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In the World Trade Organization

Panel Proceeding

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

(DS442)

Second Written Submission by the European Union

Geneva, 5 February 2016

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EU-15	Annex 21 of the Anti-Dumping Complaint of 4 October 2010 on price developments of raw materials, 2005-2009

1. INTRODUCTION

1. In this second written submission, the European Union responds to the arguments raised by Indonesia in its oral statement at the first substantive meeting of the panel with the parties and in its answers to the questions from the panel following the first substantive meeting.

2. It is recalled that Indonesia's challenge concerns the definitive anti-dumping measure on fatty alcohols from Indonesia imposed pursuant to Council Implementing Regulation (EU) No 1138/2011 of 8 November 2011 ("Definitive Regulation").[1]

3. Indonesia brings three sets of claims relating to the European Union's anti-dumping measure on fatty alcohols (the "AD measure"). In the first submission, the European Union responded to Indonesia's arguments 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 demonstrated 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.

5. In this second written submission, the European Union first recalls the key points of its first submission before responding to the limited rebuttal arguments presented by Indonesia at the time of the oral hearing and in the context of its answers to the questions from the Panel.

6. Indonesia fails to rebut the arguments presented by the European Union in its first written submission.

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[1] 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).

2. LEGAL ARGUMENT

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

8. 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 ("PTMM"), the Indonesian producer of fatty alcohols, and asserts that no adjustment was 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* based on the fact that the adjustment was made on the export price.

9. 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,[2] failed to separate and distinguish from the injury caused by the dumped imports the injurious effects of (i) the 2008 economic crisis and (ii) the difficulties of having access to raw materials for producers in the European Union.

10. 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. Indonesia alleges that the Commission failed to provide detailed information on the results of the on-site verification. Indonesia argues that a detailed report of the verification is required in order to allow the verified interested parties to comment on the verification and the panel to review the facts as established during verification.

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[2] 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").

11. As demonstrated in the European Union's first written submission, all three sets of claims are based on an erroneous interpretation of the relevant provisions of the *Anti-Dumping Agreement* and in fact request the Panel to make a *de novo* assessment of the facts on the record. An objective review of the 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 alcohols from Indonesia.

2.1. CLAIM 1: INDONESIA'S CLAIM THAT THE EUROPEAN UNION'S ADJUSTMENT FOR COMMISSIONS PAID TO ICOF-S VIOLATED ARTICLES 2.3 AND 2.4 OF THE ANTI-DUMPING AGREEMENT IS WITHOUT MERIT

2.1.1. Indonesia's argument and the European Union's rebuttal

12. Indonesia argues that the European Commission made an allegedly inappropriate adjustment for the sales commissions paid to a trading company based in Singapore, ICOF-S, when calculating the export price of PTMM, the producer of the product under consideration. In its first written submission, 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*.

13. First, it argues that the deduction is "legally incorrect in and of itself",[3] because ICOF-S, as the alleged PTMM Group's sales department, cannot be considered as an independent trader operating at arm's length from the rest of the corporate group or from PTMM. 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 simply incorrect".[4]

14. 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,

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[3] Indonesia's first written submission, para. 4.9.

[4] Indonesia's first written submission, para. 4.9.

according to Indonesia, identical to that of PTMM. Indonesia argues that like for PTMM, Ecogreen's sales department – called Ecogreen Oleochemicals (Singapore) Pte Ltd ("EOS") – 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 PTMM the same treatment as Ecogreen – are "legally unfounded and unsupported by the facts of this case".[5]

15. Indonesia asserts that "[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".[6]

16. In its first written submission, the European Union points out that Indonesia actually fails to establish a violation of the requirement to conduct a fair comparison imposed by Article 2.4 of the *Anti-Dumping Agreement* and fails to present a prima facie case in support also of its consequential claim of violation of Article 2.3 of the *Anti-Dumping Agreement*.

17. Indonesia is constructing an argument that is entirely based on the concept of a Single Economic Entity. Yet, this concept is nowhere to be found in the *Anti-Dumping Agreement* and the relationship between two companies is not a relevant consideration in the context of 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.[7]

18. The only legally relevant question is whether there existed a difference affecting price comparability between the normal value and the export price that required that an adjustment be made in order to ensure a fair comparison. Indonesia

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5 Indonesia's first written submission, para. 4.14.

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

7 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*.

develops a legal test based on whether two companies are part of a SEE. It then seeks to demonstrate that the Commission failed to make a proper determination under this self-invented, but erroneous legal test. Indonesia therefore failed to establish a prima facie case. Whether or not two companies are part of a SEE is not legally relevant for purposes of the fair comparison under Article 2.4 of the *Anti-Dumping Agreement*.

19. Furthermore, the record shows that a commission was paid in the form of a mark-up by PTMM to its related trader ICOF-S for sales made to the European Union while there was no evidence that a similar commission/mark-up was paid for domestic sales made by PTMM. Given this obvious difference between domestic and export sales transactions that affects their price comparability, which is confirmed by the Sale and Purchase Agreement between PTMM and ICOF-S, the Commission's decision to make the adjustment is supported by the facts on the record and was entirely reasonable and adequately explained.

20. Finally, 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 WTO consistency of the Commission's adjustment of PTMM's export price. 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.

21. In sum, in the first written submission, the European Union demonstrated that Indonesia failed to present the correct legal test under Article 2.4 of the *Anti-Dumping Agreement* and did not demonstrate that the determination made was that of a biased and un-objective investigating authority. The Commission's 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*.

2.1.2. Indonesia's rebuttal arguments are without merit

22. In its oral statement and its answers to the questions of the Panel, Indonesia fails to respond to the arguments developed by the European Union under Article 2.4 of the *Anti-Dumping Agreement*.

23. Indonesia confirms that its legal case hinges on the existence or not of a SEE. It continues to argue that the European Union violated Article 2.4 of the *Anti-Dumping Agreement* because it should not have made an adjustment for commissions paid between two related parties. Indonesia's interpretation of Article 2.4 is in error and the factual argument it seeks to develop in order to demonstrate that PTMM and ICOF-S constituted a SEE is therefore not legally relevant. In any case, Indonesia's factual argument is based on a misrepresentation of the facts and findings on the record and fails to establish that the European Union's investigating authority was biased and un-objective when it made the adjustment for commissions paid to ICOF-S, in accordance with the contract concluded between ICOF-S and PTMM.

24. Furthermore, Indonesia continues to assert that the European Union should not have made an adjustment to the export price of PTMM because no adjustment was made to the export price of Ecogreen either. Indonesia challenges the findings made by the investigating authority justifying the difference in treatment between these two companies as a matter of EU law, but fails to point to the alleged inaccuracies in these findings or their relevance from the perspective of WTO law. Indonesia fails to make a *prima facie* case that this difference in treatment between differently situated companies constitutes a violation of WTO law.

2.1.2.1 *Indonesia fails to rebut the European Union's legal arguments in respect of Article 2.4 and the "crux" of its claim is thus based on an erroneous reading of Article 2.4*

25. As highlighted in the European Union's answers to the Panel's questions, Indonesia's legal case stands or falls with its argument that an investigating authority must examine whether two entities are part of a SEE and that it must refuse to make an adjustment for differences affecting price comparability if certain expenses are made with respect to export or domestic sales to a related

"SEE" entity.[8] Indonesia asserts that an "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".[9]

26. In its oral statement and answers to the questions of the Panel, Indonesia fails to rebut the argument of the European Union that the notion of an SEE is foreign to Article 2.4 of the *Anti-Dumping Agreement* and that the existence of a relationship between certain entities does not preclude making adjustments for differences affecting price comparability. The determinative question is not whether two entities are related but whether there exists evidence of a difference affecting price comparability which requires that an adjustment be made.

27. Without addressing the European Union's legal arguments under Article 2.4 of the *Anti-Dumping Agreement*, Indonesia simply asserts that its position is "obvious as a matter of common sense."[10] It argues that "splitting up a previously integrated company … cannot be an automatic reason for treating them as independent so as to justify imputing a "commission" adjustment under Article 2.4."[11] This argument is a purely theoretical argument that does not reflect the facts of the case. ICOF-S is simply not a spinoff of the internal sales department of PTMM. [12] In addition, it is a theoretical argument that is based on a flawed legal interpretation of Article 2.4 of the *Anti-Dumping Agreement*. In its answers to the questions of the Panel, Indonesia asserts that "it is clear that transactions between affiliated parties such as those at issue in this case do not affect the price of the transaction".[13]

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8 European Union's answers to questions of the Panel following the first substantive meeting of the Panel with the parties ("European Union's answers to questions"), question 1, p. 3.

9 Indonesia first written submission, para. 4.69.

10 Indonesia's oral statement at the first substantive meeting of the Panel with the parties ("Indonesia's oral statement"), para. 25.

11 Indonesia's oral statement, para. 25.

12 In fact, ICOF-S is a much larger company in terms of turnover than PTMM. The record shows that ICOF-S [[…]] (see point B of the preamble of the SPA between ICOF-S and PTMM, Exhibit IDN-24 and Exhibit IDN-25).

13 Indonesia's answers to the questions of the Panel following the first substantive meeting of the Panel with the parties ("Indonesia's answers to questions") , para. 1.24.

28. 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.[14] However, in paragraphs 1.5- 1.8 of its answers to the Panel questions, Indonesia contradicts its own claim by providing an example where a producer that was previously selling on the EU market at €100 per unit, paying a commission of €10, decides to keep on selling at €100 per unit but it sets up a selling company in Singapore which will cost €4 per unit, thereby allowing the producer to keep €6 per unit of profits within the group. In that situation, Indonesia explains, the "*ex factory price … is €100-€4= € 96 per unit*".[15]

29. Hence, even though the trader is internal, Indonesia admits that an adjustment to the export price should be made but argues about its quantification (€4 instead than € 10, as in the situation of the independent trader). So, Indonesia admits that an adjustment can be made for the expense of involving a related trader, but considers that no adjustment can be made for the profits that the trader retains as those are profits of the group.[16] There is no basis in the AD Agreement for all of these distinctions.

30. By providing this example, Indonesia contradicts the main argument on which its case rests. Its example suggests that it does not contest the fact that an adjustment was made for the intervention of the related trader in Singapore, but that it takes issue solely with the amount of the adjustment. However, its legal claim is not about the amount of the adjustment but about the fact that an adjustment was made to a transaction between related parties. Indonesia has consistently argued that the key issue is that no adjustments can be made for transactions between affiliated parties because these do not affect the price of the transaction. According to Indonesia, no adjustment can be made at all if the two entities involved are related

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14 Indonesia's answers to questions, paras. 1.13, 1.24-1.25.

15 Indonesia's answers to questions, para. 1.6.

16 Indonesia's answers to questions, paras. 1.48-1.52.

parties.[17] Thus Indonesia's legal claim in the present case is contradicted by the very example Indonesia provides.

31. 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 for which no adjustment can be made.

32. In in its reply to the Panel's question 1, Indonesia confirms that the relationship between PTMM and ICOF-S is the "crux of Indonesia's claim".

> In "following the money" or "netting back" from the starting point of the invoice price to the first unrelated customer in the EU to the net *ex factory* price on which the comparison of export price to normal value was based, the EU must take into account properly the nature of the relationship between PT Musim Mas and ICOFS. The crux of Indonesia's claim is that by failing to do so, the EU improperly made an adjustment to export price. As a result, the export price was not compared to the normal value at the same level of trade and, therefore, the EU failed to make a fair comparison between export price and normal value within the meaning of Article 2.4.[18]

33. The European Union considers that Indonesia's approach is entirely misguided and not supported by the text of Article 2.4 or its context. Indonesia's legal argument is not based on the text of Article 2.4 of the *Anti-Dumping Agreement* and the "follow the money" principle that it seeks to read into this provision is simply an invention of Indonesia that is contradicted by the context of this provision.

34. The European Union recalls a couple of undisputed facts relating to Article 2.4 and the relevance of the concept of a SEE which forms the alleged "crux" of the European Union's violation of the *Anti-Dumping Agreement* in this case.

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17 See, e.g. Indonesia's first written submission, para. 4.69 – 4.71, 4.281; Indonesia's answer to questions, para. 1.24.

18 Indonesia's answers to questions, para. 1.10.

35. First, Article 2.4 is silent on the relevance of any relationship between the parties. This contrasts with other provisions of the *Anti-Dumping Agreement* that expressly concern the treatment of "related parties".[19]

36. Second, neither in Article 2.4 nor in any other provision of the *Anti-Dumping Agreement* is the concept of a SEE used, let alone defined in any way.

37. Third, the notion of an SEE was used only in two instances in WTO disputes, in an entirely different context relating to the need to make an individual dumping margin determination for entities that were so related that they formed a SEE.

38. Fourth, in neither of these disputes was the investigating authority required to examine whether companies formed an SEE, as the question was merely whether an authority was permitted to consider this relationship in light of the requirement of Article 6.10 of the *Anti-Dumping Agreement* to determine an individual margin of dumping for each producer or exported under examination.

39. Fifth, in the WTO dispute in which this notion of an SEE was first addressed in the context of Article 6.10 of the *Anti-Dumping Agreement*, *Korea – Certain Paper*, this very same concept was completely ignored in the context of the Article 2.4 discussion of the panel in that dispute.

40. There is therefore no basis for Indonesia's focus on the existence of an SEE under Article 2.4 and none has been offered by Indonesia in this dispute. In fact, as noted before, and in apparent contradiction with its own view that the existence of a SEE relationship prevents the making of adjustments under Article 2.4, 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*.[20] This seems to suggest that even Indonesia agrees that it is possible to make an adjustment for payments made between related parties, and that the only question concerns the amount of the adjustment which may be affected by the relationship.

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[19] See, for example, Articles 4.1 and footnote 11 of the AD Agreement on the definition of the domestic industry or Article 9.5 on the determination of an individual margin of dumping for new shippers.

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

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

42. Article 2.4 does not set forth a "follow the money"- principle. Indonesia confuses the *suggestion* in Article 2.4 to make the comparison "at the same level of trade, normally at the ex-factory level" with a *requirement* to determine how much of the money paid by the buyer of the goods stays with the producer. Not everything in Article 2.4 of the *Anti-Dumping Agreement* is about the level of trade of course and for other differences affecting price comparability like physical characteristics etc., the *ex-factory* consideration is irrelevant.[21]

43. Indonesia tries to read legal distinctions into the text of Article 2.4 that are simply not there. Indonesia is making a semantic argument based on terms that are not even used in Article 2.4 of the *Anti-Dumping Agreement*. For example, Indonesia asserts that when a trader is not related to the producer, and a commission is paid for its involvement, an adjustment can be made. However, according to Indonesia, when the trader is related to the producer, no "commission" is paid as the costs for involving the trading company is rather a "selling expense" for which no adjustment is due.[22] But Article 2.4 does not make this distinction between "selling expenses" and "commissions" and between "related" and "unrelated" parties or between "related" parties and parties that form a "SEE".[23] Article 2.4 requires that due allowance shall be made for any difference affecting price comparability.

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[21] Indonesia's error based on its "netting back" or "follow the money" principle is evident in the answers to the Panel's questions where Indonesia unduly links the third sentence about factors affecting price comparability with the second sentence about comparing export prices and normal value at the same level of trade, normally the ex-factory level. According to Indonesia:

> 1.22. The third sentence requires due allowance for factors affecting price comparability. The purpose of this requirement is to ensure that, in netting back from the gross invoice prices, the investigating authority does not make improper adjustments that would result in an export price and a normal value that were not established at the same level of trade within the meaning of the second sentence and, moreover, a comparison that was not fair within the meaning of the first sentence of Article 2.4
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> (Indonesia's answers to questions, para. 1.22.)

[22] Indonesia's answers to questions, para. 1.7.

[23] In its answers to the questions of the Panel, Indonesia states that the phrase "single economic entity" refers to "a closely-intertwined relationship". Indonesia's answers to questions, para. 1.11.

44. As noted in the European Union's replies to the questions of the Panel, the payment of commissions to a trader in relation to export sales and not domestic sales (or *vice versa*) is a relevant feature of the transactions that are compared and account should be taken of this feature. It may be qualified as a "commission" or "direct selling expense" for which it is well accepted that an adjustment can be made. 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 independent trader".[24] The list of potential differences affecting price comparability in Article 2.4 is a non-exhaustive list and 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". The artificial separation that Indonesia seeks to draw between "direct selling expenses" and "commissions" is irrelevant and baseless.

[24] Indonesia's first written submission, para. 4.67.

45. In addition, as noted above, seemingly inconsistent with its position that no adjustment can be made when related parties are involved, Indonesia considers that an adjustment is due for "objectively generated costs" made by a related trading company. Again, Indonesia is just playing with words and concepts to make artificial distinctions that have no basis in the text of the Agreement. Of course, Indonesia fails to explain how one can distinguish between such "objective" costs and other expenses of the related trader and why an adjustment for such "objective costs" would be warranted between related parties but no other adjustments for what can be assumed to be "un-objective" costs? There is nothing in Article 2.4 of the *Anti-Dumping Agreement* that Indonesia can point to in support of its constructed legal argument that is completely divorced from the text of Article 2.4 of the *Anti-Dumping Agreement*.

46. In sum, Indonesia's weak legal argument is not based on the text of Article 2.4 of the *Anti-Dumping Agreement.* It relies on notions that are nowhere to be found in the *Anti-Dumping Agreement* and is internally inconsistent.

47. If the Panel agrees with the European Union that an adjustment can be made pursuant to Article 2.4 of the *Anti-Dumping Agreement* when there exists a difference affecting price comparability between export sales and domestic sales, and irrespective of the relationship between the parties, it should find that Indonesia has failed to establish a *prima facie* case and it should reject Indonesia's claim under Article 2.4 of the *Anti-Dumping Agreement* and its consequential claim under Article 2.3 of the *Anti-Dumping Agreement*.

48. This is not a question of imposing a "burden of proof" in terms of the legal interpretation to be given of the covered agreement, as suggested by Indonesia. Rather, if the Panel agrees with the European Union, all of the arguments of Indonesia about the relationship that existed between PTMM and ICOF-S, and the consequences that this relationship had on the need to make an adjustment, will have failed to address the relevant questions of fact and law concerning Article 2.4. The burden of proof is on the party adducing a particular fact and its

inconsistency with the covered agreements.[25] As stated by the Appellate Body in *Chile – Price Bands (Article 21.5 – Argentina)*:

> [a] complaining party will satisfy its burden when it establishes a prima facie case by putting forward adequate legal arguments and evidence.[26]

49. If Indonesia's legal interpretation of Article 2.4 is in error, its evidence and arguments relating to the existence of such an irrelevant relationship will not be sufficient to establish a prima facie case of violation.

50. Although the European Union acknowledges that the Panel is not required to adopt either of the legal interpretations offered by the parties and may develop its own legal interpretation, it is also well-established that it is not for the Panel to "make the case" for the complaining party.[27] It remains Indonesia's obligation to establish a *prima facie* case. It cannot ask the panel to review as many facts as possible, hoping for the panel to develop the legal interpretation to Article 2.4 that suits its case and to apply that legal interpretation to the relevant facts of the case. Unfortunately, that is what Indonesia is asking this Panel to do.[28] The European Union recalls the following guidance from the Appellate Body in this respect in its report on *US – Gambling*:

> Where the complaining party has established its prima facie case, it is then for the responding party to rebut it. A panel errs when it rules on a claim for which the complaining party has failed to make a prima facie case.
>
> A prima facie case must be based on "evidence and legal argument" put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.[29] (footnotes omitted)

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25 Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, at 335.

26 Appellate Body Report, *Chile – Price Band (Article 21.5 DSU – Argentina)*, para. 134.

27 Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

28 Indonesia's answers to questions, para. 1.16–1.18.

29 Appellate Body Report, *US – Gambling*, paras. 139-140.

51. Indonesia has failed to present the evidence and legal argument sufficient to establish a *prima facie* case of violation of Article 2.4 of the *Anti-Dumping Agreement* because its factual arguments were all made to support an erroneous legal argument.

2.1.2.2 Indonesia's argument is based on a misrepresentation of the facts and findings made

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

53. Indonesia makes a number of assertions about the European Union's findings in this case which are factually incorrect and misrepresent the conclusions of the investigating authority.

54. First, Indonesia argues that the Commission treated ICOF-S as an "independent trader". For example, in its oral statement, Indonesia asserts that "investigating authorities cannot be permitted to change reality and convert integrated, SEE sales offices into independent traders with the stroke of a pen, at their discretion".[30] It also argues that the "Commission made an adjustment to PT Musim Mas on the basis that ICOF-S operated as an independent agent on a commission basis with respect to Musim Mas' export sales of the investigated product".[31] Indonesia repeatedly asserts that the European Union treated ICOF-S as an independent trader. Indonesia even argues that there was a "logical inconsistency of rejection the transaction prices between PT Musim Mas and ICOF-S as unreliable due to the relationship, but subsequently treating the two companies as an arm's length seller and trader".[32] Indonesia claims that the EU's position is that the existence of a contract "indicates that the parties are not related" such that it is "proper to impute the existence of a commission".[33]

55. Second, and related to the first point, Indonesia asserts that the Commission imposed a fictitious, "notional" commission on PTMM when no commission was

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30 Indonesia's oral statement, para. 5.

31 Indonesia's oral statement, para. 6.

32 Indonesia's oral statement, para 18; also see, para. 7 with reference to Provisional Regulation, paras 34-36.

33 Indonesia's oral statement, para. 27.

actually paid. For example, Indonesia claims that the Commission decided to treat "ICOF-S as an independent trader and to make a price adjustment for an imputed, not actual, commission between the two".[34] Indonesia argues that "[t]his case concerns an adjustment made by the Commission where no actual expense was incurred and, instead, the Commission imputed a *notional* expense".[35] Indonesia also asserts that the European Union "imputed expenses that may have been incurred based on a notionally different means whereby the exporter could have structured, or used to structure, its sales".[36]

56. Third, and prompted by the Panel's questions about the composition of the export price and the effects of the adjustment that was made on costs and profits of PTMM, Indonesia argues that the investigating authority "deducted both an amount for SG&A/indirect selling expenses for ICOFS and the so-called "profit" adjustment".[37] The implicit suggestion in Indonesia's argument is that SG&A and profit for PTMM were included in the normal value determination while they were deducted from the export price determination when the contested adjustment was made.

57. Fourth, Indonesia suggests that the Sale and Purchase Agreement is not a reliable basis for making findings. It asserts that this Agreement was merely a transfer pricing agreement. In reality, according to Indonesia, the relationship between PTMM and ICOF-S was not at arm's length[38] and ICOF-S was not only assisting PTMM with respect to export sales transactions but was also involved in PTMM's domestic sales.

58. The facts on the record do not support Indonesia's assertions. The European Union never stated that ICOF-S was an "independent trader" and this dispute does not concern the imposition of a "notional" commission where there was "no actual expense". As further explained below, the evidence on the record confirms that an expense was made in the form of a commission/mark-up accorded to ICOF-S for

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34 Indonesia's oral statement, para. 9.

35 Indonesia's answers to questions, para. 1.1.

36 Indonesia's answers to questions, para. 1.9.

37 Indonesia's answers to questions, para. 1.44.

38 Indonesia's answers to questions, paras. 1.18, 1.61, 1.62.

its involvement in PTMM's export sales. The adjustment that was made to reflect the fact that this commission/mark-up related to export sales only, did not mean that the investigating authority deducted PTMM's profits and SG&A from the export price.

2.1.2.2.1 *Indonesia's arguments about the alleged findings that ICOF-S is an "independent" and "unrelated" trader are not supported by the facts and findings on the record.*

59. The record clearly shows that the European Commission acknowledged that ICOF-S was a related trader. The Commission did not "change reality" in any way. Nor was the price adjustment made for an "imputed, not actual, commission" given that the contract evidence clearly showed that a commission/mark-up was paid by PTMM to ICOF-S and that the actual "payment" of that mark-up to ICOF-S was never put into question. Indonesia does not seem to contest that fact but rather argues that the commission/mark-up was meant to cover all costs of the sales assistance provided by ICOF-S for both domestic and export sales. However, that explanation is not supported by the Sale and Purchase Agreement between ICOF-S and PTMM, which is meant to govern transactions between those two companies. Indonesia itself explained that when it comes to transfer pricing agreements the conduct of the parties should conform to the terms of the agreement so that those terms are not a sham[39] and that "it is the very purpose of intercompany agreements to structure commercial interaction in a manner that reflects practices between unrelated companies",[40] i.e. arm's length and that this precise Sale and Purchase Agreement was "concluded in order to demonstrate to both Singaporean and Indonesian tax authorities arm's length pricing practices applied by the companies".[41]

60. In any case, it is appropriate to first recall the findings of the investigating authority before rebutting some specific mischaracterizations by Indonesia of these findings and of the facts on which they were based.

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39 Indonesia's first written submission, para. 4.224.

40 Indonesia's answers to questions, reply to question 18, p. 26.

41 Indonesia's answers to questions, reply to question 18, p. 25.

61. The investigating authority applied an adjustment pursuant to Article 2(10)(i) of the EU's Basic AD Regulation which provides that an adjustment shall be made for differences in commission paid in respect of the sales under consideration. This provision clarifies, for purposes of EU law, that the term "commissions" shall be understood to include the mark-up received by a trader "if the functions of such a trader are similar to those of an agent working on a commission basis". In application of this provision, the investigating authority found that ICOF-S received a mark-up and functioned as a trader similar to an agent working on a commission basis. Neither WTO law, nor EU law required the Commission to make a finding that ICOF-S was an "independent trader" or an "independent agent". The Commission obviously acknowledged the relationship that existed between PTMM and ICOF-S and did not "decide to treat ICOF-S as an independent trader", as wrongly suggested by Indonesia.

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

63. The suggestion that the European Union rejected the transaction price between PTMM and ICOF-S and constructed the export price is simply inaccurate and contradicted by the evidence on the record. Indeed, the Sale and Purchase Agreement between PTMM and ICOF-S provides that ICOF-S could keep a certain percentage of the sales prices it was able to negotiate with buyers in the EU by way of commission for its export sales related services.[42] So, the relevant "transaction" price between PTMM and ICOF-S was the price at which ICOF-S sold the products to the EU, minus the commission/mark-up that ICOF-S could keep. It is thus not correct that the European Union "constructed" the export price for sales made via ICOF-S to independent buyers in the European Union.

64. It is correct that the investigating authority decided not accept at face value the *amount* of the mark-up as shown in the contract. It thus examined whether the amount of the mark-up as set out in the contract was reasonably reflecting the normal profit margin of ICOF-S given the relationship between the parties. The relationship between PTMM and ICOF-S was never in dispute.

2.1.2.2.2 *Indonesia's argument that the Commission "imputed" a mark-up when none existed is contradicted by the facts on the record*

[42] Exhibits IDN-24 and IDN-25, Article 3.

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

2.1.2.2.3 *Indonesia's argument that the Commission's adjustment removed the SG&A and profits of PT MM from the export price is not supported by the facts on the record*

66. It is not so that the European Union adjusted the export price of PTMM by removing the SG&A and profit of PTMM with respect to its export sales but not with respect to its domestic sales. As explained in the answers to the Panel's questions, the Commission did not make any adjustments to the SG&A of PTMM and did not deduct the profits from the export sales. It is worth recalling that in the present case the difference in view is not about the amount of the adjustment, but rather about the fact that any adjustment was made.

67. Indonesia asserts that as part of the contested adjustment the Commission deducted both an amount for SG&A/indirect selling expenses for ICOF-S and made the so-called "profit" adjustment.[43] Indonesia is confusing different things. First, the normal value and export price are determined for PTMM, not ICOF-S. Neither with respect to normal value, nor with respect to the export price was an adjustment made for any SG&A/indirect selling expenses, let alone for profit of PTMM. The Commission did not deduct any amount of profits for PTMM. In fact, this is confirmed by Indonesia in para. 1.69 of its replies in which it states that the amount of the export price "includes PT Musim Mas's profits".[44]

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43 Indonesia's answers to questions, para. 1.44.

44 Indonesia's answers to questions, para. 1.69.

68. When it comes to the adjustment that was made for the commission/mark-up paid to the trader, ICOF-S, it is incorrect to assert that the Commission deducted both an amount for SG&A /indirect selling expenses for ICOF-S and for the profit of ICOF-S. Rather, the investigating authority made an adjustment to the export price of PTMM for the direct selling expense of PTMM given that PTMM was obliged by contract to pay a commission/mark-up to ICOF-S, just like it used to pay a commission to the independent trader it used before.

69. Therefore, the Commission did not deduct the SG&A and profit *of ICOF-S* either. Rather, it verified the amount of the commission stipulated in the Sale and Purchase Agreement by examining what the ordinary commissions are that ICOF-S charges unrelated parties. It thus constructed the amount of the commission because it did not consider that the percentage of the mark-up as identified in the contract was necessarily reliable given the relationship between ICOF-S and PTMM. It therefore examined the amount of expenses of ICOF-S per sale and the profit margin ICOF-S normally charges and then it applied a figure for the adjustment that was never contested, either before the EU courts or in the present case. That number was actually very close to the mark-up ICOF-S was entitled to according the Sale and Purchase Agreement.

70. Nor did the Commission deduct any of PTMM's SG&A. Indonesia is not correct when it asserts that "the SG&A expenses for PTMM's export sales are the indirect selling expenses incurred by ICOF-S and are reflected in ICOFS' financial statements " and that "those expenses were deducted by the Commission from the export price as part of the contested "commission" adjustment".[45] Indonesia is wrong to equate the SG&A of ICOF-S with those of PTMM. PTMM has its own SG&A and no adjustment was made for the SG&A expenses of PT MM.

71. The simple facts are that PTMM uses a trader for all of its export sales to the EU, while it directly trades some of its export sales to third countries. The Sale and Purchase Agreement suggests that PTMM used to involve an independent trader but now sought the support of ICOF-S, a large, related trading company. It paid ICOF-S a commission in the form of a mark-up, just like it paid a commission to

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45 Indonesia's answers to questions, para. 1.72.

the independent trader before. An adjustment was made to the export price because no commission was due for domestic sales. If PTMM had decided for whatever reason that the service of a trader were not needed any longer (e.g. its clients place the orders directly with it and sale/marketing/promotional service of a trader are redundant), in that case it would have avoided the cost of having to remunerate the service of such a trader (be it an independent one or a related company). Indonesia wants to avoid having to accept these basic facts by misrepresenting the situation about the relationship between PTMM and ICOF-S. Certainly, they are related parties. But each has its own activities and assets (personnel, capital, material and immaterial assets). In fact, ICOF-S [[…]]. It is simply incorrect to suggest that simply because of the shareholding relationship between these two different companies, an authority would be required to treat their expenses and profits as one and the same.

72. Indonesia wants to make the Panel believe that PTMM decided that it no longer wanted to pay an outside trader for sales assistance and decided to "internalize" these costs by spinning off its internal sales department in the form of ICOF-S. Indonesia suggests that ICOF-S was created or "set up"[46] to deal with export sales which before were handled by an independent trader, and argues that ICOF-S is like an internal sales department of PTMM. The suggestion is that the costs previously made for compensating the trading company would now be wiped out because these costs would become internal as PTMM decided to do everything itself. That is the picture that Indonesia is painting of the situation. As already mentioned above, that picture is wrong. The Sale and Purchase Agreement makes clear that ICOF-S existed already before PTMM decided to use it as a trading company. Thus ICOF-S was not set up to handle PTMM sales; it is and used to be an international trading company, which trades in a great variety of products, including products from unrelated parties. The fact that PTMM decided to change its selling policy and swap from an unrelated trader to a trader which is part of the same group does not mean that ICOF-S suddenly becomes an in-house "sales department"[47] of PTMM.

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46 Indonesia's answers to questions, para. 1.127.

47 See, e.g. Indonesia's first written submission, para. 1.7, 4.2, 4.7.

73. PTMM agreed on a commission/mark-up to be paid for the involvement of ICOF-S. There was no distinction between the part of the mark-up that would cover costs and the part that would cover the profit margin of ICOF-S, just like you would expect in a normal trading relationship. There is no indication that ICOF-S was required to subsequently transfer the profits back to PTMM or that PTMM was covering the costs of ICOF-S. There is no basis for the suggestion that simply because of their shareholding relationship, commissions paid to ICOF-S become part of the SG&A of PTMM. And even then, the commission was paid only for export sales. This suggests that there was a difference in costs affecting price comparability given that such cost was not borne for domestic sales activities.

74. As an aside, the European Union wants to point to another factual error in Indonesia's argument. Indonesia argues that "the EU made the adjustment on all export sales, including the "direct export sales", even though [[…]] This is simply incorrect. All export sales to the European Union of the subject products were made via ICOF-S and therefore an adjustment was made for all such export sales. No adjustment was made for any "direct" export sales because PTMM did not make any such direct export sales to the European Union. Again, Indonesia's statement is not supported by the facts on the record.

2.1.2.2.4 *Indonesia's arguments about the involvement of ICOF-S in domestic sales transactions and about the value of the Sale and Purchase Agreement are without merit*

75. The European Union also wants to highlight another confused and erroneous assertion by Indonesia in its answers to questions. Indonesia asserts that:

> The EU cannot contest that [[…]] and therefore no adjustment was warranted.[48]

76. The European Union has no specific information on the manner in which ICOF-S "negotiated and arranged PT Musim Mas' domestic sales" other than an email and the assertions made during verification that ICOF-S also assisted PTMM for its domestic sales. The record contradicts this assertion. For example, the Sale and Purchase Agreement refers to export sales only and it is uncontested that all domestic sales were invoiced directly by PTMM. So, the alleged involvement of

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[48] Indonesia's answers to questions, para. 1.59.

ICOF-S was contradicted by other facts on the record. In addition, even if ICOF-S was involved, this involvement was certainly not "in the same manner" given that no commission was paid to ICOF-S. Indonesia's blunt statement to the contrary is not correct.

77. Indonesia also seeks to draw the Panel into a big discussion about "transfer pricing agreements". This dispute does not require the Panel to opine on what constitutes a transfer pricing agreement and what does not. Again, the WTO Agreements do not refer to transfer pricing agreements and there is no agreed definition of a "transfer pricing agreement". Most relevantly, however, the Commission did not simply ignore the argument that the Sale and Purchase Agreement was a transfer pricing agreement. Rather, it addressed the argument and rejected the alleged legal consequences that the Indonesian producer tried to draw. The investigating authority referred among others to the name and "modalities" of the Agreement and explained that even if this agreement can also be used for purposes of calculating arm's length prices in accordance with applicable tax guidelines, this does not contradict the finding that pursuant to this same agreement the trader received a commission:

> [t]he 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 PT MM and the trader and was not limited to the transfer pricing or tax issues.[49]

78. In its first written submission, the European Union provided examples of the "modalities" of the contract, as referred to in the Amending Regulation. This is not an "ex post rationalization" as suggested by Indonesia. An investigating authority is not expected to develop each aspect of its reasoning at length. In the light of the evidence on the record, the authority's reference to the "modalities" of the agreement is clearly a reference to the comprehensive set of provisions

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[49] Amending Regulation, recital 31.

governing the relationship between the two companies, as explained in the European Union's first written submission.

79. Furthermore, Indonesia's argument that this Sale and Purchase Agreement is in fact a pure transfer pricing agreement is a hoax. Even if the agreement were a transfer pricing agreement or had the regulation of transfer pricing as its main objective, it would not mean that it is a useless or fraudulent document that investigating authorities could not rely on as part of the totality of the evidence. Transfer pricing agreements are put in place precisely to ensure that, despite the relationship between the parties, tax authorities are entitled to expect that their transactions are arm's length just as if they were unrelated parties. A transfer pricing agreement is not supposed to be a sham document. Its provisions are supposed to be meaningful; otherwise, why conclude such an agreement?

80. Certainly the purpose of a transfer pricing agreement cannot be to be a "sham" in order to deceive the tax authorities. If the parties do not conform to the terms of the transfer pricing agreement, the tax authorities can ignore it. That is not what PTMM and ICOF-S want, and it is therefore entirely reasonable to expect the parties to conform to the provisions of the agreement. So, tax authorities are entitled to rely on this document for purposes of their tax investigations, precisely because those agreements are meant to govern the financial relationships among related companies and those companies are obliged to comply with them. Therefore, it is not unreasonable or biased of an investigating authority in an anti-dumping investigation to also attach importance to this agreement and to consider its provisions to be trustworthy.

81. Finally, Indonesia repeatedly asserts that the evidence allegedly showed that ICOF-S was also involved in making domestic sales for PTMM. It presents one single e-mail from ICOF-S to PTMM asking it to sign an invoice and it pretends that this should demonstrate that all domestic sales were handled by ICOF-S in the same way. It refers to unsubstantiated assertions made during verification that the "commission" was supposed to cover ICOF-S' involvement in both domestic and export sales transactions. It suggests that because those assertions were not

rebutted on the spot by the verification team that it is "undisputed" that [[…]].[50] The European Union does not consider it relevant to engage in this debate. Indonesia cannot deny that the investigating authority had before it a contract that provides for the payment of commissions for export sales made by ICOF-S. No similar contract exists for domestic sales, and the existing Sale and Purchase Agreement does not refer to such domestic sales. All domestic sales are invoiced directly by PTMM, not by ICOF-S, as is the case for most of the export sales.

82. Even if assertions were made about the involvement of ICOF-S also in domestic sales, no evidence was ever put on the record that commissions were paid for this alleged involvement. Even before the Panel, Indonesia refers to this one email and a few assertions during verification trying to show that ICOF-S was also involved in making domestic sales, but it explicitly states that it does not argue that PTMM paid a commission for the alleged involvement of ICOF-S for which an adjustment should have been made. In fact, in its oral statement, Indonesia again confirms that on domestic sales [[…]].[51] Indonesia highlights that, unlike PTMM during the investigation, it did not argue that an adjustment should have been made on the domestic side for the alleged involvement of ICOF-S in the context of the domestic sales of PTMM.[52] This further confirms that the adjustment that was made on the export price side was justified.

83. In such circumstances, it was reasonable of the investigating authority to draw the reasoned conclusion that a commission was paid for the involvement of the related trader, ICOF-S, with respect to export sales made to the European Union, leading to an adjustment of the export price given that there was no evidence of a similar commission being paid for the domestic sales of PTMM which were all invoiced directly by PTMM in any case.

84. The European Union has in its first written submission referred to the analysis of the investigating authority which addresses all of the same arguments that were made by PTMM in the investigation. There is no reason for the European Union to develop any new and independent reasoning with respect to these facts.

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50 Indonesia's oral statement, para. 53.

51 Indonesia's oral statement, para. 54.

52 Indonesia's oral statement, para. 55.

2.1.2.3 Indonesia's claims based on the difference in treatment between Ecogreen and PT MM are not legally relevant and not supported by the facts on the record.

85. In its first written submission, Indonesia appeared to make a separate claim of violation of Article 2.4 of the *Anti-Dumping Agreement* as a result of the alleged discrimination in treatment between PTMM and Ecogreen. The European Union rebutted that claim by pointing to the lack of legal basis of Indonesia's claim. The European Union also referred to the facts on the record and the reasoned and reasonable findings of the investigating authority confirming the factually different situation of Ecogreen justifying its different treatment in the light of the requirements of EU law. In its replies to the questions of the Panel, the European Union further explained its position with clear reference to the relevant recitals in the various determinations.

86. Indonesia is not correct to argue that the only difference between Ecogreen and PTMM was that for PTMM a written contract existed. Certainly, as is clear from both the Definitive Regulation – recital 31 refers to the fact that "for one of the Indonesian companies this commission is mentioned in a contact covering only export sales" – and the Amending Regulation's recitals 5, 12 and 20 – 32, the existence of this contract was an important element to distinguish between the two companies. But it was not the sole difference.

87. As explained at length in our answers to the questions of the Panel,[53] there were a number of differences that led to the conclusion that the factual circumstances of Ecogreen were similar to those present in the *Interpipe* case that led the European Court of Justice to find that no adjustment was justified. The Commission focused on those same factual circumstances from that Court case and found, among others because of the existence of the contract, that PTMM was in a factually different situation further justifying the adjustment that was made.

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53 European Union's answers to questions, pp. 16-20.

88. Despite Indonesia's repeated assertions that Ecogreen, Interpipe and PTMM all present the same fact pattern, the European General Court disagreed, precisely based on all of the different elements of the evidence on the record for PTMM, including but not limited to the contract.

89. In its reply to question 18 of the Panel, Indonesia is unable to rebut these conclusions and simply tries to re-litigate the argument it already lost before the European General Court where this argument about discriminatory treatment and the application of the European jurisprudence more properly belongs.

90. As explained by the European Union in its reply to question 18, the different factors that, as a result of the factual circumstances present in the *Interpipe* case were more closely examined by the investigating authority and led it to the conclusion that PTMM and Ecogreen were in factually different situations included the (1) the level of direct export sales by PTMM, (2) the significance of trading activities of related trader, including from unrelated parties, and (3) the existence of contract stipulating inter alia the existence of a commission to be paid for export sales.

91. Indonesia's comments on these three factual aspects of the investigating authority's findings fail to establish that the conclusions drawn by the investigating authority were those of a biased and non-objective investigating authority.

92. First, in respect of the reasonable conclusion of the investigating authority that the level of direct export sales was much higher for PTMM while that of Ecogreen was similar to the level of direct export sales in the *Interpipe* situation, Indonesia merely argues that this "reasoning ignores entirely the explanations provided by PT Musim Mas during the verification visit".[54] However, this is a factual difference that does not require an explanation. Either the level of direct export sales of PTMM is higher than that of Ecogreen or it is not. Indonesia does not deny that, as correctly found by the investigating authority, PTMM invoices directly more than 20% of its export sales while Ecogreen only invoices a very small number of export sales directly, as was the case for *Interpipe*. Indonesia fails to demonstrate that the investigating authority made a factual error or was

[54] Indonesia's answers to questions, p. 23.

biased when it pointed to the relatively high level of export sales that were directly invoiced by PTMM, especially in comparison with the low level of such directly invoiced export sales in the case of Ecogreen. In fact, Indonesia's own evidence confirms that in a number of cases, PTMM had to "contract directly" with importers in third countries:

> Com: All export sales made through ICOF S? Generally yes, but some countries do not accept the ICOF S issued certificate of origin that product is made in Indonesia. In such cases PTMM must contract directly (China, Japan) so that PTMM can issue the certificate of origin.[55]

93. So, even according to this statement, for a number of export sales, PTMM "must contract directly" and therefore no mark-up is being paid to ICOF-S. Indonesia never denied this to be the case. Such direct contracts were concluded in a relatively significant number of cases, different from the situation that prevailed for Ecogreen. Nothing in Indonesia's reply suggests otherwise.

94. And the reason why the investigating authority looked at this criterion was because this was one of the factual circumstances that were highlighted in the *Interpipe* case as one of the elements to consider in order to assess whether an adjustment was justified or not. The relatively significant number of direct export sales made by PTMM suggested a difference with the situation in *Interpipe.*

95. Second, with respect to the existence of the contract between the trader and the producer in the case of PTMM, when no such contract exists for Ecogreen and its trading company, Indonesia merely repeats its view that no weight should be ascribed to any of the provisions of this contract because it is merely a transfer pricing agreement.

96. The European Union considers that an investigating authority is justified in relying on what is provided for in this agreement; otherwise what is the utility of concluding these agreements that are not supposed to be fraudulent? Indonesia asserts that "it is nonsensical to argue that two related companies become arm's length companies because they conclude an intercompany agreement that looks like or seeks to imitate, an agreement between unrelated companies".[56] But of

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55 Exhibit IDN-38, p. 3 as referred to by Indonesia in Indonesia's answers to questions, p. 23, fn 3.

56 Indonesia's answers to questions, p. 26.

course, that is not what the investigating authority found. It did not find that the two companies were unrelated; rather it considered relevant as an additional piece of evidence that the two parties found it useful to conclude such a comprehensive agreement and that the agreement expressly provided for the payment of a commission. If there is anything "nonsensical" about this agreement, it is the argument that Indonesia tries to develop that this agreement is on the one hand a legitimate and credible transfer pricing agreement that accords with the international principles of such agreements, but that at the same time this document is a sham that should not be given any weight in terms of assessing the manner in which two companies interact and that its provisions must be disregarded entirely by an investigating authority. According to Indonesia, an investigating authority is not acting in an objective and unbiased manner if it accords any weight to such an agreement. That is a position the European Union considers "nonsensical".

97. Indonesia presents this discussion in a binary fashion – either it is a transfer pricing agreement that cannot be relied on, or it is a contract between unrelated parties. As noted above, that is the wrong approach and it is not the approach the investigating authority took. The authority simply found that the fact that this agreement may also be used for transfer pricing/ tax purposes, "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".[57] The investigating authority conservatively concluded that this contract "represents circumstantial evidence that the trader's functions are similar to those of an agent working on a commission basis".[58] Indeed, that is at least the impression that the agreement wants to give to the relevant tax authorities and there is no reason why the investigating authority would not be allowed to take that contract into account. Indeed, neither Indonesia in the present proceedings nor PTMM before the EU courts have argued that the agreement is a fraudulent document.

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57 Recital 31 of the Amending Regulation

58 Recital 31 of the Amending Regulation.

98. In any case, Indonesia does not deny that there was no agreement of any kind governing the relationship between Ecogreen and its related trader, EOS. That is a matter of fact that further distinguishes the factual situation of both companies.

99. Third, with respect to the significance of the trader's activities and the fact that a significant extent of the trader's supplies originate from unrelated companies, similar to the activities of an agent working on a commission basis, Indonesia again "fails to see the relevance of the trader's activities with respect to products outside of the scope of the investigation".[59] The relevance of course is that these were important factual considerations that led the European Court in *Interpipe* to reach a certain conclusion. As recognized by the European General Court in the context of the PTMM case (Exhibit EU-4), this factor was rightly considered relevant for purposes of determining whether, pursuant to Article 210(i) of the Basic AD Regulation, ICOF-S was functioning as an agent working on a commission basis. The evidence Indonesia itself has put on the record shows that "Fatty alcohols for ICOF is less than 5 % of total business"[60] and that ICOF-S also sells a significant number of products from unrelated parties. In the words of the European Court examining this argument, "in contrast to Ecogreen's related trader, ICOF S' activities are based to a significant extent on supplies from unrelated undertakings".[61]

100. Indonesia tries to explain away this fact but cannot deny it. It consistently tries to portray ICOF-S as an internal sales department of PTMM which was simply spun off to Singapore for tax reasons while in fact ICOF-S [[…]]; ICOF-S was not created as the internal sales department of PTMM at all; and has significant trading activities that are unrelated to the product concerned and to PTMM's activities. If that is put in the context of all of the other evidence and is contrasted with the situation for EOS, the trading company of Ecogreen, it is clear why this consideration is relevant in the light of EU law and jurisprudence.

101. In sum, although Indonesia disagrees with the weight given by the investigating authority to some of the above stated facts and considerations, it fails to

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59 Indonesia's answers to questions, p. 28.

60 Exhibit IDN-38, p. 3.

61 Exhibit EU-4, para. 135.

demonstrate that the investigating could not reasonably have concluded that Ecogreen and PTMM were in a factually different situation taking into account the relevant factors highlighted in the *Interpipe* judgment.

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

103. Ultimately, the only relevant question remains the same as before, and has nothing to do with Ecogreen: did the investigating authority reach the reasonable and reasoned conclusion that the commission paid to ICOF-S by PTMM in the form of a mark-up for export sales only constituted a difference affecting price comparability given that no commission was paid for the alleged involvement of ICOF-S in domestic sales? The answer the European Court have given to that question and the one that the European Union has demonstrated to impose itself in this WTO dispute is: yes.

2.1.2.4 Conclusion

104. Indonesia's arguments all seek to establish that the Commission could not have considered ICOF-S as an "independent entity".[62] But that is not the issue. Nor is it legally relevant for purposes of Article 2.4 that the "EU has nowhere defined what an internal sales department is; and what an independent agent working on a commission basis is".[63] There is no need for an express definition of concepts that are not legally relevant in order to avoid arbitrary determinations, as Indonesia seems to suggest.

105. Whether an adjustment under Article 2.4 is due or not does not depend on whether two companies are unrelated, as Indonesia erroneously argues.

106. In its oral statement or answers to questions from the Panel, Indonesia failed to rebut the legal arguments made by the European Union and has not been able to establish a *prima facie* case that the European Union's reasonable and reasoned

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62 Indonesia's oral statement, para. 45.

63 Indonesia's oral statement, para. 49.

decision to make due allowances for commissions paid to ICOF-S for export sales only violated Article 2.4 of the *Anti-Dumping Agreement*.

107. Indonesia's consequential claim under Article 2.3 must also fail. In its answers to questions of the Panel, Indonesia confirmed that it only added this claim because it "considered it prudent"[64] to include a reference to Article 2.3 given that certain export transactions for which an adjustment was made for the involvement of ICOF-S also involved the construction of an export price due to the involvement of the related importer ICOF-E in the European Union. Its Article 2.3 claim is thus entirely consequential and fails, just like its principal claim under Article 2.4.

108. Finally, Indonesia did not even begin to develop a *prima facie* case under its allegedly consequential claim under Article X.3 of the GATT 1994 and any continued allegation of violation of this provision must therefore be rejected.

2.2. CLAIM 2: INDONESIA'S CLAIM THAT THE COMMISSION FAILED TO SEPARATE AND DISTINGUISH KNOWN FACTORS OTHER THAN THE DUMPED IMPORTS CAUSING INJURY IN VIOLATION OF ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT IS IN ERROR

2.2.1. Indonesia's argument and the European Union's Rebuttal

109. Indonesia argues that the Commission's determination that dumped imports caused injury to the domestic industry is inconsistent with Articles 3.5 and 3.1 of the *Anti-Dumping Agreement* because the Commission allegedly failed to conduct a proper non-attribution analysis. In particular, Indonesia claims that the Commission failed to adequately separate and distinguish the effects of the economic/financial crisis of 2008/2009 and that it did not properly examine the effects of the alleged difficulties faced by the domestic industry concerning access to raw materials and the fluctuations in the prices of these raw materials.[65]

110. In its first submission, the European Union demonstrated that Indonesia's arguments with respect to both factors are flawed.

111. First, with respect to the economic crisis, the European Union demonstrated that Indonesia's claim that the Commission incorrectly assumed that the effects of the

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64 Indonesia's answers to questions, para. 18.4.

65 Indonesia's first written submission, paras. 5.1–5.3.

financial crisis began only in 2009 and that it thus excluded the effects of the crisis from its 2008 analysis is contradicted by the facts and findings on the record. In addition, the reasoned findings of the investigating authority clearly show that it adequately separated and distinguished the injurious effects of the financial crisis from the effects of the dumped imports and provided a reasoned and adequate explanation for its non-attribution finding. The investigating authority 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 suffering injury. In the light of those factual circumstances that have not been contested by Indonesia, the authority reasonably and logically had to reach the conclusion that the economic crisis was not such as to break the causal link between the dumped imports and the injury to the domestic industry as it was not a cause that by itself could explain that injury and any effect caused by the economic crisis was properly distinguished and separated from the effects of the dumped imports. Indonesia is simply seeking the Panel to engage in an unwarranted *de novo* review of the facts based on formalistic arguments relating to the timing of the beginning of the economic crisis.

112. Second, with respect to the issue of the alleged difficulties in obtaining access to raw materials and the alleged effect of fluctuating raw material prices, the European Union demonstrated that this factor was not a factor "known" to be causing injury such that it had to be further examined in order to separate and distinguish the injury caused by this factor. Indonesia acknowledges that an investigating authority is only required to examine those factors for which evidence is adduced that they are causing injury. Indeed, the WTO jurisprudence 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"[66] in respect of the injurious effect of that factor. This was not the case for the question of raw materials which was only raised at the very start of the investigation in one set of

[66] Panel Report, *China – X-Ray Equipment*, para. 7.267. (emphasis added) See, Indonesia's first written submission, para. 5.74.

comments on the application for initiation of the investigation and without any supporting evidence that this factor was a separate cause of injury.

113. In addition, to the extent that this factor was relevant, the investigating authority necessarily took it into account since this difference between the Indonesian producers with direct access to raw materials and the European Union producers which have to import the raw materials is simply a condition of the competition between both that has always existed. It is thus not a separate cause of injury. Finally, as explained in the first written submission, the alleged effect of the raw material price fluctuations was only raised in the context of the effects of the financial crisis. Therefore, to the extent relevant, this factor was thus included in the examination of the effects of the economic crisis.

2.2.2. Indonesia fails to rebut the European Union's arguments

114. In its oral statement and in its answers to the questions from the Panel, Indonesia fails to respond to the European Union's rebuttal arguments. It merely repeats its erroneous assertions about the alleged lack of a proper causation and non-attribution analysis by the European Union. Indonesia's unsubstantiated and formalistic arguments are without merit and do not establish a prima facie case of violation of Articles 3.1 and 3.5 of the AD Agreement.

2.2.2.1 Indonesia's rebuttal arguments relating to the economic crisis are unsubstantiated and formalistic

115. With respect to the effect of the 2008/2009 economic and financial crisis, Indonesia continues to assert that the European Union considered that the economic crisis began only in 2009 and thus that it failed to properly identify the effects of the crisis in the second half of 2008.[67] Indonesia desperately tries to suggest that one statement in recital 96 of the Definitive Determination must necessarily be read to be the alpha and omega of the investigating authority's determination about the effects of the economic crisis and the alleged "starting point" of this global crisis. In its first submission, the European Union explained that when this statement is read in its context and together with many other statements about the effects of the financial crisis, it is clear that the Commission

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67 Indonesia's oral statement, paras. 62- 67.

was well aware of the commonly known fact that the global economic crisis started around the second half of 2008.

116. Indonesia argues that the statements in the relevant documents contradicting Indonesia's assertions imply that the Commission's analysis is "incoherent and contradictory"[68] and that it "paint[s] a confusing picture".[69] The European Union disagrees. The Panel is reviewing the WTO consistency of the investigating authority's entire determination and it is thus entirely appropriate for the Panel to review certain statements in their context. This is especially the case for issues such as the "starting date" of something as big and complex as "the global financial and economic crisis" which the Commission acknowledged to be a 2008/2009 crisis. The global economic/financial crisis is a complex phenomenon which develops its effects over time and it is simplistic to turn the debate about its effects on injury factors that are examined by the investigating authority on a year by year basis into a debate about the exact starting point of this crisis.

117. Perhaps even more disconcerting is Indonesia's suggestion that the European Union would not be allowed to refer the Panel to the investigating authority's comprehensive discussion of this other factor throughout its injury and causation analysis. Indonesia suggest that the "EU draws on statements in unrelated sections of the determination, in particular in the injury analysis in the Provisional Determination".[70] It asserts that "arguments of this type have been flatly rejected in WTO jurisprudence"[71] and it refers to the Appellate Body Report in *US - Steel Safeguards* in support of its point. Indonesia is wrong.

118. The European Union disagrees that the injury analysis is an "unrelated section" for purposes of examining the effects of other factors on injury. Article 3.5 of the *Anti-Dumping Agreement* that sets forth the non-attribution requirement is one paragraph of Article 3, entitled "Injury". The text of Article 3.5 refers directly to "the effects of dumping as analyzed under paragraphs 2 and 4" of Article 3, which form the heart of any investigating authority's injury analysis. To suggest that statements made with respect to the developments in the injury factors and their relationship with another injury factor like the economic crisis cannot be

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68 Indonesia's oral statement, para. 68.

69 Indonesia's oral statement, para. 70.

considered or referred to because they are set out in an "unrelated" section is thus incorrect as a matter of fact and law.

119. Indonesia's reference to *US – Steel Safeguards* is also entirely misguided. In that case, the relevant question was whether the United States had provided "reasoned conclusions" of the separate factor of "unforeseen developments" which must be demonstrated as a matter of fact before a Member is entitled to impose a safeguard measure. Nothing in the U.S.' determination suggested that the authority had examined this factor. The United States tried to argue its way out of this inevitable conclusion by pointing to a number of statements spread out over the determination that would suggest that some consideration of unforeseen developments was implied in the determination. The Appellate Body rejected this argument and highlighted that the determination did not address this factor and did "not even refer to the facts that may support this conclusion".[72]

120. Contrary to the situation in *US – Steel Safeguards*, it is simply not so that the European Union is asking the Panel to "find support for [its] conclusions by cobbling together disjointed references scattered throughout a competent authority's report" as suggested by Indonesia.[73] This is not a situation of "attempts by respondents to supplement or explain an investigating authority's conclusions by referring to the data on the record or reasoning to which the conclusions themselves did not refer"[74] as erroneously stated by Indonesia. The European Union referred to the findings and reasoning of the investigating authority as included in the relevant determinations dealing with the economic crisis, both in the specific section dealing with causation and non-attribution and in the overlapping section dealing with the evaluation of the injury factors. There is simply no basis for Indonesia's arguments that the Panel could not take into account the comprehensive discussion of this factor in the context of the injury and causation analysis as a whole.

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70 Indonesia's oral statement, para. 71.

71 Indonesia's oral statement, para. 72.

72 Appellate Body Report, *US – Steel Safeguards*, para. 326.

73 Indonesia's oral statement, para. 72 referring to Appellate Body Report, *US – Steel Safeguards*, para. 326.

74 Indonesia's oral statement, para. 72.

121. Similarly baseless is Indonesia's form-over-substance argument that the description in the movement of the injury factors showing a lack of correlation with the economic crisis "appears in an entirely different section and under a different heading from the analysis of 'other factors'".[75] Perhaps the only relevant statement that Indonesia made in its oral statement relating to this question is that it "has no issue with the EU's description of the movements in injury indicators"[76] which formed the essence of the correlation analysis by which the investigating authority separated and distinguished the effects of the economic crisis. So, Indonesia actually agrees with the substance of the European Union's analysis. It simply considers that this explanation should have been concentrated under the heading "other factors" rather than to be reflected in both the injury and causation sections. The European Union trusts the Panel to reject this formalistic and erroneous argument that of course is not based on any requirement in the text of the *Anti-Dumping Agreement*.

122. Equally formalistic and undeveloped is Indonesia's argument that the "correlation/coincidence" approach is separate from the "non-attribution" analysis and that the European Union's arguments constitute "ex post rationalization".[77] The European Union rejects the inaccurate but repeated suggestion that the European Union is providing ex post rationalization when it is merely referring to the injury and causation analysis as reflected in the relevant determinations of the investigating authority.

123. Neither is the correlation/coincidence approach a "separate element" of the causation analysis. Indonesia is confusing two things. The correlation/coincidence approach is not exclusive to the establishment of a causal relationship between the dumped imports and the injury to the domestic industry. This same approach is also a useful tool for examining a possible causal contribution to the injury resulting from other factors. It is simply a tool for examining the existence of a genuine and substantial relationship of cause and effect. One very normal way of separating and distinguishing different contributing factors is thus to examine the

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75 Indonesia's oral statement, para. 76.

76 Indonesia's oral statement, para. 76.

77 Indonesia's oral statement, para. 81.

developments of these different factors against the background of developments in the injury indicators. As explained in our first written submission, the investigating authority adequately examined all different factors and their developments and put them in their proper context as part of a set of injury indicators. Injury is not determined on the basis of profits alone, as Indonesia seems to suggest.[78]

124. Finally, Indonesia takes issue with the investigating authority's determination that the effects of the economic crisis were not such as to "break the causal link" between the duped imports and the injury to the domestic industry, but at the same time acknowledges that many panels have in the past accepted this approach as proper.[79] Indonesia provides no reference to any legal requirement that imposes a different approach in this case but simply asserts that "as a matter of logic" the non-attribution analysis "must precede the determination of the causal link".[80]

125. Leaving aside the obvious lack of legal basis to reject the Commission's determination on this basis, Indonesia's "logical" argument is wrong. First, it is artificial to create a particular order of analysis for the causation and non-attribution analysis. They are both aspects of the demonstration of a causal link between the dumped imports and the injury. Second, to the extent that the practice of investigating authorities is to first establish the existence of a causal relationship between the dumped imports and the injury, this practice is supported by the first sentence of Article 3.5 that expressly requires the authority to first establish that "the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement".

126. Indeed, contrary to what Indonesia suggest, it seems logical to first examine whether the dumped imports are causally related to the injury before examining whether other factors were not also contributing to the injury. The ultimate question for the non-attribution analysis is whether injury caused by these other factors is not attributed to the dumped imports and whether, after having separated and distinguished the effects of these other factors, the determination of a causal

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78 Indonesia's oral statement, para. 82.

79 Indonesia's oral statement, para. 83.

80 Indonesia's oral statement, para. 83.

link still holds and is not diluted by other factors. That is exactly what the investigating authority did. The particular methods and approaches for establishing this causal link are not prescribed by the *Anti-Dumping Agreement*.[81]

2.2.2.2 Indonesia's rebuttal arguments concerning access to raw materials and related raw material price fluctuations fail to address the European Union's argument

[81] Appellate Body Report, *US – Hot Rolled Steel*, para. 224.

127. Indonesia confirms that it "accepts that an interested party that raises a particular non-attribution factor must provide some evidence that this factor contributed to the injury, thereby triggering the requirement to perform a non-attribution analysis".[82] As demonstrated in the European Union's first written submission and in the answers to the questions of the Panel, that is precisely what the Indonesian interested parties failed to do.

128. In complete disregard of the facts on the record, Indonesia asserts that the "Indonesian exporters provided extensive arguments and evidence"[83] and that they provided "a significant amount of arguments and evidence"[84] on this raw materials factor. The opposite is true.

129. 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.[85]

130. Indonesia refers to *EC – Salmon* in support of its argument that the investigating authority should have examined this other factor and should have separated and distinguished its injurious effects.[86] Indonesia's reference to *EC – Salmon* is, however, inapposite. In *EC – Salmon,* there was no dispute that production costs had increased and that this factor had been raised as an "other factor" causing injury by the interested parties. The panel found that the European Union had addressed a related question concerning the relative differences in costs of

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82 Indonesia's oral statement, para. 86. (emphasis added).

83 Indonesia's oral statement, para. 87.

84 Indonesia's oral statement, para. 91.

85 European Union's answers to questions, question 21, p. 21-23.

86 Indonesia's oral statement, para. 90, referring to Panel Report, *EC – Salmon (Norway)*, para, 7.660.

production of certain European producers compared with Norwegian producers but had failed to address the general question of the impact of the acknowledged increase in production costs. The situation in this case is entirely different. The European Union has demonstrated that the Indonesian exporters failed to properly raise the raw materials issue, at least as a separate issue from the economic crisis. The Commission did not acknowledge that access to raw materials deteriorated or that prices fluctuated significantly during the period of investigation. And the Commission did not ignore this factor but found that the exporter had failed to substantiate their assertions, which, based on the facts and evidence on the record is an objective and unbiased conclusion.

131. For the sake of completeness, the European Union will briefly summarize what it has explained in the first written submission and in the answer to the questions of the Panel regarding the facts on the record. These facts demonstrate that no relevant argument was made let alone any evidence was adduced that the difficult access to raw materials and related raw material price fluctuation on which Indonesia now puts so much emphasis was a "know factor causing injury" such that it had to be examined by the investigating authority.

132. First, in the June 2011 comments on the provisional disclosure, PTMM 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 Commission failed to consider. It did not repeat such comments or elaborate on these comments thereafter. It never provided any evidence to support its statement and failed to substantiate its assertions. In fact, it never even mentioned this alleged "other factor" again in the months that followed.

133. Second, in the earlier 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. The European Union recalls that this factor 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.

134. As explained in more detail in the European Union's answer to question 20 of the Panel, both references to the "raw materials" issue are found in Section 4 of these comments, which continues for 15 pages. This section 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 situation deteriorated significantly during the period concerned (from beginning of 2007 through June 2010).[87]

135. The only additional element referred to by PTMM in these three paragraphs concerns the economic crisis, as suggested by the title of the subsection and as repeated in the text of the third paragraph of subsection 4.4.1, which reads:

> [t]his is particularly crucial in times such as the crisis in 2008 and 2009 when there were significant fluctuations in CPKO prices from USD1241/Mt in July 2008 to USD899/MT in September 2009 and touching USD465/MT in December 2008.[88]

136. In that 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". Hence, not only did PTMM present the price fluctuations of the raw material – and

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87 Provisional Regulation, recital 87, Exhibit IDN-3.

88 See also Indonesia's answers to questions, para. 1.91 ("This risk of price fluctuations materialized itself in particular during the economic crisis, starting in mid-2008; during this period the price of raw material decreased…").

notably the fall in prices – as an issue that could cause losses to the EU industry because of the economic crisis, but it also referred to a narrow time period during which those price fluctuations would have been registered. Those price fluctuations over a six months period which concerns only a very short part of the period considered for the examination of the trends relevant to the assessment of injury (1 January 2007 – 30 June 2010), and does not coincide with the investigation period (1 July 2009 – 30 June 2010), could by no means explain the fact that injury persisted at least until 30 June 2010.

137. Leaving aside this aspect, 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 Commission, as was the factor "economic crisis". Indeed, the distinction between, on the one hand, the economic crisis as an "other factor" causing injury and, on the other hand, 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 Commission examined the injury factors such as profitability, found that they deteriorated significantly during the economic crisis[89] 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.

138. 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

89 Provisional Regulation, recital 87, Exhibit IDN-3.

do they contain any evidence that there is another cause of injury which is contributing to the injury. This reality has always been there. Indonesia itself has explained that "[i]n sum … the EU industry faced a structural disadvantage because the competing Indonesian exporters have their own sources of raw materials".[90] A structural disadvantage is something stable that does not tend to change. It is something that has always been there. To the extent that this structural disadvantage can be more damaging during the period 2008/2009, the reference is again to the economic crisis, a factor that was a known cause of injury that was examined and adequately dealt with by the Commission.

139. In its answer to question 20, Indonesia simply repeats its previous assertions about the relevance of this factor and its alleged difference from the "economic crisis". The above discussion of the very few times the Indonesian exporters actually raised this factor shows that Indonesia's assertions are not supported by the facts on the record.

140. In any case, its discussion about the alleged difference between this raw materials factor and the economic crisis again seeks to elevate form over substance. It is based on the manner in which the interested parties, confusingly, labelled their assertions. It is telling that both in the first written submission and in its answers to questions,[91] Indonesia decided to quote the entire paragraph of the October 2010 comments on the application of PTMM in which it raised this factor, trying to increase its importance. In fact, if the Panel goes to the exhibit of Indonesia from which this quote is taken, IDN-35, it will see that these two paragraphs are buried amidst many other equally unsubstantiated assertions and claims.

141. Finally, the European Union disagrees with Indonesia's argument expressed in its answers to questions[92] that it was for the Commission to have asked PTMM for additional evidence to assess PTMM's arguments or that the Commission should have collected additional evidence itself. It is for the interested parties to adduce sufficient evidence of the effects of another factor such that this factor becomes a factor that is known to cause injury, requiring the authority to separate and

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90 Indonesia's answers to questions, para. 1.91.

91 Indonesia's answers to questions, para. 1.90.

92 Indonesia's answers to questions, para. 1.102, referring to Panel Report, *Mexico – Rice*, para. 7.185.

distinguish its effects. It does not suffice to simply make a blunt statement at the start of the investigation without adducing any evidence and then to expect the authority to actively seek to obtain the evidence to substantiate these assertions.

142. In paragraph 1.96 of its replies to the Panel's questions, Indonesia argues that PTMM produced evidence showing that the fluctuations in the price of raw material was a factor causing injury distinct from the economic crisis:

> by referring to documents submitted by EU companies to the Commission, namely Annex 13 and 21 of the Anti-Dumping complaint", and to the fact that the complaint "itself confirms that the development of raw material prices is set out in Annex 21".[93]

143. It is appropriate therefore to spend a few moments on this so called evidence that seems to consist of three parts. All three parts are equally unconvincing and are certainly not probative of any contribution to injury.

144. First, Indonesia refers in alleged support of its argument to page 30 of the Complaint, which it files as Exhibit IDN-58. However, page 30 of the complaint (Exhibit IDN-58) discusses a phenomenon that is precisely the opposite of what Indonesia considers to have been proven by PTMM, i.e. it discusses the increase of raw material prices. It explains that the increase of raw material prices cannot be a separate injury factor since all raw materials for fatty alcohols are traded at world market prices and therefore price fluctuations affect all producers. It explains that integrated producers can shift profits between the internal profit centres, but cannot avoid the effect of a raw material price increase. Then it adds that because the prices of synthetic raw materials and natural raw materials for fatty alcohols have not evolved in parallel (which is exactly the opposite of what PTMM argued in subsection 4.9 of its comments to the complaint), price development in natural raw materials cannot explain the injury suffered by all EU producers that use different manufacturing process.

145. Second, as it results from the list of annexes to the complaint (which is page 4 of Exhibit IDN-58), Annex 13 to the complaint that PTMM and Indonesia refer to is

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[93] Indonesia's answers to questions, para. 1.96, referring to Anti-Dumping Complaint before the European Commission against imports of Fatty Alcohol originating in India, Indonesia and Malaysia, submitted by Cognis GmbH, Sasol Olefins & Surfactants GmbH, dated 25 June 2010, p. 30. Exhibit IDN-58.

a sample invoice detailing ocean freight and insurance costs. It is therefore not relevant to support the arguments PTMM or Indonesia are making.[94]

146. Third, Annex 21 of the complaint contains a number of tables with the prices of raw materials over the period 2005-2009. The European Union is submitting this Annex 21 as Exhibit EU-15 for the Panel's information.[95] According to PTMM's comments, that table of prices would show that synthetic and natural raw materials for fatty alcohols moved in parallel.[96] That is not what the Complaint said. And PTMM never even tried to analyse those data and to explain how they would demonstrate the point it was making.

147. In any case, far from showing that the alleged drop in natural raw material prices caused injury separately from the economic crisis, PTMM developed all of these arguments in the context of "… when market conditions are as volatile as in 2008 and 2009…" and, according to PTMM, that evidence allegedly demonstrated that "the claims that synthetic FOH producers in the EU did not suffer because their raw material prices did not move are flawed" (but actually the complaint argued the opposite, i.e. that all EU producers that use different manufacturing process suffered injury at the same time).[97]

148. In light of these circumstances, it is clear that it was reasonable of the investigating authority to conclude that PTMM did not produce any evidence to substantiate its assertion, made only at the very beginning of the investigation, that raw material price fluctuation constituted a separate cause of injury to the EU industry so as to deserve further investigation.

149. Indonesia's argument that, as an active "investigating" authority, the Commission should have actively sought for the additional evidence of such a causal impact is without merit.

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94 Exhibit EU-15.

95 Annex 21 of the Anti-Dumping Complaint of 4 October 2010 on price developments of raw materials, 2005-2009, Exhibit EU-16.

96 See subsection 4.9 of the comments to the complaint, Exhibit IDN-35.

97 Exhibit IDN-35, subsection 4.9.

150. It is telling that Indonesia refers to the panel report in *Mexico – Rice* on the need for an active investigating authority.[98] Indeed, the finding that Indonesia refers to is in fact one of the few findings of that panel that the Appellate Body reversed. The European Union recalls that the panel in *Mexico – Rice* considered that the term "investigation" imposed an active involvement of the authority going beyond the limited obligation in the text of the Agreement. After having made the observation that Indonesia refers to in para. 1.102 of its answers to the questions of the Panel, the panel reached the following conclusions:

> In sum, we are of the view that the term "known exporter or producer" in Article 6.10 of the AD Agreement refers to the exporters or producers that an unbiased and objective investigating authority properly establishing the facts would be reasonably expected to have become conversant with. Article 6.10 of the AD Agreement is a general requirement that the authority has to comply with, at the latest, at the end of the investigation when making the determinations. This implies that the exporters that are known to the authorities at that point are those that an objective and unbiased investigating authority properly establishing the facts and conducting an active investigation could have and should have reasonably been considered to have knowledge of.[99]

151. However, the Appellate Body rejected this specific conclusion that Indonesia is relying on and found that the Panel's "extensive interpretation" requiring an "active investigating authority" imposed too high a burden on the authority:

> The Panel found that the term "interested parties known to the investigating authorities" in Article 12.1 covers not only the exporters known to the investigating authority, but also the exporters of which "it can reasonably obtain knowledge". In our view, the extensive interpretation given by the Panel to this term is incorrect.
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> …
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> Extending the duty to give notice under Article 6.1 to exporters of which the investigating authority does not know, but of which it might have obtained knowledge, would imply that, under Article 6.1, the investigating authority is subject to a duty to undertake an inquiry, which may be extensive, to identify the exporters. We cannot find, in Article 6.1 or anywhere else in the Anti-

98 Indonesia's answers to questions, para. 1.102.

99 Panel Report, *Mexico – Rice*, para. 7.187.

> Dumping Agreement, any legal basis for such an obligation, which in some circumstances could be onerous. Accordingly, in our view, Economía was not obliged under Article 6.1 to give notice of the required information to exporters of which it did not know but of which it could have obtained knowledge[100]

152. The European Union is puzzled by Indonesia's reliance on a dispute that demonstrates the opposite of what it is claiming to be the requirement of the investigating authority.

153. In any case, this is not a situation where the authority "remained passive in the face of possible shortcomings in the evidence submitted"[101] by the interested parties as suggested by Indonesia based on the Appellate Body report in *US – Wheat Gluten*. As the Appellate Body said in that same *US – Wheat Gluten* report, "the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities."[102]

154. In addition, the *US – Wheat Gluten* quote that Indonesia refers to suggesting an active inquiry by the investigating authority related to the examination of the relevant factors of injury which are expressly listed as requiring an evaluation in Article 4.2(a) of the *Agreement on Safeguards* and Article 3.4 of the *Anti-Dumping Agreement*. The Appellate Body found that all of these factors must be examined even if some were not raised by the interested parties and that, where necessary, this means the authority needs to gather the necessary information allowing it to evaluate these listed factors.[103] That is entirely different from the situation with respect to possible known factors in respect of which it is, as acknowledged by Indonesia, for the interested parties to adduce evidence that this is a factor known to be causing injury and requiring further evaluation.

2.2.3. Conclusion

155. The European Union demonstrated that the investigating authority examined all other known factors causing injury and ensured that it did not attribute injury to

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100 Appellate Body Report, *Mexico – Rice*, paras. 247, 251.

101 Indonesia's answers to questions, para. 1.103, referring to Appellate Body Report, *US – Wheat Gluten*, para. 55.

102 Appellate Body Report, *US – Wheat Gluten*, para. 54.

103 Appellate Body Report, *US - Wheat Gluten*, para. 55.

the dumped imports in accordance with its obligation under Article 3.5 of the *Anti-Dumping Agreement*.

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

2.3. 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

2.3.1. Indonesia's argument and the European Union's rebuttal

157. Indonesia claims that the European Union violated the obligation under Article 6.7 of the *Anti-Dumping Agreement* to make available the results of the verification visit it made to the Indonesian interested parties. It asserts that "the content of the disclosure of the verification results must provide detailed and adequate information regarding all aspects of the verification visits".[104] 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".[105]

158. In the first written submission, the European Union demonstrated that Indonesia's claim is based on a misrepresentation of the facts and a misreading of the legal obligation imposed by Article 6.7 of the *Anti-Dumping Agreement*. First, 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 of the results of the verifications in the Commission's disclosures"[106] as asserted by Indonesia. In addition, the Commission agreed with the interested parties on a list of exhibits that were taken at the end of the on-site verification. Second, the requirement of Article 6.7 does not impose any standard of specificity but rather imposes a

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104 Indonesia's first written submission, para. 6.61.

105 Indonesia's first written submission, para. 6.61.

106 Indonesia's first written submission, para. 6.53.

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.

159. 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" of the on-site verification 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 or to prepare lengthy explanations and descriptions on aspects of the verification which had no further consequences or to draft a document setting out the verification team's evaluation of the evidence and explanations that the company provided on the spot.

160. During the investigation the verified Indonesian 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. There is therefore no basis for Indonesia's assertion that the Commission did not comply with its obligation under Article 6.7 of the *Anti-Dumping Agreement*.

2.3.2. Indonesia fails to rebut the European Union's arguments

161. In its oral statement and in its answers to the questions of the Panel, Indonesia fails to respond to both the factual and legal rebuttal arguments of the European Union. Instead, it simply repeats its broad reading of what it would have ideally liked the obligation under Article 6.7 of the *Anti-Dumping Agreement* to be, ignoring that the requirements it reads into Article 6.7 are nowhere to be found in the text of that provision.

162. Indonesia asserts that the European Union is conflating the obligations under Articles 6.7 and 6.9 of the *Anti-Dumping Agreement* and argues that making

available the "results" of the verification is not the same as disclosing the "essential facts". For Indonesia, the fact that Article 6.7 provides that the results of the verification investigation have to be made available or that the "authorities shall provide disclosure thereof pursuant to paragraph 9" simply means that the results of the verification may be made available "at the same time" of the disclosure of essential facts foreseen in Article 6.9 of the AD Agreement.[107] According to Indonesia the results of the verification visit "belong to a broader universe of facts"[108] than the essential facts on which the determination will be made. It also asserts that contrary to Article 6.9, "it is not for the investigating authority however to decide – post hoc – what aspects of the verification have "consequences" for the exporters".[109]

163. Indonesia expresses the view that the "results" of the verification must disclose information that was verified as well as that which was not, and information that was subsequently corrected.[110] It considers that "the purpose of the disclosure of the results of the verification under Article 6.7 is to allow parties to defend their interests"[111] and asserts that "[t]his is not achieved by allowing an investigating authority to disclose only the results that it considers essential to its determination".[112]

164. In its oral statement, Indonesia offers two examples to "demonstrate how the EU's failure to report the results of the verification visit in this case had important consequences for the exporters' ability to defend their interests both in the investigation itself and in subsequent proceedings."[113] Indonesia refers to (1) the provision of the 2010 financial statements by ICOF-S to supplement the 2009 statements included in the questionnaire reply and (2) the email that was provided

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107 Indonesia's oral statement, paras. 95-97.

108 Indonesia's oral statement, para. 99.

109 Indonesia's oral statement, para. 101.

110 Indonesia's oral statement, para. 103.

111 Indonesia's oral statement, para. 104.

112 Indonesia's oral statement, para. 104.

113 Indonesia's oral statement, para. 106.

to support PTMM's argument that ICOF-S was also involved in domestic sales transactions.[114]

165. However, it is clear that Indonesia is developing an entirely theoretical argument that is not supported by the facts and findings on the record and that finds no basis in the text of Article 6.7 of the *Anti-Dumping Agreement*, because (as further explained below) those two documents are included in the list of documents collected during the verification a copy of which was provided to PTMM.

166. First, on the facts, it is important to re-state what the European Union explained in the first written submission. Contrary to Indonesia's assertions, it is clearly the case that the European Union provided "discussion of information that was verified, not verified or corrected with respect to essential facts referenced in Article 6.9"[115] as Indonesia seems to suggest is required under Article 6.7 of the *Anti-Dumping Agreement*. For example, the May 2011 provisional company specific disclosure document 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 [[…]] Following this May 2011 disclosure by the Commission to PT Musim Mas, the Indonesian producer provided its comments in response[116] and also defended its interests at a 5 July 2011 oral hearing before the Commission.

167. 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.[117]

168. The GDD highlighted the procedural steps the Commission had taken to disclose all essential facts and considerations, including its efforts to verify the

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114 Indonesia's oral statement, paras. 106–108.

115 Indonesia's oral statement, para. 99 referring to US Third Party Submission, para. 42.

116 PTMM comments on the Provisional Disclosure document (Exhibit IDN-34).

117 Letter regarding disclosure of definitive findings dated 2 August 2011 (Exhibit EU-10).

information,[118] and it noted certain information from Indonesian exporters that could not be verified.[119] 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.[120] It provided further information regarding the verification of information from interested parties regarding essential facts raised in the GDD.[121]

169. In addition, as explained in the first written submission, and as recalled at the time of the first substantive meeting of the Panel with the parties and in the European Union's answers to the questions of the Panel, at the end of each verification visit, the Commission and the verified producer agreed 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. The European Union submitted these lists as Exhibit EU-14. Contrary to the suggestion of Indonesia in para. 1.123 of its answers to questions according to which the Commission "did not provide the exporter with an official list of the documents", this list was provided to the interested parties, as is customary. The Commission does not understand Indonesia allusion to the absence of an "official list". What would be the difference between an official list of those documents and the list the Commission provided, in particular when PTMM itself knew exactly which documents had been taken for having provided, packed and shipped them to the Commission? [122] The list was in the file of the investigation, and its content was uncontroversial. For example, on several occasions, the provisional disclosure document refers to these exhibits obtained during verification and refers to their numbers as they appear on the list.[123] PTMM never suggested that it did

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118 General Disclosure document (Exhibit IDN-39), paras. 4–7.

119 General Disclosure document (Exhibit IDN-39), paras. 20, 29, 36, 41, 48, 59, 65, 66, 99 and 117.

120 Definitive Regulation (Exhibit IDN-4), recitals 4–7.

121 Definitive Regulation (Exhibit IDN-4), recitals 20, 29, 38, 43, 45, 48, 50, 61, 67, 68, and 119.

122 Indonesia's answers to questions, para. 1.123.

123 Provisional Disclosure Document (Exhibit IDN-33). For example on p. 2 it is stated that "The data is from the file PTMM DMSAL, which is from the combined exhibits 1 + 17 received at PTMM, Medan (Worksheet 2.4)." These exhibits and their numbers are those contained in the list of exhibits that the European Union provided as Exhibit EU-14.

not understand these references. It is therefore absolutely implausible that it did not have the agreed list of exhibits taken at verification.

170. The facts on the record are therefore clear. Both at the time of the verification and in several subsequent documents (and thus not merely at the time of the final disclosure of essential facts), the interested parties were informed of the outcome of the verification in the form of an exchange of lists of additional exhibits taken, a record of the information on which the authority based its findings, and indications that these facts were verified and that corrections were made in common agreement with the interested parties.

171. More than sufficient time was given to the interested parties to comment or to object to certain statements of fact allowing the interested parties to refer to information possibly provided during verification that was ignored. After all, verification is not something that takes place behind closed doors. The list of information to be provided during verification is sent to interested parties in advance, as required by Annex I. In addition, as is clear from the "Company internal note concerning verification of ICOF-S" filed by Indonesia as Exhibit IDN-38, the interested parties are very closely involved in the verification and are present throughout this process. So, it is not that they are kept in the dark about the verification while the investigators are going through their books behind closed doors, leaving them to guess what happened during verification. Yet, that is the suggestion of Indonesia in this dispute.

172. In any case, no comments were received on the lack of information concerning the verification in the course of this investigation. In this WTO dispute settlement proceeding, Indonesia thus raises a purely theoretical argument about the obligation under Article 6.7, seeking a declaratory ruling of the Panel. It tries to support its argument by two concrete examples of how this alleged lack of information on the results of the verification affected the due process rights of the interested parties. As explained below, these examples are not convincing. However, as a preliminary matter, the European Union notes that the verifications took place in November 2010. In the year that followed these verifications before the Definitive Regulation imposed measures in November 2011, none of these interested parties ever complained about the alleged lack of information relating to the results of the verification visits.

173. It is recalled that the two examples that Indonesia offers in its oral statement concern (1) the ICOF-S 2010 financial statements and (2) the email allegedly evidencing the involvement of ICOF-S in domestic sales of PTMM.

174. First, it suffices to look at the agreed list of exhibits taken at the time of the verification, submitted by the European Union as Exhibit EU-14 to see that both documents are clearly referenced in this list. Page 1 of this list, relating to the verification of PTMM – Medan, shows as Exhibit 18: "Evidence submitted showing ICOFS handling domestic sale for PTMM", which is the email that Indonesia has submitted as IDN-47 in this dispute. And page 2 of the list relating to the verification of PTMM – ICOS/Besdale includes as Exhibit 9: "ICOFS financial statements for 2010".[124]

175. Furthermore, this alleged lack of information on these two exhibits shared during verification never stopped PTMM from raising the arguments that these exhibits were supposed to support.

176. For example, the GDD shows that PTMM argued that an adjustment should also be made on the normal value side because ICOF-S would also coordinate domestic sales. This is the argument that is allegedly supported by the email showing the instruction by ICOF-S to PTMM to sign a domestic sales transaction, listed as Exhibit 18 from the verification. The Commission addressed this argument by pointing to the Sale and Purchase Agreement's express reference to export sales only and by highlighting the uncontested fact that "all domestic sales are invoiced directly by the company".[125] It is not because the Commission reached a different conclusion based on the facts on the record that due process rights are violated.

177. Similarly, there is no basis in the record to claim that the interested parties' due process rights were in any way affected by the fact that they allegedly did not receive a report explaining that the 2010 ICOF-S financial statements were provided during verification. These 2010 financial statements allegedly show that the level of sales by ICOF-S from unrelated parties went down from 50% to 33% in 2010. In its power point comments on the re-opened investigation dated 16

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124 Exhibit EU-14.

125 General Disclosure Document, Exhibit IDN-39, recital 33; Definitive Determination, Exhibit IDN-4, para 35.

August 2012 (Exhibit IDN-26), PTMM expressly refers to the 2010 financial statements. It states that these statements were provided during verification and that they show that the level of sales from unrelated parties by ICOF-S was lower than it was in 2009.[126] It was thus able to defend its interests and develop comments based on the information submitted during verification. Nowhere in the challenged measures the Commission ever denied the fact that these 2010 statements were provided during verification and in fact, as noted above, confirmed that this was the case by listing these 2010 financial statements in its shared "list of exhibits". The investigating authority found that the "trader's overall activities were based to a significant extent on supplies originating from unrelated companies"[127] without specifying whether this was based on the 2009 or 2010 financial statements. Indeed, whether 50 or 33% of sales are from unrelated suppliers, the Commission's finding that this is a significant level holds. Indonesia fails to establish any violation of due process rights. The list of exhibits confirms that the 2010 financial statements were provided. The interested parties based their arguments on these statements but the information simply did not affect the overall conclusion of the Commission. This is not a due process issue. The situation would not have been any different if the Commission had shared minutes of the verification in which it would have indicated that the 2010 financial statements were provided.

178. Having realized that those two examples backfire on its thesis, Indonesia in its replies to the Panel's questions comes up with three so to say different examples. Those three examples do not refer to precise consequences of the alleged lack of a proper verification report. Rather Indonesia refers to statements that were made by PTMM or ICOF-S personnel or representative during the verification and that according to Indonesia were not contested on the spot. That information essentially relates to the involvement of ICOF-S in PTMM domestic sales and to the fact that ICOF-S is not an independent trader. However, a statement or an oral explanation provided during a verification visit and which is not confirmed by any concrete evidence does not become a result of the verification or an essential fact

126 Exhibit IDN-26, p. 15.

127 Amending Regulation, recital 29.

just because the verification team did not consider it necessary to rebut it on the spot or to put it in the context of other evidence on the record.

179. As regards the content of that information it was certainly not ignored. It has already been explained that the Commission never questioned the fact that PTMM and ICOF-S are related parties. And, as regards ICOF-S's alleged involvement in domestic sales, the bottom line is that ICOF-S received a commission only for export sales and that PTMM invoiced all its domestic sales directly.

180. In summary, the fact that Indonesia found it necessary to find three new examples does nothing more than to confirm that there is simply no basis in the facts on the record to support Indonesia's arguments under Article 6.7 of the *Anti-Dumping Agreement*. Indonesia has failed to show otherwise in its oral statement or answers to the questions of the panel. Indonesia's attempt to obtain a declaratory judgment about the interpretation of Article 6.7 should therefore be rejected.

181. Second, in terms of the legal standard, Indonesia is responding to an argument the European Union never made. It is not the position of the European Union that complying with Article 6.9 automatically means that Article 6.7 has been complied with.

182. Rather, the key points of the European Union's legal argument are the following.

183. First, 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".[128] Indonesia does not appear to disagree as it fails to address this point.

184. Second, the *Anti-Dumping Agreement* provides no definition or guidance regarding the exact content of the required disclosure of the "results" of the verification. However, the ordinary meaning of the term "results" is "the effect, consequence, issue, or outcome of some action, process or design."[129] This

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128 Panel Report, *Korea – Certain Paper*, para. 7.188.

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

suggests that what needs to be made available is not the process as such but rather the "outcome" of that process. Again, Indonesia seems to acquiesce in the correctness of the ordinary meaning of the term as offered by the European Union. It refers to the Appellate Body reading of this term in *US – Steel Safeguards* as "an effect, issue, or outcome from some action, process, or design"[130] and concludes that the results referred to in Article 6.7 are the "effect" or "outcome" of the verification visit.[131] The European Union agrees.

185. However, the European Union does not understand on what basis Indonesia jumps from this definition to its assertions that "in this context [of a verification] the "results" would mean both a simple recital of the evidence obtained during the visit *and the evaluation of the evidence*".[132] The European Union clearly complied with the first suggested requirement by exchanging the lists of exhibits but sees no basis for the second requirement, at least not as part of the verification results.

186. In fact, Indonesia seems to be taking positions that are internally contradictory. In its oral statement, it said that the verification visit is "in essence, a fact-gathering and fact-checking exercise" and that at the end of the verification the authority "is still far from having decided on the essential facts which will form the basis for its decision" as this "requires review and reflection on the results of the verification".[133] Yet, in its answers to the questions, Indonesia develops the argument that the disclosure of the "results" of the verification must include "how the authority evaluated the evidence to determine its reliability".[134] Clearly, this is not the task of the investigators conducting the verification and it cannot be what is to be provided in terms of the report of the verification. But, to the extent that the verified results relate to the essential facts, the European Union would agree that, pursuant to the obligation to disclose the essential facts, such an evaluation will be provided by the investigating authority with respect to these facts at that time. It

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130 Indonesia's answers to questions, para. 1106, referring to Appellate Body Report, *US – Steel Safeguards*, para. 315.

131 Indonesia's answers to questions, para. 1.107.

132 Indonesia's answers to questions, para. 1.109.

133 Indonesia's oral statement, para. 99.

134 Indonesia's answers to questions, para. 1.110. Also see e.g. Indonesia answers to questions, para. 1.118.

will be for the interested parties to make comments, with possible reference to the questionnaire information or to information provided during verification. Indonesia only confirms everything the European Union has said about the close relationship between Article 6. 7 and 6.9 of the *Anti-Dumping Agreement*.

187. Third, Article 6.6 (requiring the authorities "to satisfy themselves as to the accuracy of the *information* supplied by interested parties *upon which their findings are based*"), Article 6.7 (on the possibility to verify this *information* or to obtain further details through investigations in the territory of another Member by conducting an on-site verification visits), Article 6.8 (on the use of facts available if "any interested party refuses access to, or otherwise does not provide, *necessary information*" such as the failure to provide information during verification; and Article 6.9 (on the requirement to "inform all interested parties of the *essential facts under consideration which form the basis for the decision* whether to apply definitive measures" in sufficient time for the parties to defend their interests) are all part of a continuum and these different provisions provide important context for the obligations contained in each of these provisions.

188. Indonesia does not contest the link between all of these provisions and seems to agree that the purpose of the disclosure of the results of the verification under Article 6.7 is to allow parties to defend their interests.[135] The European Union considers that the express reference in Article 6.7 to the obligation under Article 6.9 to disclose essential facts in sufficient time for the interested parties to defend their interests confirms that the defense of their interests is an important purpose of both provisions. In so saying, the European Union is not "conflating" the obligations under Articles 6.7 and 6.9 or rendering "the obligation of Article 6.7 inutile" as Indonesia erroneously suggests.[136] The due process rights of interested parties are protected through all of these related provisions. This is not "conflating" different obligations but rather appropriately reading this provision based on the ordinary meaning of the terms in their context. The artificial separation that Indonesia seeks to impose between these different provisions is

135 Indonesia's oral statement, para. 104.

136 Indonesia's oral statement, para. 95.

wrong, and in the case of Article 6.7 and 6.9 even directly contradicted by the express reference to Article 6.9 in Article 6.7.

189. In sum, the text and context of Article 6.7 (referring to the "results" only and its cross reference to Article 6.9) confirm that the term "results" refers to the essential factual outcome of the verification with respect to the information supplied by interested parties upon which the authorities' findings are based allowing interested parties to defend their interests. It does not require a full report on everything that happened during the on-site verification by providing minutes of the days of discussions between the investigators and the interested parties. Indonesia keeps giving examples of what it considers "could"[137] be included in the verification results but that does not mean that all of the information that could possibly be included is *required* to be included under Article 6.7.

190. The European Union disagrees with Indonesia that the reference to Article 6.9 in the context of the disclosure of the results of the verification is merely a matter of the timing of the disclosure. The text of Article 6.7 allows for two possibilities: either to make the results of any such investigations available, or to provide disclosure of the results "pursuant to" paragraph 9. The ordinary meaning of the term "pursuant to" is "in accordance with", it is not "at the time of". This is confirmed by the French ("conformément au") and Spanish ("de conformidad con") language versions.

191. The cross-reference in Article 6.7 to Article 6.9 also links in with the preceding Article 6.6 which expressly refers to the "information supplied by interested parties upon which [the authority's] findings are based". The relevant information in respect of which the authorities must satisfy themselves as to its accuracy is the information on which it will be based its findings. It is in order to comply with this obligation of Article 6.6 that on-site verifications are permitted as per Article 6.7. So, the "results" of the verification may not be the same as the "essential facts" but they do relate to the same "information upon which the authority's findings are based" (as per Article 6.6) and thus to the "essential facts under

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137 See, e.g. Indonesia's answers to questions, para. 1.113

consideration which form the basis for the decision whether to apply definitive measures" (as per Article 6.9).

192. Finally, Indonesia keeps citing to one obiter dictum in *Korea – Certain Paper*, in which the panel said that "[i]t is therefore important that such disclosure [under Article 6.7] contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully".[138]

193. This statement, which was not essential to the panel's finding and was not appealed, must be read in its context. First, in that investigation, the Indonesian exporters had expressly requested to see the results of the verification but their request had been denied. Second, the real reason why the panel found a violation was because the authority "did not inform the two Sinar Mas Group companies of the verification results in a manner that would allow them to properly prepare their case for the rest of the investigation".[139] There is no basis for a similar conclusion in this case, as demonstrated above. The European Union sent a list of information to be verified before the visit and agreed on a list of exhibits taken at the time of concluding the verification. The interested parties never complained about a lack of information on the results of the verification, despite frequent references to the verification visits in the provisional and final determinations

194. In addition, as confirmed by the lack of claims by Indonesia under Articles 6.2, 6.4 or 6.9 of the *Anti-Dumping Agreement*, Indonesia does not consider that its due process rights were violated or that the disclosure of essential facts was deficient.

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138 Panel report, *Korea – Certain Paper*, para. 7.192. See, e.g. Indonesia's oral statement, para. 103. As an aside, the European Union considers that it is interesting to note that Indonesia likes to cherry-pick the findings of this *Korea – Certain Paper* report. It highlights the statements from this report that it likes but does not hesitate to expressly disagree with other findings this panel made. For example, this panel found that an "oral" disclosure of the results of the verification is permissible. In direct contradiction with the finding of this panel, Indonesia states that it "does not consider that an oral statement alone would be sufficient". See, Indonesia's answers to questions, para. 1.120. This directly contradicts the relevant findings of the panel in *Korea – Certain Paper* :

> We agree with Korea that Article 6.7 does not require written disclosure. It requires that the verification results be disclosed to the investigated exporters without specifying the format in which such disclosure is to be made.
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> Panel Report, *Korea – Certain Paper*, para. 7.188

139 Panel Report, *Korea – Certain Paper*, para. 7.193.

Again this contrasts with the claims and arguments made in *Korea – Certain Paper*.

2.3.3. Conclusion

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

196. First, the facts show that the "results" of the verification were made available to the verified interested parties through the exchange of the lists of exhibits taken during verification and that they were also disclosed pursuant to paragraph 9 of Article 6 as expressly foreseen in Article 6.7 of the *Anti-Dumping Agreement* given that the disclosure documents referred to the verification and discussed the essential facts with reference to information obtained during verification.

197. In addition, Indonesia has failed to rebut the legal arguments provided by the European Union that confirm the limited obligation of Article 6.7 as relating only to the outcome of the verification. The term "results" does not require that the authority make available an evaluation of the evidence or a detailed report with minutes of everything that happened during verification, as erroneously argued by Indonesia. Indonesia's description of what it would like to see included in reports on the results of the verification visit[140] 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.[141] There is no requirement that the authority prepare written minutes of the verification visit,[142] yet this seems to be what Indonesia is arguing is required under Article 6.7 of the *Anti-Dumping Agreement*.

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140 Indonesia's first written submission, paras. 6.28 – 6.30.

141 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.*

142 Panel Report, *Korea – Certain Paper*, para. 7.188.

198. In sum, 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.

3. CONCLUSIONS

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