In the World Trade Organization
Panel proceedings

EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA

(DS480)

First Written Submission by the European Union

Geneva, 17 February 2017

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Canada – Welded Pipe	Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and Add.1, circulated to WTO Members 21 December 2016 [adoption/appeal pending]
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
US – Customs Bond Directive	Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VIII, p. 2925
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TABLE OF ABBREVIATIONS

[[]]	[[]]
CFPP	Cold filter plugging point
CPO	Crude palm oil
EBR	Enhanced continuous bond requirement
FAME	Fatty acid methyl esters
GATT 1994	General Agreement on Tariffs and Trade 1994
IA	Investigating Authority
IP	Investigation period
[[]]	[[]]
PCN	Product control number
PFAD	Palm Fatty Acid Distillate
PME	Palm Methyl Ester
PTMM	PT. Musim Mas
RME	Rapeseed methyl ester
SG&A	Selling, General and Administrative Expenses
WINA	[[]]

1. INTRODUCTION

1. The European Union notes that Indonesia has maintained in its first written submission only certain as applied claims raised in the panel request and it has completely abandoned its as such claims. Accordingly, the European Union has structured its first written submission by mirroring Indonesia's as applied claims presented in its submission. We consider that Indonesia's other claims are no longer within the scope of these proceedings and/or that there is no longer any basis for the Panel to rule on the substance of those claims.

2. First, the European Union will discuss Indonesia's claim regarding the IA's rejection, for the purposes of constructing the normal value, of the data included in the records of the producers, in the light of Article 2.2.1.1 of the Anti-Dumping Agreement, continuing with Indonesia's claim regarding the substitution of the costs reflected in the records of the producers under Article 2.2 of the Anti-Dumping Agreement. Second, the European Union will answer to Indonesia's allegations that the IA failed to calculate the cap for profits and, consequently, ensure that the profit margin did not exceed such a cap, not basing the amount for profits component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement. Third, the European Union will explain why Indonesia's claims in relation to the export price (double counting) must be rejected by the Panel. Fourth, the European Union will continue with Indonesia's claims regarding the injury assessment and the appropriateness of using a method based on the Cold Filter Plugging Point (CFPP). Fifth, the European Union will address Indonesia's consequential claims under Article 9.3 of the Anti-Dumping Agreement. Finally, the European Union will discuss Indonesia's claims with regard to calculation errors at the provisional stage which, according to Indonesia, led to the imposition and collection of anti-dumping duties in excess of the actual provisional margin of dumping of the Musim Mas Group.

3. With regard to the terminology, the European Union notes that Indonesia uses in its first written submission the terms "Definitive Regulation" and "Provisional Regulation" in order to describe the measures at issue in the present dispute. Indonesia defines these terms in the "Table of Exhibits" part of its first written

submission. To facilitate the Panel's work, the European Union will use the same terms in the present submission to refer to these legal instruments.

4. Finally, in the present submission the European Union has endeavoured to follow Indonesia's bracketing as BCI in its first written submission. This is without prejudice to European Union' further assessment of the character of this information.

2. INDONESIA'S CLAIMS REGARDING THE ANTI-DUMPING MEASURES ON BIODIESEL

2.1. INDONESIA'S CLAIMS REGARDING THE CALCULATION OF THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS (ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994)

5. In sum, Indonesia claims that in the biodiesel investigation the IA incorrectly rejected, for the purposes of constructing the normal value, the data included in the records of the producers, although these records were in accordance with the generally accepted accounting principles and reasonably reflected the costs associated with the production and sale of biodiesel. Indonesia submits that this rejection is inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.[1]

6. The European Union takes note of the factual description by Indonesia.[2]

7. Indonesia continues by explaining what it considers to be the legal standard concerning Article 2.2.1.1 of the Anti-Dumping Agreement following the panel and Appellate Body reports in *EU - Biodiesel*.[3]

8. The European Union does not entirely agree with Indonesia's presentation of the panel and Appellate Body legal assessment in *EU - Biodiesel*.

9. In particular, the European Union reminds the Panel that it has specifically requested in *EU - Biodiesel* that other aspects in Article 2.2.1.1 not pertaining to that case should not be subject to a legal assessment. The Appellate Body took note of that request and it mentioned in *EU - Biodiesel* that*:*

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1 Indonesia's first written submission, paras. 44- 47.

2 Indonesia's first written submission, paras. 48-63.

3 Indonesia's first written submission, paras. 64-95.

> Thus, for purposes of resolving this dispute, it is the meaning of this condition that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply.[4]

10. In other words, while the panel and the Appellate Body analysed the meaning of the phrase "reasonably reflect" in Article 2.2.1.1 of the Anti-Dumping Agreement, they did not touch upon certain other interpretative aspects in the respective provision, like the meaning of "normally". For similar reasons, the European Union respectfully submits that the respective interpretative question is not within the scope of the present proceedings.

11. As Indonesia has already pointed out, the European Union recalls that the IA decided the re-opening of the investigation also with respect to Indonesia through the Commission Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473). That Notice expressly provides that "the legal interpretations contained in the Reports appear to be also relevant for the investigation concerning Indonesia".[5]

12. In light of the above, the European Union considers Indonesia's claims to be unnecessary, premature and misconceived, as they relate to a matter that is currently open and therefore one with respect to which the investigating authority will only reach a determination in the future. In these circumstances, and pending such "final action" within the meaning of Article 17.4 of the Anti-Dumping Agreement, we do not think that Indonesia should have brought these claims. Furthermore, we expect that Indonesia will adjust its claims and/or that the Panel will qualify any rulings or recommendations that it might make on this matter in light of the outcome of the currently pending municipal anti-dumping proceedings.

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4 Appellate Body Report, *EU-Biodiesel*, fn. 120.

5 Indonesia's first written submission, para. 46 and Exhibit IDN-8.

2.2. INDONESIA'S CLAIMS REGARDING THE CONSTRUCTION OF THE NORMAL VALUE FOR THE INDONESIAN PRODUCERS UNDER INVESTIGATION ON THE BASIS OF THE COST OF PRODUCTION OF BIODIESEL IN THE COUNTRY OF ORIGIN (ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994)

13. Indonesia claims that the European Union constructed the normal value of Indonesian investigated producers by replacing the costs of CPO inscribed in the records of the exporting producers with the reference export price, which is different from the cost of production in the country of origin (Indonesia). Consequently, Indonesia considers that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:(b)(ii) GATT 1994 in failing to construct the normal value of biodiesel on the basis of the cost of production in the country of origin.[6]

14. The European Union takes note of the factual description by Indonesia.[7]

15. With respect to the legal standard, the European Union highlights that the Appellate Body has found that:

> We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country. The reference to "in the country of origin", however, indicates that, whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin".
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> Turning to the relevant context, we recall that Article 2.2.1.1 of the Anti-Dumping Agreement identifies the "records kept by the exporter or producer under investigation" as the preferred source for cost of production data to be used in such calculation. We do not see, however, that the first sentence of Article 2.2.1.1 *precludes* information or evidence from other sources from being

6 Indonesia's first written submission, paras. 99-100.

7 Indonesia's first written submission, paras. 102- 108.

> used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the "country of origin". While such documents, information, or evidence are from outside the country of origin, they would, nonetheless, be relevant to the calculation of the cost of production *in the country of origin*. These considerations support the understanding that the determination of the "cost of production in the country of origin" may take account of evidence from outside the country of origin.[8]

16. The European Union reiterates that the IA decided the re-opening of the investigation also with respect to Indonesia through the Commission Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473).[9] In these circumstances we make the same comments as are set out above with respect to the preceding claim.

2.3. THE EUROPEAN UNION DID NOT ACT INCONSISTENTLY WITH ARTICLES 2.2 AND 2.2.2(III) OF THE ANTI-DUMPING AGREEMENT WHEN REASONABLY ESTABLISHING PROFITS IN CONSTRUCTING THE NORMAL VALUE FOR THE INDONESIAN PRODUCERS UNDER INVESTIGATION

17. Indonesia alleges that the anti-dumping measures at issue are inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because the European Union failed (i) to calculate the cap for profits and, consequently, ensure that the profit margin did not exceed such a cap, and (ii) to base the amount for profits component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii).[10]

18. Differently from the claims advanced by Argentina in *EU - Biodiesel*, Indonesia does not dispute only the reasonableness of the method of establishing the profit in general, but also the specific fact that the respective profit margin was not

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8 Appellate Body Report, *EU - Biodiesel*, paras. 6.70 – 6.71 (footnotes omitted).

9 Indonesia's first written submission, para. 46 and Exhibit IDN-8.

10 Indonesia's first written submission, paras. 118 – 180.

established in relation to a ceiling taking into account the "profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

19. The European Union will explain why Indonesia's contentions must both fail.

20. In the relevant part Article 2.2 of the Anti-Dumping Agreement provides that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (fn omitted)

21. Article 2.2.2(iii) of the Anti-Dumping Agreement provides, in its relevant part:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> […]
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

22. Article 2.2.2 addresses two different scenarios. In a first scenario, the amounts for profits shall be based on actual data pertaining to "the production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation". When there are no such sales in the ordinary course of trade, then there are several alternatives, of which the last one refers to "any other reasonable method" (the second scenario).

23. There is no doubt that we are in the second scenario in the present case, as there are no sales of the like product in the ordinary course of trade, a fact not disputed by any of the Indonesian producers:

> (28) Recitals 44 and 64 of the provisional Regulation explained that […] domestic sales were not considered as being made in the ordinary course of trade. As a consequence, the normal value of

> the like product had to be constructed pursuant to Article 2(3) and (6) of the basic Regulation. That finding was not contested by any interested party and is therefore confirmed.[11]

24. The European Union will start, *first*, by recalling that the **first two possibilities mentioned in Article 2.2.2 were not available in the investigation at issue**, so that the IA had to apply the "any other reasonable method" option:

> (79) Article 2(6)(a) is not applicable given that no actual amounts for any of the sampled Indonesian (and Argentinian) companies were established given the fact that they did not have any sales in the ordinary course of trade. Therefore, no data on actual amounts of any other exporter or producer (in the sample) is available to apply Article 2(6)(a).
>
> (80) Article 2(6)(b) is not applicable given that all Indonesian (and Argentinian) companies in the sample do not have sales of products of the same general category of products that are made in the ordinary course of trade. [12]

25. *Second*, the European Union will analyse whether the amounts for profits were determined on the basis of "**any other reasonable method**" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement.

26. Under Article 2.2.2(iii) of the Anti-Dumping Agreement it is not necessary to search for a particular methodology, as it is sufficient to follow a reasonable approach. Indeed, Article 2.2.2(iii) does not state that only one method is suitable to calculate the profit margin. Thus, there may be various reasonable ways to establish the profit margin ("any other reasonable method"). In addition, it has to be taken into account that every situation is assessed on its own merits, considering the specific circumstances of the case. Therefore, a method which appears very suitable to assess the profit margin in one case may be totally inadequate to calculate the profit margin in another case.

27. In this respect, the IA's findings regarding the profit margin of the Indonesian producers are explained in the Definitive Regulation:

> (84) First, it is incorrect that the Commission systematically uses a 5 % profit margin when constructing normal value. Every situation is assessed on its own merits taking into account the specific circumstances of the case. For example, in the 2009 biodiesel proceeding against the United States, various different

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11 Definitive Regulation, recital 28.

12 Definitive Regulation, recitals 79 - 80.

> profit levels were used with the weighted average profit being well above 15 %. Second, given that the short and medium term borrowing rate in Indonesia is around 12 % according to World bank data, it seems reasonable to expect that the profit margin of doing business in the domestic biodiesel market would be higher than the borrowing cost of capital. The reference to the medium-term borrowing rate is not meant to set a benchmark but to test the reasonableness of the margin used. Third, whether or not the sales of a blend of biodiesel with mineral diesel fall under the same general category of products, Article 2(6)(b) of the basic Regulation states, as already mentioned in recital 80 above, that such sales should be made in the ordinary course of trade. Given that the domestic sales of biodiesel are not in the ordinary course of trade, the sales of the blend of biodiesel with mineral diesel is not, mutatis mutandis, considered to be in the ordinary course of trade. Therefore, and for the reasons explained above, 15 % profit is a reasonable amount that can be achieved by a relatively new, capital- intensive industry in Indonesia. The argument of the Government of Indonesia regarding a duplicative effect cannot be accepted since a cost adjustments under Article 2(5) and the reasonable profit under Article 2(6)(c) are two clearly distinct issues. Recital 65 of the provisional Regulation is hereby confirmed.[13]

28. Thus, the European Union submits that the method on which the determination of the profit margin was based took into account the following elements.

29. *First*, the figure was appropriate on the basis of the reasonable amount of profit that a relatively young, capital-intensive industry of this type under normal conditions of competition in a free and open market could achieve in Indonesia.[14]

30. *Second*, each assessment is made on a case-by-case basis and on its own merits; the economic situation of Indonesian palm oil producers is different from that of Argentinian soya bean producers.

31. *Third*, the 15% figure was not out of line with that adopted in other investigations. For instance, during the 2009 anti-dumping investigation on biodiesel originating in the United States, the IA considered that the European Union biodiesel industry could have been reasonably expected to achieve a profit margin of 15%, based on the performance of the European Union industry over the earlier part of its existence. Given that the Indonesian biodiesel industry was found to be at the stage of development that the European Union had during the corresponding period of

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13 Definitive Regulation, recital 84.

14 Provisional Regulation, recital 65 and Definitive Regulation, recital 84.

time, the 15% profit margin for the Indonesian industry was reasonable. The IA followed a similar analysis in the present case and reached the conclusion that the 15% profit margin was reasonable for the Indonesian industry at a period of time when it was at a similar stage of development as the EU industry was in 2005-2006. The Definitive Regulation mentions the various other analytical tools used by the IA in order to confirm the reasonableness of the 15% figure.

32. Several interested parties claimed that the Provisional Regulation did not explain how the IA calculated the 15 % profit margin and they assumed that the IA took the 15 % from the profit margin used in the injury calculations.[15]

33. *Fourth*, the short and medium term borrowing rate in Indonesia was around 12%, and it was reasonable to expect biodiesel producing companies to obtain a profit margin that exceeded this level. As explained in detail in this submission, the reference to the medium-term borrowing rate is not meant to set a precise figure, but merely to confirm the reasonableness of the margin used. Indeed, the medium-term borrowing rate has not been used by the IA to construct a profit margin, but simply as an additional tool to verify *ex post* the reasonableness of the profit margin. This is precisely what is required by Article 2.2.2(iii).

34. The European Union posits that this represents a "method" for the calculation of the profits that is "reasonable". The EU authorities first established a profit figure on the basis of their experience with the relevant industry from other investigations and *then tested* the reasonableness of that profit figure against several benchmarks.[16] Logically, if the amount determined by an investigating authority is "reasonable", then whatever "method" it had used in order to determine that amount should also be "reasonable". On that basis, the Panel should first examine whether the profit margin determined by the EU authorities was "reasonable" for the purposes of the chapeau of Article 2.2 of the Anti-Dumping Agreement.

35. Indonesia highlights that the medium-term borrowing rate in Indonesia was approximately 12%, while in Argentina it was 14% and yet in both cases the IA established a 15% profit margin. From this difference, Indonesia attempts to infer

15 Definitive Regulation, recital 83.

16 Definitive Regulation, recital 84.

that the IA did not reasonably establish the profit margin of the Indonesian producers.[17] However, Indonesia neither argues that its producers were discriminated in comparison to Argentinian producers, nor contests the World Bank data with respect to the borrowing rate in the two countries.

36. The European Union reiterates that the World Bank data on the short and medium-term borrowing rate in Indonesia was only used in order *to confirm* the reasonableness of the 15% profit margin, *rather than to determine* that margin in the first instance. In that regard, the fact that the EU authorities considered that investors decided to invest in the Indonesian biodiesel industry with the knowledge that the cost of the invested capital would be around 12% was an additional element that supported the reasonableness of the 15% profit margin. As the panel has found in *EU - Biodiesel*, the European Union used a reasonable method with respect to determining the profit margin in that case:

> Thus, the selection and testing of the 15% profit margin resulted from a reasoned analysis that, in our view, was rationally directed at approximating what the Argentine producers' profit margin for the like product would have been if the like product had been sold in the ordinary course of trade in the domestic market of the exporting country. Both the initial selection of a figure of 15% and its subsequent confirmation through testing against benchmarks were grounded on coherent reasoning in a context where data on the actual producers and their products was not useable.[18]

37. Similarly, although the facts are not identical in the two cases, in the present case the Panel should also find that the European Union used a reasonable method with respect to determining the profit margin with respect to the products under investigation from Indonesia.

38. In light of the above, Indonesia's allegation of an unreasonable allocation of the profit margin is unjustified and must be rejected by the Panel.

39. *Third*, with regard to Indonesia's claim that the IA failed to calculate the cap for profits and, consequently, ensure that the **profit margin did not exceed such a cap**, the European Union recalls that none of the sampled Indonesian companies had sales in the ordinary course of trade of the same general category of products.

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17 Indonesia's first written submission, para. 168.

18 Panel Report, *EU – Biodiesel*, para. 7.349. (footnotes omitted)

40. Previous panels noted that the "any other reasonable method" referred to in Article 2.2.2(iii) is:

> subject to a cap, defined as 'the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'.[19]

41. The approach of the IA is explained in particular in recital 9 et seq. of the Provisional Regulation. In view of the large number of exporting producers in Indonesia and in order to complete the investigation within the statutory time limits, the IA announced in the notice of initiation that it might limit to a reasonable number the exporting producers in Indonesia, by selecting a sample in accordance with Article 17 of the Basic Regulation (sampling).

42. In order to enable the IA to decide whether sampling would be necessary and, if so, to select a sample, all exporting producers in Indonesia were requested to make themselves known to the IA and to provide information specified in the notice of initiation.[20]

43. Eight exporting producers or groups of exporting producers provided the requested information and agreed to be included in the sample. However, three of these eight companies or groups reported no exports to the Union during the investigation period. The remaining five (groups of) exporting producers accounted for the entire known volume exported to the European Union during the investigation period.

44. In accordance with Article 17(1) of the Basic Regulation, the IA selected a sample of four exporting producers or groups of exporting producers based on the largest representative volume of exports of the product concerned to the European Union, which could reasonably be investigated within the available time. The selected sample accounted for 99% of the total volume of exports to the European Union of the product concerned in the investigation period as reported by the five exporting producers referred to above. Under these circumstances, the data on which the IA made the determination of the profit margin was based on information received

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19 E.g. Panel Report, *EC – Bed Linen*, para. 6.97.

20 Provisional Regulation, recital 16.

from producers that accounted for 99% of the total volume of exports to the European Union of the product concerned.

45. It could be argued that the IA could have looked for data from other exporters or producers of the same general category of products in the domestic market of the country of origin that were not subject to the investigation and that such data could have yielded a different result. However, the real question is "where to look?" Indeed, *on the one hand*, the sample already accounted for virtually all exports of the product concerned to the European Union. Should the IA consider only the one producer that was not part of the sample? And how could the IA have verified data from a non-sampled producer? In any event, data from the single non-sampled producer would not have changed the rate, given that its exports accounted for 1% of the total.

46. *On the other hand*, how could the IA have asked for data on profit margins from exporters or producers of products of the same general category in Indonesia that were not subject to the investigation? One should bear in mind that on 29 August 2012 the IA announced, by a notice published in the Official Journal of the European Union, the initiation of an anti-dumping proceeding with regard to imports into the European Union of biodiesel originating in Argentina and Indonesia. The notice of initiation invited all parties concerned by the investigation to contact the IA and make themselves known. No producers of products of the same general category came forward and provided data. In addition, it should be emphasised that the IA has no authority to oblige any party to provide data.

47. Indonesia claims that *"the same general category of products"* was construed too narrowly by the IA and that it should include "oleochemicals" and not only "any other fuel".[21] However, Indonesia does not meet its burden of proof, failing to explain why other oleochemicals, irrespective of their end uses and the specific markets, may nevertheless constitute the same category of products with biofuels within the meaning of Article 2.2.2 (iii). The comments made by the interested parties during the investigation also fail to address these precise aspects, limiting themselves to affirming that:

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[21] Indonesia's first written submission, para. 132.

> First, as follows from the product scope of this investigation, and in particular the discussion in recitals (15)-(22) of the Disclosure, the product concerned is not only biodiesel used as a fuel, but also biodiesel intended for industrial applications. That being the case, it is manifestly incorrect to limit the "the same general category of goods as biodiesel" to fuel only. As we have argued in the comments on the Provisional Disclosure, biodiesel at WINA is produced at the refineries that at the same time produce other oleochemicals and refined palm oil products that belong to the same general category of goods as biodiesel. Indeed, they are produced from virtually the same feedstock, through a similar production process and share the same basic properties. While refinery products generally address the food market, the biodiesel and oleochemicals address the technical markets. Biodiesel is in fact an oleochemical used as a solvent and in the production of fatty alcohols etc amongst others. As the Commission acknowledged in the past, for the profit margin to be used in accordance with Article 2(6)(b) of the basic Regulation, it is sufficient that the product concerned and other products belong to the same general category of products, such as basic organic chemicals, for example. In the case of WINA, biodiesel and other goods produced by means of refining palm oil do belong to the same general category of "oleochemicals". We therefore maintain our claim that the profit margin can be established by reference to the domestic sales made by WINA.[22]

48. The European Union disagrees. For the purpose of the investigation at issue, the "same general category" of products with biodiesel are other fuels and not any oleochemicals, irrespective of their end uses, which may constitute a different market and have a different profit margin. Neither Indonesia nor the interested Indonesian companies provided any evidence in that respect.

49. Similarly, the European Union recalls that the IA has found in recital 80 of the Definitive Regulation that:

> (80) Article 2(6)(b) is not applicable given that all Indonesian (and Argentinian) companies in the sample do not have sales of products of the same general category of products that are made in the ordinary course of trade.

50. Indeed, all sampled companies did not have domestic sales in the ordinary course of trade of the same general category of products. Therefore, no "cap" could be established.

51. Accordingly, for these two reasons, the IA was not able to calculate a cap for profits and then ensure that the profit margin did not exceed such a cap.

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[22] Wilmar Group, Comments on Definitive Disclosure, 17 October 2013, p. 13 (Exhibit IDN-16 (BCI)).

52. Thus, the reasonable profit margin of 15 % fulfils the conditions laid down in Article 2.2.2(iii).

53. Finally, the European Union recalls that the anti-dumping duties were imposed on a lesser duty rule basis and that in the case of some of the Indonesian producers (e.g. the Wilmar Group, the Musim Mas Group) the injury margin was below the dumping margin. Accordingly, even if the profits had been set at a slightly different level, the amount of the anti-dumping duty imposed would have been no different in certain cases.[23]

2.4. INDONESIA'S CLAIMS IN RELATION TO THE EXPORT PRICE (DOUBLE COUNTING)

54. Indonesia claims that with respect to one Indonesian exporting producer, namely the Musim Mas Group, the IA acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by failing to construct the export price on the basis of the price at which the imported biodiesel was first resold to an independent buyer in the European Union.

55. PFAD-based biodiesel can be double-counted for the purpose of compliance with the European Union's mandatory biodiesel blending targets.[24] Indonesia explains that the recognition of a biodiesel as falling under the double counting rules in Italy requires the provision of a specific certificate:

> As a result, although the exact amount of the "premium" for "double counting" was agreed between [[]] and its customers in the contract, this "premium" only became payable upon the issuance by the Italian government of a certificate confirming that the product qualified as "double counting". Indonesia notes that this "premium" formed an integral part of the price of the product,

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23 Definitive Regulation, recitals 214 - 215.

24 Article 21(2) of the Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources provides that:

> For the purposes of demonstrating compliance with national renewable energy obligations placed on operators and the target for the use of energy from renewable sources in all forms of transport referred to in Article 3(4), the contribution made by biofuels produced from wastes, residues, non-food cellulosic material, and ligno-cellulosic material shall be considered to be twice that made by other biofuels.

> albeit payable once a certain condition – the issuance of the certificate – was fulfilled.[25]

56. Responding to comments by the Musim Mas Group, the IA explained in the Definitive Regulation that:

> (99) In relation to recital 69 of the provisional Regulation, one party claimed that the premium for double-counting biodiesel should be added to the export price, given that this is a mere implementation of the Italian law.
>
> (100) Even if the Commission would accept this claim and add the premiums to the export price, the premiums would have to be deducted again under Article 2(10)(k) in order to compare the export price with the same normal value with due account taken for differences that affect price comparability. Given that in Indonesia there is no premium for double counting biodiesel, the higher export price in Italy would therefore not be directly comparable. That claim is therefore rejected and recital 69 of the provisional Regulation is hereby confirmed.[26]

57. Indeed, adding the premium to the export price under Article 2.3 would then require an un-adjustment to be made pursuant to Article 2.4, as the European Union will further explain.

58. In its comments on the Definitive Disclosure, the Musim Mas Group maintained that it was inappropriate to deduct the double counting premium under Article 2(10)k of the Basic Regulation, as it considered that it was part of the of the export price at which the product was resold to the first independent buyer in the European Union. Indonesia reiterates that position in its first written submission.[27]

59. The European Union submits that the IA correctly did not include the double counting premium in the export price, as the respective amount would in any event have to be deducted as a difference that affects price comparability.

60. Article 2.3 of the Anti-Dumping Agreement provides that:

> In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the

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25 Indonesia's first written submission, para. 185; Musim Mas, Comments on Provisional Disclosure, 1 July 2013, p. 4 (Exhibit IDN-18 (BCI)).

26 Definitive Regulation, recitals 99-100.

27 Indonesia's first written submission, para. 192.

> products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

61. WTO panels subsequently confirmed that "the price charged to the first independent buyer is a starting-point for the construction of an export price."[28]

62. The European Union notes, *first*, that the premium has no link to the export price, and it is not part of the price charged to the first independent buyer within the meaning of Article 2.3.[29] Under Article 2.3, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. Therefore, the IA has used as the export price (starting point) for the dumping calculation the price for the product concerned as reported by the Musim Mas Group and verified by the IA.

63. While the Musim Mas Group maintained in its comments that "customers were prepared to pay a premium" and that the "premium was an anticipated revenue",[30] this allegation does not establish that the premium was part of the export price.

64. The fact that [[]] and the Italian customers contractually "agreed" (that is, in fact, noted) that the "premium" is payable for the biodiesel sold is not determinative of what "price" means under Article 2.3. A mere statement in a contract between two private enterprises cannot in itself determine a legal interpretation under the Anti-Dumping Agreement.

65. Indeed, the Specific Provisional Disclosure for [[]] provides that:

> The double counting allowance was not considered part of the export price. These premiums were considered not linked to the product as such, but rather to the provision of documents by the related importer in order to obtain a government certificate which enables the related importer's client to fulfil the necessary conditions to blend only half the biodiesel quantity (given that this biodiesel can be counted 'double').[31]

66. Accordingly, the double counting premium is a separate allowance and not part of the export price. It is because of the Italian State intervention that the respective

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28 Panel Report, *US – Stainless Steel (Korea)*, para. 6.91.

29 The first independent buyers in the European Union are Italian customers.

30 Indonesia's first written submission, para. 189; Musim Mas, Comments on Provisional Disclosure, 1 July 2013, p. 4 (Exhibit IDN-18 (BCI)).

31 Specific Provisional Disclosure for [[]], Annex 2 A, p. 4 (Exhibit IDN-19 (BCI)).

product is double counted and thus subject to a premium on the Italian market. The respective premium is a consequence of state intervention and not part of the price within the meaning of Article 2.3.

67. *Second*, according to Article 2.4 of the Anti-Dumping Agreement, due allowance shall be made in each case for differences which affect price comparability, including differences in conditions and terms of sale, and any other differences which are also demonstrated to affect price comparability. Such adjustments may be made for cases when customers consistently pay different prices on the domestic market because of differences in factors affecting price comparability.[32] The Musim Mas Group did not demonstrate that customers consistently pay different prices on the domestic market.

68. Furthermore, the fact that the respective biodiesel receives a premium on the Italian market is directly linked to the intervention of the Italian State, which double counts biodiesel from certain sources. The very purpose of Article 2.4 of the Anti-Dumping Agreement is to address such state interventions which may affect price comparability.

69. Article 2.4 is concerned with making a fair comparison between the normal value and the export price, providing for appropriate adjustments to the extent that they have not already been made pursuant to Article 2.3 in the case of the export price. This relationship is confirmed by the third and fourth sentences of Article 2.4, which precisely confirm the overlap between Articles 2.3 and 2.4. Article 2.4 refers expressly to taxation, which is a form of state intervention justifying the making of adjustments.

70. Thus, the concepts of "fair comparison" and "price comparability" referred to in Article 2.4, together with the express reference to taxation, are instrumental to understanding what kind of adjustments are contemplated by Article 2.4.

71. In that respect, the IA was correct to note that:

> Even if the Commission would accept this claim and add the premiums to the export price, the premiums would have to be deducted again under Article 2(10)(k) in order to compare the

[32] Article 2(10)(k) of the Basic Regulation.

> export price with the same normal value with due account taken for differences that affect price comparability.[33]

72. In light of the above, the IA correctly concluded that there is no premium in Indonesia for double counting biodiesel, and thus the higher export price in Italy would therefore not be directly comparable.

73. In sum, and to put the matter in terms of a concrete example, if one starts from a situation, in which the normal value and export price are both 100 (so no dumping), and then the exporting country provides export subsidisation of 20 (pushing the export price down to 80), all other things being equal, there is dumping. The export subsidisation is not a difference affecting price comparability within the meaning of Article 2.4 of the Anti-Dumping Agreement, requiring an upward adjustment of the export price. In this scenario, the only pertinent rule is the rule against double-counting in Article VI:5 of the GATT 1994. This means that it is not permissible for the importing Member to impose, at the same time, a dumping duty of 20% and a countervailing duty of 20%. However, in referring to "the same situation *of dumping* or export subsidization" Article VI:5 of the GATT 1994 precisely confirms that the above scenario *is dumping*. That is why no adjustment under Article 2.4 would be appropriate – such an adjustment would simply mask the dumping that is occurring (enabled by the subsidy). In this respect, it makes no difference if the extra subsidy/premium/money originates from a third country, or for that matter where it might come from – the GATT tells us that dumping is still occurring.

74. Indonesia goes to great lengths to try to avoid Article 2.4 precisely because it understands the above analysis. That is why it tries to situate the discussion in the context of Article 2.3. Its arguments fail because the premium is not part of the price. However, even if one would take as a starting point the export price plus the premium (which would be a mistake) there would still be a problem, because one would have introduced an asymmetry rendering the normal value and the export price non-comparable – that is, one would simply have *masked* the dumping. Therefore, in order to ensure a fair comparison between the normal value and the export price, that is, in order to unmask the dumping, it would be necessary to re-

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33 Definitive Regulation, recital 100.

adjust under Article 2.4. Of course, such circularity would be fundamentally pointless, which precisely confirms that the correct starting point under Article 2.3 is in fact the export price (without any addition of the premium).

75. Therefore, Indonesia's allegation of a calculation error regarding the Italian premium must therefore be rejected by the Panel.

2.5. INDONESIA'S CLAIMS IN RELATION TO THE INJURY ASSESSMENT (ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT)

76. Indonesia claims that the IA's analysis of the price effects of dumped biodiesel on the prices of the EU industry sales of biodiesel at CFPP 0°C is analytically and factually flawed because the starting point for the adjustment is an "unreliable" and non-comparable price of Union producers' sales of biodiesel with CFPP +13°C.[34] Indonesia also maintains that the IA failed to consider the existence of "significant price undercutting" in respect of the domestic product, by relying on a simple mathematical price difference between the export prices of PME (mostly CFPP +13°C) with the EU industry sales prices of biodiesel at CFPP 0°C.[35]

77. The European Union submits that both contentions must be rejected.

78. Article 3.1 of the Anti-Dumping Agreement provides that:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

79. Article 3.2 of the Anti-Dumping Agreement reads as follows:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or

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34 Indonesia's first written submission, paras. 244 - 255.

35 Indonesia's first written submission, paras. 256 - 269.

> whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

80. In the case at hand the IA based its injury determination on "positive evidence", as the European Union will explain in detail. It involved an "objective examination" of both (i) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of these imports on domestic producers of such products.

81. First, **the IA's analysis of the price effects of dumped biodiesel on the prices of the EU industry sales of biodiesel at CFPP 0°C is not analytically and factually flawed.**

82. The European Union confirms that the IA compared EU industry prices with imports from Indonesia on the basis of the Cold Filter Plugging Point (CFPP). Differently from the investigation in the US - Biodiesel case,[36] in the present investigation it was not possible to do the comparison on the basis of the feedstock. The reason is because the feedstock from which the biodiesel was made was not directly relevant to the price paid, as the biodiesel sold in the European Union was a *blend of various feedstocks*:

> (122) Interested parties noted that the methodology used, being a comparison of the Cold Filter Plugging Point ('CFPP'), was not the same as used in a previous anti-dumping investigation involving biodiesel from the USA, where the comparison was made on feedstock.
>
> (123) Unlike the exporting producers in Argentina and Indonesia, the Union industry does not sell biodiesel made from one feedstock, but blends several feedstocks together to produce the final biodiesel that is sold. The final customer is not aware of, nor concerned by, the composition of what they are purchasing once the product meets the required CFPP. What matters for a customer is the CFPP irrespective of which feedstock is used. In these circumstances, it was found to be appropriate in this proceeding to make the price comparison on the basis of the CFPP.[37]

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36 Commission Regulation (EC) No 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, recital 84 (Exhibit IDN-25); Council Regulation (EC) No 599/2009 of 7 July 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America, recitals 117-123 (Exhibit IDN-26).

37 Definitive Regulation, recitals 122- 123.

83. Indonesia's assertion that the EU industry produced mainly RME with a CFPP of -10°C and below should be understood in the context of what the EU industry sold during the IP, which was mainly CFPP 0°C.[38] The European Union would welcome clarifications regarding Indonesia's allegations that the CFPP of PME from Indonesia in fact ranged from CFPP +7°C to CFPP +15°C. [39]

84. The Indonesian cooperating exporters did sell CFPP +13°C to the European Union during the IP. The IA calculated the injury on the basis of the following two analytical steps:

(i) the Indonesian import price of CFPP +13°C was not compared to the EU price of CFPP +13°C, as the EU volumes were very small.

(ii) the IA therefore compared the Indonesian import price to the EU industry price of biodiesel with a CFPP of 0°C, as this represented 993,860 MT of the sales in the sample.[40] This was done by increasing the Indonesian price to the level of CFPP 0°C by using the difference in price in the sampled EU data.

85. The methodology used by the IA is explained as follows:

> (124) For imports from Indonesia, which are at a CFPP of 13 or above, an adjustment was made, being the difference in price between the Union industry's sales of CFPP 13 and the Union industry's sales of CFPP 0, in order to compare the CFPP 13 and above from Indonesia with the CFPP 0 manufactured and blended in the Union. One Indonesian exporting producer noted that as the sales of CFPP 13 by the Union industry were made in small quantities per transaction, that these prices should be compared to similar sized transactions of CFPP 0. On inspection of transactions of CFPP 0 of a similar quantity per transaction, the difference in price found was in line with the difference using all transactions of CFPP 0, with differences in price both above and below the average price difference. As a result there was no change to the level of price undercutting found in the provisional Regulation in recital 97.[41]

86. The IA did not use the biodiesel with CFPP +13°C price directly because it was not representative (there was a very small domestic volumes of sales). However,

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38 Indonesia's first written submission, para. 224.

39 Indonesia's first written submission, para. 244.

40 E.g. Specific Provisional Disclosure for the Wilmar Group, Annex 8a, column 7 (Exhibit IDN-22).

41 Definitive Regulation, recital 124.

the IA used the respective price in order to calculate the difference between CFPP +13°C and CFPP +0°C, as no other data was available.

87. Indonesian producers such as the Wilmar Group and PT Pelita Agung Agrindustri were dissatisfied with the calculation method used by the IA.

88. The Wilmar Group claimed that the respective Indonesian imports should be compared to the sales in the European Union in such a way as to cover 100% of the PCNs sold by the EU industry:

> More importantly, we would like to request the Commission, at least in case of Indonesia, to proceed with the injury margin calculation in the same way as this was done for the US biodiesel several years ago, namely by comparing PME prices to the adjusted prices of RME and blends manufactured by the Union industry, rather than to FAME 0 only. Indeed, such calculation will be more representative as it will allow to cover 100% of the PCNs sold by the Union industry. The feedstock adjustment can be calculated by comparing the price of CFPP 13 PME made in the EU with the average RME price.[42]

89. The Wilmar Group's submission itself makes clear that in the US investigation the EU industry did not sell FAME0 (+0); therefore, the methodology used in that case was not possible in the investigation at issue:

> As a starting point we would appreciate receiving the full list of PCNs sold by the Union industry, with an indication of the volume and value of each PCN sold. Only in this way can we meaningfully exercise our rights of defence. We note that while in the previous proceeding against U.S. biodiesel the Union industry sold no FAME 0 at all (at least there were no such PCNs used in the injury margin calculations), it would appear now that the Union industry manufactures and sells predominantly FAME 0 since 993,860 MT of FAME 0 used in the injury margin calculation amount to 40% of the production of the sampled Union producers.[43]

90. In this context, the European Union also notes that the Wilmar Group requested that the IA should compare imports of +13C from Indonesia to all production of the EU industry, which is not possible.

91. Indonesia also claims that the IA:

> deprived interested parties of any meaningful opportunity to verify independently whether the European Union industry's sales

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42 Wilmar Group, Comments on Provisional Disclosure, 1 July 2013, p. 29 (Exhibit IDN-13 (BCI)).

43 Wilmar Group, Comments on Provisional Disclosure, 1 July 2013, p. 28 (Exhibit IDN-13 (BCI)).

> of CFPP 0°C biodiesel used for the purpose of the price comparison included imported biodiesel by summarily rejecting the request to disclose the PCN codes of the domestic producers.[44]

92. The IA did not include imported biodiesel in the EU industry data. What Indonesia requires, namely an independent verification of the data, amounts in fact to inspecting the respective EU companies and analysing their confidential data, which is not possible. In addition, provided that the EU industry both produces and imports the same feedstock biodiesel, disclosing the content of their sales would not be of any help in itself.

93. Contrary to what Indonesia asserts, the IA did not find the price of the EU producers' sales of biodiesel with CFPP +13°C "unreliable".[45] Instead, it was explained that a direct comparison was not considered reasonable:

> (96) All sales from Indonesia to the EU were at a CFPP of 13 degrees centigrade. Given the very small volume of sales of Union producers at this CFPP - since PME from Indonesia is almost always blended with other biodiesel from other sources before being sold to the first independent customer – a direct comparison was not considered reasonable. The export price of the PME from Indonesia at CFPP 13 was therefore adjusted upwards to a price at CFPP 0 by taking the difference in price on the Union market between the sales of PME at CFPP 13 manufactured by the Union industry and the average price of biodiesel at CFPP 0.[46]

94. Accordingly, Indonesia's argument that the two-step approach used by the IA is not appropriate in ensuring price comparability must fail. Indeed, the IA did not consider the price of the EU producers' sales of biodiesel with CFPP +13°C as "unreliable", but it rather adjusted the export price of the PME from Indonesia at CFPP +13°C upwards to a price at CFPP 0°C, in order to ensure price comparability at CFPP 0°C. This situation did not arise in the Argentinian case, because that biodiesel has a CFPP 0°C:

> (95) All sales from Argentina to the EU were at a CFPP of 0 degrees centigrade. These sales were therefore compared to the sales of Union producers of biodiesel at a CFPP of 0.[47]

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44 Indonesia's first written submission, para. 233.

45 Indonesia's first written submission, paras. 246 and 253.

46 Provisional Regulation, recital 96.

47 Provisional Regulation, recital 95.

95. The European Union recalls that the IA referred to "the very small volume of sales of Union producers at this CFPP" (sales of biodiesel with CFPP +13°C).[48] The IA did not refer to "small quantities per transaction"; that was a misrepresentation on the part of one Indonesian exporting producer.[49] The IA only confirmed that "a similar quantity per transaction" served as a basis for comparison.[50] The IA compared the EU industry sales of biodiesel at CFPP +13°C and the EU industry sales of biodiesel at CFPP 0°C based on transactions of similar volumes and it did not find differences in prices per ton.

96. Finally, as prices in the European Union do not depend directly on feedstock, but rather on the CFPP, the alternative analyses suggested by the Wilmar Group and PT Pelita Agung Agrindustri were not possible.[51]

97. In light of the above, the European Union submits that Indonesia failed to demonstrate that the IA's analysis of the price effects of dumped biodiesel on the prices of the EU industry sales of biodiesel at CFPP 0°C is analytically and factually flawed. The IA based its injury determination on "positive evidence", by conducting an "objective examination" within the meaning of Article 3.1 of the Anti-Dumping Agreement.

98. The European Union also submits that **the IA did not fail to consider the existence of "significant price undercutting" in respect of the domestic product**.

99. The European Union starts by recalling that the IA, on the basis of the available data, performed the price undercutting analysis in the framework of the other indicators, such as the EU consumption and the volume, price and market share of dumped imports from the countries concerned,[52] as well as a series of macroeconomic indicators:

> (130) As set out in recital 101 of the provisional Regulation, the following macroeconomic indicators were analysed, based on

48 Provisional Regulation, recital 96.

49 Indonesia's first written submission, para. 252.

50 Definitive Regulation, recital 124.

51 Indonesia's first written submission, para. 255.

52 Definitive Regulation, recitals 115- 120.

data received covering the entire Union industry: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the dumping margin and recovery from past dumping.

(131) Following provisional disclosure the Union industry noted that the capacity data that had been used in Table 4 of the provisional Regulation included capacity that had not been dismantled, but was not in such a state that it would have been available for use during the IP, or previous years, to manufacture biodiesel. They separately identified this capacity as 'idle capacity' which should not be counted as capacity available for use. The capacity utilisation figures in Table 4 were therefore understated. After close scrutiny of this resubmitted data, it was accepted and Table 4 is restated below. The capacity utilisation rate, which had been from 43 % to 41 % in the provisional Regulation, was now 46 % to 55 %. The Union industry also corrected the production data for 2009 to produce the table below:

(132) Recital 103 of the provisional Regulation analysed the previous capacity utilisation data, noting that production increased while capacity remained stable. With the revised data production still increases, but useable capacity decreased during the same period. This shows that the Union industry was reducing available capacity in face of increased imports from Argentina and Indonesia and thereby reacting to market signals. This revised data is now more in line with the public statements of the Union industry and Union producers, stating that during the period under consideration production was stopped in several plants and that the capacity that had been installed was not immediately available for use, or only available for use with significant reinvestment.

(133) Several interested parties questioned the revised capacity and capacity utilisation data. However, no alternatives were provided by any interested party. The revision is based on the revised capacity data provided by the complainant, covering the entire Union industry. The revised data was cross-referenced to publicly available data concerning in particular idle capacity as well as capacity of producers that ceased operations due to financial difficulties. As explained above in Section 6, 'Macroeconomic indicators', the revised data provide a more accurate dataset of capacity available to produce biodiesel during the period under consideration than the dataset originally provided and published in the provisional Regulation.

(134) One interested party stated that the Union industry was not injured, as production volumes rose in line with consumption. This argument is rejected, as other important injury indicators clearly point to the existence of injury, in particular the loss of market share to imports from the countries concerned and the reduced profitability trend leading to losses.

(135) Another interested party argued that the Union industry was not injured if comparing trends only between 2011 and the IP as opposed to comparing the trends during the period from 1 January 2009 to the end of the IP ('the period considered'). Given that the IP covers half of 2011, a comparison between 2011 and IP is not

> accurate. Besides, for a comparison to be meaningful it is necessary to examine the trends relevant for the injury assessment during a period which is long enough as it was done in the present case. This claim is therefore rejected.
>
> (136) The same interested party noted that the Commission had not published the total sales value of the Union industry in the provisional Regulation and requested that this figure be published. However, all relevant factors mentioned in Article 3(5) of the basic Regulation were examined, allowing a full assessment of injury. Sales value was collected, and verified, from sampled companies, who were representative of the Union industry as a whole.
>
> (137) The same party also noted that the Union industry was able to increase employment and therefore there was no negative effect on the Union industry during the period of investigation.
>
> (138) However, as explained in recital 106 of the provisional Regulation, employment in this capital intensive industry is relatively low. Therefore, small variations in the numbers can cause a large movement in the indexed data. The increase in overall employment does not negate the injury suffered by the Union industry as shown by other indicators.
>
> (139) In the absence of any further comments, recitals 103 to 110 of the provisional Regulation are hereby confirmed. (the table omitted) [53]

100. Accordingly, the IA based its injury determination on "positive evidence", involving an "objective examination" of both (i) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of these imports on domestic producers of such products, as required by Article 3.1 of the Anti-Dumping Agreement.

101. In addition, the IA also complied with the requirements in Article 3.2 of the Anti-Dumping Agreement. According to Article 3.2, an IA "shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member".

102. The European Union starts by recalling that the IA found that:

> (91) Import volumes from Argentina and Indonesia increased significantly from 2009 to the IP, imports from Indonesia increasing at a faster rate than imports from Argentina. Market share increased from 9,1% to 19,3% during the same period.[54]

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53 Definitive Regulation, recitals 130- 139.

54 Provisional Regulation, recital 91.

103. Indeed, as explained in Table 2, relevant imports from Indonesia had a market share of 1,4% in 2009, 4,3% in 2010, 9,7% in 2011 and 8,5% during the investigation period. This represents an increase from 100 to 600 taking 2009 as the reference index. Those imports amounted to 157 915 tonnes in 2009, 495 169 tonnes in 2010, 1 087 518 tonnes in 2011 and 995 663 tonnes during the investigation period. This represents an increase from 100 to 631 taking 2009 as the reference index.[55]

104. The data on the significant increase in the dumped imports of biodiesel from Indonesia was confirmed in the Definitive Regulation:

> (119) One interested party challenged the import data set out in Table 2 of the provisional Regulation, stating that imports from Indonesia were much lower than presented in the table. Import data in Table 2 was based on Eurostat data, which was checked carefully and found to be correct, and in line with the data collected from Indonesian exporters. Biodiesel is a relatively recent product, and the customs codes applicable to imports of biodiesel have changed over recent years. Therefore, when extracting data from Eurostat, codes applicable at the time must be used in order to ensure that the data is accurate. This explains why the interested party's extraction of data is incomplete and it shows lower imports than the full dataset presented in Table 2.[56]

105. It follows that the IA complied with the requirements in Article 3.2 first sentence of the Anti-Dumping Agreement.

106. Similarly, the European Union has already explained in detail that, with regard to the effect of the dumped imports on prices, the IA considered whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product in the European Union.

107. The IA used a two-step approach: as a first step, the Indonesian import price of CFPP +13°C was not compared to the EU price of CFPP +13°C, as the EU volumes were very small; then, the IA compared the Indonesian import price with the EU industry price of biodiesel with a CFPP of 0°C, as this represented 993,860 MT of the sales in the sample. The European Union explained why this method was reasonable in the particular circumstances of the investigation.

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55 Provisional Regulation, Table 2.

56 Definitive Regulation, recital 119.

108. Accordingly, the IA complied with the requirements in Article 3.2 second sentence.

109. In light of the above, the European Union submits that the Panel should reject Indonesia's claims with regard to the injury assessment.

2.6. INDONESIA'S CONSEQUENTIAL CLAIMS UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

110. Indonesia's claims under Article 9.3 of the Anti-Dumping Agreement are consequential to Indonesia's claims relating to the IA's determination of the amount of the dumping margin, considered inconsistent with Articles 2.2, 2.2.1.1, 2.2.2(iii), 2.3 and 2.4 of the Anti-Dumping Agreement and with Article VI:1 of the GATT 1994. Thus, Indonesia alleges that the European Union imposed on biodiesel from Indonesia anti-dumping duties exceeding the margin of dumping established in compliance with Article 2.[57]

111. The European Union recalls its observations regarding the facts and the legal assessment as presented in sections 2.1 and 2.2 above.

2.7. ARTICLES 7.1, 7.2, 9.2 AND 9.3 OF THE ANTI-DUMPING AGREEMENT VIS-À-VIS CERTAIN ESTIMATIONS AT PROVISIONAL STAGE

112. Indonesia maintains that the European Union violated Articles 7.1, 7.2, 9.2 and 9.3 (chapeau) of the Anti-Dumping Agreement because it allegedly incorrectly imposed and collected provisional anti-dumping duties with respect to the imports from one Indonesian producer under investigation (the Musim Mas Group), in excess of the actual provisional margin of dumping of this producer, as it based itself on a provisional dumping margin tainted by calculation errors.

113. As stated in the Provisional Regulation of 27 May 2013 the IA found that the Musim Mas Group's exports were dumped with a dumping margin of 2,8%, causing injury to the EU industry, with an injury margin of 23,3%. Following the

[57] Indonesia's first written submission, paras. 271 – 283.

application of the lesser-duty-rule, the IA set the provisional anti-dumping duty rate at 2,8%, which was published in the Official Journal of 28 May 2013.[58]

114. The Musim Mas Group commented on 1 July 2013 on the Provisional Disclosure on certain mathematical and/or accounting issues in the calculations of the IA relating to:

- a mathematical error in PTMM's Domestic Selling, General and Administrative Expenses (SGA);

- the income tax added to SGA at [[]] level;

- the inconsistent accounting treatment of gasoil hedging gains and losses.[59]

115. The IA reviewed and revised its calculations as set out in the Definitive Disclosure which was sent to the Applicant on 1 October 2013.[60]

116. Indonesia argues that by taking these changes into account and assuming that all other factors would have remained the same, the anti-dumping duty applied to the Musim Mas Group would have been lower than that provided for in the Provisional Regulation.

117. The Musim Mas Group provided comments on the Definitive Disclosure, claiming that the provisional anti-dumping duty should not be definitively collected because a re-calculation of the provisional anti-dumping duty would have led to a dumping margin below the *de minimis* dumping-margin.[61]

118. With regard to the <u>first estimation adjustment, related to domestic SG&A and the export tax ,</u> recital 64 of the definitive disclosure reads:

> One party claimed that in relation to recital (63) of the provisional Regulation an overstated SG&A was used for that party. After having examined this claim, it appeared that the SG&A for both domestic and export sales was included in the construction of normal value. The necessary corrections to use the SG&A for only the domestic sales were accordingly made.

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58 Provisional Regulation, recital 79.

59 Musim Mas, Comments on Provisional Disclosure, 1 July 2013, pp. 1-4 (Exhibit IDN-18 (BCI)).

60 Definitive Disclosure, recitals 64, 73, 74, 75, and 80 (Exhibit IDN-7).

61 Musim Mas, Comments on Definitive Disclosure, pp. 2 and 12 (Exhibit IDN-17 (BCI)).

119. More specifically, at provisional stage, the SG&A for the construction of normal value was inclusive of export tax. However, since at definitive stage it became apparent that that tax was only relevant for export sales and not for domestic sales (normal value), the IA re-calculated the normal value thereby excluding the export tax from the SG&A on domestic sales.

120. With regard to the second estimation adjustment, related to the hedging gains and losses, the relevant part of the definitive disclosure reads:

> (73) One party questioned the establishment of the export price, claiming that both the hedging gains and losses should be taken into account and alleging an inconsistent accounting treatment of biodiesel hedging gains and losses.
>
> (74) The claim that both the hedging gains and losses should be taken into account must be rejected. Article 2(8) of the basic Regulation clearly provides that the export price shall be the price actually paid or payable for the product when sold for export, regardless of any separate – albeit related – gain or loss linked to hedging practices. Therefore, the methodology in recitals (66) and (67) of the provisional Regulation are hereby confirmed.
>
> (75) The Commission acknowledges that an inconsistent accounting treatment of the biodiesel hedging gains and losses of one party occurred at the provisional stage. This claim is accepted and the necessary corrections have been made.

121. More specifically, hedging gains and losses were not considered part of the export price paid or payable (or as part of the constructed export price as matter of principle). However, while for one legal entity within a group, the IA did not take into account a hedging gain, it had omitted to disregard a hedging loss for another legal entity within the same group. This estimation was adjusted.

122. It should be pointed out that in comments to the provisional disclosure of 1 July 2013, the Musim Mas Group claims that there was an inconsistent treatment of the hedging allowances between companies.[62] However, the Musim Mas Group claimed that the hedging allowances had to be accounted for in the export price, while the IA was of the opposite view (hedging allowances should be disregarded). The IA corrected the inconsistent treatment but to the effect of disregarding the hedging gains and losses for *all* companies.

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62 Musim Mas, Comments on Provisional Disclosure, 1 July 2013, pp. 3-4 (Exhibit IDN-18 (BCI)).

123. The extent of this correction is a negligible increase in the export price to reflect the amount being disregarded as hedging loss in the export price determination, because it is not part of the export price.

124. Finally, with regard to the third estimation which was subsequently adjusted, concerning SG&A of the two related importers [[]] in the construction of the export price and the income tax, recital 80 of the definitive disclosure reads:

> Several exporting producers came also forward with claims for data changes in the calculations. Where these claims were substantiated with the necessary evidence, corrections were made.

125. As the income tax expenses were included in the SG&A of the related importers [[]], after the Musim Mas Group's comments on the provisional findings, an adjustment was made to exclude these income tax expenses from the importers' SG&A.

126. However, the definitive disclosure stated for the Musim Mas Group a dumping margin of 19,6% and an injury margin of 16,9%. Following the lesser duty rule, 16,9% became the proposed definitive anti-dumping duty rate. Taking into account this adjustment, the definitive anti-dumping duty of the Musim Mas Group was higher than the provisional one.

127. To conclude, these are the estimation adjustments made after disclosure and before the adoption of the Definitive Regulation.

128. Article 7.2 of the Anti-Dumping Agreement provides that:

> Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty *provisionally estimated*, being not greater than the *provisionally estimated* margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures. (emphasis added)

129. Indonesia's claim is misconceived. The pertinent measure at issue in this case is the Definitive Regulation. This is clear from the reference to "final action" in Article 17.4 of the Anti-Dumping Agreement. That is the measure that existed on the date of the establishment of the Panel. We only refer back to the Provisional Regulation in order to understand the Definitive Regulation, insofar as the findings (and associated reasoning) in the Provisional Regulation are lifted into and *re-*

affirmed in the Definitive Regulation. However, to the extent that the Definitive Regulation *replaces* specific findings in the Provisional Regulation with *different* findings in the Definitive Regulation (as here), those specific findings in the Provisional Regulation *no longer exist* with effect from the date of the Definitive Regulation.

130. One cannot bring panel proceedings against a measure (or part of a measure) that no longer exists; in any event a panel is not under an obligation to address any such claims other than to observe that no useful purpose would be served by addressing them; and in any event it is evident that such measures (or the relevant parts thereof) are not presently the cause of any present adverse impact within the meaning of Article 3.8 of the DSU. The second sentence of Article 17.4 of the Anti-Dumping Agreement permits cases to be brought against *existing* provisional measures (if certain conditions are met); it does not permit cases to be successfully brought against provisional measures (or parts thereof) that no longer exist.

131. In any event, the European Union notes that Article 7.2 speaks of anti-dumping duties and dumping margins *provisionally estimated*. The *Oxford English Dictionary* defines "to estimate" as "to form an approximate notion of (the amount, number, magnitude, or position of anything) without actual enumeration or measurement".[63] It follows that Articles 7.2 addresses those provisional determinations which are in the natures of estimates of approximate magnitudes of the dumping margin and of the corresponding anti-dumping duty to be imposed and collected.

132. The "calculation errors" in the Provisional Regulation to which Indonesia refers to are in fact provisional *estimations* within the meaning of Article 7.2 of the Anti-Dumping Agreement. The Provisional Regulation was adopted on the basis of the information that the IA had at its disposal at that moment in time; the dumping margin and the corresponding anti-dumping duties are mere estimates, as required by the Anti-Dumping Agreement.

133. In that respect, the European Union concurs with Indonesia, which acknowledges that:

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63 Oxford English Dictionary, http://www.oed.com/view/Entry/64582?redirectedFrom=estimated#eid, accessed 13 February 2017.

> at the provisional stage, the investigating authority may not yet have all the required information on the record or, else, not all the evidence may be verified. Therefore, the burden of proof which the investigating authority is obliged to meet in order to impose provisional anti-dumping duties may be different and less onerous than the burden of proof which the investigating authority has to meet in order to impose definitive anti-dumping duties.[64]

134. The very definition of "provisional" is that it is temporary, existing only until permanently or properly replaced, and likely to be changed: "of, belonging to, or of the nature of a temporary provision or arrangement; provided or adopted for the time being; supplying the place of something regular, permanent, or final".[65] After the adoption of a provisional regulation, the IA discloses its findings (estimates) to interested parties and receives comments that may lead – or not - to a revision of those provisional findings (estimates). This is inherent to all anti-dumping investigations.

135. In that respect, the Provisional Regulation clearly states that:

> the findings concerning the imposition of duties made for the purposes of this Regulation are provisional and may be reconsidered for the purpose of any definitive measures.[66]

136. This is precisely what happened in the case at hand.

137. The European Union's understanding of the phrase "provisionally estimated" is confirmed by the panel's findings in *Canada — Welded Pipe*:

> Article 7.2 makes it clear that the preliminary determination relates to "the amount of the anti-dumping duty provisionally estimated", and the "provisionally estimated margin of dumping". *This "preliminary affirmative determination" of dumping is therefore no more than a provisional estimate.* This reflects the fact that the provisional determination may be based on data that is incomplete, or that the investigating authority has not yet satisfied itself is accurate. We do not consider that an investigating authority would be required to immediately terminate an investigation on the basis of only a provisional estimate of the amount of dumping determined using unverified data. (emphasis added)[67]

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64 Indonesia's first written submission, para. 325.

65 Oxford English Dictionary, http://www.oed.com/view/Entry/153485?redirectedFrom=provisional#eid, accessed 13 February 2017.

66 Provisional Regulation, recital 184.

67 Panel Report, *Canada — Welded Pipe*, para. 7.64.

138. Furthermore, in the present case the amount of the anti-dumping duty provisionally estimated is not greater than the provisionally estimated margin of dumping. The case at hand is different from the *US — Customs Bond Directive*, where the panel found that:

> In accordance with Article 7.2 of the *Anti-Dumping Agreement*, provisional measures may not exceed "the amount of the anti-dumping duty provisionally estimated." Since the United States applied initial provisional measures in "the amount of the anti-dumping duty provisionally estimated", the application of the EBR (prior to imposition of the anti-dumping order) in conjunction with the initial provisional measures necessarily resulted in the imposition of provisional measures (i.e., the initial provisional measures together with the EBR) in excess of "the amount of the anti-dumping duty provisionally estimated," contrary to Article 7.2 of the *Anti-Dumping Agreement*.[68]

139. It follows that Indonesia's arguments in this respect are flawed and should therefore be dismissed. Indonesia does not take into account that the purpose of a provisional anti-dumping duty, as provided by the respective provisions of the Anti-Dumping Agreement, is to be a preliminary *estimation*, of a provisional character.

140. In addition, the European Union recalls that the IA mentioned that:

> As a consequence, that interested party requested that no provisional anti- dumping duties should be collected. This claim must be rejected as the definitive anti-dumping duty is clearly higher than the provisional duty.[69]

141. In that respect, Article 10.3 of the Anti-Dumping Agreement states that:

> If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

142. In the case at hand, the definitive duty is higher than the provisional duty and the decision to collect the provisional duty, as *estimated* by the IA, is thus in accordance with the Anti-Dumping Agreement.

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68 Panel Report, *US — Customs Bond Directive*, para. 7.146.

69 Definitive Regulation, recital 227.

143. With respect to Indonesia's claim under Article 7.1(ii) of the Anti-Dumping Agreement, the European Union submits that Indonesia failed to meet the burden of proof with respect to the alleged failure by the IA to make a preliminary affirmative determination of dumping. Contrary to what Indonesia summarily contends,[70] the IA's "preliminary affirmative determination" of dumping in respect of the Musim Mas Group was not based on a "flawed calculation" of the provisional dumping margin. In fact, the IA's "preliminary affirmative determination" of dumping was based on *provisional estimates* within the meaning of Article 7.2 of the Anti-Dumping Agreement. Indonesia does not discuss in any part of its first written submission the significance of the word "estimated", as it appears two times in the text of Article 7.2, first sentence.

144. Indonesia also raises consequential claims under Articles 9.3 and 9.2 of the Anti-Dumping Agreement, which apply *mutatis mutandis* to provisional measures as per Article 7.5 of the Anti-Dumping Agreement.

145. In particular, Indonesia contends that the amount of the provisional anti-dumping duties exceeds the dumping margin, contrary to Article 9.3 of the Anti-Dumping Agreement.[71] The European Union has already explained that in the present case the amount of the anti-dumping duty provisionally estimated is not greater than the provisionally estimated margin of dumping.

146. Indonesia then maintains that the provisional anti-dumping duties with respect to the Musim Mas Group were not collected in an *appropriate amount* within the meaning of Article 9.2 of the Anti-Dumping Agreement. Indonesia submits that an "appropriate amount" under Article 9.2 may not exceed:

> a. The amount of the provisionally estimated margin of dumping, determined consistently with Article 2 of the Anti-Dumping Agreement – in line with Articles 7.2 and 9.3 of the Anti-Dumping Agreement; and
>
> b. Once the definitive findings have been made, the amount of the provisional duty definitively collected must comply with Article 10.3 of the Anti-Dumping Agreement. In particular, if the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the

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70 Indonesia's first written submission, para. 344.

71 Indonesia's first written submission, paras. 346 - 350.

> difference shall be reimbursed or the duty recalculated, as the case may be.[72]

147. As already explained, the European Union complies with both conditions mentioned by Indonesia. Indonesia's incorrect interpretation of Article 7.2, first sentence stems from its very failure to give meaning to the word "estimated", used two times in the respective provision.

148. In the light of the above, the European Union submits that Indonesia's claims with respect to the provisional anti-dumping duties imposed on the products at issue from the Musim Mas Group should be rejected.

3. CONCLUSION

149. Indonesia has failed to make a *prima facie* case on its claims. The European Union has shown that the claims pursued and developed in Indonesia's first written submission are unfounded and based on erroneous arguments. The European Union respectfully requests the Panel to reject Indonesia's claims.

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[72] Indonesia's first written submission, para. 353.