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

WT/DS442

AB-2017-1

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS442/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A-1****INDONESIA'S NOTICE OF APPEAL \***

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, Indonesia hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *European Union - Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (WT/DS442), which was circulated on 16 December 2016 (the "Panel Report"). Pursuant to Rules 20(1) and 21(1) of the Working Procedures for Appellate Review, Indonesia is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submission to the Appellate Body, Indonesia appeals and requests the Appellate Body to reverse the findings, conclusions, and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

**I. The Panel's finding under Article 2.4 of the Anti-Dumping Agreement**

1. The Panel erred in the interpretation and application of Article 2.4 of the Anti-Dumping Agreement when finding that Indonesia had not demonstrated that, in its determinations in the anti-dumping investigation at issue in this dispute, the EU Commission had acted inconsistently with this provision by making an adjustment to the export price for one of the investigated producer/exporters to account for intra-company transfers between the producer and its closely affiliated sales entity.<sup>2</sup>

2. In particular, and without prejudice to the arguments developed in Indonesia's appellant's submission, the Panel incorrectly interpreted and applied Article 2.4 by not addressing Indonesia's arguments or taking into account the need to determine whether a closely affiliated sales entity is in a sufficiently close relationship to the producing entity to warrant being treated as a single producer/exporter for the purpose of its price comparison analysis.<sup>3</sup>

3. The Panel also incorrectly interpreted and applied Article 2.4 by concluding that the relationship between closely affiliated entities is not relevant to the determination of price adjustments and a fair comparison between export price and normal value under Article 2.4.<sup>4</sup>

4. The Panel also incorrectly interpreted and applied Article 2.4 by concluding that it is permissible to deduct the profits and indirect selling expenses of a closely affiliated sales entity from the export price under Article 2.4.<sup>5</sup>

5. The Panel also incorrectly interpreted and applied Article 2.4 by finding that the deduction of certain indirect selling expenses and profit from the export price while no corresponding deductions were made from the normal value did not result in an asymmetrical, unfair comparison under Article 2.4.<sup>6</sup>

6. The Panel also incorrectly interpreted and applied Article 2.4 by finding that it was permissible to make deductions from the export price for indirect selling expenses and, in

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\* This Notice, dated 10 February 2017, was circulated to Members as document WT/DS442/5. This document also reflects the correction contained in WT/DS442/5/Corr.1, in English and Spanish only.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Indonesia's right to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Report, paras. 7.96-7.97, 7.160-7.161, and 8.1.b.i.

<sup>3</sup> Panel Report, paras. 7.54-7.97.

<sup>4</sup> Panel Report, paras. 7.99-7.111.

<sup>5</sup> Panel Report, paras. 7.112-7.117.

<sup>6</sup> Panel Report, paras. 7.118-7.125.

particular, profit on the basis of what the investigating authority considered to be reasonable for the sector at issue.<sup>7</sup>

7. The Panel also incorrectly interpreted and applied Article 2.4 by dismissing the relevance of the Commission's decision to treat the producer and its closely affiliated sales entity as a single entity for the purpose of identifying the starting price for the dumping analysis.<sup>8</sup>

## **II. The Panel's duties under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU**

8. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by reaching a conclusion that the measures at issue were consistent with Article 2.4 of the Anti-Dumping Agreement without first considering Indonesia's arguments and evidence.<sup>9</sup> Specifically, the Panel acted inconsistently with Articles 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by failing to consider Indonesia's legal arguments and failing to interpret Article 2.4 in accordance with customary rules of interpretation of public international law, thereby failing to make an objective assessment of the matter, including the applicability and the conformity of the measures at issue. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by applying the legal standard that it articulated without considering Indonesia's arguments and evidence, reaching a conclusion of WTO consistency on that basis and subsequently imposing on Indonesia the burden of disproving the Panel's finding.<sup>10</sup>

9. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by engaging in prohibited *de novo* review of the evidence, and by ignoring or summarily dismissing material arguments and evidence that favoured Indonesia's case.<sup>11</sup>

## **III. Request for findings and completion of the analysis**

10. For the above reasons, Indonesia, therefore, respectfully requests the Appellate Body to reverse the Panel's finding contained in paragraphs 7.96-7.97, 7.160-7.161, and 8.1.b.i of the Panel Report, that the EU Commission did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement.

11. Indonesia also respectfully requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6(ii) of the Anti-Dumping Agreement for the reasons provided in section II of this Notice of Appeal.

12. Finally, Indonesia requests the Appellate Body to complete the legal analysis and find that the EU Commission acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in its determination of dumping margins in the underlying investigation. The factual findings contained in the Panel Report, as well as the undisputed facts on the record in the determinations of the EU Commission, constitute a sufficient basis to conclude that the measures at issue were inconsistent with Article 2.4 of the Anti-Dumping Agreement.

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<sup>7</sup> Panel Report, paras. 7.126-7.130.

<sup>8</sup> Panel Report, footnote 366.

<sup>9</sup> Panel Report, paras. 7.54-7.97.

<sup>10</sup> Panel Report, paras. 7.97, 7.110, and 7.149.

<sup>11</sup> Panel Report, paras. 7.84 and footnote 277 and paras. 7.85, 7.119, and 7.120.

## ANNEX A-2

## EUROPEAN UNION'S NOTICE OF OTHER APPEAL\*

Pursuant to Article 16.4 and Article 17.1 of the DSU the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (WT/DS442). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to modify, reverse and/or declare moot and with no legal effect the findings and conclusions of the Panel and complete the analysis with respect to the following errors of law and legal interpretations contained in the Panel Report.<sup>1</sup>

- As a preliminary issue the European Union respectfully submits that Indonesia's appeal is inconsistent with Articles 3(1), 3(2), 3(3), 3(4), 3(5), 3(7), 3(8), 3(9) and 3(10) of the DSU, or any combination thereof, and that the Appellate Body should find that it is unnecessary to rule on the substance of the matters raised by Indonesia as the contested measure has expired, and indeed ceased to exist before the termination of the panel proceedings. If the Appellate Body grants this relief the European Union withdraws all other aspects of its cross-appeal, pursuant to Rule 30 of the Working Procedures for Appellate Review.

However, where the Appellate Body does not grant the relief requested in the preceding paragraph, the EU respectfully submits that:

- First, by failing to engage with and address the EU communication concerning expiry of the measure and by making recommendations with regard to a measure, which had ceased to exist before the termination of the Panel's proceedings – a fact that was uncontroversial and not contested by Indonesia – the Panel violated Articles 11 and 19.1 of the DSU<sup>2</sup>, and for that reason the European Union requests the Appellate Body to reverse paragraph 8.3 of the Panel Report;
- Second, the Panel erred in interpreting and applying Article 12(12) of the DSU, by considering that the panel authority had not lapsed. In this respect, it erroneously referred to the standard (or guidance) provided by the Appellate Body in *EC – Bananas III*, which concerns a different situation. It also erroneously interpreted and applied Articles 8 and 12(12) of the DSU, by finding, expressly or by implication, that they are in some unspecified respect mutually exclusive, as opposed to containing concurrent obligations. Moreover, the panel violated Article 11 of the DSU because, in addition to the preceding errors: it did not take into account all of the evidence submitted to the panel to demonstrate that the panel work was indeed suspended for more than twelve months; by finding that there was no request by Indonesia within the meaning of Article 12(12); by characterizing as findings of facts matters that concern the legal characterisation of those facts; by adopting a formalistic and erroneous analysis relying on the absence in Indonesia's request of any express reference to Article 12(12), a false distinction between "work" and "meeting", and

\* This Notice, dated 15 February 2017, was circulated to Members as document WT/DS442/6.

<sup>1</sup> Pursuant to Rule 23(2)(c)(ii)(C) of the *Working Procedures for Appellate Review* this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> As a separate matter, in the event that the Panel did not include that communication concerning expiry of the measure on the Panel's record, the EU appeals that action or omission as a violation of Article 11 of the DSU, since keeping a complete record of the panel proceedings and transmitting that complete record to the Appellate Body in the event of an appeal, pursuant to Article 17(9) of the DSU and Rule 25 of the Working Procedures for Appellate Review, is a necessary corollary to the Panel's obligations under Article 11 of the DSU to assist the DSB in discharging its responsibilities, by making an objective assessment of the matter before it, including an objective assessment of the facts of the case; and make such other findings as will assist the DSB in making the appropriate recommendations or rulings.

the addressee of Indonesia's request; and by failing to properly address the question of the relationship between Articles 8 and 12(12) of the DSU, which was raised by the parties (and thereby also violating those provisions of the DSU). Any one of the foregoing errors or any combination therefore would justify reversal. Accordingly, the EU requests the Appellate Body to reverse the Panel's findings and conclusion on these matters<sup>3</sup>, and respectfully requests the Appellate Body to complete the legal analysis, by finding that, with respect to these panel proceedings, the DSB's authority lapsed pursuant to Article 12(12) of the DSU. Consequently, we ask the Appellate Body to reverse all of the Panel's findings and recommendations, or declare them moot and of no legal effect.

- Third, the panel erred in the interpretation and application of Article 6.7 ADA, by considering that the European Union had not disclosed the results of the investigation to PTMM, *inter alia*, by imposing, in practice, an obligation to disclose a description of the investigation process rather than the results of the verification visit, requiring moreover that such a description should be sufficiently detailed so as to enable the Panel to trace back any correction that was made to the information supplied to specific evidence that was verified or not during the investigation or other events, and by setting out a list of items that must always be disclosed in order to comply with Article 6.7 ADA, regardless of the specific facts of each case. Accordingly, the European Union requests the Appellate Body to reverse the Panel's findings and conclusion with regard to the interpretation and application of Article 6.7 ADA.<sup>4</sup>
- Fourth, the panel erred in the interpretation and application of the DSU, particularly Article 12.1 of the DSU, and its Additional Working Procedures Concerning Business Confidential Information, because it bracketed information that was already in the public domain and failed to require Indonesia to advance justifications for its requests for specific instances of bracketing and to provide non-confidential summaries of the bracketed information sufficient to permit a reasonable understanding of the matter. At the same time the Panel also violated Article 12.7 of the DSU because by unduly over-bracketing it submitted an incomplete report to the DSB. For the same reasons, the Panel acted inconsistently with Article 10.1 of the DSU, which requires that the interests of other Members be fully taken into account during the panel process. Finally, by failing to require the necessary justifications and make the appropriate adjudications, and by failing to comply with its own BCI Procedures, the Panel acted inconsistently with its obligation to make an objective assessment, pursuant to Article 11 of the DSU.<sup>5</sup>

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<sup>3</sup> Panel Report, paras. 8.1.a.i-iii, paras. 1.9-1.11, and paras. 7.17-7.29.

<sup>4</sup> Panel Report, paras. 7.224-7.229, 7.235-7.236, and 8.1.d.

<sup>5</sup> Panel Report, paras. 7.64, 7.74 and 7.80, 7.82, 7.83.

**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

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**ANNEX B-1****EXECUTIVE SUMMARY OF INDONESIA'S APPELLANT'S SUBMISSION****1 INTRODUCTION<sup>1</sup>**

1.1. Indonesia appeals the Panel's finding that the Commission acted consistently with Article 2.4 of the Anti-Dumping Agreement by making an adjustment to the export price for an investigated Indonesian producer/exporter to reflect transactions between the producing entity and its closely affiliated sales entity. Indonesia considers that in finding that this adjustment was not inconsistent with Article 2.4, the Panel erred in interpreting and applying Article 2.4 of the Anti-Dumping Agreement.

1.2. In addition, Indonesia considers that the Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU in how it addressed Indonesia's arguments and evidence and in conducting *de novo* review of evidence on the record before the Commission.

**2 BACKGROUND**

2.1. The measures at issue in this dispute are anti-dumping measures imposed by the EU on imports of certain fatty alcohols from Indonesia. In its determinations, the Commission made an adjustment to the export price of the investigated Indonesian producer/exporters for transactions between the producers and their closely affiliated sales companies in Singapore, as if the producers and the sales companies were not related.

2.2. The Commission originally investigated two Indonesian producer/exporters, Musim Mas Group and Ecogreen. Both made their sales to the EU using the same sales structure. The producers in Indonesia (PT Musim Mas and PT Ecogreen Oleochemicals, respectively) sold to a closely affiliated, separately incorporated sales company located in Singapore (ICOF-S and EOS, respectively). These sales companies then re-sold the goods to customers in the EU.

2.3. For both producer/exporters, the sales office in Singapore negotiated with the EU customer on price. Once the price was agreed with the EU customer, two invoices were prepared: first, the producing entity in Indonesia invoiced the sales office in Singapore for 95% of the price agreed by the EU customer. Second, the sales office in Singapore invoiced the unrelated customer in the EU for 100% of the agreed price. The difference between the price received for the sale by the sales office (100%) and the amount paid to the producing entity (95%) is referred to as the "mark-up" between the producing entities and their sales offices. For both producer/exporters, in each case, the sales office in Singapore was wholly controlled by the same holding entity or shareholders as the producing entity in Indonesia.

2.4. In calculating the export price for both producer/exporters in its provisional and final determinations, the Commission characterized the sales companies in Singapore as an independent "agent[s] working on a commission basis". The Commission did not address whether the producers in Indonesia and their closely affiliated sales offices in Singapore were part of an SEE for the purpose of determining dumping margins. In the final determination, the deduction consisted of the SG&A expenses of the sales entity in Singapore and "profit of 5% which is considered a reasonable profit for the activities carried out by trading companies in the chemical sector". Without this adjustment, both producer/exporters would have had *de minimis* dumping margins.

2.5. The Commission made this adjustment pursuant to Article 2.10(i) of the EU's Basic Regulation, which permits a "notional" adjustment where an exporter sells through an affiliated trading company. Article 2.10(i) provides that "[t]he term 'commission' shall be understood to include the mark-up received by a [related] trader of the product or the like product if the functions of such a [related] trader are similar to those of an [independent] agent working on a

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<sup>1</sup> This executive summary contains a total of 5,623 words (including footnotes). Indonesia's appellant's submission contains a total of 63,245 words (including footnotes).

commission basis". This has been described as enabling the Commission to "deduct[] from the export price a commission that was never paid, thereby artificially decreasing the export price". This provision of the Basic Regulation has no direct counterpart in the Anti-Dumping Agreement.

2.6. After the final determination, the Commission initiated a procedure to review the dumping measure. Having previously treated Musim Mas Group and Ecogreen identically, the Commission now found differences between the two producer/exporters. It decided to revise Ecogreen's dumping margin by removing the adjustment. As Ecogreen now had a *de minimis* dumping margin, the measure was terminated for Ecogreen. The Commission made no change to Musim Mas Group's dumping margin.

### 3 THE ISSUE BEFORE THE PANEL

3.1. Indonesia argued that in making price adjustments under Article 2.4 of the Anti-Dumping Agreement to reflect the involvement of a closely affiliated sales entity, an investigating authority must address whether the producing entity and its closely affiliated sales entity are in a sufficiently close relationship to warrant being treated as an SEE for the purpose of determining dumping margins. This question must be resolved using criteria such as those articulated by the panel in *Korea – Certain Paper* and the Appellate Body in *EU – Footwear* regarding the common ownership, management, and control of the entities involved.

3.2. Transactions between entities within the SEE are not reliable, for the reasons explained by the Appellate Body in *US – Hot-Rolled Steel*, paragraph 141. Moreover, these transactions do not represent expenses to the SEE as a whole. The determination of prices and price adjustments for dumping purposes must be based on the revenues and expenses of the SEE as a whole, not on the transfers within the SEE, and on how the producer/exporter actually structures its sales and the expenses it actually incurs.

3.3. Where a producer/exporter uses an unaffiliated agent to help make sales, the commission paid to that agent is a direct selling expense that can be deducted from the export price or normal value. Where a producer/exporter instead uses a closely affiliated sales entity with which it forms part of an SEE, the transfers within the SEE are not an expense to the SEE as a whole and may not be deducted. Instead, the actual expenses incurred are the expenses of the closely affiliated sales entity to pay its salespersons' salaries, office costs, etc. These are indirect selling expenses that are not deducted from the normal value or export price. The purpose of a dumping analysis is to identify price discrimination between markets. Hence, the deduction of any profit accruing to an entity for which a dumping margin is being determined would distort the price comparison.

3.4. Indonesia argued that the Commission's treatment of the producer in Indonesia and the sales office in Singapore as if they were independent entities, and the deduction of amounts for the sales office's selling expenses and the profit of traders in this sector did not accurately reflect the expenses actually incurred in making the investigated sales. It also distorted the comparison between export price and normal value, resulting in an unfair comparison under Article 2.4 of the Anti-Dumping Agreement.

### 4 THE PANEL'S RULING

4.1. The Panel rejected Indonesia's claim. The Panel stated that an adjustment may be appropriate where a factor "is linked exclusively either to the domestic sales or to relevant export sales subject to comparison, or to both sides of the comparison but in different amounts" and found that "the EU authorities did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement by considering whether ICOF-S had functions similar to an agent working on a commission basis". However, the Panel's evaluation of the relevant legal standard in section 7.3.5 and its application of that standard to reach its conclusion in section 7.3.5.1 of the Report do not contain a *single* reference to the issue of closely affiliated companies, SEEs, or whether or how transactions between them may affect price comparability within the meaning of Article 2.4, or Indonesia's arguments on this issue.

4.2. Having concluded that the Commission acted consistently with Article 2.4, the Panel "turn[ed] to" Indonesia's arguments to see whether they "affected" the Panel's conclusion or provided "reason to set aside our conclusions".

4.3. The Panel stated that the question of whether two entities were part of an SEE was not "dispositive" because it was "possible" that transactions between two entities "could be" at arm's length, "regardless of how closely intertwined their control and ownership might be". The Panel concluded that even where transactions are not at arm's length, a transaction between them "could reflect an expense" that must be adjusted for.

4.4. The Panel rejected Indonesia's argument that the deduction of amounts representing selling expenses and profit from the export price when no selling expenses or profit were deducted from the normal value resulted in an asymmetric comparison. The Panel reasoned that there was no asymmetry as the export price reflected *some* profits and selling expenses, those of the producing entity.

4.5. The Panel also rejected Indonesia's argument that it is not permissible to deduct selling expenses and profits, on the ground that the selling expenses and profits of a "downstream participant" in the sales process may be a direct selling expense to the producer. However, the Panel did not address whether there was a distinction between an *independent* and a *closely affiliated* "downstream participant".

## 5 THE LEGAL STANDARD UNDER ARTICLE 2.4

5.1. Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to conduct a "fair comparison" between the normal value and the export price "at the same level of trade, normally the ex-factory level". In order to comply with this requirement, investigating authorities are required to make "[d]ue allowance ... for differences which affect price comparability".

5.2. The process of determining the ex-factory normal value and export price requires the "netting back" from the starting price charged to the first unrelated customer. This is done by making adjustments to ensure that comparisons are not distorted by factors extraneous to the central issue of price discrimination between markets. If a domestic customer and an export customer both appeared to buy the goods at the factory gate, the price charged to the export customer should be no less than the price charged to the domestic customer. Under Article 2.4, "allowances should *not* be made for differences that do *not* affect price comparability". This means that an adjustment should be made when, and only when, a factor affects price comparability.

5.3. Article 2.4 does not expressly address transactions between closely affiliated parties. However, the Appellate Body has explained in *US – Hot-Rolled Steel* that transactions between affiliated parties may not be reliable and that it is consistent with the Anti-Dumping Agreement to use the price of a closely affiliated reseller as the starting price in the analysis of normal value. This rationale applies equally to the determination of the starting price and adjustments on the export side.

5.4. A producer/exporter may choose to make its sales using an internal sales department, an affiliated sales company, or an independent agent. The choice will affect the producer/exporter's costs and his net return on the sale. These choices must be reflected accurately in the investigating authority's dumping analysis. In trying to identify whether the producer/exporter is engaged in price discrimination between markets, the investigating authority cannot achieve a fair comparison under Article 2.4 if it ignores the producer/exporter's actual sales structure. It cannot replace the producer/exporter's actual expenses with the expenses that would have been incurred had it sold under a different hypothetical sales structure.

5.5. An investigating authority must, therefore, address whether a producing entity and its closely affiliated sales entity are in a sufficiently close relationship to warrant being treated as an SEE, using the criteria in *Korea – Certain Paper* and *EU – Footwear*.

5.6. When two entities form part of a SEE, the revenues, profits, and expenses of each entity in the SEE become the revenues, profits, and expenses of the SEE as a whole. For dumping purposes, this means that the prices, profits, and expenses of the sales entity within the SEE must be treated in the same way as if the producer/exporter were a single legal entity.

5.7. Commissions paid to an independent agent may be deducted from the normal value or export price, as appropriate. Transactions between entities within the SEE are not reliable or relevant for

determining adjustments. Any selling expenses incurred by a sales entity within the SEE must be treated in the same way as indirect selling expenses of a producer/exporter that consists of a single legal entity. These expenses are not deducted from the normal value or export price.

## 6 THE PANEL ERRED IN INTERPRETING AND APPLYING ARTICLE 2.4

6.1. The Panel failed to articulate the correct legal standard under Article 2.4 for examining adjustments in circumstances involving transactions between closely affiliated parties. In sections 7.3.5 and 7.3.5.1 of its Report, the Panel interpreted and applied Article 2.4 to find that the Commission did not act inconsistently with Article 2.4 without ever addressing Indonesia's arguments regarding the importance of examining the relationship between the parties at issue. This, in itself, is a failure to interpret and apply Article 2.4 correctly.

6.2. The Panel articulated a standard whereby an adjustment can be made where a factor exists on one side of the comparison but not the other. This suggests that the manner in which the investigating authority quantifies or describes an adjustment that may be made on only one side is beyond review for "fairness" under Article 2.4. This cannot be.

6.3. The Panel also erred in dismissing the importance of whether two entities form part of an SEE by stating that this cannot be dispositive because it is "possible" that transactions between these entities "could" be at "arm's length". Even assuming this were correct, the Panel also erred in failing to identify a proper legal standard for determining whether transactions between the closely affiliated entities in this case were at "arm's length" and where in its determinations the Commission provided a reasoned and adequate explanation of how it applied that standard.

6.4. The Panel also erred in confusing the issue of whether prices between closely affiliated entities approximate "arm's length" transactions under a transfer pricing agreement and the issue of whether entities are in "a relationship close enough to support" "properly treat[ing] multiple companies as a single exporter or producer in the context of [the] dumping determinations in an investigation".

6.5. The Panel did not even address the fact that even if a transfer between entities within an SEE is at the amount at which independent parties do business, it remains an intra-SEE transfer. The amount transferred to the sales entity remains cash in the hands of the SEE. It is not the same as a transfer to an independent entity *outside* the SEE, no matter what its amount is.

6.6. The Panel also erred in finding that an investigating authority may make adjustments to normal value or export price for the selling expenses and profits of a "downstream participant" in the sales process, without distinction between *closely affiliated* downstream participants and *independent* downstream participants. The Panel correctly stated that payments to an *independent* downstream participant are a direct selling expense to the producer/exporter that may be deducted. However, the Panel erred in suggesting that exactly the same approach may be used for "downstream participants" that are part of an SEE with the producing entity.

6.7. The Panel also erred in suggesting that deductions may be based on the "value" of a factor (the "reasonable profit" in the "chemical sector") rather than on the basis of the expenses actually incurred by the producer/exporter. Nothing in the Anti-Dumping Agreement permits the investigating authority to ignore actual expenses and to use what it considers "reasonable" or to be the correct "value" of the expense.

6.8. The Panel also erred in its analysis of the consequences of the Commission's decision to treat the producer in Indonesia and its closely affiliated sales office in Singapore as a single entity for the purposes identifying the "starting price" in the Commission's analysis. The Commission's decision to use the re-sale price of the closely affiliated sales entity as the starting price in the analysis price implies a judgment about the relationship between the sales entity and the producing entity. This should also affect the determination of adjustments to that starting price. The Panel erred in dismissing this issue, in a footnote, as merely a "conception" of Indonesia.

6.9. The Panel also erred in its analysis of whether the Commission properly adjusted for "indirect selling expenses". The Panel correctly noted that indirect selling expenses/SG&A and profit are to be *included* in the normal value and export price. However, the Panel erred in stating that there

was no unfair comparison where the normal value and export price included *some* indirect selling expenses and profit, even if other selling expenses and profit were deducted from the export price.

6.10. The Panel also erred in its analysis of the Commission's criterion of whether a closely affiliated sales entity performs the same "functions" as an independent agent. Salespersons are likely to perform the same function whether they are closely affiliated to or independent of the producer: they will make sales. Thus, their functions are scarcely relevant to the issue of whether they are making sales *independently or as part of the producer/exporter*.

6.11. Ultimately, the Panel's ruling means that investigating authorities may simply ignore the relationship between a sales entity and a producing entity and proceed on the basis that they are independent of each other. This would, in effect, deprive producer/exporters of their right to have their dumping margins based on their actual sales processes and their actual revenues and profits. It would deprive them, in the calculation of margins, of any benefits or efficiencies they achieve by performing sales functions through a closely affiliated sales entity rather than through an independent trader with its own profit motive. This cannot be a permissible means of achieving a "fair comparison" within the meaning of Article 2.4.

6.12. Indonesia requests the Appellate Body to reverse the Panel's finding that the Commission did not act inconsistently with Article 2.4 in making the contested adjustment. In addition, Indonesia requests the Appellate Body to complete the analysis. On the basis of the undisputed facts on the face of the Commission's determinations, the Appellate Body can and should find that the Commission acted inconsistently in making the contested adjustment without properly examining whether the sales and producing entities were in a sufficiently close relationship to warrant being treated as a single entity for dumping purposes.

## **7 THE PANEL FAILED TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER UNDER ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU**

### **7.1 The proper standard of review in disputes under the Anti-Dumping Agreement**

7.1. Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU contain the proper standard of review for panels in disputes under the Anti-Dumping Agreement. This standard requires a panel to examine whether the report of the investigating authority contains a "reasoned and adequate explanation of how the facts support the authority's determination. This explanation must be discernible from the published determinations and cannot be provided by the defending Member in a WTO proceeding. A panel's examination of this explanation must be based exclusively on the information contained on the record and the explanations given by the authority in its published report. A panel may not conduct a *de novo* review of evidence from the investigation record where the investigating authority itself failed to assess that evidence. It is not for a panel to examine - as the first trier of fact - a piece of evidence, to assess its probatory value, or to weigh it against other record evidence. This is the task of the investigating authority.

7.2. This is also important for safeguarding the procedural rights of the investigated company enjoys in an investigation. When an investigated company provides evidence, the investigating authority must use that evidence. If the evidence is deemed insufficient or otherwise unreliable, the investigated company has a right to know and to have an opportunity to provide further explanations. If a panel examines evidence *de novo*, without granting the company those rights, it essentially undermines the due process safeguards of the Anti-Dumping Agreement. Moreover, as it does not have the complete investigation record before it, a panel is not in a position to make "judgment calls" about the evidence.

### **7.2 The Panel acted inconsistently with Articles 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU by finding the measure at issue to be consistent with Article 2.4 of the Anti-Dumping Agreement before addressing Indonesia's arguments and evidence**

7.3. In paragraphs 7.54-7.94 of its report, the Panel conducted a stand-alone analysis of the measure at issue and concluded that it was consistent with Article 2.4 of the Anti-Dumping Agreement. The Panel reached that finding without considering any of the arguments and evidence that Indonesia had placed before the panel that were at the core of Indonesia's case. In the

remainder of its analysis, the Panel "turned to" whether Indonesia's arguments or evidence could "affect" that previously reached finding of consistency or persuade the Panel to "set aside" its earlier findings.

7.4. This approach is inconsistent with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU. WTO law does not permit a panel to reach a conclusion on a claim divorced from arguments and evidence of complaining parties. Indonesia was entitled to have its arguments and evidence addressed by a panel with an open mind on the case, not one that had already concluded that the measure was WTO-consistent. In effect, the Panel imposed a burden on Indonesia to "disprove" the panel's view that the measure was WTO-consistent. Effectively, the Panel created an "extra hurdle" for Indonesia, tilted the playing field against Indonesia, and made the case for the defendant.

### **7.3 The Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU by repeatedly conducting *de novo* review of record evidence**

7.5. The Panel repeatedly engaged in *de novo* review of record evidence. It examined evidence that had not been analysed by the investigating authority and conducted its own evaluation of that evidence to determine, for itself, the most plausible reading of that evidence. However, the role of a WTO panel is limited to examining whether the authority provided a reasoned and adequate explanation of its determination, in the light of record evidence and other potential alternative explanations.

7.6. The Panel relied on the Appellate Body reports in *US – Countervailing Duty Investigation on DRAMS* and *Thailand – H-Beams*. In those cases, the Appellate Body approved references by the panels to evidence, to which the investigating authorities had not referred, in specific, limited circumstances not present in this case. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body approved the panel's reference to a newspaper article referred to by the United States as additional support for a finding by the investigating authority that was based explicitly on a vast range of evidence, including numerous other newspaper articles, all of which pointed to the same conclusion. In these circumstances, a panel may review additional supporting evidence, because it is clear from the remainder of the analysis what the investigating authority thought about that evidence. But this is not the case when the evidence contradicts the authority's conclusion and is capable of multiple plausible readings. In *Thailand – H-Beams*, the Appellate Body approved a reference by the panel to supporting evidence that was not referred to by the investigating authority in order to protect its confidentiality. Neither of these specific circumstances were present in this case.

7.7. The Panel also articulated a new legal standard that it may examine evidence *de novo* as long as that evidence is "connected" to the explanation of the authority. This is too broad, because all record evidence in a dumping determination could ultimately be said to be "connected" to the investigating authority's explanation. If the Panel's new standard is left to stand, panels will be given *carte blanche* to engage in *de novo* review of virtually any evidence on the record. This will read the Appellate Body's previously articulated explanation-based standard out of WTO dispute settlement.

7.8. The Panel engaged in *de novo* review by determining the probatory value of the email in Exhibit PTMM-18 (Exhibit IDN-47). The authority never examined this evidence. This evidence contradicted the investigating authority's view that ICOF-S does not conduct marketing and sales activities for PT Musim Mas's domestic sales. The document was provided to show, by way of an example, a domestic sale in which ICOF-S is involved. The Panel evaluated this evidence, chose between what it considered to be plausible readings, and weighed the document against some, but not all, other evidence that was before it (and that also had not been examined by the investigating authority). This is not permissible. The Panel was also incorrect to say that the authority "ascribed limited evidentiary value" to the document. There is no indication of what the authority actually thought, as its silence can be read in many different ways.

7.9. The Panel also conducted an impermissible *de novo* review of the list of PT Musim Mas's shareholders. Indonesia explained that PT Musim Mas and ICOF-S had the same shareholders, who in addition were in a particularly close relationship and that the investigating authority had failed to analyse this point. The Panel found that the evidence did not unambiguously establish the close



nature of the shareholders' relationship. But this is not only irrelevant, because the identity of the shareholders is sufficient, regardless of their relationship. In addition, the Panel addressed an argument never made by the investigated company during the proceedings; and it weighed and balanced the evidence. The evidence was perfectly consistent with the proposition that the shareholders are closely related. Moreover, the investigating authority never sought further information or explanations on this point. As such, the Panel's approach deprives the investigated company of its due process rights during the investigation.

7.10. The Panel also found that the shareholders of PT Musim Mas and ICOF-S were not identical, although the company stated that they were the "same", which is normally understood to mean identical. The Panel thus decided to interpret for itself what the company had stated during the investigation.

7.11. The Panel also engaged in a *de novo* review of certain organizational charts filed by PT Musim Mas as part of its questionnaire response. The Commission never even mentioned these charts. The Panel engaged in a *de novo* analysis of the evidence to determine that the "marketing and sales department" in PT Musim Mas's chart was not ICOF-S. The Panel essentially determined what the investigated company sought to depict when it prepared the charts. This makes no sense. Besides being an impermissible *de novo* review, the Panel's analysis is also inconsistent with uncontested facts.

7.12. The Panel also developed its own reasoning about PT Musim Mas's marketing and sales activities. The Panel analysed a spreadsheet in PT Musim Mas's questionnaire response, to which the Commission never referred in its Determinations. The Panel discovered identical percentage amounts allocated to marketing and sales activities across different product groups and, from this, deduced that PT Musim Mas was conducting identical activities. The Panel used this to support its finding that ICOF-S was involved only with export sales and, therefore, an adjustment for its expenses and profits was warranted.

7.13. In reality, in this spreadsheet, the producer/exporter was simply allocating its expenses on the basis of turnover because that is what it was instructed to do by the Commission. It was not supposed to, and did not, reflect the actual activities and expenses on a product- or market-specific basis. The Panel thus arrived at its own (questionable) reading of evidence that could have been read in multiple ways, without even exploring why the information was presented in this manner. Moreover, the Panel's conclusion is inconsistent with the theory that PT Musim Mas conducted all of its domestic marketing and sales activities, but left the corresponding export activities to ICOF-S. In that case, the percentage amounts should have been different.

7.14. The Panel report contains further instances of *de novo* review. For instance, the Panel developed its own theory about PT Musim Mas's "direct" export sales, without any basis in the record evidence and in the absence of any statement by the Commission. In order to resolve a contradiction between assumptions concerning PT Musim Mas's marketing capacity, the Panel made up out of whole cloth a theory whereby PT Musim Mas had capacity to market its sales in certain markets, but not in others. There is no record evidence to support this, while there is evidence that contradicts the Panel.

7.15. The Panel also provided a *de novo* analysis of PT Musim Mas's Financial Statements, in its interim report. This analysis was also incorrect as a matter of basic accounting precepts. After vigorous protestations by Indonesia in its interim comments, the Panel deleted this finding. However, this finding is further useful evidence of the unprecedented willingness of this Panel to step into the shoes of the investigating authority and do its work for it.

#### **7.4 The Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by disregarding or summarily dismissing relevant evidence that favoured Indonesia**

7.16. The Panel also violated Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by disregarding or summarily dismissing relevant evidence that favoured Indonesia. This evidence pertained to the S&P Agreement between PT Musim Mas and ICOF-S.

7.17. Panels have the discretion not to examine each and every argument and piece of evidence of a party. However, this discretion does not extend to evidence that is relevant for a party's case, as presented by that party, and that "appears to favour" that party. All of the evidence at issue here is evidence that is relevant, because it pertains to issues explicitly relied on by the investigating authority, the EU in the WTO proceedings, and the Panel itself. Moreover, it all favours Indonesia, in one way or the other.

7.18. Indonesia submitted multiple pieces of evidence that demonstrated that the S&P Agreement could not be reasonably read to suggest that the two companies were unrelated. Also, the existence of a written contract and the specific content did not suggest that the agreement was something "more" than a normal transfer pricing agreement. This evidence included transfer pricing guidelines from international organizations such as the OECD and the United Nations, as well as from national jurisdictions. It also included recommendations from a specialized law firm for related companies wishing to conclude transfer pricing agreements, as well as template/model transfer pricing agreements that contained exactly the same clauses as the S&P Agreement.

7.19. The Panel either ignored this evidence or dismissed it summarily as irrelevant. For instance, the Panel initially ignored the law firm and model agreement evidence. In response to Indonesia's interim comments, the Panel made a brief statement that one of the model transfer pricing agreements was irrelevant because it pertained to a different type of commercial activity, or because the law firm recommendations contained disclaimers. These statements reflect a refusal to engage with the evidence and they entirely miss the point. The issue was that a model transfer pricing agreement included the same clauses as the S&P Agreement at issue. In another instance, the Panel relied on the OECD Guideline to make an (incorrect) point about "arm's length", but entirely ignored another section of the same document on which Indonesia had based its arguments. This is also an un-even-handed approach to the evidence that vitiates the objectivity of the analysis.

## **8 CONCLUSION AND REQUEST FOR FINDINGS**

8.1. For these reasons, Indonesia requests the Appellate Body to reverse the Panel's finding that the Commission did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in making the contested adjustment.

8.2. Indonesia also requests the Appellate Body to find that the Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU in making its finding under Article 2.4.

8.3. In addition, Indonesia requests the Appellate Body to complete the analysis. On the basis of the undisputed facts on the face of the Commission's Determinations, the Appellate Body can and should find that the Commission acted inconsistently with Article 2.4 in making the contested adjustment without properly examining whether the sales and producing entities were in a sufficiently close relationship to warrant being treated as a single entity for dumping purposes.



**ANNEX B-2****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION****1 FACTUAL BACKGROUND AND THE MEASURES AT ISSUE**

1. In 2010 the EU initiated an anti-dumping investigation regarding imports of certain fatty alcohols and their blends, originating *inter alia* in Indonesia. The findings of the investigation were crystalized in three acts – Council Regulation (EU) No. 446/2011 of 10 May 2011 ("Provisional Determination"), Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 ("Final Determination"), and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 ("Revised Determination"). These measures were the object of Panel proceedings between the EU and Indonesia.

**2 INDONESIA'S APPEAL RELATES TO AN EXPIRED MEASURE AND SHOULD BE DISMISSED**

2. As the contested measure expired on 12 November 2016 and the EU informed the Panel and Indonesia of this on 16 November 2016, the EU thinks that Indonesia's appeal is inconsistent with Articles 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 3.9 and 3.10 of the DSU and that ruling on the matters raised by Indonesia is unnecessary, since an appeal is not appropriate when *the sole measure at issue* no longer exists, because it has been withdrawn/expired. Should the Appellate Body uphold this claim of the EU, the EU withdraws the remainder of its cross-appeal.
3. Article 3 of the DSU sets out *inter alia* the objectives of the WTO dispute settlement system, such as preservation of rights and obligations of Members, prompt settlement of situations in which a Member considers that a benefit it is entitled to is being impaired, satisfactory settlement of the matter, and the initiation of dispute settlement procedures only when they may be fruitful and lead to a positive solution to the dispute and not in order to obtain an advisory opinion on legal issues.
4. In the present case, however, since the contested measure has ceased to apply, there is nothing left to "preserve", nor is any benefit being impaired. Bringing such a case risks to unnecessarily delay and prevent the prompt settlement of other disputes. Instead, the withdrawal/expiry of the measure has achieved a satisfactory settlement of the matter, in accordance with the rights and obligations under the DSU and the covered agreements. Furthermore, bringing an appeal regarding withdrawn/expired measures cannot be fruitful, since a positive and mutually acceptable solution has already been achieved, withdrawal being the first objective of the dispute settlement mechanism.
5. Since there is no longer any concrete and ongoing dispute between the parties, Indonesia appears to be seeking an "advisory opinion", a clarification or interpretation of certain provisions in the abstract. However, other WTO procedures are set out for that purpose.
6. Additionally, the EU submits that the Panel erred in making recommendations on a withdrawn/expired measure, in violation of established case-law and the Panel's obligations pursuant to Articles 11 and 19.1 of the DSU. Indeed, these provisions envisage a situation in which a measure (and hence a violation) still exists. Furthermore, the Panel's failure to address the EU communication on the expiry of the measure constitutes in itself a failure to make an objective assessment pursuant to Article 11 of the DSU.

**3 THE PANEL ERRED IN FINDING THAT THE DSB AUTHORITY FOR THESE PANEL PROCEEDINGS HAD NOT LAPSED**

7. The EU appeals the Panel's findings concerning its request for a preliminary ruling that the DSB authority for the Panel proceedings lapsed pursuant to Article 12.12 of the DSU.

8. There can be no doubt that an Article 12.12 request can be made between Panel establishment and composition.
9. First, a textual interpretation of Article 12.12 supports the EU position. Like in many other provisions in the DSU, the term "Panel" in Article 12.12 refers to an established panel, regardless of the stage of its composition. Further, the verb "suspended" includes putting something into abeyance from the very start. "[T]he work of the Panel" includes anything lawfully done in the name of the Panel, including by the Secretariat pursuant to Article 27 DSU. Finally, after 12 months without any activity, the authority of the Panel automatically lapses. Suspension can be initiated by a "request" by the complaining Member – an indication of its wishes to suspend the Panel's work. The suspension can commence "at any time" from the moment of the Panel's establishment.
10. Next, the EU submits that the final sentence of Article 12.12 has several objects/purposes, common to other provisions of the DSU which support the EU interpretation. These include setting parameters to the authority of the DSB, providing for security and predictability, limiting the reputational consequences for the accused Member, promoting the prompt settlement of disputes, and allowing both the defending Members, as well as the Secretariat to organize their limited resources so as to participate efficiently and effectively in dispute settlement or to assist Panels. Therefore, the duration of the authority flowing from the DSB is not indefinite and not in the hands of the complaining Member alone.
11. Moreover, the Panel did not consider the entirety of Article 12.12 and its reference to Article 12.9. According to the latter provision, the total period between Panel establishment and the adoption of the Panel report should not exceed 9 months, with the possibility of a suspension of 12 months (21 months in total). Allowing for an indefinite suspension after Panel establishment but before Panel composition, in addition to an Article 12.12 suspension, is irreconcilable with the time limit of Article 12.9, which begins running from the date of Panel establishment.
12. In the present case, on 11 July 2013 Indonesia informed the Secretariat that it wished to *suspend* a meeting (the only work happening at that moment), a "request", to which the Secretariat sent a confirmatory response. On 22 September 2014, more than 12 months later, the Secretariat sent a communication to the Parties, pursuant to a request from Indonesia from 19 September 2014, to resume the work of the Panel. Indonesia's suspension request was made between the Panel establishment and Panel composition and had the consequence of suspending any *future* work of the Panel for more than 12 months. The Panel, therefore, had no authority or jurisdiction to consider the matters that Indonesia raised.
13. The Panel erred by referring to the standard in *EC – Bananas III*. Indonesia was exercising, rather than relinquishing a right under Article 12.12 DSU. Furthermore, the expiry of the 12 month period did not imply that Indonesia was surrendering its right to bring dispute settlement proceedings as Indonesia had the right to bring fresh dispute settlement proceedings concerning the same matter and ask for the establishment of a new panel. Moreover, regardless of any ambiguities in Indonesia's request, it resulted in a Secretariat response, pursuant to which no panel work occurred for more than 12 months. The Panel should have made an objective assessment based on all the facts before it, pursuant to Article 11 of the DSU. The Panel, therefore, committed an error in interpretation and/or application of the law, including Article 12.12 DSU.
14. Furthermore, the Panel omitted any reference to the response to Indonesia's request from its analysis, despite it being central to the EU's argument, thereby violating Article 11 of the DSU. Moreover, the Panel's erroneously refers to the EU "insufficiently demonstrating", although there were no issues of fact and evidence. Rather, the Panel's conclusion rests upon the legal characterisation of the facts, specifically that there was no Article 12.12 request. Additionally, the Panel's comments on Indonesia's request are purely formalistic, rather than looking to the substance of the request, the response to the request and the ensuing inactivity. Finally, the Panel accepts that Article 8 and Article 12.12 of the DSU are mutually exclusive, while they actually contain concurrent obligations. Therefore, the Panel failure to analyse these matters constitutes an error in interpretation and/or application of

the DSU. All of these errors constitute a violation of the obligation to make an objective assessment pursuant to Article 11 of the DSU.

15. Having reversed the Panel's findings and conclusion on this point, the European Union requests the Appellate Body to complete the legal analysis, by finding that the DSB's authority lapsed pursuant to Article 12.12 of the DSU and reverse all of the Panel's findings and recommendations.

#### **4 THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF ARTICLE 6.7 OF THE ANTI-DUMPING AGREEMENT**

16. The Panel erred by considering that Article 6.7 ADA requires in practice the disclosure of a description of the verification process rather than its results. While the EU agrees with the Panel that "results" in Article 6.7 refers to what is achieved or obtained during the verification, it points to the relationship between Article 6.7 and Article 6.9 and argues that the "results" are closely related to the essential factual outcomes of the verification, which may have a bearing on the authorities' decisions, enabling companies to defend their interests.
17. The Panel wrongly interpreted Article 6.7 and found that disclosure of the results of the verification requires, as a minimum, an indication of: (1) the previously supplied information for which supporting evidence was requested, (2) any other information requested, (3) the documents that were collected, (4) whether the additional information was made available, and (5) whether the accuracy of the information supplied was confirmed by the investigating authority. Most of these elements refer to the process of verification, rather than its results. Instead, the verification visit is essentially a documentary exercise that focuses upon documentary evidence.
18. In this case, there is no dispute that the requirement sub (3) was respected.
19. Moreover, since the verified firms cooperated, there was no document requested that was not supplied. In any event, information not supplied does not constitute a "result" since it was not obtained as a result of the verification.
20. Information already submitted, for which supporting evidence is required is also manifestly not an outcome of the visit. In any case, PTMM representatives were present during the visit and they were informed beforehand of the documents to be prepared for the verification. Hence, what has been verified resulted from the circumstances of the procedure.
21. Requests for information are equally not a result of the visit, but pertain to the process of verification.
22. Finally, the requirement to include a statement setting out whether or not the authorities were able to confirm the accuracy of the information supplied implies that the investigating team should assess the information collected. However, the evaluation of the evidence and information is the task of the authority and the result of the antidumping investigation and is disclosed as essential facts pursuant to Article 6.9. It cannot be performed by the verification team.
23. Additionally, the Panel considered that the behaviour of the investigated firm is irrelevant in assessing the compliance with Article 6.7. However, as no particular disclosure format is prescribed, compliance with Article 6.7 should be assessed by considering all facts of the case, including the behaviour of the investigating authority and the investigated firms. In the present case, the EU and PTMM agreed on the necessary corrections and drafted a list of documents collected during the verification. PTMM never made the point that any result of the verification had not been disclosed. By denying any relevance to those factual elements, the Panel interpreted Article 6.7 in an abstract and formalistic way.
24. Finally, the Panel went even further than the minimum disclosure that itself identified. It required a description of the verification process, detailed enough to enable the Panel to

connect any correction that was made with specific evidence that was verified or not during the investigation or with other events.

25. Therefore, the EU requests the Appellate Body to reverse the Panel's conclusion in para. 8.1.d.

**5 THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF THE DSU, PARTICULARLY ARTICLE 12.1 OF THE DSU, AND ITS ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION**

26. The Panel designated as BCI and redacted from the public version of its report information which was already in the public domain. The decision to bracket this information prejudices the comprehension of the Panel report. Furthermore, the Panel erred by not requiring justifications for Indonesia's requests for specific bracketing, as well as by not requiring non-confidential summaries of the bracketed information.
27. The above constitutes an error in the interpretation and application of Article 12.1 of the DSU and Paragraphs 1 and 9 of the Panel's Additional Working Procedures Concerning BCI. For the same reasons, the Panel also acted inconsistently with Article 12.7 of the DSU by over-bracketing and, therefore, under-reporting to the DSB, as well as with Article 10.1 of the DSU. Finally, it also acted inconsistently with Article 11 of the DSU by failing to require justifications to Indonesia and by failing to comply with its own Procedures.

**ANNEX B-3****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION****1 INTRODUCTION**

1. In this executive summary, the European Union ("EU") summarizes the arguments presented to the Appellate Body in its Appellee Submission.

**2 BACKGROUND AND THE MEASURES AT ISSUE**

2. The contested measure expired on 12 November 2016, as communicated to the Panel and Indonesia soon after. Since the sole measure at issue no longer exists, Indonesia's appeal is inconsistent with provisions within Article 3 of the DSU, and, therefore, ruling on the matters raised by Indonesia is unnecessary. These claims are incorporated by reference in the present submission from the EU's Other Appellant Submission.
3. Turning to the case, in 2010 the EU initiated an anti-dumping investigation regarding imports of certain fatty alcohols and their blends, originating *inter alia* in Indonesia. Two Indonesian producers – PT Musim Mas ("PTMM") and Ecogreen, as well as their related traders – ICOF-S and EOS, respectively, were investigated.
4. A Sale and Purchase Agreement ("SPA") between PTMM and ICOF-S was among the evidence. It provides for an ICOF-S "mark-up", charged exclusively on export sales of PTMM products as payment for certain "functions, obligations and risks" – and their associated expenses – assumed by ICOF-S in respect of these sales. The SPA constitutes the entire agreement between the companies.
5. During the investigation, the issue of the appropriateness of export price adjustments for PTMM and Ecogreen, reflecting the involvement of their related traders, was deliberated. Pursuant to the EU Basic Anti-Dumping Regulation ("Basic Regulation"), an adjustment was made for both. ICOF-S was found to have similar functions to an agent on a commission basis pursuant Article 2(10)(i) of the Basic Regulation. No adjustment was made for PTMM's domestic sales. The adjustment for Ecogreen was later revised, however, PTMM's adjustment remained due to its different factual situation.
6. Another issue was whether PTMM and ICOF-S constituted a single economic entity ("SEE"). The EU did not consider so, in light of the content of the SPA, the export ICOF-S mark-up, the direct invoicing of domestic sales to PTMM and the sale activities of ICOF-S of products from other producers.
7. The findings of the investigation were crystalized in three acts – Council Regulation (EU) No. 446/2011 of 10 May 2011, Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011, and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012. The three determinations were the subject of the panel proceedings between the parties.

**3 INDONESIA'S CLAIM OF THE PANEL'S LEGAL ERROR UNDER ARTICLE 2.4 OF THE ADA**

8. The Panel established its understanding of Article 2.4 as mandating for investigating authorities to make a fair comparison between export price and normal value by making allowances for proven differences which have an impact, or are likely to have an impact, on the price of the transactions in an unequal manner. It based this on the text of Article 2.4 and WTO jurisprudence, finding that adjustments must be made only for expenses linked to either the export or domestic side of a transaction, or to both but in different amounts.
9. Indonesia's claim of error is predicated on the assumption that the correct legal standard under Article 2.4 of the ADA requires an examination of the relationship between affiliated

parties. However, Indonesia did not demonstrate how the relationship between affiliated parties is relevant for adjustments for commissions paid to a related trader only for export sales. Indonesia's reading finds no support in the text of the provision, nor in the case law referred to. In fact, the Appellate Body held, in one case referred to, that an Article 2.4 adjustment may be necessary even when the reseller is an affiliated company. Moreover, in another case, "supporting" Indonesia's deliberation of the criteria for delimiting when legally separate entities form an SEE, Indonesia itself argued that an adjustment was necessary for the interference of a trader that formed a SEE with a producer.

10. Indonesia's claim of error is also based on a partial and incorrect reading of the Panel Report, further examined below. Indonesia disputes the sequence, whereby the Panel established the Article 2.4 legal standard, examined the EU's actions and only then analysed Indonesia's arguments, criticizing the drafting technique chosen by the Panel rather than the legal standard applied. However, the Report should be read in a holistic way.
11. The Panel examined Indonesia's SEE argument, however, determined that the existence of a SEE was not dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. Regardless of the existence of a SEE, a transaction could affect export prices and normal value in different manners and, would, therefore, require allowances to be made. The Panel did not ignore the argument, nor did it misconstrue the importance of the question whether a SEE exists.
12. Finally, with regard to the amount of the adjustment, Indonesia never made a separate claim disputing it and, therefore, the Panel did not examine the issue. As this issue was not covered in the Panel Report, it should also not be examined in the appeal procedure, pursuant to Article 17.6 of the DSU.
13. Moving to the EU's factual findings, the adjustments made by the EU authorities were based on the findings that (1) the ICOF-S mark-up was exclusively linked to export sales and (2) ICOF-S had functions similar to those of an agent working on a commission basis. The Panel deemed both findings reasonable.
14. Indonesia argues that the Panel erred by finding that ICOF-S had functions similar to an agent on a commission basis, and by characterising this as a "factual" finding. The finding is irrelevant from a WTO law viewpoint and for the Panel, since no claim of "as such" inconsistency of EU domestic law with WTO law was made. The Panel rightly characterized these determinations as "factual" findings. Furthermore, the Panel did not consider this to be part of the Article 2.4 legal standard, but only examined the evidentiary support for the authorities' findings. It, nevertheless, looked at Indonesia's arguments and did not err in finding that the SPA had further functions besides being a transfer pricing agreement. ICOF-S' agent-like functions are also supported by Indonesia's own agent definition as "[n]o sale, no commission".
15. The Panel did not err in analysing whether adjustments may be made to export price for sales, general and administrative (SG&A) expenses and profits. According to Indonesia, within an SEE expenses and profits are incurred for the SEE as a whole. Its claim of error is predicated on the assumption that the degree of affiliation is crucial for Article 2.4 adjustments. The arguments of this claim were rejected by the Panel.
16. The Panel relied on jurisprudence to argue that price components reflect the particular circumstances of the sale, beginning with the cost of production and sale and an amount of profit and adding an amount for costs and profits for each successive participant in the distribution chain (their SG&A and profit). EU authorities disaggregated the mark-up into SG&A and profit components only to properly quantify the adjustment, since the mark-up was designed to cover the costs of ICOF-S' services. The Panel rejected Indonesia's SEE argument, since intervention of downstream participants may result in additional costs and profits regardless of the existence of a SEE.
17. The Panel also did not err in finding that the adjustment did not result in an asymmetrical comparison. Indonesia claims that making adjustments for SG&A expenses and profits for entities within a SEE leads to an asymmetrical, unfair comparison under Article 2.4. This is

predicated on the wrong assumption that the existence of a SEE is a key issue for Article 2.4 adjustments, which was rejected by the Panel. Furthermore, as a matter of fact, the EU did not establish a dumping margin for the SEE constituted by PTMM and ICOF-S, but established duties only with regard to PTMM's products.

18. Regarding the section of the Panel Report challenged, the Panel examined the price components of both export price and normal value, to determine whether their comparison was fair. Rightly basing itself on the P&L submitted by PTMM, the Panel found that PTMM incurred the same costs for both domestic sales and export sales, the only difference being the involvement of ICOF-S with regard, exclusively, to export sales. The Panel did not assess the correctness of the value of the allowance made, since Indonesia did not dispute it.
19. Contrary to Indonesia's argument that the deduction of SG&A costs and profits within a SEE depends on the location of the related trader (in or outside of the importing market), the EU argues that the text of Article 2.4 confirms that the existence of affiliation between companies is not dispositive of whether adjustments are warranted.
20. Finally, despite Indonesia's arguments, the EU did not treat PTMM and ICOF-S as a SEE under Article 6.10 of the ADA. This new claim was introduced at a late stage of the Panel proceedings, limiting the EU's due process rights and the interests of third parties, who could not be aware of it. Unsurprisingly, the Panel did not explore it in depth. Furthermore, Indonesia's claim would mean that the export price of a SEE should be constructed in compliance with Article 2.3, rather than through an adjustment under Article 2.4, however the Panel request does not contain any independent or principal claims based on Article 2.3. Therefore, it did not fall within the Panel's remit and should not be considered by the Appellate Body.
21. In any event, Indonesia's claim is unfounded. First, no single dumping margin under Article 6.10 was established for PTMM and ICOF-S. Second, EU authorities treated the two companies as related throughout the proceedings, but never made a SEE finding, as this was not required under WTO law. Third, since they were related, the EU, naturally, took the price for the first sale to an unaffiliated customer in the importing country as a start. Fourth, the EU did not construct the export price, but distinguished between sales from ICOF-S to unrelated customers in the EU and to the related EU trader ICOF-E. Furthermore, since ICOF-S and PTMM were related, the authorities re-examined the ICOF-S mark-up, basing their findings on facts of the case and reaching an adjustment close to the mark-up in the SPA.

#### **4 THE PANEL'S STANDARD OF REVIEW**

22. Although Indonesia claims the Panel erred in applying the relevant standard of review and sets arguments to that end, it does not seek to reverse any part of the Report, setting out such standard. Nevertheless, the EU sets out its understanding of the Panel's proper standard of review.
23. First, a balanced approach is required by the Panel with regard to the degree of control exercised over an authority – lying between complete deference and *de novo* review. Similarly, there is no absolute rule on the submission of arguments before the panel – not all arguments must have been submitted during the investigation, nor must they all be apparent from the reasoning of the contested measure. The same applies with regard to the standard of reasoning and the presentation of evidence. These should be assessed on a case-by-case basis.
24. Additionally, the entire record of evidence could be relevant in WTO proceedings. Contrary to Indonesia's view, defendants and the panel should be able to make comments on the substance of contradicting evidence, not specifically referred to in a measure, without these comments being automatically considered *ex post* rationalization or a *de novo* assessment. This depends on the substantive and procedural context of each case. Furthermore, it should be permissible for a WTO litigant to be able to refer to material beyond the "record" of a particular dispute, instead of artificially sealing it off.

25. "Silence" on the part of an authority should not entitle an interested party to assume that the evidence submitted will be expressly "used" in the measure. The authority is to examine and weigh the evidence and make determinations. A requirement to avoid "silence" would create an interminable re-iteration between the authority and parties. A better approach would be to require a panel to take into account the overall substantive and procedural context when addressing evidence on the record, which is not specifically referenced in the measure or disclosure. As panel litigation may be very complex, this approach would be balanced and reasonable.

## **5 SECTION 7.3.5.1. OF THE PANEL REPORT**

26. Indonesia accuses the Panel of pre-judging the EU's compliance with Article 2.4 before addressing its arguments, claiming a violation of Article 2.4 and (potentially) of Article 11 of the DSU. The fact that the Panel was then, supposedly, influenced by its own analysis was a breach of the burden of proof and Indonesia's due process rights under Article 17.6 of the ADA and Article 11 of the DSU.
27. First, these claims are directed against the structure and procedure, rather than the substance of the Panel Report. Second, Section 7.3.5.1 must be assessed in the context of Section 7.3 of the Report as a whole. Before Section 7.3.5.1., the Panel set out the disputed issue, the parties' positions, and the applicable legal standard, demonstrating understanding of the matter. After it, the Panel examined Indonesia's arguments regarding the compliance of the mark-up adjustment with Article 2.4 in light of the relationship between PTMM and ICOF-S.
28. Many of the arguments, submitted by Indonesia, are matters of EU, rather than WTO law. The Panel was careful to distinguish between EU and WTO law, mindful of its obligation to make an objective assessment under WTO law, while examining the reasonableness of the EU authorities' findings in the circumstances of the measure's adoption. The EU law characterisation of a particular fact pattern as consistent or not with the Basic Regulation is a question of fact, while the consistency of the contested measure with Article 2.4 of the ADA is a question of both law and fact. The Panel first engaged with the EU law facts before proceeding to its WTO law analysis and it, therefore, did not pre-judge its assessment under WTO law. Even after finding there was sufficient evidence to support the authorities' finding of a difference affecting price comparability, the Panel examined the objectivity of the authorities' evaluation before deeming the standard of Article 17.6(i) met.
29. Indonesia neglects the carefully structured Panel Report. Indonesia disputes a section which is intermediary, rather than final for the Panel's conclusions. This drafting approach was necessitated due to the blend of WTO and EU legal arguments, presented by Indonesia to the Panel.
30. Furthermore, Indonesia wrongly claims that the Panel's actions are in violation of Article 2.4. Article 2.4 does not impose any obligations on panels. Furthermore, Indonesia does not dispute the parts of the Report, setting out the legal standard of Article 2.4 (even if it claims that the Panel did not articulate a legal standard). Moreover, a Panel Article 2.4 violation could exist only as a consequential claim to a violation of Article 11 of the DSU, however, how one follows from the other is unclear.
31. Finally, Indonesia invokes Articles 17.6(i) and (ii) of the ADA within an appeal under Article 11 of the DSU, however, those provisions refer to interpretation, while Article 11 of the DSU relates to the facts. Furthermore, Indonesia turns to the Appellate Body for "comprehensive guidance" as to how to properly present its claim, which it is not entitled to do. The same applies with regard to Indonesia's lack of explanation as to its "direct export sales" argument.

## **6 THE PANEL'S ALLEGED "DE NOVO REVIEW" OF CERTAIN EXHIBITS SUBMITTED BY INDONESIA AND THE EUROPEAN UNION**

32. Indonesia accuses the Panel of conducting a *de novo* review of certain exhibits and complains that the EU offered an *ex post* explanation. It claims that a silence in the measure



precludes a panel from reviewing such matters without violating the due process rights of interested parties and conducting a *de novo* review.

33. Indonesia's extreme approach to the problem would mean that any document that is on the record but not expressly referenced in the measure that is "ambiguous" can be brought to a panel by the complainant, but in no case are the defendant or the panel allowed to engage in *ex post* explanation or *de novo* review. The complainant would, then, win on this point regardless of the substantive merits of the document in question. We argue for a more even-handed approach. In the present case the Panel was responsive to the evidence presented by Indonesia and its representations regarding it. This would not justify reversal and completion of the legal analysis of the Panel.
34. The EU also disagrees as to what *de novo* review means. A panel should not be precluded from making substantive comments on a specific piece of evidence. Indeed, the panel is obliged by Article 11 of the DSU to make an objective assessment, including of the facts.
35. Indonesia also raises certain arguments with regard to the specific exhibits of evidence it refers to. With regard to Exhibit IND-47, Indonesia does not appeal the factual findings in the Report and, therefore, the Appellate Body should rely on it, rather than Indonesia's factual assertions concerning the "nature and significance" of that evidence. The claim is a procedural, not a substantive one.
36. Regarding the company-internal verification notes, since there are no agreed written minutes of the verification, the EU argues they can only be used against Indonesia, due to their nature of an admission against interest. Regarding IND-18, 19, and 34, the Panel did indeed address the evidence, referred to. As it found the Article 2.4 legal standard to be independent of determinations on the existence of SEEs, it did not err in holding that the authority was under no obligation to refer to this evidence.
37. Regarding the substance of the Panel's analysis, it should be read in its entirety. The Panel set out the content of the SPA and considered the analysis carried out by the EU authority, and the opportunity given to PTMM to rebut these findings, concluding that the authority's findings were sound. It was reasonable for the Panel to consider these circumstances in making an objective assessment of the matter.

## **7 ALLEGED IGNORING OR SUMMARY DISMISSAL OF ALLEGEDLY KEY ARGUMENTS AND EVIDENCE CONCERNING THE SPA**

38. Since the existence of the SPA was uncontested, the Panel relied on it and extensively referred to it in its Report. Although the Panel did not refer to each exhibit specifically, it explained why it rejected Indonesia's arguments – the irrelevance of a SEE for Article 2.4, the mark-up in the SPA as a price difference necessitating an adjustment, the "entire agreement" clause in the SPA and the exclusive application of the SPA to export sales, the allocation of risk clause, the difference in factual situations between PTMM and Ecogreen. The Panel, therefore, did not ignore any of Indonesia's arguments, even if it did not refer to them one by one.

## **8 INDONESIA'S REQUEST FOR COMPLETION OF THE LEGAL ANALYSIS**

39. Although the Appellate Body will not reach this question, as it would not reverse the Panel's findings under Article 2.4, the EU considers that it could not complete the analysis, as the applied EU law does not indicate inconsistency with Article 2.4 of the ADA.

**ANNEX B-4****EXECUTIVE SUMMARY OF INDONESIA'S APPELLEE'S SUBMISSION****1 THE EU'S APPEAL OF THE PANEL'S FINDING UNDER ARTICLE 6.7 SHOULD BE REJECTED<sup>1</sup>**

1.1. Indonesia claimed before the Panel that the EU had failed to disclose the results of the verification visit, contrary to Article 6.7 of the Anti-Dumping Agreement. The Panel agreed.

1.2. The Panel properly interpreted Article 6.7 to require the investigating authority to provide results of verification in the sense of "what is achieved, brought about or obtained in the course of the on-the-spot verifications". The Article 6.7 obligation is a due process right of interested parties, including the investigated company and the applicants. The Panel clarified that the obligation was "unqualified" and "rest[ed] entirely on the investigating authorities".

1.3. The EU appeals both against the Panel's interpretation of Article 6.7 and its application of its interpretation to the case before it. Both aspects of the EU's appeal should be rejected.

1.4. The EU makes a general claim that the Panel required the investigating authority to provide excessively detailed "results" of the verification. However, the EU fails to show how the Panel erred in its legal interpretation of Article 6.7 or to show that the Panel's interpretation would burden investigating authorities. The EU has also failed to show any error in the Panel's application of its standard in this case.

1.5. The EU improperly attempts to conflate the requirements of Article 6.7 regarding the disclosure of the verification results with those of Article 6.9 regarding the essential facts. These are different concepts. The EU's argument that the results of the verification are limited to those matters that become "essential facts" would, in effect, read the obligation to provide the results of the verification out of the Anti-Dumping Agreement. As the Panel correctly noted, the term "results of the verification" is not limited to the facts that will eventually form the basis of the decision to impose measures.

1.6. The term "results" must also be read in the context of the information the investigating authority requests from companies during verifications. The EU is incorrect to argue that the results of a verification "are essentially the documentary evidence that th[e] firm provides ... but not assertions, statements, arguments (by the firm or the investigating authority)". The answers to the verifiers' questions may provide important context for documents supplied in the questionnaire responses or at verification. This context may not be self-evident on the face of the documents themselves. In these circumstances, the answers provided by company officials may be at least as important as the documents themselves.

1.7. The four elements listed by the Panel as comprising the minimum requirements of the "results" encompass the core elements of any on-the-spot verification. The EU has failed to show in concrete terms that the Panel's standard requires an excessive level of detail, either in general or in the specific circumstances of this case.

1.8. The requirement to disclose the results of the verification is, in essence, a transparency and due process obligation. These obligations are not to be taken lightly. It is not clear why the EU resists compliance with this obligation so strenuously.

1.9. For these reasons, the EU's appeal should be rejected.

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<sup>1</sup> This executive summary contains a total of 2,603 words (including footnotes). Indonesia's appellee's submission contains a total of 29,582 words (including footnotes).

## 2 THE EU'S APPEAL ON THE LAPSE OF THE PANEL'S AUTHORITY SHOULD BE REJECTED

2.1. Shortly after the establishment of the Panel, a counsellor of the WTO Secretariat sent an email to the parties to propose a meeting to hear the parties' preferences for panellists. Indonesia replied by asking to postpone the meeting "while [a]waiting the development from Brussel[s]".

2.2. Before the Panel, the EU submitted that Indonesia's reply amounted to a suspension of the Panel's work under Article 12.12 of the DSU. In its Report, the Panel rejected the EU's objection. It correctly set out a three-pronged legal standard of whether its authority had expired under Article 12.12 of the DSU. The Panel found that the EU had not met the first prong of the legal standard - i.e. whether Indonesia had made a request to suspend the work of the Panel. The Panel correctly declined to address the second and third prongs under Article 12.12.

2.3. The Appellate Body has flexibility to approach the EU's appeal from two different angles. It may assess whether, as a matter of law, the suspension of the panel's work in Article 12.12 of the DSU refers to the work of a panel that has been composed and begun its work. Alternatively, the Appellate Body may follow the Panel's approach and assess whether the EU sufficiently demonstrated that Indonesia indeed made a request to suspend the Panel's work through its email to the Secretariat.

2.4. The EU misstates the role of the Secretariat to argue that the Secretariat "act[ed] in the name of the Panel". Article 27.1 tasks the Secretariat with *assisting* panels. This provision must be read in the context of Article 8.6, which requires the Secretariat to propose names of panellists to the parties. When performing that function, the Panel is assisting the parties, not the panel.

2.5. In advancing its argument that the Secretariat acts "in the name of" a panel, the EU refers to the role of panel secretaries. Yet the EU fails to explain whether the WTO counsellor with whom Indonesia communicated was the secretary to the uncomposed panel so that it could be said that Indonesia in fact addressed the Panel in its email to this counsellor. In addition, panel secretaries merely perform tasks pursuant to the panel's instructions; they do not make decisions "in the name of the panels".

2.6. Only a composed panel may decide to suspend its work. Article 12.12 of the DSU, first sentence, starts with "[t]he panel may suspend its work at any time ...". The use of "may" affords discretion to the panel in determining whether to suspend its work following a request of the complainant. Moreover, the active voice in the phrase "[t]he panel may suspend its work ..." in the first sentence of Article 12.12 reflects the intention of the DSU negotiators to require a positive decision by the panel to suspend its work. It follows, logically, that only composed panels may take decisions pertaining to panels' work.

2.7. The context confirms that Article 12.12 refers to a *composed* panel. As is clear from Articles 6 to 16, the DSU contains a logical sequence governing all facets of a panel. The DSU does not contain a "back-and-forth" set of provisions. In addition, Article 12 of the DSU concentrates on the procedure of the panel *vis-à-vis* the parties. Article 12 thus relates to the *work* of a *composed* panel.

2.8. The EU erroneously relies on Article 12.9 to assert that Article 12 also concerns matters prior to panel composition. A holistic reading of Articles 12.8 and 12.9 yields the opposite conclusion. Article 12.8 provides a general rule of six months for panel procedures counting from the composition of a panel, at the earliest. Article 12.9 establishes the possibility of an exception to the general rule. The time-frame in the last sentence of Article 12.9 is not a time-frame for the panel's "work". Rather, it contains the maximum time a complainant may expect to have a panel report from the moment a panel is established.

2.9. Accordingly, the logical sequence of the DSU, and the structure of Article 12, confirm that the work of the panel under Article 12.12 refers to that of a composed panel.

2.10. Moreover, prior practice confirms that Article 12.12 refers to a composed panel. Panels in about 29 disputes have made a positive decision to "agree" to suspend its work upon a request of the complainant. This confirms that a panel must be composed in order to decide on the suspension of its work.

2.11. In response, the EU relies on document WT/DS420/7 in *US – Carbon Steel (Korea)* to argue that Article 12.12 may apply between panel establishment and composition. This document, however, served the purpose of informing WTO Members of Korea's communication to suspend that uncomposed panel's work. The Secretariat did not assess whether the Korean request effectively constituted a suspension under Article 12.12 of the DSU. In fact, the relevant dispute settlement sections of the WTO website reveal that the Secretariat has not treated Korea's request as a suspension under Article 12.12.

2.12. Finally, the EU raises six claims under Article 11 of the DSU. First, the EU erroneously challenges the interpretation and application of Article 12.12 under Article 11 of the DSU. This is an issue of law under Article 17.6. Second, the EU unjustifiably criticizes the Panel for adopting the standard of review it did. However, this standard complies with the Panel's duty under Article 11 of the DSU. Third and fourth, the EU incorrectly faults the Panel for not addressing issues concerning the second prong of the legal standard under Article 12.12 - whether the Panel suspended its work. Since the Panel found that the EU had not met the first prong - that Indonesia never made a request under Article 12.12 - the Panel correctly declined analysing arguments and evidence concerning the second step of the legal standard. Fifth, the EU is not correct in criticizing the Panel for regarding its finding "as a matter of fact". This finding falls under Article 17.6 of the DSU regardless of the Panel's characterization of its finding. Sixth, the Panel gave relevant and sufficient reasons to support its finding that Indonesia had not requested the suspension of the Panel's work under Article 12.12. Accordingly, all claims under Article 11 of the DSU should fail.

2.13. Accordingly, Indonesia requests the Appellate Body to dismiss the EU's other appeal concerning the Panel's finding in paragraphs 7.29 and 8.1(a) of its Report.

### **3 THE EU'S APPEAL CONCERNING THE APPELLATE BODY'S JURISDICTION**

3.1. Indonesia is very disappointed by the EU's assertion that Indonesia is "misus[ing]" the appeal procedure. Indonesia is simply making use of its right to appeal parts of a WTO panel report.

3.2. The EU fails to provide any arguments under Article 17 of the DSU, which is the provision governing Appellate Body jurisdiction. The EU questions the Appellate Body's jurisdiction on the basis of the measure at issue. But once a measure is properly before a panel, nothing in Article 17 (or, indeed, Article 6) of the DSU suggests that the Appellate Body may not have or may lose jurisdiction of appeals of questions of law contained in the panel report regarding that measure. The EU never argued before the Panel that the measure challenged by Indonesia was not properly within the Panel's jurisdiction.

3.3. The EU also appears to argue that the Appellate Body should decline to exercise its validly established jurisdiction. But Article 17.12 directly contradicts the EU's argument. Moreover, the Appellate Body has previously stated that Articles 11 and 23 of the DSU preclude a panel from declining to exercise validly established jurisdiction. These considerations apply equally to the Appellate Body. It is impossible to see how the Appellate Body would fulfil its obligations under Articles 11, 17.6 and 17.12 of the DSU if it were to decline to exercise its jurisdiction.

3.4. Moreover, when the Appellate Body is called upon to review a panel's findings, these findings already exist and could be adopted by the DSB, with all the legal consequences that this adoption entails. Before the Panel's findings have these effects, Indonesia is entitled by the DSU to have these findings reviewed by the Appellate Body. This is precisely why Article 17.12 requires the Appellate Body to address "each of the issues" brought before it. This is also why the Appellate Body does not exercise "judicial economy".

3.5. The EU also argues that, because the measure has expired, the dispute has ceased to exist. But the Appellate Body has consistently found that panels maintain jurisdiction with respect to measures that expired after the panel's establishment. The only difference is that panels are not entitled to make recommendations. These principles continue to apply when the Appellate Body is seized of an appeal against a panel report. The Appellate Body's jurisdiction builds on that of the Panel. The Appellate Body's task also does not hinge on the continued legal force of a measure. The Appellate Body is not called to determine, principally, whether a measure is consistent or not with WTO law. Instead, the Appellate Body's mandate is to review a panel's findings.

3.6. Moreover, contrary to what the EU alleges, Indonesia is not seeking to obtain an authoritative interpretation under the WTO Agreement. The EU also incorrectly quotes Indonesia's statements to the panel, arguing that this demonstrates that Indonesia agreed with the EU on certain points of principle. These quotes have nothing to do with the issue at hand, and were made at the beginning of the panel proceedings, on a different issue, well before a panel ruling was issued and before the measure expired.

3.7. The Panel also correctly maintained its recommendations in this dispute, because the expiry of the EU's measure came after the panel record had closed. This was entirely consistent with the Appellate Body's guidance concerning new evidence in late stages of panel proceedings.

#### **4 THE EU'S APPEAL CONCERNING THE PANEL'S TREATMENT OF BCI SHOULD BE REJECTED**

4.1. The EU further challenges on appeal the Panel's treatment of three sentences as business confidential information (BCI). These three sentences were submitted by Indonesia as Exhibit IDN-33 (BCI) and Exhibit IDN-24 (BCI) appended to Indonesia's first written submission and were clearly marked as BCI.

4.2. The EU's arguments should be rejected for several reasons. First, Indonesia bracketed the information that had been treated as confidential during the investigation. Moreover, the fact that the EU's General Court disclosed that information is not sufficient to remove protection of that information. The question is whether that information has properly been disclosed. Second, the EU bore the burden to prove that the General Court was authorized to disclose this information, despite it being treated as confidential during the investigation. The EU failed to meet that burden. Third, the EU raised its objection too late in the Panel's proceedings - a year after Indonesia submitted the bracketed information. The EU's objection was, therefore, untimely.

4.3. Moreover, the EU's argument that the Panel should have asked Indonesia to provide justifications for treating certain information as confidential and to submit a non-confidential summary has no foundation in the DSU or in previous practice. The EU's appeal would place an excessive burden on the parties (especially developing countries) and panels. Particularly, as a recurrent user of the WTO dispute settlement mechanism, the EU should reflect on whether this is the standard it wishes to be adopted.

4.4. Accordingly, the Appellate Body should reject the EU's appeal concerning the treatment of certain information as BCI.

#### **5 CONCLUSION**

5.1. For the above reasons, Indonesia respectfully requests that the EU's appeal be dismissed in its entirety and the Appellate Body uphold all of the Panel's findings challenged by the EU.

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**ANNEX C**

ARGUMENTS OF THE THIRD PARTICIPANTS

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**ANNEX C-1****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION****I. ARTICLE 2.4 OF THE AD AGREEMENT<sup>1</sup>**

1. Indonesia argues that the Panel applied an incorrect legal interpretation of Article 2.4 in determining that the authorities' deduction to the export price for a commission paid to a trader was not improper. Indonesia claims the Panel erred in finding that a determination of whether the producer and trader formed part of a single economic entity ("SEE") was not dispositive.

2. The essential requirement for any adjustment under Article 2.4 is that the relevant factor must affect price comparability. The United States agrees with the Panel that whether an entity constitutes an SEE would not be dispositive of the need for adjustments under Article 2.4, and that depending on the underlying facts, transactions between affiliated entities may impact price comparability.

**II. ARTICLE 17.6 OF THE AD AGREEMENT AND DSU ARTICLE 11**

3. Indonesia claims the Panel failed to engage in an objective assessment, as required by Article 11, because it concluded that the authorities did not act inconsistently with Article 2.4 of the AD Agreement *before* addressing Indonesia's arguments and evidence. The United States does not view a panel's task to be resolving claims independent of the specific arguments that are raised by the parties. However, not every error rises to the level of a breach of Article 11. In this case, the Panel did address Indonesia's arguments later in its report. The United States also notes that a panel has no obligation to address in its report all arguments and evidence raised by a party.

**III. THE CONTESTED MEASURE'S ALLEGED EXPIRY**

4. The EU argues that the Panel erred in making recommendations and that Indonesia's appeal should be dismissed because the contested measure expired before the Panel's report was circulated. However, this alleged expiry is not a fact found by the Panel, and the Appellate Body may not consider new facts on appeal. Therefore, the EU's appeal must be rejected.

5. The Appellate Body and panels have consistently refused to consider new evidence submitted during interim review. Since the EU submitted evidence of the expiry after the Panel concluded its interim review, the Panel appropriately did not consider it. The Appellate Body also may not consider it, since DSU Article 17.6 limits the scope of Appellate Body review to legal matters developed by the panel. Nothing in the DSU suggests that the Appellate Body or the Director-General could modify the record of the Panel's proceedings to add the evidence of expiry.

6. The evidence of expiry was also irrelevant. Panels are tasked with determining whether the measures at issue are consistent with the relevant obligations at the time of establishment of the Panel. The alleged expiry of the EU measure just before circulation of the panel report is not relevant to the legal situation as of the date of the Panel's establishment.

7. Based on the foregoing, the Appellate Body's analysis of the EU's appeal should end there.

8. To the extent the Appellate Body considers the EU's substantive arguments, the United States considers the Panel's making of recommendations on the contested measure to be consistent with the requirements of the DSU. Pursuant to Articles 7.1 and 6.2, it is the challenged measures, as they existed at the time of the panel's establishment, that are within the panel's terms of reference and on which the panel should make findings. Pursuant to Article 19.1, a panel *must* make a recommendation where it has found a measure within its terms of reference to be

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<sup>1</sup> This executive summary contains a total of 1230 words (including footnotes), and the U.S. third participant submission contains 13241 words (including footnotes).



inconsistent with the relevant Member's obligations. The expiry of the measure does not change this.

9. Other panels and the Appellate Body have reached similar conclusions. Statements by the Appellate Body suggesting that a recommendation may not be required, for example in *US – Certain EC Products*, were made in *obiter dicta*. That Appellate Body report does not examine the text of DSU Article 19.1 nor seek to reconcile its *obiter dicta* with the clear meaning of that text.

10. Defining the scope of a dispute based on the measures at the time of panel establishment benefits parties by balancing the interests of complainants and respondents, and by preventing Members from avoiding compliance by withdrawing, then re-imposing, offending measures.

11. The United States also views the EU's request that Indonesia's appeal be dismissed to be inappropriate and without legal authority. The Appellate Body is charged by the DSU to address the issues raised by the parties and to recommend that an offending Member bring any WTO-inconsistent measure, as it existed at the time of panel establishment, into conformity. This duty is not affected by expiry of the measure.

#### **IV. ARTICLE 12.12 OF THE DSU**

12. The EU appeals the Panel's finding that the DSB authority for the panel proceedings had not lapsed under Article 12.12.

13. The United States submits that the circumstance in Article 12.12 arises only when there is a panel to which the complaining party may direct its "request," and only if the panel has decided to exercise its discretion to accede to that request. Neither can occur before a panel has been composed. Further, the "work" of the panel refers to the examination by the panel, once composed, of the matter referred to it. Therefore, Indonesia's request *to the Secretariat* to suspend a meeting *to compose* the panel would not constitute a request *to the panel* that it "suspend its work." The United States also considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

#### **V. ARTICLE 6.7 OF THE AD AGREEMENT**

14. The EU argues that the Panel's interpretation of Article 6.7 requires, in practice, a description of the investigation process.

15. The United States considers that, at a minimum, Article 6.7 requires that the authority's verification report include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. For example, the term "essential facts" relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, information verified or corrected at verification relating to these "essential facts" must be disclosed. On the other hand, trivial or immaterial aspects of the verification need not be disclosed.

#### **VI. BUSINESS CONFIDENTIAL INFORMATION ("BCI")**

16. The EU argues that the Panel's handling of BCI was inconsistent with DSU Articles 12.1 and 12.7 and the Panel's Additional Working Procedures.

17. The United States considers that Article 12.1 does not provide an adequate legal basis for the EU's claim. Even if the Panel's bracketing could be considered contrary to DSU Appendix 3 or the Additional Working Procedures, there is no basis to say that the Panel's decision to do "otherwise" after consulting the parties is inconsistent with the requirements of Article 12.1. The United States also considers that Article 12.7 does not require a panel to disclose all factual findings in its report. In determining whether the Panel complied with Article 12.7, there must be consideration of the degree to which a bracketed fact is material to the "basic rationale behind any findings and recommendations."

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**ANNEX D**

PROCEDURAL RULINGS

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**ANNEX D-1****PROCEDURAL RULING OF 13 JUNE 2017****1 REQUESTS BY INDONESIA**

1.1. On 11 May 2017, Indonesia addressed a letter to the Presiding Member of the Appellate Body Division hearing this appeal. In its letter, Indonesia made two requests. First, Indonesia requested the Division to adopt, pursuant to Rule 16(1) of the Working Procedures for Appellate Review (Working Procedures), additional procedures for the protection of certain business confidential information (BCI) in these appellate proceedings. Second, Indonesia requested leave to modify the executive summary of its appellant's submission, which was submitted on 10 February 2017, by replacing the information enclosed within double brackets in paragraph 7.9 of that executive summary with non-confidential information.

**2 BACKGROUND AND ARGUMENTS OF THE PARTICIPANTS**

2.1. On 13 July 2015, following consultations with the parties, the Panel in this dispute adopted Additional Working Procedures Concerning Business Confidential Information (Panel's BCI Procedures)<sup>1</sup>. For purposes of the Panel proceedings, the first paragraph of those procedures defined BCI as follows:

... BCI is any information that has been designated as such by the party submitting the information and that was previously treated as confidential within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 by the Commission of the European Union in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2.2. The Panel's BCI procedures set out a number of modalities concerning how the parties, third parties, and the Panel would treat BCI in the course of the Panel proceedings. In accordance with those procedures, the Panel redacted certain BCI from the version of its Report that was circulated to WTO Members on 16 December 2016.<sup>2</sup>

2.3. On 10 February 2017, Indonesia appealed certain issues of law and legal interpretation covered in the Panel Report. Indonesia's appellant's submission, the executive summary thereof, and its appellee's submission are all marked as containing BCI, and certain information in those documents is enclosed within double brackets. On 15 February 2017, the European Union filed a Notice of Other Appeal and an other appellant's submission. The cover page of the European Union's other appellant's submission states "[[Contains information designated by Indonesia and the Panel as 'BCI', subject to adjudication, as marked]]". The European Union's appellee's submission similarly states "[[Contains BCI as marked, subject to adjudication]]", and both of these EU submissions contain information enclosed within double brackets.

2.4. At the time of filing its other appellant's submission, the European Union noted that no procedures governing the treatment of BCI had been adopted in these appellate proceedings. The European Union observed that, while the Panel's BCI Procedures do not bind the Appellate

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<sup>1</sup> Panel Report, para. 1.7. The Panel's BCI Procedures are attached as Annex A-2 to its Report.

<sup>2</sup> The information redacted from the circulated version of the Panel Report was less extensive than the information placed within double brackets in the interim report provided by the Panel to the parties on 29 July 2016. During the interim review stage, the European Union requested the Panel to review the designation of certain information as BCI in the interim report on the grounds that some such information was in the public domain and should thus not be treated as BCI. The extent of bracketing of BCI and of redaction of the same from the circulated version of the Panel Report is the subject of a claim of error raised by the European Union on appeal. (See the European Union's Notice of Other Appeal, WT/DS442/6, pp. 2-3)

Body, Indonesia had designated certain information as BCI in its appellant's submission and bracketed it accordingly. For the European Union, Indonesia was in effect requesting confidential treatment of such information pursuant to Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). According to the European Union, this meant that the European Union and the third participants were to treat such information as confidential. Likewise, the Appellate Body was required not to disclose the designated information in its Appellate Body Report. The European Union considered this to be an acceptable way of proceeding, adding that this approach had the "advantage of not troubling the Appellate Body with the adoption of BCI procedures where that is not necessary."<sup>3</sup>

2.5. The European Union explained that, based on this understanding, it had also bracketed certain information in its other appellant's submission. However, the European Union emphasized that this was without prejudice to its claim that the Panel "over-designated" information as confidential in the Panel proceedings. Furthermore, the European Union reserved its right to address the extent of the bracketing in Indonesia's appellant's submission.<sup>4</sup>

2.6. On 17 February 2017, Indonesia sent a letter requesting the Appellate Body Division hearing this appeal to agree to the confidential treatment of certain information designated as BCI pursuant to Article 18.2 of the DSU. Indonesia indicated that it had designated certain confidential information in its submissions as BCI by means of double brackets ("[" and "]") and that this information matched the information designated and treated as BCI by the Panel in this dispute. In its letter, Indonesia set out its understanding of what confidential treatment under Article 18.2 would entail in the appeal proceedings. Indonesia further stated that, to the extent that the Appellate Body agreed with its understanding, Indonesia did not request the adoption of separate procedures for the protection of BCI for these appellate proceedings.

2.7. By letter dated 20 February 2017, the Division invited the European Union and the third parties to comment on Indonesia's letter. By letter dated 23 February 2017, the European Union indicated that it shared Indonesia's understanding of the nature and consequences of Indonesia's request that certain information be treated as confidential, namely that such treatment flows directly from the DSU and that, therefore, no additional ruling was necessary. The European Union nevertheless cautioned that this was without prejudice to its challenge regarding "the extent of the bracketing of information in the public domain, and the need for meaningful non-confidential summaries". None of the third parties commented on Indonesia's letter.

2.8. By letter dated 16 March 2017, the Division informed the participants that it did not "share the understanding of the treatment of sensitive information pursuant to Article 18.2, outlined in Indonesia's letter of 17 February 2017". The Division explained that, pursuant to Articles 17.10 and 18.2 of the DSU, the confidentiality of any submissions or information submitted in these appellate proceedings was to be maintained. However, to the extent the participants in this appeal wanted the Division to undertake specific procedural steps not expressly contemplated under the DSU or the Working Procedures, such as excluding or redacting certain information from its Report, or imposing conditions on the composition of delegations or the content of discussions in an oral hearing, then the participants needed to request the specific treatment sought, explain why it was needed, and why the information in question warrants special and additional protection.

2.9. In addition, the Division noted that paragraph 7.9 of Indonesia's executive summary of its appellant's submission contained information enclosed within double brackets. The Division understood such brackets to indicate that the information contained therein was designated as BCI in the proceedings before the Panel. The Division pointed out, however, that, as indicated in the last paragraph of the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings set out in the Appellate Body's Communication of 11 March 2015 (WT/AB/23), as well as in the letter dated 6 January 2017, from the Director of the Appellate Body Secretariat to the European Union and Indonesia, executive summaries submitted by participants are annexed in an addendum to the Appellate Body Report, and the content of such executive summaries is neither revised nor edited by the Appellate Body.

2.10. Lastly, the Division indicated that although it was unable to agree to the request as formulated by Indonesia in its letter of 17 February 2017, this was without prejudice to any

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<sup>3</sup> European Union's other appellant's submission, para. 1.

<sup>4</sup> European Union's other appellant's submission, para. 2.

decision that the Division might take if it were to receive a request containing reasons for adopting additional procedures for the protection of BCI in this appeal.

2.11. On 11 May 2017, Indonesia submitted a revised request to the Division. First, Indonesia requests the Division to adopt additional procedures pursuant to Rule 16(1) of the Working Procedures. Indonesia considers that the adoption of these procedures, above and beyond the standard or "general" layer of protection of confidential information reflected in Articles 18.2 and 13.1 of the DSU, is necessary in the interest of fairness and orderly procedures. Indonesia proposes BCI procedures similar to those adopted by the Appellate Body in *US – Washing Machines*.<sup>5</sup> Indonesia further suggests that, pending the Appellate Body's findings on the European Union's claims on appeal regarding the Panel's treatment of certain information as BCI, the Appellate Body extend BCI protection to all the information covered by Indonesia's request on a provisional basis, including the information for which the European Union argues that no BCI treatment is warranted. Second, pursuant to Rules 16(1) and 18(5) of the Working Procedures, Indonesia requests leave to replace the bracketed information, at paragraph 7.9 of the executive summary of its appellant's submission, with non-confidential information. In Indonesia's view, such an adjustment would in no way change the meaning of this paragraph.

2.12. Indonesia explains that it seeks BCI protection for the following two categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any additional information submitted as BCI by either party to the Panel, in the course of the Panel proceedings, where that information was marked as BCI and was treated as BCI in the anti-dumping investigation and fell into the same categories as the information marked as BCI by the Panel.

2.13. Indonesia advances several reasons to justify its request, and contends that the identified information warrants additional protection on the basis of "objective criteria", including some of those identified by the Appellate Body in *EC and certain member States – Large Civil Aircraft*.<sup>6</sup> Indonesia highlights that, other than the three instances of BCI protection in the Panel Report that have been explicitly challenged by the European Union on appeal, there appears to be "full agreement" between the European Union and Indonesia that the information designated as BCI by the Panel warranted additional protection. Indonesia emphasizes the importance of ensuring continuity between the protection of BCI in domestic investigations, as provided for under Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and the protection of BCI in WTO dispute settlement proceedings. For Indonesia, it follows that the fact that the information for which BCI protection is being sought in WTO dispute settlement was accorded BCI treatment in the underlying anti-dumping investigation is a relevant objective criterion for adopting BCI procedures in WTO dispute settlement. Indonesia adds that additional procedures are needed so as to ensure that the protection afforded to certain information in the domestic anti-dumping proceedings and in the Panel proceedings is not lost in these appellate proceedings.

2.14. In its request, Indonesia also explains that the information treated as BCI by the Panel is proprietary to the two privately held companies concerned, PT Musim Mas (Indonesia) and ICOF-S (Singapore). These companies are not required to, and do not, publish information such as their corporate and ownership structure, nor about their operations, sales procedures, or mode of interaction between various sub-entities. Indonesia also maintains that the information for which BCI protection is being sought is, by its nature, confidential, because it relates to the corporate structure, ownership, or operations of the two companies, including the details of their respective responsibilities in sales and marketing activities. In Indonesia's view, disclosure of this information could give rise to commercial harm and to an unfair advantage for the companies' competitors. In further support of its request, Indonesia sets out a table identifying in detail the five types of information in respect of which BCI protection is being sought<sup>7</sup>, and, for each of these: (i) an

<sup>5</sup> Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on large Residential Washers from Korea*, WT/DS464/AB/R/Add.1, Annex D-1, Procedural Ruling of 9 May 2016, paras. 17-20.

<sup>6</sup> Appellate Body Report, *EC and certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, Annex III, Procedural Ruling of 10 August 2010, para. 15.

<sup>7</sup> Indonesia seeks BCI protection for: (i) information concerning ownership and control structures with respect to PT Musim Mas, ICOF-S, and the Musim Mas Group, as well as the relationship between shareholders; (ii) information on the detailed content of investigation exhibit "Attachment PTMM-18"; (iii) the content of organizational charts setting out PT Musim Mas' corporate structure; (iv) PT Musim Mas' and ICOF-S' financial and other business data and figures from annual reports, other documents submitted in the investigation

indication of where in the Panel Report and in Indonesia's submissions such information is included; and (ii) identification of the "objective criteria" that justify the adoption of additional procedures to protect the information.

2.15. On 12 May 2017, the Division invited the European Union and the third participants to comment on Indonesia's letter. By letter dated 16 May 2017, the European Union stated that it has no objection, in principle, to BCI procedures of the kind proposed by Indonesia, even though it is of the view that such additional procedures may not always be necessary. The European Union also agrees with Indonesia's proposal to designate provisionally certain information as BCI, pending the outcome of the bracketing issues that the European Union has raised in this appeal. However, the European Union stresses that the fact that its challenge on appeal concerns only a limited number of instances of bracketing in the Panel Report does not mean that it agrees with all other instances of BCI designation by the Panel. Thus, notwithstanding that it does not object to Indonesia's request, the European Union expresses doubts as to the merits of some of Indonesia's arguments. For instance, the European Union has difficulty accepting the proposition that information about ownership and control structures is by nature confidential because the companies concerned are not publicly held and therefore do not publish their financial reports. The European Union also questions the confidential nature of information contained in a document submitted in the investigation (Attachment PTMM-18<sup>8</sup>) that allegedly shows how the two companies concerned cooperate. However, the European Union acknowledges that it has not raised the bracketing of such information on appeal and doubts that these issues warrant further consideration.

2.16. As regards Indonesia's second request, the European Union has no objection, given the specific factual circumstances of this case, to Indonesia's request to amend the executive summary of its appellant's submission.

2.17. None of the third participants commented on Indonesia's letter of 11 May 2017.

### 3 ANALYSIS

3.1. Turning first to consider Indonesia's request for additional procedures to protect BCI, we recall the Appellate Body's observation in *EC and certain member States – Large Civil Aircraft* that:

The confidentiality requirements set out in [Articles 17.10 and 18.2 of the DSU, as well as paragraph VII:1 of the Rules of Conduct for the [DSU]] are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information.<sup>9</sup>

3.2. On such occasions, it is the duty of the participants to request and justify the need for additional protection of confidential information.<sup>10</sup> While it is for the participants to request additional protection of confidential information, pursuant to Article 17.9 of the DSU and Rule 16(1) of the Working Procedures, it is for the Appellate Body, relying upon objective criteria, to determine whether the information submitted by the participants deserves additional protection, as well as the degree of protection that is warranted.<sup>11</sup> Such objective criteria could include, for example: whether the information is proprietary; *whether it is in the public domain or protected*;

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(e.g. spreadsheets) and documents provided by the European Commission to PT Musim Mas and ICOF-S (e.g. disclosures); and (v) direct quotations, data, or figures from the PT Musim Mas and ICOF-S Sales & Purchase Agreement.

<sup>8</sup> Panel Exhibit IDN-47.

<sup>9</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8. See also Appellate Body Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/AB/R, para. 5.315.

<sup>10</sup> Appellate Body Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW, para. 5.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10; *China – HP-SSST (EU)*, para. 5.311.

<sup>11</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3, referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

whether it has a high commercial value for the originator of the information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market.<sup>12</sup>

3.3. Any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.<sup>13</sup> Moreover, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudicative process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand.<sup>14</sup> Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm that could result from disclosure.<sup>15</sup> When additional procedures to protect BCI are adopted, the Appellate Body must also "adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential".<sup>16</sup>

3.4. Turning to the case before us, we consider whether, in the circumstances of this appeal, and taking account of the nature of the relevant information, the general confidentiality requirements of the DSU and the Rules of Conduct for the DSU should be particularized through the adoption of special procedures to protect the confidentiality of that information.<sup>17</sup>

3.5. Indonesia explains that it seeks BCI protection for the following two broad categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any additional information submitted as BCI by either party to the Panel, in the course of the Panel proceedings, where that information was marked and treated as BCI in the underlying anti-dumping investigation and fell into the same categories as the information marked as BCI by the Panel. We understand the second category identified by Indonesia to encompass only that information which the Panel treated as BCI in the course of its proceedings. In this regard, we recall that, at the interim review stage of the Panel proceedings, the European Union objected to the treatment of certain information as BCI in the Panel Report. Consequently, the Panel made some changes to its bracketing of information, resulting in an overall reduction of redacted information in the Panel Report.<sup>18</sup> We also bear in mind that the European Union has appealed the Panel's redaction of information from five paragraphs of its Report. We observe that Indonesia requests, and the European Union does not object to, provisional BCI protection being granted to the contested information pending the outcome of the European Union's claims on appeal.

3.6. Indonesia classifies the information in respect of which BCI protection is being sought into five types: (i) information concerning ownership and control structures with respect to PT Musim Mas, ICOF-S, and the Musim Mas Group, as well as the relationship between shareholders; (ii) information on the detailed content of investigation exhibit "Attachment PTMM-18"; (iii) the content of organizational charts setting out PT Musim Mas' corporate structure; (iv) PT Musim Mas' and ICOF-S' financial and other business data and figures from annual reports, other documents submitted in the investigation (e.g. spreadsheets) and documents provided by the European Commission to PT Musim Mas and ICOF-S (e.g. disclosures); and (v) direct quotations,

<sup>12</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

<sup>13</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

<sup>14</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

<sup>15</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9.

<sup>16</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (quoting Appellate Body Report, *China – HP-SSST (EU)*, para. 5.311).

<sup>17</sup> Appellate Body Report, *China – HP-SSST (EU)*, para. 5.315 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8).

<sup>18</sup> Examples of paragraphs of the Panel Report in which the Panel reduced the extent of the redacted information include paragraphs 7.64 and 7.83.

data, or figures from the Sales and Purchase Agreement between PT Musim Mas and ICOF-S. With respect to each of these types, Indonesia maintains that the information is, by its nature, confidential and proprietary, and that any publication of the information could potentially provide an unfair advantage for the companies' competitors.

3.7. We note that in its request, Indonesia refers to examples of objective criteria identified by the Appellate Body as relevant for an adjudicator's assessment of whether to grant BCI protection to information submitted to it, as discussed at paragraph 3.2. above. In particular, Indonesia claims that the following criteria apply to the information for which it requests additional protection: whether the information is proprietary; whether it is in the public domain or protected; and the degree of potential harm in the event of disclosure.<sup>19</sup> We note that the European Union is doubtful as to whether some of Indonesia's arguments can be justified. In particular, the European Union finds it difficult to accept the proposition that information about ownership and control structures is by nature confidential because PT Musim Mas and ICOF-S are not publicly held companies and therefore do not publish their financial reports. We observe that, in some jurisdictions, the ownership and control structures of certain types of companies are a matter of public record, as the European Union points out. However, we recognize that different rules on corporate regulation apply in different jurisdictions. Accordingly, we do not dismiss the possibility that the information for which BCI protection is being sought in this case is sensitive and proprietary within the context of the markets within which the two companies operate.

3.8. Furthermore, in our view, the potential risk of harm to the two companies in question, highlighted by Indonesia, should not be ignored. At the same time, we are alive to our obligation to preserve the integrity of the adjudication process, the participants' rights to due process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large.<sup>20</sup> As mentioned above, the European Union has raised a claim on appeal challenging the Panel's treatment of certain information, in five paragraphs of its Report. We also observe that the significance of Attachment PTMM-18 is one aspect of Indonesia's appeal of the Panel's findings under Article 2.4 of the Anti-Dumping Agreement. Accordingly, we consider that there will be an opportunity in the course of these appellate proceedings for us to adjudicate on whether BCI treatment is warranted for the specific information in respect of which the European Union has raised its concerns. Moreover, Indonesia's request does not propose denying access to the information designated as BCI to the third participants in these proceedings. It follows that we do not consider that according additional protection would undermine the rights of the third participants. Nor do we consider that the proposed BCI protection would prejudice the rights and systemic interests of the WTO Membership at large while these appellate proceedings are ongoing. At the same time, we are cognizant that the interests of Members in having access to reasoning that discloses the basis for findings and conclusions must also be protected, and that the public version of our Report, circulated to all Members, be understandable.<sup>21</sup>

3.9. As Indonesia and the European Union acknowledge, the scope and extent of protection of sensitive business information in WTO dispute settlement proceedings must be determined by WTO panels and the Appellate Body, and not by domestic investigation authorities. As the Appellate Body has noted, "any additional procedures to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the DSU, the other covered agreements including the Anti-Dumping Agreement."<sup>22</sup> We further note that the information covered by Indonesia's request for additional protection was treated as BCI in the Panel proceedings and that it was treated as confidential by the EU authorities in the underlying anti-dumping investigation. In this regard, we observe that the Panel did not simply accept, without question, the BCI nature of documents submitted to it and designated as such by the parties. Rather, the Panel employed certain objective criteria to define BCI, and provided for a procedure to adjudicate any disagreements between the parties on the BCI treatment of information submitted into the Panel record. Indeed, at the interim review stage of its

<sup>19</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

<sup>20</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

<sup>21</sup> Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R, para. 279.

<sup>22</sup> Appellate Body Report, *China – HP-SSST (EU)*, para. 5.311.

proceedings, the Panel adjudicated a dispute between the parties regarding whether some information was properly designated as BCI.

3.10. Moreover, the fact that both the EU authorities and the Panel granted BCI protection to the information at issue is relevant but not dispositive as to whether that information warrants BCI protection at the appellate review stage. As the Appellate Body stated in *China – HP-SSST (EU)*, while Article 6.5 of the Anti-Dumping Agreement regulates the issue of designation of information in domestic anti-dumping duty proceedings, Article 17.7 deals with the issue of confidentiality in an anti-dumping proceeding before a WTO panel. Thus, whether information treated by the domestic investigating authority as confidential, upon a showing of "good cause" pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO adjudicator.<sup>23</sup> We also consider it useful to recall that whether information warrants BCI protection may evolve over the course of dispute settlement proceedings.

3.11. In this dispute, we note that the Panel Report contains 55 references to information that was designated as BCI, and these 55 references have been redacted from the circulated version of that Report. All of the submissions by the participants in this appeal contain multiple instances in which information that was treated as BCI in the Panel proceedings has been cited and enclosed within double brackets. Moreover, the European Union has raised a claim of error on appeal challenging the Panel's designation of some information as BCI. We further note that the BCI procedures proposed by Indonesia in this appeal are modelled on the BCI procedures adopted by the Appellate Body in *US – Washing Machines*. Yet, we see important differences between the circumstances of that dispute and those in this dispute. The panel report in *US – Washing Machines* did not include any BCI, no redactions were made in the circulated version of the report and the submissions filed by the participants on appeal likewise contained no BCI. By contrast, in this dispute, it cannot be ruled out at this stage that it may be necessary to refer to information that the Panel treated as BCI in our eventual Report. This suggests that there may be need for us to adopt further modalities to supplement the BCI procedures proposed by Indonesia in this appeal.

3.12. On balance, and without prejudice to our adjudication of the participants' claims on appeal, we consider that additional protection is warranted for the information marked by the participants as BCI and enclosed within square brackets in their submissions to the Appellate Body. We also consider that additional protection is warranted for the information designated by the Panel as BCI in its Report and in the Panel record. This excludes any information in respect of which the Panel removed the BCI designation following the parties' comments at the interim review stage.

## 4 RULING

4.1. First, for the above reasons, and in light of the previous rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the following information in these proceedings: (i) the information marked by the participants as BCI and enclosed within square brackets in their submissions to the Appellate Body; and (ii) the information designated by the Panel as BCI in its Report and in the Panel record. With specific respect to the information that the European Union has claimed on appeal did not warrant BCI protection by the Panel, the additional protection that we are granting is provided on a provisional basis, pending resolution of the claims raised by the European Union. The additional BCI protection in these appellate proceedings is provided according to the following terms, bearing in mind that the participants and third participants have already filed their written submissions:

- a. No person may have access to information that qualifies as BCI, except a member of the Appellate Body or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, or an outside advisor for the purposes of this dispute to a participant or third participant. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the underlying anti-dumping investigations in this dispute.

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<sup>23</sup> Appellate Body Report, *China – HP-SSST (EU)*, paras. 5.315-5.316.



- b. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant and third participant shall have responsibility in this regard for its employees as well as for any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.
- c. A participant or third participant that submits a document (including written submissions and oral statements) containing BCI to the Appellate Body after the adoption of these BCI procedures shall clearly identify such information in the document filed. Submissions filed prior to the adoption of these BCI procedures need not be marked retroactively. The participant or third participant shall mark the cover and/or first page of the document containing BCI, and each subsequent page of the document, to indicate the presence of such information. The specific information in question shall be placed within double brackets, as follows: [...].
- d. A participant or third participant that intends to make an oral statement at the hearing containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.
- e. The Appellate Body will not disclose BCI, in its Report or in any other way, to persons not authorized under these procedures to have access to BCI. The Appellate Body may, however, make statements of conclusion drawn from that information.
- f. Before circulating its Report to the Members, the Appellate Body will decide whether to adopt further modalities, for example to verify the designation of certain information as BCI, and to ensure both the non-disclosure of BCI in the Report to be circulated and that the analysis and findings set out in that Report can be readily understood in the event of any redaction of such BCI.

4.2. Second, pursuant to Rules 16(1) and 18(5) of the Working Procedures, the Division accepts Indonesia's request for leave to amend the executive summary of its appellant's submission as set out in its letter dated 11 May 2017. More specifically, the Division authorizes the removal of all references to BCI markings on the cover page of Indonesia's Executive Summary as well as in the headers on each page and, with respect to paragraph 7.9 of that Executive Summary, accepts Indonesia's request to: (i) replace the text enclosed within the first set of double brackets with the words "particularly close relationship"; (ii) replace the text within the second set of double brackets with the word "close"; and (iii) remove all double brackets. The amended version of this executive summary will be annexed to our Report in this dispute, in accordance with the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

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