies in advance of the visit.<sup>127</sup>
172. On 11 May 2011, the Commission disclosed by letter to PT Musim Mas its provisional findings, including three annexes:
- (i) a copy of the provisional Regulation published in the EU’s Official Journal on 10 May 2011 detailing the Commission’s provisional findings;
  - (ii) the methodology for dumping calculations and dumping calculations; and
  - (iii) the methodology for undercutting calculations and injury calculations.<sup>128</sup>
173. In the first annex, the Provisional Regulation, the Commission noted that it had conducted verification visits at Union producers, importers and users as well as exporting producers in the three countries under investigation, including from Indonesia “P.T. Musim Mas and its related companies, Medan, Singapore, Hamburg”.<sup>129</sup> At multiple points, the Provisional Regulation indicates that its findings are based on verified information from Union firms as well as exporters from concerned countries.<sup>130</sup> In the second annex, the “Calculation of dumping margin – PTMM”, the opening general section emphasizes that this calculation

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<sup>127</sup> Letter from the Commission to CMS Hasche Sigle dated 5 November 2010 (Exhibit EU-1).

<sup>128</sup> Letter regarding disclosure of provisional findings dated 11 May 2011 (Exhibit EU-2).

<sup>129</sup> Provisional Regulation (Exhibit IDN-3), recital 8(e).

<sup>130</sup> See e.g. Provisional Regulation (Exhibit IDN-3), recitals 63, 98, 118 and footnote 1. Only a minimal amount of information was not capable of verification based on the failure to provide sufficient, requested data. See Provisional Regulation (Exhibit IDN-3), recital 115.

- was based on verified information<sup>131</sup> and provides the information amended through verification where relevant.<sup>132</sup> The same is true of the third annex.<sup>133</sup>
174. The company specific disclosure document thus explained clearly that the Commission services performed on-the-spot verifications during which the information submitted in the questionnaire reply was verified and additional information was obtained and that [...]
175. Following this May 2011 disclosure by the Commission to PT Musim Mas, the Indonesian producer provided its comments in response<sup>134</sup> and also defended its interests at a 5 July 2011 oral hearing before the Commission.
176. The final disclosure by the Commission which was sent to PT Musim Mas on 2 August 2011 included three annexes:
- (i) General Disclosure Document (“GDD”);
  - (ii) Definitive dumping calculation (full calculation on CD-R); and
  - (iii) Company specific reply to arguments not addressed in detail in the GDD.<sup>135</sup>
177. The GDD highlighted the procedural steps the Commission had taken to disclose all essential facts and considerations, including its efforts to verify the information,<sup>136</sup> and it noted certain information from Indonesian exporters that could not be verified.<sup>137</sup>
178. Finally, the definitive Regulation imposing definitive measures reiterated the GDD’s procedural steps regarding the verification of information and reliance on essential facts as a basis for the measures.<sup>138</sup>

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<sup>131</sup> Provisional Disclosure document dated 11 May 2011, Annex 2 (Exhibit IDN-33), p. 1.

<sup>132</sup> Provisional Disclosure document dated 11 May 2011, Annex 2 (Exhibit IDN-33), pp. 2 – 5.

<sup>133</sup> Provisional Disclosure document dated 11 May 2011, Annex 3 (Exhibit EU-8) and Attachment “AD563 Annex 3\_Calculations\_PT.M.xls” (Exhibit EU-9).

<sup>134</sup> PT Musim Mas comments on the Provisional Disclosure document (Exhibit IDN-34).

<sup>135</sup> Letter regarding disclosure of definitive findings dated 2 August 2011 (Exhibit EU-10).

<sup>136</sup> General Disclosure document (Exhibit IDN-39), paras. 4 – 7.

<sup>137</sup> General Disclosure document (Exhibit IDN-39), paras. 20, 29, 36, 41, 48, 59, 65, 66, 99 and 117.

<sup>138</sup> Definitive Regulation (Exhibit IDN-4), recitals 4 – 7.

179. It provided further information regarding the verification of information from interested parties regarding essential facts raised in the GDD.<sup>139</sup>

### 3.3.2.2 Legal Standard

180. Article 6.7 of the *Anti-Dumping Agreement* provides for the possibility of verification visits and lays out the general obligations that apply to investigating authorities if they undertake such a procedure:

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.

181. This provision makes clear that the authorities are not required to conduct a verification visit<sup>140</sup> but rather gives permission to do so (“may carry out...”). When conducting a verification visit or “on-the-spot investigation,” the authorities are subject to the procedures in Annex I. Regarding the disclosure of the results of the verification to the verified firms, Article 6.7 allows for two methods: the investigating authority either “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”. The results “may” be made available to the applicants, but there is no obligation to do so.
182. Article 6.9 of the *Anti-Dumping Agreement* provides that the authorities shall “inform all interested parties of the essential facts under consideration” on which the definitive determination is based, and adds that this should be done “before a final determination is made” and “in sufficient time for the parties to defend their interests”.

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<sup>139</sup> Definitive Regulation (Exhibit IDN-4), recitals 20, 29, 38, 43, 45, 48, 50, 61, 67, 68, and 119.

<sup>140</sup> Panel Report, *Argentina – Ceramic Tiles*, footnote 65.

183. Thus, the results of a verification visit can be disclosed to the relevant producers or exporters by “making available” the outcome of the on-the-spot investigations to the relevant firms directly, or through the disclosure of the outcome of the verification visit as a part of the general obligation to disclose “essential facts” of the decision to all interested parties, in accordance with Article 6.9. Investigating authorities have a measure of discretion in the method chosen to “make available” these results. In fact, the panel in *Korea – Certain Paper* “agree[d] with Korea that Article 6.7 does not require written disclosure” and that it merely “requires that the verification results be disclosed to the investigated exporters without specifying the format in which such disclosure is to be made”.<sup>141</sup>
184. As for the content of the “results” of a verification visit, the *Anti-Dumping Agreement* provides no definition or guidance regarding the exact content of the disclosure. The ordinary meaning of the term “results” is “the effect, consequence, issue, or outcome of some action, process or design”<sup>142</sup> and suggests that what needs to be made available is not the process as such but rather the “outcome” of that process.
185. The context of Article 6.9 relating to the “essential facts” on which the determination will be made supports that reading of the term “results” as referring to the outcome of the verification with respect to the essential facts under consideration as established through the on-the-spot investigation. For example, and that has been the main focus in prior disputes, if certain information is not provided at the time of the on-site verification or information that was previously provided is contradicted by information that became available during the Article 6.7 on-site verification, an authority may resort to the use of facts available under Article 6.8 of the *Anti-Dumping Agreement*. It is important that the verified producer is properly informed of the fact that the use of facts available was the result of information obtained during the on-site verification. That is the kind of disclosure that needs to be included in a disclosure of the essential facts under Article 6.9 of the AD Agreement. Articles 6.6, 6.7, 6.8 and 6.9 are all part of a

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<sup>141</sup> Panel Report, *Korea – Certain Paper*, para. 7.188.

<sup>142</sup> A. Stevenson (ed.), *The Shorter Oxford English Dictionary*, 6th ed., (Oxford University Press, 2007), p. 2554.

continuum and these different provisions provide important context for the obligations contained in each of these provisions. The context in which, and the reasons why, Article 6.7 of the *Anti-Dumping Agreement* requires the results of the on-site verification to be made available, as well as its direct cross-reference to Article 6.9 of the *Anti-Dumping Agreement* thus confirm that the term “results” refers to the essential factual outcome of the verification and does not require a full report on everything that happened during the on-site verification.

186. In this respect, Indonesia’s description of what it would like to see included in reports on the results of the verification visit<sup>143</sup> is not based on the ordinary meaning of the term “results” when read in its context and it is not supported by any Appellate Body guidance.<sup>144</sup> There is no requirement that the authority prepare written “minutes” of the verification visit<sup>145</sup> even though this seems to be what Indonesia is actually arguing is required under Article 6.7 of the *Anti-Dumping Agreement*.

3.3.2.3 Indonesia’s claim that the Commission failed to make available the results of the verification visits as required by Article 6.7 of the *Anti-Dumping Agreement* is flawed

187. The European Union first summarizes once again the main facts on the record that confirm that the results of the verification were made available to PT Musim Mas as required by Article 6.7 of the *Anti-Dumping Agreement*.
188. As a preliminary matter, the European Union notes that at the end of each verification, the Commission and the verified producer agree on a list of exhibits collected during the verification. So, there is an agreement on the documents that are copied and collected by the investigators during the on-the-spot verification. That is already one important aspect of the way in which the results of the on-site verification are made available.

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<sup>143</sup> Indonesia’s first written submission, paras. 6.28 – 6.30.

<sup>144</sup> Indonesia merely cites anecdotally to the statements of some panels on investigating authorities’ practices such as found in Panel Reports, *Korea – Certain Paper*; *Mexico – Steel Pipes and Tubes*; *US – Steel Plate*.

<sup>145</sup> Panel Report, *Korea – Certain Paper*, para. 7.188.

189. Moreover, in the 11 May 2011 provisional disclosure, the Commission included two annexes of company-specific findings relating to PT Musim Mas:

- (i) the methodology for dumping calculations and dumping calculations; and
- (ii) the methodology for undercutting calculations and injury calculations.<sup>146</sup>

190. In the annex “Calculation of dumping margin – PT Musim Mas”, the opening general section emphasized that this calculation was based on verified information:

[[...]]

191. As mentioned in this excerpt, the provisional finding on the dumping margin for PT Musim Mas focused on the updated and corrected information that resulted from the verification visit. Thus, to the extent that the underlying information used to calculate the dumping margin in the provisional regulation differed from the original information provided by PT Musim Mas, such updated information reflects the results of the verification process. These differences and amendments were outlined by the Commission in this annex.

192. For example, the Commission noted that the “profitability test” of the “normal value determination” was based on certain information that resulted from the on-the-spot investigation:

[[...]]

193. Further, the Commission reviewed PT Musim Mas’ requests for some adjustments to normal value based on [[...]], which, as indicated in the opening paragraph of this annex quoted above, was based on information from PT Musim Mas that was verified through the on-spot investigation.<sup>147</sup> Likewise, adjustments to the export price were analyzed [[...]] and verified with:

- [[...]]

194. All of the worksheets that the Commission referenced and disclosed to PT Musim Mas as a part of this annex were based on verified information and were included

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<sup>146</sup> Letter regarding disclosure of provisional findings dated 11 May 2011 (Exhibit EU-2).

<sup>147</sup> Provisional Disclosure document dated 11 May 2011, Annex 2 (Exhibit IDN-33), section 2.5.1.

- in the disclosure to PT Musim Mas via the Excel file entitled “AD 563 PTMM prov discl.xls”<sup>148</sup>
195. In the next annex, the European Commission provided its calculation of the provisional undercutting and injury margins in an Excel file, which specifically noted that the post-importation adjustment was [...] Additionally, the accompanying note on the methodology outlines information that the Commission relied on in its injury calculations as obtained from the Union industry and co-operating exporting producers, based on information provided by PT Musim Mas and verified by the Commission through its on-spot investigation.<sup>149</sup>
196. As noted above, after this May 2011 disclosure by the Commission to PT Musim Mas, the Indonesian producer provided written comments<sup>150</sup> and participated in an oral hearing. The written and oral comments from PT Musim Mas reveals that the provisional disclosure letter from the Commission was sufficient to allow PT Musim Mas to respond to these factual findings and to provide a defense of its interests.
197. In sum, it is clear that the Commission made available the results of its on-site verification visits in direct disclosures to PT Musim Mas. It provided ample information to allow PT Musim Mas to contest the essential facts on which the Commission was basing its determination, and indeed PT Musim Mas provided its comments in writing and orally.
198. Importantly, at no point in time did PT Musim Mas express a concern over the lack of detail in the information relating to the verification visits that was made available to it. The Commission did not receive any formal request to obtain minutes of the verification visits or for additional information relating to the verification visit.
199. As highlighted above, there is no obligation to prepare minutes of the verification visit but only to make available the “results” of the verification visits, as the Commission clearly did. In fact, there is not even an obligation to disclose the

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<sup>148</sup> Provisional Disclosure document dated 11 May 2011, Annex 2 (Exhibit IDN-33), p. 5.

<sup>149</sup> Provisional Disclosure document dated 11 May 2011, Annex 3 (Exhibit EU-8), pp. 1 – 2.

<sup>150</sup> PT Musim Mas comments on the Provisional Disclosure document (Exhibit IDN-34).

results of the verification in a written document as an oral disclosure suffices, as the panel in *Korea – Certain Paper* found. Clearly then, Indonesia’s suggestions that a detailed report on the results of the verification is important also for the Panel to review this disclosure are baseless.<sup>151</sup> It is the disclosure of the essential facts under Article 6.9 that fulfills this important role. However, Indonesia has not made a claim that the European Union failed to properly inform the interested parties of the essential facts under consideration under Article 6.9 of the AD Agreement and the final disclosure document must therefore be understood to have been adequate in any case.

200. In sum, Article 6.7 concerns only the “results” or “the effects, consequences, issues, or outcomes of some action, process or design”<sup>152</sup> and does not require that a report be prepared including an overview and description of everything that happened or did not happen during verification or the reasons why certain information was requested during verification. Such outcomes were reported at the end of the verification, in the specific disclosures and of course in the General Disclosure Document and the Provisional and Definitive Regulations. In any case, as noted before, Indonesia failed to include a challenge under Article 6.9 of the *Anti-Dumping Agreement* thus suggesting that it is satisfied with the disclosure of the essential facts which may include the results of the verification visit under Article 6.7 of the *Anti-Dumping Agreement*.
201. Indonesia’s claim of violation of Article 6.7 is therefore without merit.

### 3.3.3. Conclusion

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

## 4. CONCLUSIONS

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<sup>151</sup> Indonesia’s first written submission, para. 6.44.

<sup>152</sup> A. Stevenson (ed.), *The Shorter Oxford English Dictionary*, 6th ed., (Oxford University Press, 2007), p. 2554.

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