



**EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL  
FROM INDONESIA**

REPORT OF THE PANEL

*BCI deleted, as indicated [[\*\*\*]]*

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### CASES CITED IN THIS REPORT

Short title	Full case title and citation
Canada – Autos	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <a href="#">WT/DS139/AB/R</a> , <a href="#">WT/DS142/AB/R</a> , adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Welded Pipe	Panel Report, <i>Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu</i> , <a href="#">WT/DS482/R</a> and Add.1, adopted 25 January 2017
China – Broiler Products	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , <a href="#">WT/DS427/R</a> and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Cellulose Pulp	Panel Report, <i>China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada</i> , <a href="#">WT/DS483/R</a> and Add.1, adopted 22 May 2017
China – GOES	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , <a href="#">WT/DS414/AB/R</a> , adopted 16 November 2012, DSR 2012:XII, p. 6251
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/R</a> and Add.1 / <a href="#">WT/DS460/R</a> , Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R-WT/DS460/AB/R
China – X-Ray Equipment	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , <a href="#">WT/DS425/R</a> and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Bed Linen	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , <a href="#">WT/DS141/R</a> , adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Fasteners (China)	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/R</a> and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Hormones	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , adopted 13 February 1998, DSR 1998:I, p. 135
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EU – Biodiesel (Argentina)	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , <a href="#">WT/DS473/AB/R</a> and Add.1, adopted 26 October 2016
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<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , <a href="#">WT/DS379/AB/R</a> , adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , <a href="#">WT/DS350/AB/R</a> , adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , <a href="#">WT/DS296/AB/R</a> , adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/AB/R</a> , <a href="#">WT/DS178/AB/R</a> , adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , <a href="#">WT/DS58/AB/RW</a> , adopted 21 November 2001, DSR 2001:XIII, p. 6481
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS277/AB/RW</a> , adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
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<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , <a href="#">WT/DS344/AB/R</a> , adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , <a href="#">WT/DS294/AB/R</a> , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CFPP	Cold filter plugging point
CIF	Cost, insurance, and freight
CPO	Crude palm oil
DET	Differential Export Tax
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBB	European Biodiesel Board
EU Basic Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, and corrigendum to Council Regulation (EC) No. 1225/2009, OJ L 7, 12.1.2010
FOB	Free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
HPE	Reference price that is published monthly by the Indonesian Authorities and is based on the average price from the previous month from three sources, i.e. CIF Rotterdam, CIF Malaysia, and the Indonesian commodity exchange market, all brought back to the FOB level
PFAD	Palm fatty acid distillate
PME	Palm methyl ester
RME	Rapeseed methyl ester
SG&A	Selling, general, and administrative
SME	Soybean methyl ester
USD	US dollars
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
Wilmar Group	P.T. Wilmar Bioenergi and P.T. Wilmar Nabati
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by Indonesia

1.1. On 10 June 2014, Indonesia requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia*, Indonesia.<sup>1</sup>

1.2. Consultations were held on 23 July 2014 but failed to resolve the dispute.

### 1.2 Panel establishment and composition

1.3. On 30 June 2015, Indonesia requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.<sup>2</sup> At its meeting on 31 August 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in documents WT/DS480/2 and WT/DS480/2/Corr.1, in accordance with Article 6 of the DSU.<sup>3</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in documents WT/DS480/2 and WT/DS480/2/Corr.1 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>4</sup>

1.5. On 4 November 2015, the parties agreed that the panel would be composed as follows:

Chairperson: Ms Deborah Milstein  
Members: Mr Gilles Le Blanc  
Mr Mathias Francke

1.6. Argentina, Australia, Brazil, Canada, China, India, Japan, Norway, the Russian Federation, Singapore, Turkey, Ukraine, and the United States notified their interest in participating in the Panel proceedings as third parties.

### 1.3 Panel proceedings

#### 1.3.1 General

1.7. The Panel began its work on this case later than it would have wished due to staff constraints in the WTO Secretariat.<sup>5</sup> The Panel held its organizational meeting with the parties on 4 May 2016. During this meeting, Indonesia requested to postpone the proceedings pending the possible appeal of the panel report in *EU – Biodiesel (Argentina)*.<sup>6, 7</sup> The European Union did not object to Indonesia's request. On 3 June 2016, the Panel decided to grant Indonesia's request and delay the proceedings until the Appellate Body Report in *EU – Biodiesel (Argentina)* had been circulated.

<sup>1</sup> Request for consultations by Indonesia, WT/DS480/1 (Indonesia's consultations request).

<sup>2</sup> Request for the establishment of a panel by Indonesia, WT/DS480/2 (Indonesia's panel request).

<sup>3</sup> DSB, Minutes of the meeting held on 31 August 2015, WT/DSB/M/367.

<sup>4</sup> Constitution note of the Panel, WT/DS480/3.

<sup>5</sup> *EU – Biodiesel (Indonesia)*, communication from the Panel (dated 15 April 2016, circulated 22 April 2016), WT/DS480/4.

<sup>6</sup> Indonesia further clarified its request in its communication dated 13 May 2016.

<sup>7</sup> The Panel Report in *EU – Biodiesel (Argentina)* was appealed by the European Union on 20 May 2016. (Notification of an Appeal by the European Union, WT/DS473/10 (dated 20 May 2016 and circulated on 26 May 2016) and by Argentina on 25 May 2016. (Notification of an Other Appeal by Argentina, WT/DS473/11 (dated 25 May 2016 and circulated on 31 May 2016)).

1.8. On 6 October 2016, the Appellate Body circulated its report in *EU – Biodiesel (Argentina)*, which was adopted by the DSB on 26 October 2016. On 4 November 2016, following a communication from the Panel requesting clarification<sup>8</sup>, Indonesia requested the Panel to resume its work and hold an additional organizational meeting to consider a proposed timetable and working procedures.<sup>9</sup> The Panel held its second organizational meeting on 30 November 2016. After consultation with the parties, the Panel adopted its Working Procedures<sup>10</sup>, Additional Working Procedures on Business Confidential Information (BCI)<sup>11</sup>, and timetable on 13 December 2016.

1.9. The Panel held a first substantive meeting with the parties on 29-30 March 2017. A session with the third parties took place on 30 March 2017. The Panel held a second substantive meeting with the parties on 4-5 July 2017. On 1 September 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 3 October 2017. The Panel issued its Final Report to the parties on 26 October 2017.

### **1.3.2 Request for a ruling on third party access to BCI pursuant to the Panel's Additional Working Procedures on Business Confidential Information (BCI)**

1.10. On 6 January 2017, the Panel received a communication from Indonesia, requesting the Panel to limit third-party access to certain company specific data provided by individual Indonesian producers, pursuant to paragraph 6 of the Panel's adopted Additional Working Procedures on Business Confidential Information.<sup>12</sup> On 12 January 2017, the European Union objected to the request, submitting that Indonesia's request is inconsistent with the DSU and fails to comply with the terms of paragraph 6 of the Additional BCI Procedures.<sup>13</sup> On 17 January 2017, the Panel informed the parties and the third parties that it had denied Indonesia's request to limit third-party access to certain BCI. The Panel's decision is set out in Annex D-1.

### **1.3.3 Requests for enhanced third party rights by Russia and the European Union**

1.11. On 12 December 2016, Russia requested the Panel to exercise its discretion under Article 12.1 of the DSU to modify its Working Procedures and grant enhanced third party rights in this proceeding.<sup>14</sup> On 13 January 2017, the European Union requested the Panel to grant Russia's request, albeit for different reasons than those contained in Russia's request.<sup>15</sup> On 2 March 2017, the Panel informed the parties and the third parties that it had rejected those requests by Russia and the European Union. The Panel's decision is set out in Annex D-2.

## **2 FACTUAL ASPECTS**

2.1. This dispute concerns the anti-dumping measures imposed by the European Union on imports of biodiesel from Indonesia that were adopted following the conclusion of an investigation on imports of biodiesel from Argentina and Indonesia.<sup>16</sup> This investigation was previously the subject

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<sup>8</sup> Communication from the Panel dated 28 October 2016.

<sup>9</sup> In a communication dated 9 November 2016, the European Union informed the Panel that it considered that outstanding developments may have a direct bearing on the question of whether or not it is necessary, appropriate or fruitful to continue with the present proceedings at this time. Specifically, the European Union referred to the fact that at that time it had yet to inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. In addition, the European Union stated that the measure at issue had been substantially annulled by the municipal courts of the European Union, and expected that a pending appeal related to this annulment would be concluded within a reasonable period of time. In a communication dated 11 November 2016, Indonesia confirmed that it wished to proceed with the dispute in the absence of any objective changes in factual circumstances.

<sup>10</sup> See the Panel's Working Procedures in Annex A-1.

<sup>11</sup> Additional Working Procedures of the Panel on Business Confidential Information, Annex A-2.

<sup>12</sup> Communication from Indonesia dated 6 January 2017, 03/ITN/I/2017.

<sup>13</sup> Communication from the European Union dated 12 January 2017.

<sup>14</sup> Communication from Russia dated 12 December 2016.

<sup>15</sup> Communication from the European Union dated 13 January 2017.

<sup>16</sup> Commission Regulation (EU) No. 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ L 141, 28.5.2013 (Provisional Regulation), (Exhibit IDN-1), p. 6; Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013 (Definitive Regulation), (Exhibit IDN-2), p. 2.

of the dispute *EU – Biodiesel* concerning a complaint by Argentina, in respect of imports of biodiesel from Argentina.<sup>17</sup>

2.2. The investigation was initiated by the European Commission on 29 August 2012<sup>18</sup> following a complaint submitted by the European Biodiesel Board (EBB).<sup>19</sup> The EU authorities<sup>20</sup> imposed provisional anti-dumping duties on 29 May 2013<sup>21</sup> and definitive anti-dumping duties on 27 November 2013.<sup>22</sup> Provisional anti-dumping duties were applied ranging from zero to 9.6%<sup>23</sup> and were subsequently definitively collected on 27 November 2013.<sup>24</sup> Definitive dumping margins were calculated ranging from 8.8% to 23.3% and definitive anti-dumping duties were applied corresponding to the calculated injury margins, which ranged from 8.8% to 20.5%.<sup>25</sup> The duties were applied in the form of specific duties expressed as a fixed amount in euro/tonne.

2.3. On 20 December 2016, the European Commission initiated a review of the anti-dumping measures imposed on imports of biodiesel originating in Argentina to bring them into conformity with the recommendations and rulings adopted by the DSB, following the adoption of the panel report, as modified by the Appellate Body report in the *EU – Biodiesel (Argentina)* dispute.<sup>26</sup> In its notice of initiation, the European Commission indicated that it also considered it appropriate to examine the anti-dumping measures imposed on imports of biodiesel from Indonesia, considering that: (a) the anti-dumping measures imposed on imports of biodiesel from Indonesia are subject to a WTO dispute and involve essentially the same claims as raised by Argentina in the *EU – Biodiesel (Argentina)* dispute; and (b) the legal interpretations contained in the adopted panel and Appellate Body reports in *EU – Biodiesel (Argentina)* appear also to be relevant for the investigation concerning Indonesia.<sup>27</sup>

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<sup>17</sup> Panel Report and Appellate Body Report in *EU – Biodiesel (Argentina)*, WT/DS473/R and WT/DS473/AB/R. Argentina challenged certain aspects of the anti-dumping measures that were imposed in respect of imports of biodiesel from Argentina. In addition, Argentina made "as such" claims concerning the second subparagraph of Article 2(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community. (Panel Report, *EU – Biodiesel (Argentina)*, paras. 2.2-2.3).

<sup>18</sup> Notice of initiation of an anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, OJ C 260, 29.8.2012, (Exhibit IDN-4). On 10 November 2012, the EU authorities initiated an anti-subsidy proceeding with regard to imports of biodiesel from Argentina and Indonesia. (Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia, OJ C 342, 10.11.2012, (Exhibit IDN-5)). The domestic industry withdrew its complaint on 7 October 2013 and the investigation was terminated on 27 November 2013. (Commission Regulation (EU) No. 1198/2013 of 25 November 2013 terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No. 330/2013 making such imports subject to registration, OJ L 315, 26.11.2013, (Exhibit IDN-6)).

<sup>19</sup> Consolidated version of the new anti-dumping complaint concerning imports of biodiesel originating in Argentina and Indonesia (Complaint), (Exhibit IDN-3).

<sup>20</sup> At the time of the investigation, the European Commission conducted investigations and adopted preliminary determinations; the European Council adopted the final determinations on the basis of proposals from the European Commission.

<sup>21</sup> Provisional Regulation, (Exhibit IDN-1).

<sup>22</sup> Definitive Regulation, (Exhibit IDN-2).

<sup>23</sup> Provisional Regulation, (Exhibit IDN-1), recital 179.

<sup>24</sup> Definitive Regulation, (Exhibit IDN-2).

<sup>25</sup> Definitive Regulation, (Exhibit IDN-2), recital 215. The injury margins for two Indonesian producers were determined to be higher than the corresponding dumping margins. Anti-dumping duty rates were assessed at the rate of the dumping margins for those producers.

<sup>26</sup> Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473) OJ C476/3 of 20 December 2016, (Exhibit IDN-8).

<sup>27</sup> The European Commission indicated that the scope of the review was limited to the cost of production of the product under investigation when constructing normal value and the production capacity and capacity utilisation in the context of establishing the impact of the dumped imports on the domestic industry. (Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization in the *EU – Anti-Dumping Measures on Biodiesel* dispute (DS473) OJ C476/3 of 20 December 2016, (Exhibit IDN-8)).

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Indonesia requests that the Panel find that the anti-dumping measures imposed by the European Union on imports of biodiesel from Indonesia are inconsistent with<sup>28</sup>:

- a. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because in constructing the normal value for the Indonesian producers under investigation, the European Union did not calculate the cost of production of biodiesel on the basis of the records kept by those producers even though the records were in accordance with the generally accepted accounting principles and accurately and reasonably reflected the actual cost of production of biodiesel, and because the European Union therefore failed to properly calculate the cost of production and properly construct the normal value for those producers.
- b. Article 2.2 of the Anti-Dumping Agreement because the European Union failed to construct the normal value for the Indonesian producers under investigation on the basis of the cost of production of biodiesel in the country of origin, i.e. Indonesia.
- c. Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because when constructing the normal value for the Indonesian producers under investigation, the European Union did not establish a cap for the profits as required by Article 2.2.2(iii) and the amount for profits established was not determined by the European Union on the basis of a reasonable method. The European Union therefore failed to properly construct the normal value for those producers.
- d. Articles 2.3 and 2.4 of the Anti-Dumping Agreement because the European Union did not construct the export price for one Indonesian producer under investigation on the basis of the price at which the imported biodiesel was first resold to independent buyers in the European Union.
- e. Article 9.3 (*chapeau*) of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because on account of the inconsistencies with Article 2 specified above in the context of the calculation of the dumping margin for the Indonesian producers, the European Union calculated a margin of dumping and imposed and collected anti-dumping duties in excess of the actual dumping margin, if any, by the Indonesian producers. This resulted in the levy of anti-dumping duties on the Indonesian producers that exceeded their margin of dumping which, under Article 9.3 of the Anti-Dumping Agreement, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by a producer/exporter.
- f. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because the European Union's determination of injury to the Union industry was not based on an objective examination of the effect of those imports on prices in the domestic market for biodiesel and the consequent impact of those allegedly dumped imports on domestic producers of biodiesel. The European Union's findings regarding the price effects of the allegedly dumped imports including price undercutting were not based on an objective examination of the evidence on the record as, among others, the European Union did not ensure price comparability in terms of physical characteristics and model-matching and based its determination of price undercutting on partial and unexplained sales of the sampled European Union producers.
- g. Articles 7.1, 7.2, 9.2, and 9.3 (*chapeau*) of the Anti-Dumping Agreement because the European Union incorrectly imposed and definitively collected provisional anti-dumping duties with respect to the imports from one Indonesian producer under investigation, in excess of the actual provisional margin of dumping of this producer, as it based itself on a provisional dumping margin tainted by calculation errors.

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<sup>28</sup> Indonesia's first written submission, para. 362; second written submission, para. 206.

3.2. Indonesia submits that, as a consequence of the measures imposed by the European Union, the benefits accruing to Indonesia under the Anti-dumping Agreement and the GATT 1994 were impaired or nullified. Indonesia considers that the measures at issue should be withdrawn.<sup>29</sup>

3.3. Indonesia requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-Dumping Agreement and the GATT 1994.<sup>30</sup>

3.4. The European Union requests that the Panel reject Indonesia's claims in this dispute in their entirety.<sup>31</sup>

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraphs 18 and 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of Argentina, Australia, Brazil, China, Japan, Norway, Russia, Turkey, and the United States are reflected in their executive summaries, provided in accordance with paragraphs 18 and 20 of the Working Procedures adopted by the Panel (see Annexes from C-1 to C-9). Canada, India, Singapore, and Ukraine did not submit written or oral arguments to the Panel.

#### **6 INTERIM REVIEW**

6.1. On 3 October 2017, the Panel issued its Interim Report to the parties. On 17 October 2017, the parties submitted communications to the Panel. Neither party asked the Panel to review specific aspects of the Interim Report, nor requested an interim review meeting.

6.2. We have made a number of changes of an editorial or formatting nature to correct typographical and other non-substantive errors, as well as to reflect the parties' designations of information as BCI.

#### **7 FINDINGS**

##### **7.1 Introduction**

7.1. Indonesia has advanced claims on an "as applied" basis concerning the anti-dumping measures at issue in this case. Indonesia challenges several aspects of the dumping determination related to the construction of normal value and export price, certain aspects of the European Union's consideration of price effects and finding of significant price undercutting made in the context of the injury determination, the collection of definitive anti-dumping duties, and finally, the decision to impose and definitively collect provisional anti-dumping duties on imports from one Indonesian producer under investigation. These claims have been brought under a number of provisions of the Anti-Dumping Agreement and GATT 1994.

7.2. We shall address Indonesia's claims after first recalling the general principles governing treaty interpretation, the standard of review, and the burden of proof in WTO dispute settlement proceedings.

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<sup>29</sup> Indonesia's first written submission, para. 363; second written submission, para. 207.

<sup>30</sup> Indonesia's first written submission, para. 364; second written submission, para. 208.

<sup>31</sup> European Union's first written submission, para. 149; second written submission, para. 77.

## 7.2 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

### 7.2.1 Treaty interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.<sup>32</sup> It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.<sup>33</sup>

### 7.2.2 Standard of review

7.4. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.5. In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

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

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we are to apply with respect to both the factual and the legal aspects of the present dispute.

7.6. When a panel is reviewing an investigating authority's determination of facts, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings support the overall determination.<sup>34</sup> Moreover, with respect to a "reasoned and adequate explanation", the Appellate Body observed:

What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took

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<sup>32</sup> Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

<sup>33</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.

<sup>34</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".<sup>35</sup>

7.7. Finally, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.<sup>36</sup> At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".<sup>37</sup>

### 7.2.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.<sup>38</sup> Therefore, as the complaining party, Indonesia bears the burden of demonstrating that the measure at issue is inconsistent with the provisions of the covered agreements that it invokes. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely, a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.<sup>39</sup> It is generally for each party asserting a fact to provide proof thereof.<sup>40</sup>

## 7.3 Whether the EU anti-dumping measures imposed on imports of biodiesel from Indonesia are inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

### 7.3.1 Introduction

7.9. Indonesia claims that the anti-dumping measures applied by the European Union on biodiesel imports from Indonesia are inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, as follows:

- a. First, the European Union acted inconsistently with the first sentence of Article 2.2.1.1 and, as a consequence Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, by failing to calculate the cost of production on the basis of the records kept by the producers. Indonesia submits that the costs of crude palm oil (CPO) reflected in the records of the exporting producers were substituted with the reference export price for CPO published by the Indonesian authorities.<sup>41</sup>
- b. Second, the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value for the Indonesian producers under investigation on the basis of the cost of production of biodiesel in the country of origin, Indonesia.<sup>42</sup>

7.10. Indonesia submits that the substance of its claims are indistinguishable from claims raised by Argentina under these provisions in the dispute *EU – Biodiesel (Argentina)* in respect of anti-dumping measures imposed on imports of biodiesel from Argentina.<sup>43</sup> Indonesia submits that

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<sup>35</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (referring to Appellate Body Report, *US – Lamb*, para. 106). (emphasis original)

<sup>36</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

<sup>37</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>38</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>39</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>40</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>41</sup> Indonesia's first written submission, para. 44; second written submission, para. 4.

<sup>42</sup> Indonesia's first written submission, para. 99; second written submission, para. 10.

<sup>43</sup> Indonesia's first written submission, para. 45.

given the identical fact pattern and decisions made by the European Union, these claims warrant the same finding of inconsistency with the above provisions of the Anti-Dumping Agreement and GATT 1994.<sup>44</sup> The European Union has not disputed the relevance of the findings contained in the panel and Appellate Body reports in *EU – Biodiesel (Argentina)* to the resolution of the dispute.<sup>45</sup>

7.11. For the purpose of addressing these claims, we consider below whether Indonesia has demonstrated that the costs of CPO reflected in the records of the exporting producers<sup>46</sup> were substituted with the reference export price for CPO published by the Indonesian authorities, and thereafter, we address whether in doing so, the European Union acted inconsistently with the provisions cited by Indonesia.

### **7.3.2 The EU authorities' determination of the cost of production for the construction of normal value for Indonesian biodiesel producers**

7.12. Indonesia submits that the set of circumstances facing Indonesia are "essentially identical"<sup>47</sup> to the factual circumstances of claims raised by Argentina in *EU – Biodiesel (Argentina)*. We address the similarities in the EU authorities' determination of the cost of production for Argentine and Indonesian biodiesel producers in the construction of normal value before considering Indonesia's claims.

7.13. On 29 May 2013, the European Commission imposed provisional anti-dumping duties on biodiesel originating in Argentina and Indonesia, imposing provisional anti-dumping duties on Indonesian producers at margins of between zero and 9.6%.<sup>48</sup> The EU authorities concluded that since both the Argentine and Indonesian domestic markets for biodiesel were heavily regulated, domestic sales were not in the ordinary course of trade, and the normal value would have to be constructed.<sup>49</sup> To construct normal value, the EU authorities calculated the normal value by adding to the producers' own production costs during the investigation period, the selling, general, and administrative (SG&A) expenses incurred and a reasonable profit margin.<sup>50</sup> At that time, the petitioner, the EBB, claimed that the "Differential Export Tax" (DET) system in Argentina and Indonesia depresses the price of soybeans and soybean oil (the main raw material inputs used in the production of biodiesel in Argentina) and CPO (the main raw material input used in the production of biodiesel in Indonesia) and therefore distorts the costs of biodiesel producers. The EU authorities indicated that they did not have enough information at that stage to make a decision as to the most appropriate way to address that claim.<sup>51</sup> The EU authorities indicated that the question as to whether the costs reasonably reflect the costs associated with the production of biodiesel would be further examined at the definitive stage.<sup>52</sup>

7.14. In the Definitive Disclosure, the EU authorities confirmed that their further investigation had established that the DET system in place in Indonesia and Argentina depressed the domestic prices of the main raw material input in Indonesia and Argentina to artificially low levels, and as a consequence, this affected the cost of biodiesel producers in both countries.<sup>53</sup> The EU authorities explained that, due to the distortions caused by the DET system in the respective countries, the costs of the main raw material were not reasonably reflected in the records kept by the producers.<sup>54</sup> In the case of Indonesia, the EU authorities noted that during the investigation period, biodiesel exports were taxed between 2% and 5%, while CPO exports were taxed

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<sup>44</sup> Indonesia's first written submission, paras. 45 and 100.

<sup>45</sup> The European Union acknowledges the factual description provided by Indonesia in respect of its claims. (European Union's first written submission, paras. 6 and 14; second written submission, paras. 8 and 11). The European Union additionally noted that the EU investigating authorities decided to reopen the investigation regarding anti-dumping measures in force equally in respect of imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the DSB in *EU – Biodiesel (Argentina)*. In light of this, the European Union submits that Indonesia's claims are "unnecessary, premature and misconceived". (European Union's first written submission, para. 12).

<sup>46</sup> We note that the Indonesian government does not set the price of CPO in Indonesia.

<sup>47</sup> Indonesia's first written submission, para. 100; second written submission, para. 11.

<sup>48</sup> Provisional Regulation, (Exhibit IDN-1), recital 179.

<sup>49</sup> Provisional Regulation, (Exhibit IDN-1), recitals 44-45 and 63-64.

<sup>50</sup> Provisional Regulation, (Exhibit IDN-1), recital 63.

<sup>51</sup> Provisional Regulation, (Exhibit IDN-1), recitals 45 and 63.

<sup>52</sup> Provisional Regulation, (Exhibit IDN-1), recitals 45 and 63.

<sup>53</sup> General Disclosure Document, AD593, Anti-Dumping Proceeding concerning imports of biodiesel originating in Argentina and Indonesia (1 October 2013) (Definitive Disclosure), (Exhibit IDN-7), recital 26.

<sup>54</sup> Definitive Disclosure, (Exhibit IDN-7), recitals 25, 34, and 57.

between 15% and 20%. The export for palm fruit was set at a rate of 40%.<sup>55</sup> The EU authorities concluded that since the DET system limits the possibility to export CPO, larger quantities of CPO are available on the domestic market, which lowers domestic CPO prices. The EU authorities noted that the domestic price of CPO was significantly lower than the international reference price, with the difference "being very close to the export tax applied to CPO".<sup>56</sup>

7.15. In light of its finding that the markets were distorted, the EU authorities therefore decided to disregard the actual costs of raw materials as recorded by the Argentine and Indonesian investigated companies in their accounts and replace those costs with the price at which those companies would have purchased the raw materials in the absence of a distortion, in constructing the respective normal values of Argentine and Indonesian producers.<sup>57</sup> To replace the costs in the records of Indonesian producers, the EU authorities used the reference price (HPE) for CPO published by the Indonesian authorities. The EU authorities explained that the published HPE price is a reference export price that is set monthly by Indonesian authorities and averages the published international prices from three different sources: cost, insurance, and freight (CIF) Rotterdam, CIF Malaysia, and the Indonesian commodity exchange market. The HPE price is set on the basis of the same sources, on a free on board (FOB) basis.<sup>58</sup>

7.16. The Government of Indonesia and several Indonesian producers raised objections concerning the decision by the EU authorities to replace the recorded costs of CPO in the constructed normal value.<sup>59</sup> In the Definitive Regulation, the EU authorities confirmed their conclusion that domestic prices of CPO were artificially lower than international prices due to the distortion caused by the Indonesian DET. The EU authorities additionally confirmed their decision to use reference HPE prices published by the Indonesian authorities and rejected comments made by Indonesian producers and the Government of Indonesia.<sup>60</sup>

### **7.3.3 Whether the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers**

7.17. Indonesia first requests us to find that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. Indonesia refers to the panel and Appellate Body findings in *EU – Biodiesel (Argentina)* in support of its claim. We note that Indonesia's claim is principally concerned with the second condition in the first sentence of Article 2.2.1.1 of the

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<sup>55</sup> Definitive Disclosure, (Exhibit IDN-7), recital 60. The EU authorities found that during the investigation period biodiesel exports from Argentina were taxed at a nominal rate of 20% with an effective rate of 14.58%, while soybean exports were taxed at 35% and soybean oil exports were taxed at 32%. (Definitive Disclosure, (Exhibit IDN-7), recital 31).

<sup>56</sup> Definitive Disclosure, (Exhibit IDN-7), recital 59. In the case of Argentine producers, the EU authorities noted that the difference between the international and the domestic price of soya beans and soya bean oil is the export tax on the product and other expenses incurred for exportation. Thus, the EU authorities concluded that producers of soya beans and soya bean oil obtain the same net price no matter whether they sell for export or domestically. (Definitive Disclosure, (Exhibit IDN-7), recital 33).

<sup>57</sup> Definitive Disclosure, (Exhibit IDN-7), recitals 35 and 58.

<sup>58</sup> Definitive Disclosure, (Exhibit IDN-7), fn 8. In the case of Argentine producers, the EU authorities replaced the costs at which investigated companies purchased soya beans with the average of the reference prices of soya beans published by the Argentine Ministry of Agriculture for export FOB Argentina during the investigation period. (Definitive Disclosure, (Exhibit IDN-7), recital 36; see also Definitive Regulation, (Exhibit IDN-2), recitals 35-42).

<sup>59</sup> P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), pp. 2-23; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), pp. 2-20; Government of Indonesia, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-11), pp. 1-3; Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), pp. 4-6; and P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), pp. 5-9.

<sup>60</sup> Definitive Regulation, (Exhibit IDN-2), paras. 66-74. The EU authorities similarly confirmed their conclusions that the price of soybean raw materials in Argentina was artificially lower than international prices due to the distortion caused by the Argentine DET, and further confirmed their decision to use an international reference price as set by the Argentine government. (Ibid. paras. 35-42).

Anti-Dumping Agreement.<sup>61</sup> We also recall that Indonesia asserts that the substance of its claims is indistinguishable from claims raised by Argentina under these provisions in the *EU – Biodiesel (Argentina)*, and as a result the same finding of inconsistency is warranted.<sup>62</sup>

7.18. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement provide as follows:

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.<sup>63</sup>

...

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[\*]

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[\*fn original]<sup>6</sup> The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

7.19. Article VI:1 of the GATT 1994 reads, in relevant part:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

...

(b) ... is less than ...

...

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<sup>61</sup> Indonesia submits that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 as a result of failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement. (Indonesia's first written submission, para. 98).

<sup>62</sup> Indonesia's first written submission, para. 45.

<sup>63</sup> Fn omitted.

- (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

7.20. In addressing whether the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the panel and the Appellate Body in *EU – Biodiesel (Argentina)* both found that Article 2.2.1.1 establishes the records of the investigated producer as the preferred source of information for the determination of the cost of production. In this respect, Article 2.2.1.1 provides for two circumstances in which an investigating authority can choose not to follow the general rule to calculate costs on the basis of the records kept by the producer/exporter. The first is that the records are inconsistent with the generally accepted accounting principles of the exporting country. The second is that the records do not reasonably reflect the costs associated with the production and sale of the product under investigation.<sup>64</sup>

7.21. The panel and the Appellate Body both reasoned that the second condition in the first sentence of Article 2.2.1.1 does not permit an investigating authority to examine the reasonableness of reported costs incurred by an exporting producer when the actual costs recorded in the records of the producer or exporter are found within acceptable limits to be accurate and faithful.<sup>65</sup> Given the structure of the first sentence of Article 2.2.1.1, the Appellate Body considered it clear that the records of the individual exporters or producers under investigation are subject to the condition to "reasonably reflect" the "costs".<sup>66</sup> The Appellate Body explained that the condition in the first sentence of Article 2.2.1.1 that the records "reasonably reflect" the costs associated with the production and sale of the product under consideration, relates to "whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".<sup>67</sup> The Appellate Body found support for its interpretation in the additional rules set out in the second and third sentences of Article 2.2.1.1 and footnote 6 of the Anti-Dumping Agreement<sup>68</sup>, and in Article 2.2, which refers to the costs of production in the country of origin.<sup>69</sup>

7.22. In order to establish whether the records reasonably reflect the costs actually incurred, the panel considered a comparison should be made between the costs in the producer's or exporter's records and the costs incurred by that producer or exporter. In its view, such a comparison does not permit an investigating authority to enquire into whether the records of the producer or exporter reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances. Therefore, an investigating authority should not be permitted to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin.<sup>70</sup>

7.23. In assessing whether the EU authorities had acted consistently with Article 2.2.1.1 in the investigation, the panel found relevant that the EU authorities decided not to use the cost of soybeans in the production of biodiesel in Argentina because "the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system".<sup>71</sup> In the panel's view, this did not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records did not reasonably reflect the costs associated with the production and sale of biodiesel.<sup>72</sup> The panel therefore found that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the

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<sup>64</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.18 and 6.46; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227.

<sup>65</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.231 and fn 400.

<sup>66</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20.

<sup>67</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

<sup>68</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.22. See also Panel Report, *EU – Biodiesel (Argentina)*, para. 7.234.

<sup>69</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.23.

<sup>70</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242. See also Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.30, 6.37, and 6.39.

<sup>71</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.

<sup>72</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.

producers under investigation on the basis of the records kept by the producers.<sup>73</sup> Having reached this finding, the panel did not consider it necessary for purposes of resolving the dispute to address Argentina's further claims that, the European Union failed to properly construct the normal value and thus acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>74</sup>

7.24. The Appellate Body upheld the panel's finding that the European Union acted inconsistently with Article 2.2.1.1 in constructing the normal value for Argentine producers.<sup>75</sup>

7.25. We recall as set out above<sup>76</sup>, at the definitive stage, the EU authorities revised the methodology and decided not to use the recorded costs of the main raw materials (soybean oil in the case of Argentine producers and CPO in the case of Indonesian producers) to establish the cost of production of biodiesel for Argentine and Indonesian investigated producers for the same reason: that "DET systems depressed the domestic prices of the main raw material input in both Argentina and Indonesia to an artificially low level", which was considered to "affect the costs of the biodiesel producers in both countries concerned".<sup>77</sup> Thus, the EU authorities applied the same rationale for deciding not to use the recorded cost of the main raw material to establish the cost of production of biodiesel for Argentine and Indonesian investigated producers.

7.26. Under these circumstances, we see no basis to deviate from the findings by the panel in *EU – Biodiesel (Argentina)* in respect of Indonesia's claim concerning Article 2.2.1.1 of the Anti-Dumping Agreement. Nor has the European Union identified any cogent reasons for us to do so.<sup>78</sup> Like the panel in *EU – Biodiesel (Argentina)*, we find that the EU authorities did not provide a legally sufficient basis under Article 2.2.1.1 for concluding that the Indonesian producers' records did not reasonably reflect the costs associated with the production and sale of biodiesel, and therefore, we find that the EU authorities acted inconsistently with its obligations under Article 2.2.1.1 by derogating from using the costs reflected in the records kept by the producers.<sup>79</sup>

7.27. Based on the foregoing, we uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the producers under investigation on the basis of the records kept by the producers.

7.28. Indonesia also requests that we find that, as a result of failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union failed to properly construct the normal value and thus acted inconsistently with Article 2.2 and Article VI:1(b)(ii) of the GATT 1994.<sup>80</sup> We recall that Indonesia has requested us to reach the same findings of inconsistency as in *EU – Biodiesel (Argentina)*, given the identical factual circumstances and decisions made by the European Union.<sup>81</sup> In this regard, the panel did not consider it necessary for purposes of resolving the dispute to address Argentina's further claims under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>82</sup> We have come to the same conclusions regarding Indonesia's claims.

### **7.3.4 Whether the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value on the basis of the cost of production in the country of origin**

7.29. Indonesia separately requests that we find that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing

<sup>73</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.249.

<sup>74</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.250.

<sup>75</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.56-6.57.

<sup>76</sup> See paras. 7.14. -7.16. above.

<sup>77</sup> Definitive Regulation, (Exhibit IDN-2), recital 30. See also *ibid.* recitals 35-42 and 66-74.

<sup>78</sup> In reaching this finding, we recall that it is well established that adopted panel and Appellate Body reports create legitimate expectations, and that the same legal issues should be resolved in the same way in subsequent cases, absent cogent reasons for finding differently. (See, for example, Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 14; *US – Stainless Steel (Mexico)*, para. 160; *US – Shrimp (Article 21.5 – Malaysia)*, para. 109; and *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

<sup>79</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.

<sup>80</sup> Indonesia's first written submission, para. 98.

<sup>81</sup> Indonesia's first written submission, para. 45.

<sup>82</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.250.

to construct the normal value on the basis of the cost of production in the country of origin.<sup>83</sup> Indonesia submits that the cost used by the EU authorities for CPO, derived from international prices, cannot be understood to be a cost in the country of origin.<sup>84</sup>

7.30. In addressing a similar claim raised by Argentina in *EU – Biodiesel (Argentina)*, the panel and the Appellate Body shared the view that the phrase "cost of production in the country of origin" in Article 2.2 and "cost of production of the product in the country of origin" in Article VI:1(b)(ii) may be understood as a reference to the price paid or to be paid to produce something within the country of origin.<sup>85</sup> The Appellate Body observed that nothing in the language of these two provisions precludes that an investigating authority may need to look for information on the cost of production from sources outside the country.<sup>86</sup> However, the reference to "in the country of origin", indicates that, whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. In these instances, information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable and it is not sufficient to simply substitute the costs from outside the country of origin for the "cost of production in the country of origin".<sup>87</sup>

7.31. In assessing whether the EU authorities had acted consistently with Article 2.2 or Article VI:1(b)(ii) of the GATT 1994, the panel evaluated whether the cost used by the EU authorities for soybeans could be understood to be a cost in the country of origin, Argentina. The panel considered it clear that the EU authorities did not use the cost of soybeans in Argentina, as the EU authorities specifically selected the average reference price of soybeans published by the Argentine Ministry of Agriculture to remove the perceived distortion in the market place caused by the Argentine DET. In this respect, the panel stated that the EU authorities selected this cost precisely because it was not the cost of soybeans in Argentina.<sup>88</sup> The panel therefore found that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value on the basis of the cost of production in Argentina.<sup>89</sup> The Appellate Body upheld the panel's finding.<sup>90</sup>

7.32. As with the decision to replace the actual purchase price of soybean reflected in Argentine producers' records, the EU authorities replaced the actual purchase price of CPO as reflected in the producers' records with an international HPE reference price published by Indonesian authorities.<sup>91</sup> The EU authorities found that prices of CPO prevailing in Indonesia were artificially lower than international prices and considered that the HPE reference price published by Indonesian authorities served as "the price at which [domestic biodiesel producers] would have purchased the CPO in the absence of such a distortion".<sup>92</sup> In this sense, the EU authorities selected the HPE reference price to remove the perceived distortion in the market place caused by the Indonesian DET, in the same way that the EU authorities had selected a reference price to remove the perceived distortion in the domestic price of soybeans caused by the Argentine DET. Under these circumstances, in the absence of any rebuttal by the European Union, we see no basis to depart from the analysis undertaken by the panel and the Appellate Body in *EU – Biodiesel (Argentina)*. We therefore find that the cost of CPO used by the European Union in respect of Indonesian producers is not a cost "in the country of origin".

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<sup>83</sup> Indonesia's first written submission, para. 100 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.260; and Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.81 and 6.83).

<sup>84</sup> Indonesia's first written submission, paras. 111-116.

<sup>85</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.256; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.69.

<sup>86</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. This could occur for instance, in circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available. (Ibid.).

<sup>87</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73.

<sup>88</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.258.

<sup>89</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.260.

<sup>90</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.83. The Appellate Body recognized that domestic prices could in fact reflect world prices, and that prices at the border could simultaneously be characterized as both an international and a domestic price. The Appellate Body agreed with the panel, however, that the mere fact that a reference price is published by the Argentine Ministry of Agriculture does not necessarily make this price a domestic price in Argentina. (Ibid. para. 6.81).

<sup>91</sup> See para. 7.15. above.

<sup>92</sup> Definitive Regulation, (Exhibit IDN-2), recital 67.

7.33. In light of this finding, we uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a cost for CPO that was not the cost prevailing "in the country of origin" in the construction of normal value.

### 7.3.5 Conclusions

7.34. We recall above the findings of the panel, as upheld by the Appellate Body in *EU – Biodiesel (Argentina)* regarding the obligations contained in Article 2.2.1.1 of the Anti-Dumping Agreement, and Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. We consider the panel's findings that the European Union acted inconsistently with these provisions in that dispute are directly relevant to the assessment of Indonesia's claims in this proceeding. We therefore uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the producers under investigation on the basis of the records kept by the producers. In addition, we uphold Indonesia's claim that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a cost for CPO that was not the cost prevailing "in the country of origin" in the construction of normal value.

## 7.4 Whether the European Union established an amount for profits inconsistently with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement

### 7.4.1 Introduction

7.35. Indonesia claims that the method applied by the European Union to establish an amount for profits for Indonesian producers is inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement. Indonesia alleges that the European Union's approach suffers from two main flaws. First, Indonesia claims that the European Union acted inconsistently with the requirement in Article 2.2.2(iii) to calculate a cap for profits, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". Second, Indonesia claims that the European Union did not determine an amount for profits on the basis of a "reasonable" method, as required under Articles 2.2 and 2.2.2(iii).

### 7.4.2 The EU authorities' determination of an amount for profits for Indonesian biodiesel producers

7.36. Before addressing Indonesia's claims, we recall the following facts related to the European Union's determination of an amount for profits for Indonesian biodiesel producers.

7.37. The EU authorities determined that Indonesian market conditions for biodiesel were such that domestic sales were not considered as being made in the ordinary course of trade, and therefore, the amount of profit could not be based on actual data from the sampled companies for purposes of constructing the normal value of the like product.<sup>93</sup> The EU authorities therefore resorted to Article 2(6)(c) of the EU Basic Regulation<sup>94</sup> (which mirrors the language in Article 2.2.2(iii) of the Anti-Dumping Agreement). The EU authorities determined the amount for profits as "the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve, that is 15% based on turnover".<sup>95</sup> The EU authorities subsequently confirmed in the Definitive

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<sup>93</sup> Provisional Regulation, (Exhibit IDN-1), recital 65. The EU authorities noted that, during the investigation period, the fully State-owned oil and gas company Pertamina was the biggest company active on the domestic market, representing more than 90% of the domestic biodiesel purchases from the sampled producers. The EU authorities determined that Pertamina is mandated by the State to blend the biofuels with fossil fuels for sale at its gas stations, and every month, the Indonesian Ministry of Trade administratively sets the "HPE price (or Export Check Price)" as a benchmark price used to calculate the monthly level of export duties. Pertamina purchases biodiesel at the level of the HPE price set by the Indonesian government. (Provisional Regulation, (Exhibit IDN-1), recital 64).

<sup>94</sup> Council Regulation (EC) No. 1225/2009 of 30 November on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, and corrigendum to Council Regulation (EC) No. 1225/2009, OJ L 7, 12.1.2010.

<sup>95</sup> Provisional Regulation, (Exhibit IDN-1), recital 65.

Regulation the 15% profit margin as "a reasonable amount that can be achieved by a relatively new, capital-intensive industry in Indonesia".<sup>96</sup>

7.38. The Government of Indonesia and Indonesian producers submitted comments during the investigation, including objections to the 15% profit margin used when constructing normal value. Several Indonesian producers objected that the EU authorities should have determined a profit amount based on actual amounts on sales of products in the same general category of products, pursuant to Article 2(6)(b) of the EU Basic Regulation.<sup>97</sup> Two Indonesian producers, P.T. Wilmar Bioenergi and P.T. Wilmar Nabati (Wilmar Group) and P.T. Pelita Agung Agrindustri referred in this regard to sales of oleochemicals in Indonesia.<sup>98</sup> Several producers also objected that the EU authorities did not determine a profit cap as required under Article 2(6)(c) of the EU Basic Regulation (and Article 2.2.2(iii) of the Anti-Dumping Agreement) and ensure that the 15% profit margin did not exceed that cap.<sup>99</sup>

7.39. In addition, several Indonesian producers asserted that the EU authorities relied on the target profit margin that had been determined for the EU industry in the context of the 2009 anti-dumping investigation into biodiesel imports from the United States, as the basis to determine the 15% margin for Indonesian producers. These producers objected that it was not reasonable or appropriate to base the profit margin for Indonesian producers on the average profit obtained by the EU industry during the 2004-2006 period as this is not based on data relating to Indonesia.<sup>100</sup> P.T. Pelita Agung Agrindustri argued that, even in the case that data from Indonesian producers cannot be used, the EU authorities should have based the profit amount on publicly available data relating to other markets rather than basing the profits on the target profit margin of the EU industry. P.T. Pelita Agung Agrindustri submitted that the profit margin of 6.8% that was established for the US producers in the 2011 US bioethanol anti-dumping investigation would have been appropriate.<sup>101</sup>

7.40. Several producers argued that, given that their revenues were in US dollars (USD), the average interest rate for USD loans offered by private banks in Indonesia for working capital and investment loans (which was between 5% and 6.3%) should be used to determine a profit amount.<sup>102</sup> Indonesian producer Wilmar Group argued that EU authorities should have taken into account a study prepared by LMC International that concluded that actual profit margins in the biodiesel sector in Indonesia were between 2.4% and 3.2%.<sup>103</sup> Indonesian producer P.T. Musim Mas submitted that a 15% profit margin for the producer company was excessive taking into account an investment cost for a 300,000 tonne per year palm methyl ester (PME) plant is about USD 30 million in Indonesia. Assuming an average price of PME at USD 1140 per tonne during the

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<sup>96</sup> Definitive Regulation, (Exhibit IDN-2), recital 84.

<sup>97</sup> P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), pp. 3 and 6; Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), pp. 3-5.

<sup>98</sup> Submission by the Wilmar Group filed on 25 July 2013, (Exhibit IDN-14 (BCI)), p. 1; P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), p. 6. See also Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), p. 12.

<sup>99</sup> P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), p. 10; P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), pp. 23-25; and P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 21.

<sup>100</sup> P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), pp. 6-9; Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), p. 4. See also P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), pp. 23-25; and P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 21.

<sup>101</sup> P.T. Pelita Agung Agrindustri, Comments on Provisional Disclosure: Dumping Margin (1 July 2013), (Exhibit IDN-15 (BCI)), p. 15 (referring to Council Implementing Regulation (EU) No. 157/2013 of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol from the United States, recital (166)).

<sup>102</sup> P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), p. 26; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 22; and Government of Indonesia, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-11), p. 4.

<sup>103</sup> Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), p. 5; Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), p. 12. Wilmar Group considered that such a rate would be in line with commercial interest rate in Indonesia ([[\*\*\*]]). (Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), p. 5).

investigation period, a 25% profit margin would result in a payback period of slightly less than 5 months, which is too ambitious for any young and innovative industry.<sup>104</sup>

7.41. Several Indonesian producers also objected to the EU authorities' reference to the short and medium term borrowing rate in Indonesia of around 12% published by the World Bank as a basis to confirm the reasonableness of the 15% profit margin. Indonesian producer P.T. Musim Mas submitted that the 12% borrowing rate was well above its actual borrowing cost of [[\*\*\*]].<sup>105</sup> Several producers further noted that the EU authorities referred to the short and medium term borrowing rate of 14% in Argentina published by the World Bank as a basis to confirm the reasonableness of a 15% profit margin applied to Argentine producers, arguing that a different treatment is justified for Argentine and Indonesian producers given that the short and medium term borrowing rate in Indonesia is lower (i.e. 12%) as compared to Argentina (i.e. 14%).<sup>106</sup> At most, they argued that the 12% rate should have been used as the profit cap under Article 2(6)(c) of the EU Basic Regulation.<sup>107</sup> In addition, the Government of Indonesia claimed that it was duplicative to replace the CPO costs in the context of constructing normal value while using at the same time a 15% profit margin to reflect the profit margin in an undistorted market.<sup>108</sup>

7.42. The EU authorities rejected comments that a profit amount should have been determined based on Article 2(6)(b) of the EU Basic Regulation on the ground "that all Indonesian (and Argentinian) companies in the sample don't have sales in the ordinary course of trade of products of the same general category of products (i.e. any other fuel)".<sup>109</sup> In this regard, the EU authorities rejected that sales of a blend of biodiesel with mineral diesel could be used to determine a profit amount. The EU authorities explained as follows:

Whether or not the sales of a blend of biodiesel with mineral diesel fall under the same general category of products, Article 2(6)(b) of the basic Regulation states, as already mentioned in recital (68) above, that such sales should be made in the ordinary course of trade. Given that the domestic sales of biodiesel are not in the ordinary course of trade, the sales of the blend of biodiesel with mineral diesel is not, *mutatis mutandis*, considered to be in the ordinary course of trade.<sup>110</sup>

7.43. The EU authorities determined that, given the short and medium term borrowing rate in Indonesia is around 12% according to World Bank data, it was reasonable to expect a higher profit margin to be obtained when doing business in the domestic biodiesel markets than the borrowing cost of capital.<sup>111</sup> The EU authorities noted that the reference to the medium term borrowing rate was not meant to set a benchmark but to "test the reasonableness of the margin used".<sup>112</sup> The EU authorities also noted that various profit levels were used in the 2009 biodiesel proceeding against the United States, with the weighted average profit well above 15%.<sup>113</sup> Finally, the EU authorities rejected the argument of the Government of Indonesia that it was duplicative to replace the cost of CPO since cost adjustments under Article 2(5) of the EU Basic Regulation and the reasonable profit under Article 2(6)(c) of that Regulation "are two clearly distinct issues".<sup>114</sup>

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<sup>104</sup> P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 10.

<sup>105</sup> P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 10.

<sup>106</sup> P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), p. 26; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 22.

<sup>107</sup> P.T. Ciliandra Perkasa, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-9 (BCI)), p. 25; P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 21.

<sup>108</sup> Government of Indonesia, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-11), p. 2.

<sup>109</sup> Definitive Disclosure, (Exhibit IDN-7), recital 68. See also Definitive Regulation, (Exhibit IDN-2), recital 79.

<sup>110</sup> Definitive Disclosure, (Exhibit IDN-7), recital 72; Definitive Regulation, (Exhibit IDN-2), recital 84.

<sup>111</sup> Definitive Disclosure, (Exhibit IDN-7), recital 72; Definitive Regulation, (Exhibit IDN-2), recital 84.

<sup>112</sup> Definitive Regulation, (Exhibit IDN-2), recital 84.

<sup>113</sup> Definitive Disclosure, (Exhibit IDN-7), recital 72; Definitive Regulation, (Exhibit IDN-2), recital 84.

<sup>114</sup> Definitive Regulation, (Exhibit IDN-2), recital 84.

**7.4.3 Whether the European Union acted inconsistently with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement by failing to calculate a profit cap and ensure that the profit margin established for each Indonesian exporter did not exceed that cap**

7.44. Indonesia first argues that the European Union violated Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement for the simple fact that it did not calculate the profit cap, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

7.45. Article 2.2 requires an investigating authority to use a "reasonable amount for administrative, selling and general costs and for profits" in constructing normal value.

7.46. Article 2.2.2 provides:

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.47. Indonesia argues that Article 2.2.2 imposes two mandatory conditions when determining an amount for profits pursuant to subparagraph (iii): first, the amount for profits must be determined on the basis of "any other reasonable method"; and second, the amount for profits so established shall not exceed the cap defined therein. Indonesia submits that the panels in *EC – Bed Linen*, *Thailand – H-Beams*, and *EU – Footwear (China)* have confirmed that both of these conditions must be met when applying a methodology pursuant to Article 2.2.2(iii) and there can be no exception to the requirement to meet either of these obligations.<sup>115</sup> Indonesia submits that there was no discussion of a benchmark for the cap nor did the EU authorities respond to requests from Indonesian producers for information pertaining to the profit cap.<sup>116</sup> Hence, Indonesia considers that it is clear that the EU authorities made no attempt to calculate a profit cap when applying the methodology under Article 2.2.2(iii).

7.48. The European Union argues that Article 2.2.2(iii) requires only that a profit margin established by an investigating authority does not exceed such a cap, and there is no mandatory requirement in Article 2.2.2(iii) to calculate a profit cap. In the European Union's view, a profit margin may not exceed the cap even absent any express reference to its calculation in the determination.<sup>117</sup> The European Union further considers that there cannot be an obligation on an

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<sup>115</sup> Indonesia's first written submission, paras. 138-142 (referring to Panel Reports, *EU – Footwear (China)*, paras. 6.52 and 7.300-7.301; *Thailand – H-Beams*, para. 7.124; and *EC – Bed Linen*, para. 6.97). See also Indonesia's first written submission, paras. 156 (referring to Panel Report, *EU – Footwear (China)*, para. 7.300).

<sup>116</sup> Indonesia's first written submission, paras. 146-150.

<sup>117</sup> European Union's opening statement at the first meeting of the Panel, para. 22. The United States shares the view that there cannot be an obligation to calculate the profit cap when the necessary information for such a calculation does not exist. Moreover, the United States submits that an investigator is not obliged to calculate a cap and indicate what that cap amount is in its determination, but rather an investigating authority may use "any other reasonable method" to determine an amount for profits so long as that amount so

investigating authority to calculate the profit cap when the necessary information for such calculation does not exist, making it objectively impossible to calculate the cap.<sup>118</sup> The European Union contends that this was precisely the case in the investigation at hand, as sampled Indonesian companies did not provide information to the EU authorities of sales in the ordinary course of trade of products in the same general category that could have been used to calculate a profit cap. The European Union also rejects that there is any requirement that an investigating authority must solicit the necessary data from non-investigated Indonesian producers, arguing that EU authorities do not have the authority to oblige any party to provide data to calculate a cap.<sup>119</sup>

7.49. The parties' arguments raise the issue of whether there is a mandatory requirement in Article 2.2.2(iii) to calculate a profit cap, or whether, as the European Union argues, there are exceptions to the requirement, for instance, in cases where investigated companies do not provide information to the investigating authorities of sales in the same general category of product, or it is not possible to calculate a cap for some other reason.

7.50. We find no basis for the European Union's argument that there is no mandatory requirement in Article 2.2.2(iii) to calculate a profit cap. We recall, as previous panels have observed, Article 2.2.2(iii) permits an investigating authority to use "any other reasonable method" to determine an amount for profit subject to a ceiling or cap, defined as "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".<sup>120</sup> The panel in *EU – Footwear (China)* found that the European Union acted inconsistently with Article 2.2.2(iii) precisely for the reason that it had failed to consider the calculation of the cap at the time it made its determination.<sup>121</sup> Furthermore, in reaching its finding, the panel found unconvincing the argument that had been made by the European Union that the necessary data for calculating the cap was not available. Even accepting that data was not available for calculating a cap, the panel reasoned that an investigating authority cannot be excused from complying with the requirements in Article 2.2.2(iii).<sup>122</sup>

7.51. We share the view of the panel in *EU – Footwear (China)*, including the view that an investigating authority may not be excused from the obligation to calculate the cap whenever applying a methodology pursuant to Article 2.2.2(iii) based on the argument that data is not available. We consider that there are important reasons for requiring an investigating authority to calculate a cap and to further provide details on the cap in the determination. Absent this information, interested parties would be unaware of whether the determined amount for profit exceeds the cap or not. This lack of information would improperly place the burden on interested parties to then try to demonstrate that the chosen amount for profit is in excess of the cap. The burden would also shift to a WTO Member representing the exporting producers to bring a challenge and demonstrate before a WTO panel that the profit amount used in constructing normal value exceeds the cap and is therefore in violation of Article 2.2.2(iii). We also consider that the obligation to calculate the cap is fundamental for the reason mentioned by Indonesia; namely that, absent a firm obligation, investigating authorities would be incentivized to adopt a passive approach to establishing a cap as a way to lessen their obligation under Article 2.2.2(iii).<sup>123</sup>

7.52. As concerns the investigation that is the subject of the present dispute, we have no evidence that the EU authorities addressed the issue of the cap in the investigation. Furthermore, the European Union has confirmed in this proceeding that the EU authorities were not able to calculate a cap for profits.<sup>124</sup> Since it is clear that the EU authorities did not calculate a cap, it is

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established does not exceed the profits normally realized by producers of the same general category of products in the exporting country. In such a situation, the United States submits that a complaining party would need to demonstrate before a WTO panel that a breach of Article 2.2.2(iii) results.

(United States' third-party submission, para. 18; third-party response to Panel question No. 1, para. 1).

<sup>118</sup> European Union's opening statement at the first meeting of the Panel, paras. 23-25.

<sup>119</sup> European Union's first written submission, paras. 41-46.

<sup>120</sup> Panel Reports, *EU – Footwear (China)*, paras. 6.52 and 7.300-7.301; *Thailand – H-Beams*, paras. 7.124-7.125; and *EC – Bed Linen*, paras. 6.97-6.98.

<sup>121</sup> Panel Report, *EU – Footwear (China)*, paras. 7.299-7.300.

<sup>122</sup> Panel Report, *EU – Footwear (China)*, para. 7.300. ("Even assuming it to be the case that relevant data on the basis of which the cap could be calculated was not available to the Commission in this case, we fail to see how this excuses the Commission from complying with the requirements of the AD Agreement".)

<sup>123</sup> Indonesia's second written submission, para. 35.

<sup>124</sup> European Union's first written submission, para. 51.

equally clear that the EU authorities failed to ensure that the amount for profit did not exceed that cap, contrary to the second condition set forth in Article 2.2.2(iii).

7.53. While we share the view of the panel in *EU – Footwear (China)* that an investigating authority may not be excused from the obligation to calculate the cap whenever applying a methodology pursuant to Article 2.2.2(iii) based on the argument that data is not available, we shall also address the parties' arguments as to whether or not data necessary to calculate a profit cap was available to the investigating authority in the underlying investigation.

7.54. As a general matter, Indonesia sees no basis as to why the EU authorities could not have solicited additional data from producers. Indonesia submits that the EU authorities regularly solicit data from producers, including producers located in third countries when investigating non-market economies. Furthermore, Indonesia submits that an investigating authority could resort to information from publicly available sources to determine the cap.<sup>125</sup> Indonesia considers that this would not have been necessary in the present investigation, as the EU authorities had the necessary data before them on which to calculate a profit cap. First, Indonesia submits that the EU authorities chose to limit the same general category of products to "other fuels", as reflected in recital 68 of the Definitive Disclosure.<sup>126</sup> Indonesia submits that one producer, Wilmar Group and related party [[\*\*\*]] provided information on the profit margins obtained on sales of blends of biodiesel and mineral diesel, i.e. "other fuels", which could have provided a basis to calculate the cap.<sup>127</sup> Even if these sales were considered to be unacceptable, Indonesia submits that the European Union has also acknowledged that [[\*\*\*]] had sales of diesel fuel and marine fuel oil – also "other fuels" – which could have been used.<sup>128</sup>

7.55. Alternatively, Indonesia argues that the EU authorities could have defined the "same general category" as oleochemicals, and used profit data for sales of oleochemicals to calculate the profit cap. Indonesia submits that the technical, physical, and chemical characteristics of a product as well as input materials and the production process are relevant factors to determining whether products are in the same general category.<sup>129</sup> Indonesia submits that oleochemicals and biodiesel are produced from the same feedstock through a similar process, share the same basic properties, and address the technical markets and therefore, both should be considered to fall within the same general category of basic organic chemicals.<sup>130</sup> Indonesia considers it was particularly unwarranted to reject profits on sales of oleochemicals, considering that the EU authorities decided to include biodiesel for non-fuel use in the scope of the product concerned. In recital 24 of the Definitive Regulation, Indonesia notes that the EU authorities denied a request for end-use relief for biodiesel for non-fuel use "in view of the fact that biodiesel declared as for non-fuel use has the same physical properties as biodiesel for fuel use".<sup>131</sup> More generally, Indonesia rejects that the scope of the same general category of products (described as "any other fuel") can be found to be narrower than the scope of the product concerned (as including biodiesel for non-fuel use).<sup>132</sup> More

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<sup>125</sup> Indonesia's first written submission, para. 156; response to Panel question No. 68, para. 17; and second written submission, paras. 31-32.

<sup>126</sup> Indonesia's response to Panel question No. 64, paras. 7-8; Definitive Disclosure, (Exhibit IDN-7), recital 68 ("Article 2(6)(b) is not applicable given that all Indonesian (and Argentinian) companies in the sample don't have sales in the ordinary course of trade of products of the same general category of products (i.e. any other fuel)").

<sup>127</sup> Indonesia' opening statement at the first meeting of the Panel, para. 20; responses to Panel question No. 6, para. 14, and No. 64, para. 10.

<sup>128</sup> Indonesia's response to Panel question No. 64, paras. 4-8.

<sup>129</sup> Indonesia's response to Panel question No. 13, paras. 18-19. Indonesia notes that demand side factors may all be relevant to the determination of the same general category of products, but are a less important factor in cases where there are dual or multiple uses of the product concerned. (Ibid. paras. 23-24).

<sup>130</sup> Indonesia's first written submission, paras. 151-153 (referring to Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), pp. 6-7); Definitive Disclosure, (Exhibit IDN-7), recital 68.

<sup>131</sup> Indonesia's second written submission, para. 46 (referring to Definitive Regulation, (Exhibit IDN-2), recital 24).

<sup>132</sup> Indonesia's second written submission, paras. 49-50. Indonesia finds support for this conclusion in Article 3.6 of the Anti-Dumping Agreement which states that:

generally, Indonesia submits that an investigator should not be permitted to define the same general category of products too narrowly, as doing so effectively allows an investigating authority to choose to exclude using sales of other products to calculate a profit cap, which thereby enables the investigator to evade complying with the requirements of Article 2.2.2(iii).<sup>133</sup>

7.56. The European Union disagrees with Indonesia that the "same general category of products" should be construed in an overly broad manner, especially given that the intention behind the methodologies contained in Article 2.2.2 is to approximate as closely as possible the price of the like product in the domestic market of the exporting country. In this respect, the European Union agrees with the reasoning set out by the panel in *Thailand – H-Beams* that, the broader the same general category of products is construed, the potential increases that the constructed normal value will not be representative of the price of the like product.<sup>134</sup>

7.57. The European Union argues that Indonesia has not met its burden of proof to explain why other oleochemicals constitute the same category of products with biofuels, taking into account their different end uses and markets, and different profit margins for that matter.<sup>135</sup> The European Union also sees no contradiction in the narrow approach with respect to determining the same general category of products (i.e. limiting the same general category to "any other fuel"), while the prevention of circumvention requires a broader approach to defining the scope of the product subject to investigation.<sup>136</sup>

7.58. Finally, the European Union submits that it would not have been appropriate to base a profit cap on sales of blended biodiesel with mineral diesel, as the European Union contends that sales of blended biodiesel with mineral diesel suffered from the "same deficiencies" as sales of biodiesel, i.e. these sales were found, *mutatis mutandis*, not to be in the ordinary course of trade because they contained domestically sold biodiesel in their blend, which was found not to be in the ordinary course of trade.<sup>137</sup> The European Union considers that the reference in Article 2.2.2(iii) to profit "normally" realized operates to permit an investigating authority to reject data that is obviously distorted by some act of State for purposes of calculating a profit cap. While the European Union does not suggest an "ordinary course of trade" requirement is included in Article 2.2.2(iii), the European Union argues that the fact that sales of a given product are not in the ordinary course of trade informs the analysis of "normally" under Article 2.2.2(iii). In other words, in certain occasions data can simultaneously be not in the ordinary course of trade and not "normal" within the meaning of Article 2.2.2(iii). The European Union finds support for its argument in the following discussion of the Appellate Body in *US – Hot-Rolled Steel* that was made in the context of Article 2.1:

In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.<sup>138</sup>

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The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

(emphasis added)

<sup>133</sup> Indonesia's second written submission, paras. 53-54.

<sup>134</sup> European Union's opening statement at the first meeting of the Panel, paras. 27-28 (referring to Panel Report, *Thailand – H-Beams*, paras. 7.112 and 7.115).

<sup>135</sup> European Union's first written submission, paras. 47-48, opening statement at the first meeting of the Panel, para. 29; response to Panel question No. 19, paras. 39-40; and second written submission, para. 35.

<sup>136</sup> European Union's second written submission, para. 36.

<sup>137</sup> European Union's second written submission, para. 25.

<sup>138</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

7.59. As highlighted by this passage, the European Union argues that the rationale of providing for a cap for profits which is used to construct the profit is to ensure that the chosen profit is "normal" in the domestic market.<sup>139</sup> In its view, the fact that sales of biodiesel blended with mineral diesel were found not to be in the ordinary course of trade establishes that they are not an appropriate basis to calculate the profit cap as there was no profit "normally" realized on sales of blended biodiesel with mineral diesel by other exporters or producers within the meaning of Article 2.2.2(iii).<sup>140</sup>

7.60. Indonesia disagrees with the European Union's interpretation of the word "normally" in Article 2.2.2(iii). Indonesia argues that the term "normally" in Article 2.2.2(iii) is intended to limit the discretion of an investigating authority by not allowing it to use data that is a statistical outlier. In this sense, the profit cap cannot be based on a statistical outlier, but should be based for instance on an average of profit data as taken from various sources. Indonesia contends that its interpretation is supported by the structure of Article 2.2.2, as well as the use of the word "normally" in other provisions of the Anti-Dumping Agreement. Indonesia submits that the term "normally" cannot be intended as having the same meaning as the language "in the ordinary course of trade" that is used elsewhere in the Anti-Dumping Agreement, which provides investigating authorities with discretion to take into account commercial conditions surrounding sales and disregard certain sales on that basis.<sup>141</sup>

7.61. The parties' debate as whether or not it was possible to calculate a profit cap in the particular investigation raises several additional questions regarding the discretion of an investigating authority surrounding the determination of the profit "normally" realized by other exporters or producers and the scope of the same general category of products.

7.62. We begin by noting that Article 2.2.2(iii) does not specify a particular requirement on an investigating authority as to how to define what products fall within the same general category of products, for purposes of determining "the profit normally realized". We agree with the European Union that there is no obligation to construe the scope of products in the same general category broadly. The panel in *Thailand – H-Beams* noted that the methodologies in Articles 2.2 and 2.2.2 aim to approximate the price of the like product. Referring in that case to Article 2.2.2(i), the panel observed that the use of a broader category of products when defining the same general category of products means that more products other than the like product will be included, which in turn may result in a constructed normal value that is less representative of the price of the like product.<sup>142</sup> We share this view and consider it equally applicable in the context of Article 2.2.2(iii).

7.63. Against this background, we see no basis why the European Union would be required to treat oleochemicals as falling within the same general category as biodiesel. In our view, a reasonable and objective authority may conclude that the same general category of products is a narrower category.<sup>143</sup> In light of this discretion, based on the information we have before us, we disagree with Indonesia that the EU authorities were necessarily required to rely on data on sales of oleochemicals as a basis to calculate the profit cap under Article 2.2.2(iii). In stating this, we do not mean to suggest that the EU authorities were therefore excused from establishing the profit cap.

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<sup>139</sup> European Union's second written submission, paras. 21-33.

<sup>140</sup> The European Union recalls that Indonesia has not disputed the finding by the EU authorities that there were no sales of biodiesel in the ordinary course of trade in Indonesia. (European Union's first written submission, para. 23 (referring to Definitive Regulation, (Exhibit IDN-2), recital 28)). The European Union further submits that data provided on sales of blends of biodiesel and mineral diesel could not be used for purposes of Article 2.2.2(iii) because profit amounts were only provided on the biodiesel element, and not the sales of the blended product. (European Union's opening statement at the second meeting of the Panel, paras. 18-19). Indonesia disputes this argument. (Indonesia's response to Panel question No. 64, paras. 4-10).

<sup>141</sup> Indonesia's response to Panel question No. 71, paras. 26-35. See also response to Panel question No. 70, para. 25.

<sup>142</sup> Panel Report, *Thailand – H-Beams*, para. 7.115.

<sup>143</sup> The European Union submits that according to Wilmar Group's website, oleochemicals are a very broad category of products, including soap, noodles, refined glycerine, cosmetic esters and palm waxes. (European Union's response to Panel question No. 19, para 40 (referring to Wilmar Group website <http://www.wilmar-international.com/our-business/tropical-oils/manufacturing/tropical-oils-products/oleochemicals/> (accessed 28 September 2017))).

7.64. We also see no issue with the decision of the EU authorities to define the scope of the same general category of products as "any other fuel"<sup>144</sup> while at the same time denying a request for end-use relief for biodiesel for non-fuel use. We recall that Article 2.2.2 aims to approximate the price of the like product. In approximating this price, an investigating authority may determine a category of products that fall in the same general category for purposes of constructing an amount for profit (or SG&A expenses) with the goal of approximating as closely as possible the price of the like product. This decision to define the category in this way could result, for instance, from the fact that a significant portion of sales of the product concerned fall within that category based on a particular end use (e.g. as a fuel). At the same time, an investigating authority may determine the need to take action to prevent circumvention in respect of products sold in the domestic market with similar physical properties but different end uses. In the case at hand, the EU authorities determined that the product for which end-use relief was requested had similar physical properties and could be further processed and thereby converted for use as a fuel.<sup>145</sup>

7.65. We disagree, however, with the European Union's interpretation of the term "normally" in Article 2.2.2(iii). We see no basis for the European Union's argument that "profit normally realized" in Article 2.2.2(iii) means that an investigator may disregard the profit realized on sales that are considered not compatible with normal commercial practice. The word "normally" is defined as "[i]n a regular manner; regularly" or "[u]nder normal or ordinary conditions; as a rule, ordinarily" or "[i]n a normal manner, in the usual way".<sup>146</sup> This suggests that the term "normally" in Article 2.2.2(iii) refers to commonality of occurrence, and therefore to profits that are regularly, ordinarily, usually, or as a rule realized. We consider this understanding is consistent with the way that the word "normally" is used, for example, in footnote 8 of the Anti-Dumping Agreement, concerning what the date of sale should "normally", i.e. usually, be. Similarly, Article 5.8 states that the volume of dumped imports shall "normally" be regarded as negligible, except in the case countries which individually account for less than 3% of the imports of the like product in the importing Member collectively account for more than 7% of imports of the like product in the importing Member.

7.66. We find that the structure of subparagraphs of Article 2.2.2 is also relevant in this regard. Subparagraphs (i) and (ii) refer to the use of "actual amounts", without any qualification that such sales must relate to any form of "normal" commercial conditions. The three alternative methods for calculating profit amounts in the three subparagraphs constitute "close approximations"<sup>147</sup> of the general rule contained in the *chapeau* of Article 2.2.2, and while subparagraphs (i) and (ii) express a preference for the actual data regarding the exporter and like product in question, there is "an incremental progression away from these principles before reaching 'any other reasonable method' in Article 2.2.2(iii)".<sup>148</sup> Since the data becomes more approximate as one progresses from subparagraph (i) to subparagraph (iii), it seems highly unlikely that the drafters would have envisaged an investigating authority considering the "normality" of the commercial conditions under subparagraph (iii) but not under subparagraphs (i) and (ii).

7.67. In addition, we are not persuaded by the European Union's reliance on the findings of the Appellate Body in *US – Hot-Rolled Steel* that:

In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.<sup>149</sup>

7.68. In that case, the Appellate Body necessarily understood "normal value" as referring to sales that are compatible with normal commercial practice. This does not mean that the term "normal"

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<sup>144</sup> Definitive Disclosure, (Exhibit IDN-7), recital 68.

<sup>145</sup> Definitive Regulation, (Exhibit IDN-2), recital 23.

<sup>146</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1945.

<sup>147</sup> Panel Report, *EC – Bed Linen*, para. 6.60.

<sup>148</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.335.

<sup>149</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

should be interpreted throughout the Anti-Dumping Agreement as referring to normal commercial practice, particularly when an "ordinary course of trade" standard is not expressly provided for, or in cases where the term "normally" appears to relate more to commonality of occurrence.

7.69. We therefore disagree with the European Union's interpretation of "normal" and its view that data available to establish "profits normally realized" within the meaning of Article 2.2.2(iii) may be disregarded in circumstances where, according to the European Union, "all of the data might be obviously distorted by some act of the State"<sup>150</sup> or data pertains to sales that are not considered as being made in the ordinary course of trade. Consequently, we also disagree with the assessment that it was appropriate to disregard information on profit amounts on sales of blends of biodiesel with mineral diesel for the purposes of calculating the cap for the same reason, i.e. that sales were not considered as being made in the ordinary course of trade.<sup>151</sup>

7.70. We also have doubts regarding the failure of the EU authorities to consider whether data on sales of diesel fuels and marine fuel oil by [[\*\*\*]] could have been used to determine the profit cap, considering that these products could be considered as "other fuels", and hence, would fall within the same general category of product.<sup>152</sup> In our view, the EU authorities could have considered these sales for the determination of the profit cap.

7.71. Ultimately, an investigating authority retains a degree of discretion to define the same general category of products pursuant to Article 2.2.2(iii). In this particular investigation, we believe that there were sales of products in the same general category that could have provided a basis to calculate the cap. In addition, if an investigating authority chooses to reject data provided in the investigation, the investigating authority would then be required to seek relevant data elsewhere, including from publicly available sources in order to comply with its obligations under Article 2.2.2(iii). We are also not persuaded by the European Union's argument that the term "normally" in Article 2.2.2(iii) permits an investigating authority to enquire into the commercial conditions surrounding those sales and to disregard certain sales based on the prevailing commercial conditions.

7.72. For the foregoing reasons, we therefore disagree with the argument of the European Union that it was objectively impossible to calculate the profit cap in the underlying investigation. In reaching this finding, we agree with the European Union that there is no obligation to construe the scope of products in the same general category broadly, and therefore, the EU authorities were not required to treat oleochemicals as falling within the same general category as biodiesel. We also agree with the decision of the EU authorities to define the scope of the same general category of products as "any other fuel" while at the same time denying a request for end-use relief for biodiesel for non-fuel use. However, we reject the European Union's argument that the phrase "profits normally realized" within Article 2.2.2(iii) permits an investigating authority to disregard data on sales that are not considered compatible with normal commercial practice. Consequently, we also reject the argument that it would have been appropriate to disregard information on profit amounts on sales of blends of biodiesel with mineral diesel for the purposes of calculating the cap for the same reason, i.e. that sales were not considered as being made in the ordinary course of trade. In addition, we also find that the EU authorities should have considered sales of diesel fuels and marine fuel oil by [[\*\*\*]] to determine the profit cap.<sup>153</sup>

7.73. Accordingly, we conclude that Indonesia has demonstrated that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement in the original investigation in

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<sup>150</sup> European Union's second written submission, para. 23.

<sup>151</sup> We recall that the EU authorities did not specifically address in the investigation whether data on sales of blends of biodiesel and mineral diesel could be used to calculate the profit cap for purposes of Article 2.2.2(iii). The EU authorities instead concluded that data on sales of blends of biodiesel and mineral diesel of one Indonesian producer could not be used to determine a profit amount under Article 2(6)(b) of the EU Basic Regulation, which implements the obligation contained in Article 2.2.2(i) of the Anti-Dumping Agreement, subject to the additional requirement that sales in the same general category be made in the ordinary course of trade. (Definitive Regulation, (Exhibit IDN-2), recital 84).

<sup>152</sup> Definitive Disclosure, (Exhibit IDN-7), recital 68.

<sup>153</sup> Indonesia rejects the European Union's assertions that it was not possible to calculate a profit cap as *ex post* rationalization that should be rejected. (Indonesia's first written submission, paras. 141 and 149-150; second written submission, para. 28). In light of our disagreement with the European Union's position that it was objectively impossible to calculate a profit cap based on a lack of data before it, we do not consider it necessary to address Indonesia's argument further.

determining the amount for profits for Indonesian producers by failing to determine the profit cap, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". As a result of this violation, Indonesia further requests that we find the European Union also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement.<sup>154</sup> We note that the *chapeau* of Article 2.2.2 indicates that amounts for administrative, selling, and general costs and for profits shall be determined "[f]or the purpose of paragraph 2" of Article 2 of the Anti-Dumping Agreement. Accordingly, we consider that Indonesia's claim under Article 2.2 is purely consequential and we therefore additionally find that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement.

#### **7.4.4 Whether the European Union determined a profit margin for Indonesian producers on the basis of a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement**

7.74. Indonesia additionally seeks a finding that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement. The European Union submits that the method on which the EU authorities determined the level of profits was reasonable, and the resulting amount was also itself reasonable.<sup>155</sup> We now address and make findings with respect to this additional aspect of Indonesia's claim, as our views in this regard could be relevant in the context of implementation.

7.75. Argentina raised a similar claim in *EU – Biodiesel (Argentina)* that, through the determination of a 15% profit margin for Argentine producers, the European Union failed to determine an amount for profits on the basis of a reasonable method within the meaning of Article 2.2.2(iii).<sup>156</sup> The EU authorities applied the same methodology when determining an amount for profits for both Argentine and Indonesian producers during the biodiesel investigation, and determined the same profit margin for all Argentine and Indonesian producers, i.e. 15% based on turnover as "a reasonable amount that can be achieved by a relatively new, capital intensive industry" in Argentina and Indonesia.<sup>157</sup> The panel in *EU – Biodiesel (Argentina)* found that Argentina failed to establish that the European Union acted inconsistently with Article 2.2.2(iii) in its determination of a 15% margin in constructing the Argentine producers' normal value.<sup>158</sup> This finding was not the subject of an appeal.

7.76. Indonesia acknowledges the panel's finding in *EU – Biodiesel (Argentina)* but nevertheless maintains that this does not prevent the Panel from finding in this proceeding that the same 15% profit margin established for Indonesian producers was not determined pursuant to a reasonable method as required by Article 2.2.2(iii). In this regard, Indonesia submits that there are factual differences between Argentine and Indonesian producers, and the evidence before the EU authorities during the investigation clearly demonstrates that a different margin should have been chosen for Indonesian producers.<sup>159</sup> The European Union submits that, although the facts are not identical in the two cases, Indonesia has not met its burden of proof as complainant to establish that the method for calculating profits for Indonesian producers was not reasonable or that the amount was not reasonable.<sup>160</sup>

7.77. We have set out the facts in paragraphs 7.37. to 7.43. above related to the European Union's determination of an amount for profits for Indonesian biodiesel producers. Under its approach, the EU authorities took as a starting point the profit margin that the EU biodiesel industry was reasonably expected to achieve during the early stages of development of the industry in 2005-2006, which was found to be 15%. The European Union confirmed that this amount was the average profit obtained by the EU industry during the 2004-2006 period which

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<sup>154</sup> Indonesia's first written submission, para. 180; second written submission, para. 84.

<sup>155</sup> European Union's first written submission, para. 34.

<sup>156</sup> Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.307-7.351. Unlike Indonesia in this dispute, Argentina did not separately claim that the European Union acted inconsistently with the requirement in Article 2.2.2(iii) to calculate a cap for profits and to ensure that the profit margin did not exceed such a cap.

<sup>157</sup> Definitive Regulation, (Exhibit IDN-2), recitals 44 and 84.

<sup>158</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.351.

<sup>159</sup> Indonesia's first written submission, para. 165; second written submission, para. 60.

<sup>160</sup> European Union's first written submission, paras. 37-38. See also comments on Indonesia's response to Panel question No. 75, para. 22.

had been determined in the context of the 2009 anti-dumping duty investigation into biodiesel imports from the United States.<sup>161</sup> The EU authorities considered that it was reasonable to use this 15% profit margin for the Indonesian and Argentine biodiesel industries as these industries were found to be at the same stage of development as the EU industry during the 2005-2006 period.<sup>162</sup> As indicated in the Definitive Regulation, the EU authorities confirmed the reasonableness of the 15% profit margin by looking at the short and medium term borrowing rates in both Argentina and Indonesia, which was found to be 14% and 12%, respectively, according to World Bank data. The EU authorities specifically noted that the reference to the short and medium term borrowing rate was not meant to set a benchmark but to "test the reasonableness" of the margin used.<sup>163</sup> The EU authorities considered it reasonable to expect a higher profit margin to be obtained in the domestic market than the prevailing borrowing cost of capital in those countries. Accordingly, the 15% profit was found to be "a reasonable amount that can be achieved by a relatively new, capital-intensive industry in Indonesia".<sup>164</sup>

7.78. Since the panel in *EU – Biodiesel (Argentina)* evaluated the methodology used by the EU authorities – which is the same methodology used to establish an amount for profits for Indonesian producers – to establish a profit margin for Argentine producers, we begin by recalling those findings. We will then assess the relevance of those findings in light of the arguments raised by Indonesia in this dispute.

7.79. In *EU – Biodiesel (Argentina)*, the panel began with an assessment of what constitutes "any other reasonable method" under Article 2.2.2(iii) before assessing "whether reliance on such a method can be discerned from the explanations provided by the EU authorities in the investigation at issue".<sup>165</sup> We first refer to the panel's interpretation of the meaning of "any other reasonable method" under Article 2.2.2(iii):

We turn first to the ordinary meaning of the term "method" in the context of Article 2.2.2(iii). Dictionary definitions of the term include "[p]rocedure for attaining an object", "[a] mode of procedure; a (defined or systematic) way of doing a thing", and "[a] written systematically-ordered collection of rules, observations, etc. on a particular subject".<sup>[575]</sup> Based on these definitions, we understand the term "method" to refer, in general terms, to a process or procedure, as opposed to an outcome.

The context of the term in Article 2.2.2(iii) sheds further light on its scope. First, the term is qualified by the words "any other". The use of "any" suggests a particularly broad scope<sup>[576]</sup>, and the use of "other" suggests that the other subparagraphs of Article 2.2.2 illustrate what may be captured by the term "method" under Article 2.2.2(iii). In that regard, we note that the chapeau and paragraphs preceding Article 2.2.2(iii) provide, in relevant part, that the amounts for administrative, selling and general costs and for profits may be "based on" or "determined on the basis of": (i) actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation; (ii) the actual amounts incurred and realized by the exporter or producer in question in respect of the same general category of products; or (iii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product.<sup>[577]</sup> It is significant, in our view, that these three alternatives refer to the kind of specific data on which the amount of

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<sup>161</sup> European Union's response to Panel question No. 7, paras. 6-8. See also Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.340-7.342; and Commission Regulation (EC) No. 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, (Exhibit IDN-25), recital 164.

<sup>162</sup> The European Union has confirmed that the EU authorities' finding in respect of investigated Argentine producers was based on the same finding. (European Union's response to Panel question No. 7, paras. 6-8).

<sup>163</sup> Definitive Regulation, (Exhibit IDN-2), recital 84. The EU authorities confirmed the reasonableness of the 15% profit margin for Argentine producers by looking at the short and medium term borrowing rate in Argentina, which was found to be 14% according to World Bank data. (Definitive Regulation, (Exhibit IDN-2), recital 44).

<sup>164</sup> Definitive Regulation, (Exhibit IDN-2), recital 84. The EU authorities reached the same finding in respect of investigated Argentine producers. (Definitive Regulation (Exhibit IDN-2), recital 44; see also Provisional Regulation, (Exhibit IDN-1), recitals 44 and 65).

<sup>165</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.333.

profit can be determined, rather than a specific procedure or methodology for the calculation of the amount for profits. This suggests to us that the term "method" in subparagraph (iii) refers to a reasoned consideration of the evidence before the investigating authority for the determination of the amount for profits, rather than to a pre-established procedure or methodology.<sup>[578]</sup> In addition, these "other" methods indicate a preference for the actual data regarding the exporter and like product in question, with an incremental progression away from these principles before reaching "any other reasonable method" in Article 2.2.2(iii). It flows from that context that the phrase "any other reasonable method" may be used in the absence of reliable data concerning the actual exporter or other exporters and the like product.<sup>[579]</sup> This, in turn, suggests that an investigating authority would usually have recourse to Article 2.2.2(iii) in circumstances where its options for basing the determination of an exporter's profit margin are constrained. This context, together with absence of any additional guidance in Article 2.2.2(iii) on what the "method" chosen should entail in terms of either the source or scope of the data or procedure, suggests to us a broad and non-prescriptive understanding of the term.

Second, as we have noted above, in addition to the requirement that it be determined on the basis of "any reasonable method", Article 2.2.2(iii) imposes a ceiling on the amount for profits determined<sup>[580]</sup>, requiring that the amount for profits "not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". The presence of this constraint, in the absence of any other guidance on the kind of "method" to be adopted, confirms our broad and non-prescriptive understanding of the term "method".

We now turn to assess what constitutes a "reasonable" method in the context of Article 2.2.2(iii). In the context of Article 2.2.2(iii), it is clear from the use of "any other" before "reasonable" that what is "reasonable" is connected to the preceding paragraphs and the chapeau and that the "methods" set in the preceding paragraphs and the chapeau are presumptively reasonable. As we have discussed, these indicate a preference for the actual data of the exporter and like product in question, with an incremental progression away from these principles before reaching "any other reasonable method" in Article 2.2.2(iii). In our view, this context suggests that the general function of Article 2.2.2 is to approximate what the profit margin (as well as administrative, selling and general costs) would have been for the like product in the ordinary course of trade in the domestic market of the exporting country.<sup>[581]</sup> Thus, in our view, the reasonableness of the method used under Article 2.2.2(iii) for determining the profit margin turns on whether it is rationally directed at approximating what that margin would have been if the product under consideration were sold in the ordinary course of trade in the domestic market of the exporting country.

Based on the foregoing considerations, we understand the term "any other reasonable method" in Article 2.2.2(iii) to involve an enquiry into whether the investigating authority's determination of the amount for profits is the result of a reasoned consideration of the evidence before it, rationally directed at approximating the profit margin to what would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country.<sup>166</sup>

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[fn original]<sup>575</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1767.

[fn original]<sup>576</sup> Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, fn 197; *Canada – Autos* para. 79.

[fn original]<sup>577</sup> See above, para. 7.310, for the text of Article 2.2.2(iii) of the Anti-Dumping Agreement.

[fn original]<sup>578</sup> Argentina acknowledges that "neither of the two procedures set forth in (i) and (ii) represents a complex or elaborated method. They are rather simple" (adding, however, that "they go beyond the mere unsubstantiated assertion with respect to what profits are"). (Argentina's response to Panel question No. 108, para. 86)

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<sup>166</sup> Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.334-7.338.

[fn original]<sup>579</sup> We note that the panel in *EC – Bed Linen* found that there is no hierarchy among the methods for determining the amount for profits in Articles 2.2.2(i)-(iii). (Panel Report, *EC – Bed Linen*, para. 6.59). The question of the interaction between these methods, or a potential hierarchy among them, has not been raised in this dispute and accordingly we express no views in that regard.

[fn original]<sup>580</sup> We note that the ceiling does not apply to the determination of the amounts for administrative, selling and general costs.

[fn original]<sup>581</sup> Panel Report, *Thailand – H-Beams*, para. 7.112.

7.80. Thus, the panel reached the view that "any other reasonable method" in Article 2.2.2(iii) "involve[s] an enquiry into whether the investigating authority's determination of the amount for profits is the result of a reasoned consideration of the evidence before it, rationally directed at approximating the profit margin to what would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country".<sup>167</sup>

7.81. The panel then turned to examine whether the EU authorities' explanations for determining a 15% profit margin as applied to Argentine producers in the investigation met this requirement. In its evaluation, the panel found relevant that the application by the petitioner EBB had drawn attention to findings made by the EU authorities in the 2009 investigation into biodiesel imports from the United States that a profit margin of 15% "represented a level reasonable achieved by the European Union biodiesel industry"<sup>168</sup>, in particular, as a profit level that would reasonably guarantee productive investment for a "newly established" biodiesel industry.<sup>169</sup> The panel took the view that the EU authorities had therefore arrived at the figure of 15% based on their experience with the relevant industry in other investigations. Accordingly, the panel concluded that "the EU authorities arrived at the 15% figure by taking into account the characteristics of a biodiesel industry that is 'young', 'innovative' and 'capital intensive' and by drawing on their earlier experience in a recent, similar investigation".<sup>170</sup>

7.82. The panel next noted the EU authorities' explanation that they had "tested" the 15% margin by comparing it to the short and medium term borrowing rate in Argentina of around 14% that was published by the World Bank. The panel was of the view that the EU authorities' determination of the amount for profits "proceeded from a reasoned consideration of the evidence before them".<sup>171</sup> In particular, the panel concluded that the 15% figure was chosen on the basis of what appear to be plausible similarities between the stage of development of the Argentine biodiesel industry at the time of the investigation, on the one hand, and the stage of development of the EU industry at the time of the investigation of biodiesel from the United States, on the other hand. The panel disagreed with Argentina that such an approach did not qualify as a "method" within the meaning of Article 2.2.2(iii).<sup>172</sup>

7.83. The panel then proceeded to evaluate the reasonableness of the EU authorities' approach. The panel concluded that "an unbiased and objective investigating authority could reasonably consider, as an initial step, that profit margins determined in prior investigations of other producers in the same industry at similar stages of development provide an indication of the profit margins of producers in a subsequent investigation."<sup>173</sup> The panel further reasoned that it would be appropriate for an unbiased and objective investigating authority to "test" that figure against relevant benchmarks. Notably, the panel found that the EU authorities had considered four such benchmarks, including: the World Bank indicator for short and medium term borrowing rates (which was 14%); the rate of the actual profits of Argentine biodiesel producers (which were "in excess of 25%"<sup>174</sup>); a 5% benchmark that had been proposed by one Argentine producer as a profit figure that was regularly used in similar commodity-related markets; and an 11% benchmark representing target profit in the context of determining the injury elimination margin for the EU industry.<sup>175</sup> The panel was persuaded by the EU argument that a 5% margin was not

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<sup>167</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.338.

<sup>168</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.340.

<sup>169</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.340.

<sup>170</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.342.

<sup>171</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.344.

<sup>172</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.344.

<sup>173</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.347.

<sup>174</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.348.

<sup>175</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.348.

systematically used, as well as the argument that the 11% figure was not appropriate for a "young and innovative" biodiesel industry.<sup>176</sup>

7.84. On this basis, the panel found "the selection and testing of the 15% profit margin resulted from a reasoned analysis that ... was rationally directed at approximating what the Argentine producers' profit margin for the like product would have been if the like product had been sold in the ordinary course of trade in the domestic market of the exporting country".<sup>177</sup>

7.85. The panel noted what it described as a "degree of inconsistency" in the EU authorities' assessment, including in the decision to reject a request by Argentine producers to use the 11% figure, as that was the figure used for calculating the target profit in the context of determining the injury elimination margin for the EU industry in the US biodiesel investigation, instead of the 15% profit rate.<sup>178</sup> Notwithstanding this observation, the panel reasoned that an objective and unbiased investigating authority could have plausibly differentiated between the determination of the profit margin of Argentine producers for the purpose of constructing normal value on the one hand, and the determination of the profit margin of the European Union industry for the purpose of determining the level of injury, on the other hand. The panel found this was reasonable given the view that the EU domestic industry had matured, justifying a reduction in its target profit in the absence of dumped imports, while the Argentine industry was found to be "young and innovative".<sup>179</sup>

7.86. Based on the above reasoning, the panel therefore found that Argentina failed to establish that the European Union acted inconsistently with Article 2.2.2(iii) in its determination of a 15% margin.<sup>180</sup>

7.87. We are of the view that the panel's assessment that the approach taken by the EU authorities constitutes a "method" within the meaning of Article 2.2.2(iii) also applies in this dispute.<sup>181</sup> We further note that Indonesia has not disputed this finding. Accordingly, we are not required to assess whether the approach taken by the EU authorities in respect of Indonesian producers constitutes a "method" under Article 2.2.2(iii). The only question that we are required to consider is whether the method used by the EU authorities in respect of Indonesian producers was "reasonable" within the meaning of Article 2.2.2(iii). We will therefore consider the parties' arguments in relation to this issue.

7.88. There is no disagreement between the parties regarding the decision by EU authorities to consider the profits obtained by the biodiesel industry outside of Indonesia (in this case the profits obtained by the EU authorities in the 2005-2006 period) as a relevant starting point to determine the reasonable profit margin for Indonesian producers.<sup>182</sup> However, Indonesia maintains that the focus of Article 2.2.2(iii) is on the profit margin in the exporting country and not the profit margin obtained by the same industry in another country.<sup>183</sup> Accordingly, Indonesia argues that the Panel must enquire into whether the EU authorities' determination of the amount of profits is the result of a reasoned consideration of the evidence before it that is rationally directed at approximating the profit margin *in Indonesia*.<sup>184</sup> In this respect, Indonesia considers that it has given *prima facie* evidence that the EU authorities failed to take into account important differences in the stage of development of the Indonesian biodiesel industry as compared to the EU industry in the 2005-2006 period, and has therefore established that the European Union failed to apply a reasonable method in respect of Indonesian producers. Therefore, Indonesia considers that the burden of proof shifts to the European Union to rebut its claim.<sup>185</sup> The European Union contends

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<sup>176</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.348.

<sup>177</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.349.

<sup>178</sup> The panel stated: "there seems to be a degree of inconsistency between this reasoning, on the one hand, and the use by the EU authorities of the 15% profit margin determined on the basis of its earlier experience from the United States investigation, on the other". (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.350).

<sup>179</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.350.

<sup>180</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.351.

<sup>181</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.344.

<sup>182</sup> Indonesia's second written submission, para. 66.

<sup>183</sup> Indonesia's first written submission, para. 163 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.338).

<sup>184</sup> Indonesia's second written submission, para. 66.

<sup>185</sup> Indonesia's responses to Panel question No. 75, para. 49, and No. 76, paras. 50-51.

that statements made by Indonesia do not qualify as *prima facie* evidence, but rather, constitute assertions unsupported by evidence, which are inadequate to establish its claim. The European Union submits that, in any event, it has provided the necessary rebuttal in the information it has provided.<sup>186</sup>

7.89. According to Indonesia, the evidence shows that the European Union industry was "two, maximum three years old" during the 2005-2006 period. Indonesia submits that the evidence also shows that some of the Indonesian producers were already active in the biodiesel industry in 2006 and 2007, which means that the Indonesian industry was already five to six years old during the investigation period in 2011 and 2012. In Indonesia's view, this demonstrates that the European Union's claim that the Indonesian industry was at a similar stage of development as the European Union industry was in 2005-2006 is factually incorrect.<sup>187</sup>

7.90. The European Union submits that the EU authorities properly concluded that the Indonesian biodiesel industry was at a similar stage of development during the investigation period as the European Union was during the 2005-2006 period. The European Union argues that information in the public domain shows that the EU biodiesel industry started in the 1990s. Hence, the EU industry would have been more than five to six years old by the 2005-2006 period and there is no basis to Indonesia's argument that the European Union industry was between two and three years old during that period.<sup>188</sup>

7.91. The European Union further submits that it is not sufficient to establish the maturity of one industry or another by reference to the number of years an industry has been in existence. The European Union submits that a biodiesel industry in one country may develop more quickly or slowly than a biodiesel industry in another country.<sup>189</sup> The European Union submits that reference to production volumes, the pace of increase or stagnation of production volumes, the number of producers and the level of competition, and the overall size of the producing country may be helpful elements in assessing the stage of development of a biodiesel industry.<sup>190</sup> In this respect, the European Union has submitted publicly available evidence on the production levels of the EU industry in the 2004-2005 period as compared to Indonesian production levels in 2012. The European Union submits that EU production reached nearly 2 million tonnes in 2004, 3 million tonnes in 2005, and 5 million tonnes in 2006. In comparison, annual production reached 2.2 million tonnes in Indonesia in 2012, similar to the production volume of the EU industry in the years 2004 and 2005.<sup>191</sup>

7.92. We note that Indonesia has also not disputed the statement that the EU industry started in the 1990s.<sup>192</sup> Indonesia also does not disagree that factors other than the date of starting operations – such as the pace of development or production volumes of biodiesel industries – may be relevant for determining whether the Indonesian industry was at a similar stage of development as the EU industry was in the 2005-2006 period.<sup>193</sup> Indonesia has not commented on or otherwise objected to production statistics submitted by the European Union<sup>194</sup>, which, according to the European Union, shows that production in Indonesia in 2012 was similar to that of the EU industry in the 2004-2005 period. To the extent that production volumes may indicate the stage of development of an industry, the figures submitted by the European Union suggest that the

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<sup>186</sup> European Union's comments on Indonesia's response to Panel question No. 75, para. 22.

<sup>187</sup> Indonesia's second written submission, paras. 70-71.

<sup>188</sup> European Union's response to Panel question No. 75, paras. 30-32.

<sup>189</sup> European Union's opening statement at the second meeting of the Panel, para. 31.

<sup>190</sup> European Union's response to Panel question No. 74, para. 28; comments on Indonesia's response to Panel question No. 74, para. 19.

<sup>191</sup> European Union's response to Panel question No. 75, paras. 31-32 (referring to European Biodiesel Board, EU production statistics 1998-2013, (Exhibit EU-6 (numbered by the Secretariat) (submitted as Exhibit EU-4 in response to Panel question No. 75, para. 31)); ECOFYS, *International biodiesel markets: Developments in production and trade* (Berlin, 2011), (Exhibit EU-3 (numbered by the Secretariat) (submitted as Exhibit EU-1 in response to Panel question No. 74, para. 29 and No. 75, para. 31)); and USDA, Indonesia Biofuels Annual Report 2017 (20 June 2017), (Exhibit EU-4 (numbered by the Secretariat) (submitted as Exhibit EU-2 in response to Panel question No. 74, para. 29 and No. 75, para. 32), p. 13)).

<sup>192</sup> Indonesia did not provide comments on the European Union's response to Panel question No. 75, in which the European Union contended that information in the public domain shows that the EU biodiesel industry started in the 1990s.

<sup>193</sup> Indonesia's response to Panel question No. 75, para. 49.

<sup>194</sup> USDA, Indonesia Biofuels Annual Report 2017 (20 June 2017), (Exhibit EU-4 (numbered by the Secretariat) (submitted as Exhibit EU-2 in response to Panel question No. 74, para. 29 and No. 75, para. 32)).

EU industry had similar annual production in the 2004-2005 period as compared to Indonesia's annual production in 2012. In our view, this would suggest that it was not unreasonable for the EU authorities to find that the two industries were at a similar stage of development. Based on this observation, it seems plausible to rely on the profits obtained by the EU industry in the 2005-2006 period as a starting point for its determination of a profit amount for sampled Indonesian producers.

7.93. The figures on annual production volumes also call into question Indonesia's argument that the Indonesian industry had been in existence (five to six years at the time of the investigation) much longer than the EU industry had been in the 2005-2006 period (roughly two to three years). Even if we accept Indonesia's contention that the maturity of an industry may be established based on the number of years in existence, the similarity in production volumes contradict Indonesia's position. On the contrary, the similarity in production volumes supports the position of the European Union that the pace of development may be very different in different countries. Overall, we are not persuaded by Indonesia's argument that the EU authorities failed to take into account important differences in the stage of development, as a basis to establish that the EU authorities did not apply a reasonable methodology.

7.94. The parties have also responded to a question from the Panel regarding the stages of development of the Argentine and Indonesian industries during the investigation period. Indonesia submits that the Indonesian biodiesel industry was at a more advanced stage than the Argentine industry at the time of the investigation.<sup>195</sup> In support of this statement, as set out in the complaint submitted in this investigation, Indonesia submits data on the installed capacity for biodiesel in Indonesia and Argentina in the 2008-2012 period.<sup>196</sup> The European Union rejects that the Indonesian and Argentine industries were at different stages of development at the time of the investigation, referring to production volumes during the 2006-2012 period.<sup>197</sup> Based on our review of this information, we are not convinced that the EU authorities acted unreasonably in their determination of a profit amount for both sampled Argentine and Indonesian producers.

7.95. Indonesia further takes issue with the EU authorities' decision to confirm the reasonableness of the 15% profit margin by reference to the short and medium term borrowing rates published by the World Bank. First, Indonesia submits that the Indonesian producers submitted detailed information, including company-specific information to demonstrate what would be a reasonable profit margin and that the EU authorities should have taken this evidence into account.<sup>198</sup> Indonesia submits that such company-specific information provides a more appropriate approach to determining the profit amount in the Indonesian market than World Bank data, which reflects data for the overall country, and not the biodiesel industry.<sup>199</sup> Second, Indonesia also argues that the EU authorities failed to take into account that the World Bank short and medium term borrowing rate was lower for Indonesia (i.e. 12%) than for Argentina (i.e. 14%). In Indonesia's view, while a 14% short and medium term rate might support the reasonableness of a 15%

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<sup>195</sup> Indonesia's response to Panel question No. 74, paras. 45-46.

<sup>196</sup> Indonesia submits data on the installed capacity for Indonesia was 4.5 billion litres in November 2010 and 4.8 billion litres in April 2012 while it can be seen that the installed capacity in Argentina was 2.8 billion litres in 2010. Indonesia notes that the Indonesian biodiesel industry reached a capacity of 3 billion litres in 2008, pointing out that the Argentine industry reached that capacity three years later in 2011. (Indonesia's response to Panel question No. 74, paras. 45 (referring to Annex 18 to the Consolidated version of the new anti-dumping complaint concerning imports of biodiesel originating in Argentina and Indonesia, (Exhibit IDN-34); and Complaint, (Exhibit IDN-3)), and 46 (referring to USDA, Indonesia Biofuels Annual Report 2010 (20 December 2010); and Complaint, (Exhibit IDN-3)).

<sup>197</sup> According to the European Union, the Argentine and Indonesian biodiesel industries both began operating in small volumes in the 2006-2007 period. The European Union submits that reports in the public domain estimate a level of production of 50,000 tonnes in Indonesia in 2006, and 30,000 tonnes in Argentina in 2006, which increased to 500,000 tonnes and 230,000 tonnes in 2008, respectively. In 2012, the European Union submits that annual production had levelled somewhat, reaching 2.2 million tonnes in Indonesia and 2.8 million tonnes in Argentina. (European Union's response to Panel question No. 74, para. 29 (referring to ECOFYS, *International biodiesel markets: Developments in production and trade* (Berlin, 2011), (Exhibit EU-3 (numbered by the Secretariat)); USDA, Indonesia Biofuels Annual Report 2017 (20 June 2017), (Exhibit EU-4 (numbered by the Secretariat)), p. 13; and USDA, Argentina Biofuels Annual Report 2015 (1 July 2015), (Exhibit EU-5 (numbered by the Secretariat)), p. 14)).

<sup>198</sup> Indonesia's first written submission, paras. 171-173.

<sup>199</sup> Indonesia's second written submission, paras. 73-74.

margin for Argentina, the same cannot be said for a 12% short and medium term rate, which is significantly lower than the determined 15% profit margin.<sup>200</sup>

7.96. The European Union argues that the EU authorities' approach to confirm the reasonableness of the 15% margin by comparing it to the World Bank short and medium term borrowing rate for Indonesia was reasonable. The European Union contends that the EU authorities found it was reasonable to expect biodiesel producers to obtain a profit margin that exceeded that level.<sup>201</sup> With respect to data provided by certain Indonesian producers, including actual profit margins, the European Union submits that the data was less reliable than World Bank data.<sup>202</sup> In this regard, the European Union notes that the actual profits on domestic sales of biodiesel of all but one of the four Indonesian sampled producers were in fact higher than 15%, reaching 30%.<sup>203</sup>

7.97. We first address the decision by the EU authorities to confirm the reasonableness of the 15% margin by comparing it to the short and medium term borrowing rate in Indonesia. We recall that there is no particular methodology prescribed by Article 2.2.2(iii), subject to the requirement that an investigating authority uses a "reasonable method". An investigating authority therefore has discretion in the approach it takes. In this respect, the EU authorities selected the profit amount obtained by the EU authorities in the 2005-2006 period and confirmed the reasonableness of this figure by testing it against certain benchmarks. In particular, the selection and testing of the 15% profit margin against the short and medium term borrowing rate in Argentina was found in *EU – Biodiesel (Argentina)* to have resulted from a reasoned analysis that was rationally directed at approximating the profit margin for sales by biodiesel producers, domestic sales by Argentine producers in that case.<sup>204</sup> We consider it would also be appropriate for the EU authorities to follow the same approach in respect of Indonesian producers, so long as it can be considered to have been reasonable. We note the European Union's explanation that the short and medium term borrowing rate in Indonesia was not intended as a profit cap, in the sense of Article 2.2.2(iii). We do not find this approach inherently unreasonable, despite the fact that the short and medium term borrowing rates in Indonesia and Argentina are not identical, in particular considering that the rate was not intended to constitute a profit cap. We therefore disagree with Indonesia that the lower short and medium term borrowing rate for Indonesia demonstrates that the method followed by the EU authorities in respect of Indonesian producers was unreasonable.

7.98. We now turn to the data submitted by Indonesian producers during the investigation regarding what would be a reasonable profit margin. In this connection, Indonesian producers provided data that: a reasonable profit margin for the biodiesel industry would be between 2.4% and 3.2% on turnover<sup>205</sup>; actual borrowing costs were around [[\*\*\*]]<sup>206</sup>; the profit margin established by the European Union would imply an unrealistically short payback period<sup>207</sup>; and the average interest rate for USD loans offered by private banks in Indonesia for working capital and investment loans (which was between 5 and 6.3%).<sup>208</sup> We recall that the EU authorities considered it reasonable to rely on the 15% profit margin based on what it considered to be plausible similarities between the stage of development of the EU and the Indonesian biodiesel industries and to then test the reasonableness of that rate. In the exercise of its discretion, an investigating authority may not consider it appropriate to rely on all data that is provided by interested parties.

<sup>200</sup> Indonesia's first written submission, paras. 168; second written submission, paras. 77-78.

<sup>201</sup> European Union's first written submission, para. 33.

<sup>202</sup> European Union's response to Panel question No. 10, para. 12.

<sup>203</sup> European Union's first written submission, para. 39; second written submission, para. 39; and response to Panel question No. 12, para. 17 ("Even if it was not explicitly mentioned in the measure at issue, the profit realized by three of the Indonesian producers was actually higher than 15%, while for the fourth producer it was only slightly lower.")

<sup>204</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.349.

<sup>205</sup> Wilmar Group, Comments on Definitive Disclosure (17 October 2013), (Exhibit IDN-16 (BCI)), p. 12.

<sup>206</sup> Submission by the Wilmar Group filed on 25 July 2013, (Exhibit IDN-14 (BCI)), p. 2.

<sup>207</sup> Indonesia's first written submission, para. 128 (referring to P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 2). Indonesian producer P.T. Musim Mas submitted that a 15% profit margin for the producer company was excessive taking into account an investment cost for a 300,000 tonnes per year PME plant is about USD 30 million in Indonesia. Assuming an average price of PME at USD 1140 per tonne during the investigation period, a 25% profit margin would result in a payback period of slightly less than 5 months, which is too ambitious for any young and innovative industry. (P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), p. 10).

<sup>208</sup> P.T. Pelita Agung Agrindustri, Comments on Definitive Disclosure: Dumping Margin (17 October 2013), (Exhibit IDN-10 (BCI)), p. 22.

In this particular case, the EU authorities found the Indonesian biodiesel market was distorted and thus, did not consider it appropriate to base the determination of normal value on actual values.

7.99. Finally, we note that Indonesia questions the determination of a 15% margin, considering that the EU authorities had adjusted the target profit for the domestic industry downwards from 15% to 11%, after finding that the EU industry had matured since the 2005-2006 period. Indonesia notes that a similar adjustment was not made for the Indonesian industry despite the fact that the Indonesian industry was more mature during the investigation period than the EU industry was during the 2005-2006 period.<sup>209</sup> The panel in *EU – Biodiesel (Argentina)* addressed this argument.<sup>210</sup> The panel took the view that this was reasonable given the view that the EU domestic industry had matured, justifying a reduction in its target profit in the absence of dumped imports, while the Argentine industry was found to be "young and innovative".<sup>211</sup> We have rejected above Indonesia's argument that the Indonesian industry was at a different (more advanced) stage of development than the EU industry was during the 2005-2006 period. Absent convincing evidence that the industry was at a different stage of development, we do not find the approach taken by the EU authorities was unreasonable.

7.100. For the foregoing reasons, we therefore reject Indonesia's request that we find that the European Union additionally acted inconsistently with Article 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement.

#### 7.4.5 Conclusions

7.101. As indicated above, we conclude that there is a mandatory requirement in Article 2.2.2(iii) to calculate a profit cap, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". As the EU authorities did not establish, or even attempt to establish such a cap in the investigation of Indonesian producers, we find that Indonesia has demonstrated that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement in failing to determine the profit cap and ensure that the profit amount established by the EU authorities does not exceed such a cap. We concluded that the European Union also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement as a result of failing to determine the profit cap. We reject, however, Indonesia's request that we find that the European Union additionally acted inconsistently with Article 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement.

### 7.5 Whether the European Union constructed the export price inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement

#### 7.5.1 Introduction

7.102. Indonesia claims that the European Union acted inconsistently with Article 2.3 and the fourth and fifth sentences of Article 2.4 of the Anti-Dumping Agreement by failing to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by P.T. Musim Mas was first resold to independent buyers in the European Union. In particular, Indonesia asserts that the EU investigating authorities improperly failed to include in that first independent resale price the additional amount – or premium – that was paid by clients to the related importer to P.T. Musim Mas, [[\*\*\*]]. The European Union argues that the premium does not form part of the price at which the imported biodiesel was first resold to an independent buyer.

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<sup>209</sup> Indonesia's second written submission, para. 72; response to Panel question No. 75, paras. 47-48.

<sup>210</sup> In *EU – Biodiesel (Argentina)*, Argentina argued that the 11% profit figure used by the investigating authority in the present investigation to calculate the injury elimination level would have been appropriate because it reflects similar levels of development between the Argentine and EU industries. (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.320).

<sup>211</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.350.

### 7.5.2 The EU authorities' construction of the export price for P.T. Musim Mas

7.103. We begin by recalling the relevant facts related to the European Union's determination of an export price for P.T. Musim Mas. Under the mandatory biodiesel blending regulatory framework of certain EU member states, palm fatty acid distillate (PFAD)-based biodiesel is eligible to be "double counted" for the purpose of compliance with EU mandatory biodiesel blending targets. This means that the contribution made by PFAD biodiesel is recognized to be twice that made by other types of biodiesel or biofuels. Because of this, producers are only required to use half as much PFAD biodiesel when blending with mineral diesel to comply with EU mandatory biodiesel blending targets. Customers are willing to pay more for PFAD biodiesels as a result, and hence, a producer is able to charge a premium to the client.<sup>212</sup> As relevant to Indonesia's claim in this dispute, biodiesel may only be "double counted" in Italy subject to the issuance of a certificate by the Italian government confirming that the biodiesel is eligible for double counting.<sup>213</sup>

7.104. In the investigation into biodiesel imports from Indonesia, the EU authorities concluded that there was a "national practice"<sup>214</sup> that clients purchasing PFAD biodiesel eligible for double counting would only pay the additional amount or premium for such biodiesel upon issuance of the certificate by the Italian government confirming the eligibility of the biodiesel for double counting. Upon receipt of such a certificate, the related importer would send a separate invoice to the client for payment of the outstanding premium to the related importer.<sup>215</sup> Evidence on the Panel's record confirms this practice.<sup>216</sup> Indonesia has also argued in this proceeding that, once customers became familiar with the operation of the double counting scheme, the invoice contained a single price that reflected the fact that PFAD biodiesel was eligible for double counting.<sup>217</sup>

7.105. In the Provisional Regulation, the EU authorities determined that the additional amount or premium that was paid by the client to P.T. Musim Mas' related importer [[\*\*\*]] did not form part of the price for resale to the first independent customer.<sup>218</sup> The EU authorities considered that:

Such premiums are not linked to the product concerned as such, but rather to the provision of documents by the related importer in order to obtain a government certificate which enables the related importer's client to fulfil the necessary conditions to blend only half the biodiesel quantity (given that this biodiesel can be counted 'double').<sup>219</sup>

7.106. In its comments on the Provisional Disclosure, P.T. Musim Mas objected to the exclusion of the double counting premium from the first independent resale price.<sup>220</sup> In the Definitive Regulation, the EU authorities maintained their decision that the premium paid for PFAD biodiesel did not form part of the export price, explaining that, even if it considered the premium as part of the export price, the premium would in any event have to be deducted again "in order to compare the export price with the same normal value with due account taken for differences that affect price comparability".<sup>221</sup>

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<sup>212</sup> Provisional Regulation, (Exhibit IDN-1), fn 1.

<sup>213</sup> Provisional Regulation, (Exhibit IDN-1), fn 1.

<sup>214</sup> Provisional Regulation, (Exhibit IDN-1), fn 1.

<sup>215</sup> Provisional Regulation, (Exhibit IDN-1), recital 69.

<sup>216</sup> Supplementary Agreement between [[\*\*\*]] and [[\*\*\*]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI)).

<sup>217</sup> Indonesia's second written submission, para. 103 (referring to Contract between [[\*\*\*]] and [[\*\*\*]] on the sale of Biodiesel (7 March 2014), (Exhibit IDN-33 (English translation) (BCI))). See also Indonesia's response to Panel question No. 77, para. 53 (referring to Contracts between [[\*\*\*]] and [[\*\*\*]] on the sale of Biodiesel (24 October 2014), and between [[\*\*\*]] and [[\*\*\*]] on the sale of Biodiesel (6 March 2014), (Exhibit IDN-35 (English translation) (BCI)).

<sup>218</sup> Provisional Regulation, (Exhibit IDN-1), recital 69.

<sup>219</sup> Provisional Regulation, (Exhibit IDN-1), recital 69.

<sup>220</sup> P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), p. 4.

<sup>221</sup> Definitive Regulation, (Exhibit IDN-2), recital 100. Article 2(10)(k) of the EU Basic Regulation implements aspects of Article 2.4 of the Anti-Dumping Agreement that address differences which affect price comparability. Under Article 2.4, an investigator is permitted to make due allowance for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

### 7.5.3 Whether the European Union properly excluded the double counting premium from the price at which the imported biodiesel was first resold to independent buyers in the European Union

7.107. Indonesia's challenge with respect to the construction of the export price of P.T. Musim Mas raises a single issue: whether the additional premium paid to P.T. Musim Mas' related importer [IMBI] for PFAD biodiesel, forms part of the price at which the imported biodiesel was first resold to an independent buyer for purposes of Article 2.3 of the Anti-Dumping Agreement.

7.108. Article 2.3 of the Anti-Dumping Agreement provides:

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

7.109. Indonesia submits that the language in Article 2.3 makes clear that the price charged to the first independent buyer is the starting point for the construction of an export price.<sup>222</sup> In Indonesia's view, the term "price" in Article 2.3 refers to the sum of money for which an article or item is sold. Indonesia submits that Article 2.3 does not contain any requirements or qualifications to the general rule that the price at which the imported products are first resold to an independent buyer should be used as the starting point for the construction of export price. For instance, Indonesia notes that Article 2.3 does not specify that the price at which a product is first resold to an independent buyer must be included in one invoice and be payable in one instance or free from any contingent conditions.<sup>223</sup>

7.110. Indonesia emphasizes that Italian customers contractually agreed to pay the premium and were willing to pay a higher price for the biodiesel sold because it was eligible for double counting. In Indonesia's view, this demonstrates that the premium is intrinsically linked to the product being sold, contrary to the determination made by the investigating authority.<sup>224</sup> Indonesia submits that this link is confirmed in contractual agreements between P.T. Musim Mas' related importer [[\*\*\*]] and its customers.<sup>225</sup>

7.111. The European Union does not dispute that the export price should be constructed on the basis of the price at which the imported product is first resold to an independent buyer.<sup>226</sup> However, the European Union is of the view that the premium has no link to the product concerned and is therefore not part of the price charged to the first independent buyer. The

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<sup>222</sup> Indonesia's first written submission, para. 206 (referring to Panel Report, *US – Stainless Steel (Korea)*, para. 6.91).

<sup>223</sup> Indonesia's first written submission, para. 207. Indonesia submits that the mere fact that the payment of part of the price is contingent on the presentation of certain documents does not mean that the price should be decreased by the amount of the premium for purposes of Article 2.3 of the Anti-Dumping Agreement. Rather, in Indonesia's view, the contingency is simply a modality of the payment. (Indonesia's first written submission, para. 213).

<sup>224</sup> Indonesia's first written submission, paras. 210-211 and 213.

<sup>225</sup> Indonesia's second written submission, para. 102 (referring, for example, to Supplementary Agreement between [[\*\*\*]] and [[\*\*\*]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI))).

<sup>226</sup> European Union's response to Panel question No. 26, para. 45 ("The question here is what is the 'price at which the imported products are first resold' within the meaning of Article 2.3.") See also response to Panel question No. 32, para. 51 ("The relevant legal standard for the purposes of this claim is in Article 2.3: 'the price at which the imported products are first resold'.") In the Specific Provisional Disclosure provided to [[\*\*\*]], the EU authorities explained that "[t]he double counting allowance was not considered part of the export price." (Specific Provisional Disclosure for [[\*\*\*]], annex 2 A, (Exhibit IDN-19 (BCI)), p. 4 (emphasis added)). Indonesia maintains that the use of the term "allowance" by the EU authorities does not mean that that the EU authorities treated the premium as an "allowance" within the meaning of Article 2.4 of the Anti-Dumping Agreement. According to Indonesia, the premium was reported in the initial sales MS Excel table of [[\*\*\*]] as an "allowance", and was subsequently reported by the EU authorities as an "allowance" due to the formatting of the European Commissions' MS Excel data table. (Indonesia's first written submission, fn 138). The European Union has not contested this point.

European Union argues that Article 2.3 concerns the price that pertains to what is imported and what is resold, which is the product. The premium is not imported or resold.<sup>227</sup> According to the European Union, the fact that Italian customers contractually agreed and were willing to pay the premium, or the fact that the premium was anticipated revenue to P.T. Musim Mas does not establish that the premium is part of the price.<sup>228</sup>

7.112. Article 2.3 of the Anti-Dumping Agreement authorizes a Member to construct the export price where, *inter alia*, the actual export price is unreliable because of association between the exporter and importer.<sup>229</sup> The plain language of Article 2.3 makes clear that "the price charged to the first independent buyer is a starting-point for the construction of an export price".<sup>230</sup> Article 2.3 does not itself contain any guidance regarding the methodology to be employed in order to construct the export price. The only rules governing the methodology for construction of an export price are set forth in Article 2.4, which provides that "[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made".<sup>231</sup> The panel in *US – Stainless Steel (Korea)* found that this sentence authorizes the only allowances that can be made.<sup>232</sup> After determining the price charged to the first independent buyer, an investigating authority would then work "backwards from the price at which the imported products are first resold to an independent buyer".<sup>233</sup>

7.113. There is no dispute that customers purchasing the biodiesel from P.T. Musim Mas' related importer [[\*\*\*]] are the first independent buyers. The sole issue is whether the premium that the customer pays to P.T. Musim Mas' related importer [[\*\*\*]] is properly considered as part of the price that is charged to first independent buyers.

7.114. There is no prior guidance on the interpretation of the term "price" as it appears in the phrase "the price at which the imported products are first resold to an independent buyer" in Article 2.3 of the Anti-Dumping Agreement. The Shorter Oxford English Dictionary defines the term "price" as "the sum in money or goods for which a thing is or may be bought or sold, or a thing or person ransomed or redeemed".<sup>234</sup> This would suggest that the phrase "the price at which the imported products are first resold to an independent buyer" refers to the sum in money for which the imported product was bought or sold. There is no further guidance regarding the term "price". In our view, as discussed in *US – Stainless Steel (Korea)*, the language "first resold" relates to the price being the starting point for the construction of the export price, from which an investigating authority would work "backwards" to construct an export price that would have been paid by the related importer had the sale been made on a commercial basis.<sup>235</sup> Accordingly, in constructing the export price, we consider that a Member must begin by determining the sum in money for which the imported product was bought by or sold to an independent buyer. A member may thereafter make any adjustments for allowances to the extent permitted under the fourth sentence of Article 2.4 of the Anti-Dumping Agreement. However, this does not change the fact that a Member must begin with the price charged to the first independent buyer.

7.115. We do not agree with the decision by the EU authorities that the premium is not part of the sum in money for which the exported product was bought by the first independent buyer. Both parties accept – as the EU authorities recognized – that customers are willing to pay a higher price

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<sup>227</sup> European Union's response to Panel question No. 26, para. 45.

<sup>228</sup> European Union's first written submission, para. 63. The European Union argues that a statement in a contract between two private enterprises cannot be determinative of the legal interpretation of what "price" means under the Anti-Dumping Agreement. (European Union's first written submission, para. 64).

<sup>229</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.90.

<sup>230</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.91.

<sup>231</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.91.

<sup>232</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.94.

<sup>233</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.99.

<sup>234</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2342.

<sup>235</sup> The panel in *US – Stainless Steel (Korea)* noted that the purpose of "working backwards" from the price at which products are first resold to an independent buyer is to remove the unreliability arising from association or a compensatory arrangement between the exporter and the importer or third party. The panel was referring to allowances to construct an export price contained in the fourth sentence of Article 2.4. (Panel Report, *US – Stainless Steel (Korea)*, para. 6.99).

for the PFAD biodiesel eligible for double counting.<sup>236</sup> This is because of its particular physical properties which make it eligible for double counting. The parties additionally agree that the premium amount is determined by market factors and equals the increased amount that customers are willing to pay for double counting-eligible biodiesel.<sup>237</sup> Customers are willing to pay a premium precisely because they are permitted to use half as much PFAD-based biodiesel when blending with mineral diesel. If the product did not qualify for the certificate and was ineligible for double counting because of its physical characteristics, the additional premium would not be paid.

7.116. The European Union argues that there is a price for the product and a separate price for the premium, and additionally emphasizes that it is the product which is imported and resold while the premium is neither imported nor resold.<sup>238</sup> First, the very notion that there is a price for the product and a price for the premium is misconceived. The premium represents an additional amount that the customer is willing to pay for the specific type and quantity of PFAD-based biodiesel that is eligible for double counting. The customer attributes the additional value to the fact that the biodiesel is eligible for double counting because of its particular physical properties. In the abstract, the premium is not anything additional that is being purchased. Therefore, it makes no sense to refer to the premium as having its own price. The fact that the premium is not imported also does not have any bearing on whether it may be considered part of the price at which the product is first resold. Similarly, the premium cannot be resold as it is simply a component of the price that is paid for the product.

7.117. The European Union has described the premium as a "distinct element" that is provided for separately in the contract and is paid in a different invoice.<sup>239</sup> The European Union has also argued that the premium has no link to the product concerned but rather, is linked to the provision of documents.<sup>240</sup> A 2011 sales contract submitted by Indonesia as evidence in this proceeding confirms that the premium was, initially at least, paid in a separate invoice upon receipt of a certificate confirming the eligibility of the PFAD biodiesel for double counting.<sup>241</sup> In addition, the provided contract indicates that P.T. Musim Mas' related importer [[\*\*\*]] provided documentation to the buyer to request the certificate.<sup>242</sup> We do not in any event consider it relevant that the amount of the premium may be paid separately in a different invoice or that documentation was provided that would enable the buyer to confirm the eligibility of the particular imported biodiesel for double counting. As we explained above, there is no guidance in Article 2.3 that requires that the price is paid in a single transaction or is reflected in a single invoice.<sup>243</sup> We also do not see how documentation confirming the physical properties or authenticity of a product means that the premium is not paid in exchange for the imported product.

7.118. We note the possibility exists that the certificate may not be granted if the biodiesel is found to be ineligible for double counting. As a factual matter, there is no evidence that this has occurred. In any event, the possibility that the certificate may not be granted has no bearing on our conclusion that, *in cases where the premium is paid for PFAD biodiesel*, the premium should be considered as part of the price at which the product is first resold. We do not see any incoherence in the view that the premium forms part of the price at which the product is first resold in any case the premium is paid, but does not form part of the price if it is not actually paid.

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<sup>236</sup> Definitive Regulation, (Exhibit IDN-2), recital 176 ("In fact data shows that double counting biodiesel has a small price premium over virgin biodiesel, the price of which is linked to mineral diesel.")

<sup>237</sup> Indonesia's response to Panel question No. 25, para. 41; European Union's response to Panel question No. 25, para. 44; and Provisional Regulation, (Exhibit IDN-1), recital 69.

<sup>238</sup> European Union's response to Panel question No. 26, para. 45.

<sup>239</sup> European Union's second written submission, para. 45.

<sup>240</sup> European Union's first written submission, para. 65.

<sup>241</sup> Supplementary Agreement between [[\*\*\*]] and [[\*\*\*]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI)), recitals 1-4.

<sup>242</sup> Supplementary Agreement between [[\*\*\*]] and [[\*\*\*]] on the sale of biodiesel (30 March 2012), (Exhibit IDN-32 (English translation) (BCI)), recitals 1-4.

<sup>243</sup> We note that Indonesia has also submitted several 2014 sales contracts as evidence, indicating that certain customers were willing to make payment for PFAD biodiesel and the premium in a single invoice. In our view, this supports Indonesia's contention that customers had become familiar with the operation of the double counting scheme and the eligibility of PFAD biodiesel to qualify for the certificate, and thus were willing to pay the full amount for the double counting-eligible biodiesel and the premium in the same invoice. (Contract between [[\*\*\*]] and [[\*\*\*]] on the sale of Biodiesel (7 March 2014), (Exhibit IDN-33 (English translation) (BCI)); Contracts between [[\*\*\*]] and [[\*\*\*]] on the sale of Biodiesel (24 October 2014), and between [[\*\*\*]] and [[\*\*\*]] on the sale of Biodiesel (6 March 2014), (Exhibit IDN-35 (English translation) (BCI)); see also Indonesia's second written submission, para. 103).

7.119. For the foregoing reasons, we therefore find that Indonesia has made a *prima facie* case that the European Union acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by failing to include the double counting premium as part of the price at which imported biodiesel produced by P.T. Musim Mas was first resold to an independent buyer within the meaning of that provision. In light of this finding, we are not required to address additional arguments of Indonesia or the European Union regarding the relevance of the rules contained in the third and fourth sentences of Article 2.4 of the Anti-Dumping Agreement or rules regarding differences affecting price comparability contained elsewhere in Article 2.4.<sup>244</sup>

#### 7.5.4 Conclusions

7.120. As indicated above, we consider that the price charged to the first independent buyer is the starting-point for the construction of an export price under Article 2.3 of the Anti-Dumping Agreement. In constructing the export price, we consider that a Member must begin by determining the sum in money for which the imported product was bought by or sold to an independent buyer. There is no further guidance to the term price in Article 2.3 relating to the price of products first resold to an independent buyer. On this basis, we consider that the premium that the customer pays to P.T. Musim Mas' related importer [[\*\*\*]] is properly considered as part of the price that is charged to first independent buyers. Therefore, we find that Indonesia has established that the European Union acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by failing to include the double counting premium as part of the price at which imported biodiesel produced by P.T. Musim Mas was first resold to an independent buyer within the meaning of that provision.

### 7.6 Whether the European Union's consideration of price effects was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

#### 7.6.1 Introduction

7.121. Indonesia claims that the EU authorities' consideration of the price effects of dumped imports is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Indonesia raises two main claims<sup>245</sup>:

- a. the EU authorities failed to ensure price comparability between imported and domestic biodiesel, by relying on low volume sales of cold filter plugging point (CFPP) 13 degrees centigrade biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports; and
- b. the EU authorities failed to establish the existence of significant price undercutting by failing: (i) to take into account noticeable differences between imported and domestic biodiesel; and (ii) to examine the significance of price undercutting with regard to the majority of the EU industry's sales.

#### 7.6.2 The EU authorities' consideration of the effect of dumped imports on the price of biodiesel sold in the domestic market

7.122. We begin by setting out the relevant facts concerning the EU authorities' price undercutting analysis. The EU authorities indicated that they would examine the effects of the imports from Argentina and Indonesia cumulatively for purposes of the injury analysis.<sup>246</sup> Despite the cumulative assessment, the price undercutting calculations were made separately for

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<sup>244</sup> The European Union has argued, for instance, that the premium paid for double counting biodiesel only results because of intervention by the Italian government. The European Union argues that state intervention of this type that creates special or exclusive rights and is specifically designed to encourage one type of activity is functionally equivalent to a decision to impose a tax, or "is in the nature of a negative tax". The European Union argues that the purpose of the first three sentences of Article 2.4 of the Anti-Dumping Agreement is to address state interventions like the double counting regime, and hence, the premium would in any event need to be deducted under these parts of Article 2.4. The European Union additionally emphasizes that there is no double counting premium scheme present in Indonesia. (European Union's first written submission, paras. 67-69 and 72; response to Panel question No. 36, para. 53; and second written submission, paras. 44, 46-48, and 51).

<sup>245</sup> Indonesia's first written submission, para. 223; second written submission, para. 114.

<sup>246</sup> Provisional Regulation, (Exhibit IDN-1), recital 90.

Argentina and Indonesia, due to the product differences between biodiesel produced by these countries. The comparison between imported and domestic biodiesel was made based on the CFPP, which is the temperature at which the biodiesel turns back into fat and cannot be used as fuel.<sup>247</sup> The biodiesel produced in Indonesia and sold to the EU market was mostly "palm methyl ester" (PME) with a CFPP level of 13 degrees centigrade (hereinafter "CFPP 13 biodiesel" or "PME"). The biodiesel from Argentina was exclusively "soybean methyl ester" (SME) with a CFPP level of zero degrees centigrade.<sup>248</sup> While SME and PME can be used in certain environments in their pure form, they are nearly always blended with "rapeseed methyl ester" (RME), which has a lower CFPP, before being used in the European Union.<sup>249</sup>

7.123. The EU industry produced biodiesel composed from different feedstocks, mainly from rapeseed (RME), but also from other feedstocks, including palm oil, waste, and virgin oils.<sup>250</sup> The EU industry blended several feedstocks together to produce the final biodiesel that was sold to customers.<sup>251</sup> The EU industry sold blended biodiesel at various CFPP levels, but mainly at a CFPP level of zero degrees centigrade (CFPP 0) and below.<sup>252</sup> In the price undercutting calculations, the EU authorities compared the price of PME from Indonesia and SME from Argentina to the price of blended CFPP 0 biodiesel sold by the EU industry (hereinafter "blended CFPP 0 biodiesel"). CFPP 0 biodiesel is a blend of different biodiesels. The EU industry used both its own production of biodiesel and imported biodiesel when producing blended CFPP 0 biodiesel. The EU authorities excluded blended CFPP 0 biodiesel made using imported biodiesel from their price undercutting calculations.<sup>253</sup>

7.124. Since Argentina exported SME with CFPP 0 to the EU market, the EU authorities compared prices of Argentine SME directly to the domestic sales of blended CFPP 0 biodiesel.<sup>254</sup> Indonesia mainly exported CFPP 13 biodiesel to the European Union.<sup>255</sup> Given that the volume of sales of domestically-produced CFPP 13 biodiesel was very low, the EU authorities considered that a direct comparison between imported and domestic CFPP 13 biodiesel was not "reasonable".<sup>256</sup> The EU authorities therefore compared Indonesian imports with blended CFPP 0 biodiesel produced by the EU industry. In order to compare CFPP 13 biodiesel from Indonesia to blended CFPP 0 biodiesel from the European Union, the EU authorities made an adjustment to account for the different CFPP levels between the compared products. The EU authorities calculated this adjustment by taking the price difference between the EU industry's sales of blended CFPP 0 biodiesel and the EU industry's sales of CFPP 13 biodiesel, and then adding that amount to the price of Indonesian biodiesel.<sup>257</sup> As a result, the price of Indonesian PME was adjusted upwards by 17.35%, to construct what the

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<sup>247</sup> Provisional Regulation, (Exhibit IDN-1), recital 94.

<sup>248</sup> Provisional Regulation, (Exhibit IDN-1), recital 30.

<sup>249</sup> The EU authorities also indicated that SME is blended with PME, because SME in its pure form does not meet the European standard EN 14214 as regards iodine and cetane numbers. (Provisional Regulation, (Exhibit IDN-1), recital 32).

<sup>250</sup> Provisional Regulation, (Exhibit IDN-1), recital 30; Definitive Regulation, (Exhibit IDN-2), recitals 18 and 117.

<sup>251</sup> Definitive Regulation, (Exhibit IDN-2), recital 123. This recital reads:

Unlike the exporting producers in Argentina and Indonesia, the Union industry does not sell biodiesel made from one feedstock, but blends several feedstocks together to produce the final biodiesel that is sold.

<sup>252</sup> European Union's second written submission, para. 57.

<sup>253</sup> Definitive Regulation, (Exhibit IDN-2), recitals 121 and 128; European Union's first written submission, para. 92.

<sup>254</sup> In *EU – Biodiesel (Argentina)*, Argentina did not submit any claims with regard to the EU authorities' consideration of price undercutting. Argentina challenged other aspects of the injury determination, in particular the evaluation of certain injury factors under Article 3.4 (production capacity and capacity utilization) and the examination of the other factors causing injury to the domestic industry under Article 3.5 (overcapacity, EU industry' imports of product concerned, double counting regimes in some EU Member States, lack of vertical integration, and access to raw materials). (Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.368-7.529; Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.114-6.148).

<sup>255</sup> Indonesia clarifies that around 19% of PME imports from Indonesia had CFPP levels other than CFPP 13, ranging between CFPP 7 and CFPP 17. (Indonesia's second written submission, para. 131).

<sup>256</sup> Provisional Regulation, (Exhibit IDN-1), recital 96.

<sup>257</sup> Provisional Regulation, (Exhibit IDN-1), recital 96; Definitive Regulation, (Exhibit IDN-2), recital 124.

price of imports of CFPP 0 biodiesel from Indonesia would have been.<sup>258</sup> The price was then compared to the price of blended CFPP 0 biodiesel sold by the EU industry.

7.125. In the Provisional Regulation, the EU authorities explained this methodology as follows:

All sales from Argentina to the EU were at a CFPP of 0 degrees centigrade. These sales were therefore compared to the sales of Union producers of biodiesel at a CFPP of 0.

All sales from Indonesia to the EU were at a CFPP of 13 degrees centigrade. Given the very small volume of sales of Union producers at this CFPP – since PME from Indonesia is almost always blended with other biodiesel from other sources before being sold to the first independent customer – a direct comparison was not considered reasonable. The export price of the PME from Indonesia at CFPP 13 was therefore adjusted upwards to a price at CFPP 0 by taking the difference in price on the Union market between the sales of PME at CFPP 13 manufactured by the Union industry and the average price of biodiesel at CFPP 0.<sup>259</sup>

7.126. Based on the above methodology, the EU authorities considered that there was significant price undercutting caused by the dumped imports of biodiesel from Argentina and Indonesia as compared with the price of EU biodiesel. The average undercutting margin for Indonesia was 4% during the investigation period.<sup>260</sup> The EU authorities confirmed their findings in the Definitive Regulation.<sup>261</sup>

### **7.6.3 Whether the adjustment made by the EU authorities to the price of imports of Indonesian biodiesel was flawed**

7.127. Indonesia first claims that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to ensure price comparability between imported and domestic biodiesel in terms of differences in quantities. Indonesia contends that the EU authorities failed to account for the low volume of sales of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports.

7.128. Article 3.1 of the Anti-Dumping Agreement sets out the basic principles that a determination of injury shall be based on positive evidence and involve an objective examination. It reads as follows:

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

7.129. The second sentence of Article 3.2 provides more specific guidance regarding the objective examination of the effect of dumped imports on prices in the domestic market. It provides:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.130. Indonesia argues that the adjustment to the price of CFPP 13 biodiesel imports did not resolve the issue of the lack of comparability in terms of volume differences, and is therefore

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<sup>258</sup> Indonesia's first written submission, para. 226(b) (referring to Specific Provisional Disclosure for the Wilmar Group, annex 8, (Exhibit IDN-20), p. 1); European Union's response to Indonesia's question No. 2, paras. 2-3.

<sup>259</sup> Provisional Regulation, (Exhibit IDN-1), recitals 95-96.

<sup>260</sup> Provisional Regulation, (Exhibit IDN-1), recitals 97 and 126.

<sup>261</sup> Definitive Regulation, (Exhibit IDN-2), recitals 121-129 and 147.

inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Indonesia refers to the EU authorities' conclusion that a direct comparison between Indonesian imports and EU sales of CFPP 13 "was not considered reasonable" given the "very small volume of sales" of EU-produced CFPP 13 biodiesel.<sup>262</sup> According to Indonesia, based on this statement, the EU authorities found that the EU industry's price of CFPP 13 biodiesel was "not comparable"<sup>263</sup> to Indonesian CFPP 13 biodiesel due to significant differences in volumes and therefore that the price was "unreliable"<sup>264</sup> for the purpose of price effects analysis.<sup>265</sup> Indonesia argues that, if the sales price of the EU producers' CFPP 13 biodiesel is non-comparable for a direct comparison, then EU sales of CFPP 13 are also non-comparable for calculating the price adjustment (to address different CFPP levels).<sup>266</sup> Indonesia underlines that the volume difference between CFPP 13 biodiesel (6,300 tonnes) and blended CFPP 0 biodiesel (993,860 tonnes) produced by the EU industry that was used for calculating the adjustment is nearly the same as the volume difference between Indonesian CFPP 13 biodiesel (995,663 tonnes) and EU-produced CFPP 13 biodiesel (6,300 tonnes) that was rejected for the purpose of a direct comparison.<sup>267</sup> Accordingly, Indonesia argues that the EU authorities failed to properly consider differences in quantities when making the price adjustment to account for physical differences between CFPP 13 biodiesel and blended CFPP 0 biodiesel. The result was a distorted calculation of the price adjustment, which undermined the accuracy of the price undercutting margin that was calculated.<sup>268</sup>

7.131. The European Union denies that the EU authorities found the price of EU industry's sales of CFPP 13 biodiesel was "unreliable" in the way Indonesia argues. Rather, a direct comparison between Indonesian and EU biodiesel at CFPP 13 was not considered "reasonable"<sup>269</sup> or "representative"<sup>270</sup> due to a very small volume of EU industry's sales at this CFPP "from the total of all biodiesel made and sold by the EU industry".<sup>271</sup> The European Union notes that the EU industry did not sell biodiesel made from one feedstock, but blended several feedstocks together to produce the final biodiesel that was sold to customers.<sup>272</sup> The EU authorities therefore compared the price of CFPP 13 biodiesel from Indonesia to the price of blended CFPP 0 biodiesel from the European Union, which had the highest share of domestic sales.<sup>273</sup> In particular, the sales of blended CFPP 0 biodiesel amounted to 993,860 tonnes, which represented 37% of the sales of the EU sampled producers, while other sales were mainly at lower CFPP levels.<sup>274</sup> The European Union submits that in order to ensure price comparability at CFPP 0, the export price of CFPP 13 biodiesel from Indonesia was adjusted upwards to a price at CFPP 0 biodiesel.<sup>275</sup> The European Union argues that this adjustment was calculated on the basis of transactions of similar volumes.<sup>276</sup>

7.132. Article 3.1 or 3.2 of the Anti-Dumping Agreement do not provide any specific guidance as to how an investigating authority should make adjustments for price comparability in the context of injury determination. This stands in contrast to Article 2.4 of the Anti-Dumping Agreement that provides specific guidance in respect of allowances to be made to ensure price comparability between the export price and the normal value in the context of dumping determination. For purposes of Article 3.2, previous panels have noted that price comparability can be ensured, for instance, by carefully defining product categories for the collection of price information or by making adjustments to prices as warranted by the factual circumstances of the case.<sup>277</sup> In light of our standard of review, the question before us is whether the EU authorities' calculation of the

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<sup>262</sup> Indonesia's first written submission, para. 245.

<sup>263</sup> Indonesia's first written submission, paras. 246 and 248-249; second written submission, paras. 115, 118-120, and 125-126.

<sup>264</sup> Indonesia's first written submission, paras. 246 and 248-249.

<sup>265</sup> Indonesia's first written submission, para. 246.

<sup>266</sup> Indonesia's first written submission, paras. 248-249.

<sup>267</sup> Indonesia's second written submission, paras. 115-116 and 118; opening statement at the second meeting of the Panel, para. 60.

<sup>268</sup> Indonesia's first written submission, paras. 250 and 254; second written submission, para. 122.

<sup>269</sup> Provisional Regulation, (Exhibit IDN-1), recital 96.

<sup>270</sup> European Union's first written submission, para. 86.

<sup>271</sup> European Union's response to Panel question No. 88, para. 41.

<sup>272</sup> European Union's first written submission, para. 82; response to Panel question No. 95, para. 54 (referring to Definitive Regulation, (Exhibit IDN-2), recital 123).

<sup>273</sup> European Union's second written submission, para. 57; response to Panel question No. 88, para. 41.

<sup>274</sup> European Union's second written submission, paras. 56-57.

<sup>275</sup> European Union's first written submission, para. 94.

<sup>276</sup> European Union's first written submission, para. 95 (referring to Definitive Regulation, (Exhibit IDN-2), recital 124).

<sup>277</sup> Panel Reports, *EC – Fasteners (China)*, para. 7.328; *China – X-Ray Equipment*, para. 7.51.

adjustment to account for different CFPP levels of Indonesian and EU biodiesel, in the context of its overall price undercutting analysis, was reasonable and objective.

7.133. As noted above, the EU authorities considered that a direct comparison between CFPP 13 biodiesel from Indonesia and CFPP 13 biodiesel made by the EU industry could not be made because of "very small volumes of sales" by the EU industry at this CFPP level. The European Union explained that CFPP 13 biodiesel constituted a small share of all biodiesel sold and produced by the EU industry.<sup>278</sup> The EU sampled producers sold 6,300 tonnes of CFPP 13 biodiesel during the investigation period, which constituted 0.23% of total sales of the EU sampled producers during the investigation period.<sup>279</sup> The low volumes of CFPP 13 sales thus represented a minuscule proportion of EU industry sales, which would not provide a robust basis for the price effects analysis. This would mean that the price comparison and the analysis of the effect of the imports would not have taken into account the vast majority (99.77%) of EU industry's sales. Such a comparison to such a small share of the EU industry's sales would not provide a reasonable picture of the effect of the dumped imports on the prices of the domestic like product to establish the existence of *significant* price undercutting, as required by Article 3.2.<sup>280</sup> It would not seem unreasonable that the EU authorities instead decided to compare the price of Indonesian imports to the EU industry's price of blended CFPP 0 biodiesel, which represented 37% of EU industry's sales (993,860 tonnes) during the investigation period. The European Union has specified that sales of blended CFPP 0 biodiesel represented the largest share of any of the types of biodiesel sold in the European Union by volume.<sup>281</sup>

7.134. We disagree with Indonesia that the EU authorities' decision not to make a direct comparison between imported and domestic CFPP 13 biodiesel rendered the price of CFPP 13 biodiesel produced by the EU industry to be "unreliable" or "non-comparable".<sup>282</sup> As we explain above, sales of 6,300 tonnes of CFPP 13 biodiesel produced by the EU industry during the investigation period constituted 0.23% of total sales of the EU sampled producers during the investigation period. The European Union has explained that it was not considered reasonable to base the price comparison on such a low percentage of sales by the EU industry, i.e. a low overall proportion of the EU industry's sales. We see no evidence on the record that the EU authorities considered that the price of CFPP 13 biodiesel was in any way unusable due to a large difference in volumes. Even though the EU authorities did not use the price of CFPP 13 biodiesel for the purpose of a direct comparison with Indonesian imports, this data was part of the record before the EU authorities. We do not find it unreasonable that the EU authorities relied on this data for a different purpose, i.e. to establish an adjustment factor to the price of CFPP 13 biodiesel from Indonesia in order to bring it to a CFPP level of 0.

7.135. We note that the EU authorities looked into the difference in quantities between sales of CFPP 13 biodiesel and blended CFPP 0 biodiesel made by the EU industry in the context of making the price adjustment. In particular, the EU authorities examined the quantities per transactions of sales of CFPP 0 biodiesel manufactured and blended in the European Union as compared to sales transactions of CFPP 13 biodiesel. In recital 124 of the Definitive Regulation, the EU authorities explained as follows:

For imports from Indonesia, which are at a CFPP of 13 or above, an adjustment was made, being the difference in price between the Union industry's sales of CFPP 13 and the Union industry's sales of CFPP 0, in order to compare the CFPP 13 and above from

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<sup>278</sup> Recital 96 of the Provisional Regulation notes that "PME from Indonesia is almost always blended with other biodiesel from other sources before being sold to the first independent customer". The Panel asked the European Union whether the decision not to make a direct comparison was strictly due to low volume of sales of CFPP 13 biodiesel or also to address the issue of blending. The European Union replied that the adjustment was made due to the low percentage of CFPP 13 biodiesel made and sold by the EU industry from the total of all biodiesel made and sold by the EU industry. (European Union's response to Panel question No. 88, para. 41).

<sup>279</sup> European Union's response to Indonesia's question No. 2, para. 6; Indonesia's response to Panel question No. 108, para. 102.

<sup>280</sup> Indonesia agrees that a finding of price undercutting with respect to the EU industry's sales of CFPP 13 biodiesel would not have been sufficient for considering whether there has been *significant* price undercutting by the dumped imports from Indonesia. (Indonesia's second written submission, para. 124).

<sup>281</sup> European Union's second written submission, para. 57.

<sup>282</sup> Indonesia's first written submission, paras. 246, 248-249, and 253; second written submission, paras. 120 and 125-126.

Indonesia with the CFPP 0 manufactured and blended in the Union. One Indonesian exporting producer noted that as the sales of CFPP 13 by the Union industry were made in small quantities per transaction, that these prices should be compared to similar sized transactions of CFPP 0. On inspection of transactions of CFPP 0 of a similar quantity per transaction, the difference in price found was in line with the difference using all transactions of CFPP 0, with differences in price both above and below the average price difference. As a result there was no change to the level of price undercutting found in the provisional Regulation in recital 97.<sup>283</sup>

7.136. Following an examination of quantities per transaction, the EU authorities observed that the difference in price remains the same regardless of the fact whether the average price was used based on all CFPP 0 transactions or only on the price of CFPP 0 transactions with the volume similar to the volume of CFPP 13 biodiesel transactions. Thus, contrary to what is suggested by Indonesia, the EU authorities took into account volume aspects of the sales in the context of making an adjustment.

7.137. Indonesia also notes that the EU authorities should have employed the same method for the calculation of the adjustment on account of physical differences that was used in the prior investigation concerning biodiesel from the United States, which factored in the type of feedstock used in producing biodiesel as a basis to make price comparisons instead of focusing on CFPP.<sup>284</sup> The EU authorities addressed the same point raised by interested parties during the investigation, explaining that the method based on CFPP was appropriate in the present investigation, because the CFPP level was a determinative factor for customers that were not concerned with the composition of biodiesel once the product meets a required CFPP level.<sup>285</sup> As mentioned above, Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not specify a methodology that must be followed in conducting a price effects analysis. An investigating authority enjoys a degree of discretion to determine the analytical methodologies that will be applied in the course of an investigation, provided that such method respects the basic principles in Article 3.1 that a determination of injury must be based on positive evidence and involve an objective examination.<sup>286</sup>

7.138. In addition, Indonesia submits that approximately 19% of biodiesel imports from Indonesia had a CFPP level other than CFPP 13, ranging from CFPP 7 to CFPP 17 degrees centigrade. Indonesia submits that the EU authorities improperly applied the adjustment calculated for CFPP 13 biodiesel to all biodiesel imports from Indonesia, without regard to the different prices of CFPP 7 to CFPP 17 varieties (other than CFPP 13 biodiesel).<sup>287</sup> The Panel questioned the parties on the volumes and prices of CFPP 7 to CFPP 17 biodiesel imports. Indonesia referred to the data of two producers that sold biodiesel other than CFPP 13 and indicated that the overall price differential between CFPP 7 and CFPP 15 biodiesel was around [[\*\*\*]] and the difference between CFPP 13 and CFPP 17 was [[\*\*\*]].<sup>288</sup> In its response, the European Union explained that sales of CFPP 12, CFPP 13, and CFPP 14 collectively accounted for 94% of all biodiesel imports from

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<sup>283</sup> Definitive Regulation, (Exhibit IDN-2), recital 124.

<sup>284</sup> In that investigation, the price of the respective feedstock (palm, soybean, or rapeseed oils) was used to calculate an allowance on account of physical differences between different types of biodiesel before a price comparison was made. The EU authorities also factored in the percentage of particular types of biodiesel in blended varieties to take into account all biodiesel that was imported or sold by the sampled EU producers. Indonesia submits that this method would have allowed to resolve the issue of difference in quantities and to permit the calculation of a reliable adjustment on account of physical differences. (Indonesia's second written submission, paras. 134-138; Commission Regulation (EC) No. 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, (Exhibit IDN-25), recital 84; and Council Regulation (EC) No. 599/2009 of 7 July 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America, (Exhibit IDN-26), recital 123).

<sup>285</sup> Definitive Regulation, (Exhibit IDN-2), recitals 122-123; Indonesia's first written submission, para. 255 (referring to Wilmar Group, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-13 (BCI)), pp. 28-29; and P.T. Pelita Agung Agrindustri, Post-Hearing Brief (30 August 2013), (Exhibit IDN-24), p. 7).

<sup>286</sup> Panel Reports, *Thailand – H-Beams*, para. 7.159; *China – Broiler Products*, paras. 7.474-7.476; *China – X-Ray Equipment*, para. 7.41; and *China – Cellulose Pulp*, para. 7.62.

<sup>287</sup> Indonesia's second written submission, paras. 131-133; first written submission, para. 244; and response to Panel question No. 102.

<sup>288</sup> Indonesia's response to Panel question No. 102, paras. 89-91.

Indonesia.<sup>289</sup> The European Union also noted that Indonesia had only referred to the price difference between the lowest price biodiesel import (presumably CFPP 17) and the highest price import (presumably CFPP 7).<sup>290</sup> This suggests that the price differential between CFPP 12, CFPP 13, and CFPP 14 would be appreciably smaller. In these circumstances, we consider that it was reasonable for the EU authorities to calculate an adjustment on the basis of CFPP 13 considering that so few imports were at the extremes (CFPP 7 and CFPP 17) that they would have an insignificant impact on the overall assessment.

7.139. Finally, in the second written submission, Indonesia raised additional arguments as to why the prices of CFPP 13 biodiesel produced by the EU industry cannot serve as the basis for calculating the adjustment to the price of imports from Indonesia. First, Indonesia submits that there may be additional costs when producing CFPP 13 biodiesel in the European Union, due to the fact that imported CPO feedstock from Malaysia or Indonesia may need to be used in the production of CFPP 13 biodiesel, which may have implications for the price of the final product. In Indonesia's view, this possibility may distort the comparison between CFPP 13 biodiesel and CFPP 0 biodiesel prices.<sup>291</sup> Second, Indonesia submits that the European Union itself acknowledged that the production of PME in the European Union is uneconomical which, according to Indonesia, demonstrates that "the odd sale of 6,300 MT of the Union produced CFPP 13°C biodiesel is unlikely to be representative of the value that the customers assign to the physical differences between PME and CFPP 0°C".<sup>292</sup>

7.140. We are of the view that these arguments are founded on a completely different basis from those adduced by Indonesia in its first written submission, in respect of its challenge to the adjustment, and we therefore do not consider it appropriate to make findings with regard to these additional arguments that have been raised in the second written submission.

7.141. In the first written submission, Indonesia focused its claim concerning the price adjustment on the EU authorities' failure to account for differences in quantities. Indonesia did not present any arguments in connection with the additional costs when producing CFPP 13 biodiesel in the European Union. Indonesia's arguments related to the presence of additional costs are a completely different basis for challenging the adjustment and cannot be considered as an elaboration of Indonesia's arguments presented in the first written submission or a rebuttal to the arguments of the European Union. We recall that Paragraph 6 of the Working Procedures provides that each party shall present the facts of the case and its arguments in its first written submission in advance of the first substantive meeting of the Panel with the parties.<sup>293</sup> Paragraph 6 of the Working Procedures is an expression of the principle of due process: the complainant must make its case at a sufficiently early stage of the proceeding to allow the respondent sufficient time to defend itself. Indonesia's additional arguments are based on the information provided in the Provisional Regulation, and we therefore consider that these arguments could have been articulated in Indonesia's first written submission.<sup>294</sup>

7.142. In consideration of the above, we conclude that Indonesia has failed to establish that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by relying on prices of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports.

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<sup>289</sup> European Union's response to Panel question No. 101, para. 57.

<sup>290</sup> European Union's comments on Indonesia's response to Panel question No. 102, paras. 46-47.

<sup>291</sup> Indonesia's second written submission, paras. 128-129.

<sup>292</sup> Indonesia's second written submission, para. 130.

<sup>293</sup> Paragraph 6 of the Panel's Working Procedures states that:

Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

<sup>294</sup> In the context of the injury determination, the EU authorities addressed the issues related to the DET system in their non-attribution analysis. In particular, the imports of biodiesel from Argentina and Indonesia made by the EU industry were examined as a non-attribution factor. (Provisional Regulation, (Exhibit IDN-1), recitals 132-136; Definitive Regulation, (Exhibit IDN-2), recitals 151-160). This issue was a subject to dispute in *EU – Biodiesel (Argentina)*. (Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.473-7.490).

#### 7.6.4 Whether the EU authorities failed to take into account noticeable differences between imported and domestic biodiesel and to examine the significance of price undercutting with regard to the majority of the EU industry's sales

7.143. Indonesia submits that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to take into account certain product differences between imported and domestic biodiesel as well as the majority of the EU industry's sales in its price undercutting analysis. Therefore, the EU authorities failed to properly consider the effect of the dumped imports from Indonesia on the price of the EU biodiesel.

7.144. Indonesia draws on the Appellate Body's interpretation of "significant price undercutting" to argue that the EU authorities failed to make a "dynamic assessment" of whether the price of PME imports from Indonesia had any effects on the price of the blended CFPP 0 biodiesel from the European Union.<sup>295</sup> Indonesia submits that the analysis fails to take into account that PME from Indonesia and blended CFPP 0 biodiesel from the European Union have noticeably different physical characteristics (different feedstock and CFPP levels), considerable price differences (the price of blended CFPP 0 biodiesel is 21% more expensive than Indonesian PME) and different modes of use (PME is rarely used by consumers in its pure form and must be blended with other types of biodiesel).<sup>296</sup> Considering that the price comparison was made between different types of biodiesel, Indonesia argues that the price effects analysis should have involved a discussion of price substitutability, price correlation, and the degree of the impact that movement of prices of imported PME might have on the EU producers' sales of blended CFPP 0 biodiesel.<sup>297</sup> Indonesia further argues that the EU authorities' finding of significant price undercutting is flawed because it is based on a comparison concerning only 37% of the EU industry's sales.<sup>298</sup>

7.145. The European Union argues that PME from Indonesia was in competition with EU biodiesel. The European Union submits that imported and domestic biodiesel had similar basic physical, chemical, technical characteristics and uses, and were considered to be like products.<sup>299</sup> The European Union notes that during the investigation the EU authorities rejected an argument raised by an interested party that PME from Indonesia was not a like product to RME and other EU biodiesels as well as to SME from Argentina due to the higher CFPP level of PME (which necessitates that PME is blended with other types of biodiesel before use).<sup>300</sup> In this respect, the EU authorities stated that PME is in competition with biodiesel produced in the European Union, which includes RME as well as biodiesel from palm oil and other feedstocks.<sup>301</sup> The EU authorities considered that PME is interchangeable with biodiesel produced by the EU industry, because it can be used in the EU market throughout the year by blending with other biodiesels.<sup>302</sup> The European Union also refers to the EU authorities' findings that imports from Indonesia and Argentina are blended with mineral diesel by the same trading companies and sold to customers in direct competition with EU biodiesel.<sup>303</sup>

7.146. The European Union further submits that it was reasonable to use only sales of blended CFPP 0 biodiesel, which represented 37% of the EU sampled producers' sales, because blended CFPP 0 biodiesel was the product with the highest volume of sales of the EU industry, while other sales were mainly of biodiesel with lower CFPP ratings.<sup>304</sup>

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<sup>295</sup> Indonesia's second written submission, para. 144 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.158).

<sup>296</sup> Indonesia's second written submission, paras. 146-147; first written submission, paras. 258 and 269.

<sup>297</sup> Indonesia's second written submission, paras. 148-151.

<sup>298</sup> Indonesia's second written submission, paras. 160-168; first written submission, paras. 259-269.

<sup>299</sup> European Union's response to Panel question No. 90, paras. 43-44 (referring to Provisional Regulation, (Exhibit IDN-1), recital 34).

<sup>300</sup> European Union response to Panel question No. 90, para. 45 (referring to Definitive Regulation, (Exhibit IDN-2), recitals 17-18).

<sup>301</sup> Definitive Regulation, (Exhibit IDN-2), recital 18.

<sup>302</sup> Definitive Regulation, (Exhibit IDN-2), recital 18.

<sup>303</sup> European Union's response to Panel question No. 90, para. 43 (referring to Provisional Regulation, (Exhibit IDN-1), recital 89).

<sup>304</sup> The European Union explained that the EU authorities "relied on 37% of the sampled producers' sales because sales of biodiesel of CFPP 0 were by far the most important sales of the sampled EU industry by volume, while other sales were mainly at lower CFPP". (European Union's second written submission, para. 57).

7.147. We note that in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body stated that the inquiry with regard to "significant price undercutting" requires "a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation".<sup>305</sup> The consideration as to whether the observed price undercutting is significant will necessarily depend on the circumstances of each case and may involve an examination of the nature of the products or product types at issue, the extent and duration of price undercutting, or the relative market shares of the product types with respect to which the authority has made a finding of price undercutting.<sup>306, 307</sup>

7.148. The obligation under Article 3.2 is to "consider", i.e. to take into account, whether there has been a significant price undercutting (or whether the effect of dumped imports is otherwise significant price depression or significant price suppression), rather than to make a *determination* regarding the effects of dumped imports on prices.<sup>308</sup> The provisions of Article 3 contemplate "a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination."<sup>309</sup> The consideration of the effects of dumped imports on prices is a step in the logical progression toward a determination whether injury is caused by the dumped imports.<sup>310</sup> The consideration of price effects under Article 3.2 is necessary in order to answer the ultimate question in Article 3.5 as to whether dumped imports are causing injury to the domestic industry. The outcome of this inquiry thus forms a basis for the overall causation analysis under Article 3.5, which requires an investigating authority to demonstrate that the dumped imports are causing injury to the domestic industry "through the effects of" dumping, or subsidies "[a]s set forth in paragraphs 2 and 4".<sup>311</sup>

7.149. Article 3.2 establishes a link between the price of dumped imports and that of like domestic products, by requiring that a comparison be made between the two.<sup>312</sup> When conducting a price effects analysis and comparing prices of the imported product to a certain domestic product, panels and the Appellate Body have emphasized that it is appropriate and important to consider factors affecting comparability, including the competitive relationship between the imported and domestic products at issue. Specifically, the Appellate Body stated in *China – GOES* that even though there is no explicit requirement regarding price comparability in Article 3.2, the failure to ensure price comparability is incompatible with basic principles for injury determination provided in Article 3.1.<sup>313</sup> The panels in *China – Broiler Products* and *China – X-Ray Equipment* highlighted that the failure to ensure price comparability in the price effects analysis could lead to a distorted analysis of the causal link between dumped imports and the injury to the domestic industry.<sup>314</sup> The panel in *China – X-Ray Equipment* stated that if two products being compared are not in competition with each other and thus are not comparable, the results of such analysis would not provide a reasonable basis for the causation analysis.<sup>315</sup>

7.150. We agree with Indonesia that there are complexities in the competitive relationship between PME imports from Indonesia and blended CFPP 0 biodiesel from the European Union that were not considered by the EU authorities in their price undercutting analysis. We note in particular that due to its higher CFPP level, Indonesian PME is generally not used on its own in the

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<sup>305</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.159.

<sup>306</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161.

<sup>307</sup> In making its claim under Articles 3.1 and 3.2, Indonesia also refers to the legal standard under Article 3.5 developed by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*. (Indonesia's second written submission, para. 149 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.262)). In this regard, we note that the requirements under Articles 3.2 and 3.5 are different. In *China – GOES*, the Appellate Body stated that the inquiry under Article 3.2 "does not duplicate the different and broader examination regarding the causal relationship" between dumped imports and injury to the domestic industry pursuant to Article 3.5. (Appellate Body Report, *China – GOES*, para. 154).

<sup>308</sup> Appellate Body Report, *China – GOES*, para. 130.

<sup>309</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>310</sup> Panel Report, *China – Cellulose Pulp*, para. 7.64.

<sup>311</sup> Appellate Body Report, *China – GOES*, para. 143 (emphasis original); Panel Report, *China – X-Ray Equipment*, para. 7.50.

<sup>312</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>313</sup> Appellate Body Report, *China – GOES*, para. 200. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161 and fn 382.

<sup>314</sup> Panel Reports, *China – Broiler Products*, para. 7.475; *China – X-Ray Equipment*, para. 7.51.

<sup>315</sup> Panel Report, *China – X-Ray Equipment*, para. 7.50.

EU market, but is rather an input to produce blended biodiesel.<sup>316</sup> Specifically, the EU authorities stated that:

SME and PME biodiesel could be used in their pure forms but they are generally blended, either among themselves or with RME, before being used in the European Union. The reason for blending SME with PME is that SME in its pure form does not meet the European standard EN 14214 as regards iodine and cetane numbers. The reason for blending PME (and SME) with RME is that PME and SME have a higher Cold Filter Plugging Point (CFPP) than RME and are not therefore suitable for use in their pure form during winter months in cold regions of the European Union.<sup>317</sup>

7.151. The EU authorities also observed that:

[T]he Cold Filter Plugging Point ('CFPP') of PME (at +13 Centigrade) means that PME cannot be used across the Union without being mixed with other biodiesels to bring down the CFPP.<sup>318</sup>

7.152. In response to a question from the Panel, Indonesia explained that the amount of PME used in a blend would depend on the season and location. In Southern Europe, CFPP -5 biodiesel is used in winter months while CFPP +5 biodiesel is used in summer months. In Northern Europe, CFPP -10 biodiesel is used in winter months and CFPP 0 biodiesel is alternately used in summer months. Indonesia noted that in summer months, PME is blended at an average of 70% in Italy and Spain, while in winter months it cannot be used at all. In the Scandinavian countries, PME may not even be used at all during the year.<sup>319</sup> The European Union has not contested this explanation.

7.153. We note that the Definitive Regulation confirms that sales of PME are affected by issues pertaining to seasonality:

Both SME and PME are imported into the Union, and are also manufactured within the Union, and are blended with RME and other biodiesels manufactured within the Union before being sold or blended with mineral diesel. The blenders have the choice of purchasing biodiesel from different feedstocks and different origins to produce their final product, based on the market and the climatic conditions throughout the year. PME is sold in larger quantities during the summer months and smaller quantities during the winter months, but it is still in competition with RME and Union made biodiesel and also SME from Argentina.<sup>320</sup>

7.154. This recital suggests that PME competes with SME from Argentina, RME, and other biodiesels produced by the EU industry, because they are used to make various blends that are suitable for certain climatic conditions. However, this recital does not address the important issue of whether imports of PME from Indonesia compete with blended CFPP 0 biodiesel produced by the EU industry. Taking into account this statement of the EU authorities, the Panel specifically asked the European Union to explain whether climatic conditions affect the competition between PME and blended CFPP 0 biodiesel. The European Union did not specifically address the issue of competition between imported PME and blended CFPP 0 biodiesel in its reply. The European Union simply stated that "[c]limatic conditions influence the suitable CFPP of the blend in different parts of the European Union", and that PME is blended with biodiesel having a lower CFPP (e.g. RME) in order to achieve CFPP 0.<sup>321</sup>

7.155. We note that recital 34 of the Provisional Regulation indicates that imported biodiesel and EU biodiesel had similar basic physical, chemical, technical characteristics, and uses, and were

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<sup>316</sup> Provisional Regulation, (Exhibit IDN-1), recitals 32 and 148. The European Union explained that the main product sold in the European Union was CFPP 0, which contains PME and other biodiesels blended together. (European Union's response to Panel question No. 88, para. 41). The European Union further noted that "[a]s PME has a higher CFPP (mostly CFPP 13), it is blended with biodiesel having a lower CFPP (e.g. RME) in order to achieve CFPP 0". (European Union's response to Panel question No. 91, para. 47).

<sup>317</sup> Provisional Regulation, (Exhibit IDN-1), recital 32.

<sup>318</sup> Provisional Regulation, (Exhibit IDN-1), recital 148.

<sup>319</sup> Indonesia's response to Panel question No. 89.

<sup>320</sup> Definitive Regulation, (Exhibit IDN-2), recital 117.

<sup>321</sup> European Union's response to Panel question No. 91, para. 48.

considered to be like products.<sup>322</sup> We also note that recital 18 of the Definitive Regulation rejects the argument of an interested party that PME is not a like product to biodiesel produced by the EU industry due to its high CFPP level, which necessitates that PME is blended with other types of biodiesel before use in the EU market. In particular, recital 18 reads:

PME produced in Indonesia is in competition with biodiesel produced in the Union, which is not just RME but also biodiesel made from palm oil and other feedstocks. PME can be used throughout the Union throughout the year, by blending with other biodiesels before use, in the same way as RME and SME. PME is therefore interchangeable with biodiesel made in the Union and therefore is a like product.<sup>323</sup>

7.156. The fact that the imported and domestic products were considered to be like products does not automatically mean that each of the products included in the basket of imported products is alike in *all* respects to each of the products included into the basket of domestic products.<sup>324</sup> Nor does the fact that the imported and domestic products were considered to be like products address the particular competitive dynamic that PME may only be used in a blend, and is actually a component of the different blends sold to end users in the EU market. PME might compete with RME to the extent that they both are used to produce a blend. However, this does not mean that PME and blended CFPP 0 biodiesel are in competition with each other. In response to a question from the Panel the European Union confirmed this understanding, noting that "[recital 18 of the Definitive Regulation] does not state that Indonesian imports of PME and blends or EU industry CFPP 0 biodiesel are in competition with each other."<sup>325, 326</sup>

7.157. The EU authorities found that the imported biodiesel was blended with mineral diesel by the same trading companies and sold to customers at the EU market in direct competition with biodiesel produced by the EU industry.<sup>327</sup> Even though both PME from Indonesia and blended CFPP 0 biodiesel might compete for sales to the companies who blend biodiesel with mineral diesel, this point nonetheless does not address the fact that the EU authorities failed to explain

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<sup>322</sup> Recital 34 of the Provisional Regulation states:

The investigation has shown that the product concerned, the product produced and sold on the domestic market of Argentina and Indonesia, and the product produced and sold in the Union by the Union industry have similar basic physical, chemical, technical characteristics and uses. They are therefore provisionally considered to be alike within the meaning of Article 1(4) of the basic Regulation.

(Provisional Regulation, (Exhibit IDN-1), recital 34)

<sup>323</sup> Definitive Regulation, (Exhibit IDN-2), recital 18.

<sup>324</sup> Panel Report, *China – X-Ray Equipment*, para. 7.65 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.13-7.76), which reads:

[A] number of panels have clarified that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration.

In addition, the panel in *China – Broiler Products* stated:

[I]n our view, ensuring that the products being compared are "like products" will not always suffice to ensure price comparability. Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported products.

(Panel Report, *China – Broiler Products*, para. 7.483)

<sup>325</sup> European Union's response to Panel question No. 92, para. 49.

<sup>326</sup> The European Union also notes that the EU authorities conducted a cumulative assessment of the effects of the dumped imports from Indonesia and Argentina on the prices of the domestic like product. The fact that the EU authorities decided to undertake a cumulative assessment based on the circumstances is not determinative of whether the requirements of Article 3.2 have been met. In any event, although the European Union refers to the fact that imports were assessed cumulatively, as Indonesia points out, the EU authorities assessed price undercutting separately for Indonesia and Argentina, due to the difference in products exported by these countries. The EU authorities clearly indicated that all Argentine exports were at a CFPP level of 0, while Indonesian imports were not, requiring a price adjustment, as discussed above.

(European Union's response to Panel question No. 90, para. 42; Indonesia's comments on the European Union's response to Panel question No. 90, paras. 17-20).

<sup>327</sup> Provisional Regulation, (Exhibit IDN-1), recital 89.

whether the comparison between sales of PME and blended CFPP 0 biodiesel was made at a proper comparison level, given that PME is an input to the blends, including CFPP 0 biodiesel.<sup>328</sup>

7.158. In our view, an objective and unbiased investigating authority should have explained why it was reasonable and adequate to compare the prices of blended CFPP 0 biodiesel with the prices of PME that is used as an input to produce such blend. The particular physical properties and end uses (for blending) have implications when it comes to competition between the compared products, i.e. an end user cannot simply use PME to the extent that blended CFPP 0 biodiesel is not available, due to climatic limitations related to CFPP levels. This necessarily affects price comparability in respect of those products. Although the EU authorities made an adjustment to the price of Indonesian PME to account for different CFPP levels of Indonesian and EU biodiesel, we are of the view that this adjustment is not sufficient to account for complexities in competitive relationships between PME and blended CFPP 0 biodiesel, given that Indonesian PME is an input to blended biodiesel, including blended CFPP 0.

7.159. Under these circumstances, we consider that the competitive dynamic between imports of Indonesian PME and blended CFPP 0 biodiesel is significantly more complex than the EU authorities' determination would suggest. The effect of seasonality in particular suggests that competition between imported PME and blended CFPP 0 biodiesel will often be nuanced, rather than "direct". While it is not impossible that a more complex analysis would still have justified a finding that imports of PME had a significant price undercutting effect on price of blended CFPP 0 biodiesel sold by the EU industry, Indonesia has raised a series of legitimate questions regarding the validity of the EU authorities' analysis. The European Union has failed to resolve these questions, or rebut the case made by Indonesia.<sup>329</sup>

7.160. We now turn to Indonesia's argument that the EU authorities improperly limited the price undercutting analysis to only 37% of the EU industry's sales. As discussed above, the EU authorities based the price undercutting calculations on the EU industry's sales of blended CFPP 0 biodiesel, which was the product with the highest volume of sales, representing 37% of the EU sampled producers' sales. We note that Articles 3.1 and 3.2 of the Anti-Dumping Agreement do not require an investigating authority to consider the existence of price undercutting with regard to the entire range of domestic like products.<sup>330</sup> There is no requirement in the Anti-Dumping Agreement that provides any specific percentage of the domestic industry sales to be considered in the price effects analysis. Indonesia acknowledges that there is no obligation under Article 3.2 to establish the existence of price undercutting with regard to the entire range of domestic like products.<sup>331</sup> Rather, Indonesia argues that extending the price undercutting analysis to at least two or three additional products sold by the EU industry would have significantly increased the credibility of the EU authorities' findings.<sup>332</sup> Indonesia adds that the EU authorities did not assess the significance of price undercutting in relation to the remaining 63% of the EU industry's

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<sup>328</sup> We note the argument of the European Union that PME imports from Indonesia were bought by both the EU industry in self-defence and also by blenders and traders. The European Union submits that the EU producers were in competition with traders and blenders which bought PME directly and Indonesian exporting producers with related importers in the European Union, which imported PME and then resold it. The European Union submits that this would be the correct price competition point. (European Union's opening statement at the second meeting of the Panel, paras. 43-44). Indonesia agrees that EU producers are likely to be in competition with traders and blenders. (Indonesia's response to Panel question No. 100, para. 86). This argument of the European Union fails to address the issue of whether there is a direct competition between CFPP 13 biodiesel from Indonesia and blended CFPP 0 biodiesel sold by the EU industry.

<sup>329</sup> We note the argument of the European Union that the existence of significant price undercutting was considered in the framework of other factors, such as an increase in volume of dumped imports from Indonesia and its market share in the EU market as well as a series of factors having a bearing on the state of the domestic industry. (European Union's first written submission, paras. 99-105). The fact that the existence of significant price undercutting was considered together with other factors examined for the purpose of injury analysis does not change our conclusion that the EU authorities' analysis of the price relationship between imported PME and blended CFPP 0 biodiesel is flawed, because it is not clear that imports of PME had an effect on prices of blended CFPP 0 biodiesel sold by the EU industry.

<sup>330</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180 (referring to Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.141).

<sup>331</sup> Indonesia's first written submission, para. 241 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180).

<sup>332</sup> Indonesia's second written submission, para. 166; opening statement at the second meeting of the Panel, para. 79.

sales.<sup>333</sup> We found above that the EU authorities' analysis of the price relationship between imported PME and blended CFPP 0 biodiesel is inadequate, because it fails to establish whether imports of PME from Indonesia had an effect on prices of blended CFPP 0 biodiesel sold by the EU industry. Given our finding that the price undercutting analysis is flawed, the question whether this analysis should have included a broader range of the domestic like products becomes moot. Given the failure by the EU authorities to properly establish price undercutting in respect of the price comparison that they did make, there is no sense in seeking to ascertain whether or not the EU authorities' analysis is sufficient to draw any conclusions regarding the existence of price undercutting more generally, including in respect of other products sold by the EU industry.<sup>334</sup>

7.161. Based on the above, we find that Indonesia has demonstrated that the EU authorities failed to establish that imports from Indonesia had an effect on prices of blended CFPP 0 biodiesel sold by the EU industry. Therefore, we find that Indonesia has made a *prima facie* case that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to establish the existence of significant price undercutting with regard to Indonesian imports. This *prima facie* case has not been rebutted by the European Union.

### 7.6.5 Conclusions

7.162. As indicated above, we find that Indonesia failed to establish that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by relying on prices of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports. We further find that Indonesia made a *prima facie* case that the EU authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to establish the existence of significant price undercutting with regard to Indonesian imports. Since that *prima facie* case has not been rebutted, we uphold Indonesia's claim accordingly.

## 7.7 Whether the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing and levying anti-dumping duties in excess of the margins of dumping

### 7.7.1 Introduction

7.163. Indonesia claims that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement. Indonesia submits that this results from the fact that the European Union acted inconsistently with Articles 2.2, 2.2.1.1, 2.2.2(iii), and 2.3 of the Anti-Dumping Agreement when constructing the normal value for Indonesian exporters and establishing the constructed export price for one Indonesian exporter. Indonesia submits that, if the dumping margins had been correctly calculated in conformity with Article 2, this would have resulted in negative dumping margins in certain cases, or the margins of dumping would have been significantly lower than the duties imposed by the European Union.<sup>335</sup> The European Union

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<sup>333</sup> Indonesia's second written submission, para. 167; opening statement at the second meeting of the Panel, para. 80.

<sup>334</sup> In its second written submission, Indonesia takes issue with the fact that the price undercutting analysis only covered the period from 1 July 2011 to 30 June 2012. Indonesia submits that the EU authorities failed to provide data on the price of CFPP 0 biodiesel during the entire period considered for the injury assessment, i.e. from 1 January 2009 to 30 June 2012, and instead only provided data on average prices of the EU industry during this period. (Indonesia's second written submission, paras. 157-159). We note that similar to Indonesia's arguments discussed in paras. 7.139. -7.141. above, Indonesia did not raise the issue of period considered for the price undercutting analysis in its first written submission. This allegation appears to relate to Indonesia's broader claim that the EU authorities failed to perform a dynamic assessment of price developments and trends over the entire period of investigation. Nevertheless, the specific factual allegations are new and were not raised by Indonesia in its first written submission. We therefore consider it inappropriate to address this new allegation in our report. In any event, it is well-established that panels do not need to address all arguments made by the parties. (See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.233). We do not need to address this argument in order to resolve the dispute before us, since we have already found that the EU authorities' price undercutting analysis was flawed.

<sup>335</sup> Indonesia's first written submission, paras. 271-272; second written submission, paras. 170-174.

has acknowledged the factual description provided by Indonesia, but has not responded to the substance of Indonesia's claim.<sup>336</sup>

### 7.7.2 The EU authorities' imposition of definitive anti-dumping duties

7.164. We recall that, on 29 May 2013, the EU authorities imposed individual provisional anti-dumping duties on four sampled Indonesian producers ranging between zero and 9.6%.<sup>337</sup> At the provisional stage, the dumping margins for the producers were based on the decision of the EU authorities to construct the normal value based on the recorded costs of production of Indonesian producers during the investigation period, the SG&A expenses incurred and a 15% profit margin.<sup>338</sup> In the Definitive Disclosure, the European Union revised its methodology for establishing the cost of production of biodiesel by replacing the recorded costs of CPO of Indonesian producers with an international reference price published by the Indonesian government. The EU authorities based their decision to replace the recorded costs of production on the finding that the Indonesian DET system distorted the costs of production of biodiesel producers.<sup>339</sup> As a result of this adjustment, the anti-dumping duty rates for Indonesian producers increased significantly. Definitive dumping margins were calculated ranging from 8.8% to 23.3% and definitive anti-dumping duties were applied corresponding to the calculated injury margins, which ranged from 8.8% to 20.5%.<sup>340</sup> The duties were applied in the form of specific duties expressed as a fixed amount in euro/tonne.

### 7.7.3 Whether Indonesia has established that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.165. The *chapeau* of Article 9.3 of the Anti-Dumping Agreement provides that:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.166. Article VI:2 of the GATT 1994 provides that:

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

7.167. Indonesia submits that, in order to demonstrate a violation of Article 9.3 of the Anti-Dumping Agreement, it is required to demonstrate, first, that the margin of dumping calculated by the EU authorities was determined in violation of the disciplines prescribed in Article 2 of the Anti-Dumping Agreement, and second, that the anti-dumping duties were imposed at a rate that is higher than the dumping margin that would have been established had the EU authorities acted consistently with Article 2.<sup>341</sup> Indonesia submits that a similar approach may be taken to establish a violation of Article VI:2 of the GATT 1994.<sup>342</sup>

7.168. Similar claims were raised by Argentina in *EU – Biodiesel (Argentina)*. In addressing Argentina's Article 9.3 claim, the panel considered that the term "margin of dumping" in Article 9.3 "relates to a margin [of dumping] that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines".<sup>343</sup> The panel additionally

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<sup>336</sup> European Union's first written submission, paras. 110-111; second written submission, para. 62.

<sup>337</sup> Provisional Regulation, (Exhibit IDN-1), recital 179.

<sup>338</sup> Provisional Regulation, (Exhibit IDN-1), recital 63.

<sup>339</sup> Definitive Disclosure, (Exhibit IDN-7), recitals 57-62.

<sup>340</sup> Definitive Regulation, (Exhibit IDN-2), recital 215. The injury margins for two Indonesian producers were determined to be higher than the corresponding dumping margins. Anti-dumping duty rates were assessed at the rate of the dumping margins for those producers.

<sup>341</sup> Indonesia's first written submission, para. 274.

<sup>342</sup> In order to demonstrate a violation of Article VI:2 of the GATT 1994, Indonesia submits that a complainant must demonstrate that: (a) the dumping margin was not determined in accordance with the disciplines laid out in Article VI:1 of the GATT 1994; and (b) that the anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article VI:1 of the GATT 1994. (Indonesia's first written submission, para. 281).

<sup>343</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.359.

observed that Article 9.3 also sets the maximum level at which anti-dumping duties may be levied.<sup>344</sup> With these considerations in mind, the panel recalled its finding that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 in establishing the dumping margins in the Definitive Regulation due to the use of surrogate input prices in the construction of normal value for investigated Argentine producers.<sup>345</sup> The panel considered whether this finding could provide a basis to establish an inconsistency with Article 9.3. The panel observed that an error or inconsistency under Article 2 of the Anti-Dumping Agreement "does not necessarily or automatically mean that the anti-dumping duty actually applied will exceed the correct margin of dumping".<sup>346</sup> The panel recalled that the EU authorities had used actual input prices when constructing the normal value and calculating the dumping margins at the provisional stage. While it was not possible to infer the exact dumping margins that would have been established had the determinations been done in accordance with Article 2, the panel considered that "the dumping margins established in the Provisional Regulation provide a reasonable approximation of what margins calculated in accordance with Article 2 of the Anti-Dumping Agreement might have been".<sup>347</sup>

7.169. The panel recalled that the margins of dumping calculated in the Provisional Regulation ranged from 6.8% to 10.6%, while the duties imposed by the EU authorities in the Definitive Regulation ranged from 22.0% to 25.7%, an amount that was "two to three times higher".<sup>348</sup> The panel considered this to be a "substantial difference" which "suggests that the anti-dumping duties imposed by the European Union in the Definitive Regulation exceeded what the dumping margins could have been had they been established in accordance with Article 2".<sup>349</sup> On this basis, the panel concluded that Argentina had made a *prima facie* case that the European Union had acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement.<sup>350</sup>

7.170. The panel further considered this "substantial difference" gave rise to a violation of Article VI:2 of the GATT 1994. The panel noted that Article VI:2 of the GATT 1994 provides that a WTO Member "may levy ... an anti-dumping duty not greater in amount than the margin of dumping in respect of such product", further specifying that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with [Article VI:1]". The panel in *EU – Biodiesel (Argentina)* considered that the terms "in accordance with" makes clear that Article VI:2 prohibits the levying of anti-dumping duties in excess of the dumping margin *determined consistently* with Article VI:1 of the GATT 1994 in the same way as the phrase "as established under Article 2" operates in Article 9.3.<sup>351</sup> Therefore, the reasoning applied under Article 9.3 applies *mutatis mutandis* to Argentina's claim under Article VI:2 of the GATT 1994.<sup>352</sup>

7.171. The Appellate Body upheld the panel's reliance on the margins calculated in the Provisional Regulation as appropriate in light of the specific circumstances.<sup>353</sup> The Appellate Body also agreed with the panel that the same considerations that guided its assessment of Argentina's Article 9.3 claim apply to its assessment under Article VI:2 of the GATT 1994.<sup>354</sup>

7.172. We have found in Sections 7.3.3 and 7.3.4 above that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 in establishing the dumping margins in the Definitive Regulation due to the use of surrogate input prices in the construction of normal value for investigated Indonesian producers. As Indonesia has indicated, the margins calculated in the Provisional Regulation ranged from zero to 9.6%, while the duties imposed by the EU authorities in the Definitive Regulation ranged from 8.8% to 20.5%, amounts which are twice as high or greater

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<sup>344</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.360.

<sup>345</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.364.

<sup>346</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.363.

<sup>347</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

<sup>348</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

<sup>349</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

<sup>350</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.365.

<sup>351</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.366.

<sup>352</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.366.

<sup>353</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.110.

<sup>354</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.112.

in the case of each Indonesian producer/exporter.<sup>355</sup> The difference is attributable to the change in the basis for constructing the normal value between the Provisional Regulation and the Definitive Regulation. In our view, this difference is significant. As the panel did in *EU – Biodiesel (Argentina)*, we therefore consider it appropriate to rely on the margins calculated in the Provisional Regulation as a basis to finding that the definitive anti-dumping duties imposed on Indonesian producers/exporters exceeded what the dumping margins might have been had they been established in accordance with Article 2 of the Anti-Dumping Agreement.

7.173. For the foregoing reasons, we uphold Indonesia's claim that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement. We further consider it appropriate to follow the approach taken by the panel in *EU – Biodiesel (Argentina)* in respect of Indonesia's claim under Article VI:2 of the GATT 1994.<sup>356</sup> Accordingly, we find that the same considerations that informed our assessment of Indonesia's claim under Article 9.3 therefore apply *mutatis mutandis* to our assessment of its Article VI:2 claim. We therefore also uphold Indonesia's claim that the European Union acted inconsistently with Article VI:2 of the GATT 1994.

#### 7.7.4 Conclusions

7.174. As indicated above, we consider that "margin of dumping" referred to in Article 9.3 of the Anti-Dumping Agreement relates to a margin of dumping that is established in a manner subject to the disciplines of Article 2 of the Anti-Dumping Agreement and which is therefore consistent with those disciplines. We find that Indonesia has made a *prima facie* case that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement. In addition, we find that the same considerations that informed our assessment of Indonesia's claim under Article 9.3 apply *mutatis mutandis* to our assessment of its Article VI:2 claim. We therefore also conclude that that the European Union acted inconsistently with Article VI:2 of the GATT 1994.

### 7.8 Whether the European Union acted inconsistently with Articles 7 and 9 of the Anti-Dumping Agreement through the application and definitive collection of provisional anti-dumping duties

#### 7.8.1 Introduction

7.175. Indonesia submits that the European Union committed several errors in calculating a provisional margin of dumping of 2.8% for the sampled Indonesian producer, P.T. Musim Mas, which led to an inflated provisional dumping margin that otherwise would have been negative.<sup>357</sup> Indonesia claims that the European Union acted inconsistently with a number of provisions of the Anti-Dumping Agreement because it applied and definitively collected provisional anti-dumping duties on imports from P.T. Musim Mas. Specifically, Indonesia requests the Panel to find that the European Union acted inconsistently with<sup>358</sup>:

- a. Article 7.1 of the Anti-Dumping Agreement because it applied provisional measures to P.T. Musim Mas based on a WTO inconsistent preliminary determination of the existence of dumping for P.T. Musim Mas;
- b. Article 7.2 of the Anti-Dumping Agreement because it applied to P.T. Musim Mas a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for P.T. Musim Mas;
- c. Article 9.2 of the Anti-Dumping Agreement because the provisional anti-dumping duty that was applied to P.T. Musim Mas and definitively collected was not in an "appropriate amount" within the meaning of Article 9.2; and

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<sup>355</sup> Indonesia's first written submission, table following para. 276. See also Provisional Regulation, (Exhibit IDN-1), recital 179; and Definitive Regulation, (Exhibit IDN-2), recital 215.

<sup>356</sup> The approach of the panel in *EU – Biodiesel (Argentina)* is set out in para. 7.170. above.

<sup>357</sup> Indonesia's first written submission, para. 286.

<sup>358</sup> Indonesia's first written submission, para. 285.

- d. Article 9.3 of the Anti-Dumping Agreement by applying to P.T. Musim Mas and definitively collecting a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for this exporting producer.

### **7.8.2 The EU authorities' determination of a provisional margin of dumping for P.T. Musim Mas and the definitive collection of provisional duties**

7.176. We begin by recalling the relevant facts related to the European Union's determination of a provisional margin of dumping for P.T. Musim Mas before addressing the substance of Indonesia's claims. On 29 May 2013, the EU authorities imposed an individual provisional anti-dumping duty of 2.8% on the sampled Indonesian producer, P.T. Musim Mas, based on a 2.8% provisional dumping margin and a 23.3% provisional injury margin.<sup>359</sup>

7.177. In its comments on the Provisional Disclosure, P.T. Musim Mas alleged that the EU authorities made three "mathematical and accounting errors"<sup>360</sup> in calculating the normal value and export price, as follows:

- a. a mathematical error in calculating P.T. Musim Mas' domestic SG&A expenses by adding to the amount of SG&A for domestic sales the amount of the export tax payable on exports of biodiesel, in constructing the normal value<sup>361</sup>;
- b. inconsistent accounting treatment of income tax expenses of two related importers, [[\*\*\*]] and [[\*\*\*]], by treating income tax expenses for both importers as an SGA expense, in addition to deducting an amount for income tax expenses as part of a 5% reasonable profit margin based on turnover, in constructing the export price<sup>362</sup>; and
- c. inconsistent accounting treatment of gasoil hedging gains and losses, by deducting gasoil hedging losses from the resale prices of a related importer [[\*\*\*]] as an allowance while failing to include hedging gains of another related importer [[\*\*\*]] in its resale prices, in constructing the export price.<sup>363</sup>

7.178. The EU authorities acknowledged these comments in the 1 October 2013 Definitive Disclosure and indicated that necessary corrections were made.<sup>364</sup> Specifically, with regard to the constructed normal value, the EU authorities excluded the export tax from the SG&A based on the fact that the export tax was not paid on domestic sales.<sup>365</sup> With regard to the constructed export price, the EU authorities excluded income tax expenses from SG&A amounts<sup>366</sup> and addressed the

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<sup>359</sup> Provisional Regulation, (Exhibit IDN-1), recital 179.

<sup>360</sup> P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), p. 1.

<sup>361</sup> P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), pp. 1-2.

<sup>362</sup> P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), p. 3.

<sup>363</sup> P.T. Musim Mas, Comments on Provisional Disclosure (1 July 2013), (Exhibit IDN-18 (BCI)), pp. 3-4; Specific Definitive Disclosure for [[\*\*\*]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 4; and Specific Provisional Disclosure for [[\*\*\*]], annex 2 A, (Exhibit IDN-19 (BCI)), p. 4.

<sup>364</sup> The Definitive Regulation notes that one interested party (P.T. Musim Mas) claimed that some "clerical mistakes" had been made in the calculation of the dumping margins at the provisional stage. (Definitive Regulation, (Exhibit IDN-2), recital 227). In the Definitive Disclosure, the EU authorities referred to "overstated SG&A", "an inconsistent accounting treatment of biodiesel hedging gains and losses" and "claims for data changes in the calculations", indicating in each case that "corrections" were made. (Definitive Disclosure, (Exhibit IDN-7), recitals 64, 73, 75, and 80).

<sup>365</sup> Definitive Disclosure, (Exhibit IDN-7), recital 64 ("One party claimed that in relation to recital (63) of the provisional Regulation an overstated SG&A was used for that party. After having examined this claim, it appeared that the SG&A for both domestic and export sales was included in the construction of normal value. The necessary corrections to use the SG&A for only the domestic sales were accordingly made.") Four specific disclosures were issued to importing companies of P.T. Musim Mas explaining the change. (Specific Definitive Disclosure for [[\*\*\*]], Annex 2 A (1 October 2013), (Exhibit IDN-28 (BCI)), p. 2; Specific Definitive Disclosure for [[\*\*\*]], Annex 2 B (1 October 2013), (Exhibit IDN-29 (BCI)), p. 2; Specific Definitive Disclosure for [[\*\*\*]], Annex 2 C (1 October 2013), (Exhibit IDN-30 (BCI)), p. 2; and Specific Definitive Disclosure for [[\*\*\*]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 2).

<sup>366</sup> Definitive Disclosure, (Exhibit IDN-7), recital 80 ("Several exporting producers came also forward with claims for data changes in the calculations. Where these claims were substantiated with the necessary evidence, corrections were made"); Specific Definitive Disclosure for [[\*\*\*]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 4; and Specific Definitive Disclosure for [[\*\*\*]], Annex 2 C (1 October 2013), (Exhibit IDN-30 (BCI)), p. 4. Indonesia submits that SG&A expenses for [[\*\*\*]] were decreased by 0.05% and

inconsistent treatment of hedging gains and losses by re-adding the amount of hedging losses from the resale prices of [[\*\*\*]] that had been deducted as an allowance.<sup>367</sup>

7.179. In its comments on the Definitive Disclosure, P.T. Musim Mas argued that the collection of provisional duties should only be done on the basis of the corrections that were made.<sup>368</sup> Based on the above corrections, P.T. Musim Mas submitted that the dumping margin at the provisional stage "would be *de minimis*" and therefore no provisional duties should be collected.<sup>369</sup> In the Definitive Regulation, the EU authorities confirmed the corrections.<sup>370</sup> Notwithstanding, the EU authorities rejected the request by P.T. Musim Mas and ordered the definitive collection of the provisional duty that had been provisionally secured on the basis that "the definitive anti-dumping duty is clearly higher than the provisional duty".<sup>371</sup> The definitive anti-dumping duty rate determined for P.T. Musim Mas was 16.9%, based on a dumping margin of 18.3% and an injury margin of 16.9%.<sup>372</sup>

### **7.8.3 Whether Indonesia has established violations of Articles 7 and 9 of the Anti-Dumping Agreement related to the definitive collection of provisional anti-dumping duties on imports from P.T. Musim Mas**

7.180. Indonesia's claims under Articles 7.1(ii), 7.2, 9.2, and the *chapeau* of Article 9.3 of the Anti-Dumping Agreement relate to the decision of the EU authorities to definitively collect the provisional anti-dumping duties on imports from P.T. Musim Mas.<sup>373</sup>

7.181. Article 7.1 provides in relevant part:

Provisional measures may be applied only if:

...

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; ...

7.182. The first sentence of Article 7.2 provides:

Provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping.

7.183. The first sentence of Article 9.2 provides:

When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be

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for [[\*\*\*]] by 0.18% to address the overstatement of income tax expenses. (Indonesia's first written submission, paras. 295-298).

<sup>367</sup> The EU authorities recognized that hedging losses of [[\*\*\*]] had been deducted as an allowance, while hedging gains of [[\*\*\*]] were not taken into account, in constructing the export price. The EU authorities determined that the export price should reflect the price actually paid or payable for the product when sold for export exclusive of any gain or loss related to hedging practices. Therefore, the EU authorities increased the export price of [[\*\*\*]] by the amount of hedging losses that were treated as an allowance. (Definitive Disclosure, (Exhibit IDN-7), recitals 74-75; Specific Definitive Disclosure for [[\*\*\*]], Annex 2 D (1 October 2013), (Exhibit IDN-27 (BCI)), p. 4 ("The hedge allowance was not considered part of the export price. As stated in Article 2(8) of the Basic Regulation, the export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the EU. Therefore the hedge allowance as indicated in the column 'other allowances' was now eliminated from the dumping calculation."))

<sup>368</sup> P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), paras. 2.2 and 21-22.

<sup>369</sup> P.T. Musim Mas, Comments on Definitive Disclosure, (Exhibit IDN-17 (BCI)), paras. 2.2 and 23.

<sup>370</sup> Definitive Regulation, (Exhibit IDN-2), recitals 76, 96, and 102.

<sup>371</sup> Definitive Regulation, (Exhibit IDN-2), recital 227.

<sup>372</sup> Definitive Regulation, (Exhibit IDN-2), recital 215.

<sup>373</sup> See paras. 7.177. -7.178. above.

dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.

7.184. The *chapeau* of Article 9.3 reads: "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".

7.185. In addressing Indonesia's claims, we consider it necessary to first clarify the precise nature of the findings sought by Indonesia. In its first submission, Indonesia framed its claims in respect of the fact that the EU authorities improperly *applied* provisional measures to P.T. Musim Mas, and thereafter definitively *collected* the provisional anti-dumping duty.<sup>374</sup> Indonesia argued, for instance, that an investigating authority cannot simply disregard the disciplines contained in Article 2 of the Anti-Dumping Agreement and impose and subsequently collect duties that exceed a provisionally estimated margin of dumping. In this respect, Indonesia argued that the language "provisionally estimated" in Article 7.2 cannot be understood as permitting an investigating authority to make "clear cut and apparent" violations of Article 2.<sup>375</sup> Indonesia submits that, if this were the case, this would defeat the purpose of imposing a limitation that provisional measures should not exceed the provisionally estimated margin of dumping.<sup>376</sup> Indonesia argues that corrections must be retroactive because, if investigating authorities were allowed to definitively collect provisional duties in excess of the actual provisional dumping margin, investigating authorities could circumvent the requirements of Article 7.2 (and Articles 9.2 and 9.3) by making errors when calculating the provisional dumping margin and thereafter collect those duties at the definitive stage.<sup>377</sup>

7.186. Following its first written submission, Indonesia made several subsequent clarifications regarding its claims. At the first substantive meeting with the Panel, for instance, Indonesia indicated that it does not challenge the provisionally estimated dumping margin and the imposition of the provisional duties "*as such*", but explained rather that Indonesia "does not agree with the definitive determination made in the Definitive Regulation to collect a provisional duty which the EU *knew* was erroneous and in excess of the real dumping margin that should have been determined at the provisional stage".<sup>378</sup> Indonesia further indicated that it does not seek to challenge the Provisional Regulation but "rather that part of the Definitive Regulation that ordered the definitive collection of the provisional duties".<sup>379</sup> Subsequently, in response to a question from the Panel, Indonesia specified that it "only seeks a finding of the Panel with respect to the definitive collection of [the provisional duties applied to P.T. Musim Mas] in the Definitive Regulation".<sup>380</sup>

7.187. From the outset, the European Union has maintained that Indonesia's claims under Articles 7 and 9 are misconceived in light of Indonesia's clarification that its challenge is directed at the definitive collection of provisional duties as opposed to any findings related to the imposition of provisional measures contained in the Provisional Regulation. The European Union considers that this is confirmed by the fact that Indonesia has identified as the pertinent measure the Definitive Regulation that ordered the definitive collection of the provisional duties. The European Union submits that the relevant obligations governing the definitive collection of provisional anti-dumping duties are contained in Articles 10.3 and 10.5 of the Anti-Dumping Agreement. The European Union contends that the EU authorities respected the obligation contained in Article 10.3 when collecting provisional duties that were secured for P.T. Musim Mas and therefore, Indonesia's claims should be rejected.<sup>381</sup>

7.188. In light of the clarifications by Indonesia, we understand that Indonesia's challenge is limited to whether the definitive collection of provisional duties applied to P.T. Musim Mas was in any way inconsistent with the cited provisions of Article 7 or 9 of the Anti-Dumping Agreement. As

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<sup>374</sup> See, e.g. Indonesia's first written submission, para. 285.

<sup>375</sup> Indonesia's first written submission, paras. 323-324.

<sup>376</sup> Indonesia's first written submission, para. 326.

<sup>377</sup> Indonesia's first written submission, para. 340.

<sup>378</sup> Indonesia's opening statement at the first meeting of the Panel, para. 59. (emphasis original)

<sup>379</sup> Indonesia's opening statement at the first meeting of the Panel, para. 59.

<sup>380</sup> Indonesia's response to Panel question No. 61, para. 95.

<sup>381</sup> European Union's first written submission, para. 129; opening statement at the first meeting of the Panel, para. 48; response to Panel question No. 50, para. 78; and second written submission, paras. 63-64 (referring to Indonesia's responses to Panel question No. 55, para. 89, and No. 61, para. 95). See also responses to Panel question Nos. 112, 114, 115, 117, 118, 120, and 121.

Indonesia has clarified that it is not challenging the fact that the EU authorities imposed provisional duties on P.T. Musim Mas pursuant to findings contained in the Provisional Regulation – nor has Indonesia challenged in any way the right of the European Union to impose provisional measures – we need not address issues related to the *application*, or *imposition* of provisional measures. In this regard, it follows therefore, that Indonesia may establish its claims to the extent that the cited provisions in Articles 7 and 9 are pertinent to the definitive collection of provisional duties.

7.189. It is evident on the face of its various subparagraphs that Article 7 addresses the imposition, or application of provisional measures. Article 7.1 expressly refers to situations in which provisional measures may be *applied* (stating that "Provisional measures may only be applied if:"). In turn, Article 7.2 addresses the form which provisional measures that are applied may take, including provisional duties or security equal to the amount of the duty provisionally estimated, subject to the requirement that any duty or security taken does not exceed the provisionally estimated margin of dumping. Articles 7.3 and 7.4 address the period of *application* of provisional measures. Article 7.3 states that "[p]rovisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation". Article 7.4 indicates that "[t]he application of provisional measures shall be limited to as short a period as possible ..." Finally, Article 7.5 indicates that "[t]he relevant provisions of Article 9 shall be followed in the *application* of provisional measures".<sup>382</sup>

7.190. At the provisional stage, the EU authorities calculated a 2.8% provisional dumping margin for P.T. Musim Mas and subsequently ordered the imposition of provisional measures in respect of imports by P.T. Musim Mas.<sup>383</sup> This determination is contained in the Provisional Regulation, which Indonesia has indicated that it does not challenge. We recall that Indonesia has requested us to make findings only in respect of the *definitive collection* of those duties. Article 7.2 addresses the form and amount that provisional measures that are imposed may take, but does not address the definitive collection of those duties. As this is the case, we agree with the view of the European Union that Indonesia's claim under Article 7.2 as concerning the definitive collection of duties is misplaced. We therefore find that there is no basis to consider Indonesia's claims under Article 7.2 of the Anti-Dumping Agreement as concerns the definitive collection of provisional anti-dumping duties on imports from P.T. Musim Mas.

7.191. In addition, we find there is no basis for Indonesia's claim under Article 7.1(ii) of the Anti-Dumping Agreement because we consider that Indonesia's claim under Article 7.1(ii) is also dependent on the findings contained in the Provisional Regulation. The EU authorities' determination that a preliminary affirmative determination has been made of dumping for P.T. Musim Mas is based on those same findings.

7.192. We next consider the relevance of Indonesia's claims under Article 9.2 and the *chapeau* of Article 9.3 of the Anti-Dumping Agreement. Indonesia first claims that the European Union acted inconsistently with Article 9.2 of the Anti-Dumping Agreement because the EU authorities did not definitively collect provisional anti-dumping duties in the "appropriate amounts", as required by the first sentence of Article 9.2.

7.193. According to Indonesia, the term "appropriate amounts" in Article 9.2 is informed by the provisions of Articles 7.2, 9.3, and 10.3 of the Anti-Dumping Agreement. An appropriate amount that is collected may not exceed the amount of the provisionally estimated margin of dumping that is determined consistently with Article 2 of the Anti-Dumping Agreement. Indonesia acknowledges that, once the definitive findings have been made, the amount of the provisional duty that is definitively collected must comply with the requirement in Article 10.3 of the Anti-Dumping Agreement. In particular, in cases where the definitive duty is lower than the provisional duty paid or payable, or the amount established for the purpose of the security that is taken, the difference shall be reimbursed or the duty recalculated, as relevant to the circumstances.<sup>384</sup> However, Indonesia argues that the requirement to definitively collect provisional anti-dumping duties in appropriate amounts cannot be set aside due to the fact that an investigating authority made calculation errors that led to a higher provisionally estimated margin

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<sup>382</sup> Emphasis added.

<sup>383</sup> Provisional Regulation, (Exhibit IDN-1), recitals 60-79 and 173-182.

<sup>384</sup> Indonesia's first written submission, paras. 353-354.

of dumping at the provisional stage, or the fact that the definitive duty is ultimately higher than the provisional duty.<sup>385</sup>

7.194. Indonesia considers that the appropriateness of the duty in the context of provisional measures can be inferred from the requirement in the first sentence of Article 7.2 that the provisional duty cannot be greater than the provisionally estimated margin of dumping.<sup>386</sup> In addition, Indonesia cites the definition of "appropriate" that was referred to by the panel in *EC – Salmon (Norway)*, as "specially suitable (for to); proper fitting".<sup>387</sup> Thus, an "'appropriate' amount of anti-dumping duty must be an amount that results in offsetting or preventing dumping".<sup>388</sup>

7.195. Indonesia also claims that the European Union acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement. Indonesia argues that the *chapeau* of Article 9.3 is equally applicable to the imposition and definitive collection of provisional anti-dumping duties, and a violation results from the fact that the provisional anti-dumping duty that was applied to and definitively collected from P.T. Musim Mas was in fact higher than the provisionally estimated margin of dumping determined consistently with Article 2 of the Anti-Dumping Agreement.<sup>389</sup> Indonesia submits that the *chapeau* of Article 9.3 sets the ceiling for the imposition and collection of anti-dumping duties.<sup>390</sup>

7.196. The European Union argues that Indonesia's claims under Article 9.2 and the *chapeau* of Article 9.3 should fail. The European Union contends that the EU authorities' preliminary determination of dumping in respect of P.T. Musim Mas was not based on a "flawed calculation" but was in fact a provisional estimate within the meaning of Article 7.2.<sup>391</sup> Therefore, the European Union argues that Indonesia has not established that the amount of the anti-dumping duty provisionally estimated was greater than the provisionally estimated margin of dumping and Indonesia cannot establish that the duties that were collected were not in an appropriate amount.<sup>392</sup> In addition, the European Union argues that Indonesia has failed to take into account that the definitive duty has been found to be higher than the provisional duty paid or payable, which triggers the obligations contained in Articles 10.3 and 10.5. According to the first sentence of Article 10.3, the European Union submits that any amount estimated for the purpose of the security need not be released if the definitive duty is higher than the provisional duty paid or payable.<sup>393</sup> The European Union submits that it respected this obligation by not collecting the difference between the definitive and provisional duties.<sup>394</sup>

7.197. We note that Article 9 is entitled "Imposition and Collection of Anti-Dumping Duties". We recall that Article 7.5 of the Anti-Dumping Agreement provides that "[t]he relevant provisions of Article 9 shall be followed in the application of provisional measures". Thus, according to Article 7.5, we understand that certain provisions of Article 9 concerning either the imposition or collection of anti-dumping duties may be relevant in respect of the *application of provisional measures*. This may include, for instance, the decision whether or not to impose anti-dumping duties in cases where all requirements for imposition have been fulfilled, or the decision whether the amount of the duty to be imposed shall be the full margin of dumping or less, as set out in Article 9.1. Article 9.2 indicates that anti-dumping duties that are imposed shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from

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<sup>385</sup> Indonesia's first written submission, para. 357.

<sup>386</sup> Indonesia's first written submission, para. 355.

<sup>387</sup> Indonesia's first written submission, para. 356 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.704).

<sup>388</sup> Panel Report, *EC – Salmon (Norway)*, paras. 7.704-7.705.

<sup>389</sup> Indonesia's first written submission, paras. 349-350.

<sup>390</sup> Indonesia's first written submission, para. 348 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 130; and *US – Continued Zeroing*, para. 315).

<sup>391</sup> See, e.g. European Union's first written submission, paras. 131-133.

<sup>392</sup> European Union's first written submission, paras. 143-148; response to Panel question No. 57, para. 84.

<sup>393</sup> Article 10.3 of the Anti-Dumping Agreement provides:

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

<sup>394</sup> European Union's second written submission, para. 65; responses to Panel question No. 47, para. 74, and No. 49, para. 77. See also response to Panel questions Nos. 51 and 52.

all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings have been accepted.<sup>395</sup> The *chapeau* of Article 9.3 provides that the amount of anti-dumping duties shall not exceed the margin of dumping as established under Article 2. The European Union does not dispute that Article 9.2 and the *chapeau* of Article 9.3 may be relevant in respect of provisional measures.<sup>396</sup>

7.198. In our view, the definitive collection of the provisional duties paid or payable is governed under either Article 10.3 or 10.5 of the Anti-Dumping Agreement. Pursuant to the first sentence of Article 10.3 if the definitive anti-dumping duty is higher than the provisional duties paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. It may be inferred from this provision that any provisional duty or security that has been collected or otherwise secured by a cash deposit or bond is confirmed. On the other hand, the second sentence of Article 10.3 provides that where the definitive duty is lower than the provisional duties or security collected or secured, the difference must be reimbursed or the duty recalculated, as the case may be. As to Article 10.5, it states that any cash deposit made or bonds collected must be released expeditiously in cases where a final determination is negative.

7.199. In the circumstances of this dispute, the EU authorities ordered the definitive collection of the provisional duty that had been provisionally secured on the basis that the definitive duty calculated was higher than the provisional duty.<sup>397</sup> We agree with the European Union's argument that this approach is consistent with the obligation contained in Article 10.3 of the Anti-Dumping Agreement.

7.200. We disagree with Indonesia's argument that the EU authorities failed to collect duties in "appropriate amounts" within the meaning of Article 9.2 of the Anti-Dumping Agreement. We recall that, pursuant to Article 7.5 of the Anti-Dumping Agreement, certain provisions of Article 9 may be relevant to "the application of provisional measures". Yet, when referring to Article 9.2 we note that the provision indicates that anti-dumping duties shall be imposed and collected in the "appropriate amounts" in each case while Article 7 governs the application of provisional measures.<sup>398</sup> At the time of the *application* of provisional measures, Article 7.2 specifically allows for the collection of a provisional duty or otherwise the collection of security in the form of a cash deposit or bond. In either case, the amount that is collected shall not exceed the provisionally estimated margin of dumping. In this case, the EU authorities collected security equal to the margin of dumping that had been calculated at the provisional stage. In this sense, we do not see how the European Union failed to impose or collect duties in the appropriate amount *at the time of the application of provisional measures*. Article 9.2 cannot be interpreted without regard to Article 10.3 of the Anti-Dumping Agreement. The definitive collection of provisional duties occurred at the definitive stage following the correction of the errors that had been identified by P.T. Musim Mas. In the Definitive Regulation, the EU authorities ordered the definitive collection of the provisional duty consistently with the obligation in the first sentence of Article 10.3 of the Anti-Dumping Agreement, i.e. the EU authorities confirmed the provisional measures and did not collect the difference between the amount estimated for the purpose of the security and the definitive duty that was determined to be higher. We therefore reject Indonesia's claim under Article 9.2 of the Anti-Dumping Agreement.

7.201. We further disagree with Indonesia's argument that the definitive collection of provisional duties is inconsistent with the obligation in the *chapeau* of Article 9.3 of the Anti-Dumping Agreement that the amount of the anti-dumping duty shall not exceed the margin of dumping as

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<sup>395</sup> A panel previously found that the provision "sources found to be dumped" in Article 9.2 is applicable in respect of provisional measures. (Panel Report, *Canada – Welded Pipe*, para. 7.77).

<sup>396</sup> See, e.g. European Union's first written submission, para. 144 ("Indonesia also raises consequential claims under Articles 9.3 and 9.2 of the Anti-Dumping Agreement, which apply *mutatis mutandis* to provisional measures as per Article 7.5 of the Anti-Dumping Agreement".) We note that the European Union has argued that Indonesia should have brought a claim with respect to the provisional determination under Article 2 of the Anti-Dumping Agreement. (European Union's response to Panel question No. 49, para. 77; second written submission, para. 68). We do not exclude that a party may choose to bring a claim directly under Article 2 in relation to provisionally estimated dumping margin or the imposition of the provisional duties. However, we do not consider the fact that Indonesia did not bring a claim under Article 2 prevents us from addressing its claims under Article 9 in relation to the provisional measures imposed on P.T. Musim Mas.

<sup>397</sup> Definitive Regulation, (Exhibit IDN-2), recital 227.

<sup>398</sup> We recall that Articles 7.1, 7.3, 7.4, and 7.5 all refer to the application of provisional measures, while Article 7.2 addresses the form which provisional measures that are applied may take.

established under Article 2.<sup>399</sup> We consider that the *chapeau* of Article 9.3 is relevant in respect of the *application of provisional measures*, by virtue of Article 7.5 of the Anti-Dumping Agreement. This means the obligation is relevant at the time of the *application of provisional measures*. We understand Indonesia's claim under the *chapeau* of Article 9.3 is based on the same issue underlying its claim under Article 9.2, specifically, that the provisional anti-dumping duty applied to and definitively collected from P.T. Musim Mas was in fact higher than the provisional margin of dumping determined consistently with Article 2 of the Anti-Dumping Agreement. As noted above, at the time of imposition of provisional measures, pursuant to the first sentence of Article 7.2, the amount of provisional duty that is imposed, or security that is taken shall not exceed the provisionally estimated margin of dumping. The EU authorities collected security equal to the margin of dumping that had been estimated at the provisional stage, and in this sense, the provisional duty amount did not exceed the margin of dumping at the time of application of the provisional measures. We therefore reject Indonesia's claim under the *chapeau* of Article 9.3 of the Anti-Dumping Agreement.

7.202. Finally, in the context of addressing Indonesia's claims, we recall our findings in Sections 7.3.3 and 7.3.4 above that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 in establishing the dumping margins in the Definitive Regulation. This was due to the use of surrogate input prices in the construction of normal value for investigated Indonesian producers. We have observed that the substantial difference between the provisional and definitive duties is attributable to the change in the basis for constructing the normal value at the definitive stage of the investigation.<sup>400</sup> Had the European Union not substituted the recorded costs of producers the definitive duties for affected producers would not have been substantially higher than the provisional duties, if at all. Indonesia has submitted evidence in this proceeding to demonstrate that the provisional dumping margin for P.T. Musim Mas would have been negative, - 0.42%, had the EU authorities not committed the errors that are the subject of the present claim. The European Union has not contested this evidence.<sup>401</sup> This evidence before us thus supports the conclusion that the definitive anti-dumping duty rate for P.T. Musim Mas would have been negative had the European Union not changed the basis for constructing the normal value at the definitive stage. This in turn presumably would have had implications for the implementation of the relevant provision under Article 10.3 of the Anti-Dumping Agreement. We therefore note that our findings made in respect of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 are relevant to Indonesia's claims.

#### 7.8.4 Conclusions

7.203. We have addressed claims raised by Indonesia under Articles 7.1(ii), 7.2, 9.2, and the *chapeau* of Article 9.3 of the Anti-Dumping Agreement, in relation to the European Union's determination of a provisional margin of dumping for P.T. Musim Mas that led to the subsequent application of provisional duties to P.T. Musim Mas and the definitive collection of those duties. As set out above, we find that Indonesia has failed to establish a basis for its claims under Articles 7.2

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<sup>399</sup> We note that Indonesia has argued that the "basis" of its claim is that the provisional dumping margin was not calculated in compliance with the disciplines set out in Article 2 of the Anti-Dumping Agreement. (Indonesia's response to Panel question No. 61, para. 95). However, Indonesia has not identified particular provisions in Article 2 in respect of its claim, nor has Indonesia presented arguments in this proceeding in respect of how the errors made in constructing the normal value and export price violated particular obligations contained in the provisions of Article 2 of the Anti-Dumping Agreement.

<sup>400</sup> See para. 7.172. above.

<sup>401</sup> Indonesia's first written submission, paras. 286 and 288; response to Panel question No. 119; P.T. Musim Mas dumping margin calculation by the European Union at the time of the final disclosure in the original investigation, (Exhibit IDN-37 (BCI)); and P.T. Musim Mas dumping margin calculation by Indonesia, (Exhibit IDN-38 (BCI)). Indonesia's calculation is additionally confirmed in the disclosure that was submitted as Exhibit IDN-36 in this proceeding. We recall that the European Commission initiated a review of the anti-dumping measures imposed on imports of biodiesel originating in Argentina following the adoption of the panel and Appellate Body reports in the *EU – Biodiesel (Argentina)* dispute. In its notice of initiation of the review, the European Commission indicated that it also considered it appropriate to review the anti-dumping measures imposed on imports of biodiesel from Indonesia. (See para. 2.3. above). In the disclosure, the EU authorities recalculated the normal value for Argentine and Indonesian producers, including P.T. Musim Mas based on the actual costs of the main raw materials as contained in the producer/exporter records. Although the content of this disclosure does not constitute a final determination, recitals 40 and 87 confirm that the final definitive anti-dumping duty rate for P.T. Musim Mas would have been *de minimis* or zero. (See also European Union's response to Panel question No. 120).

and 7.1(ii) of the Anti-Dumping Agreement as concerns the definitive collection of provisional anti-dumping duties on imports from P.T. Musim Mas, in the view that Indonesia does not challenge findings related to the imposition of provisional measures contained in the Provisional Regulation. In addition, we reject Indonesia's claims that the European Union acted inconsistently with Article 9.2 or the *chapeau* of 9.3 of the Anti-Dumping Agreement.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers; we do not reach findings as to whether, as a consequence, the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994;
- b. the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" for the main input that was not the cost prevailing "in the country of origin", Indonesia;
- c. the European Union acted inconsistently with Articles 2.2.2(iii) and 2.2 of the Anti-Dumping Agreement by failing to determine "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin"; we reject Indonesia's request that we find that the European Union additionally acted inconsistently with Article 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement;
- d. the European Union acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by failing to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by P.T. Musim Mas was first resold to independent buyers in the European Union;
- e. Indonesia has not established that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by relying on prices of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports;
- f. the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to establish the existence of significant price undercutting with regard to Indonesian imports;
- g. the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively;
- h. Indonesia has not established that the European Union acted inconsistently with Article 7.1(ii) of the Anti-Dumping Agreement because it applied provisional measures to P.T. Musim Mas based on a WTO inconsistent preliminary determination of the existence of dumping for P.T. Musim Mas;
- i. Indonesia has not established that the European Union acted inconsistently with Article 7.2 of the Anti-Dumping Agreement because it applied to P.T. Musim Mas a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for P.T. Musim Mas;
- j. Indonesia has not established that the European Union acted inconsistently with Article 9.2 of the Anti-Dumping Agreement because the provisional anti-dumping duty that was applied to P.T. Musim Mas and definitively collected was not in an "appropriate amount", within the meaning of Article 9.2; and

- k. Indonesia has not established that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by applying to P.T. Musim Mas and definitively collecting a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for this exporting producer.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Indonesia under these agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994. Indonesia requests that we use our discretion under the second sentence of the same article to suggest ways in which the European Union should bring its measures into conformity with the Anti-Dumping Agreement and the GATT 1994. Indonesia considers that the measures at issue in this dispute should be withdrawn. We decline to exercise our discretion under the second sentence of Article 19.1 of the DSU in the manner requested by Indonesia.

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