EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN FATTY ALCOHOLS FROM INDONESIA (WT/DS442)

QUESTIONS FROM THE PANEL FOLLOWING THE FIRST MEETING OF THE PANEL WITH THE PARTIES

21 DECEMBER 2015

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
China – GOES	Appellate Body Report, China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States, WT/DS414/AB/R, adopted 18 October 2012
China – X-Ray Equipment	Panel Report, China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union, WT/DS425/R and Add.1, adopted 24 April 2013
EC and certain member States — Large Civil Aircraft	Appellate Body Report, European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft, WT/DS316/AB/R, adopted 18 May 2011
Korea – Certain Paper	Panel Report, Korea – Anti Dumping Duties on Imports of Certain Paper from Indonesia, WT/DS312/R, adopted 28 November 2005
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 DSU – Argentina)	Panel Report, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina - Recourse to Article 21.5 of the DSU by Argentina, WT/DS268/RW, adopted 30 November 2006
US – Softwood Lumber IV	Appellate Body Report, United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R, adopted 19 January 2004
US – Steel Safeguards	Appellate Body Report, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248-249-251-252-253-254-258-259/AB/R, adopted 10 November 2003
US - Zeroing	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

TABLE OF EXHIBITS

Exhibit No.	Title
EU-11 (Contains BCI)	Detailed breakdown of the calculation PTMM's export price
EU-12 (Contains BCI)	Excel file "PTMM definitive disclosure.xls"
EU-13 (Contains BCI)	PTMM PowerPoint Presentation at 5 July 2011 hearing
EU-14 (Contains BCI)	List of exhibits provided to PTMM at the conclusion of the verification visit

Questions related Indonesia's claim under Articles 2.3 and 2.4 of the Anti-Dumping Agreement

1. To both parties: The Panel understands that both parties agree that the main point of contention is the adjustment made by the EU comprising a deduction from the export price. We refer the parties to paragraph 4.69 of Indonesia's first written submission:

> However – *and crucially for this dispute* – the WTO-consistency of this adjustment depends on whether the trader is indeed an independent trader. The adjustment can only be made if the producer/exporter and the trader can be regarded as two economically-separate entities, operating at arm's length… (emphasis original)

Do the Parties agree that this reflects the question before the Panel in respect of Indonesia's claim under Article 2.4? Are these statements applicable to the particular facts and circumstances of this dispute or are they intended to apply to adjustments under Article 2.4 generally?

Reply by the EU

The European Union ("EU") considers that the claim of Indonesia under Article 2.4 of the Anti-Dumping Agreement ("AD Agreement") (and its consequential claim under Article 2.3 of the Anti-Dumping Agreement) indeed hinges on this question. According to Indonesia, if a trading company that provides services to the producer/exporter is related to the producer/exporter, no adjustment can be made because the commission paid to such a related party for its services would not affect price comparability. Indonesia argues that Article 2.4 is based on the principle that one must "follow the money" and that a commission paid by a producer to a related trading company is simply money going from one pocket into the other.

The EU considers that Indonesia's approach is entirely misguided and not supported by the text of Article 2.4 or its context. In fact even Indonesia seems to be of the view that with regard to transactions within an SEE adjustments made for "*objectively ascertainable costs generated by such transactions"* are consistent with the Anti-Dumping Agreement.[1]

It follows that if the Panel agrees that this approach is misguided, and if it finds that the question of price comparability under Article 2.4 does not depend on whether two parties are related or not, it means that Indonesia has failed to make a *prima facie* case and its claims under Articles 2.4 and 2.3 should thus be rejected. The EU notes that Indonesia has made only an "as applied" claim and its arguments must thus be assessed in light of the facts and evidence on the record. The relevant question is whether a reasonable and reasoned determination was made by the investigating authority when making the adjustment in the case of PT Musim Mas ("PTMM") and the related trading company ICOF-S.

2. To Indonesia: Could Indonesia explain precisely on which sentence(s) in Article 2.4 it bases its claim? Could Indonesia explain how the facts in this case apply to the particular sentence(s) and the legal and factual rationale for its position regarding the

[1] Indonesia's first written submission, para. 4.119 (emphasis added).

adjustment, including why the existence of related parties and a single economic entity are relevant to the adjustment?

3. To the European Union: Under which sentences(s) of Article 2.4 did the EU authorities make the adjustment? Please explain the linkage between the adjustment and the sentence(s) and the legal and factual rationale for the adjustment including whether or not the existence of related parties and a single economic entity were relevant to the adjustment and, if not, why not?

Reply by the EU

The European Commission makes its determinations based on the relevant rules implementing the WTO AD Agreement into EU law, in particular, the EU Basic Anti-Dumping Regulation.[2] Article 2(10) of the Basic Anti-Dumping Regulation imposes the requirement also found in Article 2.4 of the AD Agreement to conduct a fair comparison between export price and normal value and to make adjustments where warranted for differences affecting price comparability. Article 2(10) lists a number of such differences that could justify the making of an adjustment, including "commissions". That provision was the basis for the adjustments that were made in this case.[3] Article 2.4 of the AD Agreement provides less detail in this respect and provides only an open-ended list of examples of possible differences affecting price comparability, "including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics" as well as a catch-all category for "other differences which are also demonstrated to affect price comparability". Commissions are not expressly mentioned in Article 2.4 of the AD Agreement and the European Commission did not seek to qualify its adjustments under one of the specific examples of Article 2.4 of the AD Agreement, nor is it required to do so.

Turning to the second part of the question of the Panel, the EU would like to remind the Panel that the Appellate Body has confirmed that the elements of the list of Article 2.4 of the AD Agreement 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.[4]

The EU considers that the payment of commissions to a trader in relation to export sales and not domestic sales (or vice versa) is a relevant feature of the transactions that are compared of which account should be taken. Indeed, it can be qualified as a direct selling expense for which it is well accepted that an adjustment can be made. In its first written submission, Indonesia expressly agrees that "[p]ossible price adjustments under Article 2.4 of the Anti-Dumping Agreement include the commission paid to an

2 See Exhibit EU-3.

3 See recital 31 of the Definitive Regulation, Exhibit IDN–4.

4 Appellate Body Report, *US – Zeroing (EC)*, para. 157.

independent trader".[5] Given the non-exhaustive nature of the list of potential differences affecting price comparability in Article 2.4, the EU does not consider it necessary to expressly state if commissions for trading companies' involvement in a sales transaction are a difference in the conditions and terms of sale and/or in the level of trade. And, of course, the different examples of types of differences affecting price comparability in Article 2.4 are also not mutually exclusive. There is likely to be an overlap between these different types of differences affecting price comparability. This is clear from footnote 7 to Article 2.4 which states that "some of the above factors may overlap". In this case, the evidence referred to by the European Commission in the form of a contract for the provision of export sales-related services by ICOF-S reveals that PTMM paid a commission in the form of a mark-up to ICOF-S for these export sales services. There was no contract or other evidence reflecting a similar mark-up/commission for domestic sales. The reasonable and reasoned conclusion of the European Commission was therefore that there existed a difference between export sales (export price) and domestic sales (normal value) that affected price comparability that needed to be adjusted for.[6]

Finally, in response to the last part of the Panel's question, the existence of a single economic entity was an issue that the European Commission examined as a result of developments specific to EU law and in response to specific comments and arguments of the interested parties only. This is clear from recital 31 of the Definitive Regulation, referring to comments received following the provisional disclosure that "no adjustment should have been made" for commissions for sales via the respective related traders. It is stated that "[b]oth 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". In the Definitive Regulation, the European Commission addressed these comments in the light of the text of the EU Basic Anti-Dumping regulation and concluded that both traders in Singapore had functions similar to those of an agent working on a commission basis.[7]

However, as a result of a new judgment rendered by the Court of Justice (the highest EU Court) on 16 February 2012, it was considered necessary to review the determination made given the close similarity in the "factual circumstances" of Ecogreen to those discussed in that Interpipe NTRP VAT judgment in which the Court of Justice found that an adjustment was made on the basis of insufficient evidence. Once again, the key question was not whether a single economic entity existed but whether, in the light of the available evidence, Ecogreen was in a factual situation similar to that of Interpipe

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

6 See, e.g. recital 38 of the Provisional Regulation, Exhibit IDN-3; and recitals 31-33 of the Definitive Regulation, Exhibit IDN-4.

7 Recital 31 of the Definitive Regulation, Exhibit IDN-4.

such that it would not be appropriate to make an adjustment for Ecogreen. That is clear from recital 5 of the Amending Regulation. Recital 10 of the Amending Regulation reflects the fact that PTMM again raised the "single economic entity" argument to which the EU responded in two ways. First, in recital 11 it is explained that the argument is misguided because "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". Second, in recitals 12 and 22-32, it is explained why the factual circumstances of PTMM were different from those of Ecogreen and thus Interpipe. With respect to PTMM and ICOF-S, it was found that the adjustment was warranted because the evidence available demonstrated that a specific commission was paid to ICOF-S in relation to export sales, which was not paid in relation to the domestic sales of PTMM.

4. To the European Union: In paragraph 11 of the Amending Regulation the EU refers to the concept of single economic entity and to Article 2(10)(i) of the basic Regulation. How did this concept and this provision form the basis of the adjustment?

Reply by the EU

Article 2(10)(i) of the EU Basic Anti-Dumping Regulation formed the basis of the adjustment that was made for the commission paid to ICOF-S by PTMM. This is confirmed by recitals 31-34 of the Definitive Regulation.[8]

As noted before, the concept of a "single economic entity" did not form the basis of the adjustment. As is clear from recital 10 of the Amended Regulation, PTMM raised the concept of a "single economic entity" arguing that "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". PTMM referred to the European Court judgment in joined cases C-191/09 P and C-200/09 P, the Interpipe cases. It was in response to this argument of PTMM that the European Commission stated in recital 11 of the Amending Regulation, to which the Panel refers, that the existence or not of a "single economic entity" does not determine the question of adjustments under Article 2(10)(i). It thus rejected the argument of PTMM and found 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 can be made".[9] It then refers back to the reasons why an adjustment was considered necessary which were explained in the Definitive Regulation and further discussed in recitals 12 and 22-33 of the Amending Regulation. In these recitals, the European Commission goes through the criteria and evidence referred to in the Interpipe judgments. Applying these criteria and assessing the evidence relating to PTMM and considering the arguments put forward by the interested

8 See Exhibit IDN-4.

9 Moreover, the argument of the PTMM was that the simple existence of common ownership/control determined the existence of a single economic entity (see General Court judgment in T-26/12, paras. 40 and 48, Exhibit EU-4).

parties, the European Commission reasonably found that it was justified to make an adjustment for PTMM, which was in a situation different from that of Ecogreen.

The reason why no adjustment was made for Ecogreen concerned the factual circumstances which resembled those present in the Interpipe case. The decision was not based simply on the fact that Ecogreen and the related trading company were owned or controlled by the same person such that they constituted a single economic entity. That is clear from recital 5 of the Amending Regulation which states that "the factual circumstances for Ecogreen are similar to those of Interpipe NTRP VAT in respect of the adjustment made pursuant to Article 2(10)(i) of the basic Regulation, in particular the following factors in combination: volume of direct export sales to third countries of less than 8% (1-5%) of all export sales; existence of common ownership/control of the trader and the exporting producer; the nature of the functions of the trader and the exporting producer, …". So, although common ownership/control was one of the factors considered in Interpipe and thus also in the context of Ecogreen, it was not the determinative factor in any way but simply one of the factual circumstances mentioned in Interpipe that formed the context for the re-assessment of the adjustment made for Ecogreen. In recitals 12-33, the European Commission further elaborates on the differences in the factual circumstances between Ecogreen and PTMM to conclude that the factual circumstances for PTMM were different from those that led to the rejection of the adjustment in Interpipe. That finding was later upheld by the European General Court (See Exhibit EU-4). Indonesia's exclusive focus on the "single economic entity" concept based on common ownership /control is thus not only misguided from the perspective of WTO law, it is also wrong from the perspective of EU law, as explained in the Amending Regulation and as confirmed by the General Court.

The logical error that Indonesia makes is to assert that simply because common ownership/control was one element of the factual circumstances that were considered relevant in the Interpipe/Ecogreen analyses that it is a sufficient or determinative factor.

While it is understandable from Indonesia's viewpoint to magnify the importance of the sole common ownership-element which is common to Interpipe, Ecogreen and PTMM, that approach is not correct of course from an EU law perspective, let alone from the perspective of WTO law. There is no dispute that PTMM and ICOF-S are "related" and there is therefore no need to have a separate consideration of this factual circumstance. For example, in recital 27 of the Amending Regulation the European Commission refers very clearly to PTMM's "related trader in Singapore" and similar references to the "related trader" can be found in recitals 28 and 29. This relationship was simply not *at issue* and it was *not the issue* for purposes of making the adjustment.

5. To the European Union: Can the European Union provide a breakdown of all of the components of the export price adjustment, including components pertaining to sales, marketing, and negotiating costs?

Reply of the EU

In order to answer the question, the EU is providing as Exhibit EU-11 a detailed breakdown of the calculation of the export price based on the same excel sheets that were provided to PTMM at the time of the Definitive Disclosure on 26 August 2011. This detailed breakdown also reports the SG&A of PTMM. [[…]]

The "confusion" that may have arisen in terms of the SG&A-aspect of this commission results solely from the fact that, rather than simply accepting the [[…]] mark-up/commission that Article 3 f) of the Sale and Purchase Agreement between PTMM and ICOF-S provided for, the European Commission decided to "construct" the amount of the mark-up/commission based on the SG&A and profit of ICOF-S for sales from unrelated parties. The European Commission never sought to adjust for the SG&A or profits of PTMM.

The references to SG&A and profits of ICOF-S therefore relates to the determination of the amount of the adjustment and does not concern whether an adjustment should have been made. It is plain in the present case that the amount of the adjustment made is not challenged by Indonesia as such. Indonesia focuses solely on whether an adjustment was warranted in the given situation in light of the alleged single economic entity between PTMM and ICOF-S.

6. To both parties: In order to assess compliance with the fair comparison requirement under Article 2.4, is it necessary for the Panel to examine both the export price and the normal value or can the examination focus on the export price in isolation?

Reply by the EU

Article 2.4 of the AD Agreement requires investigating authorities to make a fair comparison between export price and normal value. It provides that the comparison shall be made at the same level of trade, normally at the factory level, and in respect of sales made at as nearly as possible the same time. It further provides that due allowance shall be made for differences affecting price comparability.

There are many different practical ways of implementing these requirements, by adjusting only one side of the comparison to make it comparable to the other comparator or by adjusting both export price and normal value at the same time. If a certain difference is reflected solely in the export price, it will suffice to look at the export price. For example, adjusting for export-related transport costs and for costs/profits incurred between the related importer and the first re-sale to an independent buyer in the importing country, as foreseen in the fourth sentence of Article 2.4, are standard adjustments that apply solely to the export price. Other elements may require more of a comparison. For example, determining whether there is a need to adjust for differences in physical characteristics depends on the relevant characteristics of the product concerned as compared with the characteristics of the domestically-sold

product. In the current dispute the situation is rather straightforward since a commission/mark-up was paid for the involvement of a trading company only with respect to export sales. The investigating authority adjusted the export price to ensure a fair comparison with the normal value for which there was no evidence of any commissions/mark-ups. Therefore, whether this adjustment was warranted or not would require the Panel only to look at the evidence considered by the investigating authority when making the adjustment to the export price.

7. To both parties: In order to ensure a fair price comparison under Article 2.4, is the comparison analysed from the perspective of the price paid by the buyers in the domestic and export markets (including the constructed value of such prices in the case of normal value) or is it analysed from the perspective of the profitability of export and domestic sales to the producer/exporter?

Reply by the EU

The question of price comparability concerns the differences between the export transactions and the domestic transactions of the like product. Article 2.4 seeks to ensure that the price comparison is not unfair and that due allowance is made for differences affecting price comparability, in order "to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing".[10] Differences between domestic and export prices may in fact reflect "objective differences" between the two types of transactions. In order to send the product by cargo overseas, additional packing cost may be required, transportation cost will be higher because more distance needs to be travelled, additional quality control may be required when exporting the goods because of demands of customers in the importing country, additional testing or slightly different paint may be required because of stricter regulatory requirements in the importing country, etc. The adjustments are not made from the perspective of the buyer or the seller, but rather from the perspective of the product and the transactions that are compared.

Indonesia proposes to read into Article 2.4 of the AD Agreement the principle that it calls "follow the money", i.e. what ultimately goes into the pocket of the exporting producer when he sells to the importing country compared to what he gets into his pocket when selling the same product domestically. There is of course no textual basis for this principle in Article 2.4 which merely, but importantly, seeks to ensure that the comparison between export price of the product concerned and the normal value of the like product is not affected by any differences that affect price comparability between the two. Such a difference could be the fact that, pursuant to Article 2.6, the products may not be "identical" (i.e. alike in all respects) or could be related to other characteristics of the transaction that affect price comparability. The AD Agreement concerns the "product", not the producer. Article 2.1 provides that there is dumping if the product "is introduced" into the commerce of another country at a price that is less than its normal

[10] Indonesia's first written submission, para. 4.57.

value and states that this is the case "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The concept of dumping is not about "following the money" and is not about establishing who ultimately benefits from certain sales transactions or the profitability of those transactions; it is about ensuring a fair and correct comparison between two types of transactions that are comparable or that are made comparable such that it can be determined whether the product was introduced into the commerce of another country at less than its normal value.

8. To Indonesia: In paragraphs 4.69, 4.70 and 4.71 of Indonesia's first written submission the terms "economic benefit of the sale... to the SEE", "financial return on each sale... to the SEE", "return to the unit as a whole" are used. Do these terms reflect examining a fair price comparison under Article 2.4 from the perspective of buyers in the domestic and export markets or from the perspective of the profitability of the producer/exporter?

Comment by the EU

The EU notes that the use of multiple expressions by Indonesia in those paragraphs (which are nowhere to be found in the treaties) for referring to seemingly the same concept, bear witness to the groundless nature of Indonesia "follow the money" theory, which was created for the sole purpose of the present case.

9. To both parties: In order for a fair comparison to be made between the export price and normal value, can adjustments be made to SG&A costs and profit? If so, do such adjustments relate to the price paid by buyers in the domestic and export markets or to the profitability of the producer/exporter?

Reply by the EU

According to the EU, the answer to this question is given in Article 2.4 of the AD Agreement: due allowance shall be made for differences affecting price comparability as well as for differences in terms of the level of trade. Sales to a distributor may require less costs than sales to a final consumer, which is why the AD Agreement suggests working back to the ex-factory level to compare prices at the same level of trade, adjusting for any cost differences between export and domestic sales if they are not at the same level of trade. And the same is true for any other factor affecting price comparability.

This being said, once the differences affecting price comparability of the transactions are adjusted for, the prices are to be compared and no adjustment will be made of course for the fact that on export sales the producer only takes a 2% profit margin, for example, while he sells with a 5% profit margin domestically. The fact that the producer has less competition on the home market is not a factor that is to be adjusted for. Those differences do not affect the price comparability of the transactions and should obviously not be adjusted for as they are an inherent aspect of the prices that are to be compared. In a situation where prices are not constructed – the "normal situation" –

one takes the domestic prices and compares these with the export prices for similar transactions. And where normal value is constructed, once the constructed normal value is determined, that is the normal value that will be used, including its normal profit margin.

10. To both parties: If an adjustment is made to SG&A costs, does it matter how those costs are incurred, in particular does it matter whether the costs are incurred by paying a third party or internally by the producer/exporter? If so, why? With respect to incurring costs by paying a third party, does the mode of payment matter (e.g., term/flat fee contract versus sales commission)? If so, why?

Reply by the EU

Article 2.4 of the AD Agreement requires that a fair comparison is made and that adjustments be made for differences affecting price comparability. This includes adjustments that relate to differences in costs incurred by the producer, for example additional packaging material, quality control, materials used, etc. These costs could be purely internal such as, for example, additional quality control requiring an additional step in the production process, or could relate to costs made for obtaining certain materials to be used in the exported product that are not used in the domestic product, like a particular type of paint. But there again, it does not matter whether the additional material is sourced from a related or integrated company or from a third party supplier. An adjustment will be required if this is a cost that relates to the export sales transaction that is not borne for the domestic sales transaction, or *vice versa* of course, or if there is otherwise a difference affecting price comparability.

The internal v. external sourcing question could be relevant when it comes to determining the level of the adjustment as it could be argued that the internally-sourced costs do not reliably or reasonably reflect the value of this additional element. In that case, further investigation may be necessary in order to determine or confirm the level of the adjustment. But, once again, that is a question that relates to the quantification of the adjustment (which is not at issue here) and not to the question *whether* an adjustment is due.

When it comes to payments made to third parties, the mode of payment does not matter for purposes of determining whether an adjustment is required. An adjustment will be due if the payment is made only for a domestic transaction and not made for the export transaction or *vice versa,* or if the amounts are different in comparable circumstances.

11. To both parties: In order for a fair comparison to be made between the export price and normal value, do the same categories of cost need to be deducted or be absent from both (e.g., delivery costs) or can a category of cost be deducted from one but not the other (e.g., sales cost, SG&A)?

Reply by the EU

There are many ways in which an investigating authority can comply with Article 2.4 of the AD Agreement and no particular method for ensuring a fair comparison is prescribed by this provision.

So, as noted before, adjustments can be made on both sides to completely strip out a particular aspect like transportation costs, or one can adjust the export price for the difference between the export price and the normal value: e.g. if both are transported from the factory to the main port for distribution domestically or abroad, only the difference for the part that relates to the export cost could be adjusted for on the export price side. It is true that Article 2.4 of the AD Agreement expresses a preference for ex-factory comparison but that is indeed just a preference to take care of a potential level of trade issue and it is not an obligation for investigating authorities. The ex-factory preference is not relevant to differences in physical characteristics for example. The same flexibility in approach obviously applies also to a commission. The recipient of the commission can be handling domestic or export sales or both. An adjustment will be required on just one side or both (if the amount of the commission is different) in order to ensure a fair comparison. So, if certain costs are incurred on both sides but at different levels, an investigating authority could ensure a fair comparison by eliminating this cost factor altogether – i.e. adjusting both export price and normal value to zero for this factor – or by adjusting the export price downward to bring it to the same level of the cost incurred on the normal value side, or by adjusting the normal value side upward to bring it to the same level as the export price. If an additional cost factor is present only on the domestic or export price side, one adjusts this factor only on that side by deleting it, or by adding the same cost factor on the other side. Those are all different practical ways of ensuring a fair comparison.

12. To both parties: In order for a fair comparison to be made between the export price and normal value, can adjustments be made to profit and, if so, do the same categories of profit need to be deducted or be absent from both or can a category of profit be deducted from one but not the other?

Reply of the EU

The EU refers the Panel back to its earlier replies related to Article 2.4 of the AD Agreement in so far as this question concerns differences affecting price comparability. Profits do not come into play when determining whether an adjustment is required for differences affecting price comparability (other than under the fourth sentence for sales through related importers in the context of constructed export price).

If the question of the Panel is whether an adjustment can be made because the profit margin on export sales is lower than the profit margin on domestic sales the answer is of course "no". The fair comparison simply seeks to ensure a proper apples-to-apples comparison between the two sets of prices. It would not make sense to add profit on the export side because the domestic sales price reflects a profit margin of 10% while the export sales transactions, when properly adjusted for differences affecting price

comparability, show a profit margin of 5%. That is not what Article 2.4 stands for and that is not what the EU does of course.

A different issue arises when an adjustment for a service rendered by a related provider must be quantified. In such a case, it may be that the level of the adjustment is affected by the level of profit that would generally be charged for a similar service by an unrelated party. In simple terms, when the service is between related parties, the investigating authorities may base its quantification of the adjustment on a reliable cost/profit data for the service that was provided. That is why in the case of ICOF-S, the European Commission did not simply accept the [[…]] mark-up/commission of the Sale and Purchase Agreement as the level of the adjustment that was to be made but rather looked at the cost/profit of ICOF-S and constructed the amount for the commission/mark-up based on what was considered to be a reasonable profit for activities carried out by trading companies in the chemical sector[11] which was added to the actual SG&A of ICOF-S. In the sense, profit is simply a proxy for a particular type of costs, that is, the cost of capital, and as it happens the total constructed amount of the adjustment was very close to the 5% commission provided for in the Sale and Purchase agreement between ICOF-S and PTMM. This does not mean that an adjustment was made for profit of PTMM

Again it is important to repeat that Indonesia has not taken issue in the present dispute with the quantification of the adjustment as such.

13. To both parties: What is the relevance, if any, of Article 2.3, and the fourth sentence of Article 2.4, to the interpretation of Article 2.4 in the particular circumstances of this dispute? Please include in your response the relevance of these provisions to adjustments to costs and profits to the export price and normal value for the purpose of conducting a fair comparison under Article 2.4.

Reply of the EU

As explained at the time of the oral hearing, the EU considers that the fourth sentence of Article 2.4 is evidence of the fact that Article 2.4 does not embody the "follow the money principle" that Indonesia is suggesting it does. The fourth sentence provides that allowances for costs between importation and resale and for profits should be made in cases where the export price is considered unreliable because of association between the exporter and the importer or a third party and the export price is constructed on the basis of the price at which the imported products are first resold to an independent buyer, pursuant to Article 2.3 of the AD Agreement.

If Indonesia were right that Article 2.4 stands for the principle that one must "follow the money" there would be no basis to make an adjustment for profits of this related importer. Yet that is exactly what the fourth sentence provides for. If Indonesia is right, the profits of this related importer are profits that go into the pocket of the exporting

[11] Recital 36 of the Definitive Regulation, Exhibit IDN-4.

producer and therefore, by "following the money" back to the exporting producer no adjustment is warranted. That is effectively its argument with respect to ICOF-S as well: that the commission/mark-up charged by ICOF-S for its export sales-related services is simply part of the profit of the exporter, just like further profits made by other related parties like ICOF-E, one would logically assume. Indonesia stopped short of that logical conclusion by not contesting the adjustments made under this fourth sentence of Article 2.4 when constructing the export price for sales via ICOF-E, because it knows the fourth sentence contradicts its position.

This fourth sentence is not an exception that confirms the "follow the money" rule as Indonesia suggested during the oral hearing nor is it worded as an exception. Rather, it simply clarifies that, when constructing the export price, due allowance is to be made for the profit made by the related importer when selling to the first unrelated buyer in the country of importation. Thus, the fourth sentence contradicts Indonesia's theory and reflects the rule that Article 2.4 is not about following the money but about ensuring a fair comparison and adjusting for differences affecting price comparability.

14. To both parties: Can the parties please provide a detailed breakdown of the components of SG&A and profit figures in the normal value and export price, including those for sales, marketing, and negotiating costs, so as to permit a side-by-side comparison of the components of the export price and normal value?

Reply by the EU

The Company Specific Disclosure Document, and Annex 2 in particular, which was submitted by Indonesia as Exhibit IDN-33, provides a description of the manner in which the normal value and export price were calculated.

Additional information is contained in the confidential Company Specific Definitive Disclosure document, submitted as Exhibit EU-10. This document was only shared with PTMM and merits additional protection as it contains Business Confidential Information. [[…]]

The EU notes that Indonesia has not made any claims relating to the determination of the normal value and has not challenged the European Commission's determination of the normal value. In fact, Indonesia expressly stated in para. 55 of its opening oral statement that it has not made an argument that if an adjustment was made to the export price for the involvement of ICOF-S, a similar adjustment should have been made on the domestic, normal value side given that PTMM claimed that ICOF-S also acted as the sales department for domestic sales. As is clear from para. 55 of the oral statement, Indonesia argued that PTMM may have made this argument at the time of the investigation but that this was not the argument it was making in this WTO proceeding which is based solely on the argument that no adjustment can be made for commission/mark-ups between parties that are part of a single economic entity, as explained in response to Question 1 of the Panel.

Finally, the EU refers the Panel back to its answer to Question 5 in which we provide additional information on the breakdown of the export price.

15. To Indonesia:

    a. Is it Indonesia's position that the mark-up on the export side covers SG&A for PTMM's export sales?

    b. Is it Indonesia's position that all SG&A on PTMM's domestic sales is incurred by ICOF-S through the mark up granted for export sales?

    c. Is it Indonesia's position that there is no separate recovery of the SG&A covered by ICOF-S on PTMM's domestic sales?

16. To the European Union:

    a. Is it the European Union's position that all SG&A on PTMM's domestic sales is incurred by ICOF-S? If not, please explain what specific SG&A costs are incurred in respect of domestic sales by PTMM.

Reply by the EU

It is not the position of the EU that all SG&A of PTMM 's domestic sales were incurred by ICOF-S. Quite the contrary is the case as the record evidence confirms that PTMM incurred a number of SG&A costs for domestic sales which were no different from the SG&A costs it incurred on the export sales side. The lists of specific SG&A costs is itemized in Exhibit EU-11 with reference to the information as provided by PTMM. As noted before, Indonesia has not argued that an adjustment should have been made for the alleged involvement of ICOF-S in respect of domestic sales, even though that was an argument made by PTMM at the time of the investigation.

    b. Is it the European Union's position that ICOF-S derives no revenue in respect PTMM's domestic sales?

Reply by the EU

The question at issue in this dispute is whether the evidence on the record supports the determination made by the investigating authority. The record evidence shows that all domestic sales were invoiced directly by PTMM. Recital 35 of the Definitive Regulation contains the response to the argument of PTMM that in case the export price were to be adjusted for the commission of the related trader in the third country "an identical adjustment to the normal value should be made, since the trader would also coordinate domestic sales". The response of the European Commission is clear as it explains that "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". There is no evidence on the record that would show that ICOF-S received any service fee for its alleged involvement in the domestic sales directly invoiced by PTMM.[12]

[12] See in that sense Exhibit IDN-21, pp. 2 and 3 ("[[…]]"); and Exhibit IDN-22, p. 4 ("[[…]]").

17. To both parties: Does it follow that, by making the adjustment on export sales, the EU authorities ensured symmetry between normal value and export price? If so, please explain how.

Reply by the EU

A number of adjustments were made by the EU to the export price to ensure symmetry in the comparison, including but not limited to the adjustment for the commission/mark-up paid to ICOF-S for its involvement in export sales given that no evidence existed of a similar commission/mark-up being paid with respect to domestic sales.

18. To both parties: Could the parties please complete the following table relating to the respective circumstances and treatment of PTMM and Ecogreen. In particular, please identify relevant criteria – for instance, those in paragraph 42 of the European Union's opening statement – applied to determine their comparative circumstances, how each criterion applied to each entity, and provide commentary on the inferences drawn from their respective circumstances. (Add lines if necessary).

Reply by the EU

The EU refers the Panel back to recitals 31–33 of the Definitive Regulation[13] as well as recitals 5–32 of the Amending Regulation[14] in which the investigating authority responds to the arguments of the interested parties relating to the relevance of the European Court's jurisprudence in respect of the making of adjustments for commissions. In these recitals, the investigating authority elaborates on why it considers that "the factual circumstances for Ecogreen are similar to those of Interpipe" (recital 5 of the Amending Regulation) while "there are a number of differences in the circumstances of the two Indonesian exporting producers, in particular the following in combination: …" (recital 12 of Amending Regulation).

The particular differences in the circumstances that are considered as establishing the different factual situation of PTMM as compared with Ecogreen, as listed in recital 12, are:

- 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; and
- the existence of a contract between the trader and producer which provided that the trader was to receive a commission for the export sales.

This list is not surprising given the factual circumstances that were considered in the Interpipe judgment to which reference is made in recital 5:

- Volume of direct sales to third countries by the exporting producer;

[13] See Exhibit IDN-4.

[14] See Exhibit IDN-5.

- Existence of common ownership/control of the trader and the exporting producer; and

- The nature and the functions of the trader and the exporting producer.

The same factual elements are also discussed in the judgment of 25 June 2015 of the General Court in Case T-26/12. The Court noted that "it is apparent from recital 31 of the contested regulation that the Council based its conclusion, in particular, that ICOF S did not carry out the functions of an internal sales department, on three factors, namely, first, on the fact that ICOF S also sold products manufactured by other producers, including by unrelated producers; secondly, on the fact that the applicant paid ICOF S a commission, mentioned in a contract, only on the export sales made by ICOF S; and, thirdly, on the fact that the applicant invoiced directly domestic sales and some export sales to third countries".[15]

The Court considered that, with respect to the first factor, the proportion of sales made by the trader relating to products from unrelated producers was an important factor.[16] The Court confirmed that "ICOF-S's overall activities were based to significant extent on supplies from unrelated undertakings. Over 50% of ICOF S' total sales in 2009, of more than USD 1.4 billion, related to products from independent third party producers".[17] It considered that "the proportion of ICOF-S' turnover stemming from its activities with unrelated undertakings remains significant, including in 2010" and that "ICOF S is a very large trader, whose economic activity is capable of being carried out independently of [PTMM], since it relates to a significant extent to products from unrelated producers".[18] This was not the case for Ecogreen. In the case of Ecogreen, the trader sold significantly less from unrelated parties.[19]

The second factor, the existence of a written contract, is also unique to ICOF-S. As the Court confirmed, it "is apt to distinguish those two companies from other related companies between which any payment of commissions is based only on a series of verbal agreements [like Ecogreen]. The existence of such a contract thus demonstrates that the relationship between the applicant and ICOF S is organised on the basis of normal commercial conditions".[20] The Court then went on examining the content of the contract in paras. 61-66 of its judgment, which confirmed the abovementioned conclusion.

The third factor relates to the level of direct sales made by PTMM. As the Court highlighted, the record shows that PTMM "acted as the contracting party in respect of 27.08% of export

15 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 50. (emphasis added)

16 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 53.

17 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 54.

18 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 57.

19 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 135.

20 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 60.

sales. The volume of export sales in respect of which the applicant issued an invoice directly is therefore much higher than that at issue in the case that gave rise to the judgment in Interpipe" where direct sales invoiced by the producer represented only about 8% of the total volume of sales to the European Union.[21] As stated in recital 5 of the Amending Regulation, also from this viewpoint the situation of Ecogreen was similar to that of Interpipe, as the volume of direct export sales by Ecogreen did not exceed 5% of its total export sales.

It therefore does not come as a surprise that the Court, and without disputing that PTMM and ICOF-S were under common control,[22] also rejected any claim of discrimination similar to the one being made by Indonesia now. We refer to paragraphs 134-137 of the Court's decision:

> 134 Thus, first of all, the volume of direct export sales made by the applicant is much higher than that of the sales invoiced by Ecogreen, which volume did not exceed 5% of the volume of that company's export sales.
>
> 135 Next, in contrast to Ecogreen's related trader, ICOF S' activities are based to a significant extent on supplies from unrelated undertakings. That factor was considered, in the analysis of the first plea in law, to be proof, or at least sound evidence that ICOF S' functions were not those of an internal sales department (see paragraphs 59 to 66 above).
>
> 136 Lastly, the applicant is bound to ICOF S by a written contract under which ICOF S is entitled to a commission on export sales. It must be pointed out that no such contract exists between Ecogreen and its related trader. The existence of a formal contract between two related companies, such as that between the applicant and ICOF S, constitutes an indication of the nature of the relationship between those two companies and of the functions carried out by each of them in the framework of that relationship. The Council was therefore fully entitled to find that that factor made it possible to distinguish the applicant's situation from that of Ecogreen as regards the application of Article 2(10)(i) of the basic regulation.
>
> 137 Accordingly, even though the applicant's export sales' structure displays some similarities to those of Interpipe and Ecogreen, ICOF S' functions are not comparable to those carried out by the related traders of Interpipe and Ecogreen. The applicant's situation therefore justified different treatment in the context of adjustments to the export price.

Before summarizing this entire analysis in the table provided by the Panel, the EU considers it appropriate to underline that Indonesia has not pointed to any legal basis for a claim of violation of the AD Agreement resulting from this differential treatment of two Indonesian producers. Although Indonesia repeatedly sought to draw the attention of the Panel to the difference in treatment, Indonesia ultimately confirmed that it did not claim that such differential treatment violated Article 2.4. At the hearing Indonesia confirmed that the only violation it is claiming under Article 2.4 relates to the fact that an adjustment was made for sales commissions between PTMM and ICOF-S despite the

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21 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 69.

22 Case T-26/12 *PT Musim Mas v Council*, Exhibit EU-4, para. 49.

fact that they were related parties that allegedly form a single economic entity. It is with this issue that Indonesia's claim stands or falls.

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

As per the request of the Panel, we briefly summarize the key factual circumstances that led the European Commission to reject making an adjustment for Ecogreen while making an adjustment for PTMM, which it considered to be in a situation different from that of Ecogreen (and similar to that of Interpipe). The fact that both trading companies were related to the exporting producer was not contested either during the investigation or thereafter. It was not a factor that required further elaboration.

Criterion	PTMM/ICOF-S	Comment	Ecogreen/EOS	Comment
Volume of direct export sales by exporting producer to the EU	Significant (27%)	See recitals 24-27 of Amending Regulation; much higher than level of Interpipe	Low (max 5%)	Recital 5 of Amending Regulation: similar to about 8% level of Interpipe
Significance of trading activities of related trader, including from unrelated parties	Significant, in 2009 more than 50% of sales from other unrelated third party producers (1.4 billion USD), sales of concerned product from PTMM represented only [[…]]	See recital 31 Definitive Regulation and recitals 28-29 Amending Regulation	No significant sales from unrelated parties by EOS	See recital 12 of Amending Regulation and recital 31 Definitive regulation.
Existence of contract stipulating inter alia commission for export sale	Sale and Purchase agreement that expressly provides for payment of commissions/mark-ups for export sales only; the "very name and the modalities of the agreement justify the finding that the contract	See recital 31 Definitive Regulation and recitals 30-31 Amending Regulation; see also Court judgment for further analysis of	No contract	See recital 12 of Amending Regulation and 31 Definitive Regulation

	was intended to govern the relationship between PTMM and the trader and was not limited to the transfer pricing or tax issues"	nature and provisions of the contract		

19. To both parties: It is the Panel's understanding that Indonesia's claim under Article 2.3 of the Anti-Dumping Agreement is entirely consequential on Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement? Could the parties please explain how a violation of Article 2.4 would necessarily, in and of itself, lead to a violation of Article 2.3? Please refer to specific elements of the text of each provision in your answer.

Reply of the EU

The EU considers that Indonesia has failed to develop any independent reasoning of a violation of Article 2.3 of the AD Agreement. The EU understands Indonesia's claim to be that the export price was not constructed correctly because the same adjustment was made for the commission/mark-up of ICOF-S also in the context of sales made via ICOF-E for which the export price was constructed. The alleged inconsistent adjustment is thus argued to vitiate also the construction of the export price under Article 2.3 of the AD Agreement. As is also confirmed by Indonesia's first submission, its Article 2.3 claim is indeed entirely consequential:

> 4.285. Indonesia recalls that, for the reasons set out above, the Commission acted inconsistently with Article 2.4 by making the deduction at issue for all sales. As a result, the Commission has also acted inconsistently with Article 2.3 of the Anti-Dumping Agreement with respect to sales via ICOF-S Europe.

The EU does not consider that a violation of the fair comparison obligation necessarily leads to a violation of Article 2.3 of the AD Agreement. These provisions apply to different stages of the process of establishing the existence and amount of dumping. Article 2.2 of the AD Agreement relates to the establishment of normal value, and Article 2.3 concerns the conditions for determining the export price. Article 2.4 deals with the comparison of the normal value and export price as determined under Article 2.2 and 2.3 of the AD Agreement. Therefore, even considering the question from a purely logical point of view, it is clear that a violation of Article 2.4, which deals with a later step in the process, would not automatically lead to a violation of the earlier step of establishing the export price. Arguably, an erroneously established export price can never be "fairly" compared under Article 2.4 but the mere fact that the comparison was allegedly not "fair" does not mean that the export price was also not correctly determined.

In fact, the adjustment for the commission/mark-up of ICOF-S was not an element of the construction of the export price as is clear from the evidence on the record, such as for example Annex 2 of the Company-Specific Disclosure Document (Exhibit IDN-33),

recitals 34-36 of the Provisional Regulation[23] and recitals 28-30 of the Definitive Regulation.[24]

In sum, Indonesia has failed to make a *prima facie* case that when constructing the export price for sales made via ICOF-E by relying on the first resale price to an independent buyer as foreseen in Article 2.3, the EU acted inconsistently with Article 2.3. Its consequential claim under Article 2.3 fails given the lack of argument on the specific conditions of Article 2.3, the lack of logic behind the consequential reasoning of Indonesia and the lack of factual support on the record for its consequential claim.

Questions related to causality

20. To Indonesia: During the investigation, did Indonesia make separate arguments in relation to the effects of the financial crisis and in relation to raw material costs? Alternatively, were these two sets of facts part of the same argument? Please identify specifically in the record where these arguments were made.

21. To the European Union: Please identify specifically in the record where arguments in relation to raw material costs were addressed by the EU authorities.

Reply by the EU

The alleged increase in raw material costs was simply not an issue in the investigation. In fact, as is clear from the arguments developed by Indonesia in its first written submission, Indonesia's entire case rests on a few paragraphs in PTMM's comments on the initiation of the investigation dated 4 October 2010. In all of the comments and communications that followed, PTMM failed to repeat let alone substantiate the general comments it made on the application and subsequent initiation of the investigation. So, neither in its June 2011 comments that followed the Provisional Disclosure of 11 May 2011 (Exhibit IDN-34), nor in any of the subsequent communications, did PTMM substantially develop the question of the raw materials costs and access to raw materials as an important "other factor" causing injury.

For example, in its 10 June 2011 comments on the provisional disclosure (Exhibit IDN-34), [[…]] 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"[25] in respect of the injurious effect of that factor. In respect of the cost/access to raw materials, the interested parties failed to present both arguments and evidence.

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23 See Exhibit IDN-3.

24 See Exhibit IDN-4.

25 Indonesia's first written submission, para. 5.74, referring to Panel Report, *China – X-Ray Equipment*, para. 7.267. (emphasis added)

At the 5 July 2011 hearing with PTMM that followed the Provisional Disclosure (Exhibit EU–13), [[…]] In the final disclosure of 26 August 2011 (Exhibit IDN-39) and in the provisional specific disclosure to PTMM (Annex 3 and cover letter) (Exhibit EU-8), causation and non-attribution were of course also addressed. Recitals 97 and 98 of the General Disclosure Document are similar to the recitals of the Definitive Regulation. They reflect the finding of the European Commission that the claim about the lack of access to raw materials is unsubstantiated. [[…]]

In any case, and in response to the Panel's specific question, the EU refers the Panel to the following recitals of the Definitive Regulation:

- Recital 10 explaining that despite certain raw material differences, all products have the same basic characteristics;
- Recital 66 confirming that the alleged differences in raw material prices between fatty alcohol products produced from natural oils and facts and synthetic sources, such as crude or mineral oil, did not require the development of an additional product control number among others because the cost of production difference is not such as to warrant a differentiation in terms of PCNs;
- Recital 90 confirming that the investigation did not reveal any substantial differences between fatty alcohol produced from different raw materials; and
- Recital 97 in which the Commission acknowledged that several parties claimed that the real cause of injury was, among seven other alleged "real causes" of injury, "the increased raw material prices and the lack of proper access to these raw materials". In recital 98, the Commission finds that "the above parties were not able to substantiate their claims".

As demonstrated above, and in light of the agreed standard that only factors for which argument and evidence of its effect on injury have been provided are to be examined by the investigating authority, it is clear that the conclusion in recital 98 of the Definitive Regulation is reasonable and supported by the facts on the record.

22. To the European Union: We refer to paragraph 155 of the European Union's first written submission. Could the European Union please explain further its statement that access to raw materials "is not a factor causing injury but simply an aspect of the conditions of competition that may be reflected in price differences". In particular:

    a. Is it the European Union's position that a time lag in access to lower priced raw materials has an impact on profitability?

    b. What would the nature of that impact be?

    c. How would that impact fit into the concept of material injury to the domestic industry?

Reply by the EU

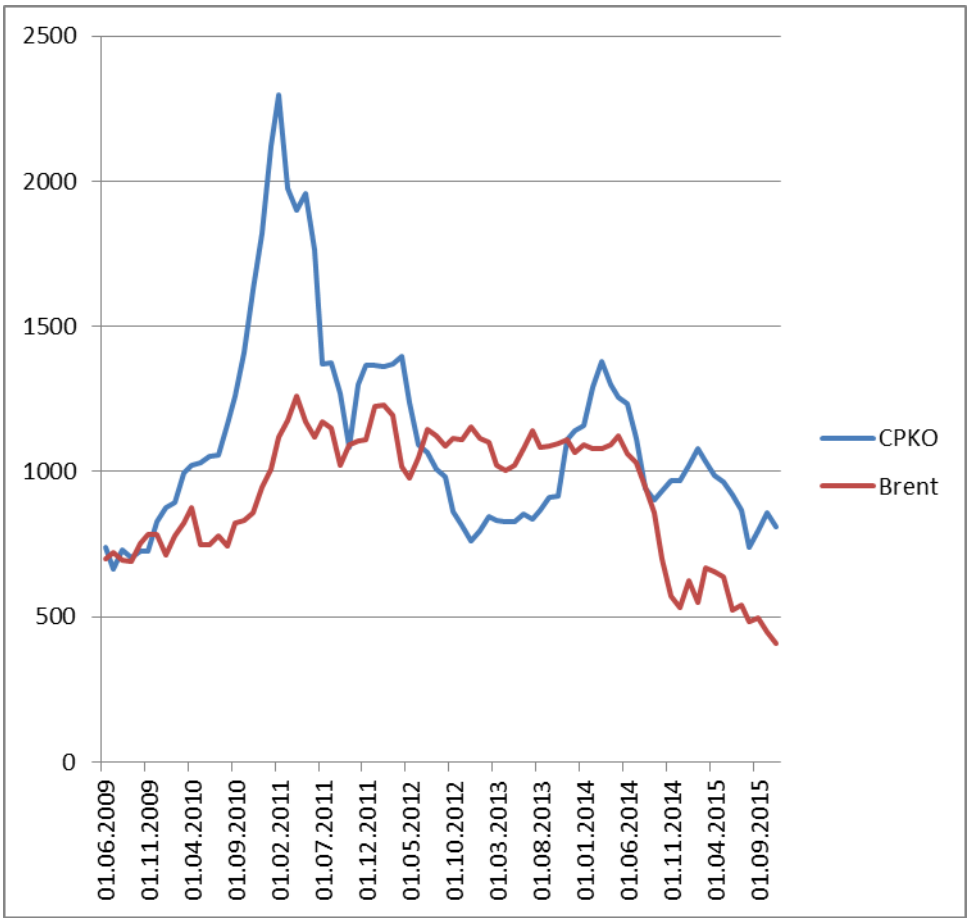
As a preliminary matter the EU notes that its statement in paragraph 155 is simply a matter of common sense given that the difference in access to raw materials is an inherent element of the conditions of competition between Indonesian producers with direct access to palm oil and the EU producers which do not have such direct, proximate access. It is thus simply an element of the conditions of competition that has always existed, and which has not prevented the development of the EU industry in this sector. The (unsubstantiated) new element that PTMM raised in a one-sentence statement concerned the economic crisis allegedly making this lack of "proper" access "particularly detrimental". It is not clear what is meant by "proper" access, not how this factor is any different from the general factor relating to the economic downturn which was clearly examined at length by the European Commission as another factor potentially causing injury.

The EU will reply to the specific follow-up questions of the Panel about the common sense statement it made in its first written submission. However, it is clear that these answers will not be found in the record of the investigation because there was simply no reason to examine any of these questions given the lack of "argument and evidence" from PTMM on this factor.

The EU does not consider that the time lag between ordering raw materials and the actual delivery for incorporation into the production process would have had a determining impact on the profitability of the Union producers. The reason for this statement is that all raw materials for FOH production are traded at world market prices, and therefore affect all FOH producers, regardless of their location. The contract price is set at the time of ordering the raw material and therefore the Union producers are at all times perfectly aware of their raw material costs, regardless of the moment of delivery.

It is recalled that the raw materials for the production of FOH are either natural or synthetic. The prices of these raw materials do not develop in parallel over the years, contrary to what Indonesia is alleging (see below graph, comparing Brent crude oil price evolution in USD/10bbl to the CPKO price evolution in USD/MT over the period from 1 July 2009 (start of the original investigation period) to 30 November 2015).[26]

[26] Source: Malaysia Palm Kernel Oil - source: ycharts.com – price in USD/MT; BRENT OIL - Source: investing.com - Price in USD per barrel.



Based on this absence of correlation, contrary to the statement made in Exhibit IDN-35, the use of natural or synthetic raw materials has a determining impact on the cost of production, and since at the same time all parties are aware of the world market prices of these raw materials, FOH producers can source accordingly.

As a consequence, although the evolution of raw material prices obviously has consequences for the cost of production, it cannot be seen as a cause of material injury to the Union industry. The natural availability of raw materials is simply a comparative condition of competition, comparable for instance to the availability of cheap labour in India.

In the absence of downward price pressure exercised by dumped imports, the Union industry will be able to take into account the conditions of competition in which it operates, as well as the costs of raw materials it should incorporate in its price setting. This is not an external factor capable of causing injury and the interested parties as well as Indonesia failed to argue, let alone demonstrate otherwise. The EU industry was healthy in the past, despite the lack of direct access to palm oil, or the time lag in accessing that raw material which is one of the inputs for fatty alcohols.

23. To the European Union: We refer to the statement in Recital 98 of the Definitive Regulation:

> "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."
>
> What in particular was not substantiated?
>
> a. That access to raw materials was a separate claim from the economic crisis?
>
> b. That access to raw materials is another factor causing injury rather than a structural competitive advantage?
>
> c. Or rather, the facts underlying PTMM's claim regarding access to raw materials?

Reply by the EU

The EU considers that the interested parties did not substantiate that the access to raw materials was a factor causing injury rather than a structural competitive advantage. As noted above, Indonesia merely stated in one sentence that "the lack of proper access to raw materials, which was particularly detrimental for the Union industry during the economic crisis" was another factor that the European Commission failed to consider. It made this otherwise non-developed statement once, in its June 2011 comments on the provisional disclosure. It did not repeat such comments or elaborate on these comments thereafter.

In the 4 October 2010 comments on the complaint, PTMM merely raised the raw materials issues together with many other issues relating to the injury and causation elements raised in the complaint. It is mentioned only two brief times in Section 4 "No injury to community producers / causal link". Both times it was linked to the economic crisis, a factor clearly considered by the European Commission as an "other factor" causing injury.

First, Section 4 which continues for 15 pages has a section 4.4 entitled "No causal link between imports and the complainants' drop in profitability". Subsection 4.4.1 develops three paragraphs on "Raw materials access particularly important during the economic crisis" and the related subsection 4.4.2 concerns "Asian producers also suffered under the economic crisis".

So, it is clear that both subsections, by their very title, concern the effects of the economic crisis, a known factor that was adequately examined. The three paragraphs dealing with access to raw materials make the basic points that integrated suppliers with direct access to the key material inputs fare better than the EU producers and that EU producers have to purchase their raw materials long in advance due to the long voyage of the raw materials shipments from Indonesia and Malaysia. Clearly, that is nothing new but has always been part of the realities of the conditions of competition between

Indonesian and EU producers. Yet, the EU producers were healthy prior to 2007 and their losses increased significantly during in the period concerned (from beginning of 2007 through June 2010).[27] The only additional element referred to by PTMM in these three paragraphs concerns the economic crisis, as suggested by the title of the subsection. In the third paragraph, PTMM refers to "significant fluctuations in CPKO prices" from July 2008 to December 2008 and provides an illustration of price developments to argue that the drop in raw material prices [in this period] is too huge for community producers to cushion and hence they made losses".

Leaving aside the correctness of this statement, Indonesia's argument is artificial because it separates the economic crisis from its concrete effects. It seeks to elevate to the position of "other factors causing injury" a possible aspect of the crisis. It is clear that the factor of "profitability" of the EU industry was examined by the European Commission, as was the factor "economic crisis". Indeed, the distinction between the economic crisis as an "other factor" causing injury and other factors which allegedly became problematic due to the economic downturn (such as the alleged issue of prices of raw materials) is entirely artificial. The European Commission examined the injury factors such as profitability, found that they deteriorated significantly during the economic crisis (see for example recital 87 of the Provisional Regulation[28]) but also found that despite the general economic recovery in 2009-2010, the EU industry was not able to recover as a result of the dumped imports.

Second, a brief reference is also made in a short section 4.9 of this same set of comments on the application of 4 October 2010. Section 4.9 consists of two paragraphs and is entitled "No access to raw materials by the complainants". In two short paragraphs, PTMM asserts once again that the complainants are "at a disadvantage due to long lead times for delivery of raw materials in the EU and the fact that they have to buy it from FOH producers in Indonesia and Malaysia who have controls over CPKO supply". It then refers again to the volatile situation in 2008/2009 to argue that integrated producers in the exporting countries fared better than the complainant. That is exactly the same as the general points about the conditions of competition that were made before in the above discussed subsection 4.4.1. These statements are not an argument about another injury factor, let alone do they contain any evidence that there is another cause of injury which is contributing to the injury. This reality has always been there. And, again, to the extent relevant, the reference is again to the 2008/2009 economic crisis, a factor that was a known cause of injury that was examined and adequately dealt with by the European Commission.

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27 Provisional Regulation, para 87, Exhibit IDN-3.

28 Exhibit IDN-3.

24. To Indonesia: Please identify, in the record, supporting evidence provided to the EU authorities for the argument that the effect of raw material prices should be considered as a factor causing injury distinct from the economic crisis?

25. To the European Union: Does the European Union acknowledge that it did not make a separate assessment of the impact of raw material prices on the domestic industry?

Reply by the EU

The EU examined all other known factors causing injury and ensured that they did not attribute injury to the dumped imports in accordance with its obligation under Article 3.5 of the AD Agreement. Access to raw materials or the impact of raw material prices was not such a known factor causing injury as the interested parties failed to present arguments and evidence that this was the case, as explained in our previous responses.

Questions related to Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement

26. To the parties: What is the meaning and content of the term "results" in Article 6.7? For instance, do the "results" pertain to:

    a. the evidence obtained by the investigating authority during the visit; or

    b. additionally to the investigating authority's evaluation of that evidence; or

    c. do the "results" pertain to something else?

Reply by the EU

As explained in the EU's first written submission, the AD Agreement provides no definition or guidance regarding the exact content of the disclosure obligation relating to the "results" of the verification. The ordinary meaning of the term "results" is "the effect, consequence, issue, or outcome of some action, process or design"[29] and suggests that what needs to be made available is not the process as such but rather the "outcome" of that process. In its report on *US – Steel Safeguards*, the Appellate Body also found that "the ordinary meaning of "result" is, as defined in the dictionary, "an effect, issue, or outcome from some action, process or design"".[30]

The context of Article 6.9 relating to the "essential facts" on which the determination will be made supports this 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.

The evaluation of the evidence by the investigating authority is not part of the "results" of the verification visit. The disclosure obligation of Article 6.9 of the AD Agreement concerns the essential facts on which the determination will be made, and even that obligation which logically follows the verification visit and the disclosure of the results of

[29] A. Stevenson (ed.), *The Shorter Oxford English Dictionary*, 6th ed., (Oxford University Press, 2007), p. 2554.

[30] Appellate Body Report, *US – Steel Safeguards*, para. 315.

the verification visit does not require disclosing any analysis or evaluation. As noted by the Appellate Body in *China – GOES*, "Articles 6.9 and 12.8 [of the SCM Agreement] concern the disclosure of "facts" in the course of such investigations "before a final determination is made"".[31] The panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 DSU - Argentina)* similarly found that "the text of Article 6.9 clarifies that this obligation applies with respect to facts, as opposed to the reasoning of the investigating authorities".[32]

So, the "results" or outcome of the verification visit could include the list of exhibits that were provided in addition to the questionnaire responses that were verified and could also include, where relevant, other relevant outcomes such as refusals to provide certain information. 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 investigating authority may resort to the use of facts available under Article 6.8 of the AD Agreement. The lack of cooperation may be a result that has to be made available to the interested party. 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 or of a refusal to provide certain information. The lack of cooperation during verification is a result of the verification visit. The consequence of relying on facts available and the identification of the facts to be used is not to be disclosed as part of an Article 6.7 disclosure but is an essential part of the 6.9 disclosure obligation. Articles 6.6, 6.7, 6.8 and 6.9 are all part of a 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 AD 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 AD 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.

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 European 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. The contrast with the detailed requirements concerning the information to include in the

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[31] Appellate Body Report, *China – GOES*, para. 240.

[32] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 DSU – Argentina)*, para. 7.148.

reports of the investigating authority under Article 12 of the AD Agreement is telling. The general reference to the "results" of the verification in Article 6.7 confirms that no detailed report of any kind is required.

27. To both parties: what type of action does the phrase "shall make the results of any such investigations available", require from the investigating authority? For example, does this phrase mean that the investigating authority should i) create a report of the results for the file, so that the firms investigated can access it at any time; ii) send such a report to the firms investigated; iii) make such a report available upon request from an investigated firm; iv) make an oral statement at the end of the on-site verification; or v) some other form of specific communication of the results?

Reply by the EU

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".[33] In this respect it is important to recall that 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.

The French version reads as follows:

> Sous réserve de l'obligation de protéger les renseignements confidentiels, les autorités mettront les résultats de ces enquêtes à la disposition des entreprises qu'ils concernent, ou prévoiront leur divulgation à ces entreprises conformément au paragraphe 9, et pourront mettre ces résultats à la disposition des requérants.

And the Spanish reads:

> A reserva de lo prescrito en cuanto a la protecci ón de la información confidencial, las autoridades pondrán los resultados de esas investigaciones a disposición de las empresas a las que se refieran, o les facilitarán información sobre ellos de conformidad con el párrafo 9, y podrán ponerlos a disposición de los solicitantes

The terms to "make available", "mettre a disposition" or "poner a disposición" all contain the idea of giving an interested party an opportunity to become acquainted with the information. Although sending a report would clearly "make available" the results of the verification, this term does not require such an active "giving" of the results to the verified party. The Appellate Body in *EC and certain member States — Large Civil Aircraft* found that to "make available" is part of the ordinary meaning of the verb to

[33] Panel Report, *Korea – Certain Paper,* para. 7.188.

provide, to supply or furnish for use.[34] In *US – Softwood Lumber IV,* the Appellate Body found that "another definition of "provides" is "to put at the disposal of"".[35] So, even the term "to provide" does not always require an act of "giving" something but could include the mere "making available" or "putting at the disposal of". This confirms that 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 by sending them a report or by making the results available as part of the file or, as an additional alternative through the disclosure of the outcome of the verification visit as a part of the general obligation to disclose "essential facts" of the decision to all interested parties, in accordance with Article 6.9, and possibly inviting the parties concerned to make comments on that disclosure, which of course may also concern the point that certain results (facts that happened during the verification or documents collected) have not been mentioned.

In this respect, it is important to read Article 6.7 in the context of other provisions that concern the defence of the parties' interest like Article 6.2 of the AD Agreement and Article 6.4 of the AD Agreement which provides that:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

To make available upon request any non-confidential information that is used by the authorities, which may be affected by the results of the verification, is the general obligation of the authorities. Indonesia has failed to make a claim under Articles 6.2 or 6.4 of the AD Agreement and is reading a host of obligations into Article 6.7 of the AD Agreement that are simply not to be found in that provision.

28. To both parties:

    a. To the European Union: Could the European Union please provide the document referred to in the first substantive meeting containing the agreed list of exhibits provided to PTMM at the conclusion of the verification visit?

    b. To Indonesia: Does Indonesia agree that PTMM received this document at the conclusion of the verification visit?

    c. To both parties: When the Definitive Disclosure is read in light of that document, is that sufficient to comply with Article 6.7? If not, why not?

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[34] Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 963 referring to *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2383.

[35] Appellate Body Report, *US – Softwood Lumber IV*, para. 69, referring to Collins Dictionary of the English Language, G.A. Wilkes (ed.) (Wm. Collins Publishing, 1979), p. 1176.

Reply by the EU

In relation to a., the European Union recalls that in the present case there were three verification visits concerning PTMM and therefore there are 3 lists of documents that were collected at the end of each visit. They are provided to the Panel as Exhibit EU-14.

In relation to b., the normal procedure – and this procedure was followed in this case as well - is that the company would keep its own copy of this same list with agreed exhibits collected after the verification visit. [[…]]

In relation to c., the EU refers the Panel to paragraphs 185–198 of its first written submission in which it explained with specific references to the record that the disclosure document properly informed the parties of the results of the verification visit. The European Commission made available the results of its on-site verification visits in direct disclosures to PTMM. It provided ample information to allow PTMM to contest the essential facts on which the European Commission was basing its determination, and indeed PTMM provided its comments in writing and orally. Importantly, at no point in time did PTMM express a concern over the lack of detail in the information relating to the verification visits that was made available to it. The European Commission did not receive any formal request to obtain minutes of the verification visits or for additional information relating to the verification visit. The combination of the lists of exhibits that were taken at the verification with the information contained in the disclosure documents that reflected also the exchanges that took place between the European Commission investigators and the company during verification, confirm that the EU did not violate Article 6.7 of the AD Agreement.

29. To Indonesia: Indonesia argues that the lack of a proper report of the results prevented the investigated companies from making their case (§6.2 of Indonesia's first written submission). In light of PTMM Counsel's Notes in Exhibit-IDN-27, what information would have been necessary in order for the investigated companies to make their case properly between the end of the verification visit and the EU authorities' determination?

    a. After receiving the allegedly incomplete disclosure from the investigating authority did the investigated companies request a separate or more complete report from the EU authorities?

    b. If not, was any such request made at any point in time during the investigation?

30. To both parties: Is what is reflected in the PTMM Counsel's Notes in Exhibit-IDN-27 at pages 9, 13, and 15 relating to the role of ICOF-S in domestic sales the kind of information that should be disclosed as a "result" of the verification visit under Articles 6.7 or 6.9? Please explain your answer.

Reply by the EU

The relevant results of the discussion reflected on these pages are all included in the list of exhibits that was made available to PTMM:

- [[…]]

The "results" of the verification were thus made available to PTMM. Article 6.7 does not require that the European Commission present a report that reflects the discussion between Commission investigators at an early stage of the investigation and company representatives. On substance, all of the arguments that were made by PTMM inter alia on the basis of these and other exhibits have been addressed in the disclosure documents that were provided to PTMM as well as of course in the provisional and definitive regulation.