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EUROPEAN UNION – COUNTERVAILING DUTIES ON IMPORTS OF BIODIESEL FROM INDONESIA

FINAL REPORT OF THE PANEL

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Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
China – AD on Stainless Steel (Japan)	Panel Report, *China – Anti-Dumping Measures on Stainless Steel Products from Japan*, WT/DS601/R and Add.1, adopted 28 July 2023
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Cellulose Pulp	Panel Report, *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WT/DS483/R and Add.1, adopted 22 May 2017, DSR 2017:IV, p. 1961
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
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EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
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Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
EU – Biodiesel (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add.1, adopted 28 February 2018, DSR 2018:II, p. 605
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Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
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Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Morocco – Hot-Rolled Steel (Turkey)	Panel Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/R and Add.1, adopted 8 January 2020; appeal withdrawn by Morocco as reflected in Appellate Body Report WT/DS513/AB/R, DSR 2020:I, p. 45
Pakistan – BOPP Film (UAE)	Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, appealed 22 February 2021

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Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
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US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
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US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Measures (China)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R, DSR 2015:I, p. 183
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
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US – Ripe Olives from Spain	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R and Add.1, adopted 20 December 2021, DSR 2021:I, p. 7
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
US – Softwood Lumber VI	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, p. 2485
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Softwood Lumber VII	Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020, appealed 28 September 2020
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073

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US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Supercalendered Paper	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R, DSR 2020:III, p. 1227
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Washing Machines	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title	Description/Long Title
EU-2 (English translation)	Presidential Regulation 61/2015	Regulation of the President of the Republic of Indonesia No. 61 of 2015 concerning collection and use of oil palm plantation fund (25 May 2015), submitted by the GOI to the Commission as exhibit GOI-BSF-2 (Indonesian original and English translation)
EU-3 (English translation)	Minister of Finance Regulation 133/PMK.05/2015	Regulation of the Minister of Finance of the Republic of Indonesia No. 133/PMK.05/2015 concerning general agency service rates of the OPPF management agency at the Ministry of Finance (14 July 2015) (Indonesian original and English translation)
EU-4 (English translation)	Presidential Regulation 24/2016	Regulation of the President of the Republic of Indonesia No. 24 of 2016 concerning amendment to Regulation of the President of the Republic of Indonesia No. 61 of 2015 concerning collection and use of oil palm plantation fund (15 March 2016), submitted by the GOI to the Commission as exhibit GOI-BSF-3 (Indonesian original and English translation)
EU-5 (English translation)	MEMR Regulation 26/2016	Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia No. 26 of 2016 concerning procurement and utilization of biodiesel biofuel in the framework of financing by the OPPF management agency (10 October 2016), submitted by the GOI to the Commission as exhibit GOI-BSF-5 (Indonesian original and English translation)
EU-6 (English translation)	MEMR Decree 2026/2017	Decree of the Minister of Energy and Mineral Resources of the Republic of Indonesia No. 2026 K/12/MEM/2017 concerning amendment to the Decree of the Minister of Energy and Mineral Resources No. 6034 K/12/MEM/2016 concerning market index prices for biofuel mixed into fuel oil (5 May 2017) (Indonesian original and English translation)
EU-7 (English translation)	Presidential Regulation 66/2018	Regulation of the President of the Republic of Indonesia No. 66 of 2018 concerning second amendment of Regulation of the President of the Republic of Indonesia No. 61 of 2015 concerning collection and use of oil palm plantation fund (15 August 2018), submitted by the GOI to the Commission as exhibit GOI-BSF-4 (Indonesian original and English translation)
EU-11	Appendix B questionnaire	Appendix B to the government questionnaire, titled "Information in relation to producers and distributors of palm oil (CPO), which provided palm oil to the biodiesel industry"
EU-35 (English translation)	MEMR Regulation 12/2015	Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia No. 12 of 2015 concerning third amendment to Regulation of the Minister of Energy and Mineral Resources No. 32 of 2008 concerning provision, utilization, and the trading procedures for vegetable fuel (biofuel) as other fuel (18 March 2015) (Indonesian original and English translation)
EU-47	Contract between the OPPF management agency and a biodiesel producer	Biodiesel procurement financing agreement for the period November 2017 – April 2018, between the OPPF management agency (BPDPKS) and an Indonesian biodiesel producer (English translation)
EU-50 (BCI)	Wilmar verification report	Commission's mission report of verification visit for Wilmar
EU-55 (BCI)	Disclosures of undercutting calculations	Methodology for calculation of the provisional undercutting margins, annex 2 in the provisional disclosure; Methodology for calculation of the definitive undercutting margins, annex 2 in the final disclosure
EU-56 (BCI)	Refineries information	Information materials collected by the Commission regarding certain refineries
EU-57 (BCI)	Traders information	Information materials collected by the Commission regarding certain traders involved in refining
EU-67 (BCI)	EBB's response to post-IP development questions	EBB's response to list B of the post-IP questions (6 September 2019)
EU-69	Final disclosure	General final disclosure document (4 October 2019)
EU-72	GOI's comments on EBB's response to post-IP development questions	GOI's comments on EBB's response to list B of the post-IP questions (16 September 2019)

Exhibit	Short Title	Description/Long Title
EU-74	Masol's, Saipol's, and Verbio's responses to post-IP development questions (open version)	Masol's response to list A of the post-IP questions (6 September 2019) (open version); Saipol's response to list A of the post-IP questions (13 September 2019) (open version); and Verbio's response to list A of the post-IP questions (10 September 2019) (open version)
EU-75 (BCI)	Contract between the OPPF management agency and PT Wilmar Nabati Indonesia	Financing agreement for procurement of vegetable fuel types biodiesel for the period November 2017 – April 2018 between the OPPF management agency (BPDPKS) and PT Wilmar Nabati Indonesia
EU-79 (BCI)		Appendix B's replies by nine CPO suppliers
EU-88 (BCI)	Annexes to EBB's response to post-IP development questions	Annexes to EBB's response to list B of the post-IP questionnaire (6 September 2019)
EU-102 (BCI)		European Biodiesel Board - post-verification visit email
EU-103 (BCI)		European Commission verification report - Guvnor
EU-107 (BCI)		Breakout of Indonesian imports
EU-109	Annex 3.h to GOI's letter of 30 August 2019	Annex 3.h to the letter dated 30 August 2019 from the GOI to the Commission, enclosing outstanding annexes to PTPN's response to the appendix B questionnaire
IDN-1	Provisional Regulation	Commission Regulation (EU) No. 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia, Official Journal of the European Union, L Series, No. 212/1 (13 August 2019)
IDN-2	Definitive Regulation	Commission Regulation (EU) No. 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, Official Journal of the European Union, L Series, 317/42 (9 December 2019)
IDN-5	Commission's letter to GOI (22 May 2019)	Letter dated 22 May 2019 from the Commission to the GOI indicating the intent to use Article 28 of the basic anti-subsidy Regulation (facts available)
IDN-6 (BCI)	GOI's response to Commission's letter of 22 May 2019	GOI's response to the Commission's letter of 22 May 2019 indicating the intent to use Article 28 of the basic anti-subsidy Regulation (facts available) (5 June 2019)
IDN-7	Deficiency letter to GOI	Deficiency letter dated 1 March 2019 from the Commission to the GOI
IDN-8 (BCI)	GOI's response to deficiency letter	GOI's response to the Commission's deficiency letter of 1 March 2019 (14 March 2019)
IDN-9 (BCI)	Wilmar's comments on final disclosure	Wilmar's comments on the general final disclosure document (14 October 2019)
IDN-10 (BCI)	Wilmar's comments on EBB's response to post-IP development questions	Wilmar's comments on EBB's response to list B of the post-IP questions (16 September 2019)
IDN-11 (BCI)	GOI's questionnaire response	GOI's response to government questionnaire, including exhibits (excerpts)
IDN-12 (BCI)[1]	GOI verification exhibits	Compilation of exhibits provided by the GOI during the on-site verification of the GOI questionnaire response
IDN-14 (BCI)	Provisional duties information for Wilmar	Letter dated 23 July 2019 from the Commission to Wilmar providing information on the planned imposition of provisional duties (excerpts)
IDN-15	Post-IP development questions	Letter dated 13 August 2019 from the Commission to the EBB and the sampled EU biodiesel producers, enclosing lists A and B of questions concerning developments after the end of the investigation period
IDN-17	GOI's provisional disclosure comments on subsidization findings	GOI's provisional disclosure comments on the findings on subsidization in Commission Regulation (EU) No. 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia (28 August 2019)
IDN-18	EU producers' sampling questionnaire responses	Company A's response to the sampling questionnaire (stamped 4 December 2018); Saipol's response to the sampling questionnaire (stamped 30 November 2018); and

[1] This exhibit has been submitted to the Panel as a single PDF file containing multiple documents that are not page-numbered consecutively. We therefore use the page numbering of the PDF file to make reference to a specific portion of this exhibit in this Report.

Exhibit	Short Title	Description/Long Title
		Verbio's response to the sampling questionnaire (stamped 30 November 2018)
IDN-20	Argentina Regulation	Commission Regulation (EU) No. 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina, Official Journal of the European Union, L Series, No. 40/1 (12 February 2019)
IDN-21	Decision on Argentine undertaking	Commission Regulation (EU) No. 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina, Official Journal of the European Union, L Series, No. 40/71 (12 February 2019)
IDN-22	GOI's comments on final disclosure	GOI's comments on the final general disclosure document (14 October 2019)
IDN-23	GOI's provisional disclosure comments on injury findings	GOI's provisional disclosure comments on the findings on injury in Commission Regulation (EU) No. 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia (28 August 2019)
IDN-31	Wilmar's provisional disclosure comments	Wilmar's comments on Commission Regulation (EU) No. 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia (28 August 2019)
IDN-32	Wilmar's letter of 10 September 2019	Letter dated 10 September 2019 from Wilmar to the Commission regarding lack of transparency in the non-confidential version of Masol's response to the post-IP development questions
IDN-33	Wilmar's letter of 23 September 2019	Letter dated 23 September 2019 from Wilmar to the Commission regarding lack of transparency in the non-confidential versions of the sampled EU producers' responses to the post-IP development questions
IDN-36 (BCI)	GOI's letter of 28 June 2019	Letter dated 28 June 2019 from the GOI to the Commission, enclosing the statement of the Ministry of Finance on tax allowances for biodiesel producers and PTPN's response to the appendix B and mini-questionnaire
IDN-37 (BCI)	GOI's letter of 30 August 2019	Letter dated 30 August 2019 from the GOI to the Commission, enclosing outstanding annexes to PTPN's response to the appendix B questionnaire
IDN-42 (BCI)	PT Wilmar Bioenergi Indonesia's sales information	Summary of information on biodiesel sales in the domestic market by PT Wilmar Bioenergi Indonesia
IDN-45, EU-46 (BCI)	GOI verification report	Commission's mission report of verification visit for GOI
IDN-56 (BCI)	Wilmar's rebuttal comments on EBB's submission on threat of injury	Wilmar's rebuttal of threat of injury allegations in EBB's submission of 29 April 2019 and comments on EBB's request for registration of imports (19 June 2019)
IDN-57	GOI's response to post-IP development questions	GOI's response to list B of questions concerning developments after the end of the investigation period, enclosed in the Commission's letter of 13 August 2019 to the EBB and the sampled EU biodiesel producers (6 September 2019)
IDN-58 (BCI)		Export figures of [[***]]
IDN-59 (BCI)		Wilmar's response to sampling questionnaire
IDN-60 (BCI)		PT Wilmar Bioenergi Indonesia's response to the exporter questionnaire
IDN-76 (BCI)		PTPN's audited account for the year 2017
IDN-82	Wilmar's comments on the EBB's complaint	Wilmar's comments on the EBB's complaint (17 January 2019)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AKR	PT AKR Corporindo Tbk
BCI	business confidential information
CARBIO	Cámara Argentina de Biocombustibles
CFPP	cold filter plugging point
CPO	crude palm oil
Commission	European Commission
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBB	European Biodiesel Board
FAME	fatty-acid mono-alkyl esters
GAIN	Global Agricultural Information Network
GATT 1994	General Agreement on Tariffs and Trade 1994
GOI	Government of Indonesia
investigation period	period of investigation for the subsidy determination (1 October 2017 – 30 September 2018)
Masol	Masol Iberia Biofuel, S.L.U.
MEMR	Minister of Energy and Mineral Resources
MIP	minimum import price
MOPS	Means of Platts Singapore
OPPF	Oil Palm Plantation Fund
period considered	period considered for the injury determination (1 January 2015 – 30 September 2018)
Pertamina	PT Pertamina
PME	palm oil methyl ester
post-IP	post-investigation period (1 October 2018 – 30 June 2019)
PTPN	PT Perkebunan Nusantara
RED	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC
RED II	Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast)
RME	rapeseed methyl ester
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SME	soybean methyl ester
USDOC	United States Department of Commerce
Verbio	Verbio Vereinigte BioEnergie AG
Wilmar	Wilmar Group, including PT Wilmar Nabati Indonesia, PT Wilmar Bioenergi Indonesia, and Wilmar Trading Pte. Ltd.
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 11 August 2023, 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 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[2]

1.2. Consultations were held on 4 October 2023.

1.2 Panel establishment and composition

1.3. On 13 October 2023, Indonesia requested the establishment of a panel pursuant to Article 6.2 of the DSU with standard terms of reference.[3] At its meeting on 27 November 2023, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in document WT/DS618/2, in accordance with Article 6 of the DSU.[4]

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 document WT/DS618/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 14 March 2024, the parties agreed that the panel would be composed as follows:

Chairperson:	Mr David UNTERHALTER
Members:	Mr Ricardo RAMÍREZ-HERNÁNDEZ Mr Peter VAN DEN BOSSCHE

1.6. Argentina, Australia, Brazil[6], Canada, China, Japan, Norway, the Russian Federation, Singapore, Thailand, Türkiye, the United Kingdom, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures[7], Additional Working Procedures concerning Business Confidential Information (BCI)[8], and timetable on 26 April 2024. The Panel updated its timetable on 8 July 2024, 10 February 2025, 20 March 2025, and 11 April 2025.

1.8. The Panel held a first substantive meeting with the parties on 8 and 9 October 2024. A session with the third parties took place on 9 October 2024. The Panel held a second substantive meeting with the parties on 4 and 5 February 2025. On 20 March 2025, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 17 April 2025. The Panel issued its Final Report to the parties on 12 June 2025.

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[2] Request for consultations by Indonesia, WT/DS618/1 (Indonesia's consultation request).
[3] Request for the establishment of a panel by Indonesia, WT/DS618/2 (Indonesia's panel request).
[4] DSB, Minutes of the meeting held on 27 November 2023, WT/DSB/M/485, para. 3.4.
[5] Constitution note of the Panel, WT/DS618/3/Rev.1.
[6] Brazil filed its notification of interest to participate in the Panel proceedings as a third party following the date of the Panel's composition. The Panel included Brazil in the list of third parties after consultations with the parties.
[7] Working Procedures of the Panel (Annex A-1).
[8] Additional Working Procedures of the Panel concerning Business Confidential Information (Annex A-2).

2 FACTUAL ASPECTS

2.1. In its panel request, Indonesia identified the measures at issue as "the definitive countervailing duties on imports of biodiesel from Indonesia as well as the underlying investigation that led to the imposition of these measures". Indonesia indicates that such measures "include, amongst others, the actions taken or omitted by the European Commission … during the course of – or in relation to – the investigations".[9] Indonesia's panel request states that the measures at issue "are evidenced by" the following legal instruments:

a. Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia (definitive Regulation)[10]; and

b. Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia (provisional Regulation).[11]

2.2. The panel request further notes that the legality of the measures at issue should also be reviewed in light of the European Commission's anti-subsidy measures on imports of biodiesel from Argentina imposed through the following legal instruments:

a. Commission Implementing Decision (EU) 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina (Decision on Argentine undertaking)[12]; and

b. Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina.[13]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Indonesia requests that the Panel find that the measures at issue are inconsistent with the European Union's obligations under Articles 1.1(a)(1)(i), 1.1(a)(1)(ii), 1.1(a)(1)(iv), 1.1(a)(2), 1.1(b), 1.2, 2.1, 2.4, 12.1, 12.3, 12.4, 12.4.1, 12.7, 12.11, 14, 14(d), 15.1, 15.2, 15.4, 15.5, 15.7, 15.8, 18.3, 19.3, 19.4, and 32.1 of the SCM Agreement, and Articles I:1, VI:3, and XVI of the GATT 1994.[14] Indonesia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the European Union bring its measures into conformity with its WTO obligations.[15]

3.2. The European Union requests that the Panel reject Indonesia's claims in their entirety.[16]

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 paragraph 23 of the Working Procedures (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Canada, Japan, the Russian Federation, the United Kingdom, and the United States are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, and C-7). Brazil, China, Norway, Singapore, Thailand, and Türkiye did not submit written or oral arguments to the Panel.

[9] Indonesia's panel request, p. 1.
[10] Definitive Regulation (Exhibit IDN-2).
[11] Provisional Regulation (Exhibit IDN-1).
[12] Decision on Argentine undertaking (Exhibit IDN-21).
[13] Argentina Regulation (Exhibit IDN-20).
[14] Indonesia's first written submission, paras. 73, 139, 207, 233, 234, 254, 272, 555, 554, 512, 152, 259, 336, 377, 499, and 501.
[15] Indonesia's first written submission, para. 561.
[16] European Union's first written submission, para. 1038.

6 INTERIM REVIEW

6.1. On 8 May 2025, the European Union submitted a written request for the review of precise aspects of the Interim Report. Indonesia did not submit any specific comments on the Interim Report. Neither party requested an interim review meeting. On 22 May 2025, Indonesia submitted comments on the European Union's requests for review. The Panel's discussion and disposition of the parties' submissions related to the interim review are set out in Annex A-3.

7 FINDINGS

7.1 Introduction

7.1. This dispute concerns countervailing duty measures that the European Union has imposed on imports of biodiesel originating in Indonesia. Indonesia has challenged the European Commission (Commission)'s determinations as to the existence of certain subsidies and the threat of material injury, as well as challenging other aspects of the investigation.[17]

7.2. In section 7.3, we address Indonesia's claims related to the Commission's determinations concerning the Oil Palm Plantation Fund (OPPF). In section 7.4, we address Indonesia's claims concerning the Commission's determination that Indonesia provides a countervailable subsidy to biodiesel producers through the provision of crude palm oil (CPO) to biodiesel producers. In section 7.5, we address Indonesia's claims related to the Commission's threat of material injury determination. In section 7.6, we address Indonesia's claims related to the Commission's decision to reject a price undertaking offer by an Indonesian biodiesel producer, the Wilmar Group[18] (Wilmar). In section 7.7 we address Indonesia's claims concerning the Commission's alleged failure to provide meaningful non-confidential summaries of EU producers' submissions. In section 7.8, we address Indonesia's claim that the Commission failed to provide necessary information to interested parties, including necessary information to propose alternative methodologies to determine the existence of price undercutting.

7.2 General principles regarding treaty interpretation, 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". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[19]

7.2.2 Standard of review

7.4. This dispute concerns claims raised by the European Union under the GATT 1994 and the SCM Agreement. Article 11 of the DSU sets out a general standard of review for panels, providing, 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.

[17] The investigation of subsidization and injury covered the period from 1 October 2017 to 30 September 2018 (the investigation period). The Commission examined trends relevant for the assessment of injury over the period from 1 January 2015 to the end of the investigation period (the period considered). In certain cases, the Commission also examined data post-dating the end of the investigation period until 30 June 2019 (the post-IP). See Provisional Regulation (Exhibit IDN-1), recital 13; Definitive Regulation (Exhibit IDN-2), recitals 16 and 321.

[18] The Wilmar Group includes two Indonesian companies, PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia, as well as a Singaporean company Wilmar Trading Pte. Ltd. (Provisional Regulation (Exhibit IDN-1), recital 28.)

[19] Appellate Body Reports, *US – Gasoline*, pp. 15-16; *Japan – Alcoholic Beverages II*, p. 10, section D.

7.5. Article 11 of the DSU thus establishes the standard of review this Panel must apply with respect to both the factual and the legal aspects of the present dispute. As concerns actions taken by an investigating authority, the obligation to conduct an "objective assessment" has been found to require panels to evaluate whether the competent authorities 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 supported the overall determination.[20] Panels and the Appellate Body have understood this standard to mean that a panel may not undertake a *de novo* review of the evidence or 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 investigation and must consider all such evidence submitted by the parties to the dispute.[21] 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".[22]

7.6. A panel's examination of whether an investigating authority's conclusions were reasoned and adequate is not necessarily limited to the pieces of evidence *expressly* relied upon by the authority to establish and evaluate the facts in arriving at a particular conclusion.[23] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting evidence on the record for each fact in the final determination.[24] However, since a panel's review cannot be *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on evidence on the record – cannot form the basis of a panel's finding that the authority's conclusion was reasoned and adequate.[25]

7.2.3 Burden of proof

7.7. 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.[26] Therefore, Indonesia bears the burden of demonstrating that the challenged measures are inconsistent with the GATT 1994 and the SCM Agreement. 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.[27] Each party asserting a fact should provide proof thereof.[28]

7.3 The Commission's determination that the GOI provides a countervailable subsidy to biodiesel producers through the OPPF

7.3.1 Introduction

7.8. In the underlying investigation, the Commission determined that the Government of Indonesia (GOI) subsidizes the Indonesian biodiesel industry by providing grants to Indonesian biodiesel producers through the OPPF. The GOI initially established the OPPF (and the OPPF management

[20] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.
[21] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188. See also Panel Reports, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.5; *US – Pipes and Tubes (Turkey)*, appealed 25 January 2019, para. 7.4; *US – Coated Paper (Indonesia)*, para. 7.7; *US – Washing Machines*, para. 7.5; *China – Autos (US)*, para. 7.5; *China – Broiler Products*, para. 7.5; and *China – GOES*, para. 7.4.
[22] Appellate Body Reports, *US – Softwood Lumber VI (Article 21*.5 *– Canada)*, para. 93; *US – Lamb*, paras. 106-107. See also Panel Reports, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.4; *US – Pipes and Tubes (Turkey)*, appealed 25 January 2019, para. 7.4; *US – Coated Paper (Indonesia)*, para. 7.7; *US – Washing Machines*, para. 7.5; *China – Autos (US)*, para. 7.5; *China – Broiler Products*, para. 7.5; and *China – GOES*, para. 7.4.
[23] Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.
[24] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.
[25] Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.
[26] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 337.
[27] Appellate Body Report, *EC – Hormones*, para. 104.
[28] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 335.

agency)[29] in 2015 through Presidential Regulation 61/2015[30] which was amended or clarified on several occasions.[31] The GOI established the OPPF alongside an amendment to mandatory requirements to blend biodiesel with petroleum-based diesel for resale to the domestic economy.[32] Disbursements made to Indonesian biodiesel producers through the OPPF are aimed at facilitating the procurement of biodiesel by domestic fuel blending entities in fulfilment of the domestic blending mandate.[33]

7.9. In this dispute, Indonesia raises various claims challenging the Commission's determination that the disbursements made to Indonesian biodiesel producers through the OPPF amount to a financial contribution in the form of direct transfer of funds, which confers a benefit and is specific to the biodiesel companies. The European Union asks the Panel to reject each of Indonesia's claims. Before addressing Indonesia's claims, we set out the relevant factual aspects of the functioning of the OPPF and its management agency.

7.3.2 Factual aspects concerning the functioning of the OPPF and the Commission's determinations

7.10. The Commission evaluated Presidential Regulation 61/2015[34], as amended by Presidential Regulation 24/2016[35], as well as Minister of Energy and Mineral Resources (MEMR) Regulation 26/2016 and Minister of Finance Regulation No. 133/PMK.05/015[36] for the purpose of assessing the functioning of the OPPF and its management agency.

7.11. Presidential Regulation 61/2015 entrusts the OPPF management agency (established in conjunction with the OPPF) to collect export levies on exports of palm oil commodities by virtue of Finance Regulation No. 133/PMK.05/015. Exporters pay levies at the time of export which are payable to an account appointed by the OPPF management agency.[37] Export levies are collected on exports of CPO and derivative products produced with CPO, including biodiesel. During the investigation period, the levy on different varieties of CPO was set at USD 50 per tonne while the levy on certain derivate products was lower. The export levy for biodiesel was set at USD 20 per tonne.[38]

7.12. Presidential Regulation 61/2015 designates the funds collected through the levies on CPO and CPO-based products for specific purposes, including the development of the palm oil industries related to the production of cooking oil and other downstream industries, and notably, the biodiesel industry.[39] The OPPF management agency may prioritize the use of funds based on specified governmental policies.[40]

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[29] The regulation defines the term "Oil Palm Plantation Fund", or "Fund", as "an amount of money collected by the Oil Palm Plantation Management Fund [*sic*] Agency", and the term "Regulator of Oil Palm Plantation Fund", or "Fund Management Agency", as "an agency formed by the Government to collect, administer, manage, keep, and distribute the Fund". (Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)), Articles 1(4) and 1(6)). Depending on the context, the parties also use the term "OPPF" to refer to the mechanism of collecting and using the funds pursuant to the regulation, or to the agency administering the mechanism.

[30] Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)).

[31] Presidential Regulation 24/2016 (Exhibit EU-4 (English translation)); MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)); and Presidential Regulation 66/2018 (Exhibit EU-7 (English translation)). See also Minister of Finance Regulation 133/PMK.05/2015 (Exhibit EU-3 (English translation)); MEMR Decree 2026/2017 (Exhibit EU-6 (English translation)).

[32] MEMR Regulation 12/2015 (Exhibit EU-35 (English translation)).

[33] Indonesia's first written submission, paras. 27, 32, and 66-69. See also MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)), Article 2 (setting out that the purpose of disbursements from the OPPF to biodiesel producers "aims to … the realization of accelerating the fulfilment of the minimum requirement for the utilization of Biofuel of Biodiesel Type"). The Commission observed that the B20 blending mandate, requiring at least a 20% blending rate with mineral diesel, was established in 2015 pursuant to MEMR Regulation 12/2015. (Provisional Regulation (Exhibit IDN-1), recital 189).

[34] Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)).

[35] Presidential Regulation 24/2016 (Exhibit EU-4 (English translation)).

[36] Minister of Finance Regulation 133/PMK.05/2015 (Exhibit EU-3 (English translation)).

[37] Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)), Articles 5(1) and 7(4).

[38] Minister of Finance Regulation 133/PMK.05/2015 (Exhibit EU-3 (English translation)), pp. 17-18.

[39] Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)), Articles 11(1) and (2). See also Presidential Regulation 66/2018 (Exhibit EU-7 (English translation)), Article 11.

[40] Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)), Article 11(3).

7.13. MEMR Regulation 26/2016 describes the purpose of disbursements from the OPPF to biodiesel producers to support the GOI's mandate to blend biodiesel with petroleum-based diesel for resale to the domestic economy.[41] Specifically, MEMR Regulation 26/2016 entrusts the director general of governmental entity Direktorat Jenderal Energi Baru, Terbarukan, dan Konservasi Energi (EBTKE) to appoint certain fuel blending entities[42] to procure and blend biodiesel with petroleum-based diesel.[43] The director general also appoints biodiesel producers to supply biodiesel to the appointed fuel blending entities, and allocates volumes of biodiesel to be provided by participating biodiesel producers.[44] At the time of the investigation, the Commission confirmed that the director general had appointed two fuel blending entities: state-owned oil and gas company PT Pertamina (Pertamina) and private oil and gas company PT AKR Corporindo Tbk (AKR).[45]

7.14. Presidential Regulation 61/2015 further sets forth a specific payment mechanism for purchases of biodiesels by appointed fuel blending entities (Pertamina and AKR). As per Presidential Regulation 61/2015, Article 19, fuel blending entities shall purchase biodiesel at the "market index price" for petroleum-based diesel (diesel reference price).[46] The Commission determined that the diesel reference price is based on prices reported by Platts Singapore for oil (the Means of Platts Singapore (MOPS)) plus the production cost of diesel in Indonesia.[47]

7.15. The Indonesian minister of energy and mineral resources also determines a biodiesel reference price. Pursuant to MEMR Decree 2026/2017, the biodiesel reference price is based on the CPO domestic price, to which transformation costs are added.[48] During the verification visit, the GOI explained that the amount of transformation costs added to the CPO domestic price is subject to yearly review, although the amount may not change. The Commission determined that a transformation cost of USD 125 per metric tonne was applied until 5 May 2017, and was subsequently lowered to USD 100 per metric tonne.[49]

7.16. Article 19 of Presidential Regulation 61/2015 directs Pertamina and AKR to pay participating biodiesel producers the diesel reference price for the purchase of biodiesel. Participating biodiesel producers invoice Pertamina and AKR for the purchase of biodiesel. Thereafter, biodiesel producers are required to provide an invoice of the sale to the OPPF management agency and, upon verification, obtain a reimbursement for the price difference between the price paid by Pertamina and AKR (the diesel reference price) and the reference price of biodiesel for the applicable period.[50] Participating biodiesel producers receive payments (direct cash/bank transfers) following verification.[51]

7.17. The Commission observed that during the investigation period all Indonesian exporting producers chose to participate in the procurement of biodiesel and thus were under the obligation to sell biodiesel to Pertamina and AKR. The Commission also observed that, during the investigation period, the reference price for biodiesel was higher than the reference price for diesel. As a result, all the exporting producers received payments from the OPPF during the investigation period.[52]

[41] MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)), Article 2; Provisional Regulation (Exhibit IDN-1), recitals 44 et seq.

[42] Applicable regulations define fuel blending entities as business entities having a business license to carry out activities of general trading of oil-gas petroleum fuel. See e.g. MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)), Article 1.

[43] MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)), Article 9(1).

[44] MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)), Article 9(8); Provisional Regulation (Exhibit IDN-1), recitals 44-45 and 56-59.

[45] Provisional Regulation (Exhibit IDN-1), recital 46.

[46] Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)), Article 19.

[47] Provisional Regulation (Exhibit IDN-1), recital 48.

[48] Provisional Regulation (Exhibit IDN-1), recital 48; MEMR Decree 2026/2017 (Exhibit EU-6 (English translation)).

[49] Provisional Regulation (Exhibit IDN-1), recital 48.

[50] Provisional Regulation (Exhibit IDN-1), recitals 47 and 49. See also Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)), Article 19; Presidential Regulation 24/2016 (Exhibit EU-4 (English translation)), Article 19; MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)), Articles 13-15; and Presidential Regulation 66/2018 (Exhibit EU-7 (English translation)), Articles 11 and 18(1).

[51] Provisional Regulation (Exhibit IDN-1), recitals 47-50 and 62.

[52] Provisional Regulation (Exhibit IDN-1), recital 53.

7.3.3 Claims related to the Commission's characterization of the OPPF disbursements as financial contributions to biodiesel producers

7.18. Indonesia raises two distinct claims under Article 1.1(a)(1)(i) of the SCM Agreement in connection with the Commission's determination that the OPPF disbursements to investigated Indonesian biodiesel producers entailed a financial contribution to biodiesel producers:

a. Indonesia claims that the Commission erred by determining that OPPF disbursements to biodiesel producers entailed a financial contribution "by a government or any public body within the territory of a Member" as required by Article 1.1(a)(1) of the SCM Agreement.[53]

b. Indonesia claims that the Commission erred by determining that OPPF disbursements constituted "grants" and not purchases of biodiesel by the GOI.[54]

7.19. Article 1.1 of the SCM Agreement is entitled "Definition of a Subsidy" and provides the following in relevant part:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> > there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
> >
> > > a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)[.]

7.20. We address Indonesia's two claims in turn.

7.3.3.1 Whether the Commission erred in finding that the OPPF disbursements to biodiesel producers entail a financial contribution *by* a government or public body

7.21. Indonesia first claims that the OPPF payments to biodiesel producers are not properly characterized as a direct transfer of funds under of Article 1.1(a)(1)(i) of the SCM Agreement because the payments do not involve financing *by the government* to the recipient biodiesel producers.

7.22. In the investigation, the Commission determined that the OPPF is funded through export levies on the exportation of CPO and derivative products, including biodiesel.[55] As explained above[56], the Commission further determined that the legal acts implementing the OPPF granted the OPPF management agency the right to use the export levies imposed on CPO and derivatives for the purpose of reimbursing biodiesel producers equal to the price difference between the price paid by Pertamina and AKR (the diesel reference price) and the reference price of biodiesel for the applicable period. Thus, the funds of the OPPF are used for the benefit of biodiesel producers. The Commission additionally noted that the collection of levies is carried out by Indonesian customs authorities.[57]

7.23. Based on these facts, the Commission took the view that the legal framework implementing the OPPF "effectively grants the Management Agency the exercise of governmental functions with respect to the biodiesel sector" and accordingly, the Commission found that the OPPF management agency acts as a public body.[58] In this regard, the Commission additionally observed that "the

[53] Indonesia's first written submission, paras. 70 and 73-84. See also Indonesia's panel request, section 1(a).
[54] Indonesia's first written submission, paras. 85-86 and 91-106. See also Indonesia's panel request, section 1(b).
[55] Provisional Regulation (Exhibit IDN-1), recitals 42 and 60.
[56] See paras. 7.14-7.16 above.
[57] Provisional Regulation (Exhibit IDN-1), recital 60.
[58] Provisional Regulation (Exhibit IDN-1), recitals 59-61.

Steering Committee of the [m]anagement [a]gency is composed exclusively of officials of various ministries of the GOI".[59]

7.24. Further to this assessment and upon confirming that biodiesel producers that sold to Pertamina and AKR received direct cash/bank transfers from the OPPF funds during the investigation period, the Commission concluded that OPPF disbursements made to biodiesel producers qualify as "direct transfer[s] of funds from a government[] pursuant to Article 3(1)(a)(i) of the basic Regulation", in the form of grants to the investigated biodiesel producers.[60]

7.25. The Commission also responded to arguments put forward by the GOI and exporters that the disbursements made to biodiesel producers were not made "by the government" because they were "privately sourced", effectively constituting the funds of biodiesel producers. The Commission responded that EU regulations and the SCM Agreement do not require an investigating authority to take into account the origin or nature of the funds transferred by the government. Rather, the Commission observed that what matters is that the transfer of funds is attributable to the state, as opposed to private funds used at the discretion of private operators.[61]

7.26. The Commission also found that the GOI had failed to prove its assertion that the funds were collected outside the specific accounts of the GOI's budget and thus concluded that the levy is collected and becomes part of the general budget of the state.[62] In this regard, the Commission explained:

> The fact that the levy is then directed to the OPPF is just the manner how the GOI uses the public revenue collected from the export levies and export taxes. In any event, the OPPF consists of funds which are collected by means of export levies and export taxes imposed by the GOI and the funds are controlled by the [m]anagement [a]gency. Therefore, they amount to public resources, regardless of whether they are an integral part of the State's budget.[63]

7.27. Contrary to the Commission, Indonesia argues that the origin or nature of funds is not irrelevant. Indonesia emphasizes the statement by the Appellate Body in *US – Large Civil Aircraft (2nd complaint)* that "[i]t is clear from the examples in subparagraph (i) that a direct transfer of funds will normally involve financing *by* the government to the recipient".[64] Thus, Indonesia argues that if a direct transfer of funds does not involve financing *by the government* to the recipient, no financial contribution exists.[65] Central to its claim, Indonesia considers that the funds of the OPPF cannot constitute financing by the government since biodiesel producers themselves provided the funds upon paying the export levies. In view of this, Indonesia considers the funds to be private in origin, with the funds simply transferred back to biodiesel producers by the OPPF following the sale of biodiesel to fuel blending entities, Pertamina or AKR. In this way, Indonesia considers the transfer of funds by the OPPF to biodiesel producers involves financing by the biodiesel producers to biodiesel producers, rather than financing by the government to the biodiesel producers.[66]

7.28. Indonesia further emphasizes that the OPPF funds are an asset "owned" by the OPPF management agency, rather than the GOI. Indonesia submits that this follows from the regulations governing the OPPF, which specify that the export levy "shall be paid to a bank account appointed

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[59] Provisional Regulation (Exhibit IDN-1), recital 45.

[60] Provisional Regulation (Exhibit IDN-1), recitals 62 and 69.

[61] Provisional Regulation (Exhibit IDN-1), recital 63 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 284 and 309).

[62] Provisional Regulation (Exhibit IDN-1), recital 64. The Commission found that the GOI had not provided any indication that the payments were made into a specific account of the OPPF that would thus prevent the payments collected from the export levy on CPO and its derivative products from going into the general state budget and being used for any other purpose deemed fit by the GOI. (Definitive Regulation (Exhibit IDN-2), recital 32). The GOI and exporting producers contested this finding.

[63] Provisional Regulation (Exhibit IDN-1), recital 64.

[64] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 617. (emphasis added)

[65] Indonesia's first written submission, para. 74.

[66] See e.g. Indonesia's first written submission, paras. 74-75; second written submission, paras. 5-6, 8-11, 13, and 16-17.

by the [m]anagement [a]gency in cash".[67] Indonesia further refers to the 2018 audited financial statements of the OPPF management agency which Indonesia argues show that export levies have been actually paid to its bank accounts.[68] The income statement mentions, for instance, that in 2018 the OPPF management agency earned IDR 14,367,402,955,848 of its income as "Income from fund collection of oil palm plantation".[69] The income statement furthermore clarifies that "Income from fund collection of oil palm plantation" is "derived from levies on the export of oil palm products and its derivatives".[70] Finally, Indonesia emphasizes that "Notes" to the financial statements explain that references to "cash" include "cash in banks".[71] In this regard, Indonesia notes that the OPPF management agency has accounts in PT Bank Mandiri (Persero) Tbk, PT Bank Negara Indonesia (Persero) Tbk and PT Bank Rakyat Indonesia (Persero) Tbk.[72] Indonesia submits that the OPPF management agency makes disbursements in favour of biodiesel producers from the account held in PT Bank Mandiri.[73] On this basis, Indonesia argues that the OPPF management agency collects export levies and places them into its own bank account and the export levies are accounted for by the OPPF management agency. According to Indonesia, the state has no role in either collecting, owning, or managing export levies since such levies form part of assets recorded on the balance sheet of the OPPF management agency.[74]

7.29. Indonesia contends that, because the origin of funds derives from payments by biodiesel exporters and the funds are placed in a bank account established by the OPPF management agency, the actions of the OPPF management agency should be seen as comparable to that of a neutral keeper and handler of an escrow account, which serves as a conduit for the economic value of the market participants. According to Indonesia, this reinforces the notion that OPPF disbursements involve financing by the biodiesel producers to biodiesel producers, rather than financing by the government.[75]

7.30. Finally, Indonesia emphasizes that the export levies, by law, are collected by the OPPF with the primary objective of financing the OPPF and making payments to biodiesel producers.[76] Indonesia maintains that the OPPF is therefore, by law, funded by the CPO supply chain, for the benefit of the CPO supply chain. Indonesia further emphasizes that the OPPF can only function if the export levy is actually paid. Indonesia also submits that information provided by the GOI during verification showed that in 2017 and 2018, biodiesel producers paid more into the fund than they received back as disbursements.[77]

7.31. The European Union argues that the evaluation of the existence of a financial contribution involves the consideration of the nature of the transaction through which something of economic

[67] Indonesia refers to Article 5, paragraph 1, of Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)), amended by Presidential Regulation 24/2016 (Exhibit EU-4 (English translation)), which states "[l]evy on export of commodities as meant in Article 3 paragraph (1) point a shall be paid to a bank account appointed by the Fund Management Agency in cash." (Indonesia's first written submission, para. 76 and fn 75. See also Indonesia's second written submission, paras. 19-20 (referring to GOI's verification report (Exhibit EU-46 (BCI)), p. 9)).

[68] Indonesia's first written submission, para. 76. The 2018 audited financial statements of the OPPF management agency was submitted to the Commission as exhibit 2B during the on-site verification of the GOI questionnaire response. See GOI verification exhibits (IDN-12 (BCI)).

[69] Indonesia's first written submission, para. 77. See also GOI verification exhibits (Exhibit IDN-12 (BCI)), exhibit 2B (English version), p. 48 of the PDF file.

[70] Indonesia's first written submission, para. 78. See also GOI verification exhibits (Exhibit IDN-12 (BCI)), exhibit 2B (English version), p. 58 of the PDF file.

[71] Indonesia's first written submission, para. 79. See also GOI verification exhibits (Exhibit IDN-12 (BCI)), exhibit 2B (English version), p. 56 of the PDF file.

[72] Indonesia's first written submission, para. 79. See also GOI verification exhibits (Exhibit IDN-12 (BCI)), exhibit 2B (English version), p. 57 of the PDF file.

[73] Indonesia's first written submission, para. 80 and fn 81.

[74] Indonesia's first written submission, para. 81. Indonesia disagrees with the Commission's position in the provisional Regulation that the GOI could not prove that the export levy is collected outside the specific accounts of the GOI's budget. (Provisional Regulation (Exhibit IDN-1), recital 64). Indonesia argues that the GOI rebutted Commission's statement in its comments on the provisional Regulation where the GOI indicated that export levies are directly paid to the "BPDPKS" (the acronym used by the GOI in its comments to refer to the OPPF) and are not first paid to the customs authorities and then transferred to the BPDPKS. (GOI's provisional disclosure comments on subsidization findings (Exhibit IDN-17), para. 20).

[75] Indonesia's first written submission, para. 81; second written submission, paras. 5, 8, 13, and 16.

[76] Indonesia's first written submission, para. 82.

[77] Indonesia's first written submission, para. 83 (referring to GOI verification exhibits (Exhibit IDN-12 (BCI)), exhibit 2B; GOI's provisional disclosure comments on subsidization findings (Exhibit IDN-17), para. 21).

value is transferred by a government or a public body. What matters to evaluate whether a financial contribution exists is whether the transfer of funds is attributable to the government or public body (as opposed to private funds used at the discretion of private operators). Hence, the European Union maintains that the terms of Article 1.1(a)(1) do not impose any limitation on the source or origin of the funds transferred but only requires that there be a "government practice" that "involves a direct transfer of funds". The European Union maintains that there is nothing in the SCM Agreement limiting the notion of a subsidy only to the transfer of funds that the state has collected via certain specific sources (for example, via income taxes or value-added taxes) but excluding funds collected via other sources (such as duties imposed on the importation or exportation of goods).[78] Moreover, the European Union contends that the terms "by a government" in the *chapeau* of Article 1.1(a)(1) must be understood in light of the situations listed in subparagraphs (i) to (iv) that follow. These situations include financial contributions conferred by *private entities* in Article 1.1(a)(1)(iv) of the SCM Agreement. According to the European Union, this confirms that the source of the funds used for the financial contribution does not matter as a transfer of funds collected by *private entities* may well fall within the notion of a subsidy for purposes of Article 1.1 of the SCM Agreement.[79]

7.32. The European Union further argues that Indonesia overlooks the compulsory nature of the export levies imposed by the GOI on palm oil products. In this regard, the European Union underscores that, rather than biodiesel producers willingly deciding to contribute to a fund and then decide how such funds were going to be used, the GOI collected funds further to its policy objective to support the biodiesel industry. The European Union considers that the compulsory collection of export levies makes those funds public resources, and that these funds go into the state budget in the same way as any other funds collected by the GOI (e.g. corporate taxes).[80]

7.33. Finally, the European Union emphasizes that the GOI distributed those funds via the OPPF management agency, which was found to be a public body, and also decided how those funds were disbursed. The European Union notes that "Indonesia has not disputed the fact that the OPPF and the [m]anagement [a]gency constitute 'public bodies'".[81] Consequently, the European Union considers whether the OPPF funds are held in and transferred from bank accounts which have been opened in the name of the OPPF management agency does not have any bearing on the determination of whether the funds constitute public funds and thus constitute a financial contribution by a public body, for purposes of the SCM Agreement.[82]

7.34. We begin by recalling the text of Article 1.1(a)(1)(i) of the SCM Agreement. Article 1.1(a)(1)(i) characterizes, as a financial contribution, situations in which "a government practice involves a direct transfer of funds". Article 1.1(a)(1)(i) does not refer to the origin of funds transferred by a government but only refers to whether there is a "government practice" involving a "direct transfer of funds" to a recipient. Thus, the relevant enquiry under Article 1.1(a)(1)(i) relates to situations where "a government or any public body" transfers or provides funds to private recipients in some fashion. Given this, we do not see any basis for Indonesia's argument that there is a requirement to consider the origin or source of the funds or the designated use of those funds.[83]

[78] European Union's first written submission, para. 23; second written submission, para. 10.

[79] European Union's first written submission, para. 24.

[80] European Union's first written submission, para. 26; second written submission, para. 24 (referring to Provisional Regulation (Exhibit IDN-1), recital 60). The European Union also rejects Indonesia's assertion that the OPPF disbursements do not qualify as a "government practice" for purposes of Article 1.1(a)(1)(i), supposedly because the collection of export levies and the disbursement of funds to biodiesel producers are not "habitual" actions by governments. The European Union argues that the plain language of Article 1.1(a)(1)(i) does not require that actions by governments involving transfers of funds be "habitual", cautioning that otherwise, Article 1.1(a)(1)(i) would only capture subsidy "programs" but not "one-off" subsidies. The European Union in any event considers the collection of taxes and the use of those funds for public spending are a habitual type of action that should be covered. (European Union's second written submission, para. 30).

[81] European Union's first written submission, para. 29 (referring to Provisional Regulation (Exhibit IDN-1), recital 33).

[82] European Union's first written submission, paras. 27-32.

[83] We recognize that there may be circumstances under which a government facilitates or is otherwise involved in a private-to-private transfer, which may not give rise to a governmental "direct transfer of funds" to a recipient, as the government is not collecting the funds which are being provided on a voluntary basis. We discuss the particular circumstances concerning the functioning of the OPPF in detail below.

7.35. Prior panel and Appellate Body reports support this interpretation. The Appellate Body has observed that the existence of a financial contribution depends on whether such transfer of economic value listed in Article 1.1(a)(1) can be attributed to, and can thus be considered the conduct of the relevant WTO Member.[84] In other words, provided that a direct transfer of funds can be attributed to a government, there is no need for further consideration. This view is further confirmed in *US – Carbon Steel (India)*, where the Appellate Body similarly rejected that a "transfer of funds" under Article 1.1(a)(1)(i) refers only to situations where funds are drawn from government resources or a charge on a public account:

> We again note that Article 1.1(a)(1)(i) relates to a "government practice" that "involves" a direct transfer of funds. Thus, while we would agree that a "transfer" indicates that funds are moved from a transferor to a transferee, we do not consider that Article 1.1(a)(1)(i) prescribes that the resources must necessarily be drawn from government resources or result in a charge on the public account. Moreover, an interpretation that limits the scope of subparagraph (i) to funds drawn from government resources or charged on the public account would accord little relevance to the fact that subparagraph (i) refers only to a "government practice" that "involves" direct transfers of funds.[85]

7.36. Indonesia's arguments fail to recognize the GOI's role in the collection and subsequent transfer of funds to biodiesel producers. As the Commission found, the GOI enacted a regulatory scheme under which biodiesel producers and their subsidiaries are *required* to pay export levies upon exporting a range of products, including CPO but also CPO-derivative products.[86] GOI customs officials collect those levies. The collection of export levies by the GOI's own customs officials makes those funds public resources, just as any other funds collected by a government become part of the state budget. The legal framework establishing the OPPF additionally requires that reimbursements are paid to participating biodiesel producers equal to the price difference between the diesel reference price and biodiesel reference price. The OPPF disburses these levies to biodiesel producers. The Commission found that the OPPF management agency exercises governmental functions with respect to the biodiesel sector and thus constitutes a public body, which has not been contested by Indonesia in the context of this dispute. The GOI therefore plays a direct role, not only in the collection of export levies, but also in transferring the funds to biodiesel producers. We consider that these elements are sufficient to establish that the funds are being provided *by the GOI* and are therefore attributable to the GOI, for purposes of establishing that the OPPF disbursements entail a financial contribution *by a government or public body*, in the sense of Article 1.1(a)(1)(i). Moreover, the fact that the funds were collected with the objective of financing OPPF activities does not alter the conclusion we have reached. There is therefore no reason further to consider the objective with which the funds were collected.

7.37. Indonesia calls attention to Presidential Regulation No. 24/2016, which instructs that the export levy "shall be paid to a bank account appointed by the [OPPF] [m]anagement [a]gency in cash".[87] According to Indonesia, the fact that export levies are transferred to specific accounts and appear on the balance sheet of the OPPF management agency confirm that export levy funds are assets "owned" by the OPPF management agency, and do not form part of the state budget.[88] In addition, Indonesia emphasizes that biodiesel producers contribute to paying export levies as well as receiving funds from the OPPF. Thus, Indonesia views the OPPF funds as financing by the biodiesel producers to biodiesel producers themselves and analogizes the OPPF scheme as comparable to that of an escrow account.[89] Indonesia also equates the OPPF's operation to "EURO-denominated transfers between private parties cleared by the European Central Bank" and "clearing houses of Government-arranged commodity exchanges", arguing that there are "multiple instances where [] funds pass through the government financial system without involving financing by the government".[90]

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[84] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.
[85] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.96.
[86] Minister of Finance Regulation 133/PMK.05/2015 (Exhibit EU-3 (English translation)), appendix I.
[87] Presidential Regulation 24/2016 (Exhibit EU-4 (English translation)), Article 5.
[88] Indonesia's first written submission, para. 81.
[89] Indonesia's first written submission, para. 81.
[90] Indonesia's second written submission, para. 17. See also Indonesia's first written submission, para. 81; second written submission, paras. 15-16.

7.38. We are not persuaded by these arguments. The fact that the levies may be transferred to a bank account designated or "owned" by the OPPF management agency upon collection does not alter our assessment that the funds become public resources, particularly as the payment of levies are compulsory and are collected by Indonesian customs officials. Moreover, any account used by the OPPF management agency is under the control of the OPPF management agency, which was found to be a public body, once again, a point not contested in this dispute. Indonesia's comparisons to escrow accounts and the other arrangements are equally misplaced, as such comparisons overlook the fact that the OPPF payments are made in the context of a regulatory regime imposed by the GOI, which mandates the collection of the export levies and confers to participating biodiesel producers the right to receive OPPF funds upon fulfilling the applicable requirements.

7.39. Indonesia also emphasizes that the OPPF is funded by the CPO supply chain, including through payments by exporting biodiesel producers, for the "benefit" of the CPO supply chain, and that the OPPF can only function if the export levy is actually paid.[91] Indonesia also submits, as a matter of fact, that investigated biodiesel producers received more funds from the OPPF than they were required to pay into it.[92] Indonesia's argument once again appears directed at the origin or specific purpose of the OPPF disbursements. As we have already observed, the fact that the funds were collected with the objective of financing OPPF activities does not alter the conclusion we have reached.

7.40. For the foregoing reasons, we see no basis in the text of Article 1.1(a)(1)(i) of the SCM Agreement supporting Indonesia's claim. We therefore find that Indonesia has not established that the Commission acted inconsistently with to Article 1.1(a)(1) of the SCM Agreement by determining that the disbursements from the OPPF to the biodiesel producers constituted a financial contribution by a government or public body.[93] We further share the concerns expressed by the European Union and third parties to this dispute[94] that accepting Indonesia's claim would improperly limit the scope of coverage of the SCM Agreement by focusing on the origin of the funds and disregarding the central role of the GOI in the collection of export levies and their mandatory nature.

7.3.3.2 Whether the Commission erred by characterizing the OPPF payments as "grants" to biodiesel producers within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement

7.41. Indonesia further claims that the Commission acted inconsistently with Article 1.1(a)(1)(i) of the SCM Agreement by determining that OPPF disbursements constituted financial contributions in the form of grants.[95] We recall, in its provisional regulation, the Commission concluded that the disbursements made by the OPPF management agency to biodiesel producers were grants, as follows:

> [T]he disbursements made by the Management Agency to the biodiesel producers qualify as "financial contribution in the form of a direct transfer of funds from a government" pursuant to Article 3(1)(a)(i) of the basic Regulation. It is undisputed that in the purchases by Pertamina and AKR of biodiesel pursuant to the blending requirements the Management Agency covered the difference between the price paid by Pertamina and AKR (on the basis of the reference price for mineral diesel) and the

[91] Indonesia's first written submission, para. 83.

[92] We note that the parties disagree whether investigated biodiesel producers received more funds from the OPPF than they were required to pay into it. (See e.g. Indonesia's first written submission, para. 83, European Union's first written submission, paras. 34-35). Their disagreement appears to stem from the fact that particular investigated exporting biodiesel producers form part of corporate groups that also export CPO or derivative products (and thus also pay levies pertaining to those exports). Therefore, on a group-wide basis, an exporting producer of CPO-products may pay more in levies than they receive in reimbursements for domestic biodiesel sales to Pertamina or AKR. (See e.g. Indonesia's second written submission, para. 70).

[93] Indonesia's first written submission, para. 84.

[94] For instance, the United States submits that a restrictive interpretation of Article 1.1(a)(1)(i) as proposed by Indonesia would allow Members to shield certain forms of government financing from being classified as subsidies, through collecting money and segregating it in a special account to argue that it is "private" financing rather than financing by the government. The United States maintains that such an interpretation would frustrate the object and purpose of the SCM Agreement and create an obvious circumvention risk. (United States' third-party submission, para. 21). See also Canada's third-party submission, paras. 4-9; United Kingdom's third-party submission, para. 9.

[95] Indonesia's first written submission, para. 85.

> (higher) reference price for biodiesel. In this respect, the biodiesel producers received a grant from the GOI amounting for such difference.[96]

7.42. In its comments submitted after the provisional regulation, the GOI and exporting producers challenged this finding, arguing that the Commission erred in analysing the OPPF disbursements in isolation, and "not as part of the payment made by the GOI when purchasing biodiesel".[97] The Commission rejected this argument, observing that the GOI does not purchase the biodiesel, which is instead purchased by fuel blending entities, Pertamina and AKR. The Commission additionally explained that the GOI, via the OPPF, does not have any contractual purchase relation with the biodiesel producers and does not receive anything in exchange of the money it disburses to the biodiesel producers:

> The applicable legislation gives the biodiesel producers participating in this programme the right to receive (a) the payment for the biodiesel by the blenders; and (b) the additional money from the OPPF. There are no contractual obligations of the biodiesel producers towards the GOI nor towards the OPPF, other than the duty to comply with the mandate received in accordance with the relevant rules and for which they receive compensation. Lacking any mutual contractual obligation, the money disbursed by the OPPF are not therefore part of a contract for consideration (such as the purchase of biodiesel by the government in exchange of a price). Simply put, the GOI mandates each of the biodiesel producers participating in the programme to sell specific quantities of biodiesel to Pertamina or AKR at a given price (mineral diesel reference price) and the GOI provides additional funds directly to the biodiesel producers. Whereas the purpose and context of the programme is to incentivise the use of biodiesel on the domestic market, the GOI does not purchase biodiesel directly and then uses it for governmental purposes or resells it on the market. Rather, the GOI supports the sales of biodiesel by providing additional funds to biodiesel producers also in transactions where private operators (such as AKR) are involved.[98]

7.43. Following the final disclosure, the GOI and exporting producers claimed that the Commission erred in asserting that there is no contractual relationship between the biodiesel producers and the OPPF. To support this claim, one of the exporter producers submitted copies of agreements it had entered into with the OPPF. The GOI additionally argued that the OPPF disbursements should be regarded as consideration for the purchase of biodiesel because Pertamina is a state-owned company and therefore it should be treated as a single economic entity with the GOI, which is the ultimate purchaser of the biodiesel.[99]

7.44. The Commission rejected that the existence of contracts in place between the OPPF and biodiesel producers changed its conclusion that the OPPF disbursements constitute a grant. The Commission took the view that the contracts between the OPPF and biodiesel producers merely restate the legal obligation of the OPPF to pay the difference between the price paid by the fuel blending entities and the biodiesel reference prices once biodiesel is delivered. The contracts did not create a contractual obligation for the biodiesel producers to provide biodiesel to the OPPF. The Commission further noted that the contracts did not specify that the GOI purchases biodiesel or that payments were made for that reason.[100] Hence, the Commission found that the contracts did not reflect reciprocal obligations between the biodiesel producers and the OPPF, and the OPPF management agency disbursed the money without expecting anything in return.[101]

7.45. The Commission also rejected that Pertamina should be regarded as a public body or single economic entity with the GOI. In this regard, despite being a state-owned company, the Commission noted that Pertamina acts as a market operator purchasing biodiesel for blending and subsequent

[96] Provisional Regulation (Exhibit IDN-1), recital 69. In its determination, the Commission refers to the reference price for mineral diesel. We understand that "mineral diesel" is petroleum-based diesel. Both the terms mineral diesel and petroleum-based diesel appear in this Report.
[97] Definitive Regulation (Exhibit IDN-2), recital 34.
[98] Definitive Regulation (Exhibit IDN-2), recital 37.
[99] Definitive Regulation (Exhibit IDN-2), recital 44.
[100] Definitive Regulation (Exhibit IDN-2), recital 50.
[101] Definitive Regulation (Exhibit IDN-2), recital 50.

resale. The Commission found no evidence to support a finding that Pertamina should be considered as a public body for purposes of the investigation.[102]

7.46. Indonesia has presented similar arguments in this proceeding to those raised during the investigation. In this regard, Indonesia submits that a grant does not arise simply because a government or public body "makes a payment" to another entity. Rather, Indonesia argues that, when a payment is connected in the same legal instrument to a performance of certain reciprocal obligations, such payment is not a grant.[103] Indonesia argues that the OPPF disbursements are conditional on biodiesel producers performing a reciprocal obligation to deliver biodiesel to fuel blending entities, and this conditionality means that the "payments" from the OPPF cannot be assimilated to "grants".[104] Indonesia argues further that the disbursements from the OPPF to biodiesel producers form part of the "payment" or remuneration for the purchase of biodiesel "by the public bodies of the GOI, such as a State-owned petrofuel company Pertamina, or by privately-owned Indonesian petrofuel entities under the direction of the GOI."[105]

7.47. The operation of the OPPF and how it disburses funds to biodiesel producers is described in paragraphs 7.13-7.16 above. As Indonesia acknowledges[106], under the OPPF scheme, participating biodiesel producers are assigned to supply a certain volume of biodiesel to appointed Indonesian fuel blending entities, Pertamina and AKR, which blend that biodiesel with mineral diesel. Pursuant to the scheme, Pertamina and AKR purchase biodiesel from biodiesel producers at the rate of the diesel reference price. Following the delivery of biodiesel, biodiesel producers provide a copy of the sales invoice and accompanying documents demonstrating that biodiesel has been invoiced and delivered to a fuel blending entity to the OPPF management agency for verification. Upon verification, biodiesel producers receive payment from the OPPF equal to the difference between the diesel reference price and the biodiesel reference price.

7.48. Indonesia submits that the legal instruments implementing the OPPF[107], as well as contracts between participating biodiesel producers and the OPPF management agency[108], establish that the conveyances of funds from OPPF to Indonesian biodiesel producers in the form of reimbursements involve a reciprocal obligation on part of Indonesian biodiesel producers to assume the responsibility for performing the delivery of biodiesel to fuel blending entities.[109] Indonesia further submits that the Commission's calculations of the subsidy margin allegedly obtained by Indonesian biodiesel producers based on the OPPF payments themselves confirm that the payment concerned is an exact mathematical difference between the price of the diesel paid by fuel blending entities and the reference price for biodiesel.[110]

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[102] Definitive Regulation (Exhibit IDN-2), recitals 48-55. In addition, exporting producer Wilmar claimed that, even if Pertamina was not considered as a public body, the blenders are "entrusted and directed" by the GOI to purchase biodiesel on behalf of the government and/or the biodiesel suppliers are "entrusted or directed" to sell biodiesel to the blenders. The Commission rejected this claim, finding no evidence on record to support the claim. The Commission instead found that the evidence available showed that fuel blending entities, Pertamina and AKR, and biodiesel producers willingly participate in the context where the GOI imposes certain blending requirements and where the GOI financially intervenes to ease the burden arising from the blending mandate. (Definitive Regulation (Exhibit IDN-2), recital 56).

[103] Indonesia's first written submission, para. 86.

[104] Indonesia's first written submission, paras. 97 and 101.

[105] Indonesia's first written submission, para. 98.

[106] Indonesia's first written submission, paras. 92-96 and 100-101.

[107] Indonesia refers specifically to Regulation of the Minister of Energy and Mineral Resources No. 41 of 2018. (Indonesia's first written submission, para. 93 and fn 100 (referring to GOI's questionnaire response (Exhibit IDN-11 (BCI)), exhibit GOI-BSF-6)). The OPPF was also implemented and amended pursuant to Presidential Regulation 61/2015 (Exhibit EU-2 (English translation)); Presidential Regulation 24/2016 (Exhibit EU-4 (English translation)); and MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)).

[108] Indonesia refers as an example to "Article 3 of the Financing agreement for the procurement of biofuel type of biodiesel for period May – October 2018 concluded between the Management Agency and one of the Indonesian biodiesel producers, PT. WILMAR NABATI INDONESIA." Indonesia appears to refer to annex 1.11 titled "Contract WINA-OPPF (Period May 2018-Oct 2018)" of Wilmar's comments on the final general disclosure document, but this annex is all in Bahasa and Indonesia has not submitted an English translation to the Panel. (Wilmar's comments on final disclosure (Exhibit IDN-9 (BCI)), annex 1.11).

[109] Indonesia's first written submission, paras. 93-94. See also Indonesia's second written submission, para. 38 (stating that reciprocal legal obligations between OPPF and biodiesel producers are "contractually enshrined").

[110] Indonesia's first written submission, para. 95 (referring to Provisional duties information for Wilmar (Exhibit IDN-14 (BCI))).

7.49. Hence, through the specific operation of the OPPF, Indonesia argues the GOI "acts through OPPF, AKR and Pertamina" and "gets biodiesel 'in return' for its OPPF payments as well as payments that petrofuel [blending] entities make when purchasing biodiesel under the GOI mandate".[111] According to Indonesia, the OPPF payments should therefore not have been qualified as a grant.

7.50. The European Union disagrees with Indonesia's characterization, emphasizing that the biodiesel is provided to fuel blending entities (Pertamina and AKR) and not to the GOI.[112] The European Union argues that there is no such reciprocal obligation between biodiesel producers and the GOI, as the GOI receives nothing in return for payment. Rather, the European Union maintains that the only "condition" imposed on biodiesel producers to collect the OPPF disbursement is to provide certain documents verifying that they provided biodiesel to the assigned fuel blending entity. The European Union argues that this condition to submit documentation and verify delivery does not prevent the OPPF disbursements from being properly characterized as grants under Article 1.1(a)(1)(i).[113]

7.51. The European Union further argues that contracts on record between the OPPF and biodiesel producers make clear that biodiesel producers did *not* sell the biodiesel to the OPPF but rather, the biodiesel was sold to a fuel blending entity.[114] In this regard, the European Union contends that the GOI is nowhere named as the buyer of the biodiesel: in the Indonesian legislation implementing and regulating the OPPF program; in the contracts entered between the biodiesel producers and the OPPF[115]; or in the contracts entered between the biodiesel producers and Pertamina and AKR.[116] As the Commission found in the investigation, the European Union submits that the contracts merely restate the obligations imposed on the OPPF by Indonesian law, namely to pay the biodiesel producer the difference between the price paid by fuel blending entities, Pertamina or AKR, and the biodiesel reference price after the biodiesel producer delivers the biodiesel.[117]

7.52. Lastly, the European Union stresses that the participating fuel blending entities, Pertamina and AKR, were not determined to be public bodies or to form part of the GOI. As a result, their purchases of biodiesel should not be considered as "indirect" purchases of biodiesel by the GOI.[118]

7.53. Indonesia attempts to support its claim based on observations made by the Appellate Body in *US – Large Civil Aircraft (2nd complaint)*. Indonesia further argues that findings by the panel in *US – Softwood Lumber VII* confirm that the OPPF payments are not grants.

7.54. Based on the Appellate Body's assessment in *US – Large Civil Aircraft (2nd complaint)*, Indonesia takes the view that a direct transfer by a government can only properly be characterized as a grant where it is made, *either* on an unconditional basis *or otherwise*, where the transfer is made but subject to conditions that do not involve reciprocal obligations on the recipient to provide in exchange funds, goods or services.[119] Indonesia acknowledges that certain grants can be conditional, for example, requiring the recipient to use the funds for a specific purpose. However, Indonesia argues that to be properly characterized as a grant, the transfers of funds cannot be connected to a performance of a reciprocal obligation to deliver something in return.[120]

7.55. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body undertook a broad assessment of the various types of financial contributions covered by Article 1.1(a)(1). Regarding the examples of direct transfers of funds ("e.g. grants, loans, and equity infusion") in Article 1.1(a)(1)(i), the Appellate Body assessed that grants are transactions in which "money or money's worth is given to

[111] Indonesia's first written submission, para. 98; second written submission, para. 38.
[112] European Union's second written submission, paras. 35-39.
[113] European Union's second written submission, para. 41. See also European Union's first written submission, para. 45. The European Union has noted, for instance, that subsidies may be subject to a condition linked to the conduct of a company and still fall within the scope of the SCM Agreement (e.g. prohibited export subsidies). (European Union's first written submission, paras. 48-49).
[114] European Union's second written submission, para. 46.
[115] See e.g. Contract between the OPPF management agency and a biodiesel producer (Exhibit EU-47); Contract between the OPPF management agency and PT Wilmar Nabati Indonesia (Exhibit EU-75 (BCI)).
[116] European Union's second written submission, para. 49.
[117] European Union's second written submission, para. 50.
[118] European Union's second written submission, para. 53 (referring to Definitive Regulation (Exhibit IDN-2) recital 54). See also European Union's first written submission, paras. 61-70.
[119] Indonesia's second written submission, para. 30.
[120] Indonesia's second written submission, paras. 28-30, 32-37, and 46.

a recipient", adding that grants are made "normally without an obligation or expectation that anything will be provided to the grantor in return".[121] Thus, the Appellate Body endorsed the view that grants involve situations in which funds (or something of financial value) are provided to a recipient, without anything be provided *to the grantor* in return. Thus, the Appellate Body referred specifically to situations in which there is a reciprocal obligation to provide something to the *grantor* in return, not more generally to situations involving where conditions are imposed on the receipt of the grant. The Appellate Body recognized that grants can take many forms and that some grants are made on a conditional basis, noting that grants may require the recipient to use the funds for a specific purpose or could require a recipient to itself raise part of the funds needed for a project.[122] Notably, in stressing that nothing would be provided to the grantor in return, the Appellate Body distinguished grants from other forms of direct transfers of funds such as loans and equity infusions, which the Appellate Body described as "characterized by reciprocity".[123]

7.56. Indonesia maintains that the panel in *US – Softwood Lumber VII* applied this interpretation and made findings that payments conditioned on the performance of certain obligations by the recipient were not grants.[124] Indonesia argues that the same type of reciprocal obligations exists in the case of the OPPF payments.

7.57. We find it useful to briefly recall the circumstances of *US – Softwood Lumber VII* before considering Indonesia's reliance on this case. In the underlying investigation at issue in that dispute, the United States Department of Commerce (USDOC) had determined that certain disbursements provided by the Québec and New Brunswick local governments to log harvesters constituted grants. The panel disagreed with this assessment, finding instead that the respective disbursements formed part of the consideration provided in exchange for the performance of silviculture and forest management services on government-owned timber harvest areas. The panel found that the obligation for the log harvesters to perform particular silviculture and forest management activities in Québec and New Brunswick, and the subsequent reimbursement of the costs should have been considered "as part of the same transaction" (which also included the governments' provision of timber to the log harvesters).[125] Given these reciprocal obligations, the panel concluded that the USDOC did not reasonably and adequately explain its findings that the reimbursements constituted grants.

7.58. We disagree with Indonesia as to the relevance of the circumstances in *US – Softwood Lumber VII* to the assessment of the OPPF disbursements. Contrary to Indonesia's assertions, we do not identify any meaningful reciprocal obligations between the biodiesel producers and the OPPF management agency (or the GOI more broadly) that would call into question the characterization of the OPPF disbursements as grants. Indonesia characterizes the "reciprocal obligation" as an "obligation on [the] part of the Indonesian biodiesel producers to assume the responsibility for performing the delivery of biodiesel to petrofuel [blending] entities".[126] However, such reciprocal obligations arise between the biodiesel producers and the fuel blending entities that purchase biodiesel. There is no reciprocal obligation between the biodiesel producers and the OPPF management agency. The OPPF management agency has an obligation to provide funds (equal to the difference between the diesel reference price and biodiesel reference price), while biodiesel producers do not have any obligation towards the OPPF management agency other than to provide documentation confirming the sale to the appointed fuel blending entity.[127]

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[121] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616.

[122] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1292.

[123] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616 (noting that, in the case of a loan, the lender lends money or money's worth on the basis that the principal along with interest is repaid, while with an equity infusion, a government acquires share in exchange for providing capital to a recipient).

[124] Indonesia's second written submission, para. 36 (referring to Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.621).

[125] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.621 ("[t]his is because the obligations and the reimbursement are both parts of the set of terms based on which New Brunswick provided Crown timber to JDIL."); para. 7.626 ("[w]e agree with Canada that the PCIP reimbursement are part of the bundle of rights and obligations that are part of the bundle of rights and obligation that are exchanged when Resolute harvests non-auction Crown timber").

[126] Indonesia's first written submission, para. 93.

[127] We recognize that the sale of biodiesel to blenders, Pertamina and AKR, and the subsequent disbursements made to biodiesel producers through the OPPF do not take place in isolation from each other but take place in furtherance of GOI policies. As indicated above, the GOI established mandatory requirements to

7.59. As reflecting the absence of any reciprocal obligation, in the investigation, the Commission noted that the agreements on record between the biodiesel producers and the OPPF also did not specify any obligation for biodiesel producers to supply biodiesel to the OPPF management agency (or the GOI) in exchange for payments. These agreements state the legal obligation of the OPPF to pay the biodiesel producer the difference between the price paid by the fuel blending entities and the biodiesel reference price upon verification of deliveries.[128] The absence of any indication to deliver biodiesel to the GOI in exchange for payment led the Commission to uphold its conclusion that the payments constituted a grant.[129] In the investigation, the Commission also found that there is otherwise no direct link to show that biodiesel is sold to the GOI since Pertamina was found not to be a public body or formed part of the government.[130]

7.60. Based on evidence on record and contrary to Indonesia's assertions, we consider that the sale of biodiesel to the fuel blending entities, on the one hand, and the arrangements for biodiesel producers to receive disbursements from the OPPF, on the other hand, reflect two separate transactions, not a single transaction involving reciprocal consideration. As the OPPF disbursements derive from a separate arrangement between the OPPF and biodiesel producers, and the OPPF management agency does not receive biodiesel in exchange, the OPPF disbursements are essentially given for free. This supports the Commission's characterization of the OPPF disbursements as grants.

7.61. Finally, Indonesia asserts the following, in arguing that the GOI gets biodiesel delivered to it through fuel blending entities in return for both OPPF disbursements and payments made by the fuel blending entities acting under the GOI mandate:

> Blending of such biodiesel with mineral diesel allows the GOI to reduce the use of fossil fuel and thus to decrease GHG emissions generated by transportation. In that sense, consideration that the GOI obtains through OPPF payments is the same that was obtained by the Government of Canada in *Softwood Lumber VII,* i.e. a good or a service that allows the GOI to pursue governmental objectives. Indeed, the Government of Canada in *Softwood Lumber VII* did not physically receive any silviculture and forest management services that would benefit directly and solely the Government of Canada as opposed to benefits that such services provided to a wider public and a common good.[131]

7.62. We find no merit to this argument. In referring to *US – Softwood Lumber VII*, Indonesia fails to recognize the nature of the reciprocal obligations connected with the reimbursements at issue in that dispute. Under the facts of that dispute, the panel found that the disbursements in question were in fact reimbursements that formed part of the consideration provided in exchange for the performance of silviculture and forest management services on government-owned timber harvest areas.[132] Indonesia fails to acknowledge that Québec and New Brunswick were in effect procuring forest management services against consideration. Indonesia's assertion that the government did not "physically receive any silviculture and forest management services that would benefit directly and solely the Government of Canada" is therefore incorrect. Finally, as part of directly procuring services, we recognized that the Québec and New Brunswick governments may also have achieved

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blend biodiesel with petroleum-based diesel for resale to the domestic economy. The disbursements made to participating biodiesel producers through the OPPF are aimed at facilitating the procurement of biodiesel by blending entities in fulfillment of this mandate. (MEMR Regulation 12/2015 (Exhibit EU-35 (English translation)); MEMR Regulation 26/2016 (Exhibit EU-5 (English translation)), Article 2). Notwithstanding this interrelationship between the biodiesel sales and the subsequent disbursements, this does not alter our assessment that the sale of biodiesel to the blending entities, on the one hand, and the arrangements for biodiesel producers to receive disbursements from the OPPF, on the other hand, reflect two separate transactions, as we conclude below.

[128] In contrast, purchase contracts on record between biodiesel producers and fuel blending entity Pertamina, did reflect such obligations. The Commission noted, for instance, that purchase contracts on record between biodiesel producers and Pertamina set out the terms of sale, including the volume and purchase price of biodiesel (the diesel reference price).

[129] Definitive Regulation (Exhibit IDN-2), recitals 45-46.

[130] Definitive Regulation (Exhibit IDN-2), recital 48. We also agree with the Commission's observation that the applicable legislative framework establishing and implementing the OPPF does not set out any obligations for biodiesel producers to provide anything of economic value to the OPPF in return for the payments, beyond confirmation of the sale of biodiesel to either Pertamina or AKR. See e.g. GOI's questionnaire response (Exhibit IDN-11 (BCI)), p. 25.

[131] Indonesia's second written submission, para. 39.

[132] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, paras. 7.261 and 7.626.

fulfilment of public policy objectives related to more effective forest management ("a wider public and a common good"). Notwithstanding, the fulfilment of those objectives was obtained through procuring silviculture and forest management services.

7.63. Similar elements are not present in the circumstances before us. We do not question whether the GOI may have met its regulatory and policy objectives of reducing the use of fossil fuel and thus to decrease greenhouse gas emissions through implementation of the blending mandate and the OPPF. However, the fact remains that the GOI does not purchase or receive biodiesel in exchange for providing funds to biodiesel producers. Any comparison to the situation *US – Softwood Lumber VII* is therefore inapposite.[133]

7.64. In light of the foregoing, we find that Indonesia has failed to demonstrate the existence of any reciprocal obligation between the biodiesel producers and the OPPF management agency and has otherwise failed to demonstrate that the Commission did not reasonably and adequately explain its findings that the OPPF payments constituted grants. We therefore find that Indonesia has not established that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by determining that the disbursements from the OPPF to biodiesel producers constituted financial contributions in the form of grants.[134]

7.3.4 Whether the Commission improperly determined that the OPPF disbursements conferred a benefit to Indonesian biodiesel producers

7.65. Indonesia claims that the Commission erred in determining that the OPPF disbursements conferred a benefit on Indonesian biodiesel producers, in violation of Article 1.1(b) of the SCM Agreement.[135]

7.66. In the provisional Regulation, after finding that the OPPF disbursements to biodiesel producers constituted grants[136], the Commission determined that the OPPF disbursements conferred a benefit, as follows:

> [T]he exporting producers are put in a better situation than they would be absent the scheme. To put it simply, the transfer of funds made by the Management Agency amount to grants and the market does not provide for free grants. Those grants place the biodiesel producers in a better position than they otherwise would have been in the marketplace. Absent the scheme the biodiesel producers would only obtain the payment from Pertamina and AKR at the price of mineral diesel.[137]

7.67. The Commission found that the OPPF payments confer a benefit equal to the full amount of the payments received during the investigation period.[138] The Commission calculated the amount of countervailable subsidy for each exporting producer in terms of the total amount of grant received during the investigation period, allocating those amounts over the total turnover generated by each investigated producers' sales during the period.[139] The Commission affirmed its determination in the provisional Regulation in the definitive Regulation[140] after addressing various comments by the GOI and the investigated exporters.[141]

7.68. For the reasons we discuss below, we find that Indonesia's claim is based on a flawed premise, namely that biodiesel producers received OPPF payments in return for the purchase of biodiesel by the GOI.

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[133] In this regard, the European Union has pointed out that the GOI could have designed a policy to purchase biodiesel directly and sell it to operators at a reduced price but did not do so. (European Union's opening statement at the first meeting of the Panel, para. 11).

[134] The Panel further notes that all third parties providing submissions in this dispute agree that the payments are grants for purposes of Article 1.1(a)(1)(i). Canada and the United Kingdom, however, disagree with the Commission's benefit determination, as discussed in fn 151 below.

[135] Indonesia's panel request, section 1(c). See also Indonesia's first written submission, para. 107.

[136] Provisional Regulation (Exhibit IDN-1), recitals 62 and 69.

[137] Provisional Regulation (Exhibit IDN-1), recital 71.

[138] Provisional Regulation (Exhibit IDN-1), recital 81.

[139] Provisional Regulation (Exhibit IDN-1), recital 81.

[140] Definitive Regulation (Exhibit IDN-2), recital 86.

[141] Definitive Regulation (Exhibit IDN-2), recitals 59-101.

7.3.4.1 The applicable standard for determining the existence of benefit in the case of grants

7.69. We recall that Article 1.1(b) of the SCM Agreement provides that "a subsidy shall be deemed to exist if … a benefit is thereby conferred". Notably, Article 1.1(b) does not state how to determine whether a benefit has been conferred, or how to measure the benefit. Generally, the term "benefit" is defined as "[a]dvantage, profit, good".[142] It is well established that a benefit arises when a recipient obtains something that it would not receive from the market.

7.70. The term "benefit" also appears in Article 14 of the SCM Agreement. Article 14 governs the calculation of the amount of a subsidy in terms of the benefit to the recipient and has been found to constitute relevant context for the interpretation of benefit in Article 1.1(b).[143] The title of Article 14, "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient", similarly reflects that an advantage is provided to the recipient of a financial contribution. In this sense, prior panels and the Appellate Body have observed that a financial contribution is considered to confer a "benefit" in situations where the financial contribution has made the recipient "better off" than it would otherwise have been, absent that contribution. Subparagraphs (a) through (d) of Article 14 provide guidance on government provisions of equity capital, loans, loan guarantees, as well as the provision of goods or services, or the purchase of goods, by a government. The guidance provided in subparagraphs (a) through (d) reflects that a "benefit" determination must be established by reference to the situation of the recipient on the marketplace, absent the financial contribution.[144]

7.71. Notably, Article 14 does not offer any guidance for the financial contributions as a "direct transfer of funds" in the form of a grant. Prior panel reports have considered that a grant is essentially a gift from a government that "automatically makes the recipient 'better off' than it would otherwise have been because it gives that recipient greater resources than it had before, to allow it to pursue its commercial aims".[145] Accordingly, where a subsidy takes the form of a grant, a benefit exists in the amount of the grant.[146]

7.3.4.2 Evaluation

7.72. Indonesia claims that the Commission committed various errors in its benefit assessment related to the OPPF disbursements, including that the Commission: "selected a wrong counterfactual" to analyse the situation of the recipient on the marketplace, absent the financial contribution; wrongly concluded that absent the OPPF payments, the biodiesel "reference price" would be lower; failed to consider the export levies paid by biodiesel producers; and failed to consider that the benefit, if any, was passed through to biodiesel blenders.[147] We note that the GOI and the investigated exporters raised essentially the same allegations in the investigation as reflected in the definitive Regulation.[148]

7.73. As with its challenge to the Commission's characterization of the OPPF disbursements as grants, Indonesia considers that the OPPF disbursements should not be viewed in isolation from the overall legal framework establishing the blending mandate and the OPPF, and under which fuel blending entities, Pertamina and AKR, were appointed to purchase and blend biodiesel from participating biodiesel producers. As set out above[149], pursuant to the legal framework, Pertamina and AKR purchase and blend biodiesel from participating biodiesel producers. Pertamina and AKR purchase biodiesel from biodiesel producers at the diesel reference price. Biodiesel producers that sell to Pertamina and AKR may subsequently request the OPPF management agency to reimburse

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[142] Oxford Dictionaries online, definition of "benefit", noun, https://www.oed.com/dictionary/benefit_n?tab=meaning_and_use (accessed 11 April 2025), meaning 3.a.

[143] Appellate Body Report, *Canada – Aircraft*, para. 155.

[144] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.163. See also Appellate Body Reports, *Canada – Aircraft*, para. 157; *EC and certain member States – Large Civil Aircraft*, para. 973.

[145] See e.g. Panel Reports, *India – Sugar and Sugarcane*, appealed 24 December 2021, para. 7.259.

[146] Panel Report, *EC and certain member States – Large Civil Aircraft*, fn 5724 ("in the context of a grant, the magnitude of the subsidy is properly determined on the basis of the amount of funding actually transferred by means of the grant. In other words, where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same").

[147] Indonesia's first written submission, para. 107.

[148] Definitive Regulation (Exhibit IDN-2), recitals 59-86.

[149] See paras. 7.14-7.16 above.

them for the amount of the difference between the diesel reference price that is actually paid and the higher biodiesel reference price that is calculated by the Indonesian minister of energy and mineral resources.[150]

7.74. Indonesia disagrees with the Commission's assessment that the OPPF disbursements as grants confer a benefit equal to the full amount of the disbursements. For Indonesia, the OPPF funds are properly viewed as forming part of the total remuneration or consideration for the purchase of biodiesel, in combination with the payments made by fuel blending entities. On this basis, Indonesia thus argues that the Commission was required to consider the total remuneration received by the recipient to assess whether, with the financial contribution, the recipient is truly "better off".[151] Indonesia submits that a counterfactual assessment is therefore required in order to properly determine whether the payments conferred a benefit.

7.75. Indonesia takes the view that the Commission did in fact undertake a counterfactual analysis. In this respect, Indonesia refers to the Commission's response to comments and arguments raised by the GOI and investigated exporters following the provisional and final disclosures, as reflected in the definitive Regulation.[152] Indonesia argues that the Commission erred by improperly analysing a counterfactual in which both the blending mandate and the OPPF were withdrawn, rather than considering the situation with the withdrawal of the OPPF alone. Indonesia contends that the Commission further erred in finding that the mere existence of the OPPF programme show that normal market conditions would not support the biodiesel reference price and that, absent the OPPF and its payments, there would not be any domestic sales of biodiesel.[153]

7.76. According to Indonesia, fuel blending entities like Pertamina and AKR would still be required to fulfil the blending mandate absent payments from the OPPF and would be forced to purchase biodiesel. Therefore, absent the OPPF payments, Indonesia submits that biodiesel producers would simply charge a higher price to fuel blending entities. Indonesia has advanced a number of arguments as to what price biodiesel producers would charge absent the OPPF payments. For instance, Indonesia has contended that biodiesel producers would charge blenders the biodiesel reference price absent the OPPF.[154] Indonesia has also submitted that in the presence of the blending mandate and in the absence of payments from the OPPF, the fuel blending entities would have to pay biodiesel producers the "market" price for biodiesel.[155] In this regard, Indonesia contends that the Commission had evidence before it of domestic biodiesel sales that took place outside the OPPF scheme showing higher prices were being charged.[156] Furthermore, Indonesia maintains that biodiesel export prices were higher than the reference price set by the GOI during the investigation period and that Indonesian producers could in any case obtain such prices.[157] In all scenarios, Indonesia contends that absent the OPPF, the domestic biodiesel sales price would be at least equal to the biodiesel reference price, if not higher, and hence, the Commission should have found that payments from the OPPF do not make biodiesel producers "better off".[158]

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[150] Provisional Regulation (Exhibit IDN-1), recital 48; MEMR Decree 2026/2017 (Exhibit EU-6 (English translation)).

[151] Indonesia's first written submission, para. 114. Canada and the United Kingdom, as third parties, have expressed similar views that a government's direct transfer of funds should be viewed as accounting for part of the total remuneration for a good when the funds are conditioned on the provision of a good, even in situations where the government does not take title to the good. (Canada's third-party response to Panel question No. 1, paras. 7-12; Canada's third-party submission, paras. 20-22; and United Kingdom's third-party response to Panel question No. 2, paras. 7-8).

[152] Definitive Regulation (Exhibit IDN-2), recitals 59-86.

[153] Indonesia's first written submission, paras. 111 and 113.

[154] Indonesia's first written submission, para. 115.

[155] Indonesia's first written submission, para. 112.

[156] Indonesia's second written submission, para. 60. See also Indonesia's response to Panel question No. 13.a (referring to Provisional duties information for Wilmar (Exhibit IDN-14 (BCI)), pp. 18 et seq).

[157] Indonesia's first written submission, para. 112; response to Panel question No. 18; and second written submission, paras. 55 and 59-61 (referring to Indonesia's responses to Panel questions Nos. 11 and 13; GOI verification exhibits (Exhibit IDN-12 (BCI)), p. 87; PT Wilmar Bioenergi Indonesia's sales information (Exhibit IDN-42 (BCI)); Provisional duties information for Wilmar (Exhibit IDN-14 (BCI)), pp. 18 et seq).

[158] Indonesia has also rejected the Commission's reasoning that, absent the OPPF, the biodiesel reference price would be lower, arguing that the biodiesel reference price is in fact determined based on raw material costs, to which a reasonable amount is added to cover conversion costs, SG&As and profits. (Indonesia's first written submission, paras. 116-123). Indonesia argues that the biodiesel reference price in

7.77. In our evaluation of Indonesia's challenge to the Commission's determination that the OPPF disbursements constitute grants[159], we have rejected Indonesia's argument that the payments by the OPPF are part of a payment for the purchase of biodiesel. Rather, we have upheld the Commission's determination that funds provided by the OPPF were payments made without reciprocal obligations, and thus grants. We have recognized that the OPPF payments are linked to differences in prices between the price of the diesel paid by the fuel blending entities and the reference price for biodiesel.[160] However, we do not consider that this fact alone establishes that the GOI is purchasing or procuring biodiesel as the fact remains that the GOI does not receive anything in return for the payments. As the GOI provides payments to biodiesel producers in a separate arrangement and does not receive biodiesel in exchange, the OPPF disbursements are essentially given for free. In view of this, we have upheld the Commission's characterization of the OPPF disbursements as grants.

7.78. We further consider that the Commission did not err in its conclusion that the OPPF payments confer a benefit in the full amount of the grant. We agree with the Commission that the assessment of the determination of the amount of OPPF payments and whether it was used to compensate biodiesel producers in addition to payments from Pertamina or AKR, is not relevant to the assessment. We note that such an approach is consistent with the view that grants are not generally available in the marketplace and thus make the recipient better off by virtue being provided. Indeed, we are not aware of commercial transactions like the OPPF scheme, where one commercial entity makes payments to another commercial entity for nothing in return except a commitment to sell its goods to others in the market at a reduced price.

7.79. In light of our finding, we decline to address further Indonesia's arguments pertaining to the Commission's additional analysis and response to comments and arguments raised by the GOI and investigated exporters following the provisional and final disclosures.[161]

7.80. Indonesia additionally argues that the Commission should have taken into account the fact that biodiesel producers paid the export levies themselves pursuant to the OPPF scheme, when assessing whether the OPPF payments made the biodiesel producers "better off".[162] Exporting producers made similar allegations during the investigation that the biodiesel producers pay more to the OPPF than they receive as disbursements in return, and therefore do not receive a benefit.[163] We also reject this argument. As set out above, we have rejected Indonesia's claim that OPPF payments to biodiesel producers are not properly characterized as financial contributions by the government on the basis that biodiesel producer pay the export levies that become the funds of the OPPF, and thus the payments by the OPPF are simply financing to the biodiesel producers by themselves.[164] At the time export levies paid by the biodiesel producers are collected by GOI customs officials, the funds are under the control of the government and go into the state budget. Thus, the fact that the OPPF funds come from export levies paid by biodiesel producers does not affect the determination as to the existence and extent of any benefit from the OPPF. Rather, the OPPF disbursements to biodiesel producers reflect direct payments from the GOI. We therefore reject the claim that there is any obligation on the part of the Commission to offset or adjust the amount of benefit of the OPPF payments by taking into account what the recipients may have paid as levies.[165]

7.81. Finally, we note that Indonesia claimed in its first written submission that the Commission failed to consider that the benefit, if any, passed through to biodiesel blenders. Indonesia contends that the fact that fuel blending entities are not willing to pay the biodiesel reference prices and benefit from a lower price confirms that any benefit of the OPPF payments was fully passed on to

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Indonesia has in fact evolved in line with CPO CIF Rotterdam quotations, i.e. in line with global market price fluctuations for biodiesel. (Indonesia's first written submission, para. 118 (referring to Wilmar's comments on final disclosure (Exhibit IDN-9 (BCI)); second written submission, para. 61).

[159] See section 7.3.3.2 above.

[160] Indonesia's first written submission, para. 95.

[161] The Commission made clear that it was only considering claims by the GOI and exporters that the payments of the OPPF are the consideration for the purchase of biodiesel on an arguendo basis. See also Definitive Regulation (Exhibit IDN-2), recitals 70 and 86.

[162] Indonesia's first written submission, paras. 124-129; second written submission, paras. 69-72.

[163] Definitive Regulation (Exhibit IDN-2), recital 60.

[164] See para. 7.38 above.

[165] Moreover, we note that the payment of the export levies by biodiesel producers and other exporters of CPO products are separate and distinct transactions that are not tied to or conditioned on making or receiving the OPPF payments.

the fuel blending entities.[166] The Commission rejected the same claim raised by GOI and exporters in the investigation. In this regard, the Commission recalled its view that there is no real market price for biodiesel in Indonesia as the GOI regulates and distorts the whole CPO-biodiesel value chain. Thus, the Commission considered that the only price existing on the market is the one that was paid by the blenders (the diesel reference price). In any event, the Commission took the view that, even if it were the case that the blenders ultimately pay a lower price for the biodiesel they purchase, the issue of whether Pertamina or AKR (also) benefit from this programme is not subject of this investigation, since they are not exporting producers of the product concerned.[167] We agree with the Commission that the matter of whether the blenders may also receive any advantage from the broader OPPF scheme is a distinct matter from whether biodiesel producers received a benefit arising from the OPPF payments.

7.82. For the foregoing reasons, we therefore find that Indonesia has not established that the Commission acted inconsistently with Article 1.1(b) of the SCM Agreement by determining that the disbursements by the OPPF to biodiesel producers conferred a benefit to Indonesian biodiesel producers.

7.3.5 Whether the Commission erred in allocating OPPF subsidy amounts or by failing to correctly adjust the amount of subsidy

7.83. Indonesia makes several additional claims related to the Commission's calculation of subsidy amounts arising from OPPF disbursements and allocation of OPPF subsidy amounts to exports of biodiesel:

a. Indonesia claims that the Commission acted inconsistently with Article 19.4 of the SCM Agreement by "fail[ing] to properly allocate the alleged subsidy amounts resulting from the OPPF payments and thus failing to accurately determine the per unit subsidy amount and to impose countervailing duties at the level not exceeding that amount".[168]

b. Indonesia claims that the Commission acted inconsistently with Articles 1.1(a)(1)(ii), 14, 19.3, 19.4 and 32.1 of the SCM Agreement, as well as Article VI:3 of the GATT 1994, by failing to adjust the amount of the alleged subsidy "to account for discounts granted as well as export levies, transport and credit costs".[169] Indonesia submits that, by failing to do so, the Commission thus failed to adequately explain its benefit calculation method, to ascertain as accurately as possible the amount of subsidization bestowed on the investigated products, and to levy countervailing duties in the appropriate amounts.

7.3.5.1 Whether the Commission erred in allocating OPPF subsidy amounts to biodiesel exports

7.84. We recall, in the investigation, the Commission found that the OPPF payments confer a benefit equal to the full amount of the payments received during the investigation period.[170] The Commission calculated the amount of countervailable subsidy for each exporting producer in terms of the total amount of grant received during the investigation period, allocating those amounts over the total turnover generated by each investigated producers' sales during the period.[171] The Commission affirmed its determination in the definitive Regulation.[172]

7.85. Indonesia argues that OPPF subsidy amounts should not have been allocated over producers' domestic *and* export sales but rather, should have been allocated solely over sales of biodiesel on the Indonesian domestic market. Indonesia maintains that it cannot be contested that

[166] Indonesia's first written submission, paras. 107 and 119.
[167] Definitive Regulation (Exhibit IDN-2), recitals 74 and 86.
[168] Indonesia's first written submission, para. 138; second written submission, para. 80. In its panel request, Indonesia additionally referred to Articles 19.1 and 21.1 of the SCM Agreement, as well as Article VI:3 and Article XVI:1 of the GATT 1994, in respect of this claim. (Indonesia's panel request, section 1(c)). However, Indonesia did not refer to these provisions in its subsequent submissions to the Panel.
[169] Indonesia's first written submission, paras. 135-145; second written submission, para. 81.
[170] Provisional Regulation (Exhibit IDN-1), recital 81.
[171] Provisional Regulation (Exhibit IDN-1), recital 81.
[172] Definitive Regulation (Exhibit IDN-2), recital 86.

domestic biodiesel sales were the only sales that justify obtaining payments from the OPPF, and thus, only those sales benefit from the payments.[173]

7.86. Indonesia argues that it was incorrect for the Commission to calculate subsidization per unit of the subsidized and exported product without taking into account the fact that the exported product "does not and cannot benefit from what essentially is a domestic subsidy".[174] On that basis, Indonesia argues that the Commission levies countervailing duties on biodiesel imported from Indonesia in excess of the amount of the subsidy found to exist, contrary to Article 19.4 of the SCM Agreement.[175]

7.87. The European Union responds that the Commission did not err by allocating the subsidies over the total sales of biodiesel, because the OPPF disbursements supported the overall production of biodiesel by the recipient companies, regardless of whether biodiesel was destined for sale domestically or export.[176] Moreover, the European Union submits that there is no information on the record showing that OPPF payments were not used to support overall production. In this regard, the European Union maintains that there is no evidence on the record showing the biodiesel producers kept separate biodiesel production lines depending on the destination of the biodiesel for domestic sale or exportation or showing the biodiesel producers kept separate cost accounting or financial procedures depending on the destination of the biodiesel.[177]

7.88. As we understand, Indonesia is not challenging the allocation of the OPPF subsidy to biodiesel sales *per se*. Rather, Indonesia challenges the allocation of an amount of the subsidy to exports of biodiesel. The Commission purportedly erred in allocating the subsidy to exports of biodiesel to the European Union because the OPPF payments are only made after a producer sells biodiesel domestically (to fuel blending entities under the OPPF scheme). Thus, Indonesia argues that only domestic sales "benefit"[178] from such payments. In effect, Indonesia argues that the Commission should not have imposed any countervailing duty on biodiesel imports into the European Union because those export sales did not trigger the payment of funds from the OPPF.

7.89. We note that, in raising its claim, Indonesia emphasizes that Article 19.4 of the SCM Agreement mandates that "no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the *subsidized and exported* product".[179] The main thrust of Article 19.4 is to ensure that the amount of countervailing duty does not exceed *the amount of subsidy found to exist* for the product under investigation. Unless the use of a subsidy is restricted to the manufacture and sale of products destined only for the domestic market, we see no reason why an authority may not determine that the subsidy benefits the manufacture and sale of products destined for both domestic and export markets.[180] In such a situation, the imported product, i.e. "the subsidized and exported product", would be countervailable.

7.90. In this respect, we note that the first sentence of Article VI:3 of the GATT 1994 supports our understanding that subsidy amounts may be allocated over the total production of an investigated product to calculate the per unit rate of subsidization. The first sentence of Article VI:3 provides:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or

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[173] Indonesia's first written submission, para. 136.
[174] Indonesia's first written submission, para. 138.
[175] Indonesia's first written submission, para. 138; second written submission, paras. 75 and 78-79.
[176] European Union's first written submission, paras. 103 and 109-111; second written submission, para. 122.
[177] European Union's first written submission, para. 109.
[178] Indonesia's first written submission, para. 136.
[179] Article 19.4 of the SCM Agreement. (emphasis added; fn omitted)
[180] We note that, in *US – Washing Machines*, the Appellate Body further took the view that the assessment of the existence of a product-specific tie is not necessarily based on whether the subsidy actually results in increased production or sale of the product in question, but rather whether the subsidy operates in a manner that can be expected to foster or incentivize the production or sale of the product concerned. (Appellate Body Report, *US – Washing Machines*, para. 5.270).

indirectly, on the *manufacture, production or export of such product* in the country of origin or exportation.[181]

7.91. In the case before us, the total amount of subsidy that has been provided equals the full amount of the OPPF payments. Indonesia contends that those payments are conditioned on and triggered by domestic biodiesel sales only.[182] Any condition that a producer sell its product domestically does not prevent that producer from using the proceeds of a subsidy to finance its overall product-specific activities, which may benefit the manufacture or production of that product, whether for sale domestically or export.

7.92. Indonesia contends that in determining whether to allocate a subsidy, an authority must consider the design, structure and operation of a subsidy, with a focus on whether the bestowal of the subsidy is connected to, or conditioned on the export of a specific product.[183] Indonesia once again seems to focus on the reference in Article 19.4 to the "the subsidized and exported product". However, in the absence of any demonstration that a recipient's use of a subsidy was restricted to the manufacture and sale of a product destined only for the domestic market, such a focus on whether the product is exported is not required to calculate the per unit rate of subsidization for purposes imposing a countervailing duty.[184]

7.93. Indonesia has also asserted that the recipient companies cannot use OPPF payments to promote their sales of biodiesel to the European Union or other destinations.[185] However, there is nothing before us to suggest that there were restrictions on the use of the OPPF disbursements by the recipient companies nor has Indonesia pointed to any evidence in this respect.[186] Thus, absent any restrictions on the use of the funds, as money is fungible, it is reasonable to expect that the subsidies could be used to benefit the totality of biodiesel production, including production that is ultimately destined for export.

7.94. We accordingly see no error in the Commission's approach to calculating the amount of countervailable subsidy for each exporting producer in terms of the total amount of grant received during the investigation period and allocating those amounts over the total turnover generated by each investigated producers' sales during the period. We therefore reject Indonesia's claim that the Commission acted inconsistently with Articles 19.1, 19.4 and 21.1 of the SCM Agreement, or Article VI:3 and Article XVI:1 of the GATT 1994, by failing to properly allocate the alleged subsidy amounts resulting from the OPPF payments, or otherwise failing to accurately determine the per unit subsidy amount or impose countervailing duties at the level not exceeding that amount.

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[181] Emphasis added.

[182] In setting out its claim, for instance, Indonesia notes that domestic biodiesel sales were the only sales that justify obtaining payments from the OPPF. Indonesia also notes that the OPPF payments reflect the "exact mathematical difference between the price of the diesel paid by petrofuel [blending] entities and the reference price for biodiesel sold in the domestic market". (Indonesia's first written submission, paras. 136-137). (emphasis omitted)

[183] Indonesia's response to Panel question No. 22.

[184] We note that Article 3.1(a) of the SCM Agreement prohibits "subsidies contingent, in law or in fact … upon export performance". Footnote 4 to Article 3.1(a), in turn, specifies that a subsidy is *de facto* contingent on export performance when the granting of that subsidy, "without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings". As we have discussed, while such an analysis is required to determine the existence of an export contingent subsidy, such an assessment may not be required in determining the per unit rate of subsidization in the absence of any demonstration that a recipient's use of a subsidy is restricted to the manufacture and sale of a product destined only for the domestic market.

[185] Indonesia's second written submission, para. 79.

[186] The European Union submits that there is no information on the record showing that the biodiesel producers kept separate biodiesel production lines depending on the destination of the biodiesel for domestic sale or exportation or that the biodiesel producers kept separate cost accounting or financial procedures depending on the destination of the produced biodiesel. (European Union's first written submission, para. 109).

7.3.5.2 Whether the Commission erred by failing to adjust the amount of subsidy to account for discounts, transportation, and credit costs

7.95. Indonesia further claims that the Commission failed to adjust the amount of the alleged subsidy "to account for discounts granted as well as export levies, transport and credit costs".[187] By allegedly failing to do so, Indonesia claims that the Commission did not ascertain "as accurately as possible" the amount of subsidization bestowed on the investigated products, as required by Article 19.3 of the SCM Agreement, and thus failed to levy countervailing duties in the "appropriate" amounts, as required under Article 19.4 of the SCM Agreement.[188] Indonesia has asked the Panel to address these claims if it upholds the Commission's determination that the OPPF payments constitute grants that confer a benefit.

7.96. Regarding alleged *transportation costs*, Indonesia claims that the OPPF payments should be understood to reimburse transportation costs that the Indonesian biodiesel producers incurred on their sales of biodiesel to Pertamina or AKR. For Indonesia, biodiesel producers would not have received payment from the OPPF if they had not first incurred costs by transporting biodiesel to Pertamina and AKR. Instead, Indonesia claims that, but for the OPPF payments, the fuel blending entities would have themselves compensated biodiesel producers for transportation costs since the fuel blending entities placed a purchase order for biodiesel on delivered terms.[189]

7.97. Indonesia further argues that biodiesel producers incurred *credit costs* relating to the OPPF disbursements. According to Indonesia, participating biodiesel producers can only invoice the OPPF for its part of the price relating to the biodiesel sales after the invoice has been issued to Pertamina or AKR. Indonesia submits that the OPPF furthermore does multiple checks with regard to the data provided by the producers and, as a result, Indonesian biodiesel producers receive a payment from the OPPF only "several months" after they have invoiced Pertamina or AKR. Indonesia argues that this delay in payment from the OPPF gives rise to a credit cost that should be deducted similar to transportation costs incurred by biodiesel producers.[190]

7.98. Finally, Indonesia submits that biodiesel producers had to "*discount*" their sales price to Pertamina or AKR. In effect, Indonesia submits that biodiesel producers only charge Pertamina or AKR the diesel reference price instead of charging the biodiesel reference price or "market" price for biodiesel. Indonesia submits that biodiesel producers must charge this lower price in order to qualify for payments from the OPPF. Indonesia characterizes this lower price as a "discount cost" that biodiesel producers incur to obtain the alleged subsidy from OPPF.[191] Similar to alleged transportation and credit costs, Indonesia argues that the Commission should have made an adjustment to reflect this discount cost. We note that, since the OPPF provides funds to participating biodiesel producers equal to the difference in the diesel reference price actually paid by the fuel blending entities and the biodiesel reference price, the discount cost alleged by Indonesia equals the full amount of the OPPF payment which the Commission found to be the subsidy.

7.99. The European Union argues that there is no basis in the SCM Agreement for any of the requested adjustments. In respect of transportation costs, the European Union argues that if Indonesia's theory were accepted, every time a subsidy is granted conditional upon the production and sale of some specific good, the investigating authorities would have to deduct amounts of the subsidy to offset for costs related to the production and sale of that subsidized good. The European Union submits that such a requirement would lead in essence to the "cancellation" of the

[187] Indonesia's first written submission, paras. 135-145; second written submission, para. 81. Although Indonesia refers to "discounts granted as well as *export levies*, transport and credit costs", Indonesia addresses the relevance of the payment of export levies by biodiesel producers to the assessment of benefit in its claim under Article 1.1(b), addressed in paragraph 7.80 above. We therefore limit our assessment of Indonesia's claim in this section to alleged discounts granted and transport and credit costs.

[188] In both its panel request and first written submission, Indonesia maintains that the Commission acted inconsistently with Articles 1.1(a)(1)(ii), 14, 19.3, 19.4, and 32.1 of the SCM Agreement, as well as Article VI:3 of the GATT 1994. Despite claiming violations of all of these provisions, Indonesia has only discussed the legal requirements contained in Articles 19.3 and 19.4 of the SCM Agreement when setting out its claim. We therefore focus on Indonesia's arguments in relation to those two provisions.

[189] Indonesia's first written submission, para. 146; second written submission, para. 83.

[190] Indonesia's first written submission, para. 147.

[191] Indonesia's first written submission, para. 148.

SCM Agreement, since the amount of the subsidy would be always offset by the costs pertaining to the production and sale of the good.[192]

7.100. Regarding alleged credit costs, the European Union emphasizes that the Commission determined that the OPPF payments were grants, exporting producer should not have received those grants in the first place. Thus, it maintains that credit costs cannot exist because in the absence of the OPPF disbursements there would be no credit costs and nothing for Pertamina and AKR to reimburse or compensate.[193]

7.101. Finally, the European Union challenges the premise of Indonesia's argument that the biodiesel reference price reflects a "market" price for biodiesel that blenders would have paid had they not been afforded the opportunity to pay the lower diesel reference price under the OPPF scheme. The European Union explains:

> Indonesia's construction is based on a factual inaccuracy: the characterisation of the "biodiesel reference price" set by the Government of Indonesia as the "market price" for biodiesel. However, the European Commission carefully examined the evidence on the record of the investigation and found that "Indonesian domestic biodiesel market is entirely regulated from the price of CPO to the price and demand of biodiesel" and that "the reference price [for biodiesel] set by the Government of Indonesia does not reflect what the price would be under undistorted market conditions". The European Commission reasonably concluded that the "whole CPO-biodiesel value chain" was distorted and that the only "reliable proxy" for an undistorted domestic market price was the one that was paid by the petrofuel [blending] entities, i.e., the reference price for mineral diesel, which was lower than the biodiesel reference price fixed by the Government of Indonesia.[194]

7.102. We note that investigated biodiesel producers similarly claimed during the investigation that the Commission should have made adjustments for alleged transportation and credit costs incurred related to their participation in the OPPF scheme.[195] The Commission rejected these arguments. The Commission took the view that any transportation costs incurred by the biodiesel producers formed part of the terms of their commercial transactions with the fuel blending entities and such costs are not directly paid to the GOI.[196] The Commission also rejected producers' claims that they incurred credit costs, emphasizing that the OPPF payments were found to be grants, and not part of the payment for the purchase of biodiesel.[197]

7.103. We recall, in the preceding analysis, we have rejected Indonesia's claim that the funds from the OPPF are part of a payment for the purchase of biodiesel by the GOI. Rather, we have upheld the Commission's determination that funds provided by the OPPF were grants. We have recognized that the OPPF payments are linked to differences in prices between the price of the diesel paid by fuel blending entities and the reference price for biodiesel.[198] However, this fact alone does not change the fact that the GOI is not purchasing or procuring biodiesel and is not receiving anything in return for the payments except a commitment to sell its goods to others in the market at a reduced price. The OPPF payments help to facilitate the purchase of biodiesel by blenders and more broadly finance and support the development of the biodiesel industry. Hence, we have agreed with the Commission's determination that the OPPF payments confer a benefit to biodiesel producers in the amount of the grant.

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[192] European Union's first written submission, paras. 122-123. The European Union further submits that Article VI:3 of the GATT 1994 explicitly permits Members to countervail not only subsidies provided for the "manufacture, production or export" of a product, but also "any special subsidy to the transportation of a particular product". The European Union maintains that it is undisputed that the GOI's disbursements to the exporting producers included the amount of transport cost incurred for the delivery of the biodiesel to the fuel blending entities. (European Union's first written submission, para. 126).

[193] European Union's second written submission, paras. 136-138.

[194] European Union's second written submission, para. 127 (referring to Definitive Regulation (Exhibit IDN-2), recitals 73 and 84). (fns omitted)

[195] Definitive Regulation (Exhibit IDN-2), recitals 87 and 98.

[196] Definitive Regulation (Exhibit IDN-2), recitals 88, 90-92, and 98.

[197] Definitive Regulation (Exhibit IDN-2), recital 94.

[198] Indonesia's first written submission, para. 95.

7.104. In light of our findings as to the nature of the payments provided, we see no basis requiring the Commission to enquire into whether the payments compensated biodiesel producers for costs incurred or otherwise compensated biodiesel producers for the price they receive from biodiesel sales to Pertamina or AKR. As we have found, the price that biodiesel producers may receive from Pertamina or AKR – and whether or not it reflected any discount – relate to the terms of a different transaction involving different parties. Moreover, as the funds provided by the OPPF are not part of a payment for the purchase of biodiesel, we see no basis for assigning a credit cost related to any purported "delay" in payment from the OPPF.

7.105. Finally, as exporting producers claimed during the investigation[199], Indonesia argues that without incurring transportation costs to deliver biodiesel, Indonesian biodiesel producers would not have received a corresponding payment from the OPPF.[200] Thus, Indonesia argues that the costs for transportation qualify as a cost incurred to be eligible for the subsidy scheme that should have been excluded.[201] In this regard, we note that the Commission assessed that the transport costs in question should not be treated as a cost incurred to be eligible for the subsidy as those costs are not paid directly to the GOI, but instead to the fuel blending entities.[202] We consider this assessment was correct and agree that the only fees or costs that would normally be deducted are those paid to the government in order to receive the subsidy, of which none have been identified by Indonesia.[203]

7.106. For the foregoing reasons, we reject Indonesia's claim that the Commission acted inconsistently with Articles 1.1(a)(1)(ii), 14, 19.3, 19.4 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, by failing to adjust the amount of the alleged subsidy "to account for discounts granted as well as export levies, transport and credit costs"[204]; by failing to adequately explain its benefit calculation method or ascertain as accurately as possible the amount of subsidization bestowed on the investigated producer; or by failing to levy countervailing duties in the appropriate amounts.

7.3.6 Whether the Commission erred in determining that the OPPF was specific

7.107. The Commission found that the OPPF[205] was *de jure* specific, reasoning that the legislation pursuant to which the OPPF granting authority operates explicitly limits access to the subsidy to certain enterprises, namely those active in "the CPO value chain".[206] The Commission also found that even if there was no *de jure* specificity, the GOI directs the OPPF granting authority to *de facto* support only the biodiesel industry and "the vast majority" of OPPF is used to finance the biodiesel producers.[207] In support of this alternative determination of *de facto* specificity, the Commission noted that the OPPF is "predominantly used by the biodiesel industry and the granting authority exercised its discretion in doing so [*sic*]".[208]

[199] In the investigation, exporters claimed that transportation costs were a cost incurred to be eligible for the subsidy scheme and shall be excluded pursuant to Article 7(1)(a) of the EU basic Regulation. (Definitive Regulation (Exhibit IDN-2), recital 87).

[200] Indonesia's first written submission, para. 146 ("[w]ithout incurring such transportation costs, Indonesian biodiesel producers would not have received a corresponding payment from OPPF").

[201] Indonesia's first written submission, para. 147.

[202] Definitive Regulation (Exhibit IDN-2), recital 90.

[203] The Commission observed that EU guidelines for the calculation of the amount of subsidy in countervailing duty investigations specify the following: "the only fees or costs that may normally be deducted are those paid directly to the government in the investigation period. It must be shown that such payment is compulsory in order to receive the subsidy. Thus, payments to private parties, e.g. lawyers, accountants, incurred in applying for subsides are not deductible". (Definitive Regulation (Exhibit IDN-2), recital 89).

[204] Indonesia's first written submission, paras. 135-145; second written submission, para. 81.

[205] We note that in its specificity analysis, the Commission referred to the subsidy at issue simply as "the OPPF". For instance, at recital 75 of the provisional Regulation, the Commission found that "the OPPF is *de jure* specific". At the same time, in some instances, the Commission also referred to the subsidy at issue as the "Biodiesel Subsidy Fund". (See e.g. Provisional Regulation (Exhibit IDN-1), recital 80). For clarity and in the interest of consistency, we refer to the subsidy at issue in the context of Indonesia's specificity claim as "the OPPF".

[206] Provisional Regulation (Exhibit IDN-1), recital 75.

[207] Provisional Regulation (Exhibit IDN-1), recitals 76 and 78.

[208] Provisional Regulation (Exhibit IDN-1), recital 77.

7.108. Indonesia contends the Commission's finding that the OPPF was *de jure* specific as well as its alternative finding that the OPPF was *de facto* specific were both inconsistent with Articles 1.2, 2.1 and 2.4 of the SCM Agreement.[209] The European Union asks us to reject Indonesia's claims.

7.109. We first consider Indonesia's claim concerning the Commission's finding that the OPPF was *de jure* specific. We begin our analysis by noting that Article 1.2 of the SCM Agreement provides that only "specific" subsidies are countervailable. The concept of "specificity" is then elaborated in Article 2. Article 2.1 sets out principles for determining whether a subsidy is *de jure* specific to "an enterprise or industry or group of enterprises or industries" as follows:

> In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.[210]

7.110. The *chapeau* of Article 2.1 frames the central inquiry as a determination as to whether a subsidy is specific to "certain enterprises". The ordinary meanings of the terms "group" and "certain" do not indicate any numerical threshold as regards the number of things required in order to qualify as "group" or "certain". We agree with the Appellate Body's finding that the relevant enterprises must be "known and particularized" but not "explicitly" identified.[211] At the same time, for the establishment of *de jure* specificity, the limitation of access to subsidies to certain enterprises must be explicit and clear from the content of the relevant instrument, and not merely implied or suggested.[212] The SCM Agreement is silent as to the precise point at which a subsidy ceases to be specific because it is sufficiently broadly available.[213] Certain panels have considered, and we agree, that a subsidy is specific if its recipients represent a "sufficiently discrete segment" of the economy of the subsidizing Member.[214] The fact that the subsidized industries may be producing many different end products, or the economic diversity of beneficiaries, is not determinative as regards specificity.[215]

7.111. We recall that in the provisional Regulation, the Commission observed that the OPPF payments are "available for a limited number of industries, all relating to the CPO value chain".[216] The Commission found that "support of the palm oil value chain" is the "main explicit aim" of Presidential Regulation 61/2015 establishing the OPPF, noting that:

> In [the Regulation's] preamble, it is stated that the OPPF is needed "to ensure the continuous development of oil palm plantation, it requires a national strategy supported by management of fund for continuous development of oil palm plantation". In its Article 1 that legislation further specifies that "Oil Palm Plantation means all activities of management of natural resources, human resources, production facility, equipment

[209] Indonesia's first written submission, para. 272.
[210] Fn omitted.
[211] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.365.
[212] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 368.
[213] Panel Reports, *US – Upland Cotton*, para. 7.1142; *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.41.
[214] Panel Report, *US – Upland Cotton*, para. 7.1151.
[215] Panel Reports, *US – Softwood Lumber IV*, para. 7.121; *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.38.
[216] Provisional Regulation (Exhibit IDN-1), recital 73.

> and machinery, cultivation, harvest, processing, and marketing related to Oil Palm Plantation".
>
> In Article 11 it is then stipulated that "The collected Fund shall be used for: a. development of Oil Palm Plantation human resources; b. Research and development of Oil Palm Plantation; c. Promotion of Oil Palm Plantation; d. rejuvenation of Oil Palm Plantation; and e. Oil Palm Plantation facilities and infrastructures".[217]

7.112. Indonesia argues that by referring to the enterprises to which the OPPF was specific as those *active in the CPO value chain*, the Commission failed to make a determination that was precise enough to establish specificity.[218] For Indonesia, the Commission's identification of the enterprises to which the OPPF was specific by reference to the CPO value chain erodes the meaning of the term "specific". Indonesia asserts that every enterprise in Indonesia that uses diesel fuel containing 20% biodiesel in line with the blending mandate is "active in the CPO value chain", and hence reference to the CPO value chain is not sufficient to identify known and particularized enterprises.[219] Indonesia notes that Article 2 of the SCM Agreement does not recognize the notion of "value chain" specificity.[220]

7.113. The European Union contends that the Commission's specificity determination was valid as it clearly identified the class of enterprises to which the subsidy was limited on the basis of information on the record and in accordance with principles in the SCM Agreement.[221] The European Union contends that Article 2.1 of the SCM Agreement does not specify any numerical threshold as regards the number of entities that could be covered within the relevant "certain enterprises".[222]

7.114. At the outset, we reject Indonesia's argument that the Commission's specificity analysis was flawed because the term "value chain" does not appear in Article 2 of the SCM Agreement. We agree with the European Union's view that so long as the authority demonstrates that access to the subsidy at issue is limited to certain enterprises, the authority is not precluded from making that demonstration by referring to terms that do not mirror the language of Article 2 of the SCM Agreement. We note that an investigating authority need not necessarily use the precise wording of the WTO Agreement to fulfil the substantive requirements of the WTO Agreement. We also note that to determine whether the Commission's specificity analysis was clear, it would not be appropriate for us to focus exclusively on any particular phrase used therein in isolation. Rather, we would consider the Commission's specificity analysis as a whole to determine whether its determination of specificity was lacking in clarity and precision in the manner that Indonesia alleges.

7.115. We note that the Commission considered the OPPF to be *de jure* specific stating that "the OPPF is available for a limited number of industries, all relating to the CPO value chain".[223] The Commission found that supporting the palm oil value chain was "the main explicit aim" of the Presidential Regulation 61/2015 establishing the OPPF. The Commission noted in this regard that the preamble of this regulation indicates that the OPPF is needed "ensure the continuous development of oil palm plantation". The Commission further refers to the definition of "oil palm plantation" set out in Article 1 of that legislation, which specifies that:

> Oil Palm Plantation means all activities of management of natural resources, human resources, production facility, equipment and machinery, cultivation, harvest, processing, and marketing related to Oil Palm Plantation.[224]

7.116. Read in the context of the Commission's overall specificity analysis, the Commission's reference to the "palm oil value chain" was clearly based on the definition of "Oil Palm Plantation" set out in Article 1 of the regulation establishing the OPPF. That definition of "Oil Palm Plantation" explicitly circumscribes the range of activities that the OPPF is accessible for and

[217] Provisional Regulation (Exhibit IDN-1), recitals 73-74.
[218] Indonesia's first written submission, para. 160.
[219] Indonesia's second written submission, para. 87.
[220] Indonesia's first written submission, para. 161.
[221] European Union's first written submission, para. 135.
[222] European Union's first written submission, para. 135.
[223] Provisional Regulation (Exhibit IDN-1), recital 73.
[224] Provisional Regulation (Exhibit IDN-1), recital 73.

therefore entities that are eligible to receive support from the OPPF.[225] The Commission's analysis makes it clear to us that it referred to the range of activities that the OPPF was explicitly aimed to support as the "palm oil value chain".

7.117. We are not persuaded with Indonesia's argument that all enterprises in Indonesia can be considered to be active in the CPO value chain because they incorporate 20% of biodiesel in line with the blending mandate. As discussed above, we understand the Commission's reference to "the CPO value chain" not in isolation but in conjunction with other elements in its specificity analysis, especially the Commission's explicit reliance on Article 1 of the Presidential Regulation 61/2015. Indonesia has not explained why "Oil Palm Plantation" as defined in Article 1 of the Presidential Regulation 61/2015 could be understood to refer to all enterprises in Indonesia. Indonesia has also not put forward any arguments as to why "Oil Palm Plantation" as defined in Article 1 of the Presidential Regulation 61/2015 refers to a segment of the economy that is not sufficiently discrete to make the OPPF a specific subsidy.

7.118. Thus, we are of the view that the Commission's *de jure* specificity analysis demonstrated that the access to the subsidy was indeed limited to certain enterprises, as required under Article 2 of the SCM Agreement. Therefore, we conclude that Indonesia has not established that the Commission's finding that the OPPF was *de jure* specific was inconsistent with Articles 1.2, 2.1 and 2.4 of the SCM Agreement.[226] In light of this conclusion, we refrain from resolving Indonesia's arguments concerning the Commission's *de facto* specificity determination. We note in this regard that the Commission's finding of *de jure* specificity is sufficient to make the OPPF subject to Part V of the SCM Agreement, regardless of the Commission's alternative *de facto* specificity determination.

7.3.7 Conclusion

7.119. For the reasons we set out in sections 7.3.3-7.3.6 above, we find that Indonesia has not established that the Commission acted inconsistently with to Article 1.1(a)(1) of the SCM Agreement by determining that the disbursements from the OPPF to the biodiesel producers constituted a grant and not purchases of biodiesel by the GOI. We further find that Indonesia has not established that the Commission acted inconsistently with Article 1.1(b) or Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the disbursements by the OPPF conferred a benefit to Indonesian biodiesel producers which is specific. Finally, we reject Indonesia's additional claims that the Commission erred in calculating the correct amount of subsidization, by allocating the OPPF subsidy over biodiesel producers' domestic *and* export sales, or by failing to adjust the amount of the alleged subsidy to account for discounts granted as well as export levies, transport and credit costs[227].

7.4 The Commission's determination that the GOI provides a countervailable subsidy to biodiesel producers through the provision of CPO

7.4.1 Introduction

7.120. In the underlying investigation, the Commission investigated whether the GOI was intervening in the CPO market to ensure that CPO producers supply CPO to biodiesel producers at

[225] We note that, as the Appellate Body has noted, eligibility to a subsidy can be limited in many different ways, including by circumscribing the type of activities conducted by the recipients. (Appellate Body Report, *US – Washing Machines*, para. 5.223).

[226] We note that the term "certain enterprises" permits a qualitative identification of entities that constitute the set of enterprises to which the subsidy is specific. This is keeping with the fact that Article 2 of the SCM Agreement do not indicate any numerical threshold as regards the maximum number of entities that can qualify as a "group" or "certain" enterprises. (Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.365 and 4.377).

[227] In particular, Indonesia maintains that the Commission acted inconsistently with Articles 19.1, 19.4 and 21.1 of the SCM Agreement, and Article VI:3 and Article XVI:1 of the GATT 1994, by allocating OPPF subsidy amounts over producers' domestic and export sales rather than allocating the subsidy solely over sales of biodiesel on the Indonesian domestic market. Indonesia further maintains that the Commission acted inconsistently with Articles 1.1(a)(1)(ii), 14, 19.3, 19.4 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, by failing to adjust the amount of the subsidy to account for alleged "discounts" granted as well as export levies that were paid, and alleged transport and credit costs.

an artificially low level.[228] CPO is the main raw material used to produce biodiesel in Indonesia, representing approximately 85% of the total production cost of biodiesel.[229] The Commission observed that the GOI had implemented a policy of imposing export taxes on CPO, and also introduced an export levy on exports of CPO in May 2015. In addition to the export tax and levy, the Commission determined that the GOI also intervenes in the CPO market to *de facto* control domestic CPO prices, to ensure that CPO is sold at lower prices. The Commission found that this "set" of measures results in a policy where the GOI provides a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement by "entrusting" or "directing" CPO suppliers to provide CPO to the biodiesel industry for less than adequate remuneration, thereby providing a countervailable subsidy to biodiesel producers.[230] Moreover, the Commission found that the GOI provided subsidies directly to CPO producers to ensure that CPO producers comply with the policy of providing CPO at artificially low prices.[231]

7.121. The Commission further found that the same "set" of measures qualifies as a form of "income or price support" to biodiesel producers within the meaning of Article 1.1(a)(2) of the SCM Agreement, thus providing an alternative basis establishing that the GOI subsidizes the biodiesel industry.[232]

7.122. Indonesia makes a series of claims in connection with the Commission's findings:

a. Indonesia claims that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement, because it improperly found that the GOI "directed" or "entrusted" Indonesian CPO producers to sell CPO to biodiesel producers for less than adequate remuneration.[233]

b. Indonesia claims that the Commission acted inconsistently with Article 1.1(a)(2) of the SCM Agreement, by finding that the GOI provided "income or price support" to biodiesel producers within the meaning of Article 1.1(a)(2) of the SCM Agreement.[234]

c. Indonesia claims that the Commission acted inconsistently with Article 1.1(b) and Article 14(d) of the SCM Agreement in determining that a benefit was being conferred on Indonesian biodiesel producers (resulting from the alleged provision of CPO for less than adequate remuneration).[235]

d. Indonesia claims that the Commission's specificity determination concerning the provision of CPO for less than adequate remuneration and the provision of income or price support is inconsistent with Articles 1.2, 2.1, and 2.4 of the SCM Agreement.[236]

e. Indonesia claims that the Commission's resort to facts available in this context was inconsistent with Article 12.7 of the SCM Agreement.[237]

7.4.2 Whether the Commission established that GOI intervention in the CPO market constitutes a financial contribution within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement

7.123. We begin with Indonesia's claim as relates to the Commission's finding that the GOI allegedly "entrusted" or "directed" Indonesian CPO producers to provide CPO to biodiesel producers, inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement.

7.124. Article 1.1(a)(1) of the SCM Agreement provides in relevant part as follows:

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[228] Provisional Regulation (Exhibit IDN-1), recital 90.
[229] Provisional Regulation (Exhibit IDN-1), recital 83.
[230] Provisional Regulation (Exhibit IDN-1), recital 172.
[231] Provisional Regulation (Exhibit IDN-1), recitals 90, 153, and 155.
[232] Provisional Regulation (Exhibit IDN-1), recital 194.
[233] Indonesia's first written submission, paras. 207 and 233.
[234] Indonesia's first written submission, para. 247.
[235] Indonesia's first written submission, paras. 259-260.
[236] Indonesia's first written submission, para. 272.
[237] Indonesia's first written submission, para. 538.

> For purposes of this Agreement, a subsidy shall be deemed to exist if:
>
> [T]here is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> …
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government … entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments[.]

7.125. Pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement, a government or public body therefore provides a financial contribution when it "entrusts or directs" a private body to carry out certain functions listed in Articles 1.1(a)(1)(i) to (iii), including entrusting or directing such a body to provide goods (as covered under Article 1.1(a)(1)(iii) of the SCM Agreement).

7.126. As we have noted above and discuss in further detail below, in the underlying investigation the Commission determined that the GOI intervened in the Indonesian CPO market, including through imposing export restraints and *de facto* controlling the price of CPO in the domestic market, and in doing so, entrusted or directed Indonesian CPO suppliers to sell CPO to downstream producers, including Indonesian biodiesel producers, for less than adequate remuneration. The Commission further found that the GOI provided subsidies provided directly to CPO producers to ensure that CPO suppliers comply with the policy of providing CPO at artificially low prices.

7.127. Indonesia makes two separate claims related to the Commission's determination. Indonesia claims, first, that the Commission failed to establish that, through the "set" of described measures, the GOI "directed" or "entrusted" Indonesian CPO producers to provide CPO to biodiesel producers within the meaning of Article 1.1(a)(1)(iv). Indonesia maintains that the Commission also failed to properly address the criteria in Article 1.1(a)(1)(iv), to show that the alleged provision of CPO is a type of function that would "normally be vested" in the government, and "in no real sense, differs from practices normally followed by governments". We first set out the relevant aspects of the Commission's determinations and evidence on the record before evaluating Indonesia's claim.

7.4.2.1 The Commission's "entrustment or direction" findings

7.128. In the underlying investigation, the Commission determined that, through imposing an export tax and levy on the export of CPO and by *de facto* controlling the price of CPO in the domestic market, the GOI entrusted or directed private Indonesian CPO producers to sell CPO to biodiesel producers. The Commission determined that the GOI had in place a government policy to support the biodiesel industry and that the support to the biodiesel industry was achieved "mainly through the export tax and levy imposed on CPO and the biodiesel subsidy fund".[238] As discussed below, the Commission further based its finding of entrustment or direction on an evaluation of GOI's intervention in the marketplace to control CPO prices, which led the Commission to conclude that all independent CPO suppliers in Indonesia aligned their prices to prices set by PT Perkebunan Nusantara (PTPN), a public body acting under the control of the GOI. Moreover, the Commission found that the GOI provides subsidies to CPO producers to ensure that CPO producers comply with the policy of providing CPO at artificially low prices.[239]

7.129. As the Commission noted, the export tax on CPO was first introduced in 1994 and as noted in Regulation 128/PMK.011/2011, the objective was to protect domestic supply and ensure price stability of cooking oil and to develop manufacturing industries downstream.[240] The Commission noted that the export tax regulations had been updated on various occasions. In the latest Regulation 13/2017 (applicable during the investigation period), the export tax consists of a

[238] Provisional Regulation (Exhibit IDN-1), recital 112.
[239] Provisional Regulation (Exhibit IDN-1), recital 90.
[240] Provisional Regulation (Exhibit IDN-1), recital 114.

progressive tariff schedule on CPO as well as on 22 other CPO-derivative products, including biodiesel.[241] The progressive export tax is linked to the reference price for CPO exports such that the export tariff increases when the CPO export price goes up. The export tariff ranges from USD 0/tonne - when the international CPO price is below USD 750 - up to USD 200/tonne when the CPO price is above USD 1250.[242] The Commission noted that:

> "[H]igher export prices command higher tariff rates". As a result, the GOI linked the export system directly to international CPO prices, and not to other concerns, such as production levels or environmental impact. It follows that the effects on prices paid by the exporting producers is not incidental but the direct and intended result of the measures designed by the GOI.[243]

7.130. In addition to the export tax regime, the Commission observed that the GOI imposed an export levy on CPO exports and CPO-derivative products which was collected during the investigation period. The Commission noted that the export levy during the investigation period was USD 50 per tonne on CPO and USD 30 per tonne on refined products.[244] The export levy was set at USD 20 per tonne for biodiesel during the investigation period.[245] The Commission observed that the introduction of the export levy coincided with a period where Indonesian prices were nearly identical to world prices. While recognizing that the export levy is collected to fund the OPPF to provide direct support to the biodiesel industry, the Commission considered that the introduction of the export levy further "allows biodiesel producers to purchase CPO at lower prices than would otherwise be available".[246]

7.131. The Commission acknowledged that the export tax was not collected during the investigation period due to lower international prices[247], and also acknowledged that the export levy had been suspended after the investigation period. The Commission noted that legislation authorizing the export tax had not been repealed, leaving open the possibility that it would be applied in the future. The Commission further did not consider the fact that the export tax had not been imposed during the investigation period, or that levy was suspended after the investigation period, called into question the existence of a financial contribution.[248]

7.132. The Commission further investigated the role of PTPN, a state-owned CPO supplier selling CPO in the Indonesian market, and its impact on sales by independent CPO suppliers as part of its finding of entrustment or direction. According to the provisional Regulation, PTPN supplies between 6% to 9% of the domestic market, with 40% of supply otherwise coming from individual farmers and the remaining part coming from "larger" suppliers.[249] As part of its assessment, the Commission determined that PTPN did not cooperate in the investigation, and in addition, that many of the identified independent CPO suppliers had either failed to participate in the investigation or failed to provide complete information in response to the Commission's questionnaire. The Commission therefore resorted to facts available in respect of certain aspects of its evaluation of PTPN and other CPO suppliers in the marketplace.[250] The Commission had sought information on PTPN's ownership, as well as evidence of any formal indicia of government control in PTPN, including on the decision-making process within PTPN.

7.133. The Commission found that the GOI "directly controls" PTPN[251], including through appointing all of PTPN's corporate bodies (i.e. its board of directors and board of commissioners), all of which report to the GOI. The Commission found that the board of directors is responsible for all relevant

[241] Provisional Regulation (Exhibit IDN-1), recital 87.
[242] Provisional Regulation (Exhibit IDN-1), recital 115.
[243] Provisional Regulation (Exhibit IDN-1), recital 116.
[244] Provisional Regulation (Exhibit IDN-1), recital 117.
[245] Provisional Regulation (Exhibit IDN-1), recital 89.
[246] Provisional Regulation (Exhibit IDN-1), recital 117.
[247] Provisional Regulation (Exhibit IDN-1), recital 148; Definitive Regulation (Exhibit IDN-2), recitals 106 and 112.
[248] Definitive Regulation (Exhibit IDN-2), recital 108. The Commission noted that legislation authorizing the export tax had not been repealed and referred to a public statement which, it said, showed that the GOI intended to use the export tax in the future.
[249] Provisional Regulation (Exhibit IDN-1), recital 146.
[250] See e.g. Provisional Regulation (Exhibit IDN-1), recitals 93-96 and-126-127; Definitive Regulation (Exhibit IDN-2), recitals 123-125, 134, and 143. Indonesia's additional claims that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in its determination are discussed in section 7.4.6 below.
[251] Provisional Regulation (Exhibit IDN-1), recital 128.

decisions taken by PTPN's group companies, including decisions on pricing strategy for the sale of CPO as well as the price at which PTPN accepts offers for CPO that is sold pursuant to its daily auctioning system. In light of PTPN's corporate governance system, the Commission concluded the PTPN is under control of the GOI and also found evidence that the GOI exercised meaningful control over PTPN when setting and accepting CPO prices.[252]

7.134. In particular, the Commission noted that PTPN organizes online daily auctions to sell its CPO. Prospective buyers may register to participate and have access to the online platform.[253] The Commission stated that it had obtained evidence in the course of the investigation that the GOI sets the price at which CPO is sold at auction. The key aspects of the Commission's findings are as follows:

a. Before launching the daily bidding process, PTPN identifies a "price idea" for the day. However, PTPN is not under the obligation to reject offers below the price idea. Instead, when the price offered by a prospective buyer is below that price idea, the matter is referred to the board of directors (that is appointed by the GOI) which can decide to accept the offer. The Commission stated that it confirmed during verification that lower prices were accepted "on a regular basis".[254]

b. Given that PTPN's management board ("where the GOI is solely represented") makes decisions on prices, the Commission concluded that the GOI exercises meaningful control over PTPN relating to pricing decisions. In addition, as PTPN's board of directors is appointed by and reports to the GOI, the Commission concluded that the GOI "effectively sets the price for CPO on the domestic market".[255]

c. The Commission also concluded, based on available information that PTPN does not act as a rational operator on the market as a result of the meaningful control that the GOI exercises over PTPN. In this respect, the Commission concluded that by following GOI directives, PTPN has been loss making in the past years, and that a rational operator would have maximized profits rather than behaving in this manner.[256]

7.135. In light of the above, the Commission concluded that PTPN is a public body exercising governmental functions when selling CPO on the market.[257]

7.136. In addition to evaluating the GOI's role in setting the price at which CPO is sold at PTPN's auctions, the Commission further found evidence that the domestic market price of CPO (for sales by independent CPO suppliers) "consistently and systematically followed"[258] the daily auction price accepted by PTPN for its sales. The Commission made the following findings in this respect:

a. The Commission verified that PTPN publishes the results of daily tender data on its online platform "always at 15:30h" on the day of the tender, indicating the exact award unit price for CPO sold. All companies registered within the PTPN informatics system may access this tender data, regardless of whether they have participated in individual tenders or whether they have been successful in their bids.[259]

b. The Commission noted that all exporting biodiesel producers had confirmed that they have daily negotiations to purchase CPO from CPO suppliers other than PTPN and biodiesel producers generally carried out those negotiations once the results of the PTPN tenders are available. The exporting biodiesel producers further explained that they used the PTPN daily prices as the starting price of the negotiations.[260]

[252] Provisional Regulation (Exhibit IDN-1), recitals 130-131.
[253] Provisional Regulation (Exhibit IDN-1), recital 132.
[254] Provisional Regulation (Exhibit IDN-1), recital 133.
[255] Provisional Regulation (Exhibit IDN-1), recitals 133-134.
[256] Provisional Regulation (Exhibit IDN-1), recital 135.
[257] Provisional Regulation (Exhibit IDN-1), recital 137.
[258] Provisional Regulation (Exhibit IDN-1), recital 137.
[259] Provisional Regulation (Exhibit IDN-1), recital 140.
[260] Provisional Regulation (Exhibit IDN-1), recital 141.

c. Exporting producers additionally explained that any differences between the PTPN prices and the prices negotiated with independent CPO suppliers are mainly due to different logistic costs. In this respect, the exporting producers explained that PTPN tenders are issued for deliveries mainly in Dumai (on the island of Sumatra) and Belawan, which is ideally located for logistics. Other independent suppliers may be located in more remote areas, such as, for example the island of Borneo, and therefore logistics costs increase.[261]

d. The Commission also verified that the exporting producers always paid a unit price to independent CPO suppliers during the investigation period that was the same or lower than the PTPN price for that day.[262]

7.137. Hence, based on available evidence, the Commission concluded that, *de facto*, all independent CPO suppliers in Indonesia, irrespective of their size, align their prices to the daily PTPN prices and that any deviation therefrom mainly derives from logistic costs.[263]

7.138. The Commission took the view that, by organizing "a transparent price setting mechanism", the GOI "is exercising one of th[e] more subtle means of direction of the Indonesian CPO suppliers".[264] In particular, the Commission found that by making public the daily unit price of CPO, the GOI effectively sets a maximum price at which CPO will be sold on that specific day. The Commission found that this transparency in the market allows buyers to align their behaviour in practice by not purchasing CPO from suppliers that request a price higher than those set by the GOI.[265] In this regard, the Commission found that negotiating behaviour is significantly imbalanced in favour of CPO buyers given that the CPO supplier market is fragmented and that buyers, including biodiesel producers in particular, are larger undertakings with a need for significant volume of raw materials. The Commission considered that in this context any CPO buyer will have a significant degree of buying power and can resist offers from suppliers at higher prices than those set by the GOI.[266]

7.139. The Commission further found that, while the export tax or levy was not the financial contribution at issue, together with the above elements, they function to direct CPO suppliers to sell their goods domestically at a lower price than could otherwise be achieved through exports. The Commission found that this thereby places CPO suppliers in an "economically irrational" situation that *induces* them to sell their goods domestically for a lower price than they could obtain, thus *inducing* them to comply with the GOI's policy objective behind the export tax and levy.[267]

7.140. As regards the nature of the GOI's alleged intervention in the market, we note the Commission's view that the sole fact that export taxes or levies as such are not explicitly identified as financial contributions in EU domestic law or the SCM Agreement does not exclude them from having the potential nature of a financial contribution that would fall under the definition of a subsidy under EU law or the SCM Agreement. The Commission submits that it provided ample evidence that the export tax and levy on CPO "was used as a tool to induce CPO producers to comply with the state policy objectives in a manner amounting to a countervailable subsidy."[268] The Commission cited a number of documents and public statements that, it found, showed that the GOI explicitly uses export restraints in pursuing a policy to support the development of the biodiesel industry, in particular, by ensuring the availability and reducing the domestic price of CPO.[269] The Commission

[261] Provisional Regulation (Exhibit IDN-1), recital 141.
[262] Provisional Regulation (Exhibit IDN-1), recital 142.
[263] Provisional Regulation (Exhibit IDN-1), recital 143. See also Wilmar verification report (Exhibit EU-50 (BCI)).
[264] Provisional Regulation (Exhibit IDN-1), recital 145.
[265] Provisional Regulation (Exhibit IDN-1), recital 145.
[266] Provisional Regulation (Exhibit IDN-1), recital 146.
[267] Provisional Regulation (Exhibit IDN-1), recital 147.
[268] Provisional Regulation (Exhibit IDN-1), recital 157.
[269] Provisional Regulation (Exhibit IDN-1), recital 118. The Commission cited, for example, an explanation of the Indonesian directorate general for customs and excise in "Customs and Excise News Magazine, Volume 47, No. 9, September 2015". (Provisional Regulation (Exhibit IDN-1), recital 119 and fn 29). The Commission also made reference to "judgement of the General Court of 10 April 2019, T-300/16, Jindal Saw, ECLI:EU:T:2019:235, para. 117". (Provisional Regulation (Exhibit IDN-1), recital 123 and fn 31). See also Customs and Excise News Magazine, Volume 47, No. 9, September 2015; "Export taxes and other restrictions on raw material and their limitation through free trade agreements: Impact on developing countries" (2016); General Court, Case T-300/16, Jindal Saw Ltd and Jindal Saw Italia SpA v. Commission (10 April 2019), ECLI:EU:T:2019:235, para. 117.

found that by imposing export restraints, "the GOI effectively restricts the freedom of action of CPO suppliers by *de facto* limiting their business decision at what price to sell their product and where."[270]

7.141. Finally, the Commission found that that the provision of CPO to biodiesel producers should be understood as a typical function normally vested in the government, thereby satisfying the criterion in Article 1.1(a)(1)(iv) that a government either entrusts or directs a private body to carry out one or more of the type of functions which would "normally be vested" in the government:

> With respect to the "normally vested" criterion … the provision of raw materials located within a country to national companies is a function which is normally vested in the government. Under general international law, States have sovereignty over their natural resources. While they enjoy large discretion how to organise the exploitation of their natural resources, their sovereignty normally translates into a regulatory governmental power to do so. In this respect, it is irrelevant whether or not a government would habitually engage in this function. [Therefore], the provision of CPO located on Indonesian soil to the Indonesian biodiesel industry is a function which is normally vested in the government.[271]

7.142. In light of the above, the Commission concluded that the set of measures adopted by the GOI led to a financial contribution in the form of governmental provision of CPO for less than adequate remuneration to the Indonesian biodiesel exporting producers.[272]

7.4.2.2 Evaluation

7.143. Indonesia considers the appropriate legal standard under Article 1.1(a)(1)(iv) requires an investigating authority to identify "an explicit and affirmative action of delegation or command" on the part of a government to a private entity to undertake one of the types of functions foreseen in Articles 1.1(a)(1)(i)-(iii) of the SCM Agreement.[273] Toward this end, an investigating authority must provide conclusive evidence to warrant a finding of entrustment or direction rather than mere "indications".[274] Indonesia maintains that the Commission failed to adduce any actual evidence of the conferral of responsibility or exercise of authority over the group of Indonesian CPO producers to support a finding of entrustment or direction.

7.144. According to Indonesia, the Commission found that the GOI entrusted or directed Indonesian CPO producers by means of export restraints in the form of fiscal measures. Indonesia submits that the bulk of evidence put forward by the Commission is limited to the alleged "price alignment with the CPO prices set by PTPN and the fact that CPO suppliers satisfied internal demand for CPO first before exporting".[275] Indonesia maintains that this analysis "rests on conjecture" and "does not suffice for a positive conclusion as to the existence of enforcement or direction of the class of domestic CPO producers in Indonesia".[276] Indonesia also argues that the systemic implications of the Commission's approach are significant because it would mean that an investigating authority could consider that measures of general application – such as fiscal measures – amount in fact to the entrustment or direction of a particular industry, rather than requiring a specific command-and-control relationship.[277]

7.145. At a minimum, Indonesia argues that the Commission was required to explicitly identify the relevant elements of governmental action that constrained the freedom to sell CPO both domestically or for export, and to any downstream purchasers. Indonesia maintains that the

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[270] Provisional Regulation (Exhibit IDN-1), recital 148. According to the Commission, it considered information for the purpose to confirm that domestic prices in Indonesia were lower than market prices. The Commission found that Indonesian domestic CPO prices were "consistently lower" than Malaysian CPO prices as well as Indonesian CPO export prices, based on Indonesia Export Statistics provided by the GOI. (Ibid. recitals 163 and 167). According to the Commission, this verified that the GOI "induced the CPO producers to sell locally at lower prices than otherwise". (Ibid. recital 162).

[271] Provisional Regulation (Exhibit IDN-1), recital 170.

[272] Provisional Regulation (Exhibit IDN-1), recital 172.

[273] Indonesia's first written submission, para. 211.

[274] Indonesia's second written submission, para. 108.

[275] Indonesia's second written submission, para. 107 (referring to European Union's response to Panel question No. 30, para. 37). See also Indonesia's first written submission, para. 223.

[276] Indonesia's second written submission, para. 107.

[277] Indonesia's first written submission, para. 223.

Commission's assessment that export restraints constrained the "free choice" of CPO producers overlooks that CPO producers were not prevented from selling to other purchasers, rather than just biodiesel producers. Ultimately, Indonesia considers that the Commission limited its assessment to conclude that the decision of CPO producers to fulfil domestic demand before exporting constituted "irrational economic behaviour".[278]

7.146. The European Union maintains that the Commission's assessment is consistent with the relevant legal standard for establishing "entrustment" or "direction" under Article 1.1(a)(1)(iv), particularly because there is no requirement to provide evidence of an explicit instruction, and there is also no requirement that the conferral of responsibility or exercise of authority must be explicit in nature. The European Union considers that the findings of the Appellate Body that there is no specific evidentiary standard support this interpretation. According to the European Union, entrustment and direction - through the giving of responsibility to or exercise of authority over a private body - imply a more active role than mere acts of encouragement. However, these terms do not systematically impose a requirement on the WTO Member to demonstrate that there was both "control" and "command".[279] Hence, the focal point of the analysis is whether the government is using private actors as a proxy.[280] The European Union further contends that entrustment or direction cannot be found to exist based solely on the economic effects of a government measure.[281] This means that when examining whether a government entrusts or directs a private body, one needs to examine the government's actions, and not purely a private party's reactions to a government measure, which would essentially be the effect of a government measure rather than necessarily a case of entrustment or direction. The European Union does not imply, however, that the behaviour of private entities is irrelevant, particularly in cases where that behaviour is not economically rational.[282]

7.147. The European Union argues that the evidence before the Commission supports its finding that CPO producers are being "induced" to provide CPO at cheaper prices for the benefit of biodiesel producers. The European Union maintains that this is reflected in the Commission's observations that CPO producers were selling CPO at prices aligned to those set by PTPN which were consistently lower than the export prices that would have been available but for the export restraint mechanism. The European Union contends that this constitutes economically irrational behaviour, and the operation of these measures together was thus correctly found to ensure that prices were "artificially low" to the benefit of biodiesel producers.[283]

7.148. The European Union also disagrees with Indonesia that a finding of "entrustment" or "direction" is precluded since CPO producers could freely choose to whom they supplied CPO. The European Union accepts that free choice may be a relevant factor to consider but argues that the extent to which CPO producers retained any free choice is a fact-specific question that can only be evaluated in the context of considering measures put in place by the GOI. In this respect the European Union contends that market freedom was in fact extremely limited given the operation of the export restraints, as is evidenced by the high degree of observed price alignment.[284] The European Union also maintains that CPO producers only resorted to exporting CPO once domestic demand was satisfied and thus, the fact that some CPO is exported does not contradict the finding that CPO producers are deprived of a rational choice.[285]

7.149. In the underlying investigation, the Commission determined based on evidence on the record described in paragraphs 7.128-7.244 above that the GOI provided a financial contribution to biodiesel producers by allegedly entrusting or directing Indonesian CPO suppliers to provide CPO to Indonesian biodiesel producers. The Commission concluded as follows:

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[278] Indonesia's second written submission, para. 109.

[279] European Union's first written submission, para. 264.

[280] European Union's first written submission, para. 260; second written submission, paras. 189-193 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, paras. 137-138).

[281] European Union's first written submission, para. 266, referring to Panel Report, *US – Countervailing Measures (China)*, para. 7.401.

[282] European Union's first written submission, para. 266, referring to Appellate Body Report, *Japan – DRAMs (Korea)*, para. 138; Panel Report, *US - Softwood Lumber VII*, para. 7.600.

[283] European Union's second written submission, paras. 199-205.

[284] European Union's second written submission, paras. 206-210.

[285] European Union's response to Panel question No. 38, paras. 65-72 (referring to Definitive Regulation (Exhibit IDN-2), recitals 127 and 153; and Provisional Regulation (Exhibit IDN-1), recital 148).

> In line with the conclusion of the Appellate Body in *US – Countervailing Duty on DRAMS*, the Commission took the view that the GOI directs CPO suppliers within the meaning of Article 1.1(a)(iv) of the SCM Agreement. In that case, in fact the Appellate Body concluded that "it may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental acti on is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, 'guidance' by a government can constitute direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case". In this case the Commission, also supported by the available evidence, concluded that the GOI created a system that induces suppliers to sell CPO at a specific price, thereby directing them to do so. As explained …, the Commission established that the price published by PTPN constitutes the maximum price on the domestic market of Indonesia and is de facto followed by all CPO and biodiesel producers on the market. Finally, with reference to the requirement of some sort of government's participation, it must be recalled that PTPN is a public body and therefore its activity can be considered as the GOI's activity on the market and PTPN's activity clearly qualifies as that "demonstrable link" between the policy and the conduct of private bodies involved, which are acting as a proxy for the GOI to carry out its policy.
>
> Therefore, through those measures the GOI induces the CPO suppliers to keep CPO in Indonesia as they cannot sell at better prices which would prevail in Indonesia absent those measures.
>
> In this sense, the input producers are "entrusted" or "directed" by the GOI to provide goods to the domestic users of CPO, and notably biodiesel producers, for less than adequate remuneration. The CPO producers are given the responsibility to create an artificially low-priced domestic market in Indonesia.[286]

7.150. Our task is to evaluate whether Indonesia has established that the Commission, as an unbiased and objective investigating authority, could not have found, based on evidence before it, that the GOI entrusted or directed Indonesian domestic CPO suppliers to provide CPO to biodiesel producers.

7.151. As regards Article 1.1(a)(1)(iv), the legal concepts "entrust" or "direct" encompass the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution.[287] In prior cases, the term "entrust" has been understood to refer to situations where a government "gives responsibility to" a private body, while the term "direct" has been understood to refer to situations where the government "exercises its authority over" a private body. In both instances, a government relies on a private body as a proxy to carry out one of the types of financial contributions listed in subparagraphs (i) through (iii) of Article 1.1(a)(1).[288] Conversely, "situations involving *exclusively* private conduct – that is, conduct that is not in some way attributable to a government or public body – cannot constitute a 'financial contribution' for purposes of determining the existence of a subsidy under the SCM Agreement".[289]

7.152. Prior WTO panel reports have examined whether restraints on the export of a good could lead to "entrustment" or "direction" to provide such a good in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement. In *US – Countervailing Measures (China)*, the panel found that in limiting the ability of domestic suppliers to export various raw materials through measures including export taxes, export quotas, and export licensing requirements, the Chinese government did not entrust or direct those suppliers to provide those goods to Chinese producers. In particular, the panel took the

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[286] Provisional Regulation (Exhibit IDN-1), recitals 150-152.

[287] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 108. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

[288] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116. See also Panel Reports, *US – Export Restraints*, paras. 8.29-8.34; and *Korea – Commercial Vessels*, paras. 7.368-7.372.

[289] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 107. (emphasis added)

view that there was no indication that the Chinese government had *directed* the private suppliers to provide the goods at issue, because it did not "give[] responsibility" to domestic producers to carry out the function of providing goods to domestic users, and the government did not *exercise its authority* over suppliers to provide those goods to the Chinese domestic producers.[290] The panel explained:

> The fact that the Government of China exercises its authority and thus engages in an act of direction with respect to the conditions under which magnesium and coke may be exported from China, is not sufficient to establish that the Government of China exercises authority over a private body to carry out the function of providing magnesium and coke to domestic users in China. In order for a government action to constitute "direction" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, it is not sufficient that the action involves an exercise of authority over a private body. The exercise of authority must have as its object one of "types of function" within the meaning of Articles 1.1(a)(1)(iv). To interpret "direction" to occur where an exercise of authority in respect of a restriction leads producers to increase their supply to the domestic market essentially means that direction is found to exist on the basis of the economic effects of the export restraint.[291]

7.153. In *US – Export Restraints*, the panel considered whether "export restraints" constitute a "financial contribution" in the sense of Article 1.1(a)(1) of the SCM Agreement and in particular, the provisions of Article 1.1(a)(1)(iii) and (iv).[292] The complaining party asked the panel to consider whether a broad scope of measures, defined as border measures that expressly limit the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or otherwise government-imposed fees or taxes on exportation of products, could meet the definition of "financial contribution" in the SCM Agreement. The panel concluded that such export restraints did not satisfy the "entrusts or directs" standard of Article 1.1(a)(1)(iv) under the view that the concepts entrustment or direction require an explicit and affirmative action of delegation or command.[293]

7.154. The panel in *US – Countervailing Duty Investigation on DRAMs* agreed that the delegation or command inferred by the terms "entrustment" and "direction" must take the form of an affirmative act but found nothing in the text of Article 1.1(a)(1)(iv) that would require the act of delegation or command to be "explicit".[294] The Appellate Body in *US – Countervailing Duty Investigation on DRAMs* disagreed that an explicit delegation or command is required to establish entrustment or direction, taking the view (as set out above) that entrustment or direction can occur where a government gives responsibility to, or exercises authority over, a private body to effectuate one of the types of functions listed in subparagraphs (i) through (iii) of Article 1.1(a)(1).[295] However, the Appellate Body agreed with the panel in *US – Export Restraints* that Article 1.1(a)(1)(iv) does not extend to cover "situation[s] in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market".[296] It also agreed that entrustment or direction "cannot be inadvertent or a mere by-product of governmental regulation".[297] The Appellate Body further emphasized that, as Article 1.1(a)(1)(iv) requires the participation of the government, albeit indirectly, there must be a "demonstrable link" between the government and the conduct of the private body.[298]

7.155. In *US – Softwood Lumber VII*, the panel assessed whether a policy imposed by the governments of British Columbia and Canada restricting the export of logs (permitting log exports only if certain criteria were met and upon payment of a fee) qualified as direction or entrustment.[299]

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[290] Panel Report, *US – Countervailing Measures (China)*, paras. 7.400-7.401.
[291] Panel Report, *US – Countervailing Measures (China)*, para. 7.401.
[292] Panel Report, *US – Export Restraints*, paras. 8.29-8.44.
[293] Panel Report, *US – Export Restraints*, para. 8.44.
[294] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, paras. 7.33 and 7.42.
[295] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, paras. 109-111 and 113.
[296] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114 (quoting Panel Report, *US – Export Restraints*, para. 8.31).
[297] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.95; and Panel Report, *China – GOES*, para. 7.93.
[298] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112.
[299] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, paras. 7.593-7.607.

In the underlying investigation of that dispute, the USDOC had concluded that the government policy effectively "compels" log suppliers to supply the domestic market, and further viewed a penalty imposed on exporting logs without authorization as a "form of threat or inducement" that effectuated the existence of entrustment or direction.[300] The panel disagreed that the government had given responsibility to, or exercised authority over private log suppliers to provide logs to the domestic mill producers:

> [W]e agree with Canada that *there is no evidence that the Governments of British Columbia and Canada require log suppliers to provide their logs to anyone, or direct them to sell those logs at any particular price*. We acknowledge, of course, that restrictions on exports of logs could affect private-party behaviour of log suppliers. But entrustment or direction cannot be a mere by-product of government regulation. Indeed, government regulations of different types could affect private-party behaviour. However, just because a governmental regulation has such an effect does not mean that the *government gives* responsibility to, or the *government exercises* authority over, a private body to provide goods. In particular, *we do not consider that a government entrusts or directs a private party to provide goods, or provide them at a particular price, just because that private party's behaviour, in terms of sale and pricing of its goods, is affected by the regulatory framework in which it operates*. Therefore, the USDOC's considerations that the LEP process "discourages log suppliers from considering the opportunities that may exist in the export market", "restricts the ability of log suppliers to enter into long-term supply contracts with foreign purchasers" and leads to a lower price of timber in British Columbia, pertain in our view to the effects of the export regulation for logs and do not indicate the existence of entrustment and direction.[301]

7.156. Thus, prior panel reports have interpreted the legal concepts of "entrustment" or "direction" under Article 1.1(a)(1)(iv) to require a "demonstrable link" between the government and the conduct of the private body. At the same time, it is not sufficient that a government's measure or action involves an exercise of authority over a private body. Rather, the exercise of authority must have as its object one of "types of function" within the meaning of Articles 1.1(a)(1)(iv). Therefore, not all situations where a government is merely intervening in the market as a regulator will give rise to the existence of entrustment or direction. In other words, a government would not be considered to entrust or direct a private party in situations where a private party's behaviour is merely affected by – or a response to – the regulatory framework in which it operates, where there is otherwise not evidence that a government directed or required private actors to, for instance, provide goods in the sense of Article 1.1(a)(1)(iii). In this sense, entrustment or direction cannot be inadvertent or a mere by-product of government regulation.[302]

7.157. We agree with the approach taken by prior panels. We acknowledge that an investigating authority may, in certain circumstances, establish that a government "directs" or "entrusts" private entities in the absence of evidence of an "explicit" instruction or requirement to undertake a particular conduct, such as directing or requiring private actors to provide goods to users. Hence, an investigating authority may seek to establish the existence of entrustment or direction by analysing a government's actions more broadly, including measures adopted by that government. However, we share the view of panels in previous disputes that a government does not entrust or direct a private party to provide goods just because the private party's behaviour in terms of sale and pricing of its goods is affected by the regulatory framework in which it operates. In the Panel's view, whether a government's action or regulation is having particular or intended economic effects, such as leading producers to increase their supply to the domestic market, will not suffice to establish that the government "gives responsibility" to or "exercises authority" over a private body to provide goods. Rather, an authority would need to establish on the basis of evidence that the regulatory scheme adopted, and the actions taken, by the government are such, in their scope and intensity so as to deny suppliers the ability to sell their products freely. With this in mind, we turn to consider the Commission's findings and its evaluation of the evidence before it.

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[300] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, paras. 7.605 and 7.608.
[301] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.606. (emphasis added)
[302] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114.

7.158. Central to the Commission's finding on entrustment or direction, the Commission concluded that it had "probative and compelling" circumstantial evidence before it to establish that the GOI created a system that "*induces*" CPO suppliers to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration.[303]

7.159. As explained in paragraphs 7.128-7.142 above, the Commission determined that the GOI had in place an underlying policy to support the biodiesel industry that, in the Commission's view, led the GOI to take deliberate steps to induce CPO suppliers to provide biodiesel producers with their primary input, CPO, at an artificially low price. According to the Commission, support to the biodiesel industry is achieved by a number of measures, "mainly through the export tax and levy imposed on CPO and the biodiesel subsidy fund"[304], but also through the exercise of GOI authority over a public body, PTPN, to *de facto* set domestic CPO prices at an artificially low level.[305] In this respect, the Commission found that PTPN regularly accepts bids to sell its CPO "at artificially low levels" but also makes daily tender data for these sales publicly available, and this price level is *de facto* followed by all CPO and biodiesel producers on the market.[306] Moreover, the Commission considered whether subsidies that the GOI provides directly to CPO producers helped to ensure that CPO producers comply with the policy of providing CPO at artificially low prices.[307] We recall the rationale for the Commission's finding related to this combined "set" of measures was that:

> [T]here is no such legitimate imposition of export restrictions when it becomes evident that the use of such instrument together with other mechanisms to keep commodities domestically and force suppliers to sell below market prices is part of a broader scheme engineered by the government to support a particular industry or set of industries to boost their competitiveness. Thus, the nature of the government action, including its context, object and purpose, is relevant in assessing the 'financial contribution' element.[308]

7.160. The Commission's observations appear aimed at distinguishing its evaluation from circumstances in past disputes, where panels have rejected restraints on the export of a good could lead to "entrustment" or "direction" to provide such a good in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement. Hence, the Commission refers to the existence of "other mechanisms" and a broader scheme designed to effectuate a government policy to support a particular industry. We disagree with the Commission's assessment of the evidence and its determination that "other mechanisms" support the conclusion that the GOI exercises authority over or directs Indonesian CPO suppliers to provide CPO in support of the biodiesel industry.

7.161. Despite consideration of potential GOI intervention in the marketplace to influence pricing, we consider the Commission's analysis is nevertheless flawed as it remains focused solely on the collective economic *effects* of various GOI measures. The Commission has not adduced evidence or identified any measure that reveals that the GOI mandates or directs CPO suppliers (explicitly or otherwise) to provide CPO to biodiesel producers or to sell CPO at any particular price, or evidence that the GOI restricts suppliers. To the extent that the GOI intervenes through to PTPN to *de facto* control prices, and this, in combination with the effects of the export restraints, may influence the market behaviour of producers, there is not a concurrent obligation (explicit or otherwise) to provide that CPO to biodiesel producers.

7.162. The European Union additionally emphasizes that the Commission considered subsidies that the GOI provides directly to CPO producers as part of the analysis of entrustment or direction. As the European Union notes, the Commission refers to these subsidies at the outset of its discussion of entrustment or direction in the Provisional Regulation, stating that the subsidies "ensure that [CPO producers] comply with the policy of providing CPO at artificially low prices".[309] The Commission provides a limited assessment of these subsidies, following its assessment of the export

[303] Provisional Regulation (Exhibit IDN-1), recitals 150-151. (emphasis added)
[304] Provisional Regulation (Exhibit IDN-1), recital 112. The Commission referred to the "Biodiesel Subsidy Fund" when evaluating GOI disbursements to biodiesel producers pursuant to the OPPF. The OPPF and Indonesia's claims related to these disbursements are discussed in Section 7.3of this Report.
[305] Provisional Regulation (Exhibit IDN-1), recital 90.
[306] Provisional Regulation (Exhibit IDN-1), recitals 137-143.
[307] Provisional Regulation (Exhibit IDN-1), recital 90.
[308] Provisional Regulation (Exhibit IDN-1), recital 109.
[309] Provisional Regulation (Exhibit IDN-1), recital 90.

restraints and the role play by PTPN in "induc[ing] suppliers to sell CPO at a specific price".[310] The Commission cites evidence to show that the GOI continues its support for sustainable management of oil palm plantations, in which "oil palm is a top sector that contributes significantly to the Indonesian economy".[311] However, once again, we see no indication that receipt of this support is contingent upon CPO producers supplying CPO to biodiesel producers to establish that the GOI imposes an obligation, directs or otherwise induces CPO producers to provide CPO to the biodiesel producers.

7.163. As explained above, we agree with past panels that restrictions on exports and other regulatory arrangements can affect the behaviour of private parties in a marketplace. However, we also share the views of past panels that, the mere fact that a government regulation or restriction has such an effect should not be conflated as the government "giving responsibility to" or "exercising authority over" a private body to provide goods. A government does not entrust or direct a private party to provide goods to anyone or even at a particular price just because the private party's behaviour in terms of sale and pricing of its goods is affected by the regulatory framework in which it operates.[312] Moreover, we consider the fact that independent Indonesian CPO suppliers retain the freedom to sell their products both domestically or for export, and to any downstream purchasers, not just to biodiesel producers. Therefore, CPO suppliers are not required to provide CPO to biodiesel producers, irrespective of the GOI's imposition of the export tax and/or levy, and irrespective of the alleged exercise of GOI authority over PTPN, a public body, to *de facto* set domestic CPO prices. This freedom to operate contradicts a finding that such independent suppliers are entrusted or directed to provide their CPO to biodiesel producers.[313]

7.164. The rationale underlying the Commission's reasoning has already been rejected in a number of past disputes. As one example, the panel in *US – Softwood Lumber VII* rejected the argument that an arguably more restrictive set of export measures (in terms of their alleged effects in the marketplace) supported the finding that the government had entrusted or directed domestic suppliers to provide goods. In the facts underlying that dispute, the USDOC had determined that an export "blocking system" in place had *de facto* created "an environment in which log sellers are forced into informal agreements that lower export volumes and domestic prices".[314] Pursuant to the export arrangements in place, the panel recognized that suppliers may be denied authorization to export depending on whether a domestic purchaser had made an offer for fair market value to purchase the logs. However, the panel noted that the supplier retained the possibility to reject that offer and sell to someone else, to use the log themselves, or in certain cases to hold off harvesting logs in the first place. The panel concluded that the freedom for private log suppliers to operate

[310] We note that, in its assessment of direction or entrustment in the Provisional Regulation, the Commission first discussed the export restraint system put in place by the GOI, concluding that "the export restraints were designed, introduced and monitored by the GOI with the specific purpose of keeping CPO prices at lower level for the benefit of the downstream industries". (Provisional Regulation (Exhibit IDN-1), recital 123). Thereafter, the Commission discussed the GOI's further intervention in the market in order to *de facto* control CPO prices through PTPN. (Provisional Regulation (Exhibit IDN-1), recitals 124-146). Following its evaluation of these two aspects (the imposition of export restraints and PTPN's involvement in the CPO market), the Commission set out its conclusion that "the GOI directs CPO suppliers within the meaning of Article 1.1(a)(iv) of the SCM Agreement", explaining that "the GOI created a system that induces suppliers to sell CPO at a specific price" and that "PTPN's activity clearly qualifies as th[e] 'demonstrable link' between the policy and the conduct of private bodies involved". (Provisional Regulation (Exhibit IDN-1), recital 150). The Commission went on to explain: "[i]n this sense, the input producers are 'entrusted' or 'directed' by the GOI to provide goods to the domestic users of CPO, and notably biodiesel producers, for less than adequate remuneration". (Provisional Regulation (Exhibit IDN-1), recital 152). The Commission's discussion of support being provided to oil palm plantations only appears thereafter, in which the Commission states that support was provided to "encourage" or "guarantee" that CPO suppliers "comply with the mandate imposed on them". (Provisional Regulation (Exhibit IDN-1), recitals 153 and 155). In its submissions before the Panel, the European Union submitted that: "support to the CPO industry cannot, in isolation, be regarded as directing CPO producers to provide CPO for LTAR", and therefore, "such additional measures, in the specific context of this case and considering other measures adopted by the GOI, were properly taken into account to *confirm the existence of* 'entrustment' or 'direction'". (European Union's first written submission, para. 273 (emphasis added)).

[311] Provisional Regulation (Exhibit IDN-1), recital 153. See also Provisional Regulation (Exhibit IDN-1), recitals 154-155.

[312] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.606.

[313] Panel Report, *US – Supercalendered Paper*, para. 7.64 (quoting Appellate Body Reports, *US – Carbon Steel (India)*, paras. 4.68-4.69; *US – Softwood Lumber IV*, para. 71.)

[314] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.607.

could not be understood as the government "giving responsibility to" or "exercising authority over" a private body to provide goods to domestic mill operators.[315]

7.165. As evidence on the record showed in the underlying investigation before us, independent Indonesian CPO suppliers similarly retained the freedom to operate and sell their products, including exporting CPO rather than selling domestically. In this regard, the record showed that 70% of the CPO production in Indonesia during the investigation period was exported, notwithstanding the imposition of export levies during the investigation period.[316]

7.166. The freedom thus retained by CPO suppliers is at odds with an understanding that the regulatory scheme established by the GOI had the scope and intensity to deny CPO suppliers the freedom to act as rational market operators, and therefore the GOI's actions do not constitute "entrustment" or "direction" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.

7.167. Furthermore, we recall that the Commission partially relied on facts available to assess the GOI's involvement in PTPN's operations, on the basis that PTPN and the GOI had only given some explanations concerning PTPN's functioning but did not provide supporting evidence on the decision-making process within PTPN.[317] The Commission also relied on information available to conclude that PTPN was loss-making in recent years, as a result of following GOI directives to sell CPO at low prices.[318] The Commission did not consider similar information from independent CPO suppliers as to whether they had been profitable in the face of the measures put in place by the GOI.[319] The Commission also made observations concerning the limited negotiating power that CPO suppliers have when selling CPO in the Indonesian market:

> [T]he investigation indicated that in terms of negotiating power the market is significantly imbalanced in favour of CPO buyers. The market for CPO is in fact rather fragmented, with 40 % of the supply coming from individual farmers, between 6 % to 9 % from PTPN and the remaining part coming from "larger" suppliers (compared to the individual farmers) but still having modest market shares. Contrary to that, and particularly with respect to the biodiesel industry, purchasers are larger undertakings with a need for significant volumes of raw materials that they generally cannot entirely fulfil with their in-house supply. In this context, any purchaser will have a significant degree of buying power, such that it can resist any attempt from its supplier to ask for a price higher than that set by the GOI. Hence, the Commission concluded that by communicating transparently the daily CPO prices, the GOI is, through PTPN, effectively setting the maximum daily CPO prices in Indonesia. Such a reference price amounts to the guidance for CPO suppliers to sell CPO in Indonesia in line with the pursued public objectives.[320]

7.168. The Commission's finding with regard to the GOI intervention in the CPO market to *de facto* control domestic CPO prices allegedly provides the demonstrable link supporting its conclusion that the GOI induces Indonesian CPO suppliers to keep CPO in Indonesia as they cannot sell at better prices which would prevail in Indonesia absent the total configuration of measures.[321] In the investigation, exporting producers and the GOI claimed that the fact that PTPN was "under no obligation to re-offer a higher price" and "regularly accepted offers below [its price idea]" does not evidence that PTPN voluntarily depreciated CPO prices or that PTPN systematically accepts offers below its price idea. To the contrary, the exporting producers and the GOI claimed that, like any price-setting mechanism that ensures a market outcome, the prices that PTPN can obtain reflect not

[315] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.607.
[316] Definitive Regulation (Exhibit IDN-2), recital 153.
[317] Provisional Regulation (Exhibit IDN-1), recitals 126-127.
[318] Provisional Regulation (Exhibit IDN-1), recital 135.
[319] As both parties have acknowledged, three independent CPO suppliers provided audited accounts indicating that they were profitable during the investigation period. (European Union's response to Panel question No. 88, paras. 283 and 291-292 (referring to Appendix B's replies by nine CPO suppliers (Exhibit EU-79 (BCI))); Indonesia's second written submission, para. 300). The Commission does not appear to have factored this into its analysis, stating that the three CPO suppliers' replies could not be considered complete and accurate as they were missing other information, and that the Commission could not rely on these limited responses to draw inferences applicable to all CPO suppliers in Indonesia.
[320] Provisional Regulation (Exhibit IDN-1), recital 146.
[321] Provisional Regulation (Exhibit IDN-1), recital 146.

only the price at which PTPN is willing to sell, but also the price that the purchasers are willing to pay.[322]

7.169. The European Union has referred us to the Commission's finding that evidence on the record showed a pattern of price setting and price following.[323] We recall that the Commission also found that domestic prices were distorted based on a number of factors, including that CPO producers had to "sell locally at lower prices than otherwise", due to the fact that, absent measures put in place by the GOI, the producers would have exported the CPO at the higher world market price.[324] We note that the Commission also compared Indonesian domestic prices with Malaysian domestic prices to confirm that prices in Indonesia are lower than "market prices".[325]

7.170. We do not consider the Commission's own assessment of the market imbalances between CPO suppliers and biodiesel producers, and its further assessment that both PTPN and independent CPO suppliers were put into an "economically irrational" situation, by being encouraged to sell CPO domestically in the presence of the export tax and levy, support the conclusion that PTPN's participation in the market was responsible for ensuring that CPO suppliers sell CPO "at artificially low levels". Rather, the Commission's own analysis established a clear price difference between domestic and export prices in Indonesia, leading the Commission to conclude that but for the export levy, selling for export would be more profitable for CPO suppliers.[326] The Commission also referred to press articles, which it found further corroborate the finding that the export levy was having the effect of inducing CPO suppliers to sell domestically instead of selling for more profit by exporting.[327] This evidence and the Commission's own observations suggest that the fact that Indonesian domestic CPO prices are lower than external prices perhaps reveals that the export tax and levy were having their intended effects, providing at the very least a plausible explanation that PTPN's participation in the market has less of an impact on influencing prices in the marketplace.

7.171. Based on the above, we therefore uphold Indonesia's claim that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that, through a set of measures, including an export tax and export levy, and by *de facto* acting as a price setter in the domestic CPO market, the GOI induced the domestic CPO producers to sell CPO locally and thereby "entrusted" or "directed" private CPO suppliers to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration, in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement.

7.4.2.3 Indonesia's additional claim that the Commission acted inconsistently with Article 1.1(a)(1)(iv) by failing to establish that the alleged provision of CPO is a type of function that would "normally be vested" in the government

7.172. Indonesia argues that the Commission also acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by failing to properly establish that the provision of CPO is alleged type of function "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments", as specified in Article 1.1(a)(1)(iv).

7.173. In the underlying investigation, the Commission determined that the provision of CPO could be considered a function "which would normally be vested in the government" in its provisional Regulation, as follows:

> With respect to the "normally vested" criterion, which had not been further clarified by the Panel yet, the Commission considered that the provision of raw materials located within a country to national companies is a function which is normally vested in the government. Under general international law, States have sovereignty over their natural resources. While they enjoy large discretion how to organise the exploitation of their natural resources, their sovereignty normally translates into a regulatory governmental power to do so. In this respect, it is irrelevant whether or not a government would habitually engage in this function. The Commission therefore found that the provision

[322] Wilmar's comments on final disclosure (Exhibit IDN-9 (BCI)), para. 80. See also Definitive Regulation (Exhibit IDN-2), recitals 122, 139, 148-150, 152, and 513.
[323] European Union's response to Panel question No. 103, paras. 34-42.
[324] Provisional Regulation (Exhibit IDN-1), recital 162; Definitive Regulation (Exhibit IDN-2), recital 127.
[325] Provisional Regulation (Exhibit IDN-1), recital 163.
[326] Definitive Regulation (Exhibit IDN-2), recital 127.
[327] Definitive Regulation (Exhibit IDN-2), recitals 128-130.

of CPO located on Indonesian soil to the Indonesian biodiesel industry is a function which is normally vested in the government.

As regards the "in no real sense differs" criterion, the Commission observed that the language originated in the 1960 report of the Panel on Review Pursuant to Article XVI:5, in which similar language was used in respect of producer-funded levies that were deemed not to differ, in any real sense, from government practices of taxation and subsidisation. Against that background, this criterion requires an affirmative finding that the provision of goods by the entrusted private bodies does not, in any real sense, differ from the hypothesis that the government had provided such goods itself. The Commission considered this to be the case. Rather than providing the inputs directly to the biodiesel industry in order to achieve the GOI's public policy objectives of boosting the development of the biodiesel industry, including its export potential, the GOI through a set of measures induces private entities to do so on its behalf. Moreover, to the extent that such provision of goods by the government involves some revenue expenditure (such as the provision of subsidies to the inputs or the sacrifice of income by providing goods for less than adequate remuneration), such an action should be understood as the typical functions normally vested in the government ([36]).[328]

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[36] See Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (Drams) from Korea*, WT/DS296, 21 February 2005, footnote 57 ("[W]e consider that the reference to functions 'normally vested in the government' should also be understood to mean functions of taxation and revenue expenditure. (…) To the extent that loans and restructuring measures involve taxation or revenue expenditure, they are capable of falling within the scope of that provision").

7.174. Indonesia argues that the Commission erred in its assessment, as it was required to establish that the provision of CPO is a function that would ordinarily be part of governmental practice in the legal order of Indonesia, to fulfil the requirements of Article 1.1(a)(1)(iv).

7.175. In light of our finding that Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that the GOI had "entrusted" or "directed" private CPO suppliers to provide CPO to Indonesian biodiesel producers, we do not consider it necessary to engage with the additional interpretative question raised by Indonesia's claim to resolve the dispute, and we therefore decline to do so.

7.4.3 Whether the Commission established that GOI provides "income" or "price" support to Indonesian biodiesel producers

7.176. We next consider Indonesia's claim that the European Union acted inconsistently with Article 1.1(a)(2) of the SCM Agreement, read in conjunction with Article XVI:1 of the GATT 1994, and Article 32.1 of the SCM Agreement, because the Commission determined that the "set of measures taken by the GOI intervening in the CPO market" qualify as income and price support granted by the GOI to the biodiesel industry. This claim concerns the same measures that the Commission analysed in its assessment of direction or entrustment: (i) the GOI's imposition of the export tax and levy; (ii) alleged intervention in the CPO market to *de facto* control domestic CPO prices; and (iii) direct subsidies to CPO producers to ensure that CPO producers comply with the policy objectives. We recall the relevant aspects of the Commission's determination before evaluating Indonesia's claim.

7.4.3.1 The Commission's "income or price support" findings

7.177. In addition to the conclusion that the set of measures adopted by the GOI led to a financial contribution in the form of the GOI's provision of CPO for less than adequate remuneration, the Commission also assessed whether the set of measures (involving the GOI's imposition of the export tax and levy; GOI's alleged intervention in the CPO market to *de facto* control domestic CPO prices; and the provision of direct subsidies to CPO producers) qualify as income or price support granted in favour of Indonesian biodiesel producers. The Commission observed that the categories of

[328] Provisional Regulation (Exhibit IDN-1), recitals 170-171.

financial contribution and "income or price support" in the SCM Agreement are not mutually exclusive and thus, a finding that a measure amounts to a financial contribution does not prevent that same measure from qualifying as income or price support.[329]

7.178. The Commission observed that the origin of the terms "income or price support" is found in Article XVI of the GATT 1994, which refers to "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory". The Commission found that the terms "any form" indicate the broad scope of the category[330], also noting that the term "support" is often used in the context of agriculture to refer to government support programmes. Thus, the Commission found that the meaning of "support" refers to the action of the government that "contributes to the success or maintaining the value of prices or of the income received by someone".[331]

7.179. In its assessment, the Commission first evaluated "whether the GOI intends to support the creation and development of the biodiesel industry" or has "a declared policy objective to support the development of the biodiesel industry"; then evaluated what kind of measures the GOI adopted to provide support to the biodiesel industry; and lastly, assessed whether the set of measures that it identified could qualify as "'any form of income/price support' in the sense of Article XVI of the GATT 1994".[332]

7.180. The Commission found that Presidential Regulation 66/2018 has an explicit policy to support the development of the biodiesel industry as reflected in "[t]he policy objectives regarding export taxes" and "the aims of export duties … to ensure the availability of raw materials and to spur the growth of the domestic downstream palm oil industry".[333] The Commission also found evidence in press articles and public statements that the GOI had over the years a clear policy of fostering and supporting the expansion of the biodiesel industry, including through the establishment of the OPPF.[334]

7.181. As with its analysis of direction or entrustment[335], the Commission found that the GOI uses export taxes and levies as a "tool" to depress CPO prices to benefit downstream industries. The Commission further found that GOI also intervenes in the CPO market to *de facto* control domestic CPO prices, which other CPO suppliers follow in accordance with the stated policy to support the biodiesel industry. The Commission further recalled that the GOI uses direct subsidies to CPO producers to ensure that CPO producers comply with the policy objectives.[336]

7.182. The Commission concluded on the basis of the information available that "the GOI has put in place a set of measures in order to intervene in the market ensuring … that the biodiesel producers benefit from artificially low prices for CPO, which represents around 90% of their costs of production".[337]

7.183. As a final step, the Commission assessed that the regulatory conditions adopted by the GOI "do not have as a side effect that CPO suppliers sell [their] input to biodiesel producers at lower prices than those available internationally"; instead, the Commission found that "[s]uch a result is intended and successfully achieved through the GOI's actions".[338] In this respect, the Commission explained:

> The set of measures put in place by the GOI allows biodiesel producers to have access to their main raw material and cost element at a price below the world market price, which then is translated into artificially higher profits resulting mainly from exports to third markets. In this sense, the GOI's actions contribute to the income received by

[329] Provisional Regulation (Exhibit IDN-1), recital 174.
[330] Provisional Regulation (Exhibit IDN-1), recital 176.
[331] Provisional Regulation (Exhibit IDN-1), recital 177.
[332] Provisional Regulation (Exhibit IDN-1), recital 181.
[333] Provisional Regulation (Exhibit IDN-1), recital 182.
[334] Provisional Regulation (Exhibit IDN-1), recitals 183-187.
[335] See paras. 7.128-7.142 above.
[336] Provisional Regulation (Exhibit IDN-1), recital 188.
[337] Provisional Regulation (Exhibit IDN-1), recital 190.
[338] Provisional Regulation (Exhibit IDN-1), recital 191.

> biodiesel producers. Without such actions, the biodiesel producers would not benefit from the distorting effects on CPO derived from the State intervention.
>
> All those measures show that the Indonesian biodiesel industry is supported and artificially stimulated by the GOI. This finding is corroborated by the increasing number of biodiesel producers in Indonesia as well as by the sharp increase of the production capacity and exports in the past 10 years[.][339]

7.184. On this basis, the Commission concluded that the GOI provides "income or price support" to the biodiesel industry in the sense of Article XVI of the GATT 1994.[340]

7.4.3.2 Evaluation

7.185. As set out above, in the alternative the Commission concluded that the "set" of measures adopted by the GOI, under which the GOI was found to have directed or entrusted Indonesian CPO producers to provide CPO, could qualify as "income or price support" within the meaning of the applicable EU law and Article 1.1(a)(2) of the SCM Agreement.

7.186. Article 1.1(a)(2) provides that a subsidy shall be deemed to exist if "there is any form of income or price support in the sense of Article XVI of GATT 1994" that confers a benefit. The first sentence of Article XVI:1 refers to notification of "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory". There is no definition or other guidance in the SCM Agreement regarding the meaning of "income or price support".

7.187. As detailed above, the Commission concluded that the GOI has an explicit policy to support the development of the biodiesel industry and pursuant to that policy put in place a "set of measures" which operate to depress CPO prices below international prices to benefit downstream industries, including biodiesel producers. The Commission concluded that by lowering the cost of the primary input to the production of biodiesel, the set of measures operated as income support, specifically finding that the lowering of the cost of the main raw material below the world market price increases the revenue and net profitability of Indonesian biodiesel producers resulting from their exports to other markets.[341]

7.188. According to Indonesia, Article 1.1(a) cannot be interpreted as allowing a determination that a measure or set of measures can simultaneously constitute both a financial contribution and a form of price or income support. Rather, Article 1.1(a)(2) only covers situations where, absent a financial contribution by a government or public body, there is nevertheless income or price support.[342] As a reflection of this, Indonesia submits that, to the extent that the GOI allegedly directed or entrusted CPO producers to do so, by necessity the GOI's actions cannot also constitute *direct* government intervention in the market aimed to fix the price at a particular level.[343] Indonesia further disputes that the evidence supports the Commission's determination that a "set" of measures exists to support the biodiesel industry, and operate in such a way, directly or indirectly, to increase exports of biodiesel or to ensure a level of income was maintained, as would be required for an analysis of price or income support.[344]

7.189. The European Union disagrees that the categories of financial contribution are mutually exclusive from the concept of "income or price support", arguing that the very objective of Article 1.1(a)(2) is to provide for an alternative form of subsidy to that referred to in

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[339] Provisional Regulation (Exhibit IDN-1), recitals 191-192.
[340] Provisional Regulation (Exhibit IDN-1), recital 194.
[341] See paras. 7.177-7.184 above. See also Provisional Regulation (Exhibit IDN-1), recitals 174-192.
[342] Indonesia's first written submission, para. 242; second written submission, para. 113. Indonesia considers that the separator "or" at the very end of Article 1.1(a)(1) by necessity indicates that what follows would be a category of subsidy or subsidization that is different from a financial contribution, lest otherwise the term "or" would be rendered devoid of meaning (Indonesia's first written submission, para. 244).
[343] Indonesia's first written submission, para. 242; second written submission, para. 115.
[344] Indonesia's first written submission, para. 245.

Article 1.1(a)(1), and such an understanding is also consistent with the object and purpose of the SCM Agreement.[345]

7.190. The European Union further emphasizes that the terms "any form" ("any form of price or income support") in Article 1.1(a)(2) indicate the broad scope of this category of governmental actions that can constitute income or price support.[346] The European Union accepts that an analysis of price or income support requires consideration beyond just the *effects* of the measure on a market. The European Union considers, however, that the evidence establishes a demonstrable link between the existence of a government policy to support and boost the development of the domestic biodiesel industry and that the government intervention in a market led producers to maximize revenues and profits when exporting biodiesel. In this respect, the European Union argues that the evidence on the record affirms the existence of a government policy to support and boost the development of the domestic biodiesel industry and that the measures analysed by the Commission were shown to fulfil that purpose and stimulate domestic demand.[347]

7.191. We note the European Union's observation that "support" refers to the action of the government that contributes to the success or maintaining the value of prices or of the income received by someone. The European Union maintains that the expression "income or price support" must be interpreted as encompassing any act of the government which amounts, *directly or indirectly*, to maintaining or increasing revenue stability or prices. According to the European Union, the reference "in the sense of Article XVI of the GATT 1994" means that account must also be taken of the effects of that action on exports and imports, thereby including all forms of income or price support that *directly or indirectly* increase exports of "any product" from a WTO Member's territory or reduce imports of this product into its territory.[348]

7.192. Beginning with its text, Article 1.1(a)(2) of the SCM Agreement provides that a subsidy shall be deemed to exist if "there is any form of income or price support in the sense of Article XVI of GATT 1994", where Article XVI applies in respect of subsidies that increase exports or decrease imports. As prior panels have noted[349], there is no definition or other form of guidance in the SCM Agreement regarding the meaning of "price support". There is also no definition or guidance regarding the meaning of "income support". At first glance, the phrase "any form of … price support" or "any form of income … support" under Article 1.1(a)(2) of the SCM Agreement is broad and could be interpreted to cover any government measure that has the effect of raising prices within a market or the income of a recipient.[350] We share the views of prior panels, however, that Article 1.1(a) of the SCM Agreement suggests that a more narrow interpretation is appropriate. Indonesia cites previous findings by the panel in *China – GOES* in arguing that "price" support should be given a narrow meaning. We recall that the panel in *China – GOES* noted that, like the notion of a financial contribution, "income or price support" should be understood to refer to a particular form of government action rather than to the effects of government action:

> Reading the term "price support" in this context, it is our view that it does not include all government intervention that may have an effect on prices, such as tariffs and quantitative restrictions. In particular, it is not clear that Article 1.1(a)(2) was intended to capture all manner of government measures that do not otherwise constitute a financial contribution, but may have an indirect effect on a market, including on prices. The concept of "price support" also acts as a gateway to the SCM Agreement, and it is our view that its focus is on the nature of government action, rather than upon the effects of such action. Consequently, the concept of "price support" has a more narrow

[345] For instance, the European Union submits that the direct provision of funds to domestic producers may be qualified as a financial contribution but also as a form of direct support to those producers. (European Union's second written submission, para. 227).

[346] European Union's first written submission, paras. 310-311; second written submission, para. 219.

[347] European Union's first written submission, para. 320.

[348] European Union's first written submission, paras. 310-311; second written submission, para. 219.

[349] Panel Report, *China – GOES*, para. 7.83.

[350] See, e.g. Panel Report, *China – GOES*, para. 7.84. That panel noted, for instance, that according to Blacks Oxford Dictionary of Economics, price support includes "government policies to keep the producer prices … above some minimum level". The panel acknowledged that this does not necessarily contradict a broad reading of Article 1.1(a)(2), although it does suggest that the government sets or targets a given price and consequently does not capture every government measure that has an incidental and random effect on price. (Panel Report, *China – GOES*, para. 7.84 (referring to Oxford Dictionary of Economics, 3rd ed., J. Black (ed.) (Oxford University Press, 2009), p. 355)).

> meaning than suggested by the applicants, and includes direct government intervention in the market with the design to fix the price of a good at a particular level, for example, through purchase of surplus production when price is set above equilibrium.[351]

7.193. In *China – GOES*, the panel also noted that "market price support" is a term used in the Agreement on Agriculture, and that Annex 3 thereof provides that "market price support" is calculated as the difference between an external reference price and the "applied administered price".[352] For the panel, therefore, price support requires "a direct form of government control over domestic prices … in the form of a fixed, administered price, rather than a movement in prices being an indirect effect of another form of government intervention."[353] The Agreement on Agriculture refers to "income support" once when referring to "decoupled income support" in Annex 2 to that Agreement, indicating, for instance, that "[e]ligibilty for such payments shall be determined by clearly-defined criteria…" and that "[t]he amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period". By referring to payments, income support thus also requires some direct involvement.

7.194. We note that, more recently, the panel in *EU and Certain Member States – Palm Oil (Malaysia)* provided an assessment of the term "income support" in Article 1.1(a)(2), which took into account the previous assessment of "price support" by the panel in *China – GOES*. Specifically, the panel in *EU and Certain Member States – Palm Oil (Malaysia)*, took the view that the two terms are closely connected and, therefore, certain aspects of the analysis of price support should be equally relevant to the term "income support".[354]

7.195. The panel ultimately concluded that income support requires a similar type of direct government intervention in the market to ensure that income for certain enterprises or associated with certain activities is maintained at or above a particular level.[355] The panel then applied its understanding of "income support" in evaluating the measure before it. The measure at issue, in essence, provided a tax break to biodiesel blenders that opted to incorporate the higher-cost biofuels as opposed to palm oil-based biodiesel (from Malaysia and Indonesia). By its operation, therefore, the measure reduced the amount of tax due under certain conditions and could be viewed as supplementing the taxpayers' income net of tax. The panel explained:

> [T]he concept of "income support" [is] narrower than a measure that simply reduces tax burden and thereby positively affects after-tax income. An "income support" would be expected to do more than reduce an expense (thereby permitting more income to be retained) and to do even more than merely add to income through its effects.[356]

7.196. We agree with the finding by the panel in *EU and Certain Member States – Palm Oil (Malaysia)* that direct government intervention is required in the market to ensure that income for certain enterprises or associated with certain activities is maintained at or above a particular level, to support a determination of "income support".

7.197. We will therefore consider whether the Commission demonstrated that the GOI could be said to have intervened in the market in this manner to ensure that income for biodiesel producers is maintained at or above a particular level, to support the determination that the GOI provided "income or price support" to the biodiesel industry within the meaning of Article 1.1(a)(2) of the SCM Agreement.

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[351] Panel Report, *China – GOES*, para. 7.85.
[352] Panel Report, *China – GOES*, para. 7.87.
[353] Panel Report, *China – GOES*, para. 7.87.
[354] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.1352.
[355] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.1354.
[356] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.1355. The panel further observed that, while the variable tax at issue incentivized purchasing particular biodiesel varieties, it was not entirely clear whether the measure supplemented income or not as it creates a choice either between incorporating higher-cost qualifying biofuels or refraining from such incorporation at the cost of a higher tax burden. From this perspective, the panel considered that the tax measure could have increased the overall operating costs for the enterprises, and thus would not have provided income support. (Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.1356).

7.198. We note that the Commission did not specify whether it determined that the GOI's measures constitute "income support" or "price support", instead submitting that the set of measures qualify as "an income and price support" granted by the GOI.[357] Nevertheless, the Commission concluded in its assessment that the set of measures put in place by the GOI allows biodiesel producers to have access to their main raw material and cost element at a price below the world market price, which the Commission found, "translated into artificially higher profits resulting mainly from exports"[358]. The Commission reasoned that, "[i]n this sense, the GOI's actions contribute to the income received by biodiesel producers".[359] We therefore understand the Commission to have treated the measures as a form of income support, which arises from producers supplementing income through higher profits from exports of biodiesel. There is otherwise no contention that the measures fix the price of biodiesel at a particular level to constitute "price support".

7.199. As we explained above, we found that "income support" would be expected to do more than simply reduce an expense (such as a producer's input costs) to supplement income, but should instead be directly tied to income levels and ensure that income is maintained at or above any particular level. In its assessment, the Commission merely concluded that the set of measures put in place allows biodiesel producers to realize higher profits. This amounts to an assessment of the *effects* of the set of measures in the marketplace. This does not constitute income support because the measures do not ensure that income is maintained at or above a particular level.

7.200. We therefore uphold Indonesia's claim that the Commission acted inconsistently with Article 1.1(a)(2) and 32.1 of the SCM Agreement[360] by determining that, through a set of measures, including an export tax and export levy, and by *de facto* acting as a price setter in the domestic CPO market, the GOI provides income or price support to the biodiesel industry.[361]

7.4.4 Whether the Commission erred in determining that the provision of CPO conferred a benefit on Indonesian biodiesel producers

7.201. Indonesia claims that the European Commission acted inconsistently with Article 1.1(b) and Article 14(d) of the SCM Agreement in determining that CPO suppliers provide CPO to biodiesel producers in Indonesia for less than adequate remuneration (as either a financial contribution or form of income or price support), thereby conferring a benefit upon Indonesian biodiesel producers.

7.202. In the investigation, the Commission determined that the GOI's measures were aimed at artificially lowering the domestic price of CPO, and conferred a benefit to the biodiesel industry by allowing biodiesel producers to purchase CPO locally at lower prices than would otherwise have been available. To reach this conclusion, the Commission identified FOB CPO export prices from Indonesia to the rest of the world as an appropriate benchmark for comparison, finding that FOB CPO export prices are set according to free market principles, reflect prevailing market conditions in Indonesia, and are not distorted by government intervention.[362]

7.203. Indonesia argues that the Commission erred by improperly disregarding Indonesian in-country prices without reasoned and adequate justification, and by relying on an alternative benchmark to determine that CPO is provided for less than adequate remuneration on the Indonesian

[357] Provisional Regulation (Exhibit IDN-1), recital 173.
[358] Provisional Regulation (Exhibit IDN-1), recital 191.
[359] Provisional Regulation (Exhibit IDN-1), recital 191.
[360] We note that Article 32.1 of the SCM Agreement provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". Claims under Article 32.1 of the SCM Agreement have been treated as consequential in nature.
[361] In light of our finding, we do not consider it necessary to engage with the parties' disagreement regarding whether the categories of financial contribution in Article 1.1(a)(1) are mutually exclusive from the concept of "income or price support" within the sense of Article 1.1(a)(2), and hence, we do not address the issue of whether a measure (or set of measures) can simultaneously constitute both a financial contribution and a form of price or income support.
[362] Provisional Regulation (Exhibit IDN-1), recitals 195-201. We note, in the context of determining that the GOI had "entrusted" or "directed" CPO suppliers to provide CPO to the biodiesel industry, the Commission also assessed whether the CPO producers actually carried out the GOI policy to provide CPO for less than adequate remuneration. To verify this, the Commission observed that Indonesian domestic CPO prices were approximately 10% lower than the Indonesian CPO export prices and also noted that the average Indonesian domestic CPO price was lower than the average Malaysian CPO price during the investigation period. (Provisional Regulation (Exhibit IDN-1), recitals 161-169).

market. Indonesia's challenge to the Commission's assessment raises similar questions that we have confronted in our preceding evaluation regarding the extent to which GOI intervention in the CPO market led to distortions in the Indonesian domestic CPO market.

7.204. We recall that we have upheld Indonesia's claims regarding the Commission's assessment of whether GOI intervention in the CPO market constitutes a financial contribution within the meaning of Article 1.1(a)(1)(iv), or alternatively "income or price support" to the biodiesel industry within the meaning of Article 1.1(a)(2) of the SCM Agreement. As we have upheld Indonesia's claims in these respects, we do not consider it necessary to make additional findings regarding Indonesia's claims under Articles 1.1(b) and 14(d) of the SCM Agreement to resolve the dispute. We therefore decline to do so.

7.4.5 Whether the Commission erred in its specificity determination concerning the provision of CPO

7.205. Indonesia argues that the Commission's specificity determination is inconsistent with Articles 1.2, 2.1 and 2.4 of the SCM Agreement.[363] Indonesia contends that the Commission's reference to industries active in "the palm oil value chain" fails to identify the exact industry to which the subsidy is specific.[364] Indonesia submits that by making its specificity findings on the basis of a "set of measures", Commission failed to indicate *where* the industry to which the subsidy is specific is explicitly identified.[365]

7.206. In the provisional Regulation, the Commission determined that the subsidy arising from the "set of measures", including the export tax and levy, and alleged price setting by PTPN, conferred benefits that were available "only to certain industries in Indonesia, namely those active in the palm oil value chain". The Commission found that the "set of measures" at issue are therefore *de jure* specific.[366] In the definitive Regulation, the Commission rejected the GOI's contention that a subsidy is specific only if it refers to a single industry. The Commission explained that the relevant set of measures are specific "because they benefit the enterprises active in the palm oil value chain" and are thus linked to a class of enterprises or industries that are known and particularized.[367]

7.207. We recall that we have upheld Indonesia's claims regarding the Commission's assessment of whether GOI intervention in the CPO market constitutes a financial contribution within the meaning of Article 1.1(a)(1)(iv), or alternatively "income or price support" to the biodiesel industry within the meaning of Article 1.1(a)(2) of the SCM Agreement. Thus, we do not consider it necessary to make findings regarding Indonesia's claims that the Commission acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the provision of CPO and provision of income or price support to the biodiesel industry are specific. We therefore decline to do so.

7.4.6 Whether the Commission's resort to facts available was inconsistent with Article 12.7 of the SCM Agreement

7.208. The Commission partially relied on facts available in determining that CPO was provided for less than adequate remuneration.[368] Indonesia argues that the Commission's resort to facts available in this context was inconsistent with Article 12.7 of the SCM Agreement as it was based on the misconceived ground that the GOI failed to provide the necessary information that the Commission had requested.[369] The European Union asks us to reject Indonesia's claim.

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[363] Indonesia's first written submission, para. 272.
[364] Indonesia's first written submission, para. 268.
[365] Indonesia's first written submission, para. 271.
[366] Provisional Regulation (Exhibit IDN-1), recital 202.
[367] Definitive Regulation (Exhibit IDN-2), recitals 184-187.
[368] Provisional Regulation (Exhibit IDN-1), recital 99.
[369] Indonesia's first written submission, paras. 523 and 526. Although Indonesia initially indicated that it is pursuing a claim under Article 12.11, Indonesia has not made any arguments regarding that provision. (Indonesia's first written submission, para. 513). Therefore, we do not address Indonesia's claim under that provision any further.

7.209. Indonesia claims that the Commission acted inconsistently with Article 12.7 on three main grounds, each of which involves distinct considerations.

7.210. First, Indonesia challenges the Commission's resort to facts available in respect of information concerning PTPN – a GOI owned CPO producer.[370] Indonesia submits that there was no basis for the Commission to resort to facts available as the GOI did provide to the Commission all necessary information concerning PTPN within a reasonable period.[371] The European Union contends that the Commission's resort to facts available was justified as the GOI failed to submit all necessary information regarding PTPN within a reasonable period.[372]

7.211. Second, Indonesia challenges the Commission's alleged resort to facts available in respect of information concerning non-GOI-related CPO suppliers (independent CPO suppliers) on the basis of the GOI's alleged failure to secure information from those independent suppliers.[373] Indonesia submits that the Commission erred because the GOI "has no power over such independent suppliers".[374] The European Union contends that the premise underlying Indonesia's arguments is wrong, as the Commission did not rely on facts available *because of the GOI's failure* to elicit information from independent CPO suppliers.[375]

7.212. Third, Indonesia argues that in applying facts available, the Commission improperly disregarded certain information on the record which showed that independent CPO suppliers were profitable. Indonesia contends that the Commission should have taken that information into account to conclude that PTPN's pricing policy did not depreciate Indonesian CPO prices.[376] The European Union argues that the relevant information did not explain the price alignment of other CPO suppliers with PTPN's prices.[377]

7.213. In section 7.4.6.1 we describe the relevant procedural facts that form the background for the Commission's resort to facts available. In section 7.4.6.2 we recall the explanations that the Commission provided to justify its resort to facts available to reach certain intermediate findings leading to the overall determination that CPO was provided for less than adequate remuneration. In section 7.4.6.3 we address the specific aspects of Indonesia's claim.

7.4.6.1 Relevant procedural facts

7.214. At the initiation of the investigation, the Commission requested the GOI to "forward" a questionnaire attached to the government questionnaire as appendix B (the Appendix B questionnaire) to CPO producers supplying the biodiesel industry, including to state-owned CPO supplier, PTPN.[378] The Appendix B questionnaire asked for a wide range of information, including on the CPO suppliers' corporate structure, the mechanism for price determination, domestic and export sales, profitability, and subsidies received.[379]

7.215. Through a deficiency letter dated 1 March 2019, the Commission informed the GOI that certain CPO suppliers had not responded to the Appendix B questionnaire. Responding to the deficiency letter, the GOI indicated that it had "fulfilled its obligation to communicate the APPENDIX B and mini questionnaires" to independent CPO suppliers, referring to the "postal record showing delivery receipts to relevant Indonesian CPO suppliers".[380] The GOI also responded to certain questions that the Commission had raised in the deficiency letter concerning PTPN's CPO business.

[370] Indonesia's first written submission, paras. 533-536.
[371] Indonesia's first written submission, para. 536.
[372] European Union's first written submission, paras. 1016-1022.
[373] Indonesia's first written submission, paras. 527-532.
[374] Indonesia's first written submission, paras. 523, 536, and 531.
[375] European Union's response to Panel question No. 89, para. 297.
[376] Indonesia's second written submission, paras. 299-301.
[377] European Union's second written submission, para. 485.
[378] Provisional Regulation (Exhibit IDN-1), recital 92.
[379] Appendix B questionnaire (Exhibit EU-11), pp. 2-12.
[380] GOI's response to deficiency letter (Exhibit IDN-8 (BCI)), p. 9.

7.216. The Commission conducted a verification visit from 1 to 4 April 2019. The verification report indicates that during the visit, the Commission queried the GOI as to why PTPN had not responded to the Appendix B questionnaire despite being state-owned.[381]

7.217. On 22 May 2019, the Commission issued an Article 28 letter to the GOI indicating its intention to rely on facts available. The Commission noted that it was lacking important information due to the absence of "full and comprehensive" reply to the Appendix B questionnaire from PTPN and independent CPO suppliers. The Commission also noted that the explanations provided by PTPN during the verification visit "remain insufficient".[382]

7.218. In response, the GOI stated that it had "already provided the Commission with ample documents to understand [PTPN's] system", including annual reports, articles of association, yearly aggregate sales volumes with all unit prices, and lists of boards of directors and commissioners. As regards information concerning independent CPO suppliers, the GOI repeated its view that it had fulfilled its obligation by forwarding the Appendix B questionnaire to the relevant CPO suppliers and is not liable for any shortcomings in their responses. [383]

7.219. The GOI filed the Appendix B questionnaire response in respect of PTPN with the Commission on 30 June 2019.[384] On 30 August 2019, the GOI also filed certain additional information concerning PTPN's audited accounts, income tax returns, and profitability with the Commission.[385]

7.4.6.2 The Commission's explanations regarding its decision to resort to facts available and its findings based on facts available

7.220. In the provisional Regulation, the Commission noted:

> [W]ith regard to the alleged government provision of CPO for less than adequate remuneration, the GOI did not provide the necessary information and evidence as requested by the Commission in its questionnaire and during the verification visit.
>
> The absence of sufficient cooperation did not allow the Commission to collect all the information it considered relevant for its findings in this investigation. More specifically, the Commission could not obtain from the GOI information on the palm oil market based on direct information provided by CPO suppliers nor does it have complete information regarding PTPN's role on this market with regard to the biodiesel industry.[386]

7.221. The Commission referred to these recitals of the provisional Regulation at several points in the definitive Regulation, including when rejecting Wilmar's contentions that the bids placed by interested buyers are generally based on international market prices and that PTPN's tendering process is competitive.[387] The Commission also rejected Wilmar's contention that PTPN is a rational market operator, noting that PTPN did not duly respond to the Appendix B questionnaire and the information purportedly showing that PTPN's CPO business was profitable was submitted belatedly and was not backed by audited accounts.[388]

7.222. In respect of replies received by independent CPO suppliers, the Commission noted the following:

> [T]he vast majority of the replies were incomplete and many of them did not contain information on profitability. The Commission therefore could not draw any conclusion from these replies. *In fact, the lack of cooperation by the GOI as well as the CPO*

[381] GOI's verification report (Exhibit EU-46 (BCI)), p. 3.
[382] Commission's letter to GOI (22 May 2019) (Exhibit IDN-5), pp. 4-5.
[383] GOI's response to Commission's letter of 22 May 2019 (Exhibit IDN-6 (BCI)), pp. 3-5.
[384] GOI's letter of 28 June 2019 (Exhibit IDN-36 (BCI)).
[385] GOI's letter of 30 August 2019 (Exhibit IDN-37 (BCI)).
[386] Provisional Regulation (Exhibit IDN-1), recitals 95-96.
[387] Definitive Regulation (Exhibit IDN-2), recitals 120, 123, and 148.
[388] Definitive Regulation (Exhibit IDN-2), recital 125.

> *suppliers was a further indication that CPO suppliers are acting following the GOI's command in support of the biodiesel producers.*[389]

7.223. The Commission also found in the absence of any "verifiable evidence" that "[r]ather than independently setting their prices in view of international prices, CPO suppliers follow the CPO prices effectively set by PTPN".[390]

7.4.6.3 Whether Indonesia has established the Commission acted inconsistently with Article 12.7 of the SCM Agreement

7.224. Article 12.7 of the SCM Agreement provides:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.225. Article 12.7 of the SCM Agreement allows an investigating authority to make determinations on the basis of facts available only in circumstances involving the existence of at least one of three alternative grounds. These three grounds are when "any interested Member or interested party" (a) refuses access to necessary information within a reasonable period; (b) otherwise does not provide such information within a reasonable time period; or (c) significantly impedes the investigation. This provision is intended to ensure that an interested Member's or interested party's failure to provide necessary information does not impede the investigation.

7.226. We agree with past Appellate Body reports that Article 6.8 and Annex II of the Anti-Dumping Agreement are relevant to the interpretation and application of Article 12.7 of the SCM Agreement.[391]

7.4.6.3.1 Whether the Commission improperly resorted to facts available in relation to information concerning PTPN

7.227. The Commission resorted to facts available in relation to information concerning PTPN on the ground that the GOI failed to submit PTPN's Appendix B questionnaire response in a timely fashion. Indonesia argues that the Commission's resort to facts available was improper as the GOI provided the Commission with "ample documents to understand PTPN's system" and thus provided all the "necessary" information, leaving the Commission with no valid basis under Article 12.7 for resorting to facts available.[392] The European Union argues that the Commission had a valid basis for resorting to facts available because the GOI provided merely partial and untimely replies.[393]

7.228. We must therefore resolve the question as to whether the Commission properly found that the GOI failed to provide, within a reasonable period, the information regarding PTPN that the Commission had requested in the Appendix B questionnaire. To resolve this issue, we examine the facts and circumstances concerning the relevant requests for information, the submissions made by the GOI in response, and finally, the Commission's finding that GOI failed to submit information regarding PTPN within a reasonable period.

7.229. We note that the provisional and the definitive Regulations as well as the evidence on the record reveal that the GOI submitted a purportedly complete and consolidated response to the

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[389] Definitive Regulation (Exhibit IDN-2), recital 143. (emphasis added)
[390] Definitive Regulation (Exhibit IDN-2), recital 150.
[391] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 291 and 295; Panel Reports, *EU – PET (Pakistan)*, fn 386; *China – Autos (US)*, paras. 7.173-7.175; *US – Pipes and Tubes (Turkey)*, appealed 25 January 2019, para. 7.191; *China – GOES*, paras. 7.446-7.447; and *China – Broiler Products*, para. 7.355. Notably, the Ministerial Declaration on Dispute Settlement Pursuant to Agreement on Implementation of Article VI of the GATT 1994 or Part V of the SCM Agreement underlines the "need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".
[392] Indonesia's first written submission, para. 536; response to Panel question No. 85, p. 51.
[393] European Union's response to Panel question No. 86, paras. 266 and 269.

Appendix B questionnaire on 30 June 2019.[394] The GOI provided "the last outstanding annexes to- and translations of the Appendix B reply of PTPN" on 30 August 2019.[395] For Indonesia, the GOI provided the Commission with necessary information regarding PTPN within a reasonable period through these documents.[396] Indonesia contends that in any event, that GOI had, through a series of documents submitted earlier in the proceedings, already provided the Commission with all the necessary information.[397] Indonesia points to the following documents in this regard[398]:

a. the GOI's questionnaire response dated 7 January 2019[399];

b. the GOI's response to deficiency letter dated 14 March 2019[400];

c. the GOI's verification report[401]; and

d. the GOI's comments on Commission's letter of 22 May 2019 dated 5 June 2019.[402]

7.230. We will address Indonesia's arguments in two steps. First, we consider whether the Commission reasonably rejected the GOI's submission dated 30 June 2019 (supplemented by the GOI's submission dated 30 August 2019) as being untimely. We recall that the Commission as well as the GOI regarded that submission as PTPN's Appendix B response. Thus, if the Commission improperly disregarded that submission on the ground that it was untimely, its resort to facts available in respect of information concerning PTPN would have been without basis. For reasons discussed in paragraphs 7.234-7.236 below, we consider that an objective and unbiased investigating authority could reasonably have disregarded that document as being untimely. Second, we consider whether, as Indonesia maintains, items (a) through (d) listed in paragraph 7.229 above had in any event already provided the Commission with the necessary information regarding PTPN. For reasons discussed in paragraphs 7.239-7.242 below, we conclude that these documents did not provide sufficient answers to the Appendix B questionnaire concerning PTPN.

7.231. We begin our assessment as regards whether the GOI's submission dated 30 June 2019 (supplemented by the GOI's submission dated 30 August 2019) was provided "within a reasonable period" in accordance with Article 12.7 of the SCM Agreement. We recall that the Commission did not consider these documents to be timely and therefore disregarded them. The Commission noted as follows:

> [T]he GOI submitted a reply to the Appendix B for PTPN on 30 June 2019. The Commission however observed that the reply was submitted long after the deadline for the submission of that information (12 March 2019, extended by the Commission to 14 March 2019) and after the verification visit at the GOI's premises had taken place. The Commission therefore considered that the submission was not submitted in good time, was not verifiable and the GOI has not acted to the best of its ability in accordance with Article 28 of the basic Regulation.[403]

7.232. The European Union asserts that the Commission rightly disregarded these submissions as being untimely.[404]

7.233. Article 12.7 strikes a balance between the right for an interested Member or interested party to submit necessary information and have that information taken into account, on the one hand, and the obligation placed upon the investigating authority to conclude its investigation within prescribed timeframes, on the other.[405] A number of panels and the Appellate Body have noted that

[394] GOI's letter of 28 June 2019 (Exhibit IDN-36 (BCI)). See GOI's response to Commission's letter of 22 May 2019 (Exhibit IDN-6 (BCI)), p. 5; and Provisional Regulation (Exhibit IDN-1), recital 98.
[395] GOI's letter of 30 August 2019 (Exhibit IDN-37 (BCI)).
[396] Indonesia's first written submission, para. 536.
[397] Indonesia's response to Panel question No. 85, pp. 50-51.
[398] Indonesia's responses to Panel question No. 85, pp. 50-51, question No. 118, p. 19.
[399] GOI's questionnaire response (Exhibit IDN-11 (BCI)).
[400] GOI's response to deficiency letter (Exhibit IDN-8 (BCI)).
[401] GOI's verification report (Exhibits IDN-45, EU-46 (BCI)).
[402] GOI's response to Commission's letter of 22 May 2019 (Exhibit IDN-6 (BCI)).
[403] Provisional Regulation (Exhibit IDN-1), recital 98.
[404] European Union's first written submission, para. 985.
[405] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.121.

an interested Member or an interested party's failure to submit the relevant information by a pre-established deadline does not, in and of itself, necessarily amount to a failure to provide necessary information "within a reasonable period" in the sense of Article 12.7 of the SCM Agreement.[406] At the same time, given that trade remedy investigations are subject to an overall time-limit, investigating authorities cannot be expected to continue to accept information indefinitely.[407] In light of these considerations, past panels and the Appellate Body have held that what is "within a reasonable period" will depend on the facts and circumstances of the given case and must be determined keeping in view the notions of flexibility and balance inherent in the concept of "reasonableness".[408] The foregoing considerations reflected in Appellate Body and panel reports accord with our understanding of Article 12.7 of the SCM Agreement.

7.234. As the Commission noted in the provisional Regulation, the deadline for the GOI to submit the complete Appendix B response was 12 March 2019, which was extended to 14 March 2019.[409] The provisional Regulation also indicates that the Commission transmitted the Appendix B questionnaire to the GOI at the initiation of the investigation, which took place on 6 December 2018.[410] This reveals that the GOI had approximately 14 weeks to submit the complete Appendix B response. The 14 weeks that the GOI had to submit PTPN's response was considerably more than double the period of 30 days that is provided for in the first sentence of Article 12.1.1. Moreover, the GOI submitted PTPN's purportedly complete Appendix B questionnaire response more than 15 weeks after that 14-week deadline, representing a very significant delay.

7.235. Furthermore, as the Commission noted, the submissions of 30 June and 30 August 2019 were also filed after the Commission had conducted the verification visit (which took place during 1-4 April 2019). The Commission noted that certain information in these belated submissions "attempt[ed] to show that PTPN's CPO business (which accounts for the majority of its activities) was profitable" in the period from 2016 to the investigation period.[411] The Commission also noted, that this information was not supported by PTPN's audited accounts, which in fact indicated that PTPN as a whole was loss-making for the years 2016 and 2017.[412] Indonesia does not challenge the factual accuracy of any of these findings.[413]

7.236. In these circumstances, we do not consider that the Commission could be faulted for disregarding the submissions of 30 June and 30 August 2019, given that they were submitted significantly after the relevant deadline and after the Commission had conducted its verification visit.

7.237. We now consider whether, as Indonesia maintains, items (a) through (d) listed in paragraph 7.229 above provided the necessary information regarding PTPN requested in the Appendix B questionnaire. Indonesia notes that all information contained in these documents had been provided to the Commission during or before the verification visit in April 2019. Indonesia contends that even if the submissions of 30 June and 30 August are disregarded, the information in the documents reflected in items (a) through (d) of paragraph 7.229 above provided the Commission with all "necessary" information for the Commission to determine whether CPO was provided for less than adequate remuneration.[414] The European Union argues that the Commission

[406] Panel Reports, *Korea – Certain Paper*, para. 7.49; *US – Steel Plate*, para. 7.76 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 73-74).
[407] Panel Report, *US – Steel Plate*, para. 7.76.
[408] Appellate Body Report, *US – Hot-Rolled Steel*, para. 85.
[409] Provisional Regulation (Exhibit IDN-1), recital 98.
[410] Provisional Regulation (Exhibit IDN-1), recital 92.
[411] Definitive Regulation (Exhibit IDN-2), recital 125.
[412] Definitive Regulation (Exhibit IDN-2), recital 125; European Union's comments on Indonesia's response to Panel question No. 115, paras. 40-41 (referring to Annex 3.h to GOI's letter of 30 August 2019 (Exhibit EU-109)).
[413] Indonesia asserted in response to a Panel question that PTPN turned profitable in 2017. However, as the European Union notes, this assertion is at odds with profitability information provided by Indonesia itself, which shows that PTPN incurred a loss of 2.09% in 2017. (Indonesia's response to Panel question No. 115, p. 18; European Union's comments on Indonesia's response to Panel question No. 115, para. 39). Further, the audited accounts for Indonesia also indicate that in the year 2017, PTPN incurred a "Total comprehensive loss for the year" amount of 277,083,442,523 Rupiah. (GOI's letter of 30 August 2019 (Exhibit IDN-37 (BCI)), annex 2.a, p. 5; PTPN's audited account for the year 2017 (Exhibit IDN-76), consolidated statement of financial position as of December 31, 2017, p. 5 (p. 13 of the PDF file)).
[414] Indonesia's second written submission, para. 290.

reasonably concluded that these documents did not provide sufficient answers to the Appendix B questionnaire concerning PTPN.[415]

7.238. We note that in the provisional Regulation, the Commission acknowledged that the GOI had submitted certain information regarding PTPN but also found that such information did not fully respond to the Appendix B questionnaire. Specifically, the Commission stated:

> The GOI claimed that it had provided aggregate data concerning PTPN, which would also include the data requested in Appendix B of the questionnaire. In this respect, the Commission observed that the GOI provided data with regard to PTPN in response to the questionnaire, which included information on its management structure, annual reports and transaction data. However, the Commission noted that it did not receive any of the detailed information which it requested in the Appendix B of the questionnaire which would have allowed it to acquire a complete understanding of the role of PTPN on the palm oil market and of the other relevant producers.[416]

7.239. We note that the Appendix B questionnaire contained about 28 questions concerning a wide range of topics, including list of shareholders, board of directors, board of supervisors, sales of CPO (including information on customers, volumes, value, and delivery terms), volume and value of domestic and export sales by category of customers, profitability of domestic and export sales, and details regarding any relevant subsidy programmes.[417] The documents identified as items (a) through (d) of paragraph 7.229 above are responsive to certain aspects of the Appendix B questionnaire, but, as explained below, not to all aspects.

7.240. The GOI's questionnaire response dated 7 January 2019 provides a narrative description of PTPN's CPO tendering process, which speaks to several questions in the Appendix B questionnaire.[418] The same document also reveals details regarding the share ownership, board of directors, annual reports for 2015-2017, and information concerning sales transactions of PTPN – all of which relate to various questions contained in the Appendix B questionnaire.[419] The GOI's 14 March 2019 response to the Commission's deficiency letter contains narrative information regarding how PTPN formulates CPO prices, data regarding the total volume and value of sales of CPO by PTPN in the domestic and export markets in the years 2015, 2016, 2017, and during the investigation period, and aggregate annual volume and value of CPO sales to various clients in the years 2015, 2016, 2017, and during the investigation period.[420] The GOI verification report reflects the information that PTPN provided to the Commission during the verification visit as regards how PTPN's CPO tender process works.[421] This information relates to several questions in the Appendix B questionnaire.

7.241. We also note, in its letter dated 5 June 2019 (in which the GOI responded to a communication by the Commission indicating its intention to apply facts available), the GOI asserted that it had provided the Commission with a wide range of information regarding PTPN by the time of the Commission's verification visit. However, that letter incorrectly notes that "the only missing element" that the GOI had not provided by that point was a "transaction-by-transaction sales listing of CPO sales by PTPN". The evidence on the record shows that the GOI had also not fully provided by that point information concerning PTPN's income tax returns for 2016 and 2017 and the channels of distribution on domestic and export markets. Crucially, while the Appendix B questionnaire required information on profitability of PTPN's domestic and export CPO sales during the investigation period, the GOI had also not provided this information. Indonesia confirms that this information was provided only on 30 June 2019, i.e. at a point that, for reasons discussed above, the Commission reasonably deemed too late.[422]

7.242. Thus, while the GOI did submit some information concerning PTPN by the time of the Commission's verification visit in April 2019, it had left several important aspects of the Appendix B questionnaire unanswered. That information was relevant to the Commission's inquiry

[415] European Union's response to Panel question No. 86, para. 265.
[416] Provisional Regulation (Exhibit IDN-1), recital 97.
[417] Appendix B questionnaire (Exhibit EU-11).
[418] GOI's questionnaire response (Exhibit IDN-11 (BCI)), pp. 35-36.
[419] GOI's questionnaire response (Exhibit IDN-11 (BCI)), pp. 41-44.
[420] GOI's response to deficiency letter (Exhibit IDN-8 (BCI)), pp. 7-10 and exhibit GOI-Suppl-5 thereto.
[421] GOI's verification report (Exhibits IDN-45, EU-46 (BCI)).
[422] Indonesia's response to Panel question No. 116, pp. 18-19.

regarding whether PTPN acted as a rational economic operator, and by extension to the Commission's inquiry into whether CPO was provided for less than adequate remuneration.

7.243. We also note that prior to 30 June 2019, the GOI had only submitted the information regarding PTPN that the Commission requested in the Appendix B questionnaire in a piecemeal fashion over several months and in several different documents. It was only in its 5 June letter – which was the GOI's response to the Commission's communication indicating its intention to apply facts available – that the GOI indicated the following:

> In any event, for the sake of the fullest of clarities, the GOI will now endeavour after the end of this current Ramadan to send over certain State-officials from the GOI to the site of PTPN to complete Appendix B and the mini-questionnaire.[423]

7.244. This suggests to us that while the GOI was aware that it had to submit a "complete" Appendix B response, it had not yet done so. The GOI eventually submitted the complete Appendix B questionnaire response only on 30 June, which, as discussed above, was well beyond what we consider was a reasonable timeframe in the sense of Article 12.7 of the SCM Agreement. The GOI considerably delayed the submission of a consolidated Appendix B questionnaire response for PTPN even though the Commission on multiple occasions requested a full and comprehensive reply.[424] Therefore, we consider that the Commission reasonably found that despite the submission of some relevant documents in a piecemeal fashion, the GOI had not in fact provided within a reasonable time the necessary information regarding PTPN requested in the Appendix B questionnaire. Hence, the Commission was justified in resorting to facts available.

7.245. Accordingly, we reject Indonesia's claim that the Commission improperly resorted to facts available in respect of information concerning PTPN.

7.4.6.3.2 Whether the Commission improperly made determinations concerning independent CPO suppliers on the basis of the facts available

7.246. Indonesia also claims that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in respect of independent CPO suppliers on the ground of the GOI's failure to secure complete responses to the Appendix B questionnaire from such suppliers.[425] Indonesia argues that the Commission should not have applied facts available in respect of information concerning independent CPO suppliers on the ground that the GOI did not get independent CPO suppliers to respond properly to the Appendix B questionnaire, as the GOI has no control over such suppliers. We note that Indonesia's claim is based on three premises, all of which must be valid for Indonesia's claim to succeed. These premises are:

a. that the Commission actually made a determination concerning independent CPO suppliers on the basis of the facts available[426];

b. that the Commission did so *on the ground that* the GOI – whom the Commission viewed as being responsible for ensuring that CPO suppliers submitted full responses to their respective Appendix B questionnaires – failed to fulfil this "responsibility"; and

c. that the Commission could not reasonably have treated the GOI's alleged failure to fulfil this "responsibility" as one of the three alternative grounds foreseen in Article 12.7 that must exist for a resort to facts available to be valid.

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[423] GOI's response to Commission's letter of 22 May 2019 (Exhibit IDN-6 (BCI)), p. 5.

[424] The Commission in its deficiency letter dated 1 March 2019 conveyed to the GOI that state owned as well as other CPO suppliers had not submitted Appendix B as requested. (Deficiency letter to GOI (Exhibit IDN-7), p. 4). The verification report also indicated that during the verification visit between 1-4 April 2019, the Commission asked the GOI "why PTPN did not reply to Appendix B and the mini-questionnaire, despite being a state-owned supplier of CPO". (GOI's verification report (Exhibit EU-46 (BCI)), p. 3)

[425] Indonesia's first written submission, paras. 513, 523, 526, and 531; response to Panel question No. 88, p. 52. See also Definitive Regulation (Exhibit IDN-2), recital 142.

[426] We also refer to this as a *resort to facts available in respect of information concerning independent CPO suppliers*.

7.247. We examine each of these premises in turn. We consider it useful to recall, as noted in paragraph 7.224 above, that Article 12.7 of the SCM Agreement permits an investigating authority to make "determinations … on the basis of the facts available". However, a determination could validly be made on that basis only in circumstances involving the existence of at least one of three alternative grounds, i.e. when "any interested Member or interested party *refuses access to*, or *otherwise does not provide*, necessary information within a reasonable period or *significantly impedes the investigation*". Accordingly, any determination made on the basis of facts available in cases in which none of these three alternative grounds exist would be inconsistent with Article 12.7 of the SCM Agreement. The three premises into which we divide Indonesia's claim correspond to various elements of Article 12.7 of the SCM Agreement.

7.4.6.3.2.1 Did the Commission resort to facts available in respect of information concerning independent CPO suppliers?

7.248. In this section, we determine whether, as a matter of fact, the Commission made in its provisional and definitive Regulations any "determinations" concerning independent CPO suppliers "on the basis of the facts available" (in other words, whether the Commission resorted to facts available in respect of information concerning independent CPO suppliers). We begin by noting that the Commission's findings regarding independent CPO suppliers were focused on the question as to whether such suppliers were aligning their CPO prices with PTPN's prices on account of the GOI's alleged entrustment and direction of those suppliers. The Commission stated:

> Absent cooperation by CPO suppliers, and on the basis of the elements contained in the provisional Regulation, the Commission considered that there is significant evidence showing that CPO suppliers have been entrusted or directed by the GOI to provide CPO for less than adequate remuneration in pursuit of the GOI's policy objectives to support the development of the biodiesel industry.[427]

7.249. We note that the Commission refers to the absence of cooperation by CPO suppliers when reaching the conclusion stated above. The Commission also stated that it concluded that independent CPO suppliers aligned their prices with those set by PTPN to comply with the GOI's policy objectives "[s]ince CPO suppliers failed to provide sufficient information to the contrary".[428] The Commission noted that "there was *no direct evidence* available on how CPO suppliers set their prices"[429] and that the Commission "could not draw any conclusion" in this regard from the responses submitted by the relevant CPO suppliers on account of various shortcoming in such responses.[430] The Commission treated the "the lack of cooperation by the GOI as well as the CPO suppliers" as "a further indication CPO suppliers are acting following the GOI's command in support of the biodiesel producers".[431] To us, these aspects of the Commission's provisional and the definitive Regulations clearly indicate that the Commission made the determination that the CPO suppliers set their prices under the GOI's influence on the basis of the facts available. In other words, the Commission resorted to facts available in relation to information concerning independent CPO suppliers.

7.250. The European Union's own submissions confirm this understanding. The European Union explains that the Commission needed information regarding independent CPO suppliers via the Appendix B questionnaire to "assess whether CPO suppliers acted as rational market operators"[432], "properly understand how the CPO market operated"[433], and "understand that dynamics of palm oil market directly from CPO suppliers".[434] The European Union explicitly indicates that there were "gaps" in necessary information due to insufficient responses of CPO suppliers, and the Commission used "information available" to fill the resulting "evidential lacuna".[435]The European Union's explanations confirm that the Commission resorted to facts available in respect of information concerning independent CPO suppliers.

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[427] Definitive Regulation (Exhibit IDN-2), recital 134.
[428] Provisional Regulation (Exhibit IDN-1), recital 137.
[429] Emphasis added.
[430] Definitive Regulation (Exhibit IDN-2), recitals 143 and 148.
[431] Definitive Regulation (Exhibit IDN-2), recital 143.
[432] European Union's response to Panel question No. 88, para. 278.
[433] European Union's response to Panel question No. 88, para. 282.
[434] European Union's response to Panel question No. 88, para. 285.
[435] European Union's responses to Panel question No. 89, para. 295, question No. 90, paras. 306-307; and second written submission, paras. 478 and 481.

7.251. We note that the fact that independent CPO suppliers were not interested parties in the underlying investigation does not affect this conclusion.[436] As past panels have explained (and we agree), in situations in which an authority does not use the information submitted by the interested party from which that information was requested (for example due to incomplete or late submission of the requested information), the only possibility for the authority to fill the information gap created by the resulting lack of "necessary information" is to apply the facts available in the sense of Article 12.7 of the SCM Agreement.[437] In this case, the Commission requested the GOI to ensure the submission of certain information concerning independent CPO suppliers, but did not receive that information.[438] As the European Union itself acknowledges, the Commission filled the resulting "gaps" in necessary information using "information available". In our view, this represents nothing but a resort to facts available in relation to information concerning independent CPO suppliers.

7.252. Based on the foregoing, we therefore find that the Commission did resort to facts available in relation to information concerning independent CPO suppliers. We next examine whether the Commission resorted to facts available *on the ground of* the GOI's failure to ensure submission of information concerning independent CPO suppliers.

7.4.6.3.2.2 Did the Commission resort to facts available on ground of the GOI's alleged failure to ensure submission of information concerning independent CPO suppliers?

7.253. In this section, we determine in light of the provisional and definitive Regulations, whether Indonesia correctly presupposes that the Commission resorted to facts available in respect of information concerning CPO suppliers *on the ground of* the GOI's failure to ensure the submission of information concerning independent CPO suppliers. The European Union considers that Indonesia wrongly assumes that the Commission resorted to facts available in relation to information concerning independent CPO suppliers *because of* the GOI's purported failure to ensure that independent CPO suppliers submitted the requested information.[439] The European Union instead asserts that the GOI's failure to provide information *concerning PTPN* was *the basis* which permitted the Commission to fill the evidential lacunae in respect of information concerning independent CPO suppliers.[440] For the European Union, once the GOI failed to furnish the necessary information regarding PTPN, this put the Commission "in the situation of needing to have recourse to facts available". The European Union argues that Article 12.7 permitted the Commission to also fill "lacunae caused by the additional and separate lack of cooperation from other entities from which the [Commission] sought information".[441]

7.254. We do not agree with the European Union's characterization of events. We consider that only the GOI's failure to provide necessary information *concerning independent CPO suppliers* could have been the basis on which the Commission resorted to facts available in relation to information concerning independent CPO suppliers, and not the GOI's failure to provide necessary information *regarding PTPN*. Indeed, the European Union's own framing of its argument presupposes the existence of "an additional and separate lack of cooperation" in relation to independent CPO suppliers. Absent "additional and separate lack of cooperation" in relation to independent CPO suppliers, we do not see how the Commission could have applied facts available in respect of information concerning such entities only on the ground of an unrelated lack of cooperation by PTPN.

7.255. We also note that certain statements of the Commission reveal that the Commission, as a matter of fact, expected more from the GOI than the mere transmission of the Appendix B questionnaire to independent CPO suppliers. At recital 96 of the provisional Regulation, the Commission notes:

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[436] We also note in this regard that our analysis in section 7.4.6.3.2.2 reveals that the ground on which the Commission's resort to facts available was not that the independent CPO suppliers failed to cooperate in their own right as interested parties. Rather, the ground on the Commission did so was that the GOI failed to fulfil its "responsibility" to ensure that submission of information concerning independent CPO suppliers.

[437] Panel Reports, *EC – Salmon (Norway)*, para. 7.348; *Korea – Stainless Steel Bars*, appealed 22 January 2021, para. 7.194.

[438] See paras. 7.255-7.258

[439] European Union's second written submission, para. 471.

[440] European Union's response to Panel question No. 90, para. 307; second written submission, para. 481.

[441] European Union's response to Panel question No. 90, para. 307.

> The absence of sufficient cooperation did not allow the Commission to collect all the information it considered relevant for its findings in this investigation. More specifically, the Commission *could not obtain from the GOI* information on the palm oil market *based on direct information provided by CPO suppliers* nor does it have complete information regarding PTPN's role on this market with regard to the biodiesel industry.[442]

7.256. The Commission states in this passage that it "could not obtain from the GOI … direct information provided by CPO suppliers". The Commission, in its own words, not only expected the GOI to forward the Appendix B questionnaires to independent CPO suppliers but also expected to obtain from the GOI information concerning such suppliers. This understanding is also reinforced by recital 159 of the definitive Regulation, which states:

> The Commission also observed that that the questionnaires to independent CPO suppliers were part of the questionnaire addressed to the GOI, and therefore the responsibility to coordinate, collect and ensure the timely sending of complete replies lied entirely on the GOI.[443]

7.257. As the European Union highlights, the quoted passage appears in relation to the issue of whether the Commission had sent reminders to certain CPO suppliers who had not filed "open versions" of their responses to do so. We consider, however, that the statement nevertheless reveals that the Commission expected the GOI to do more than merely transmit the Appendix B questionnaire to the relevant suppliers. Rather, in the Commission's view, the GOI had "the responsibility to coordinate, collect and ensure the timely sending of complete replies".

7.258. The Commission's statements discussed above thus reveal that the Commission held the GOI responsible for the absence of information requested from independent CPO suppliers. These statements, therefore, further show that the Commission resorted to facts available in respect of missing information concerning independent CPO suppliers *because of the GOI's purported failure to ensure* that independent CPO suppliers submitted the requested information.

7.4.6.3.2.3 Did the Commission err by resorting to facts available on the ground of the GOI's failure to ensure submission of information concerning independent CPO suppliers?

7.259. In examining the third premise, we determine whether the Commission could reasonably have treated the GOI's alleged failure to fulfil this "responsibility" as any of the three grounds foreseen in Article 12.7 of the SCM Agreement, such that its resort to facts available would be valid. Indonesia contends that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available on the ground of the alleged failure of the GOI to ensure the submission of information concerning entities that were independent of the GOI.[444] For Indonesia, the Commission should have directly pursued the information it needed from independent CPO suppliers instead of erroneously placing that responsibility on the GOI.[445] Indonesia contends that, by forwarding the Appendix B questionnaires to the independent CPO suppliers, Indonesia fulfilled its obligation and no culpability on the GOI's part arises due to any shortcomings in responses.[446] For Indonesia, the Commission accordingly had no basis to resort to facts available in these circumstances.

7.260. The European Union argues that in the absence of relevant information, the Commission was entitled to resort to facts available to avoid a situation in which the investigation was hampered due to lack of that information, even if the information pertained to non-GOI-owned entities.[447] As the European Union rightly suggests, the possibility to resort to facts available under Article 12.7 of the SCM Agreement is meant to enable investigating authorities to overcome a lack of information needed to complete an investigation. However, Article 12.7 does not allow a resort to facts available in all conceivable situations in which an investigating authority may be missing information that is necessary for the determination. Rather, as a matter of law, an investigating authority may have

[442] Provisional Regulation (Exhibit IDN-1), recital 96. (emphasis added)
[443] Definitive Regulation (Exhibit IDN-2), recital 159.
[444] Indonesia's first written submission, paras. 523, 526, and 531; response to Panel question No. 88.
[445] Indonesia's first written submission, paras. 528 and 531-532.
[446] Indonesia's first written submission, paras. 527 and 530; second written submission, paras. 293 and 296.
[447] European Union's first written submission, paras. 1012-1013.

recourse to facts available only if it affirmatively establishes the existence of any of the three scenarios foreseen in Article 12.7 of the SCM Agreement. We note in this regard, the following findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)*:

> We have determined above that Article 12.7 of the SCM Agreement limits the circumstances under which an investigating authority may resort to facts available to those where an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". The SCM Agreement contemplates no other possibilities; for instance, where an investigating authority, until a very late stage of the investigation, learns the need for information which it did not request during the course of the investigation and that is necessary to its final subsidization or injury determinations.[448]

7.261. Past panel reports provide examples of situations in which an authority cannot resort to facts available, even in the absence of "necessary" information. The panel in *US – Coated Paper (Indonesia)* noted that if an interested party is prevented from providing necessary information "by external factors outside its control", an investigating authority could not reasonably have concluded that that party failed to cooperate.[449] The panel in *Korea — Stainless Steel Bars*, like a number of other panels, noted that if an interested party is not informed of the information required of it, "it cannot plausibly be said to have 'refuse[d] access to, or otherwise … not provide[d], the necessary information'".[450] Past panels have also noted that failure by an interested Member/party to cooperate only gives rise to consequences envisaged by Article 12.7 if the investigating authority itself acted in a reasonable, objective, and impartial manner.[451]

7.262. The issue before us in determining whether the Commission's resort to facts available complied with Article 12.7, therefore, is not simply whether the Commission lacked such information as was necessary for the determination. The issue, rather, is whether in the circumstances of the case, the Commission objectively established that the GOI "refuse[d] access to, or otherwise d[id] not provide, necessary information within a reasonable period or significantly impede[d] the investigation", such that the Commission could properly have resorted to facts available.[452] Specifically, we must determine whether the absence of complete responses to the Appendix B questionnaire from the relevant CPO suppliers could reasonably have led an objective and unbiased investigating authority to hold that the GOI failed to provide necessary information, or significantly impeded the investigation.

7.263. For Indonesia, the answer is no. Indonesia asserts that it forwarded the Appendix B questionnaires to the relevant CPO suppliers and provided the Commission the relevant postal records as evidence thereof.[453] Indonesia asserts that the fact that several independent CPO suppliers sent their response to the Commission (even if such responses were not, in the Commission's view, fully satisfactory) evidences that the GOI cooperated with the Commission in duly transmitting the Appendix B questionnaire.[454] Indonesia contends that insofar as there were defects in the responses received and/or missing responses, the GOI could not reasonably be held to have failed to cooperate with the Commission on that basis, as the GOI has no power over

[448] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 16.16.

[449] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.115. While the panel made this finding in relation to paragraph 7 of Annex II of the Anti-Dumping Agreement, the principle being expressed by the panel is nevertheless relevant to the issue before us.

[450] Panel Report, *Korea – Stainless Steel Bars*, appealed 22 January 2021, paras. 7.188 and 7.196. See also Panel Reports, *Mexico – Anti-Dumping Measures on Rice*, fn 211; *US – Anti-Dumping and Countervailing Duties (China)*, paras. 16.9, 16.15, and 16.16; and *China – GOES*, paras. 7.447-7.448.

[451] Panel Reports, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.92; *Guatemala – Cement II*, para. 8.251.

[452] We also note at this point that the independent CPO suppliers themselves were not interested parties and that both parties are of the view that lack of cooperation from such suppliers in their own right was not, and could not have been, the basis for resort to facts available. (European Union's response to Panel question No. 89, para. 294; question No. 90, paras. 304-305; European Union's second written submission, paras. 456 and 470; and Indonesia's response to Panel question No. 89, p. 53).

[453] Indonesia's first written submission, para. 527.

[454] Indonesia's first written submission, para. 530.

independent CPO suppliers.[455] For Indonesia, the Commission itself should have pursued the information with such entities directly.[456]

7.264. We note that nothing in Article 12.7 of the SCM Agreement *a priori* excludes the possibility that an investigating authority may legitimately require an interested Member or interested party to furnish information regarding another entity. Indeed, the panel in *Korea – Certain Paper* was not persuaded by Indonesia's contention (in that dispute) that, because the investigated exporters experienced difficulties in obtaining the requested information concerning an entity that they did not control, the authority's resort to facts available was improper. The panel noted that there was "a significant degree of commonality of ownership and management" between the investigated exporters and the entity about which the information was requested. The panel also noted that while the investigated exporters asserted that they could not compel the relevant entity to provide the requested information, they were nevertheless able to do so at a later stage.[457]

7.265. We recognize that the facts in this case and in *Korea – Certain Paper* are not identical. That case involved entities with common ownership, whereas this case involves the GOI and independent entities. Nevertheless, the findings of the panel in that case illustrate how an interested Member or interested party may, depending on circumstances, legitimately be asked by an investigating authority to provide information about an entity other than itself. We share that view. We would further note that several third parties to this dispute also share this view.[458] We therefore consider, in line with Article 12.7, that the Commission was not *a priori* precluded from seeking to obtain information from the GOI regarding independent CPO suppliers. However, whether the GOI's alleged failure to provide that information could have been a valid basis for application of facts available is a separate matter.

7.266. In our view, that question depends on whether the nature of the requested information was such that the GOI could reasonably have obtained it.[459] We also consider relevant whether the GOI made reasonable efforts to obtain the requested information and whether the GOI made the Commission aware of any difficulties involved in obtaining that information. We also note in this context that the Appellate Body in *US – Hot-Rolled Steel* found that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement by resorting to facts available on ground of an interested party's failure to produce the requested information concerning a separate entity. In reaching that finding, the Appellate Body noted that the requested information "was not known to, nor in the possession of" the interested party of whom that information was requested. The Appellate Body also noted that the information pertained to the operations of, and was known only to, an entity other than the interested party of whom that information was requested.[460] We will be guided, in our analysis, by these considerations.

7.267. The European Union acknowledges that it had requested the GOI's cooperation in receiving information from entities that were "independent" of the GOI.[461] We note that the European Union describes part of the information requested through the Appendix B questionnaire as follows:

> Appendix B included requests for qualitative information on the sales channels and process (questions 3(a)-(e)), as well as quantitative data on CPO prices (question 3(g) and Table 5 of the attached mini-questionnaire) and profitability of CPO

[455] Indonesia's first written submission, paras. 529 and 531.
[456] Indonesia's first written submission, paras. 529 and 531.
[457] Panel Report, *Korea – Certain Paper*, para. 7.51.
[458] Australia's third-party response to Panel question No. 11, para. 10; United States' third-party response to Panel question No. 11, para. 57.
[459] The provisional and the definitive Regulations reveal that the Commission expected the GOI to either collect and submit itself the requested information concerning independent CPO suppliers to the Commission, or to ensure that the relevant CPO suppliers file that information with the Commission (see e.g. Provisional Regulation (Exhibit IDN-1), recital 96, where the Commission indicates that it "could not obtain from the GOI" information regarding independent CPO suppliers; and Definitive Regulation (Exhibit IDN-2), recital 159, where the Commission states that the "responsibility to coordinate, collect and ensure the timely sending of [independent CPO suppliers'] complete replies lied entirely on the GOI"). In stating whether the GOI could reasonably have "obtained" the requested information, we refer, collectively and interchangeably, to either of these means through which the Commission expected the GOI to ensure the submission of the relevant information.
[460] Appellate Body Report, *US – Hot-Rolled Steel*, para. 105.
[461] European Union's second written submission, para. 459; response to Panel question No. 120, para. 113.

> sales (questions 3(g)-(h) and Table 6 of the attached mini questionnaire), both on the domestic and on the export markets.[462]

7.268. This is not an exhaustive description of the scope of the information requested in the Appendix B questionnaire. The quoted passage, however, reveals that the GOI could not have readily obtained much of the requested information, such as commercial information concerning the sales channels or export sales of those independent CPO suppliers. In this regard, we note that the European Union has not placed before us any evidence indicating that the GOI had any means available to it under its domestic system of obtaining such commercial information pertaining to unrelated private entities or compelling such entities to file that information with the Commission.

7.269. Further, we note that the evidence on the record reveals that the GOI informed the Commission that the GOI's understanding of its obligation towards the Commission was limited to transmitting the questionnaire to the relevant suppliers. The GOI's response to the Commission's letter indicating the latter's intention to apply facts available is pertinent:

> As the GOI noted, twelve of [the CPO suppliers] responded. Despite all these best efforts by the GOI, it was not able to convince all of them to respond. However that may be, the GOI did perform substantial work of what is essentially a task for the investigating authority (the European Commission).
>
> …
>
> If, despite all these efforts from the GOI and the companies under investigation, the remainder of the [independent] suppliers did not reply to Appendix B and the mini-questionnaire, then such alleged fact is truly beyond the control and obligations of the GOI. The GOI has no power over such [independent] suppliers and no culpability on part of GOI should be imputed or created where none exist. The implicit allegations in this regard towards the GOI are without merit.[463]

7.270. Thus, the GOI informed the Commission of its views as regards the limited extent of its responsibility and made the Commission aware that it has "no power over such independent suppliers" and hence furnishing their responses to the Appendix B questionnaire "is truly beyond the control" of the GOI. We note that the European Union has not submitted any evidence on the record contradicting the GOI's clearly articulated position that the independent CPO suppliers were beyond its control.

7.271. We also note that it is undisputed between the parties that the GOI provided postal records evidencing transmission of Appendix B questionnaire of the relevant CPO suppliers. The European Union asserts that while the GOI claimed that it attempted to contact the suppliers by phone and visit their premises to alert them about the Commission's questionnaire, the GOI did not provide evidence showing that it indeed undertook such efforts.[464] We consider, however, that the postal records of transmission of the questionnaire demonstrate the GOI's cooperation in "forwarding" the Appendix B questionnaire to the relevant suppliers. We also agree with Indonesia that the fact that several CPO suppliers provided responses (albeit incomplete in certain respects) to the Commission confirms that the GOI had succeeded in making certain of the suppliers aware of the questionnaire.

7.272. The European Union contends that the GOI did not do its utmost to cooperate with the Commission in relation to independent CPO suppliers, as it submitted evidence *regarding PTPN* "extremely late".[465] We note, however, that the GOI's actions in relation to PTPN are a completely separate matter from the GOI's actions in relation to independent CPO suppliers. PTPN is a state-owned entity. The Commission found that PTPN was under the control of the GOI. Therefore, the Commission could have expected the GOI to play a greater role in relation to PTPN's Appendix B

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[462] European Union's response to Panel question No. 88, para. 281.

[463] GOI's comments on Commission's letter of 22 May 2019 (Exhibit IDN-6 (BCI)), pp. 4-5. On 14 March 2019, also indicated in its response to the Commission's deficiency letter that "the GOI has fulfilled its obligation to communicate the Appendix B and mini questionnaires to relevant Indonesian CPO suppliers". (GOI's response to deficiency letter (Exhibit IDN-8 (BCI)), p. 9).

[464] European Union's first written submission, paras. 1005-1006.

[465] European Union's first written submission, para. 994.

questionnaire response. However, the Commission could not reasonably have had the same expectation of the GOI in respect of independent CPO suppliers. Hence, even though GOI could reasonably be viewed as having failed to cooperate sufficiently with the Commission in relation to PTPN, that alone does not mean that the GOI should similarly be viewed as having failed to cooperate in relation to independent CPO suppliers.

7.273. The European Union asserts that "the GOI did not take all measures it could reasonably have done to elicit responses from other CPO suppliers".[466] In response to our question inviting the European Union to clarify what measures GOI could have taken in this regard, the European Union explained that the GOI could have sent the independent CPO suppliers "reminders" regarding their pending Appendix B questionnaire responses.[467] In this regard, we note that the European Union does not point us to any communication on the record whereby the Commission requested the GOI to send such reminders. In our view, even if the GOI's failed to send such reminders, that does not mean that the Commission could reasonably have concluded that the GOI failed to cooperate with the Commission in a manner that would justify a resort to facts available in respect of independent CPO suppliers.

7.274. The European Union also notes that the Appendix B questionnaire was part of the broader questionnaire meant for the GOI and submits that the Commission requested the GOI to forward the questionnaires to the relevant CPO suppliers as the GOI was "best placed" to contact numerous suppliers and elicit a response.[468] However, in our view, this does not in and of itself automatically transform into an obligation for the GOI to "to coordinate, collect and ensure the timely sending of complete replies". If the GOI could otherwise not reasonably be expected to obtain certain information, the fact that a request for such information is made in a questionnaire directed at the GOI is immaterial. Further, as the panel in *US – Supercalendered Paper* suggested, the fact that it would be "inconvenient or impractical" for an authority to fulfil the requirements of Article 12.7 cannot alter the obligations enshrined in the WTO Agreement.[469]

7.275. The European Union further argues that because the GOI used CPO suppliers as the means of providing a subsidy to biodiesel producers, any "burden on private operators to provide information" is the "side effect of the action of the GOI".[470] We disagree with the European Union insofar as it is suggesting that the entrustment or direction of independent CPO suppliers by the GOI implies that the GOI would necessarily be responsible for the collection, coordination, and timely sending of Appendix B responses of such CPO suppliers. To begin, the Commission could only have determined any entrustment or direction *after* collecting and examining the relevant information.[471] Logically, the transfer of information-gathering responsibility that otherwise lies with the investigating authority onto the investigated government cannot be justified on the basis of allegations of the existence of entrustment or direction before any entrustment or direction has been established. Furthermore, whether the government in question could reasonably be expected to obtain the requested information pertaining to independent entities would still depend on the nature of the requested information, not on the nature of a subsidy that may exist.

7.276. To summarize the foregoing considerations, we consider that Indonesia has shown that the Commission cannot reasonably have expected the GOI to obtain much of the requested information. The GOI explained to the Commission that its responsibility was limited to "forwarding" the Appendix B questionnaire to the relevant CPO suppliers, as requested by the Commission. The GOI also provided evidence showing that it indeed forwarded the questionnaire to the relevant suppliers,

[466] European Union's response to Panel question No. 89, para. 302.
[467] European Union's response to Panel question No. 120, para. 112.
[468] European Union's response to Panel question No. 91, para. 308; second written submission, para. 360; and response to Panel question No. 120, para. 111.
[469] Panel Report, *US – Supercalendered Paper*, paras. 5.57 and 5.81.
[470] European Union's first written submission, paras. 1000-1001.
[471] In its comments on the Interim Report, the European Union asserted that a lack of cooperation from independent CPO suppliers can constitute part of the evidence used to conclude that they were entrusted/directed. The European Union argues that a finding of entrustment or direction could be premised on circumstantial evidence. We note in this regard that insofar as lack of cooperation by independent CPO suppliers is used as evidence establishing entrustment or direction, this lack of cooperation itself can only be established *after* the investigating authority has sought to collect information from independent CPO suppliers in the first place. A shift in information-gathering responsibility from the investigating authority to the investigated government *ab initio* cannot be justified based on the possibility that independent CPO suppliers may, when approached by the authority, not cooperate, and that lack of cooperation may in turn be used by the authority to establish the existence of entrustment or direction.

and explained to the Commission that it is beyond the GOI's control to ensure that the suppliers duly respond. The European Union has not submitted any evidence contradicting the GOI's clearly articulated position that the independent CPO suppliers were beyond its control. Nor has the European Union offered any other persuasive argument as to why the GOI could reasonably be understood to have failed to provide necessary information, or significantly impeded the investigation, in the absence of complete responses by independent CPO suppliers.

7.277. Therefore, we consider that the Commission essentially resorted to facts available without a reasonable basis to show that the GOI "refuse[d] access to, or otherwise d[id] not provide, necessary information" regarding independent CPO suppliers. We therefore uphold Indonesia's claim that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in respect of independent CPO suppliers on the ground of the GOI's failure to ensure submission of information concerning independent CPO suppliers.

7.4.6.3.3 Whether the Commission improperly disregarded information submitted by independent CPO suppliers

7.278. Indonesia argues that in relying on facts available in relation to PTPN's pricing policy and its impact on the Indonesian CPO market, the Commission failed to consider information that had been submitted by other CPO suppliers. For Indonesia, had the Commission made findings based on the Appendix B responses of the independent CPO suppliers (Indonesia refers in particular to responses submitted by "eight of Wilmar's related suppliers"), it would have found that "PTPN's pricing policy did not depreciate CPO prices on the Indonesian market as a whole".[472] Indonesia asserts that information submitted by the relevant CPO suppliers shows that such suppliers were profitable, which in turn demonstrates that they follow PTPN's prices because PTPN's prices "are deemed adequate in light of prevailing market conditions and sufficient to make profits".[473]

7.279. The European Union argues that the relevant CPO suppliers had submitted very little information, and that information did not explain the price alignment with PTPN's prices.[474]

7.280. We note that the European Union has asserted, and Indonesia does not dispute, that of the nine CPO suppliers' Appendix B responses on the Commission's record, only three suppliers' responses contained information on profitability along with the relevant audited accounts.[475] Indonesia has not explained how accounts-backed profitability information concerning only three CPO suppliers could have led the Commission to conclude that "PTPN's pricing policy did not depreciate CPO prices on the Indonesian market as a whole"[476], when there were several other CPO suppliers on the market whose profitability levels were unknown.

7.281. We recall that the Commission concluded that PTPN's CPO business was not profitable based on PTPN's own company-wide audited accounts for the years 2016 and 2017, given that PTPN did not submit CPO-specific profitability information within a reasonable period. Indonesia does not explain why information concerning profitability of other CPO suppliers was more relevant to a determination as to whether PTPN's CPO prices were rational than information concerning PTPN's own overall profitability. Accordingly, we reject Indonesia's argument that the Commission improperly disregarded information submitted by the relevant CPO suppliers.

7.4.7 Conclusion

7.282. For the reasons we set out in sections 7.4.2-7.4.6 above, we find that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that, through a set of measures, including an export tax and export levy, and by *de facto* acting as a price setter in the domestic CPO market, the GOI induced the domestic CPO producers to sell CPO locally and thereby entrusted or directed private CPO suppliers to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration. We additionally find that the Commission acted inconsistently with Articles 1.1(a)(2) and 32.1 of the SCM Agreement by determining that the same "set" of measures

[472] Indonesia's response to Panel question No. 92, p. 54; first written submission, para. 538; and second written submission, para. 301.
[473] Indonesia's second written submission, para. 299.
[474] European Union's second written submission, para. 485.
[475] European Union's response to Panel question No. 88, para. 291.
[476] Indonesia's response to Panel question No. 92, p. 54.

qualifies as a form of "income or price support" to biodiesel producers within the meaning of Article 1.1(a)(2) of the SCM Agreement, thus providing an alternative basis establishing that the GOI subsidizes the biodiesel industry.

7.283. In light of these findings, we refrain from ruling on Indonesia's additional claim that the Commission erred in its assessment, by failing to establish that the provision of CPO is a function that would ordinarily be part of governmental practice in the legal order of Indonesia, to fulfil the requirements of Article 1.1.(a)(1)(iv) of the SCM Agreement. We also refrain from ruling on Indonesia's additional claims under Articles 1.1(b) and 14(d) of the SCM Agreement and Articles 1.2, 2.1 and 2.4 of the SCM Agreement in relation to the Commission's assessment of benefit and specificity.

7.284. We additionally uphold Indonesia's claim that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in respect of independent CPO suppliers on the ground that the GOI purportedly failed to ensure submission of independent CPO suppliers' Appendix B responses. We, find, however, that Indonesia has not established that the Commission acted inconsistently with Article 12.7 by resorting to facts available in respect of information concerning PTPN. Indonesia also did not establish that the Commission improperly disregarded any information submitted by independent CPO suppliers when making findings concerning whether PTPN depreciated CPO prices in Indonesia or otherwise.

7.5 The Commission's determination that imports of biodiesel from Indonesia cause a threat of material injury to EU biodiesel producers

7.5.1 Introduction

7.285. In the underlying investigation, the Commission determined that subsidized imports from Indonesia threatened material injury to the domestic industry. The Commission reached this determination following its consideration of the impact of Indonesian imports on the prices of the domestic like products, its examination of state of the domestic industry, its assessment of certain threat of injury factors, and a determination of a causal link between the subject imports and the threat of materials injury.

7.286. Indonesia makes a series of claims in connection with the Commission's findings:

a. Indonesia claims that the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement because it failed to make an objective examination, on the basis of positive evidence, of the effect of the allegedly subsidized imports on prices of EU producers, and thus improperly found significant price undercutting and price depression[477];

b. Indonesia claims that the Commission acted inconsistently with Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement because it failed to make an objective examination, on the basis of positive evidence, of a threat of injury and of a fragile economic condition of its domestic industry[478];

c. Indonesia claims that the Commission acted inconsistently with Articles 15.1, 15.7 and 15.8 of the SCM Agreement when it concluded that the factors in Article 15.7 of the SCM Agreement could lead to the conclusion that further imports from Indonesia were imminent and would be injurious[479]; and

d. Indonesia claims that the Commission acted inconsistently with Articles 15.1,15.2 15.5, 15.7 and 15.8 of the SCM Agreement because it failed to make an objective examination, on the basis of positive evidence, that allegedly subsidized imports are, through the effects of subsidization, threatening to cause injury to the domestic industry; and because the EU failed to ensure that the threat of injury caused to the domestic industry by other

[477] Indonesia's first written submission, para. 336.
[478] Indonesia's first written submission, para. 377.
[479] Indonesia's second written submission, para. 239.

factors, such as imports from Argentina, was not attributed to allegedly subsidized imports.[480]

7.5.2 Claims related to the Commission's consideration concerning the impact of Indonesian imports on the prices of domestic like products

7.287. In the investigation at issue, the Commission defined the product under investigation as biodiesel, in pure form or as included in a blend, originating in Indonesia. The examination of trends relevant for the assessment of injury covered the period from 1 January 2015 to the end of the investigation period, 30 September 2018 (period considered).[481] The Commission also considered data from the post-IP in its analysis of the state of the domestic industry.[482]

7.288. This section examines Indonesia's claims challenging the Commission's determinations of price undercutting and price depression, its analysis of the state of the domestic industry, and its analysis of the factors relating to a threat of injury and the existence of a "change in circumstances" that would create a situation in which the subsidy would cause injury. The section also addresses Indonesia's claims regarding the Commission's causation and non-attribution analysis.

7.5.2.1 Claims concerning the Commission's consideration of price effects

7.289. Indonesia claims that the Commission's consideration of the price effects of Indonesian biodiesel imports is inconsistent with Articles 15.1 and 15.2 of the SCM Agreement. Indonesia raises two main claims[483]:

a. The Commission failed to ensure price comparability when examining the effect of imports from Indonesia on the prices of domestic like products, failed to establish price undercutting for the product as a whole and thus failed to establish the existence of significant price undercutting by means of Indonesian imports.

b. The Commission failed to make an objective examination, on the basis of positive evidence, of the effect of the allegedly subsidized imports on prices of EU producers, and thus improperly found significant price undercutting and price depression.

7.290. In the following sections we first summarize the salient factual aspects of the Commission's consideration of price effects. Next, we set out the parties' main arguments concerning the Commission's examination of price effects. This is followed by the Panel's evaluation of Indonesia's claims against the relevant legal standards.

7.5.2.2 Factual aspects of the Commission's determination

7.291. The Commission observed that biodiesel can be produced from different feedstocks. Biodiesel produced in Indonesia is primarily palm oil methyl ester (PME), which is derived from palm oil. Biodiesel produced in the European Union is mainly rapeseed methyl ester (RME), which is derived from rapeseed oil, although other feedstock may be used. Both PME and RME are fatty-acid mono-alkyl esters (FAME), however, they have different physical and chemical properties, including different cold filter plugging points (CFPP). The CFPP is the temperature at which a fuel will cause a fuel filter to plug due to the crystallization or jellification of some fuel components. Generally speaking, in the EU market biodiesels are either blended directly with mineral diesel, or blended together with other biodiesels to achieve a particular CFPP, before being mixed with mineral diesel to produce the diesel sold to end users.

7.292. The Commission determined that consumers are not concerned by the feedstock used to produce biodiesel, but rather require a product that fulfils a minimum CFPP level, which varies depending on the season and climatic conditions.[484] Biofuels with a higher CFPP can be sold for use

[480] Indonesia's first written submission, para. 499.
[481] Provisional Regulation (Exhibit IDN-1), recital 13.
[482] Definitive Regulation (Exhibit IDN-2), recitals 321-341.
[483] Indonesia's panel request, paras. 3(a) and (b).
[484] Provisional Regulation (Exhibit IDN-1), recital 289.

during summer months in warmer regions, whereas a lower CFPP is required during winter months and in colder regions.[485]

7.293. The Commission found that due to its high CFPP level, Indonesian PME (CFPP +13) is not normally blended with mineral diesel by itself. It is usually first blended with other biodiesels with lower CFPP to produce an intermediate blend at CFPP +5 or CFPP 0, and then mixed with mineral diesel.[486] The higher the desired CFPP of the blend, the larger the percentage of PME that can be used in the blend of biodiesels.[487]

7.294. The Commission examined the effect of imports of Indonesian PME on prices of biodiesel in the European Union by considering whether there was price undercutting during the investigation period.[488] The Commission used three methods to examine price undercutting.

7.295. Under the first method the Commission compared imports of Indonesian PME (CFPP +13) to sales of PME produced in the European Union (CFPP +10).[489] This comparison covered around 20% of all sales by the sampled EU producers.[490] The comparison yielded undercutting of 6.0% to 11.6%.[491]

7.296. Because the comparison under method 1 only covered around 20% of the sales of the sampled EU producers, the Commission made two other types of price comparisons to assess the reliability of its undercutting finding under method 1.[492]

7.297. Under the second method, the Commission compared imports of Indonesian PME (CFPP +13) to sales of EU produced PME (CFPP +10) as well as biodiesel sold by EU producers with a CFPP of around 0 degrees[493] called "FAME0".[494] For this purpose, the prices of FAME0 were adjusted downwards taking account of the market value of the difference in physical properties between biodiesel with CFPP 0 and CFPP +10.[495] This comparison covered 55 % of all sales of the EU industry. The comparison yielded undercutting of 7.4%.

7.298. Under the third method, the Commission compared sales of Indonesian PME (CFPP +13) to all the sales of biodiesel of the sampled EU producers.[496] This comparison yielded undercutting of 17.5%.

7.299. The Commission considered that because all three comparison methods showed significant levels of price undercutting, the imports of Indonesian PME during the investigation period significantly undercut the sales of the EU industry.[497]

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[485] Provisional Regulation (Exhibit IDN-1), recital 289.
[486] Provisional Regulation (Exhibit IDN-1), recital 290.
[487] Provisional Regulation (Exhibit IDN-1), recital 291.
[488] Provisional Regulation (Exhibit IDN-1), recital 285. The Commission determined the price undercutting during the investigation period by comparing: (a) the corresponding weighted average prices per product type of the imports from the Indonesian producers to the first independent customer on the EU market, established on a cost, insurance, freight (c.i.f.) basis, with appropriate adjustments for importation costs; and (b) the weighted average sales prices per product type of the sampled EU producers charged to unrelated customers on the Union market.
[489] Provisional Regulation (Exhibit IDN-1), recitals 292-295; Definitive Regulation (Exhibit IDN-2), recitals 234-244.
[490] Provisional Regulation (Exhibit IDN-1), recital 293.
[491] Provisional Regulation (Exhibit IDN-1), recitals 292-294; Definitive Regulation (Exhibit IDN-2), recitals 234.
[492] Provisional Regulation (Exhibit IDN-1), recital 295.
[493] Provisional Regulation (Exhibit IDN-1), recitals 296-297; Definitive Regulation (Exhibit IDN-2), recitals 245-255.
[494] FAME0 is usually a blend of various biodiesels which may contain PME as well as other biodiesels such as RME. (Provisional Regulation (Exhibit IDN-1), recital 297).
[495] Provisional Regulation (Exhibit IDN-1), recital 296. For this purpose, the prices of FAME0 were adjusted downwards taking account of the market value of the difference in physical properties. This market value was assessed based on the price difference between FAME10 and FAME0 on the EU market.
[496] Provisional Regulation (Exhibit IDN-1), recitals 298-299; Definitive Regulation (Exhibit IDN-2), recitals 256-257.
[497] Provisional Regulation (Exhibit IDN-1), recital 300.

7.300. The Commission further found that price undercutting of around 10% exercised a significant downward pressure on prices.[498] The Commission stated that "[a]s a result, the Union industry could not improve their unsatisfactory profit margin due to the price pressure exercised by significant quantities of low-priced subsidised imports in an otherwise favourable market situation."[499] The Commission therefore concluded that imports of Indonesian PME resulted in price depression.[500]

7.5.2.3 Main arguments of the parties

7.301. Indonesia claims that the Commission improperly found significant price undercutting and price depression inconsistent with Articles 15.1 and 15.2 of the SCM Agreement. Indonesia submits that the Commission's contention that Indonesian PME imports had a negative impact on the prices of EU producers was based on flawed price undercutting calculations[501], and that the finding of price depression was not supported by facts.[502] Indonesia makes the preliminary point that there is no direct competitive overlap between Indonesian PME (CFPP +13) and EU biodiesels with a lower CFPP level, namely FAME0.[503] Indonesia asserts that in any event, the price effects of Indonesian PME on CFPP 0 blends (FAME 0) is limited by the volume of PME that can be included in any such blend. Indonesia also submits that the differences in CFPP level impact price comparability, end uses and end users, and result in a lack of substitutability between Indonesian PME and EU produced biodiesels.[504] Similarly, Indonesia maintains that there is a lack of competitive overlap between Indonesian PME and EU produced PME, and that they are not sufficiently similar, because they have different end-uses.[505] Indonesia therefore argues that insofar as the Commission's undercutting findings were based on comparisons of these products, the Commission failed to ensure price comparability and thus failed to conduct an objective examination of the price effects of Indonesian PME imports.

7.302. As regards the Commission's price depression findings, Indonesia contends that Indonesian PME imports had no impact on the prices of EU producers between 2015 and the investigation period. Rather, the EU producers' prices followed their costs.[506] Indonesia also points out that the volume of Indonesian PME imports was negligible during the period immediately preceding the investigation period.[507] Additionally, Indonesia points out that EU producers actually improved their profitability when imports of Indonesian PME re-entered the EU market.[508] Indonesia contends that the lack of a competitive relationship between Indonesian PME and EU produced biodiesel precluded the former from exercising downward pressure on the prices of the latter on the EU market.[509] Moreover, Indonesia submits that the lack of product comparability was not considered in the Commission's examination of price depression.[510]

7.303. Additionally, Indonesia asserts that there is a limit on the volume of Indonesian PME that can be used in EU biodiesel blends due to the proportion of lower CFPP biodiesel that must also be included in such blends to produce a CFPP0 biodiesel.[511] Indonesia contends that as a result, the lower price of Indonesian PME is neutralized by the price premium of the lower CFPP biofuels incorporated to produce a CFPP0 blend.[512] Indonesia therefore submits that the price of Indonesian PME alone cannot determine the price of EU produced biodiesel, and that any price competition results from the overall price of the blend.[513] In conclusion, Indonesia contends that Indonesian PME

[498] Provisional Regulation (Exhibit IDN-1), recital 328.
[499] Provisional Regulation (Exhibit IDN-1), recital 329.
[500] Definitive Regulation (Exhibit IDN-2), recital 399 (referring to Provisional Regulation (Exhibit IDN-1), recital 328).
[501] Indonesia's first written submission, para. 321.
[502] Indonesia's first written submission, paras. 333-335; second written submission para. 177.
[503] Indonesia's first written submission, para. 322.
[504] Indonesia's first written submission, paras. 323-324.
[505] Indonesia's second written submission, para. 155.
[506] Indonesia's first written submission, paras. 332-333; second written submission, paras. 173 and 177-181.
[507] Indonesia's first written submission, para. 332.
[508] Indonesia's first written submission, para. 333.
[509] Indonesia's first written submission, para. 334; second written submission, para. 173.
[510] Indonesia's first written submission, para. 327.
[511] Indonesia's first written submission, paras. 325-326.
[512] Indonesia's first written submission, para. 326; second written submission, paras. 174-175; and response to Panel question No. 147.
[513] Indonesia's first written submission, paras. 325-326.

imports do not provide explanatory force for the Commission's conclusions on price effects on EU produced biofuels.[514]

7.304. The European Union submits that there is no clear-cut correlation between CFPP level and the price of a biofuel, and that the alleged differences in end uses and end users of biodiesels of differing CFPP levels are more complex than Indonesia asserts.[515] The European Union disputes Indonesia's assertion of a limit to the amount of Indonesian PME that can be included in a CFPP0 blend, which it says is unsupported by evidence.[516] According to the European Union, the evidence on the record shows that CFPP 0 (FAME 0) blends can include more than 20% of PME and up to 50% depending on the mix.[517] As such, the European Union submits that the price effects of PME on biofuel blends is not limited to a 20% volume cap.

7.305. As regards the price depression findings, the European Union acknowledges that prices followed costs in the EU industry during the investigation period. However, the European Union contends that the EU industry was nevertheless unable to raise its prices during a period of decreased costs, which coincided with the re-entry of Indonesian PME imports into the market. The European Union therefore asserts that it cannot be excluded that absent the imports the EU industry could have raised its prices and improved its profitability.[518] The European Union also asserts that the profitability of the EU industry remained at break-even levels during the period considered. Further, the European Union submits that notwithstanding the low level of Indonesian PME imports observed during the first three years of the period considered up to 2017, the threat of injury context meant that the Commission was entitled to rely on changes of circumstances towards the end of the investigation period, i.e. 2018, when Indonesian PME imports re-entered the EU market.[519]

7.306. The European Union also argues that the Commission based its price depression findings on multiple factors including the price sensitive nature of the biodiesel market, the existence of significant price undercutting and the EU industry's inability to increase its prices and improve its profitability during the investigation period.[520] The European Union therefore maintains that the Commission properly found that absent the Indonesian PME imports the situation of the EU industry could have improved. Accordingly, the European Union requests the Panel to reject Indonesia's claims that the Commission's price effects analysis is inconsistent with Articles 15.1 and 15.2 of the SCM Agreement.

7.5.2.4 Whether the Commission objectively considered the existence of significant price undercutting

7.307. Article 15.1 of the SCM Agreement provides that a determination of injury:

> [S]hall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[521]

7.308. The second sentence of Article 15.2 provides in relevant part that:

> With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized 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[.]

7.309. We note that the Appellate Body has found, in the context of Articles 3.1 and 3.2 of the Anti-Dumping Agreement, that the price undercutting inquiry requires "a dynamic assessment of

[514] Indonesia's first written submission, para. 336.
[515] European Union's first written submission, para. 560.
[516] European Union's first written submission, para. 563.
[517] European Union's first written submission, para. 564.
[518] European Union's first written submission, para. 571.
[519] European Union's first written submission, paras. 572-575; second written submission, para. 306.
[520] European Union's first written submission, paras. 581-582; second written submission, para. 304.
[521] Fn omitted.

price developments and trends in the relationship between the prices" of the subject imports and those of domestic like products over the entire period of investigation, including whether import and domestic prices are moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices.[522] In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body expressed the view that an investigating authority is not required to establish the existence of price undercutting for each of the product types under investigation, or with respect to the entire range of goods making up the domestic like product. Nonetheless, the investigating authority is to take into account all relevant evidence including, where appropriate, the relative market share of each product type and may not disregard evidence suggesting that the subject imports have no, or only a limited, effect on domestic prices.[523]

7.310. Articles 15.1 and 15.2 do not impose a specific methodology for considering price effects. However, we agree with the findings of previous panels and the Appellate Body that the investigating authority must ensure price comparability by virtue of the requirement to objectively examine the effect of imports on prices in the domestic market for like products.[524] The investigating authorities remain bound by the requirement to conduct an "objective examination" on the basis of positive evidence, irrespective of how the issues were argued during the investigation.[525]

7.311. The requirement to conduct an objective examination based on positive evidence in Article 15.1 means that to the extent that a price comparison forms part of the methodology used to examine undercutting, the investigating authority must ensure price comparability of the products being examined. This will vary depending on the specifics of each case but will normally involve a consideration of the products' characteristics and their competitive relationship. Additionally, the investigating authority is required to consider whether an adjustment to the prices of the products under comparison is required to ensure price comparability.

7.312. Price comparability depends on the characteristics of the transactions (such as the level of trade) and the extent to which the product categories at issue are in competition with each other. Differences which may call into question price comparability include not only price differences, but also non-price differences (such as those in physical characteristics and uses) that could affect substitutability and the competitive relationship between the subject imports and the domestic like products.[526] We note that the panel in *China – AD on Stainless Steel (Japan)* found that price comparability would depend, *inter alia*, on the extent to which the product categories at issue compete with each other, as affected by physical or other characteristics of the products.[527] We agree with this interpretation and will be guided by it.

7.313. In the following section we will examine Indonesia's specific claim that the Commission failed to ensure price comparability when examining the price effects of Indonesian PME imports.

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[522] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.159.

[523] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.180-5.181. In the investigation at issue, the investigating authority observed that, during the period of investigation, the dumped imports and domestic sales were concentrated *in different segments of the HP-SSST market*. While the majority of domestic sales was of Grade A, the market share held by Grade A dumped imports was only 1.45% during one examined year and there were no Grade A dumped imports thereafter. Meanwhile, during the period of investigation, the dumped imports of other grades (Grades B and C) each held a market share of around 90% of the respective market segments. The price differences between the Grades A, B, C were significant. The Appellate Body noted that "an objective examination … of whether there had been a significant price undercutting by the dumped imports as compared with the prices of the domestic like product (encompassing all three product types) should have taken into account the relevant market shares of the respective product types."

[524] Appellate Body Report, *China – GOES*, para. 200; Panel Reports, *China – AD on Stainless Steel (Japan)*, para. 7.117; *China – X-Ray Equipment*, para. 7.68.

[525] Appellate Body Report, *China – GOES*, para. 201.

[526] Panel Reports, *China – GOES*, para. 7.528; *China – Broiler Products*, paras. 7.481-7.483; *China – AD on Stainless Steel (Japan)*, para. 7.116; and *China – X-Ray Equipment*, para. 7.50.

[527] Panel Report, *China – AD on Stainless Steel (Japan)*, paras. 7.120-7.122.

7.5.2.4.1 The relationship between the Commission's methods for examining price undercutting

7.314. As a preliminary step, we shall address the parties' submissions concerning the relationship between the three methods that the Commission used to examine price undercutting.

7.315. Indonesia argues that methods 2 and 3 are not self-standing and merely attempt to disguise the lack of representativity affecting method 1, which itself is incapable of establishing the existence of "significant" undercutting.[528] Moreover, since the three methods are intrinsically linked, Indonesia considers that if the Panel finds that any of the three methods is flawed, the logical conclusion should be that the Commission failed to establish the existence of significant price undercutting for the product concerned as a whole.[529]

7.316. In its responses to questions from the Panel the European Union confirmed that in its view, the Commission mainly relied on method 1 for its consideration of price undercutting, and that all three methods showed the existence of significant undercutting.[530] The European Union also submitted that each of the three methods had "self-standing value in the consideration of price effects (undercutting)" and thus can be appreciated individually on their own merits.[531] The European Union also submitted that even if one of the methods was found to be incompatible with the SCM Agreement, the Panel could still validate the Commission's consideration of price undercutting on one or more of the remaining methods.[532]

7.317. We note that the Commission stated that because the comparison under method 1 only covered around 20% of the sales of the sampled EU producers, it made additional price comparisons under methods 2 and 3 to assess the reliability of the undercutting finding under method 1.[533] This suggests to us that methods 2 and 3 were subsidiary to method 1. It is apparent that the Commission was concerned by the proportion of the sales covered under the method 1 comparison. It therefore only resorted to methods 2 and 3 to validate its findings as regards the 20% of sales of EU producers in relation to the broader EU market.

7.318. This does not bear out an intrinsic link between the three methods as suggested by Indonesia.[534] Rather, the Commission's findings under the respective methods were both self-standing and intended to be corroborative of each other. The Commission used methods 2 and 3 "to assess the reliability" of the undercutting finding under method 1.[535] The use of additional methods to support and corroborate the price undercutting findings under method 1 is not indicative of an inherent weakness in method 1. According to the Commission, the conclusion on the existence of significant undercutting is supported by each of the methodologies used.[536] This suggests that the evidence developed under the additional methods may be supportive of the conclusion under method 1. However, the absence of corroborative support would not necessarily make that method unreliable. Since each method is self-standing, we therefore agree with the European Union that each of the Commission's methods of considering price undercutting could be considered individually on their own merits, and in relation to one another. As such the Panel considers that a finding of inconsistency of one method with the requirements of the SCM Agreement would not automatically invalidate the Commission's consideration of price undercutting.

7.319. Accordingly, it is appropriate to examine the methods individually to establish whether any of these methods might support the Commission's finding of significant price undercutting.

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[528] Indonesia's response to Panel question No. 125.
[529] Indonesia's response to Panel question No. 126.
[530] European Union's response to Panel question No. 125, para. 114; comments on Indonesia's response to Panel question No. 125, para. 82.
[531] European Union's response to Panel question No. 125, paras. 114-116 and 120.
[532] European Union's response to Panel question No. 126, paras. 125-126; comments on Indonesia's response to Panel question No. 126, paras. 83-84.
[533] Provisional Regulation (Exhibit IDN-1), recital 295.
[534] We note that the situation differs with respect to the Commission's consideration of price depression.
[535] Provisional Regulation (Exhibit IDN-1), recital 295.
[536] Provisional Regulation (Exhibit IDN-1), recital 300.

7.5.2.4.2 Price comparability

7.320. Under method 1 the Commission compared the prices of Indonesian PME imports (CFPP +13) to the prices of EU produced PME (CFPP +10). The Commission noted that the difference in CFPP levels between Indonesian PME and EU produced PME was due to the incorporation of a low cost additive by EU producers, which it did not consider warranted an adjustment.[537] The Commission also declined to make an adjustment for the alleged price difference between Indonesian PME and EU produced PME because it found no evidence to substantiate that difference.[538]

7.321. Indonesia asserts that method 1 disregards the fact that there is no direct competition between Indonesian PME and EU produced PME.[539] First, Indonesia asserts that the Commission does not dispute that Indonesian PME was solely used as an input to biodiesel blends. According to Indonesia, the Commission only found that sampled EU producers had significant sales of pure PME to mineral diesel refineries.[540] Second, Indonesia asserts that it is uncontested that EU PME (CFPP +10) has a lower CFPP than Indonesian PME (CFPP +13) (because of the use of an additive). Indonesia asserts that its lower CFPP level means that EU produced PME can be directly blended with mineral diesel, while Indonesian PME with a CFPP of 13 cannot.[541] Indonesia contends that the Commission failed to explain whether the comparison of sales between Indonesian PME and EU PME was made at a proper comparison level, given that Indonesian PME is an input to biodiesel blends while EU produced PME is directly mixed with mineral diesel.[542]

7.322. Indonesia further argues that the Commission refused to make any adjustments for the differences in CFPP level, which is a technical characteristic that affects competition and produces price differences between Indonesian PME and EU produced PME. Indonesia thus argues that the Commission failed to ensure price comparability.[543]

7.323. Indonesia also argues that the sampled sales used in method 1 are not representative of the EU industry at large and cannot adequately reflect the existence of significant undercutting.[544] Indonesia contends that under method 1 the Commission only considers 20% of the total sales by the sampled producers, and that this proportion likely represents the sales of only one EU producer.[545] Indonesia argues that any undercutting established on the basis of that sample is not representative of the impact on prices of Indonesian PME imports on the product concerned as a whole[546], and further cannot be considered significant.[547]

7.324. The European Union disputes that there is no direct competition between Indonesian PME and EU produced PME. The European Union asserts that Indonesian PME was found to *normally* be included in intermediate blends, thereby not excluding the possibility of sales to end user refineries.[548] The European Union further submits that Indonesian exporters directly competed with the EU industry for the sale of PME to biodiesel traders and refineries[549], and that at least one Indonesian exporter did sell to a company which appeared to be a refinery.[550] The European Union says that it cannot be excluded that Indonesian PME was sold for directly blending with mineral diesel.[551]

7.325. The European Union submits that Indonesia fails to explain why an adjustment between Indonesian PME (CFPP +13) and EU PME (CFPP +10) would be justified, or to identify any real price

[537] Definitive Regulation (Exhibit IDN-2), recital 235.
[538] Definitive Regulation (Exhibit IDN-2), recitals 241-242.
[539] Indonesia's first written submission, paras. 291 and 330; second written submission, para. 140.
[540] Indonesia's first written submission, para. 291.
[541] Indonesia's first written submission, para. 293; second written submission, paras. 137-142.
[542] Indonesia's first written submission, para. 292.
[543] Indonesia's first written submission, paras. 294-296.
[544] Indonesia's second written submission, paras. 157-160.
[545] Indonesia's first written submission, para. 297.
[546] Indonesia's first written submission, para. 297; second written submission, para. 176.
[547] Indonesia's second written submission, para. 176.
[548] European Union's first written submission, para. 498.
[549] European Union's first written submission, para. 509.
[550] European Union's first written submission, para. 510.
[551] European Union's comments on Indonesia's response to Panel question No. 121, paras. 45-46.

differences between the two products.[552] The European Union also submits that even if an adjustment for the level of trade were required, it would not have been significant[553] and that nothing in the technical characteristics of Indonesian PME prevents its direct blending with mineral diesel.[554] The European Union asserts that Indonesian PME could be directly blended with mineral diesel as its CFPP can be easily reduced from +13 to +10 by incorporating a low-cost additive.[555] Further, the necessity of a level of trade adjustment was not self-evident from the administrative record of the investigation. Therefore, absent any claim of adjustment from the interested parties, the Commission was not obliged to investigate on its own initiative whether such adjustment was justified.[556]

7.326. The European Union does not dispute that method 1 covers only 20% of the sampled EU producers' sales, and also does not dispute that only one sampled domestic producer was producing and selling PME.[557] The European Union submits however that an investigating authority is not required to establish the existence of price undercutting for each of the product types under investigation, or for the entire range of goods making up the domestic like product.[558] The European Union also submits that the amount of sales considered by an investigating authority is limited by the regulations governing anti-subsidy investigations, which stipulate deadlines for the completion of the investigations.[559] Finally, the European Union submits that Indonesia did not challenge the consistency of the selected sample in the underlying investigation.[560] The European Union contends that Indonesia did not point to any evidence that: (a) a different sample of EU producers would have been more appropriate to capture more sales of PME by the domestic industry, and (b) there was any production of EU PME that was not covered in the sample.[561]

7.327. The starting point of Indonesia's argument is that the comparison was flawed because Indonesian PME and EU produced PME are not comparable, since the former cannot be directly blended with mineral diesel, whereas the latter can. As such, Indonesia argues that method 1 compares transactions at different levels of trade. Indonesia maintains that the record does not refer to any location in the EU market where CFPP +13 biodiesel, i.e. Indonesian PME, can be used directly with mineral diesel.[562] Indonesia also asserts that the need for a level of trade adjustment was self-evident based on the panel's findings in *EU – Biodiesel (Indonesia*), according to which the nature of Indonesian PME as an input was also an important consideration when determining whether Indonesian PME was in competition with other types of biodiesel.[563] The European Union, in response, argues that the necessity of a level of trade adjustment was not self-evident from the administrative record of the investigation, nor did the interested parties claim an adjustment on this basis during the investigation.[564]

7.328. In the provisional Regulation the Commission noted that Indonesian PME "is not normally blended with mineral diesel by itself".[565] However, the Commission subsequently clarified in its definitive Regulation that "the fact that PME is usually mixed with other biodiesels does not mean that PME is not directly blended with mineral diesel."[566] The Commission also found that EU-produced PME (CFPP +10) had been sold directly to mineral diesel refineries.[567] On the basis of this evidence,

[552] European Union's first written submission, paras. 519-520.
[553] European Union's first written submission, paras. 512-514; second written submission, paras. 283-284.
[554] European Union's second written submission, para. 265.
[555] European Union's second written submission, paras. 252-267 and 273-274.
[556] European Union's first written submission, paras. 513-514; comments on Indonesia's response to the Panel question No. 121(a), para. 42.
[557] European Union's first written submission, paras. 521-527.
[558] European Union's first written submission, para. 524.
[559] European Union's first written submission, para. 527.
[560] European Union's first written submission, para. 524.
[561] European Union's first written submission, para. 527.
[562] Indonesia's response to Panel question No. 53(c).
[563] Indonesia's second written submission, paras. 152 and 167 (referring to Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.158).
[564] European Union's first written submission, para. 513; comments on Indonesia's response to Panel question No. 121(b), para. 48.
[565] Provisional Regulation (Exhibit IDN-1), recital 290.
[566] Definitive Regulation (Exhibit IDN-2), recital 228.
[567] Definitive Regulation (Exhibit IDN-2), recitals 228 and 253.

both parties agree that EU produced PME can be mixed directly with mineral diesel.[568] The point of contention between the parties is whether Indonesia has identified evidence on the record that PME (CFPP +13) was never mixed directly with mineral diesel. Indonesia bears the burden of proof to support its assertion.

7.329. Indonesia maintains that there is no evidence that Indonesian PME was sold directly for blending with mineral diesel. Indonesia observes that the European Union is unable to cite a single country where Indonesian PME (CFPP +13) can be used directly for mixing with mineral diesel.[569] The European Union rebuts this assertion by reference to a series of exhibits[570] which it says show that Indonesian PME and EU produced PME were sold to the same customers i.e. diesel refineries, and thus make it reasonable to assume that Indonesian PME was in fact blended directly with mineral diesel.[571] The European Union says this assumption is supported by the fact that Indonesian PME (CFPP +13) can be brought to the CFPP level of EU produced PME (CFPP +10) by simply incorporating a low cost additive.[572] Indonesia argues that this evidence constitutes *ex post facto* rationalization, as the Commission never sought to address, either in the provisional or definitive Regulation, the competitive relationship between EU produced PME and Indonesian PME.[573] Indonesia also argues that even if Indonesian exporters and EU producers may have sold PME to the same customers, i.e. traders and refineries, this does not evidence that those customers used Indonesian and EU PME in the same way.[574] This is because both traders and refineries may engage in blending of different types of biodiesel, while also purchasing or selling biodiesel for direct mixing with mineral diesel.[575]

7.330. In response to questions from the Panel, both parties amplified their initial arguments concerning the possibility of directly blending Indonesian PME with mineral diesel. The European Union emphasized that the record of the investigation does not contain any evidence in support of Indonesia's allegation that it is not possible to blend Indonesian PME with mineral diesel.[576] Moreover, the European Union says that the direct mixing of cheaper biodiesel like PME with mineral diesel would be logical for any profit-maximizing entity.[577] Indonesia responded that the Commission never assessed precisely how biodiesel exported by Indonesian producers was used in the European Union. For Indonesia, the European Union's exhibits concerning this point only prove that EU produced PME (CFPP +10) could be directly blended with mineral diesel, without showing the same for Indonesian PME (CFPP +13).[578]

7.331. The Panel considers that the focus of its inquiry here is whether Indonesia has established by reference to evidence on the record of the underlying investigation that Indonesian PME was exclusively used as an input to blends, i.e. Indonesian PME was never directly blended with mineral diesel in the EU market. Despite its questioning of the European Union's evidence on this point, Indonesia has not identified to the Panel any evidence that would support its assertion that Indonesian PME was exclusively used as an input to blends. In this regard, the timing of the European Union's evidence concerning the sale of Indonesian PME and EU produced PME to the same parties is perhaps of lesser importance than the absence of evidence capable of supporting this key prong of Indonesia's claim. Importantly, no evidence has been pointed out on the record to undermine the reasonableness of the Commission's finding, i.e. the fact that PME is usually mixed with other biodiesels does not mean that PME is not directly blended with mineral diesel.

7.332. Indonesia contests that the supply of Indonesian PME to refineries, which are known to mix EU PME directly with mineral diesel in the EU market, proves that Indonesian PME was also used in this way. For Indonesia it suffices to note that the very same customer may indeed purchase

[568] Indonesia's first written submission, para. 292; European Union's response to Panel question No. 52, para. 124.
[569] Indonesia's second written submission, paras. 140-141.
[570] Disclosures of undercutting calculations (Exhibit EU-55 (BCI)); Refineries information (Exhibit EU-56 (BCI)); and Traders information (Exhibit EU-57 (BCI)).
[571] European Union's second written submission, paras. 255-267.
[572] European Union's response to Panel question No. 53.
[573] Indonesia's second written submission, para. 148.
[574] Indonesia's second written submission, para. 149.
[575] Indonesia's second written submission, para. 150.
[576] European Union's response to panel question No. 51.
[577] European Union's response to Panel question No. 52.
[578] Indonesia's responses to panel questions Nos. 51, 52, and 53.

Indonesian and EU PME for different purposes.[579] However, that contention does not suffice to discharge the burden of proof resting upon Indonesia, which would require Indonesia to show that the refineries did exclusively blend Indonesian PME with other biodiesels. It is not enough to assert that refineries were capable of producing intermediate blends using Indonesian PME. Neither party has identified evidence on the record of the investigation that points to the production of intermediate biodiesel blends at the refineries which purchase both Indonesian and EU PME.

7.333. The Panel agrees with the European Union that the Commission's finding does not exclude the possibility that Indonesian PME, like EU PME, could be directly blended with mineral diesel.[580] In its responses to questions following the second substantive meeting, Indonesia concedes that Indonesian PME could theoretically be blended with mineral diesel, but asserts that a technical possibility does not evidence competition between Indonesian PME and EU produced PME.[581] In addition, Indonesia does not identify evidence on the record that shows Indonesian PME *is always* an input to a blend and can never be mixed directly with mineral diesel by refineries.

7.334. The parties were asked why the low cost additive used in the EU PME could not be used to lower the CFPP level of Indonesian PME, since this would allow for its direct mixing with mineral diesel.[582] When confronted with this possibility, Indonesia replied that Indonesian PME is not intended to be directly mixed with mineral diesel, therefore Indonesian producers have no demand justifying the use of the additive.[583] This response does not rebut the possibility of using the additive to lower the CFPP level of Indonesian PME.[584] The Panel therefore considers that Indonesia has not met the burden of proof in respect of its assertion that Indonesian PME is exclusively used as an input to blends.

7.335. Indonesia also argues that the differences between the CFPP levels of Indonesian PME and EU produced PME produce a price difference for which an adjustment should have been made. Indonesia draws support for this argument from the Commission's determination in respect of biodiesel from Argentina, in which the Commission expressly acknowledged that different CFPP levels command different prices.[585] Indonesia also points out that in the investigation at issue the interested parties suggested a price adjustment to reflect a difference in CFPP levels between EU-produced and Indonesian PME.[586] Based on the adjustment of 100-130 EUR/MT made by the Commission to ensure price comparability between CFPP+10 and FAME0, interested parties suggested that the difference of one unit of CFPP would result in a price difference of 10-13 EUR/MT[587] or 3.5-8.5 EUR/MT[588] and an overall price adjustment of "between 10,5-25,5" or "between 30 and 39 EUR/MT".[589]

7.336. The Panel notes that while the Commission did observe in its investigation into Argentine biodiesel that "price differences result from different levels of CFPP"[590], the Commission did not establish that a difference in one degree would lead to a specific amount of change in price.[591] Nor did it make such a finding in the investigation at issue. As regards the adjustment suggested by the interested parties which was premised on the price difference between CFPP +10 biodiesel and CFPP0

[579] Indonesia's response to Panel question No. 52.
[580] European Union's first written submission, para. 535.
[581] Indonesia's response to panel question No. 147.
[582] Panel question No. 53(d).
[583] Indonesia's response to Panel question No. 53(d).
[584] The European Union maintains that PME CFPP +13 can be brought to a lower CFPP +10 by simply incorporating an additive. According to the European Union it can be very reasonably assumed that refineries would incorporate PME into mineral diesel without going first through an intermediate blend. (European Union's response to Panel question No. 53(c)).
[585] Indonesia argues that the difference in price resulting from different CFPP levels is confirmed by the fact that product control numbers (PCNs) used by the Commission made a distinction for such differences and that Indonesian PME was classified as P13 and not P10. (Indonesia's second written submission, para. 166). In our view, PCNs used by investigating authorities are above all analytical tools used to structure product comparisons. They serve to distinguish product categories but do not prejudge their comparability or related price differences.
[586] Indonesia's response to Panel question No. 53(d).
[587] GOI's comments on final disclosure (Exhibit IDN-22), paras. 164-165.
[588] Wilmar's provisional disclosure comments (Exhibit IDN-31), para. 142.
[589] GOI's comments on final disclosure (Exhibit IDN-22), paras. 164-165; Wilmar's provisional disclosure comments (Exhibit IDN-31), para. 142.
[590] Argentina Regulation (Exhibit IDN-20), recital 458.
[591] European Union's first written submission, para. 540.

biodiesel (FAME0), the Panel considers that the price difference in that comparison reflects the substantial differences in CFPP levels between those products. This price difference is not directly relevant to the comparison of CFPP+13 and CFPP+10 PME biodiesel, where the difference in CFPP level is only 3 degrees and both biodiesels are usually mixed with other biodiesels as inputs to a blend.

7.337. Moreover, the Commission examined the proposals of the interested parties but did not accept the price difference they had suggested between CFPP+10 PME and CFPP +13 PME, noting in the definitive Regulation that "no such price difference was found by the Commission and no evidence of a price difference was provided by the GOI or Wilmar".[592] It would not be appropriate for the Panel to speculate whether, and by what amount a price adjustment was justified merely on account of the difference in CFPP levels of Indonesian PME (+13) and EU produced PME (+10). The Panel considers that Indonesia has not shown that it was unreasonable for the Commission to decline to make a price adjustment on this basis.

7.338. Indonesia also takes issue with the Commission's decision not to make an adjustment to account for the additive to EU produced PME.[593] Considering the low cost of the additive, (0.1% of the cost of production), the Commission did not consider an adjustment to be necessary as it would not have any impact on the calculations.[594] Indonesia argues that a cost difference of 0,1%, even if accurate, does not necessarily translate into a price difference of only 0,1%. Indonesia maintains that price differences result from different CFPP levels which constitute technical characteristics, and that buyers would be willing to pay a premium for lower CFPP biodiesel, i.e. EU produced PME which can be directly blended with mineral diesel. The European Union responds that, in view of the minuscule cost of the additive, no adjustment between imported CFPP +13 PME and domestic CFPP +10 PME was necessary.[595]

7.339. Although it is well established that differences in physical characteristics or end uses may affect price comparability between products[596], the Panel considers that Indonesia has not established that the Commission's finding that a cost difference of only 0,1% would be unlikely to substantially affect price comparability was not reasoned and adequate.[597] Therefore, Indonesia has not established that the Commission failed to ensure price comparability when examining the effects of Indonesian imports under method 1.

7.5.2.4.3 Significance and the representativeness of the sample of EU sales

7.340. Indonesia also challenges the representativeness of the proportion of the EU industry sales used in the comparison under method 1. Indonesia argues that method 1 only considers sales by one sampled EU PME producer, and the size of the sample of EU sales considered (20%) was not sufficiently representative to establish undercutting for the product concerned as a whole.[598] In its responses to questions from the Panel, Indonesia emphasizes that the undercutting established under method 1 could not be significant because Indonesian PME is sold in a niche segment of the market and is therefore not in competition with the vast majority of sales of biodiesel by

[592] Definitive Regulation (Exhibit IDN-2), recital 242.
[593] Definitive Regulation (Exhibit IDN-2), recital 235. The Commission found that:

> The PME sold at CFPP +10 was not blended to reach that CFPP, an additive costing less than EUR 1 per MT, i.e. only around 0,1% of the cost of production, was added to the biodiesel. The Commission does not consider that an adjustment for this additive is necessary as it would not have any impact on the calculations.
>
> (Ibid. recital 235)

[594] Definitive Regulation (Exhibit IDN-2), recital 235.
[595] European Union's response to Panel question No. 54, para. 128.
[596] Panel Reports, *China – AD on Stainless Steel (Japan)*, para. 7.116; *China – Broiler Products*, para. 7.483; *China – X-Ray Equipment*, para. 7.68.
[597] In this respect, the panel in *China – Broiler Products* noted that "for a price comparison to be informative of the level of price undercutting by subject imports, it must compare transactions that include the same pricing components (*insofar as pricing components have an impact on the price*)." (Panel Report, *China – Broiler Products*, para. 7.481(emphasis added)).
[598] Indonesia's first written submission, paras. 297 and 328-329; second written submission, para. 176.

EU producers.[599] Indonesia submits that a comparison that does not take into account the vast majority of EU industry sales cannot provide a robust basis for the Commission's price effects analysis.[600]

7.341. The European Union does not dispute that only one sampled domestic producer was producing and selling PME, but considers that the use of a sample does not preclude the existence of other EU producers selling PME.[601] The European Union contends that the Commission was not required to establish the existence of price undercutting for each of the product types under investigation, or with respect to the entire range of goods making up the domestic like product.[602] The European Union also disputes that PME was sold in a niche segment of the market. The European Union contends that Indonesian PME was in direct competition with EU PME, and also exercised price pressure on biodiesel blends.[603] The European Union also points out that the sample of EU producers used in the Commission's comparison was uncontested and was sufficiently representative to confirm the Commission's findings of price effects.[604] Furthermore, the European Union submits that the undercutting established by the Commission was indeed "significant" in the totality of the circumstances of this case, i.e. having regard to (a) the volume of the sales considered (20%), (b) the magnitude of the undercutting margins, and (c) the price sensitive nature of biodiesel.[605]

7.342. The Panel observes that the SCM Agreement does not include any explicit requirement to consider any specific share of domestic sales in the price effects analysis. The second sentence of Article 15.2 of the SCM Agreement reads, in relevant part:

> With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member[.]

7.343. The term "price undercutting" in Article 15.2 is qualified by the word "significant", which is defined as "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential".[606] The Appellate Body previously observed, in the context of Article 3.2 of the Anti-Dumping Agreement, that:

> [T]he word "significant"… is relevantly defined as "important, notable, consequential". … The *significance* of the price undercutting found on the basis of that dynamic assessment is a question of the magnitude of the price undercutting. What amounts to *significant* price undercutting – that is, whether the undercutting is important, notable, or consequential – will therefore necessarily depend on the circumstances of each case. In order to assess whether the observed price undercutting is significant, an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, how long the price undercutting has been taking place and to what extent, and, as appropriate, the relative market

[599] Indonesia's responses to Panel question Nos. 56 and 60 (referring to Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.262; Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.180- 5.181).
[600] Indonesia's second written submission, paras. 157-159 (referring to Panel Report, *EU – Biodiesel (Indonesia*), para. 7.133).
[601] European Union's first written submission, para. 524.
[602] European Union's first written submission, para. 524.
[603] European Union's second written submission, paras. 288-292 and 294-296; comments on Indonesia's responses to Panel question No. 122(a) and (b), paras. 49-52 and 54; and question No. 123, para. 56.
[604] European Union's first written submission, para. 527; comments on Indonesia's response to Panel question No. 126, para. 85.
[605] European Union's second written submission, paras. 297-299.
[606] Oxford Dictionaries online, definition of "significant", adjective, https://www.oed.com/dictionary/significant_adj?tab=meaning_and_use (accessed 11 April 2025), meaning 4.a.

> shares of the product types with respect to which the authority has made a finding of price undercutting.[607]

7.344. We agree with the Appellate Body's reasoning and shall be guided by it. Article 15.2 of the SCM Agreement is concerned with the investigating authority's consideration of the effect of the allegedly subsidized imports on prices of a like domestic product. The parties do not dispute that the proportion of domestic sales that is considered by an investigating authority in a price effects analysis is relevant to the significance of the effect of imports on domestic prices. This issue was the subject of a previous dispute between the parties. The panel in *EU – Biodiesel (Indonesia)* found that the low volumes of the domestic like product considered by the investigating authority represented a miniscule proportion of the domestic industry's industry sales, and consequently the price comparison and the analysis of the effect of the imports would not have considered the vast majority of the domestic industry's sales.[608] The panel in that case noted that "a comparison to … 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 [of the Anti-Dumping Agreement]."[609] We agree with this reasoning. Arguably, if price undercutting concerns only a very limited proportion of domestic sales of the like product, this could lead to no, or minimal, effect of the subsidized imports on prices in the domestic market for like products. The question is therefore whether Indonesia has established that the Commission could not have properly found that price undercutting in respect of 20% of sampled EU sales was significant.

7.345. The Panel notes that the 20% share of sampled EU sales considered under method 1 is a substantially larger share than the proportion of domestic sales considered in *EU – Biodiesel (Indonesia)* (0.23%). The representativeness of this proportion of EU sales as regards the market for biodiesel as a whole must also be appreciated in the particular circumstances of this case. First, the Panel notes that Indonesia did not object to the Commission's composition and selection of the sample during the investigation. Instead, Indonesia argues that the proportion of PME in the sample is exaggerated as regards the broader EU industry. The European Union points out that Indonesia did not provide any evidence showing that a different sample of EU producers would have been more appropriate to capture more sales of PME by the domestic industry. Nor does Indonesia point to any actual evidence on the record of the investigation indicating that any production of PME existed in the EU market in addition to the one already covered by the sample.[610] According to the Commission the sample was selected on the basis of the highest representative quantity of production (more than 18% of the total production volume of the EU industry), which could reasonably be investigated within the time available. In view of these explanations, the Commission would have been entitled reasonably to consider the selected sample as representative of the domestic industry. Second, in the EU market, PME competes with other biodiesels such as RME and soybean methyl ester (SME) as inputs to blends. The Commission considered how the low prices of Indonesian PME affected other types of biodiesel produced in the European Union and the biodiesel market as a whole:

> PME is also imported into the Union to be mixed with other biodiesels to make, for example, FAME0. However the quantity of PME imported is driven by the price of these imports as well as their physical properties, and *therefore the price of imported PME exerts a price pressure on blends as well*. *PME is among the cheapest types of biodiesel which can be used in blends such as FAME0 and FAME+5* which are suitable for use in a significant part of the Union market throughout the year*. Imports of PME thus directly*

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[607] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161 (referring to *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2833). (fns omitted)

[608] Panel Report, *EU – Biodiesel (Indonesia*), para. 7.133

[609] Panel Report, *EU – Biodiesel (Indonesia*), para. 7.133. The panel in that case noted that:

> 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. The low volumes of CFPP 13 sales thus represented a miniscule 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.

(Ibid. para. 7.133 (fn omitted))

[610] European Union's first written submission, para. 527.

> *compete with other types of biodiesel produced in the EU which would otherwise be blended in larger quantities to achieve the same blend result*.[611]

7.346. As such, the Commission concluded the availability of a cheaper option, such as Indonesian PME, would exercise a downward price pressure on the biodiesel market as a whole, negatively affecting all producers of biodiesel, irrespective of the raw materials used.[612] The Commission explained the additional evidence of the competitive relationship between Indonesian PME and other biodiesels in the EU market in the definitive Regulation. It provides a clear explanation of how cheaper PME competes with other biodiesels as inputs to blends.[613] The Commission's consideration of the competitive relationship between PME and other biodiesels is relevant to the Commission's observation under method 1 that PME would exercise downward price pressure on the biodiesel market as a whole. The competition among biodiesels of different feedstocks, including PME, was also observed in the context of the comparison covering 55% of the sales of the sampled producers. This competitive relationship provides sufficient evidence that the price of PME imports has spillover effects for the whole EU biodiesel market, which is significant. This evidence of the competitive dynamic in the market provides meaningful support for the Commission's conclusion that the price effects of Indonesian PME observed under method 1 had implications for the broader EU biodiesel market. In these circumstances, the Commission reasonably could find price effects in the EU market based on the price effects observed in the sample.

7.347. The Commission's explanation of the competitive relationship between PME and other types of biofuels such as RME and SME as inputs to blends, examined within the uncontested sample of EU sales, supports the Commission's assessment of the significance of the price effects observed under method 1 as regards the EU market for biodiesel.

7.348. Indonesia did not object to the composition of the sample during the underlying investigation, nor challenge the sample in its panel request. However, in developing its arguments concerning the Commission's price undercutting comparison, Indonesia maintains that the sample of EU sales considered likely only represents the PME production of one EU producer. Indonesia also asserts that that producer was affiliated with an Indonesian producer of PME and was acquiring its PME from that producer. The European Union does not dispute that the sample only contained one domestic producer of PME. According to the European Union, Indonesia does not provide any evidence showing that a different sample of EU producers would have been more appropriate. First, the Commission addressed Indonesia's contention as regards the composition of the sample. This was first raised by Wilmar in the underlying investigation. The Commission explained that between the EU producer and the affiliated Indonesian producer palm oil was traded at arm's length and that this therefore did not influence the injury analysis.[614] Indonesia does not challenge the reasonableness of the Commission's conclusion on this point. Second, Indonesia has not pointed to any evidence on the record indicating that any European production of PME existed in addition to the production covered by the sample. The Panel therefore considers that the Commission provided a reasoned and adequate explanation for the reliance it placed on the 20% share of the production of the sampled EU producers.[615] The European Union correctly observes that there is no requirement to establish the existence of price undercutting for each of the product types under investigation, or with respect to the entire range of goods making up the domestic like product.[616] This was confirmed by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*.[617] We note further that the SCM Agreement does not include any explicit requirement to consider any specific share of domestic sales in the price effects analysis.

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[611] Definitive Regulation (Exhibit IDN-2), recital 254. (emphasis added)

[612] Definitive Regulation (Exhibit IDN-2), recitals 231-233. See also Provisional Regulation (Exhibit IDN-1), recital 328.

[613] The European Union maintains that imports of Indonesian PME exert downward pressure on the prices of FAME0. See European Biodiesel Board - post-verification visit email (Exhibit EU-102 (BCI)); European Commission verification report - Guvnor (Exhibit EU-103 (BCI)).

[614] Definitive Regulation (Exhibit IDN-2), recital 348.

[615] See para. 7.345 above. The sample refers to three producers representing around 18% of EU biodiesel production. That sample was not challenged by Indonesia.

[616] European Union's first written submission, paras. 427 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.180 and 7.141), 463 (referring to Panel Report, *EU – Biodiesel (Indonesia),* para. 7.133) and 524.

[617] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.180. See also Panel Report, *EU – Biodiesel (Indonesia),* para. 7.160.

7.349. Based on the foregoing, the Panel finds that Indonesia has failed to show that, in the circumstances of the present case, an objective and impartial investigating authority could not have properly found that the existence of price undercutting between 6,0% and 11,6% for 20% of sampled domestic sales constituted "significant price undercutting" for the product as a whole.

7.5.2.4.4 Observations on methods 2 and 3

7.350. The Panel recalls its earlier finding that the methods used to examine undercutting were self-standing. In light of the above finding, the Panel does not consider it necessary to evaluate the Commission's examination of price undercutting under methods 2 and 3, since the Panel finds that method 1 was sufficient to enable an objective examination of price effects. However, there are a few observations concerning methods 2 and 3 which the Panel consider useful to summarize considering the parties' detailed submissions on the issue of price comparability.

7.351. Indonesia argues that method 2 does not ensure price comparability.[618] Firstly, Indonesia submits that the Commission's comparison of Indonesian PME and EU FAME0 under method 2 is flawed because Indonesian PME is only an input to biodiesel blends, whereas FAME0 is directly blended with mineral diesel.[619] As such, Indonesia contends that there is no direct competitive relationship between Indonesian PME and FAME0.[620] Indonesia therefore asserts that the Commission repeated the error identified by the panel in *EU – Biodiesel (Indonesia)*.[621] Secondly, Indonesia contends that the price adjustment which the Commission applied to prices of EU FAME0 biodiesel to account for differences in CFPP level did not assess the complexities in the competitive relationships between Indonesian PME and FAME0.[622] According to Indonesia, this adjustment did not account for the effect of climactic conditions on the competitive dynamic and price comparability of Indonesian PME and FAME0.[623] Finally, Indonesia asserts that blending Indonesian PME with other biodiesels of a lower CFPP to produce a FAME0 blend (CFPP 0) requires the use of more expensive inputs. This neutralizes any potential price effect linked to the use of more affordable Indonesian PME in FAME0 blends.[624]

7.352. The European Union argues that Indonesia's reliance on the panel's findings in *EU – Biodiesel (Indonesia)* are misplaced insofar as the facts in the underlying investigation in that case differ significantly from the Commission's determinations in the present case, and that the circumstances in the EU industry have now changed.[625] The European Union criticizes Indonesia's characterization of Indonesian PME as exclusively an input to biodiesel blends as overly simplistic, and says that Indonesia has not substantiated this claim.[626] According to the European Union, the Commission's findings do not exclude the possibility to blend PME directly with mineral diesel[627], and in any event, Indonesian PME can be reduced to CFPP +10 (which can be blended directly with mineral diesel) by incorporating an inexpensive additive.[628] Additionally, the European Union says that the impact of climatic conditions on the competitive relationship was

[618] Indonesia's first written submission, para. 298.
[619] Indonesia's first written submission, paras. 299, 201, and 301; second written submission, para. 164.
[620] Indonesia's comments on the European Union's response to Panel question No. 128(d), para. 24.
[621] Indonesia's second written submission, paras. 161-162.
[622] Indonesia's second written submission, para. 167. Indonesia asserts that method 2 is no different in practice from the comparison that was faulted by the panel in *EU – Biodiesel (Indonesia)*. That comparison, like method 2, fails to assess the competitive dynamic and price comparability between Indonesian PME and FAME0.
[623] Indonesia's comments on the European Union's response to Panel question No. 129(d), paras. 25-26.
[624] Indonesia's first written submission, para. 301; comments on the European Union's response to Panel question No. 128, paras. 12-13 (referring to Indonesia's responses to Panel questions Nos. 123, 124, and 127).
[625] European Union's first written submission, para. 533. The European Union explains the differences between the instant case and *EU – Biodiesel (Indonesia)* as: (a) the expansion of the basket of domestic products in the Commission's comparison to include both EU PME (CFPP +10) and FAME0, and (b) the downward price adjustment applied to the prices of FAME0 to take account of the difference in physical characteristics. The European Union also asserts a change in circumstances subsequent to the underlying investigation in *EU – Biodiesel (Indonesia)*, namely that the domestic industry has since started producing and selling PME directly to refineries which is in direct competition with Indonesian PME. (European Union's comments on Indonesia's response to Panel question No. 121(a), para. 47).
[626] European Union's first written submission, paras. 534 and 536; second written submission, para. 265.
[627] European Union's first written submission, paras. 535-536.
[628] European Union's second written submission, paras. 265-267 and 273-274.

factored in the Commission's analysis under method 2 by making a downward adjustment to the price of the domestic sales of FAME0.[629] The European Union asserts that there is a certain degree of competition between Indonesian PME and FAME0 blends throughout the year and across all of Europe, which varies depending on the time of year and the climatic conditions.[630] The European Union also argues that the neutralization of the price effect of low-cost Indonesian PME in blends cannot be inferred as a matter of pure logic[631], and that there is no clear-cut correlation between price and CFPP level given the complex biodiesel market.[632] The European Union contends that the amount of PME used in a biodiesel blend depends on the season and location across Europe[633], and that the higher the target CFPP level, the larger the percentage of PME that could be used in the blend of biodiesels for a particular market at a given moment of the year.[634]

7.353. Under method 2, the Commission compared imports of Indonesian PME to sales of EU produced PME and blended CFPP0 (FAME0) biofuels. On its face, method 2 appears to share the same flaws identified by the panel in *EU – Biodiesel (Indonesia*), in that it overlooks or fails to account for the significant differences affecting comparability between Indonesian PME on the one hand and finished CFPP0 blends like FAME0 on the other. The Commission's reasoning concerning the existence of competition between inputs to blends including PME, RME, SME and other types of biofuels is clear. It explains the competitive dynamic between PME and other biodiesel inputs in blends[635], but does not disclose how PME as an input competes with finished CFPP0 biodiesel. The fact that the price of PME as an input may affect the price of the blends into which it is incorporated, does not evidence price comparability or substitutability between PME and FAME0. The Commission's finding that in the absence of Indonesian PME, more locally sourced biodiesel would be blended and that PME thus directly competed with other types of EU-produced biodiesel used to make blends is equivalent to the explanation considered and rejected by the panel in *EU – Biodiesel (Indonesia*) because it did not "address the important issue of whether imports of PME from Indonesia *compete[d] with blended CFPP 0 biodiesel* produced by the EU industry".[636]

7.354. Furthermore, while the Commission did acknowledge a price adjustment was justified under method 2 on account of the difference in CFPP levels between PME and FAME0, it is not apparent from the text of the Commission's determinations how this adjustment considered and accounted for the impact of climatic conditions on the use of the two products.

7.355. Indonesia submits that method 3 failed to ensure price comparability because it compared the prices of all Indonesian PME imports with all EU sales of biodiesel by the sampled EU producers, without adjustment.[637] As such, Indonesia argues that method 3 fails to account for differences in CFPP which affect the competitive relationship between different biodiesels and price comparability.[638] Indonesia contends that method 3 in the present case mirrors the investigating authority's faulted comparison in *China – X-Ray Equipment*[639] which was based on total sales value divided by quantity sold, without examining uses or prices of the imports or the domestic products. Indonesia therefore argues that method 3 was similarly flawed because it did not account for the differences in the products being compared.[640] Indonesia also submits that it is immaterial whether the interested parties made suggestions for adjustments under method 3; it was the Commission's duty to ensure price comparability.[641]

7.356. The European Union argues that method 3 is distinguishable from the panel's findings in *China – X-Ray Equipment* because of differences in the underlying basket of goods on which average prices had been calculated.[642] The European Union also submits that there was no basis for the

[629] European Union's second written submission, para. 301.
[630] European Union's second written submission, para. 301; response to Panel question No. 129(a), paras. 153-162.
[631] European Union's first written submission, para. 539.
[632] European Union's first written submission, paras. 540-541.
[633] European Union's first written submission, paras. 540-541.
[634] European Union's first written submission, paras. 540-541.
[635] Definitive Regulation (Exhibit IDN-2), recital 254.
[636] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.154.
[637] Indonesia's first written submission, paras. 302-305.
[638] Indonesia's first written submission, para. 305.
[639] Indonesia's first written submission, para. 305 (referring to Panel Report, *China – X-Ray equipment*, paras. 7.68 and 7.85); second written submission, para. 171.
[640] Indonesia's first written submission, para. 305.
[641] Indonesia's first written submission, para. 306; second written submission, para. 171.
[642] European Union's first written submission, para. 551.

Commission to make a further price adjustment to other biodiesels in the basket of goods compared under method 3.[643] The European Union asserts that no interested parties provided the Commission with a substantiated claim for such adjustment.[644]

7.357. Under method 3, the Commission compared Indonesian PME to all biodiesel sales of the sampled EU producers without any adjustment to the price. The flaw in method 3 is that it does not attempt to achieve price comparability between the products involved. The Commission acknowledged this in its definitive Regulation after the lack of price comparability in method 3 was criticized by an interested party as being inconsistent with the findings of the panel in *EU – Biodiesel (Indonesia*).[645] Indonesia described the comparison as essentially meaningless.[646] However, the Commission declined to take any further action because the interested party did not make any suggestions or estimations on the amount of the adjustments for differences in physical characteristics, or any suggestion as to how to deal with the complexities of the price comparability as found by the WTO panel ruling. It suffices to note that method 3, as a self-standing method, would fall short of providing an objective methodology for examining the effect of imports on domestic prices because of its inherent deficiencies concerning price comparability.

7.5.2.4.5 Conclusion

7.358. The Panel therefore finds that Indonesia has not established that the EU acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement because it failed to consider the existence of significant price undercutting and because it failed to ensure price comparability when examining the effect of Indonesian imports on the prices of domestic like products.

7.5.2.5 Whether the Commission objectively considered the existence of significant price depression

7.359. Indonesia submits that the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement because it failed to make an objective examination, on the basis of positive evidence, of the effect of the allegedly subsidized imports on prices of EU producers, and thus improperly found price depression.[647] Indonesia contends that the Commission did not objectively examine the trend that the sampled EU producers had historically set their prices in line with costs[648], and instead established price depression merely by reference to parallel price trends or on the basis of an increase in imports from Indonesia.[649] Indonesia repeats its previous price comparability arguments in the context of the price depression findings, and submits that the Commission did not separately address the issue of price comparability in its price depression analysis.[650] Indonesia therefore argues that the Commission's price depression findings were flawed by reference to the flawed undercutting findings. Moreover, Indonesia asserts that the Commission conflated the allegations of price depression with the allegation of undercutting, whereas undercutting and price depression are independent lines of inquiry.[651]

7.360. The European Union contends that the Commission engaged in an objective examination based on positive evidence of the effects of Indonesian biodiesel on the prices of domestic like products.[652] The European Union submits that there were two elements to the Commission's price depression findings: (a) the price sensitive nature of the biodiesel market, and (b) price pressure felt in the market because of the significant volumes of Indonesian PME entering the market. [653] The European Union also argues that the reference to undercutting of around 10% should be read merely

[643] European Union's first written submission, para. 549.
[644] European Union's first written submission, para. 549.
[645] Definitive Regulation (Exhibit IDN-2), recital 267.
[646] Definitive Regulation (Exhibit IDN-2), recital 267.
[647] Indonesia's first written submission, para. 336.
[648] Indonesia's first written submission, paras. 332 and 335.
[649] Indonesia's first written submission, para. 335 (referring to Panel Reports, *China – Cellulose Pulp*, paras. 7.80-7.81; and *China – GOES (Article 21.5 – US)*, paras. 7.50-7.51).
[650] Indonesia's first written submission, paras. 323-324.
[651] Indonesia's first written submission, para. 335 (referring to Panel Report, *US – Ripe Olives from Spain*, para. 7.259).
[652] European Union's first written submission, para. 496.
[653] European Union's first written submission, paras. 492-494; response to Panel question No. 131, paras. 168-174.

as pointing to the existence of significant price effects.[654] The European Union submits that the Commission's findings established a link between price pressure and EU producers' loss of market share, which was in turn captured by significant volumes of Indonesian imports re-entering the market.[655] Further, according to the European Union "the ability of Indonesian imports to exercise price pressure on the biodiesel market as a whole results from a plurality of elements other than just simply the undercutting methods investigated by the Commission."[656] These elements include the characteristics of the biodiesel market presented in recitals 231 and 233 of the definitive Regulation.[657]

7.361. In its consideration of price depression, the Commission first explained that the sampled domestic producers' average sales prices to unrelated customers had increased by 16% during the period 2015 to 2017, before decreasing by 5% between 2017 and the investigation period. The Commission also observed that costs increased by 14% between 2015 and 2017 and decreased between 2017 and the investigation period.[658] We recall that the Commission relied on the following data to examine prices of the domestic industry:

Table 1: Sales price in the European Union[659]

	2015	2016	2017	IP
Average unit sales price on the total market (EUR/tonne)	715	765	832	794
Index	100	107	116	111
Unit cost of production (EUR/tonne)	728	767	827	791
Index	100	105	114	109

7.362. The Commission then noted that in a price-sensitive biodiesel market "a price undercutting of around 10 % does exercise a significant downward pressure on prices".[660] According to the Commission, this prevented the EU industry from benefitting from decreased costs during the corresponding period.

7.363. Article 15.2 of the SCM Agreement provides in relevant part that:

> With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether … the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree.

7.364. The Appellate Body has noted that the language used in Article 15.2 instructs the investigating authority to consider whether subject imports have explanatory force for certain specified consequences, that is, the significant depression or suppression of domestic prices.[661] The Appellate Body further noted that:

> An examination of price depression, by definition, calls for more than a simple observation of a price *decline*, and also encompasses an analysis of *what* is pushing down the prices. With regard to price suppression, Articles 3.2 and 15.2 require the investigating authority to consider "whether the effect of" subject imports is "[to] prevent price increases, *which otherwise would have occurred*, to a significant degree". By the terms of these provisions, price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices "otherwise would have" increased. The concepts of price depression and price suppression thus both implicate an analysis concerning the question of what brings about such price phenomena.[662]

[654] European Union's response to Panel question No. 132, para. 176.
[655] European Union's response to Panel question No. 131, paras. 173-174.
[656] European Union's response to Panel question No. 132, para. 178.
[657] European Union's first written submission, para. 500; response to Panel question No. 132, para. 178.
[658] Provisional Regulation (Exhibit IDN-1), recitals 326-327.
[659] Provisional Regulation (Exhibit IDN-1), table 11. "IP" stands for "investigation period".
[660] Provisional Regulation (Exhibit IDN-1), recital 328.
[661] Appellate Body Report, *China – GOES*, para. 141.
[662] Appellate Body Report, *China – GOES*, para. 141. (italics original; underlining added; fns omitted)

7.365. The Appellate body has also noted that an investigating authority's inquiry under Article 15.2, requires the consideration of any evidence that calls into question whether the subsidized imports provide explanatory force for the observed price effects:

> [T]he inquiry under Articles 3.2 and 15.2 does not duplicate the different and broader examination regarding the causal relationship between subject imports and injury to the domestic industry pursuant to Articles 3.5 and 15.5. Neither do Articles 3.2 and 15.2 require an authority to conduct an exhaustive and fully fledged non-attribution analysis regarding all possible factors that may be causing injury to the domestic industry. Rather, the investigating authority's inquiry under Articles 3.2 and 15.2 is focused on the relationship between subject imports and domestic prices, and the authority may not disregard evidence that calls into question the explanatory force of the former for significant depression or suppression of the latter.[663]

7.366. We agree with these Appellate Body findings, and will be guided by them. There is an implicit requirement in Article 15.2 to consider how the subject imports are responsible for any price depression or suppression. As the Appellate Body observed, the analysis is aimed at considering whether and in what way the subject imports have produced price effects, i.e. the depressed prices in the domestic industry. This analysis is circumscribed by the same objectivity requirement imposed by Article 15.1 which we have addressed above in relation to the Commission's examination of price undercutting. It means that an investigating authority is required to consider the reasons why the subject imports explain the observed price effects, or on the other hand, reasons why they may not provide explanatory force. This implicates a balancing exercise, such that even in the presence of a price effect, an investigating authority must weigh and consider the evidence that establishes or disproves a connection between the subject imports and the price effect.

7.367. Turning to the Commission's price depression findings in this case, the European Union has explained, in its first written submission, that the Commission's reference to undercutting of around 10% refers to "the average undercutting found on the basis of the three undercutting method[s]".[664] As discussed above, method 3 compares sales of EU biodiesel (which include FAME0 and RME at CFPP-14), with Indonesian PME (CFPP+13), without any adjustment for CFPP levels and is therefore inherently flawed. This flaw is carried over into the 10% price undercutting margin relied on by the Commission in its consideration of price depression and therefore undermines that consideration.

7.368. The European Union argues that "even absent a finding of significant undercutting, the Commission found that there would still be clear evidence to conclude that the sharp increase of large volumes of Indonesian cheap imports exercised significant price pressure on the domestic industry."[665] The relevant Commission's finding reads as follows:

> The biodiesel market is a price-sensitive commodity market. In such a commodity market *a price undercutting of around 10 % does exercise a significant downward pressure* on prices. *Due to this price pressure*, the Union industry could not benefit from the decreasing costs during the investigation period, because it had to fully pass on this cost decrease to its customers to avoid an even larger loss of market share.
>
> *As a result*, the Union industry could not improve their unsatisfactory profit margin due to the price pressure exercised by significant quantities of *low-priced subsidised imports* in an otherwise favourable market situation.[666]

7.369. While the Commission referred to quantities of subsidized imports in its price depression findings, it also referred to the low price of imports. No further explanation is provided in the provisional or definitive Regulation regarding how the volumes of imports and their prices interacted to lead to price depression. The European Union argues that it is evident from recitals 328 and 329 of the provisional Regulation quoted above that the pressure on prices and negative consequences deriving from it were felt because of the significant volumes of Indonesian PME entering the market. However, the European Union concedes that the Commission did not conduct an analysis of the

[663] Appellate Body Report, *China – GOES*, para. 154.
[664] European Union's first written submission, para. 494 and fn 481.
[665] European Union's response to Panel question No. 59, para. 154.
[666] Provisional Regulation (Exhibit IDN-1), recitals 328-329. (emphasis added)

relative contributions of the volume of imports and price undercutting to the resulting price depression but considered such analysis to be irrelevant and practically impossible to carry out.[667]

7.370. In *China – GOES*, the panel was confronted with a similar explanation by the respondent. The Appellate Body noted that MOFCOM's finding of significant price depression and suppression rested on an examination of the effect of both the prices and volume of subject imports on domestic prices and that, in such circumstances, "a panel must still allow for the possibility that either prices or volume was sufficient by itself to sustain a finding".[668] However, noting the absence of further reasoning in the final determination *regarding the manner in which the effects of the prices and volume of subject imports operated either independently or together to depress domestic prices*, the Appellate Body observed that the panel was unable to disentangle the relative contribution of these effects without substituting its judgement for that of the authority.[669]

7.371. The Panel considers that the Commission's findings in the above recitals fall short of explaining *how* the volume of imports depressed prices. It does not enable the Panel to meaningfully review how the Commission concluded that the volume of *low-priced subsidized imports* provided explanatory force for the prices observed in the EU market for the like products. In the absence of an analysis of the relative contributions of the volume of imports and price undercutting to the resulting price depression, the Panel is likewise unable to discern how either of these factors support the Commission's conclusions that imports of Indonesian PME were the cause of the Commission's observation of significant downward pressure on prices.

7.372. Finally, we turn to Indonesia's submission that throughout the period from 2015 to the investigation period, prices of sampled EU producers followed their costs, and that Indonesian imports had no impact on the EU industry's ability to increase prices and improve profitability.[670] The European Union contends that Indonesia's submission ignores the fact that the costs decreased for the first time between 2017 and the investigation period and that consumption increased, but the EU industry was unable to benefit from this positive development and raise its prices because of the concurrent massive re-entrance of Indonesian imports at significant undercutting rates. The European Union argues that "it cannot be excluded that – absent the imports – the domestic industry could have benefitted from the cost reduction, raise its prices and thus improve profitability".[671]

7.373. The Commission recognized that between 2015 and 2017 the unit cost of production "followed the trend of prices".[672] In the definitive Regulation, the Commission confirmed that it did not "dispute" "a link between the cost of production and the sales price".[673] This trend existed on the market during the period when Indonesian imports were virtually non-present (not exceeding 0.3% of market share). The Commission, however, found that the price pressure exercised by Indonesian imports (market share of 3.3%) prevented the domestic industry from benefitting from the cost decrease.

7.374. Price depression analysis implies more than an observation of a price decline, and should include an analysis of *what* pushes down the prices.[674] We agree with the finding of the panel in *Pakistan – BOPP Film (UAE)* that in the circumstances where the prices of the domestic product followed costs very closely, it was not sufficient for the investigating authority to assert that price depression was the effect of subject imports and other factors. The authority was required to explain why, in light of the evidence, the price depression was the effect of the subject imports.[675] We adopt the same approach in this case.

7.375. The Commission's findings do not disclose why it considered the emergence of Indonesian imports to be responsible for preventing the domestic industry from raising prices considering that historically, the prices always closely correlated with costs. On the basis of the data before the Commission it is evident that in the period considered prior to the investigation period the

[667] European Union's response to Panel question No. 131, para. 175.
[668] Appellate Body Report, *China – GOES*, para. 216.
[669] Appellate Body Report, *China – GOES*, paras. 217-221.
[670] Indonesia's first written submission, paras. 332-333; second written submission, para. 177.
[671] European Union's first written submission, para. 571. See also European Union's second written submission, para. 305.
[672] Provisional Regulation (Exhibit IDN-1), recital 327.
[673] Definitive Regulation (Exhibit IDN-2), recital 298.
[674] Appellate Body Report, *China – GOES*, para. 141.
[675] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, paras. 7.341-7.343.

EU industry's prices followed costs. During the investigation period, following the reintroduction of Indonesian PME to the market, the EU industry's prices trended downward, but this also coincided with decreased costs of production. In other words, this was consistent with the trend before the investigation period. An objective and unbiased investigating authority would have been expected to examine the reasons behind the cost-price correlation and the domestic industry's long-standing inability to raise prices to a profitable level in the absence of Indonesian PME imports, and explain why it attaches more importance to the subject imports as a reason for price depression rather than to the trends that preceded their appearance on the market.

7.376. The obligation to consider whether the effect of imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred to a significant degree, implicates an analysis of *what* brings about such price effects.[676] It is not evident from the provisional and definitive Regulations that the Commission engaged in a meaningful consideration, i.e. beyond correlation, of how the Indonesian imports brought about the observed domestic prices. In this context, the failure to consider the evidence of a pre-existing cost-price trend which could provide explanatory force for the absence of domestic price increases in the investigation period is indicative of an incomplete examination of price depression.

7.377. In light of the above, we uphold Indonesia's claim that the Commission improperly established price depression, in breach of Articles 15.1 and 15.2 of the SCM Agreement.

7.5.3 Claims related to the examination of the state of the EU industry

7.5.3.1 Introduction

7.378. In examining the impact of Indonesian imports on the EU industry, the Commission evaluated all economic indicators having a bearing on the state of the industry during the period considered. The Commission considered the relevant microeconomic and macroeconomic factors and found that they showed a mixed picture.[677] However, the Commission concluded that despite an increase of sales and production caused by increasing consumption, profitability remained poor, and the EU industry did not show indications of improving its economic situation.[678] The Commission also considered the relevant microeconomic and macroeconomic factors during the post-IP. Following that evaluation, the Commission concluded that in the post-IP the economic situation of the EU industry further deteriorated.[679] As a result of these findings the Commission concluded that the EU industry was in a "fragile economic condition".[680]

7.379. Indonesia claims that the Commission's determination concerning the state of the EU industry is inconsistent with Articles 15.1, 15.4, 15.7, and 15.8 of the SCM Agreement. Indonesia claims that the Commission failed to make an objective examination of the factors having a bearing on the state of the industry, including those listed in Articles 15.4 and 15.7 of the SCM Agreement.

7.380. In this section, we address the aspects of Indonesia's claim which relate to the Commission's consideration of the fragile economic condition of the domestic industry, and its examination of the economic factors having a bearing on the state of the domestic industry under Article 15.4 of the SCM Agreement. In section 7.5.4 we address the aspects of this claim concerning the threat of injury, and the Commission's examination of the factors under Article 15.7 of the SCM Agreement.

[676] Appellate Body Report, *China – GOES*, para. 141.
[677] Provisional Regulation (Exhibit IDN-1), recital 343.
[678] Provisional Regulation (Exhibit IDN-1), recitals 345-346.
[679] Definitive Regulation (Exhibit IDN-2), recital 341.
[680] Provisional Regulation (Exhibit IDN-1), recital 360.

7.5.3.2 Factual aspects of the Commission's consideration

7.381. The Commission relied on the data collected by the European Biodiesel Board (EBB) and data received from three sampled producers representing 18% of the total production of the product.[681]

7.382. The Commission found that the injury indicators showed "a mixed picture".[682] On the one hand, the Commission found that employment in the industry "remained stable" throughout the period considered and that productivity increased and then slightly decreased (with an overall end-to-end increase of 8 points).[683] The industry was generating a positive cash flow throughout the period considered and was able to self-finance its activities. It continued to invest throughout the period considered; investments strongly fluctuated. The return on investments was low but positive.[684] The Commission also considered consumption, production, capacity, volume and market share of the EU industry prior to and during the investigation period[685]:

Table 2: EU consumption, production, capacity, sales volume, and market share, and Indonesian imports' volume and market share[686]

	2015	2016	2017	IP
Total EU consumption (tonnes)	11,791,953	11,435,468	14,202,128	15,634,102
Index	100	97	120	133
Total EU production (tonnes)	11,789,896	11,958,862	13,071,053	13,140,582
Index	100	101	111	111
EU production capacity (tonnes)	16,009,878	16,561,814	16,594,853	17,031,230
Index	100	103	104	106
EU sales volume (tonnes)	11,305,117	10,920,665	13,004,462	12,741,791
Index	100	97	115	113
EU market share	95.9%	95.5%	91.6%	81.5%
Volume of imports from Indonesia (tonnes)	13,340	31,115	24,984	516,088
Market share of Indonesian imports	0.1%	0.3%	0.2%	3.3%

7.383. The Commission made the following findings[687]:

a. Due to the significant increase in subsidized imports, in particular during the investigation period, the increase in production capacity is "significantly lower than the demand growth".

b. After the removal of anti-dumping duties in 2018, the EU industry market share fell nearly 15% compared to 2016.

c. The market grew by 33% during the period considered, but EU sales and total EU production increased by only 13% and 11%, respectively. The EU industry only benefited from the market growth during the investigation period "to a very limited extent", while a significant part of this growth was absorbed by increasing quantities of imports, such as the subsidized imports from Indonesia.

7.384. The Commission also examined the evolution of prices[688] and profits:

[681] Provisional Regulation (Exhibit IDN-1), recitals 264-265, and 303-306. During the investigation period, 44 domestic producers were members of the EBB and 196 other domestic producers manufactured the like product.
[682] Provisional Regulation (Exhibit IDN-1), recital 343.
[683] Provisional Regulation (Exhibit IDN-1), recital 320. See also European Union's first written submission, para. 651 and fn 622.
[684] Provisional Regulation (Exhibit IDN-1), recitals 337-339 and 344.
[685] Provisional Regulation (Exhibit IDN-1), recitals 268, 271, 280, 309, and 314.
[686] Provisional Regulation (Exhibit IDN-1), tables 3, 4, 5, 8, and 9. "IP" stands for "investigation period".
[687] Provisional Regulation (Exhibit IDN-1), recitals 269, 310, 315-318.
[688] Addressed in the previous section.

Table 3: Profitability[689]

	2015	2016	2017	IP
Profitability of EU sales to unrelated customers (% of sales turnover)	-0.1%	0.9%	0.8%	0.8%
Index	-100	900	800	824

7.385. The Commission observed that profitability was around break-even during the whole period considered, remaining below 1 % of turnover[690], and that the EU industry "could not improve their unsatisfactory profit margin which was substantially below the target profit in a growing market."[691] Based on the data of the investigation period, the Commission concluded that the industry's profitability was poor, and its production and sales benefitted from the market growth only "to a very limited extent" noting that the industry lost 15% of market share.[692]

7.386. The Commission found that whilst the indicators were not conclusive on the existence of material injury during the investigation period, it was necessary to examine whether there was a threat of material injury.[693]

7.387. In the definitive Regulation, the Commission examined post-IP data (October 2018 - June 2019) for the three sampled producers. The Commission noted that production during the post-IP was "slightly down", while sales remained stable. The unit cost of production dropped slightly whereas the unit sales price remained stable.[694] The Commission concluded that the data revealed "little change" compared to the investigation period, apart from the fact that profits had increased from 0.8 % to 3.8 %. Profits were then examined on a quarterly basis: increasing by 10.8% in the fourth quarter of 2018, by 0.1% in the first quarter of 2019 and falling by 5% in the second quarter of 2019. The Commission described profits during the winter of 2018-2019 as "exceptional"[695], explaining that "RME prices hit all-time high levels due to low levels of water in the Rhine during the winter of 2018-19"[696]. The Commission highlighted that the producers recorded a loss of 5% in the second quarter of 2019, which it said was attributable to Indonesian imports.[697] Overall, the Commission concluded that during the post-IP the economic situation of the domestic industry had "further deteriorated".[698]

7.388. Based on the above, the Commission relied on "the fragile economic condition" of the domestic industry to support its finding of a threat of injury.[699] The Commission noted that an industry whose profitability remains below 1% of turnover, which lost almost 15 percentage points of market share, and which could not benefit from a market that grew by 33%, is not "robust".[700]

7.5.3.3 Main arguments of the parties

7.389. Indonesia claims that the Commission's consideration of the situation in the domestic industry is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement. Indonesia submits that the data considered by the Commission do not show an industry in a fragile economic condition. Rather, all macroeconomic and microeconomic factors, save for market share, improved continuously or stabilized during the investigation period. Indonesia contends that slight losses in market share were not indicative of industry fragility because they reflect normal market conditions, and occurred in the context of increasing sales, growing consumption, and the re-opening of the

[689] Provisional Regulation (Exhibit IDN-1), table 14. "IP" stands for "investigation period".
[690] Provisional Regulation (Exhibit IDN-1), recital 336.
[691] Definitive Regulation (Exhibit IDN-2), recital 314.
[692] Provisional Regulation (Exhibit IDN-1), recitals 342-343 and 345; Definitive Regulation (Exhibit IDN-2), recitals 319-320.
[693] Provisional Regulation (Exhibit IDN-1), recital 346.
[694] Definitive Regulation (Exhibit IDN-2), recitals 326-327.
[695] Definitive Regulation (Exhibit IDN-2), recital 331.
[696] Definitive Regulation (Exhibit IDN-2), recital 336.
[697] Definitive Regulation (Exhibit IDN-2), recitals 328-332 and table 3.
[698] Definitive Regulation (Exhibit IDN-2), recitals 321-341.
[699] Provisional Regulation (Exhibit IDN-1), recitals 341-346 and 360; Definitive Regulation (Exhibit IDN-2), recital 405.
[700] Definitive Regulation (Exhibit IDN-2), recital 319.

EU market following the lifting of anti-dumping duties which had hitherto restricted, *inter alia,* imports of Indonesian PME.[701]

7.390. Indonesia complains that the Commission's consideration of the state of the industry focused on individual factors, rather than the overall state of the industry.[702] Indonesia argues that the Commission analysed the macroeconomic factors in the abstract, without considering that these had shown improvements in absolute terms, and the context in which the improvements took place.[703] As regards the microeconomic factors, Indonesia argues that the Commission's analysis ignored that the EU producers were unable to increase their prices and improve their profitability prior to the re-entry of Indonesian imports, and that their prices evolved in line with their costs.[704] Further, a target profit of 11% was unrealistic, unsupported by anything reflected in the record of the underlying investigation, and unreasonable having regard to the EU industry's history of break-even profitability.[705] Indonesia contends that such poor profitability may indicate structural issues on the EU biodiesel market, and that Indonesian imports have no explanatory force for the state of the industry.[706]

7.391. Indonesia asserts that the EU industry improved its economic situation in the post-IP.[707] Indonesia submits that the Commission selectively considered evidence concerning profitability in the post-IP, and disregarded exculpatory evidence which explained the fluctuating profitability of the EU producers.[708]

7.392. The European Union submits that, the Commission engaged in an objective examination of the state of the domestic industry.[709]

7.393. The European Union contends that Indonesia is unable to demonstrate why the inability of the domestic industry to generate profits during a prolonged period of time despite favourable market conditions would not make its condition fragile.[710] The European Union also submits that "economic fragility" of the domestic industry can amount to a *de facto* situation which is decoupled from the effects of subject imports, so that the effect of subject imports is not determinative of the state of the industry.[711] The European Union disputes Indonesia's proposition that there were only "slight" losses of market share[712], and contends that the EU industry lost 15 percentage points of market share – which cannot be considered as slight or minor – while at the same time being unable to increase profits due to the price depression exercised by subject imports.[713]

7.394. As regards the macroeconomic factors, the European Union submits that Indonesia fails to properly describe the evolution, in relative terms, of production and sales vis-à-vis consumption.[714] The European Union asserts that increases in consumption were only partially reflected in the domestic industry's production and sales volumes and that during the period considered the injury indicators showed a mixed picture.[715] The European Union also asserts that the profitability of the EU industry remained poor throughout the period considered and below the level of normal profitable operations.[716] The European Union also disputes Indonesia's claim that the inability of the domestic industry to benefit from positive market developments was not the consequence of the resumption of Indonesian imports, and argues that Indonesia fails to engage in a holistic evaluation of all the relevant indicators.[717]

[701] Indonesia's first written submission, para. 355; second written submission, para. 183.
[702] Indonesia's first written submission, para. 356.
[703] Indonesia's first written submission, para. 358.
[704] Indonesia's first written submission, paras. 362-366.
[705] Indonesia's second written submission, paras. 183 and 190-194.
[706] Indonesia's first written submission, para. 367; second written submission, para. 195.
[707] Indonesia's first written submission, para. 368; second written submission, paras. 183 and 196.
[708] Indonesia's first written submission, paras. 368-374; second written submission, paras. 198-202.
[709] European Union's first written submission, paras. 722 and 728.
[710] European Union's first written submission, paras. 711 and 724.
[711] European Union's first written submission, para. 711.
[712] Indonesia's first written submission, para. 355.
[713] European Union's first written submission, paras. 714-715.
[714] European Union's first written submission, paras. 716-718.
[715] European Union's first written submission, para. 718.
[716] European Union's first written submission, para. 718.
[717] European Union's first written submission, para. 719.

7.395. As regards the microeconomic factors, the European Union disputes Indonesia's claim that insofar as prices of the sampled EU producers evolved in line with costs, the EU industry cannot be considered fragile. The European Union counters that when costs decreased for the first time between 2017 and the investigation period, the domestic industry was unable to raise its prices due to the re-entry of Indonesian imports into the market at significant undercutting rates, which also gained significant market share.[718] The European Union also submits that the fact that imports do not have explanatory force for the "fragile" situation of the domestic industry does not prevent an investigating authority from determining that the domestic industry was indeed fragile at a specific point in time.[719] The European Union therefore submits that Indonesia's submissions concerning alternative reasons for the poor profitability of the EU industry prior to the re-entry of Indonesian imports do not invalidate the conclusion that the EU industry was objectively not in a healthy status.[720] Nonetheless, the European Union asserts that Indonesian imports did provide explanatory force for the fragile situation of the domestic industry because of the negative price effects observed between 2017 - 2018.[721]

7.396. The European Union submits that the 11% target profit derives from the 2013 anti-dumping investigation, which was the subject of the panel proceedings in *EU – Biodiesel (Indonesia)*, and was based on data from 2004 – 2006 and adjusted to reflect 2011 prices.[722] The European Union asserts that this target profit is entirely reasonable, and it is irrelevant that the industry was unable to achieve that profit level during the period considered, as the industry was affected by "unfair imports".[723] Moreover, the European Union asserts that there was evidence of the existence of the target profit in the record of the underlying investigation.[724]

7.397. Finally, as regards the post-IP findings, the European Union submits that Indonesia fails to demonstrate that an objective and unbiased investigating authority could not have concluded, based on the totality of the post-IP data, that the situation of the domestic industry further deteriorated.[725] The European Union argues that Indonesia focuses only on the moderate improvement in profitability, whereas other indicators declined or remained stable.[726] The European Union submits that these indicators coupled with a significant drop in profits observed in the second quarter of the post-IP justified the Commission's finding of further deterioration of the situation of the domestic industry.[727] The European Union also contends that Indonesia exaggerates the evidentiary value of the exculpatory evidence.[728] The European Union therefore submits that the Commission's assessment of the fragile condition of the domestic industry is not inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.

7.5.3.4 Whether the Commission objectively considered the state of the EU industry

7.398. Article 15.1 of the SCM Agreement requires that a determination of injury be based on positive evidence, *i.e.* "credible" evidence of "an affirmative, objective and verifiable character".[729] The determination shall also involve an objective examination of the consequent impact of the imports on the domestic producers of the like products. This requirement implies that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness and not favour the interests of any interested party.[730]

7.399. Article 15.4 of the SCM Agreement provides as follows:

[718] European Union's first written submission, paras. 571, 584, and 723; second written submission, para. 312.
[719] European Union's first written submission, para. 724.
[720] European Union's first written submission, paras. 724-725.
[721] European Union's first written submission, para. 726; second written submission, para. 319.
[722] European Union's second written submission, para. 344.
[723] European Union's second written submission, paras. 345-346.
[724] European Union's second written submission, para. 347.
[725] European Union's first written submission, para. 728; second written submission, paras. 377-378.
[726] European Union's first written submission, para. 729.
[727] European Union's first written submission, para. 730; second written submission, para. 313.
[728] European Union's first written submission, paras. 733-736; second written submission, paras. 322-333.
[729] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[730] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

> The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.400. Article 15.4 thus requires an investigating authority to perform an examination of the impact of the subsidized imports on the domestic industry. The Appellate Body observed that Article 15.4 does not "merely require an examination of the state of the domestic industry, but contemplate[s] that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination" – in other words, "an examination of the explanatory force of subject imports for the state of the domestic industry".[731] This examination shall include an evaluation of all of the listed economic factors and indices having a bearing on the state of the industry. None of these factors alone, nor several of them, can necessarily give decisive guidance. Previous panels considered that the investigating authority's assessment should focus on "the overall state of the domestic industry, and not the individual factors".[732] Further, previous panels have understood the obligation to "evaluat[e]" economic factors and indices as requiring an assessment of the "role, relevance and relative weight of each factor in the particular investigation".[733] We agree with these interpretations and will be guided by them.

7.401. With this in mind, we turn to Indonesia's arguments that the economic indicators before the Commission did not point to an industry in a fragile economic condition. Indonesia's claims concerning the Commission's assessment of economic situation in the domestic industry can be summarized into three main challenges. First, Indonesia maintains that, from 2015 to 2017, all indicators, except for market share, improved continuously and stabilized between 2017 and the investigation period. Indonesia contests the Commission's finding that the EU industry only benefitted from the market growth to a very limited extent and points to the increases in production, production capacity, and sales. Second, according to Indonesia, the "slight" loss of market share does not demonstrate a fragile economic situation because: (a) sales were increasing while consumption was growing, and (b) the market context changed following the annulment of WTO inconsistent anti-dumping duties which allowed the re-entry of Indonesian PME imports. Third, Indonesia contests the Commission's assessment of the low profitability of the domestic industry as a sign of fragility, as well as the finding of a link between the Indonesian imports and low profitability.[734] We address these three grounds below.

7.402. The Commission considered the following macroeconomic indicators over a four-year period commencing in 2015 and ending in the investigation period: production, production capacity, capacity utilization, sales volume, market share, growth, employment, productivity, magnitude of the amount of subsidization, and recovery from past subsidization or dumping. The Commission also considered the following microeconomic factors: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital. Among the macroeconomic indicators, production capacity, capacity utilization, production, and sales increased between 2015 and the investigation period, by 6%, 3%, 11%, and 13%, respectively, and evolved in line with the growth in consumption, which increased 33% over the entire period considered. The Commission considered that these indicators showed a "mixed picture". It observed that "production capacity increased slowly" and that "the increase in production capacity is significantly lower than the demand growth".[735] Employment remained stable throughout the period considered, and productivity increased between 2016 and 2017 and then slightly decreased by 4%.

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[731] Appellate Body Report, *China – GOES*, para. 149.

[732] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.377. See also Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.226.

[733] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162. See also Panel Report, *Egypt – Steel Rebar*, paras. 7.43-7.44.

[734] Indonesia's first written submission, paras. 355-375; second written submission, paras. 183 and 188-202.

[735] Provisional Regulation (Exhibit IDN-1), recital 310.

7.403. It would appear therefore that in general the macroeconomic indicators showed an overall positive trend during the period considered, except for the domestic industry's market share. The Commission found that after the removal of anti-dumping duties on imports from Indonesia, the EU industry significantly lost market share compared to 2016 (almost 15%), in particular between 2017 and the investigation period. Concurrently, the Commission noted that the market share of Indonesian imports reached 3.3% in the investigation period. The Commission also found the Indonesian imports were likely to have a substantial impact on the domestic industry given their significant volumes and low prices and the annulment of the anti-dumping duties. Taking all these indicators into account the Commission concluded that "[a]s a consequence of the increasing imports at low prices significantly undercutting or depressing the Union industry's prices, the Union industry lost market share and was not able to benefit from the market growth."[736] The Commission also observed that the increase of 33% in consumption "was only partially reflected in the Union industry production and sales volume which increased only by 11% and 13% respectively during the same period".[737]

7.404. The term "fragile" ordinarily connotes something that is easily breakable or vulnerable. As such, for the domestic industry to be objectively considered as being in a fragile economic situation, the economic indicators would be expected to demonstrate a degree of precariousness or vulnerability in the industry. We agree with Indonesia that it is difficult to reconcile the positive changes seen in the quantitative indicators of production, production capacity, capacity utilization, sales volume, and growth with fragility. Likewise, the stability seen in employment and slight changes in productivity equate more closely with a situation of equilibrium than fragility.

7.405. The only macroeconomic indicator of the domestic industry which showed a negative development was market share, which declined by 15%. The Panel observes that the decrease in the EU industry's market share corresponded to a significant increase in consumption of 33%, while the market share of Indonesian imports peaked at 3.3% in the same period. When considered alongside the annulment of the anti-dumping duties, it suggests that the economic situation of the industry as regards market share is not fully explained by the market share gains of Indonesian imports. The domestic industry's loss of market share also contrasts with the notable improvements in the domestic industry's production and sales volumes, which increased by 11% and 13% respectively. We agree with Indonesia that, in the context of corresponding improvements across the other economic indicators, the loss of market share does not objectively point to a fragile domestic industry.

7.406. The Commission found that the EU industry's profitability was around break-even during the whole period considered, remaining below 1% of turnover.[738] For the Commission, this meant that "the profitability of the Union industry remained poor throughout the period considered".[739] This level of profitability "indicates that the Union industry did not manage to reach the level of normal profitable operations".[740]

7.407. In the definitive Regulation, the Commission examined the post-IP (October 2018 – June 2019) using the data of three sampled producers. The Commission concluded that the data revealed little change compared to the IP, apart from the fact that profits had increased from 0.8% to 3.8%. Profits were also examined on a quarterly basis: increasing by 10.8% in the fourth quarter of 2018, by 0.1% in the first quarter of 2019, and falling by 5% in the second quarter of 2019. The Commission described profits during the winter of 2018-2019 as "exceptional", explaining that that one producer was able to benefit from a particular transport situation. The Commission highlighted that the producers recorded a loss of 5% in the second quarter of 2019, which it said was attributable to Indonesian imports.[741] The Commission has thus concluded that the economic situation of the industry "further deteriorated".[742]

7.408. Indonesia argues that the Commission lacked objectivity in its consideration of the profitability of the domestic industry. Indonesia reiterates that the Commission's price undercutting

[736] Provisional Regulation (Exhibit IDN-1), recital 324.
[737] Provisional Regulation (Exhibit IDN-1), recital 342.
[738] Provisional Regulation (Exhibit IDN-1), recital 336 and table 14. See Table 3 above.
[739] Provisional Regulation (Exhibit IDN-1), recital 345.
[740] Provisional Regulation (Exhibit IDN-1), recital 345.
[741] Definitive Regulation (Exhibit IDN-2), recitals 328-332 and table 3.
[742] Definitive Regulation (Exhibit IDN-2), recitals 323 and 341.

and price depression findings are unfounded.[743] Indonesia further argues that low profitability in the abstract does not amount to fragility and points out that the EU industry continued to have positive cash flows, investments, and returns on investments. Indonesia contends that the provisional and definitive Regulations do not identify the margin of profit that the Commission would consider suitable for the EU industry not to be fragile. Moreover, Indonesia submits that the target profit referenced by the Commission in the definitive Regulation has never been achieved by the EU industry, even when there were virtually no imports on the market, and consequently the target profit is not reasonable.[744]

7.409. The European Union responds that the absence of an explanatory link between allegedly subsidized imports and the profitability of the domestic industry does not prevent an investigating authority from determining that a domestic industry which is unable to generate profits during a prolonged period of time is in fact fragile.[745] The European Union also clarifies that the target profit served as "an external benchmark against which to assess the performance of the domestic industry" but emphasizes that it does not impact the overall threat of injury analysis.[746]

7.410. We observe that the data before the Commission showed that the profitability of the EU industry improved slightly from 2015 to 2016 and then remained low but stable up to the IP. The European Union contends that this low profitability was indicative of the fragile state of the domestic industry. However, we agree with Indonesia that low profitability in in and of itself does not objectively demonstrate fragility. The European Union makes the additional contention that domestic industry's profitability remained below the industry's target profit, referring to the Commission's statement that "the Union industry could not improve their unsatisfactory profit margin which was substantially below the target profit in a growing market."[747] The European Union submits that this target profit (11%) is the same as the one calculated in the context of the 2013 anti-dumping investigation underlying *EU – Biodiesel (Indonesia)* and that this profit level was based on 2004, 2005, and 2006 data, and then adjusted to reflect 2011 prices.[748] The European Union contends on that basis that the target profit level is reasonable as it predates the entry of Indonesian imports.[749] The European Union also submits that there is evidence in support of the target profit on the administrative record of the investigation.[750]

7.411. We observe that the Commission only referred to a "target profit" for the first time in the definitive Regulation.[751] In doing so, the Commission did not provide any details on the level of profit that it would have considered satisfactory, nor did it explain how it arrived at the target profit level. The explanations that the European Union provides do not appear to be part of the record of the investigation under review and thus cannot amount to the evidence of "an affirmative, objective and verifiable character". Margins of profitability are industry specific. As the Commission observed, the EU industry's profitability generally remained around break even during the period considered. An objective and unbiased examination of that level of profitability leading to the conclusion that it was unsatisfactory compared to an industry benchmark requires a timely disclosure of the benchmark and explanation of its suitability for the specific domestic industry. The fact that the domestic industry asserted that an 11% target profit was reasonable in its questionnaire responses does not automatically make such target profit reasonable in the absence of an objective assessment by the investigating authority.

7.412. In the post-IP, the Commission noted that there was an increase in the industry's profitability. However, for the Commission, this change was not reflective of the overall state of the industry. The Commission explained that "[t]he higher profits in the winter of 2018-19 were exceptional" and recorded by one sampled company.[752] The company increased its prices and profits in this period, which affected the fourth quarter of 2018 and part of the first quarter of 2019. The Commission

[743] Indonesia's first written submission, paras. 362-363.
[744] Indonesia's responses to Panel questions Nos. 62 and 63.
[745] European Union's first written submission, paras. 711 and 724.
[746] European Union's second written submission, para. 352; response to Panel question No. 64, para. 176.
[747] Definitive Regulation (Exhibit IDN-2), recital 314.
[748] European Union's second written submission, paras. 344-345.
[749] European Union's second written submission, para. 345.
[750] European Union's second written submission, para. 347.
[751] Definitive Regulation (Exhibit IDN-2), recitals 314, 332.
[752] Definitive Regulation (Exhibit IDN-2), recital 331.

highlighted that the producers recorded a loss of 5% in the second quarter of 2019, which it said was attributable to Indonesian imports.[753]

7.413. Indonesia faults the Commission for disregarding alternative explanations for the low profitability in the post-IP, including: (a) a strike that affected a sampled domestic producer in February 2019; (b) the existence of increased demand for RME during the winter period; and (c) the price of rapeseed which increased in April 2018.[754] In summary, Indonesia argues that the Commission dismissed the relevance of positive 10.8% profit in the fourth quarter of 2018 on the basis of the exceptional situation of one producer while refusing to factor in other exceptional issues which negatively affected other producers in the sample[755] which might have lowered the level of profit in the first quarter of 2019.

7.414. The European Union emphasizes the overall development of indicators during the post-IP, and specifically that: (a) production was slightly down, as well as capacity utilization rates; (b) sales volume did not improve; and (c) the unit cost of production dropped slightly whereas the unit sale price remained stable. For the European Union, these elements together with the drop in profits during the second quarter of 2019 justified the conclusion that the situation of the domestic industry further deteriorated in the post-IP.[756] Indonesia counters that there is no evidence that the situation of the EU industry deteriorated in the post-IP; production and sales were stable, while profitability improved.[757]

7.415. We consider that the Commission's disregard of the exculpatory evidence which provided explanation for the lower profits observed in the post-IP undermines the objectivity of its consideration of profitability. This is apparent in its contrasting approaches to exceptional situations that affected two producers: the reliance on the lower profitability of one producer affected by a strike and the disregard of high profits of another producer as exceptional. Moreover, the Commission's refusal to consider the impact of higher demand for RME on profits in the winter of 2018-2019 was not that of an unbiased and objective investigating authority. This analysis had material consequences for the assessment of the industry's performance in the post-IP; it resulted in the Commission's disregard of the relevance of 3.8% overall profitability and an emphasis instead on a decrease of 5% in a single quarter (the second quarter of 2019).

7.416. Previous panels have found that rather than considering the trends relating to each of the economic factors and indices in isolation, the investigating authority must assess the "relative weight" of each factor in the investigation.[758] We agree with this approach. A "mixed picture" in which most of the indicators and indices range from positive to stable does not point to a situation of fragility. Likewise, an inability to capture the full share of growth in consumption following the resumption of biodiesel imports does not necessarily mean that a domestic industry is fragile. In that sense, the Commission's emphasis on the domestic industry's loss of market share and its inability to benefit from the market growth, in isolation from the other relevant economic factors and indices having a bearing on the state of the domestic industry, lacks objectivity. Additionally, based on the figures which showed "little change" between the investigation period and the post-IP, an objective investigating authority could not have reached the conclusion that the situation of the domestic industry further deteriorated in the post-IP. The Commission's emphasis on the loss of market share and fluctuating profitability in isolation from the other economic indicators undermines the objectivity of its consideration of the overall state of the domestic industry.

7.417. For these reasons, we consider that Indonesia has established that the Commission did not objectively consider the factors having a bearing on the state of the domestic industry, and therefore acted inconsistently with Articles 15.1 and 15.4 of the SCM Agreement.

[753] Definitive Regulation (Exhibit IDN-2), recitals 328-332 and table 3.
[754] Indonesia's first written submission, paras. 368-374; second written submission, paras. 196-202.
[755] See EU producers' sampling questionnaire responses (Exhibit IDN-18).
[756] European Union's first written submission, paras. 728-730.
[757] Indonesia's second written submission, para. 196.
[758] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.226; Panel Report, *Pakistan – BOPP Film (UAE)*, appealed on 22 February 2021, para. 7.351 (referring to Panel Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; *Egypt – Steel Rebar*, paras. 7.43-7.44).

7.5.4 Claims related to the Commission's assessment of threat of material injury

7.418. In this section we examine Indonesia's claims under Articles 15.1, 15.7, and 15.8 of the SCM Agreement that the Commission acted inconsistently with its obligations in the following two ways.

a. Indonesia claims that the Commission made several errors in evaluating factors supporting the affirmative threat of injury determination (threat factors). Consequently, Indonesia argues that the Commission could not reasonably have concluded that "the fragile economic condition of the Union industry [was] likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia".[759]

b. Indonesia claims that the Commission's threat of injury determination is inconsistent with Article 15.7 of the SCM Agreement for the additional reason that the Commission failed to identify a potential "change in circumstances" that would result in the injury to the domestic industry materializing.

7.419. We address both grounds underlying Indonesia's claims, in sections 7.5.4.1 and 7.5.4.2 respectively.

7.5.4.1 Indonesia's claim concerning the factors supporting the existence of a threat of material injury

7.420. Indonesia claims that the Commission's analysis of each of the factors supporting the existence of a threat of material injury (threat factors) is inconsistent with Articles 15.1, 15.7 and 15.8 of the SCM Agreement. For Indonesia, the Commission also breached Articles 15.1, 15.7 and 15.8 in reaching the overall conclusion that the threat factors that the Commission examined showed that further imports were imminent and would be injurious.[760] The European Union requests us to reject Indonesia's claims in their entirety.

7.5.4.1.1 The Commission's evaluation of the threat of material injury factors

7.421. Both in the provisional and definitive Regulations, the Commission determined that the subsidized imports constituted a threat of material injury. To fulfil the requirements of Article 15.7 of the SCM Agreement, the Commission evaluated the following threat factors in its assessment:

a. the nature of the subsidies in question and the trade effects likely to arise therefrom;

b. significant rate of increase of subsidized imports into the EU market indicating the likelihood of substantially increased imports;

c. sufficient freely disposable capacity and absorption capacity of third countries; and

d. price level of subsidized imports.

7.422. The Commission relied on each of these factors in reaching its affirmative threat of injury determination. We discuss the Commission's findings regarding each of the individual threat factors in further detail in our evaluation below. The Commission also evaluated the level of inventories as a threat factor. However, unlike the threat factors listed above, the Commission considered the level of inventories "a less meaningful indicator for the threat of injury analysis" in the circumstances of this case.[761]

7.423. The Commission reached the following *overall conclusion* following its examination of the individual threat factors:

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[759] Provisional Regulation (Exhibit IDN-1), recital 360; Definitive Regulation (Exhibit IDN-2), recital 405.
[760] Indonesia's first written submission, paras. 394-395, 404, 411-412, 421-422, and 425-426; second written submission, para. 239.
[761] Provisional Regulation (Exhibit IDN-1), recital 359.

> In view of the analysis of factors concerning the threat of injury listed in recital (348), the Commission concluded that the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia, which supports a provisional finding of threat of injury under Article 8(8) of the basic Regulation.[762, 763]

7.5.4.1.2 Whether the Commission breached its obligation in its examination of the threat factors

7.424. We begin our analysis by noting the applicable requirements under Articles 15.1 and 15.7 of the SCM Agreement. Article 15.1 of the SCM Agreement provides that a determination of injury:

> [S]hall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[764]

7.425. Article 15.7 of the SCM Agreement provides:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:
>
> > (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
> >
> > (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
> >
> > (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
> >
> > (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
> >
> > (v) inventories of the product being investigated.
>
> No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

7.426. Article 15.7 of the SCM Agreement lists a series of factors that investigating authorities "should consider" in making a threat of material injury determination. Although Article 15.7 does not specify any methodology that an authority must follow in considering the listed factors, past panels have held that such consideration must go beyond a mere recitation of the facts in question and must instead put them into context. Investigating authorities are not required to make an "explicit" finding or "determination" with respect to the factors considered.[765] Referring to findings of the panel in *US – Softwood Lumber VI*, the panel in *EC and certain member States – Large Civil Aircraft* noted that the word "should" in Article 15.7 means that:

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[762] Provisional Regulation (Exhibit IDN-1), recital 360.
[763] Definitive Regulation (Exhibit IDN-2), recital 405.
[764] Fn omitted.
[765] Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.2162; *US – Softwood Lumber VI*, para. 7.67; and *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, paras. 7.249-7.250.

> [C]onsideration of each of the factors listed in Article[] 15.7 is not mandatory. Consequently, a failure to consider a factor at all, or a failure to adequately consider, a particular factor would not necessarily demonstrate a violation of the provisions. Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given.[766]

7.427. We agree with the findings of these past panels and will take them into account in our analysis.

7.428. The fourth sentence of Article 15.7 stipulates that no one of these factors can necessarily give decisive guidance. Rather, it is the "totality of factors" considered that "must" lead to a certain "conclusion", namely that (a) further subsidized imports are imminent and (b) material injury would occur unless protective action is taken.[767]

7.429. Past panels have observed, and we agree, that an investigating authority's key findings supporting the overall threat of injury determination must be adequately explained and must be such as could be reached by an objective and unbiased authority in light of the evidence on the record. The investigating authority's reasoning must also take sufficient account of conflicting evidence and respond to competing plausible explanations of that evidence.[768]

7.430. Indonesia submits that the Commission's examination of each individual threat factor was flawed and inconsistent with Articles 15.1, 15.7, and 15.8 of the SCM Agreement. We address each of the factors considered by the Commission and the parties' arguments concerning that consideration individually. However, we will evaluate the consistency of the Commission's determination based on an assessment of all threat factors taken as a whole, taking into account the evidence that was before the Commission and the analysis in the provisional and the definitive Regulations.[769] We adopt this approach because Article 15.7 stipulates that no one of the individual threat factors can necessarily give decisive guidance. Rather, it is the "totality of factors" considered that "must" lead to a certain "conclusion", namely (a) that further subsidized imports are imminent and (b) that material injury would occur unless protective action is taken.

7.431. Indonesia additionally argues that a threat of injury determination must involve a conclusion that the volume of subsidized imports will increase in the future.[770] In support of its argument, Indonesia refers to the word "further" in the last sentence of Article 15.7, which provides, in relevant part, that the totality of threat factors "must lead to the conclusion that further subsidized exports are imminent". For Indonesia, this implies that Article 15.7 of the SCM Agreement does not permit a threat of injury finding when volumes of imports are expected to remain at the same level.[771]

7.432. We disagree with Indonesia's reading of this provision. We first note that the dictionary meaning of the word "further" is "[m]ore extended, going beyond what already exists or has been dealt with; additional, more".[772] This ordinary meaning does not, to us, indicate that the phrase "further subsidized exports" in Article 15.7 necessarily refers to *increased* exports. The context in which this phrase appears further confirms our understanding. We note that if a threat of injury finding necessarily required a likelihood of increase in imports, investigating authorities would be under an obligation to consider and make an affirmative determination regarding the threat factor

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[766] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.2162 (referring to Panel Report, *US – Softwood Lumber VI*, para. 7.68).

[767] Panel Reports, *US – Softwood Lumber VI*, para. 7.69; *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, paras. 7.284-7.298.

[768] See e.g. Panel Reports, *US – Softwood Lumber VI*, paras. 7.89 and 7.94; *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, paras. 7.263, 7.266, and 7.286; *Mexico – Corn Syrup*, paras. 7.173 and 7.175; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

[769] We have reproduced in paragraph 7.423 above the Commission's own overall conclusion following its examination of individual threat factors.

[770] Indonesia's second written submission, paras. 208, 210, and 225-226.

[771] We note that Indonesia's legal argument is premised on Indonesia's view that the Commission's finding that "likelihood that such imports will continue to increase" in recital 352 of the provisional Regulation was erroneous. In section 7.5.4.1.5.5 below, we uphold Indonesia's argument that the Commission's finding was erroneous. However, for reasons discussed above, we disagree with Indonesia that a finding regarding a continued increase in imports is, as a matter of law, necessarily required for a valid threat of injury determination.

[772] Oxford Dictionaries online, definition of "further", adjective, https://www.oed.com/dictionary/further_adj?tab=meaning_and_use (accessed 11 April 2025), meaning 2.

set out in Article 15.7(ii) of the SCM Agreement, pertaining to "a significant rate of increase of subsidized imports". However, the phrase "should consider" precedes the list of threat factors enumerated in Article 15.7 and indicates that a consideration of each of the factors listed in Article 15.7 is not mandatory. Further, Article 15.7 explicitly recognizes that no one of the individual threat factors can necessarily give decisive guidance. This implies that it is not mandatory for an investigating authority to establish "the likelihood of substantially increased importation" in order to sustain a threat of injury determination.

7.433. This is logical, as subsidized imports may threaten material injury to the domestic industry for reasons other than increased import levels. For instance, it is conceivable that even in situations when the import level is not expected to rise, a trend of decreasing import prices could nevertheless threaten material injury through a significant depressing or suppressing effect on domestic prices in the future. We therefore reject the argument that a threat of injury determination, or an examination of individual threat factors, must involve a conclusion that the volume of subsidized imports will increase in the future.

7.434. With this in mind, we now evaluate Indonesia's arguments regarding the Commission's consideration of each of the individual threat factors. In section 7.5.4.1.6, we evaluate whether the totality of threat factors, taken as a whole, objectively supported the Commission's threat of injury determination.

7.5.4.1.3 Nature of the alleged subsidies and the trade effects likely to arise therefrom

7.435. In the underlying investigation, the Commission first assessed the nature of the subsidies in question and the trade effects likely to arise therefrom, the first threat factor contained in Article 15.7(i) of the SCM Agreement.

7.436. The Commission determined that the GOI was providing biodiesel producers with three forms of countervailable subsidies: (a) the OPPF payments; (b) the provision of CPO for less than adequate remuneration; and (c) revenue foregone due to the bonded zone scheme. In the provisional Regulation, the Commission stated the following regarding the nature and likely trade effects of these subsidies:

> [T]he GOI's measures supporting the domestic biodiesel industry ensure that biodiesel exports remain very competitive because of the lower costs of obtaining CPO (as opposed to Union producers who cannot benefit from such low prices). It is therefore foreseeable that the subsidised imports of the product concerned, because of the nature of the GOI's support measures, will continue to negatively affect the Union industry's economic situation.[773]

7.437. In the definitive Regulation, the Commission upheld its provisional findings regarding the nature and likely trade effects of the subsides and further stated the following:

> There is a clear link between the availability of CPO at low prices and the price undercutting found during the investigation period, as members of the Union industry, having to source their CPO on the world market, pay much more for their raw materials and therefore cannot match the prices of the subsidised Indonesian biodiesel. The continuation of this programme, together with the other two subsidy programmes found in this investigation, are capable of keeping exports of Indonesian biodiesel at a price level affecting the Union industry.[774]

7.438. Indonesia contends that the Commission's consideration of this threat factor was flawed in two respects. First, Indonesia submits that the Commission failed to objectively examine whether any trade effects arose from OPPF payments and the bonded zone scheme.[775] Second, Indonesia

[773] Provisional Regulation (Exhibit IDN-1), recital 350.
[774] Definitive Regulation (Exhibit IDN-2), recital 343.
[775] Indonesia's first written submission, para. 388.

argues that the Commission erroneously found that the alleged subsidization resulting in lower CPO prices in Indonesia had negative trade effects.[776] We examine each ground in turn.

7.5.4.1.3.1 Nature and likely trade effects of the OPPF payments and the bonded zone scheme

7.439. We start with Indonesia's allegation that the Commission examined the nature and likely trade effects of only one of the alleged subsidies in question, i.e. the provision of CPO for less than adequate remuneration. Indonesia argues that the Commission failed to address the nature and trade effects of the other two subsidies: the OPPF payments and the bonded zone scheme. According to Indonesia, neither of these subsidies were capable of negative trade effects. Indonesia submits that the OPPF payments incentivized domestic consumption rather than exports. Indonesia further submits that the maximum subsidy margin under the bonded zone scheme was merely 0.16%.[777] The European Union argues that the Commission's findings properly addressed the nature and likely trade effects of all three subsidies.[778]

7.440. We note that the Commission's core reasoning in its examination was that the availability of CPO for less than adequate remuneration conferred a price advantage upon Indonesian imports and that this price advantage would negatively affect the domestic industry, since the domestic industry could not benefit from this price advantage. The Commission explained that the domestic producers "having to source their CPO on the world market, pay much more for their raw materials".[779] We note that this reasoning relates exclusively to one subsidy, the alleged provision of CPO for less than adequate remuneration. As Indonesia argues, it is not readily apparent from the Commission's analysis how the OPPF and the bonded zone scheme subsidies contributed to lower the costs of obtaining CPO in Indonesia.[780]

7.441. Although the Commission's examination of OPPF and the bonded zone scheme subsidies is not readily apparent in the Commission's *reasoning*, the Commission's *conclusion* referred to all three subsidies in its scope. Specifically, the provisional Regulation concludes in relation to this threat factor that "the subsidised imports of the product concerned, because of *the nature of the GOI's support measures*, will continue to negatively affect the Union industry's economic situation".[781] Likewise, the definitive Regulation states that the provision of CPO for less than adequate remuneration "together with the other two subsidy programmes found in this investigation, are capable of keeping exports of Indonesian biodiesel at a price level affecting the Union industry".[782] While these statements purportedly draw *conclusions* regarding the collective trade effects of all three subsidies, nothing in the Commission's *reasoning* leading to those conclusions readily reveals how the OPPF payments and the bonded zone scheme would contribute to such trade effects.

7.442. The European Union asserts that no interested party argued before the Commission that anything precluded the OPPF payments or the bonded zone scheme from having trade effects that could threaten injury.[783] We recall that an investigating authority need not necessarily address all the threat factors identified in Articles 15.7 (i)-(v) of the SCM Agreement. However, in this case, the Commission chose to examine the threat factor in Article 15.7(i) and reached conclusions about this threat factor in relation to all three subsidies. In our view, the Commission should therefore have provided reasoned and adequate explanations as to how the nature and likely trade effects of each of those three subsidies supported the Commission's conclusion. The fact that no interested party specifically argued that two of the three subsidies in question (i.e. the OPPF payments and the bonded zone scheme) did not have negative trade effects does not excuse the Commission from providing the requisite explanation.

7.443. The European Union further argues that by allocating the benefit amount from the OPPF payments and the bonded zone scheme to the investigated producers' total turnover (production),

[776] Indonesia's first written submission, para. 391.
[777] Indonesia's first written submission, paras. 389-390.
[778] European Union's first written submission, para. 751.
[779] Definitive Regulation (Exhibit IDN-2), recital 343.
[780] Indonesia's second written submission, para. 212.
[781] Provisional Regulation (Exhibit IDN-1), recital 350. (emphasis added)
[782] Definitive Regulation (Exhibit IDN-2), recital 343.
[783] European Union's first written submission, para. 751.

the Commission necessarily addressed the nature of the subsidies in question.[784] The European Union argues that the allocation of the benefit amount in this manner indicated that the OPPF and the bonded zone scheme subsidies benefitted biodiesel regardless of whether the biodiesel was sold domestically or exported.[785]

7.444. We find this line of argument by the European Union to be an *ex post* rationalization. We do not find anything in the sections of the provisional and the definitive Regulations concerning the examination of the nature and trade effects of the subsidies in question linking that inquiry to the manner in which the Commission allocated the benefit conferred by the OPPF payments and the bonded zone scheme. There is also no discussion regarding the nature and trade effects of these subsidies in the provisional and the definitive Regulations concerning the allocation of benefit conferred by the OPPF payments and the bonded zone scheme.[786] The Commission merely explained that it allocated the benefit amount over the total turnover on the ground that "no subsidy was granted by reference to the quantities manufactured, produced, exported or transported".[787] We note that in deciding to allocate the benefit amount over the total turnover of a producer, the Commission was simply applying its domestic regulation governing the determination of the amount of subsidy when the subsidy is not granted by reference to the quantities manufacture, produced, exported, or transport.[788] Thus, when allocating the benefit amount the Commission did not include any explanation regarding the nature or likely trade effects of any of the subsidies in question in the sense of Article 15.7(i) of the SCM Agreement.

7.445. The European Union argues that an investigating authority's findings regarding the determination of subsidization and benefit may involve an examination of the nature of subsidies and may thus suffice to comply with Article 15.7(i) of the SCM Agreement.[789] We agree with the European Union that nothing in the SCM Agreement *a priori* excludes that possibility. However, it is for the investigating authority to make it clear in the published determinations how its findings on the existence and amount of subsidization/benefit are relevant to its analysis regarding Article 15.7(i) of the SCM Agreement. The Commission's provisional and definitive Regulations fail to do so.

7.446. The only reference to the notion of "benefit" in the Commission's analysis of "the nature and likely trade effects" is the statement that the subsidies that the Commission found to exist show that "the imports of the product concerned benefit from governmental support".[790] Nothing in this assertion reveals the nature of the subsidies in question and their likely trade effects. Indeed, given that every subsidy, by definition, involves a benefit, the mere fact of the existence of a benefit does not, in and of itself, shed light on the nature and trade effects of the subsidy in question. In our view, a meaningful examination of the nature and trade effects of the subsidy in question for the purposes of Article 15.7(i) of the SCM Agreement calls for more than a simple statement to the effect that subsidies that confer a benefit on the imports at issue were found to exist. Therefore, we disagree with the European Union that by simply stating that the OPPF payments and the bonded zone scheme were found by the Commission to be subsidies involving a benefit, the Commission also reasonably and adequately explained the nature and trade effects of those subsidies for the purposes of Article 15.7(i) of the SCM Agreement.

7.5.4.1.3.2 Nature and likely trade effects of the provision of CPO for less than adequate remuneration

7.447. Indonesia further argues that the Commission's examination of the trade effects of the provision of CPO for less than adequate remuneration did not take into account the fact that the export levy applied not only to CPO, but also to biodiesel. For Indonesia, the export levy paid by

[784] European Union's response to Panel question No. 73, para. 205.
[785] European Union's first written submission, para. 751 (quoting Definitive Regulation (Exhibit IDN-2), recital 343); response to Panel question No. 73, para. 208.
[786] Definitive Regulation (Exhibit IDN-2), recitals 194-196; Provisional Regulation (Exhibit IDN-1), recitals 81, 238, and 262.
[787] Definitive Regulation (Exhibit IDN-2), recitals 195-196.
[788] Definitive Regulation (Exhibit IDN-2), recital 195.
[789] European Union's response to Panel question No. 73, para. 205.
[790] Provisional Regulation (Exhibit IDN-1), recital 349.

Indonesian biodiesel exporters "at least partially offset" the benefit obtained through lower CPO prices.[791]

7.448. Indonesia calls into question the Commission's analysis of the provision of CPO for less than adequate remuneration and the relevance of potential offsetting effects from the export levy. We note that Article 15.7(i) of the SCM Agreement requires an investigating authority to examine the nature of *the subsidy in question* and the trade effects likely to arise from *that subsidy*. Article 15.7(i) of the SCM Agreement therefore focuses on the trade effects likely to arise from the *subsidy in question*. That provision does not mandate authorities to necessarily take into account the trade effects of measures other than the subsidy in question. In this case, the subsidy in question was the provision of CPO for less than adequate remuneration. The imposition of any export levy on biodiesel was not a component of the subsidy in question. We also note that Indonesia's argument that the export levy on biodiesel offset the benefit obtained through the subsidy in question, i.e. provision of CPO for less than adequate remuneration, pertains to the issue of amount of benefit, rather than to the nature and trade effects likely to arise from *the subsidy itself*.[792] We therefore are not convinced that the Commission failed to fulfil the requirements of Article 15.7(i) by not taking into account the export levy on biodiesel in addressing the nature and trade effects of the provision of CPO for less than adequate remuneration.

7.5.4.1.4 Significant rate of increase of subsidized imports

7.449. The Commission also examined the "significant rate of increase of subsidized imports" as identified in Article 15.7(ii) of the SCM Agreement. In the provisional Regulation, the Commission found that the significant increase in the volume of Indonesian imports after the termination of the anti-dumping duties in March 2018 "indicates the likelihood that such imports will continue to increase".[793] The Commission reaffirmed this finding in the definitive Regulation.[794] Indonesia contends that the Commission's conclusion was not objective for the following four reasons:

a. The Commission did not properly examine the trends during the investigation period as well as the post-IP concerning the volume of imports from Indonesia following the lifting of anti-dumping in March 2018.[795]

b. The Commission did not properly consider the limit on Indonesian imports imposed by the Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (RED II).[796]

c. The Commission did not properly consider the seasonal constraints that limited the demand for Indonesian imports in the EU market.[797]

d. The Commission did not properly consider the limit on volume of exports to the EU market arising due to Indonesia's domestic blending mandates.[798]

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[791] Indonesia's first written submission, paras. 392-393; second written submission, para. 213.
[792] We note in this regard that we invited Indonesia to clarify if Indonesian interested parties demonstrated that export levies on biodiesel offset the benefit derived due to low CPO prices. In response, Indonesia pointed us to a portion of Wilmar's comments on the provisional Regulation. (Indonesia's response to Panel question No. 136, p. 31 (referring to Wilmar' Comments on Provisional Regulation (Exhibit IDN-79 (BCI)), paras. 120-122). Of note, Wilmar's own contention that Indonesia identifies appears in the context of Wilmar's submission on the subsidy margin (and not in context of the Commission's analysis relating to Article 15.7(i) of the SCM Agreement). This accords with our view that Indonesia's argument pertains to the amount of benefit/subsidy – an issue that is regulated by other provisions of the SCM Agreement. We further note, from an abundance of clarity, that we are not suggesting that the amount of benefit conferred by a subsidy can never be relevant to an analysis of the likely trade effects of the subsidy. However, no aspect of the evidence on the record that Indonesia draws our attention to indicates that the interested parties argued before the Commission that the amount of benefit arising from the provision of CPO for less than adequate remuneration was so small that the Commission should specifically have examined whether it could have had any trade effects.
[793] Provisional Regulation (Exhibit IDN-1), recital 350.
[794] Definitive Regulation (Exhibit IDN-2), recital 369.
[795] Indonesia's first written submission, para. 404.
[796] Indonesia's first written submission paras. 407-409.
[797] Indonesia's first written submission, para. 406.
[798] Indonesia's first written submission, para. 410.

7.450. The overarching issue we must consider is whether Indonesia has shown that the Commission failed to support its conclusion that there was a "likelihood that such imports will continue to increase" with reasoned and adequate explanations and positive evidence.

7.451. We start by addressing Indonesia's arguments regarding trends concerning volume of Indonesian imports. The following table shows data regarding Indonesian import volumes in various quarters of the investigation period and post-IP that the Commission had before it[799]:

Table 4: Imports from Indonesia during and after the investigation period[800]

Quarter	Q4 2017 (IP)	Q1 2018 (IP)	Q2 2018 (IP)	Q3 2018 (IP)	Q4 2018 (post-IP)	Q1 2019 (post-IP)	Q2 2019 (post-IP)
Indonesian imports (metric tonnes)	0	25,275	227,114	263,678	139,091	234,677	207,310

7.452. The data show that following the termination of the anti-dumping duties on Indonesian biodiesel in March 2018 (i.e. in the first quarter of 2018), Indonesian imports increased sharply during the second and third quarters of 2018, i.e. the rest of the investigation period. However, the post-IP data included by the Commission in its examination does not show that the imports continued increasing after the investigation period.[801] As the definitive Regulation notes[802], at no point in the post-IP did the import level exceed the level observed in the third quarter of 2018. Furthermore, the import level in the second quarter of 2018 (that was within the investigation period) was higher than the import level in corresponding quarter of the following year, i.e. the second quarter of 2019 (which fell in the post-IP). Addressing this decline in Indonesian imports in the second quarter of 2019 relative to the second quarter of 2018, the Commission reasoned that this difference "can be explained by a single shipment falling on one side or the other of a quarter".[803] While this reasoning is not implausible, by the Commission's own admission, the post-IP data was "inconclusive … as to whether substantially increased imports should be expected in the future".[804]

7.453. The European Union submits that the *data of the investigation period* formed a valid basis for the Commission to conclude that, absent any measures, imports would have continued to increase in 2019.[805] We disagree. This approach essentially ignores developments – recorded in the Commission's definitive Regulations – in the post-IP. In particular, the data before the Commission clearly indicated that the import level in the second quarter of 2018 exceeded the import level in the second quarter of 2019 (which was a period preceding the imposition of provisional measures). In our view, an objective and unbiased authority could not have reaffirmed, based on the data of the investigation period alone, that imports would continue increasing in 2019, if post-IP data undermined that view. We therefore consider that the Commission did not provide a reasoned and adequate explanation as to why it considered that Indonesian imports would likely continue increasing in 2019. This alone undermines the Commission's conclusion that Indonesian imports were likely to continue increasing.

7.454. The Commission's conclusion is further undermined by its explicit finding that pursuant to the RED II, "EU-wide imports of high ILUC risk feedstock biodiesel, such as PME, will be capped at the 2019 levels".[806] The finding that the RED II would "cap" Indonesian biodiesel imports at the 2019

[799] At the provisional stage, the Commission had only examined import volume data from the investigation period (i.e. from the fourth quarter of 2017 to the third quarter of 2018). Responding to a request made by the GOI after the imposition of the provisional measures, the Commission also examined the import volume data from a period following the investigation period, specifically the fourth quarter of 2018 through the second quarter of 2019.

[800] Definitive Regulation (Exhibit IDN-2), tables 4-5. "IP" stands for "investigation period".

[801] We note that neither party contends before us that the data from a period following the investigation period was not relevant to the Commission's analysis of this threat factor and that we should therefore not take such data into account for the purposes of our analysis.

[802] Definitive Regulation (Exhibit IDN-2), recital 355.

[803] Definitive Regulation (Exhibit IDN-2), recital 357.

[804] Definitive Regulation (Exhibit IDN-2), recital 357.

[805] European Union's opening statement at the first meeting of the Panel, para. 196; response to Panel question No. 71, para. 196.

[806] Definitive Regulation (Exhibit IDN-2), recital 367.

levels contradicts the finding that there was a likelihood of a continuation of increase of Indonesian imports, especially given that the 2019 levels that the Commission had reviewed were not higher even than the 2018 levels.[807]

7.455. In this regard, we note once again that because the import level in the second quarter of 2018 was higher than that in the second quarter of 2019, the Commission had no affirmative basis for reasonably expecting that the import level in the second half of 2019 would be higher than that in the corresponding part of 2018. Thus, in our view, the Commission could not have assumed that the RED II cap at the 2019-levels would be at a significantly higher import-volume level than the level that the Commission had already observed.

7.456. The European Union contends, however, that the reference in the published determinations to the "cap" on EU-wide PME imports at the 2019 level does not undermine the Commission's expectation that such imports would continue to increase.[808] The European Union's precise position in this regard continued to evolve from its first written submission to its written responses to questions after the second substantive meeting. To enable us to fully address the European Union's argumentation on this issue, we trace the evolution of its views.

7.457. In several parts of its first written submission, the European Union echoed the definitive Regulation in stating that the RED II "capped" Indonesian imports at the 2019 levels and that there is no dispute "between the parties that, between 2020 and 2023, the amount of high-ILUC risk PME was capped to the 2019 levels".[809] However, when we asked the European Union to reconcile those statements with its finding regarding the likelihood of increase in imports, the European Union responded that it "no longer rel[ies]" on its assertions in its first written submission that Indonesian imports were capped at the 2019 levels.[810] Instead, the European Union responded that findings of the panel in *EU and Certain Member States – Palm Oil (Malaysia)* support the proposition that "the RED II did not establish a cap on the volume of imports".[811]

7.458. We invited the European Union to comment on the finding of that panel that "[i]t [was] undisputed that the entirety of the EU conventional biofuel market is governed by the RED II regime, in the sense that there is little to no demand for biofuels not eligible to count"[812] towards renewable energy consumption targets set by the RED II regime. Even though the European Union initially sought to rely on that panel report, the European Union responded that in making that finding, the panel failed to fully reflect the European Union's position regarding the market for biofuels not eligible to count towards the relevant target. Specifically, the European Union referred to its submission before that panel that such biofuels "are still consumed, albeit in small quantities, in the European Union".[813] The European Union further responded that in the underlying investigation, the Commission found "significant sales of Indonesian PME which were not in possession of a RED II Directive certificate".[814] The European Union emphasized that such "non-RED II sales" made up [[***]].[815] According to the European Union, this further corroborates the Commission's view expressed in recital 360 of the definitive Regulation that the effect of the RED II could not be forecasted and thus did not affect the analysis under Article 15.7(ii) of the SCM Agreement.

7.459. We have several observations. We first recall that we are bound, in our review, by the findings as set out in the Commission's provisional and definitive Regulations. Therefore, even though the European Union has submitted before us that the definitive Regulation contains an "incorrect characterization" of the RED II as establishing a cap[816], the European Union's submissions

[807] Indonesia's first written submission, para. 408; response to Panel question No. 70, p. 42.
[808] European Union's response to Panel question No. 71, para. 202.
[809] European Union's first written submission, para. 777. See also ibid. paras. 685-686.
[810] European Union's response to Panel question No. 72, para. 203. See also European Union's response to Panel question No. 71, paras. 199-200; second written submission, para. 398.
[811] European Union's response to Panel question No. 71, para. 199; second written submission, para. 398 (referring to Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.973).
[812] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.324.
[813] European Union's response to Panel question No. 140, para. 200 and fn 71 (quoting Panel Reports, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.326; *EU – Palm Oil (Indonesia)*, para. 7.338).
[814] European Union's response to Panel question No. 140, para. 200 (referring to Provisional Regulation (Exhibit IDN-1), recital 228; Definitive Regulation (Exhibit IDN-2), recitals 238-240).
[815] European Union's response to Panel question No. 140, para. 201 (referring to Breakout of Indonesian imports (Exhibit EU-107 (BCI)))
[816] European Union's response to Panel question No. 140, para. 197.

contradicting the Commission's explicit findings are *ex post* arguments that we may not take into account. The European Union has drawn attention several times to recital 360 of the definitive Regulation, arguing that the findings in that recital remain valid. The European Union highlights that recital 360 notes that the effects of the RED II could not be forecast. For the European Union, recital 360 remains valid despite a finding elsewhere regarding the existence of a cap at the 2019 level.[817] Recital 360 of the definitive Regulation provides as follows:

> Both Wilmar and the GOI then noted the provisions of the RED II Directive which will limit in future the imports of high-ILUC risk PME into the EU. The Commission noted that this limit starts to have effect as of end 2023. Given that the effect of this Directive cannot be forecast, and that PME can still be imported into the EU under this Directive under the conditions thereby set out, this argument was also rejected as it does not affect the current analysis of threat of injury that Indonesian imports pose to the Union industry in the near future.[818]

7.460. The context surrounding the Commission's statement that "the effect of this Directive cannot be forecast" shows that in making this statement, the Commission was not referring to the RED II as a whole, but to a discrete aspect thereof, namely the requirement to phase out imports of PME between the end of 2023 and 2030.[819] That aspect of the RED II is different from the cap on EU-wide imports of PME at the 2019 levels. Therefore, we do not consider that the contents of recital 360 somehow supplement or modify the Commission's explicit finding elsewhere that under the RED II, "EU-wide imports of high ILUC risk feedstock biodiesel, such as PME, will be capped at the 2019 levels".

7.461. We now turn to the European Union's argument that in the underlying investigation, the Commission found "significant sales of Indonesian PME which were not in possession of a RED II Directive certificate".[820] For the European Union, such sales indicate that the effect of the RED II could not be forecast. We find this argument is unclear. The European Union emphasizes that a significant portion of Indonesian PME sales during the investigation period did not have a RED II certificate. However, we note that the investigation period extended up to 30 September 2018 whereas the RED II was published on 21 December 2018. As the investigation period ended before the RED II was published, it would not seem possible for any of Indonesian exports to have a RED II certificate. The Commission did refer in the provisional Regulation to sales of Indonesian PME without a "RED certificate", but we understand that in those findings the Commission was referring to certificates issued under the Directive 2009/28/EC on the promotion of the use of energy from renewable sources (RED), and not RED II.[821] Further, the Commission made findings regarding sales of PME not certified under the RED in the context of its examination of price effects.[822] However, the Commission did not explain anywhere in the provisional and the definitive Regulations how or why such sales would mean that there was a likelihood of a continued increase in imports despite the cap on imports at the 2019 level imposed by the RED II. Thus, we do not see how such sales relate to the Commission's analysis of the threat factor in Article 15.7(ii) of the SCM Agreement. Consequently, we do not agree with the European Union's arguments.[823]

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[817] European Union's first written submission, para. 780; response to Panel question No. 71, para. 201; and second written submission, para. 399.

[818] Fn omitted.

[819] The European Union itself indicates that recital 360 of the definitive Regulation refers to the "phasing out period" kicking-in from 2023, which was " three years after the end of the investigation". Clearly, this is not a reference to the cap that the Commission indicated was to take effect from 1 January 2020. (European Union's first written submission, para. 780 (referring to Definitive Regulation (Exhibit IDN-2), recital 360)).

[820] European Union's response to Panel question No. 140, para. 200.

[821] Provisional Regulation (Exhibit IDN-1), recitals 273-274 and 288.

[822] Provisional Regulation (Exhibit IDN-1), recital 288; Definitive Regulation (Exhibit IDN-2), recitals 238-244.

[823] The European Union could be understood to contend that that Indonesian imports could have continued increasing despite the cap on the amount of PME eligible to count towards the RED II targets, as nothing precludes EU consumption of PME even if that consumption would no longer count towards the relevant targets. If we were to consider that argument rather than rejecting it as an *ex post* rationalization, it would still not sufficiently explain why the Commission could reasonably have found a likelihood of increase in Indonesian imports. A quantitative cap on the amount of Indonesian biodiesel that would be eligible to count towards RED II targets would normally limit the demand for such imports. Even though in theory there may be some

7.462. We also note the European Union's argument that Indonesian interested parties did not provide any evidence showing that, because of the RED II, Indonesian imports did not threaten injury.[824] We note in this regard that Article 15.1 of the SCM Agreement obliges investigating authorities to make an injury determination based on positive evidence. Further, Article 15.7 stipulates that a determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. Therefore, an authority cannot make findings supporting its affirmative injury determination simply on the ground that interested parties did not provide any evidence to the contrary. The Commission concluded that there was a likelihood that imports would continue to increase beyond the levels already seen by the Commission. It was therefore incumbent on the Commission to provide reasoned and adequate explanations based on positive evidence to support that conclusion.

7.463. In sum, despite the European Union's efforts to demonstrate that the RED II did not cap Indonesian imports, the foregoing considerations do not permit us to overlook the Commission's finding that "under the RED II Directive where EU-wide imports of high ILUC risk feedstock biodiesel, such as PME, will be capped at the 2019 levels". Both the data concerning the level of Indonesian import levels (addressed in paragraphs 7.452 and 7.453 above) and this finding regarding this cap on Indonesian imports undermine the Commission's conclusion that there existed "the likelihood that such imports will continue to increase".

7.464. The European Union also argues that Article 15.7 of the SCM Agreement permits an investigating authority to establish threat of injury in circumstances when, after a steep initial increase in imports which had already had measurable negative effects on the domestic industry, imports continue to enter at significant but rather stable levels.[825] As indicated in paragraphs 7.431-7.433 above, we agree with the European Union that Article 15.7 of the SCM Agreement does not in all circumstances necessarily require a likelihood of a future increase in imports for an investigating authority to reach an affirmative threat of injury determination. However, in this case, the European Union cannot avail itself of that possibility permitted under Article 15.7 of the SCM Agreement. This is because Commission's examination under Article 15.7(ii) of the SCM Agreement did not involve a finding that Indonesian imports would continue to enter at the level that had already been observed by the Commission based on the data before it. The Commission went further and explicitly concluded that there existed "the likelihood that such imports will continue to increase". Thus, insofar as the European Union seeks to argue that the Commission's threat of injury determination remains valid on the basis that Indonesian imports would have continued to enter at the levels observed by the Commission, we consider it to be a further impermissible *ex post* rationalization not reflected in the provisional and the definitive Regulations.

7.465. We now address two additional arguments that Indonesia raises regarding the Commission's assessment of this threat factor.

7.466. Indonesia argues that the use of Indonesian PME in the European Union is subject to a natural limit as it can at most comprise 20% of a FAME0 blend. For Indonesia, this limited the extent to which Indonesian imports to the European Union could possibly have increased and the Commission erred by not taking this limit into account.[826] We reject Indonesia's argument. Even if there were a limit as to the amount of Indonesian PME that could be blended in a FAME0 blend, Indonesia has not produced any evidence showing that the use of Indonesian PME in the European Union had already reached that limit. Therefore, Indonesia has not shown that an increase in Indonesian imports was no longer possible by virtue of that limit.

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demand for such imports after that cap is reached, the Commission's analysis would still be lacking a reasoned and adequate explanation as to why that demand would be so high as to raise a reasonable likelihood of a continued increase in import levels that would threaten material injury. We note that per its own submission in the *EU and Certain Member States – Palm Oil (Malaysia)* case, to which the European Union has drawn our attention, biofuels not eligible to count towards the relevant targets are only consumed "in small quantities". (European Union's response to Panel question No. 140, para. 200 (referring to Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.338))

[824] European Union's second written submission, para. 399; response to Panel question No. 140, para. 197.

[825] European Union's comments on Indonesia's response to Panel question No. 140, para. 140.

[826] Indonesia's first written submission, para. 406.

7.467. Indonesia further argues that the likelihood of a substantial increase in Indonesian imports was unrealistic in light of the planned adoption of the B30 mandate in Indonesia. Indonesia contends that the B30 mandate would increase domestic consumption of biodiesel and thereby limit the volume of Indonesian biodiesel production that could be exported.[827] We reject this argument. As stated in paragraph 7.481 below, we consider that it was reasonable for the Commission to conclude that there was no evidence indicating that the B30 mandate would significantly affect the level of Indonesian production available for exports in the near future.

7.5.4.1.5 Sufficient freely disposable capacity and absorption capacity of third countries

7.468. The provisional Regulation notes that the production capacity of Indonesian biodiesel producers "significantly exceeds the domestic demand by around 300%" and that "more than half" of that capacity is "spare capacity" which will need to be utilized for exports were Indonesian producers "to increase their currently low capacity utilization".[828] The Commission also noted that the United States imposed anti-dumping and countervailing duties on Indonesian biodiesel imports (provisionally in November 2017 and definitively in April 2018), creating a situation in which the United States would not absorb a significant portion of Indonesian spare capacity. Nor are there other known markets that could do so.[829] The Commission provisionally concluded that Indonesian producers are therefore "likely to direct their spare capacities to the Union market, causing further injury to the Union industry".

7.469. In the definitive Regulation, the Commission addressed Indonesian interested parties' contentions that there would not be any spare capacity in Indonesia available to redirect biodiesel to the European Union, because: (a) domestic demand for biodiesel would increase as Indonesia was moving from a B20 to a B30 mandate[830], and (b) China would absorb Indonesian biodiesel exports. The Commission found that "it is unlikely that a B30 mandate will be met in the near future, and significantly affect the spare capacity in Indonesia in the near future".[831] The Commission also found that there was no evidence of a long-term increase in demand in China for Indonesian biodiesel exports.[832] The Commission definitively concluded that Indonesian producers were "likely to direct their spare capacities to the Union market, causing further injury to the Union industry".

7.470. Indonesia challenges the Commission's assessment on the following grounds:

a. The Commission did not objectively consider evidence showing that the B30 mandate would have a limiting effect on biodiesel exports.[833]

b. The Commission did not objectively address the growth in Indonesian exports to China.[834]

c. The Commission did not address evidence and arguments showing that not all of Indonesia's production capacity could be used for exports due to the remote geographic location of some production facilities.[835]

d. The Commission did not address evidence and arguments showing that biodiesel production lines were also used for making products other than biodiesel for which demand was growing.[836]

7.471. We examine each of these arguments in turn.

[827] Indonesia's first written submission, para. 410.
[828] Provisional Regulation (Exhibit IDN-1), recital 353.
[829] Provisional Regulation (Exhibit IDN-1), recital 356.
[830] The term "B20" or "B30" represents the percentage of the amount of biodiesel mixed in blended fuel.
[831] Definitive Regulation (Exhibit IDN-2), recital 384.
[832] Definitive Regulation (Exhibit IDN-2), recital 395.
[833] Indonesia's first written submission, paras. 419 and 420.
[834] Indonesia's first written submission, para. 417; second written submission, para. 236.
[835] Indonesia's first written submission, para. 416; response to Panel question No. 75, p. 44.
[836] Indonesia's first written submission, para. 416; response to Panel question No. 75, p. 44.

7.5.4.1.5.1 Impact of the B30 mandate on spare capacity

7.472. Indonesia asserts that evidence before the Commission indicated that the B20 mandate had led to substantial increases in domestic consumption and capacity utilization between 2018 and 2019. For Indonesia, the contemplated introduction of the B30 mandate starting in January 2020 was expected to further increase domestic consumption, thereby limiting capacity to export.[837] Indonesia contends that the Commission ignored the evidence submitted by the Indonesian interested parties and improperly focused its analysis only on the EBB's meritless concerns about the B30 mandate.[838] The European Union contends that the Commission duly considered all evidence and reached conclusions that an objective and unbiased authority could have reached, on the basis of that evidence.[839]

7.473. We are faced with a situation involving allegations that the Commission ignored certain evidence on the record and that no evidence on the record substantiated the Commission's conclusions. We agree with Appellate Body reports indicating that, in such a situation, and in accordance with the applicable standard of review, we must ascertain whether Indonesia has shown that the Commission failed to evaluate all of the relevant evidence in an objective and unbiased manner, including by taking sufficient account of conflicting evidence.[840] We are not barred from examining the evidence on the record that was not expressly reflected in but was connected to the explanations in the determination.[841] This flows from the principle that investigating authorities are not required to discuss every piece of supporting evidence in the determination.[842] At the same time, as we cannot engage in a *de novo* review, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on evidence on the record – cannot be taken into account.[843]

7.474. Accordingly, we review whether Indonesia has established that the Commission failed to evaluate the evidence on the record (including conflicting evidence) in an objective and unbiased manner in finding that the "B30 mandate will not significantly limit the amount of biodiesel exported from Indonesia to the EU in the near future".[844] For reasons discussed below, we conclude that Indonesia has not done so.

7.475. The Commission reached its finding that the B30 mandate will not significantly affect the spare capacity in Indonesia in the near future based on the following considerations:

a. Indonesian operators faced difficulties in distribution, availability of storage and blending infrastructure in implementing the B20 mandate.

b. Certain sectors requested delayed implementation for the B30 mandate, that "technical adaptations may be necessary for vehicles to run on B30 fuel", and that certain machinery "may be out of warranty if they use B30 fuel".

c. The finding of a US Global Agricultural Information Network (GAIN) report[845] that the full implementation of the B20 mandate was achieved three years after the set deadline.

d. The "extremely ambitious" nature of the targeted increase of blending rate from 19.9% to 30% in one single year considering the lower average increase in blending rates in past years.[846]

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[837] Indonesia's first written submission, paras. 414-415; response to Panel question No. 77, p. 46.
[838] Indonesia's first written submission, para. 419.
[839] European Union's second written submission, paras. 421-422.
[840] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.84 and 5.99 (referring to Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 516).
[841] Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.
[842] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.
[843] Appellate Body Report, *US – Lamb*, paras. 153-161.
[844] Definitive Regulation (Exhibit IDN-2), recitals 378 and 384.
[845] United States Department of Agriculture, *Indonesia Biofuels Annual Report 2019*, GAIN Report No. ID1915 (Jakarta, 15 July 2019). A copy of the report is submitted to the Panel in EBB's response to post-IP development questions (Exhibit EU-67 (BCI)), annex 1.
[846] Definitive Regulation (Exhibit IDN-2), recitals 376-383.

7.476. We note that contrary to Indonesia's allegation, the considerations set out above were not "unsubstantiated".[847] The European Union has identified evidence on the record that supports these considerations. Such evidence on the record includes Indonesian press reports highlighting "resistance [in Indonesia] to using biodiesel" on account of "limited warranty" for vehicle engines and heavy machinery for use of B20 fuel. The press reports also indicate that as of December 2018 "the implementation of B20 [was] still not optimal". The reports further state that there were problems in Indonesia with regard to distribution of biodiesel and lack of fuel storage and blending infrastructure.[848] The press reports also identify "a lack of supplies in some regions [to be] one of the crucial issues in the implementation of the B20 policy"; refer to technical issues related to mining equipment arising from the consumption of B20 fuel; and quote a mining industry association as "urg[ing] the government not to increase the use of biodiesel to 30 percent blending".[849] The evidence on the record also includes an Indonesian press report quoting an Indonesian expert as indicating that "[i]t will take at least the next 5 years for [the B30] mandatory target to be realistic".[850]

7.477. We further note that evidence before the Commission that the European Union has identified indicated the existence of delays in the intended implementation of the B20 mandate. For example, according to the GOI's own submissions, [[***]].[851] However, evidence on the record indicated that the B20 mandate was in fact extended to this sector only in 2018.[852] Indeed, Indonesia itself indicates that the B20 mandate was fully implemented only in 2019.[853] We also note that Indonesia does not challenge the Commission's finding that "the average increase in blending rates is between 2,5 and 3,2 percentage points per year", in light of which the Commission considered the shift from B20 to B30 in one year to be "extremely ambitious".[854] In our view, the foregoing evidence on the record does substantiate the Commission's findings regarding the predicted difficulties in implementation of the B30 mandate.[855]

7.478. We also find that the European Union has sufficiently explained how the Commission considered the relevant evidence submitted by Indonesian interested parties.[856] For instance, the Commission noted the GOI's plans to move from a B20 to a B30 mandate and the argument that the implementation of the B30 mandate would absorb all production capacity of biodiesel in Indonesia.[857] The Commission also noted the Indonesian interested parties' evidence which indicated that "the number of blending points is being reduced and their size increased"[858] – i.e. measures taken to improve the availability and accessibility of CPO. The Commission also recognized that full B30 trials were due to start in November 2019.[859] This reveals that the Commission took the evidence submitted by Indonesian interested parties into account but was not persuaded by it. For reasons discussed below, we find that the Commission did not treat that evidence unreasonably, as that evidence was not responsive to the concerns regarding implementation of the B30 mandate that formed the basis for the Commission's findings.

[847] Indonesia's first written submission, para. 421.
[848] EBB's response to post-IP development questions (Exhibit EU-67 (BCI)), pp. 4-6 (referring to Annexes to EBB's response to post-IP development questions (Exhibit EU-88 (BCI)), annexes 8 and 12).
[849] EBB's response to post-IP development questions (Exhibit EU-67 (BCI)), p. 5 of the PDF file (referring to Annexes to EBB's response to post-IP development questions (Exhibit EU-88 (BCI)), annexes 9-12).
[850] EBB's response to post-IP development questions (Exhibit EU-67 (BCI)), p. 7 of the PDF file (referring to Annexes to EBB's response to post-IP development questions (Exhibit EU-88 (BCI)), annex 12).
[851] GOI verification exhibits (Exhibit IDN-12 (BCI)), exhibit 2A-slides BPDP, p. 13 of the PDF file.
[852] EBB's response to post-IP development questions (Exhibit EU-67 (BCI)), annex 1, p. 12; Wilmar's comments on the EBB's complaint (Exhibit IDN-82), p. 39.
[853] Indonesia's comments on the European Union's response to Panel question No. 137, para. 32.
[854] Definitive Regulation (Exhibit IDN-2), recital 383.
[855] We note that the Commission did not doubt the GOI's intent to move towards a B30 mandate over time. Neither do we read the provisional and the definitive Regulations to deny that an increase in the blending mandate would lead to an increase in domestic consumption when such an increase is implemented. Rather, the Commission's finding was more limited. Based on the evidence before it (as discussed above), the Commission reasonably considered that "in the near future", the B30 mandate was "unlikely" to "significantly affect" the spare capacity in Indonesia. (Definitive Regulation (Exhibit IDN-2), recital 384).
[856] European Union's response to Panel question No. 79, para. 240.
[857] Definitive Regulation (Exhibit IDN-2), recital 375.
[858] Definitive Regulation (Exhibit IDN-2), recital 377.
[859] Definitive Regulation (Exhibit IDN-2), recital 379.

7.479. The GOI's comments on provisional disclosure dated 28 August 2019[860] state that "Indonesia is moving from a B20 to a B30 mandate … [t]herefore, demand in Indonesia will soon increase by 50%". The GOI's comments on post-IP developments dated 6 September 2019[861] note that "the move from B20 to B30 starting in 2020 will increase domestic demand for biodiesel to 9.9 million kiloliter". Wilmar's comments on post-IP data dated 16 September 2019[862] note that to implement B30 "the biodiesel specifications would need to be improved" and that biodiesel producers were "working diligently to implement changes in their production process in order to achieve these higher specifications". While these submissions underscore the GOI's intention to move from a B20 to a B30 mandate, they do not, in our view, sufficiently counter the evidence highlighting challenges to the timely implementation of the B30 mandate.

7.480. Wilmar's comments on the provisional Regulation dated 28 August 2019[863] assert that "contrary to the EBB allegations, the reaction to the B30 mandate with increased blending requirement ha[d] actually been positive" and that "final test that ha[d] recently been launched ha[d] received positive feedback".[864] The brief cites a press article dated 13 June 2019 indicating that a B30 trial involving three trucks and eight passenger vehicles had been launched. The article does not indicate how the launch of a trial involving three trucks and eight passenger vehicles could counter broader concerns regarding the implementation of the B30 mandate.[865] The GOI's comments on EBB's observations on post-IP developments dated 6 September 2019[866] note that "the road tests of B30 have been successful and showed that both users and the automotive industry could accept the B30". However, the comments also note that the B30 trials will "be in full force by November 2019".[867] Whether the B30 mandate would be implemented on time would depend on the outcome of all trials. Indonesian interested parties' evidence reveals that the trials had not fully been conducted.

7.481. To us, the discussion above shows that the evidence on the record before the Commission did identify several concerns regarding the timely implementation of the B30 mandate. Therefore, the Commission's finding that the move from a B20 to a B30 mandate will not significantly limit biodiesel exports to the European Union in the near future was not unsubstantiated. Further, the Commission's provisional and definitive Regulations indicate that the Commission took sufficient account of the relevant evidence submitted by the Indonesian interested parties. Although that evidence showed that B30 trials were underway and that the GOI intended to adopt a B30 mandate, that evidence also showed that full trials had not yet concluded; as such the timely implementation of the B30 mandate could not have been foreseen with certainty. The Indonesian interested parties' evidence also did not sufficiently counter the evidence underlining concerns regarding the timely implementation of the B30 mandate. We therefore disagree with Indonesia's contention that the Commission's findings regarding the B30 mandate were unsubstantiated and ignored all the evidence that the Indonesian interested parties had submitted.

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[860] GOI's provisional disclosure comments on injury findings (Exhibit IDN-23), para. 100.

[861] GOI's response to post-IP development questions (Exhibit IDN-57), p. 2.

[862] Wilmar's comments on EBB's response to post-IP development questions (Exhibit IDN-10 (BCI)), para. 9.

[863] Wilmar's provisional disclosure comments (Exhibit IDN-31), paras. 187-193.

[864] Wilmar submitted materially the same comments in: Wilmar's comments on final disclosure (Exhibit IDN-9 (BCI)), paras. 161-169; Wilmar's rebuttal comments on EBB's submission on threat of injury (Exhibit IDN-56 (BCI)), paras. 32-38.

[865] Wilmar's comments note that availability and supply issues concerning B20 fuel "are really not an issue anymore as by January 2019 Pertamina has simplified from 69 blending points to just 29 blending points in the larger depots where infrastructure is ready". (Wilmar's provisional disclosure comments (Exhibit IDN-31), para. 192). The Commission acknowledged the reduction in the number of blending points and the increase in the size of the blending points that Wilmar's comments refer to. The Commission nevertheless considered that "the B30 mandate is expected to take time to implement" due to requests from certain sectors to delay the implementation of the B30 mandate, technical adaptations required for vehicles to run on B30 fuel and non-availability of warranty for certain machinery if they use B30 fuel. (Definitive Regulation (Exhibit IDN-2), recital 377).

As discussed in paragraph 7.477 above, the evidence on the record did indicate the existence of the concerns that the Commission referred to. We consider an objective and unbiased authority could reasonably have attached more weight to evidence indicating concerns regarding the implementation of the B30 mandate that the Commission referred to than to Wilmar's point concerning the reduction in the number of blending points and the increase in the size of the blending points.

[866] GOI's comments on EBB's response to post-IP development questions (Exhibit EU-72), p. 5.

[867] The GOI's comments on the final general disclosure dated 14 October 2019 contained the same assertions. (GOI's comments on final disclosure (Exhibit IDN-22), para. 199).

7.5.4.1.5.2 Remote geographic location of certain biodiesel production facilities

7.482. We next turn to Indonesia's arguments regarding the remote geographic location of certain biodiesel production facilities. Indonesia contends that the Commission failed to address arguments by Indonesian interested parties that not all production capacity in Indonesia could be used for exports because of the geographic location of certain production facilities.[868] The European Union contends that the Indonesian interested parties did not substantiate this argument with positive evidence.[869]

7.483. We note that the argument that Indonesia raises before us was also raised before the Commission by Wilmar. Wilmar's briefs in which the argument appears, however, do not identify any evidence to support the proposition that certain production facilities cannot export on account of their remote location and merely contain bare assertions to that effect.[870] Indonesia refers to several exhibits to show the Commission had evidence on the record that indicated the limitations on exports placed by remote location of certain plants. However, for reasons discussed below, we agree with the European Union that none of these exhibits point to any concrete logistical difficulties that would preclude exports from any specific plants. Accordingly, we consider that the Commission did not act unreasonably by not addressing that contention in the provisional and the definitive Regulations.

7.484. Indonesia asserts that the GOI's questionnaire response, dated 7 January 2019, contained information regarding the geographic spread of biodiesel plants.[871] However, as the European Union notes[872], this exhibit simply mentions the geographical location of Indonesian producers, without linking the location to any difficulties regarding exportation that arise due to the location. Likewise, the relevant portions of the GOI verification exhibits[873] and GOI's observations on post-IP development[874] only indicate the regions within Indonesia where biodiesel plants are located without referring to the inability of any producers to export. The relevant portion of the GOI verification exhibits[875] indicates that the OPPF management agency made a presentation to the Commission indicating that plantations in remote areas face difficulties due to poor logistical infrastructure. However, as the European Union notes[876], that presentation was referring to the logistical problems faced by palm oil plantations and does not speak to the alleged difficulties experienced by biodiesel producers in exportation. Finally, Indonesia refers to evidence on the record indicating that a particular biodiesel producer located in a remote area [[***]].[877] We again agree with the European Union that [[***]] cannot be ruled out.[878]

7.485. We would also note that the exhibits that Indonesia points to do not state that some of Indonesia's production capacity is unavailable for exports due to remote geographic location. Rather, the information that Indonesia refers to appears in several different contexts unconnected to that contention. We therefore find that the Commission did not err by somehow disregarding relevant evidence regarding the unavailability of some of Indonesia's production capacity for exports.

7.5.4.1.5.3 Use of biodiesel production lines for making other products

7.486. Indonesia argues that the Commission failed to take into account that biodiesel production lines were also used for making other products and that demand for those products was growing.[879] For Indonesia, this trend reveals that there would have been less available spare capacity for exporting biodiesel to the European Union. In support of its argument, Indonesia points to [[***]]'s responses to its sampling questionnaire and the main questionnaire evidencing that

[868] Indonesia's response to Panel question No. 75, p. 44.
[869] European Union's second written submission, para. 403.
[870] Wilmar's rebuttal comments on EBB's submission on threat of injury (Exhibit IDN-56 (BCI)), para. 35; Wilmar's provisional disclosure comments (Exhibit IDN-31).
[871] GOI's questionnaire response (Exhibit IDN-11 (BCI)), pp. 16 and 19.
[872] European Union's second written submission, para. 405.
[873] GOI verification exhibits (Exhibit IDN-12 (BCI)), p. 14 of the PDF file.
[874] GOI's response to post-IP development questions (Exhibit IDN-57), annex 1.
[875] GOI verification exhibits (Exhibit IDN-12 (BCI)), p. 14.
[876] European Union's second written submission, paras. 408-409.
[877] Indonesia's response to Panel question No. 75, p. 45 (referring to Export figures of [[***]] (Exhibit IDN-58 (BCI))).
[878] European Union's second written submission, para. 411.
[879] Indonesia's first written submission, para. 416.

[[***]] of its production capacity was used for [[***]].[880] Indonesia also cites [[***]]'s briefs, wherein [[***]] argued that biodiesel production capacity was also used for producing fatty alcohol, further referring to a press report noting the rising global demand for fatty alcohol.[881]

7.487. The European Union argues that there is no convincing evidence on the record supporting Indonesia's contention.[882] The European Union asserts that [[***]] did not submit to the Commission the full research report that was summarized in the press article regarding growing demand for fatty alcohols that [[***]] referred to.[883] The European Union also notes that [[***]] did not provide information on [[***]] in its submissions concerning the Commission's inquiry into the existence of threat of material injury. Rather, [[***]]. The European Union also argues that this information pertained to [[***]] and not to the Indonesian industry at large.[884]

7.488. We note that Wilmar contended the following in its briefs to the Commission:

> Indonesian biodiesel producers use their biodiesel production capacity also for the production of other products, such as fatty alcohol. And with the growth of demand for fatty alcohol, additional production capacity will be used for fatty alcohol production reducing again any excess capacity. [885]

7.489. Wilmar's argument reproduced above includes a single footnote.[886] That footnote refers to a press report indicating that the global demand for fatty alcohol was projected to increase between 2018 and 2023.[887]

7.490. Indonesia has not drawn our attention to any aspect of the evidence on the record which would corroborate Wilmar's assertion that Indonesian biodiesel producers were making *fatty alcohol*. Rather, Indonesia has only referred to evidence on the record indicating that [[***]]. Moreover, neither Wilmar's argument reproduced above nor the press report footnoted therein mentions [[***]].

7.491. We consider that an objective and unbiased investigating authority could not reasonably be expected to have connected Wilmar's contention regarding growing demand for *fatty alcohol* on the one hand, and [[***]]'s submissions regarding its production of [[***]] on the other. This is even more so the case given that [[***]] submitted information regarding its production of [[***]] only when expressing its views on product scope, which is a wholly different substantive aspect of the underlying investigation from the threat of injury determination.

7.492. We therefore disagree with Indonesia's contention that the Commission improperly ignored the interested parties' contention regarding the use of biodiesel production lines for production of other products. Rather, we agree with the European Union that the interested parties did not substantiate this contention in a manner intelligible to the Commission. The Commission, in our view, did not act unreasonably by not addressing that contention in the provisional and the definitive Regulations.

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[880] Indonesia's response to Panel question No. 75.b, p. 45 (referring to Wilmar's response to sampling questionnaire (Exhibit IDN-59 (BCI)), p. 2 and annex 1; PT Wilmar Bioenergi Indonesia's response to the exporter questionnaire (Exhibit IDN-60 (BCI)), p. 9).

[881] Wilmar's rebuttal comments on EBB's submission on threat of injury (Exhibit IDN-56 (BCI)), para. 35; Wilmar's provisional disclosure comments (Exhibit IDN-31), para. 190.

[882] European Union's second written submission, para. 414.

[883] European Union's second written submission, paras. 415-416.

[884] European Union's second written submission, para. 413.

[885] Wilmar's provisional disclosure comments (Exhibit IDN-31), para. 190 (fn omitted). See also Wilmar's rebuttal comments on EBB's submission on threat of injury (Exhibit IDN-56 (BCI)), para. 35; Wilmar's comments on final disclosure (Exhibit IDN-9 (BCI)), para. 169.

[886] Wilmar's provisional disclosure comments (Exhibit IDN-31), fn 72. (fn omitted). See also Wilmar's rebuttal comments on EBB's submission on threat of injury (Exhibit IDN-56 (BCI)), fn 24; Wilmar's comments on final disclosure (Exhibit IDN-9 (BCI)), fn 103.

[887] Market Research Future, "Fatty Alcohol Market Size to Reach USD 10,078.8 Million at CAGR 6.67% by 2023 | Strong Demand in Surfactant Industry Driving the Global Sales of Fatty Alcohols", *Globe Newswire*, (Pune, India, 14 May 2019) https://www.globenewswire.com/news-release/2019/05/14/1823719/0/en/Fatty-Alcohol-Market-Size-to-Reach-USD-10-078-8-Million-at-CAGR-6-67-by-2023-Strong-Demand-in-Surfactant-Industry-Driving-the-Global-Sales-of-Fatty-Alcohols.html (accessed 31 March 2025).

7.5.4.1.5.4 Availability of China as an alternative export market

7.493. We note that the Commission found that China cannot be considered as a viable long-term alternative for Indonesian exports and that there is no evidence of a long-term increase in demand for biodiesel exported from Indonesia to China.[888] The Commission supported this conclusion based on the following considerations:

a. There is no blending mandate in force in China and therefore sales are not made on a long-term basis.

b. China only imports PME opportunistically when it is cheaper than mineral diesel.

c. China accounted for only about 27% of Indonesian exports, while the European Union accounted for about 71%.[889]

7.494. We next consider Indonesia's argument that the Commission's analysis of availability of China as an alternative export market was flawed. Indonesia argues that the Commission failed to acknowledge that Indonesian exports to China were increasing in 2018 and 2019, and that there was no evidence that such exports would not continue in the future.[890] The European Union argues that the Commission properly addressed the evidence concerning Indonesia's exports to China and that Indonesia has failed to rebut any of the Commission's relevant findings.[891]

7.495. Indonesia does not dispute the Commission's finding that China accounted for only 27% of the Indonesian exports during the post-IP, while the European Union accounted for 71%. Indonesia also does not contest the Commission's finding that there is no blending mandate in effect in China. As regards the Commission's finding that China only imports PME when it is cheaper than biodiesel, we note that this finding is well supported by evidence on the record. Specifically, the EBB placed on the record certain data showing that in the period between 2013 and 2019, China's imports of biodiesel took place only when CPO was priced the same as or less than gasoil. The data shows that in periods when gasoil was priced significantly lower than CPO, China had almost no imports of biodiesel. The evidence submitted by Wilmar showing large quantities of Indonesian biodiesel exports to China pertains to 2018 and 2019, which according to EBB's data was a period when biodiesel was priced as the same level or lower than mineral diesel.[892]

7.496. In light of the above, Indonesia has failed to establish that the Commission improperly failed adequately to examine China as an alternative market.

7.5.4.1.5.5 Price level of subsidized imports

7.497. The Commission relied on price levels of subsidized imports as the basis for its threat of injury determination. In the provisional Regulation, the Commission recalled its price undercutting findings and noted that Indonesian import prices were "substantially lower" than the prices charged by the domestic industry.[893] The Commission explained in the definitive Regulation that:

> The findings on significant undercutting are made in the context of a state of the Union industry which is extremely delicate although not yet materially injured by the observed undercutting. Such undercutting, if continued, poses a threat that the Union industry will suffer material injury.[894]

7.498. The Commission also recalled its finding of price depression, noting that:

> [D]ue to the price pressure from subsidised Indonesian imports, the Union industry could not benefit from the decreasing costs during the investigation period, because it

[888] Definitive Regulation (Exhibit IDN-2), recitals 387 and 395.
[889] Definitive Regulation (Exhibit IDN-2), recitals 387-395.
[890] Indonesia's second written submission, para. 236.
[891] European Union's first written submission, para. 811.
[892] EBB's response to post-IP development questions (Exhibit EU-67), pp. 7-9; Wilmar's comments on final disclosure (Exhibit IDN-9 (BCI)), paras. 170-180.
[893] Provisional Regulation (Exhibit IDN-1), recital 358.
[894] Definitive Regulation (Exhibit IDN-2), recital 398.

> had to fully pass on this cost decrease to its customers to avoid an even larger loss of market share.[895]

7.499. The Commission also noted that the fact that exports of biodiesel from Indonesia to China were priced the same as exports to the European Union in 2018 and the first half of 2019 was also indicative of the threat posed by the subject imports.[896]

7.500. Indonesia argues that for the same reasons as those underlying its claim concerning the Commission's price undercutting and price depression findings, the Commission's reliance on those findings in the context of its examination of threat factors was flawed.[897]

7.501. As the European Union notes, Indonesia's argument concerning the Commission's references to price undercutting and price depression in its assessment of threat factors is consequential to Indonesia's claim under Article 15.2 of the SCM Agreement. As discussed in section 7.5.2.4 above, Indonesia has not established that the Commission's price undercutting analysis was flawed. Accordingly, we find that the Commission's reference to its price undercutting finding in its assessment of threat factors did not undermine the Commission's threat of injury determination. However, as discussed in section 7.5.2.5, Indonesia has established that the Commission's conclusion on price depression was inconsistent with the SCM Agreement. Therefore, the flaws in the Commission's consideration of price depression do undermine its threat of injury determination.

7.502. Indonesia further argues that in consideration of the threat factor regarding the price level of subsidized imports, the Commission failed to demonstrate that prices of subject imports would "likely increase demand for further imports" as required under Article 15.7(iv) of the SCM Agreement.[898] For Indonesia, demand for Indonesian imports would not be "incentivized" beyond a point since Indonesian PME can constitute a maximum of 20% of a FAME0 blend.[899] The European Union asserts that the Commission did explain the importance of price as a driver for consumer behaviour in general and with regard to PME in particular.[900] The European Union also argues that the massive increase in Indonesian imports within a few months in the last part of the investigation period shows that such imports would attract further demand due to their low prices.[901] The European Union refers to its arguments regarding Indonesia's price effects claim wherein the European Union rebutted Indonesia's contention that demand for Indonesian PME cannot rise beyond a point because only a maximum of 20% by volume of Indonesian PME could be included in a FAME0 blend.[902]

7.503. Article 15.7 of the SCM Agreement indicates:

> In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:
>
> …
>
> (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports;

7.504. We note that Article 15.7 (iv) has two aspects: first, whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices; and second, whether such prices would likely increase demand for further imports. We recall that investigating authorities are not obligated to consider every threat factor identified in subparagraphs (i) through (v) of Article 15.7 of the SCM Agreement to reach a valid threat of injury determination. Indeed, an

[895] Definitive Regulation (Exhibit IDN-2), recital 399.
[896] Definitive Regulation (Exhibit IDN-2), recital 400.
[897] Indonesia's first written submission, para. 423.
[898] Indonesia's first written submission, para. 424.
[899] Indonesia's first written submission, para. 424.
[900] European Union's first written submission, para. 818 (referring to Definitive Regulation (Exhibit IDN-2), recitals 233 and 254).
[901] European Union's first written submission, para. 821.
[902] European Union's first written submission, para. 822.

authority may base its injury determination on a set of factors that does not include any of the factors set out subparagraphs (i) through (v), so long as the set of factors that the authority does examine objectively support its threat of injury determination.

7.505. This implies that it is also not mandatory for an authority to address every aspect of any of the threat factors set out in subparagraphs (i) through (v) of Article 15.7 of the SCM Agreement. An authority may, accordingly, not necessarily violate Article 15.7 if it examines the first aspect of the threat factors set out in Article 15.7(iv), but not the second aspect. Indeed, nothing in Article 15.7 precludes the possibility that imports "entering at prices that will have a significant depressing or suppressing effect on domestic prices" may threaten injury to the domestic industry through some means other than "increased demand for further imports" (for example, such imports may threaten the profit margins of domestic producers whose prices they will depress). In light of the non-mandatory nature of Articles 15.7 (i)-(iv), the absence of an inquiry by an authority into whether the price level of subsidized imports would likely increase demand for such imports does not, in and of itself, amount to a flaw in the threat of injury determination.

7.506. We note that nothing in the portions of the provisional and the definitive Regulations pertaining specifically to this threat factor reveals that the Commission considered that the price level of subsidized imports "would likely increase demand for further imports". Rather, the Commission connected the price level of subject imports with the existence of threat of injury through a different explanation. The Commission explained that the price undercutting by Indonesian imports existed when the state of the domestic industry was "extremely delicate although not yet materially injured". The Commission found that given this state of the domestic industry, "price undercutting, if continued, pose[d] a threat that the Union industry will suffer material injury".[903] Indonesia does not challenge this aspect of the Commission's reasoning.

7.507. Rather, Indonesia simply asserts that the Commission acted inconsistently with Article 15.7 of the SCM Agreement because it failed to demonstrate that the price level of subsidized imports would likely increase demand for such imports. As noted above, investigating authorities are not required to enquire into every aspect of the threat factors set out in subparagraphs (i) through (v) of Article 15.7 of the SCM Agreement. Accordingly, we disagree with Indonesia that an alleged failure to demonstrate the likely increase in demand for subject imports *per se* violates Article 15.7 of the SCM Agreement.

7.5.4.1.6 Whether the Commission's determination, based on the totality of the threat factors considered, is consistent with Article 15.7 of the SCM Agreement

7.508. We recall that Article 15.7 of the SCM Agreement provides that the totality of the factors considered by an investigating authority must lead to the conclusion that "further subsidized exports are imminent and that, unless protective action is taken, material injury would occur". In accordance with the analytical approach, we articulated in paragraph 7.430 above, we now assess whether the Commission's examination of individual threat factors could have led an objective and unbiased authority to that conclusion. In making this assessment, we bear in mind the guidance in Article 15.7 of the SCM Agreement that no single factor is determinative. At the same time, the published determinations may reveal that some flaws to be so fundamental that, on balance, they may undermine the overall conclusion notwithstanding the relevance of the remainder of the assessment of the threat factors.

7.509. We note that following its examination of individual threat factors, the Commission reached the following conclusion:

> The Commission therefore concluded that during the investigation period, imports from Indonesia constituted a threat of material injury to the Union industry, and the Commission confirmed its conclusions on threat of material injury set out in recital 360 of the provisional Regulation.[904]

[903] Definitive Regulation (Exhibit IDN-2), recital 398.
[904] Definitive Regulation (Exhibit IDN-2), recital 405.

7.510. Recital 360 of the provisional Regulation referred to in the Commission's definitive conclusion above states:

> In view of the analysis of factors concerning the threat of injury listed in recital (348), the Commission concluded that the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia, which supports a provisional finding of threat of injury under Article 8(8) of the basic Regulation.[905]

7.511. We find that, for reasons explained below, certain flaws in the Commission's assessment of certain individual threat factors are so fundamental that they undermine the Commission's overall finding of threat of material injury.

7.512. In particular, as we have discussed above, we have found the Commission's finding that there was a "likelihood that [subsidized] imports will continue to increase" was not supported by import volume data. As discussed in paragraph 7.453 seen in light of the post-IP import volume data, the sharp increase in imports following the termination of anti-dumping duties in March 2018 could not have provided the Commission with an objective basis for projecting that subsidized imports will continue to increase. Furthermore, the Commission failed to properly factor the impact of the RED II into its assessment regarding the likelihood of continued increase in imports. The Commission explicitly noted that the RED II will cap the imports at the 2019 level. We note that, if the imports to the European Union were capped at the 2019 level due to the RED II, the existence of any magnitude of spare capacity in Indonesia could not have led to a continued increase in Indonesian imports. For the same reason, any impact that the United States' imposition of trade remedies duties on Indonesian imports would have on spare Indonesian capacity would not in turn impact the European Union market.

7.513. In its examination of the threat factors concerning the nature and likely trade effects of subsidies in question and the price levels of subsidized imports, the Commission also noted that price undercutting, if continued, would negatively affect the domestic industry and pose a threat of injury. However, the Commission did not explain why the continuation of price undercutting that had not yet caused material injury would do so in the future, especially in the absence of any positive evidence indicating the likelihood of an increase in the volume of imports.

7.514. In light of the foregoing, and the fundamental flaws identified in our findings, we conclude that the totality of threat factors that the Commission examined do not constitute a sound basis for the Commission's conclusion that "the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia". We therefore find that the Commission's affirmative threat of injury determination was inconsistent with Articles 15.1 and 15.7 of the SCM Agreement.

7.5.4.2 Whether the Commission identified a relevant change in circumstances within the meaning of Article 15.7 of the SCM Agreement

7.515. Indonesia claims that the Commission's threat of injury determination is also inconsistent with Article 15.7 of the SCM Agreement because the Commission failed to provide evidence identifying a potential change in circumstances that would support its threat of injury finding.[906] The European Union responds that the Commission's determination makes clear that the "change in circumstances which would create a situation in which the subsidy would cause injury" is the repeal of anti-dumping duties in March 2018, which led to the increase in subsidized imports that would cause injury to the domestic industry.[907]

7.516. We recall that the chapeau of Article 15.7 of the SCM Agreement provides that:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would

[905] Provisional Regulation (Exhibit IDN-1), recital 360.
[906] Indonesia's first written submission, para. 376.
[907] European Union's first written submission, paras. 740-744.

create a situation in which the subsidy would cause injury must be clearly foreseen and imminent.

7.517. While the SCM Agreement does not contain a similar provision, footnote 10 of the Anti-Dumping Agreement (attached to Article 3.7) provides an example of a change in circumstances: "there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices".

7.518. In its provisional Regulation, the Commission does not set out or refer to the identification of a specific change in circumstances. As the European Union notes, the Commission observed that anti-dumping duties on imports of biodiesel from Indonesia were annulled in March 2018 and "as a result, imports increased dramatically thereafter".[908] The Commission concluded that "after the termination of anti-dumping duties in March 2018, the fact that the volume of biodiesel imports from Indonesia has increased significantly indicates the likelihood that such imports will continue to increase."[909] The European Union submits that this reference to the repeal of anti-dumping duties in March 2018 should be understood as the Commission's identification of the change in circumstances supporting its threat of injury determination. We note that the annulment of the anti-dumping duties took place in March 2018, *i.e.* during the investigation period. In other words, this event had already occurred before the investigation was initiated. In this respect, Indonesia rejects the very notion than an event that has already occurred could constitute a change in circumstances that is "clearly foreseen and imminent", as dictated by Article 15.7 of the SCM Agreement.[910]

7.519. The European Union argues that "[t]he change in circumstances" which is "clearly foreseen and imminent" should not be read narrowly by reference only to the text of the provision. In its view, this requirement can encompass situations where the changes of circumstances have already occurred, and their effects extend to a future period not covered by the investigation.[911] The European Union contends that while a change may take place during the investigation period, the effects stemming from that change may take some time to materialize on the market.[912]

7.520. As set out above, Article 15.7 of the SCM Agreement requires that "[t]he change in circumstances which *would create a situation in which the subsidy would cause injury* must be clearly foreseen and imminent". Indonesia relies on the panel's findings in *US – Coated Paper (Indonesia)* to argue that the investigating authority would be expected to explain the change in circumstances that will result in the future situation being different from the past.[913] We note that the European Union agrees with this interpretation.[914]

7.521. The requirement for the investigating authority to *identify* "[t]he change in circumstances which would create a situation in which the subsidy would cause injury" follows directly from the text of Article 15.7. For the provision would not refer to a "change in circumstances" if this was not something that needed to be identified by the investigating authority. The existence of this requirement finds support in previous dispute settlement reports. The Appellate Body in *US – Softwood Lumber VI (Article 21.5 - Canada)* stated that a determination under Article 15.7 must "show how a 'clearly foreseen and imminent' change in circumstances would lead to further [] subsidized imports causing injury in the near future".[915] The panel in *US – Softwood Lumber VI*, stated that the change in circumstances is "one element to be considered" in making a threat of injury determination and the investigating authority's consideration of this element "must be discernible from its determination".[916] We agree with this view.

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[908] Provisional Regulation (Exhibit IDN-1), recitals 281-282.
[909] Provisional Regulation (Exhibit IDN-1), recital 352.
[910] Indonesia's second written submission, para. 205.
[911] European Union's response to Panel question No. 69, paras. 191-192.
[912] European Union's second written submission, para. 387.
[913] Indonesia's second written submission, para. 205 (referring to Panel Report, *US – Coated Paper (Indonesia)*, paras. 7.276-7.277).
[914] European Union's first written submission, para. 607 (quoting Panel Report, *US – Softwood Lumber VI*, para. 7.57); second written submission, para. 383 (referring to Panel Report, *US – Coated Paper (Indonesia)*, para. 7.277).
[915] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 96. See also Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.297.
[916] Panel Report, *US – Softwood Lumber VI*, paras. 7.55 and 7.57-7.58.

7.522. The European Union submits that a contextual reading of its determination permits the understanding that "[t]he removal of existing trade defence measures led to a 'situation', i.e. the increase in subsidized imports, that would cause injury to an already fragile domestic industry (i.e. the starting point of the threat of injury analysis)."[917]

7.523. We recall that the Commission did not make a finding of material injury based on the investigation period and post-IP data. We have also concluded above that the Commission's finding of the fragile economic condition was not reached objectively. Further, the Commission did not have an objective basis for projecting that subsidized imports would continue to increase considering its simultaneous finding that imports were capped at the 2019 level by the RED II Directive.[918] In circumstances where the increased Indonesian imports have not caused injury over 15 months and the facts suggest that the level of imports would be capped, an unbiased and objective investigating authority would have been expected to provide a compelling explanation as to why nonetheless the annulment of the duties would result in increased imports threatening injury to the industry. However, the Commission did not account for the effects of the RED II directive in its evaluation of the likelihood of imminent and foreseeable threatened injury. In light of the above, we consider that the Commission did not explain how the alleged change in circumstances, i.e. the annulment of anti-dumping duties, would result in the fragile economic condition of the EU industry materializing into actual injury, in view of the evidence that the increased imports following the annulment of duties were non-injurious and that the level of imports would be capped by the RED II directive.

7.524. For these reasons, we consider that Indonesia has established that the Commission failed to properly consider the existence of a change in circumstances in its threat of injury determination and therefore acted inconsistently with Article 15.7 of the SCM Agreement.

7.5.5 Claims related to the Commission's determination of the existence of a causal link and evaluation of other known factors

7.525. Indonesia claims that the Commission's causation analysis is inconsistent with Articles 15.1, 15.2, 15.5 and 15.7 of the SCM Agreement because the Commission failed to objectively examine (a) the evolution and significance of the volume of Indonesian imports, and (b) the evolution of prices and profitability of the sampled EU producers.[919] Indonesia also claims that the Commission's non-attribution analysis is inconsistent with Article 15.5 of the SCM Agreement because the Commission failed to objectively examine the evidence attributing the threat of injury to imports of biodiesel from Argentina. Accordingly, Indonesia claims that the Commission did not establish that the threat of injury was caused through the effect of subsidies.[920]

7.5.5.1 Factual aspects of the Commission's causation analysis

7.526. The Commission observed that "there were only negligible imports" from Indonesia between 2015-2017 as well as during the first months of the investigation period. The Commission noted a significant increase in the subject imports during the second half of the investigation period, achieving a market share of 3.3%.[921] The Commission recalled its findings on price undercutting and price depression.[922] In particular, the Commission observed that, "[d]ue to the significant and sudden increase of the subsidised imports of Indonesian biodiesel at prices below those of the Union industry, the Union industry lost market share in the investigation period, and could not improve its unsatisfactory profit margin in an otherwise favourable market situation".[923] The Commission concluded that the "subsidised imports had a negative impact on the situation of the Union industry".[924]

7.527. The Commission also observed that the change in profitability of the EU industry was not significant as the profits remained within a band of -1% to 1% during the period considered. The

[917] European Union's first written submission, para. 742. See also European Union's second written submission, para. 394.
[918] Definitive Regulation (Exhibit IDN-2), recital 367.
[919] Indonesia's first written submission, paras. 446, 452, and 460.
[920] Indonesia's first written submission, para. 473.
[921] Provisional Regulation (Exhibit IDN-1), recital 361 (referring to recital 280).
[922] Provisional Regulation (Exhibit IDN-1), recital 361 (referring to recital 294).
[923] Provisional Regulation (Exhibit IDN-1), recital 362. See also Definitive Regulation (Exhibit IDN-2), recital 407.
[924] Provisional Regulation (Exhibit IDN-1), recitals 362-363.

Commission acknowledged that production and capacity "did increase in absolute terms during the period considered" but reasoned that the domestic industry "was unable to fully take advantage of the increase in consumption, due to imports from Indonesia taking market share from the Union industry".[925]

7.528. The Commission further cited the "significant spare capacity" of Indonesian producers, which could be directed to the EU market, as well as the closure of the US market (the "second biggest export market of Indonesia"[926]) due to the imposition of measures. The Commission concluded that the closure of the US market had directed Indonesia's excess production to the EU market. The Commission also observed that the EU market accounted for 40% of the worldwide biodiesel consumption, thus concluding that the EU had become "the most attractive destination for Indonesian subsidised imports" to the detriment of the domestic industry.[927]

7.529. On this basis, the Commission concluded that "the subsidised imports of Indonesian biodiesel [were] causing a threat of material injury to the Union industry".[928] The Commission did not make any reference to post-IP data as part of its determination of the existence of a causal link between the subject imports and threat of injury.

7.5.5.2 Main arguments of the parties

7.530. Indonesia argues that the Commission was required to objectively assess the significance of the volume of subsidized imports on the basis of positive evidence.[929] Indonesia points out the Commission's acknowledgement that Indonesian imports were negligible during the period considered. For Indonesia, the core of the Commission's causation analysis rested on the EU industry's loss of market share.[930] However, market shares were not substantially lost to Indonesian imports.[931] According to Indonesia, any limited increase in import volumes and market shares was only logical, as Indonesian exporters were no longer barred from accessing the EU market following the removal of anti-dumping duties in 2018.[932]

7.531. Indonesia also argues that the Commission's causation analysis was flawed by virtue of its flawed consideration of volume and price effects of the subject imports and the impact of the subject imports on the state of the domestic industry.[933] Indonesia submits that the Commission's causation analysis conflated the correlated increase in the volume of Indonesian imports and the loss of market share in the EU industry with causation.[934] Similarly, the Commission considered that there was a correlation between the re-entry of Indonesian imports and the level of profits of the EU industry. However, the Commission did not consider that the EU industry had been unable to increase their profits prior to the resumption of Indonesian imports.[935] Indonesia argues that there is no evidence on the record that after August 2018, imports from Indonesia would have put volume or price pressure on the EU industry in a way that was likely to threaten to cause injury. Indonesia further argues that the post-IP data confirms the absence of a causal link between Indonesian imports and the state of the EU industry.[936] Accordingly, Indonesia submits that the Commission's analysis was not dispositive of the question whether the subsidized imports were the cause of the threat of injury to the domestic industry.[937]

7.532. Finally, Indonesia submits that the Commission was required to separate and distinguish the injury caused by factors other than the subsidized imports as part of the non-attribution analysis under Article 15.5 of the SCM Agreement.[938] Indonesia contends that the Commission never

[925] Definitive Regulation (Exhibit IDN-2), recitals 409-410.
[926] Provisional Regulation (Exhibit IDN-1), recital 364.
[927] Provisional Regulation (Exhibit IDN-1), recital 364.
[928] Provisional Regulation (Exhibit IDN-1), recital 365; Definitive Regulation (Exhibit IDN-2), recital 415.
[929] Indonesia's first written submission, para. 431.
[930] Indonesia's first written submission, paras. 439-445.
[931] Indonesia's first written submission, para. 440.
[932] Indonesia's first written submission, para. 445.
[933] Indonesia's first written submission, paras. 434 and 446.
[934] Indonesia's first written submission, para. 446.
[935] Indonesia's first written submission, paras. 448-452.
[936] Indonesia's first written submission, para. 453.
[937] Indonesia's first written submission, paras. 435-436, 446.
[938] Indonesia's first written submission, paras. 464-468.

explained why the threat of injury would be caused through the effects of subsidization.[939] Indonesia submits that during the period considered the increase of imports from Argentina was three times that of Indonesian imports and the prices of Argentine imports were lower.[940] Indonesia says that its imports have never come close to causing the threat of injury that the Commission attributed to Argentine imports in a separate investigation.[941] Therefore, Indonesia submits that the Commission improperly attributed to Indonesian imports a threat of injury solely caused by Argentine imports.[942]

7.533. The European Union highlights that once the anti-dumping measures were lifted, imports increased significantly during the second half of the investigation period, while prices dropped and were undercutting and depressing EU industry prices. As a result, Indonesia's market share increased from 0.2% to 3.3%. In addition, the European Union emphasizes the Commission's observation that the EU market had become "the most attractive destination" for Indonesian imports due to the "closure" of the second biggest market for Indonesian biodiesel, the United States (which had imposed countervailing and anti-dumping measures on Indonesian imports).[943]

7.534. The European Union argues that the threat of injury is not exclusively tied to the period considered but the Commission's determination was based on the situation at the end of the investigation period together with projections about the likely increase in imports. The European Union contends that the EU industry had "ample spare capacity", yet Indonesian imports were able to capture additional market share.[944]

7.535. While noting that Argentine imports also increased during the period considered, the European Union argues that subject imports need not be the only cause of injury or threat of injury.[945] The European Union also rejects Indonesia's argument that the Commission did not establish a link between imports and the evaluation of prices, costs, or profits of the domestic industry. For the European Union, the relevant issue was whether the subsidized imports could have an impact on the EU industry faced by low profit levels as opposed to whether there is a link between imports during the period and the profitability of the EU industry.[946] Finally, the European Union acknowledges that it did not consider the data from the post-IP in its attribution analysis but rejects Indonesia's contention that this data contradicts the finding of a causal link between imports and the threat of injury. The European Union argues that the Commission correctly established that data show the EU industry had further deteriorated.[947]

7.5.5.3 Whether the Commission properly evaluated the existence of a causal link and considered other known factors causing injury

7.536. We note that Indonesia does not dispute the data underlying the Commission's finding of significant increase in the volume of Indonesian imports. In its causation analysis, the Commission examined the evolution in Indonesian imports and concluded that imports increased dramatically following the lifting of the anti-dumping duties.[948] Indonesian imports progressed from 0.2% to 3.1% of the market share in one year only and their absolute volume increased by 2,818 percentage points between 2015 and the investigation period.

7.537. Article 15.2 of the SCM Agreement only instructs the investigating authority to consider "whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption" and does not make any reference to the reasons for the increase. Therefore, the fact that this increase followed the removal of anti-dumping measures which were found to be inconsistent with WTO rules was not material to the Commission's task under

[939] Indonesia's first written submission, para. 472.
[940] Indonesia's first written submission, para. 482.
[941] Indonesia's first written submission, paras. 482-494.
[942] Indonesia's first written submission, para. 497.
[943] European Union's first written submission, para. 887.
[944] European Union's first written submission, paras. 889-890.
[945] European Union's first written submission, para. 894.
[946] European Union's first written submission, paras. 897-900.
[947] European Union's first written submission, paras. 901-908; response to Panel question No. 80, following the first substantive meeting.
[948] Provisional determination (Exhibit IDN-1), recitals 280, 282, and 361, and Tables 5 and 6.

Article 15.2. We therefore find that Indonesia has not established that the Commission erred in finding a significant increase in imports, pursuant to Article 15.2 of the SCM Agreement.

7.538. We turn now to Indonesia's claims concerning the Commission's causation and non-attribution analysis. Article 15.5 of the SCM Agreement requires an investigating authority to demonstrate that subsidized imports are, through the effects of subsidies, causing injury within the meaning of the SCM Agreement. This demonstration must be "based on an examination of all relevant evidence before the authorities"[949]. In addition, an authority must also examine any known factors other than the subsidized imports which at the same time are also injuring the domestic industry and should ensure that injury caused by these other factors are not attributed to the subsidized imports.[950]

7.539. The Appellate Body in *China – GOES* held that the provisions of Article 15 contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination:

> The paragraphs of Articles 3 [of the Anti-Dumping Agreement] and 15 [of the SCM Agreement] thus stipulate, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Together, these provisions provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis. These provisions contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination. This inquiry entails a consideration of the volume of subject imports and their price effects, and requires an examination of the impact of such imports on the domestic industry as revealed by a number of economic factors. These various elements are then linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated. Specifically, pursuant to Articles 3.5 and 15.5, it must be demonstrated that dumped or subsidized imports are causing injury 'through the effects of' dumping or subsidies '[a]s set forth in paragraphs 2 and 4'. Thus, the inquiry set forth in Articles 3.2 and 15.2, and the examination required in Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. As further explained below, the interpretation of Articles 3.2 and 15.2 should be consistent with the role these provisions play in the overall framework of an injury determination under Articles 3 and 15.[951]

7.540. We agree with the Appellate Body's findings and will be guided by them.

7.541. We recall our earlier findings which identified the inconsistencies in the Commission's consideration of price effects, the impact of the subject imports on the domestic industry, and the Commission's threat of injury determination. The Panel considers that in light of these inconsistencies in the preceding steps of inquiry it is unnecessary to review the Commission's subsequent analysis of causation and non-attribution because, in the absence of a valid finding of material injury or threat thereof, the question of whether the subject imports or other known factors were the cause of such injury becomes moot. Thus, we do not consider it necessary to make findings regarding Indonesia's claims under Articles 15.5 and 15.7 of the SCM Agreement to resolve the dispute. We therefore decline to do so.

7.5.6 Claims that the Commission did not exercise "special care" in the application of countervailing measures

7.542. Indonesia claims that the Commission did not exercise "special care", and thus breached Article 15.8 of the SCM Agreement, because it decided to apply countervailing measures despite various errors in its (a) examination of the state of the domestic industry pursuant to Article 15.4,

[949] Article 15.5 of the SCM Agreement.
[950] Article 15.5 of the SCM Agreement.
[951] Appellate Body Report, *China – GOES*, para. 128.

(b) consideration of threat factors pursuant to Article 15.7, and (c) non-attribution analysis pursuant to Article 15.5.[952]

7.543. We recall that we have upheld Indonesia's claims concerning the Commission's examination of the state of the domestic industry pursuant to Article 15.4 and the Commission's consideration of threat factors pursuant to Article 15.7. We have also explained, in paragraph 7.538 above, that we need not make findings concerning Indonesia's claim regarding the Commission's non-attribution analysis pursuant to Article 15.5. Thus, we do not consider it necessary to make findings regarding Indonesia's claim under Article 15.8 of the SCM Agreement to resolve the dispute. We therefore decline to do so.

7.5.7 Conclusion

7.544. For the reasons we set out in sections 7.5.2-7.5.6 above, we find that Indonesia has not established that the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement by failing to ensure price comparability, when examining the effect of Indonesian imports on the prices of domestic like products, and by failing to consider the existence of significant price undercutting for the product as a whole. We find that the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement in respect of its consideration of the effect Indonesian imports on the prices of domestic like products in its finding of significant price depression.

7.545. Additionally, we find that the Commission acted inconsistently with Articles 15.1 and 15.4 of the SCM Agreement by failing to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry. The Commission acted inconsistently with Articles 15.1 and 15.7 of the SCM Agreement by concluding that the totality of threat factors that the Commission examined indicated that "the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia". The Commission acted inconsistently with Article 15.7 of the SCM Agreement by failing to properly consider the existence of a change in circumstances in its threat of injury determination. Finally, Indonesia has not established that the Commission acted inconsistently with Article 15.2 of the SCM Agreement in considering that there had been a significant increase in the volume of Indonesian imports.

7.546. In light of the above findings of inconsistencies in the preceding steps of inquiry into the existence of a threat of material injury, and in the absence of a valid finding of material injury or threat thereof, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 15.5 and 15.7 of the SCM Agreement in assessing whether the subject imports or other known factors were the cause of a threat of material injury to EU biodiesel producers. We also refrain from ruling on Indonesia's claims that the Commission acted inconsistently with Article 15.8 of the SCM by failing to exercise "special care" in the application of countervailing measures.

7.6 The Commission's rejection of a price undertaking offer

7.547. Indonesia claims that the Commission violated Article I:1 of the GATT 1994 by rejecting Wilmar's price undertaking offer after it had accepted a price undertaking offer in a separate investigation on biodiesel from Argentina. Indonesia argues that although both offers had comparable terms[953], the Commission deemed Wilmar's offer "impracticable", thereby applying the "impracticability" standard set out in Article 18.3 of the SCM Agreement inconsistently.[954] For Indonesia, the Commission therefore did not accord immediately and unconditionally an advantage to Indonesian exports that it accorded to Argentine exports.[955]

7.548. The European Union asserts that the Argentine price undertaking was not comparable to Wilmar's price undertaking offer, and hence, Indonesia has not shown how the Commission accorded Indonesian imports less favourable treatment.[956] The European Union notes that the Argentine price

[952] Indonesia's first written submission, paras. 376-377, 394, 404, 411, 422, 426 and 497; second written submission, paras. 206-207, 239, and 274.
[953] Indonesia's response to Panel question No. 84, p. 49; second written submission, para. 277.
[954] Indonesia's second written submission, paras. 283-285.
[955] Indonesia's first written submission, paras. 501, 508, and 509.
[956] European Union's first written submission, para. 950.

undertaking pertained to all biodiesel exports from Argentina, whereas Wilmar's offer pertained to only one exporter. The European Union also asserts that in contrast to Wilmar, the Argentine exporters had proposed in their price undertaking offer an acceptable minimum import price (MIP) and annual level of imports as well as a proper system to monitor against circumvention.[957] The European Union asserts that Article 18.3 of the SCM Agreement grants investigating authorities wide discretion to accept undertakings and a panel should refrain from second guessing an authority's exercise of such discretion.[958]

7.6.1 The Commission's decision to reject Wilmar's voluntary price undertaking offer

7.549. In the definitive Regulation, the Commission concluded that Wilmar's price undertaking offer was "impracticable and unworkable". The Commission based its decision on the following reasons: (a) the proposed MIP was not sufficient to offset the amount of countervailable subsidies; (b) Wilmar's proposed annual level of exports was close to the market share of all Indonesian imports during the investigation period; (c) Wilmar did not mention how the annual level of exports would be controlled and monitored; and (d) Wilmar operated through complex sales channels and has a complex structure, raising the likelihood of circumvention.[959]

7.6.2 Whether the Commission erred by rejecting Wilmar's price undertaking offer

7.550. Indonesia claims that the Commission's rejection of Wilmar's price undertaking offer was inconsistent with Article I:1 of the GATT 1994 and with Articles 15.8 and 18.3 of the SCM Agreement. While Indonesia appends Articles 15.8 and 18.3 of the SCM Agreement to the list of provisions that the Commission's rejection of Wilmar's price undertaking offer allegedly violated, Indonesia has based all its arguments on Article I:1 of the GATT 1994. Thus, we begin by evaluating whether Indonesia has established that the Commission acted inconsistently with Article I:1 of the GATT 1994. Article I:1 of the GATT 1994, in relevant part, provides:

> [A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.551. Pursuant to Article I:1, any "advantage" granted by a Member to a product from another Member "shall be accorded immediately and unconditionally" to the like products from all Members. The term "advantage" covers situations creating more favourable competitive opportunities or affecting the commercial relationship between products originating in different countries.[960]

7.552. We note Article 18.3 of the SCM Agreement specifically regulates the issue of an authority's acceptance of a price undertaking offer, while Article I:1 of the GATT 1994 is a general provision. We assume *arguendo* that Article I:1 is of application notwithstanding the provisions of Article 18.3. The question is, then, whether Article I:1 is breached.

7.553. To resolve Indonesia's claim on this basis, we must determine whether Indonesia has established that the Commission granted an "advantage" within the meaning of Article I:1 of the GATT 1994 to biodiesel originating in Argentina that it did not accord to biodiesel originating in Indonesia. Indonesia cannot establish this, based merely on the fact that the Commission refused Wilmar's price undertaking offer, even though it had adopted the Decision on Argentine undertaking, accepting a price undertaking offer from the Argentine exporters. [961] In our view, the question of whether the Commission accorded an "advantage" to Argentine biodiesel does not relate simply to the *acceptance of a price undertaking offer*. Rather, in our understanding, the "advantage" conferred by the acceptance of a price undertaking lies in the particular terms of the price undertaking in question, the manner in which those terms would operate, as well as the particular circumstances of the underlying investigations. Thus, the burden falls on Indonesia to show that Wilmar's price undertaking offer was substantively equivalent to the Decision on Argentine undertaking in relation

[957] European Union's first written submission, para. 951.
[958] European Union's first written submission, para. 954.
[959] Definitive Regulation (Exhibit IDN-2), recitals 490-500.
[960] Panel Reports, *EU - Palm Oil (Malaysia)*, para. 7.1040; *EC – Bananas III*, para. 7.239.
[961] Decision on Argentine undertaking (Exhibit IDN-21). This document sets out the terms of the price undertaking that the Commission adopted in the separate investigation regarding Argentine biodiesel.

to the terms of that offer and the manner in which those terms would operate. We do not see how the Commission could have improperly denied Wilmar the same "advantage" that it accorded to Argentine biodiesel, if Wilmar never sought that advantage by making a price undertaking offer that was substantively equivalent to the Decision on Argentine undertaking.

7.554. The European Union argues that the Argentine price undertaking differed from Wilmar's price undertaking offer in several key respects. The European Union notes that Wilmar's offer pertained to Wilmar alone (i.e. to one Indonesian exporter only), whereas the Argentine undertaking offer covered all exporters in Argentina and the Cámara Argentina de Biocombustibles (CARBIO) (the Argentine Chamber of Biofuels).[962] The European Union asserts that the Argentine undertaking offer included a MIP that the Commission found to be adequate to offset the amount of countervailable subsidies, whereas Wilmar's MIP was considered to be inadequate.[963] Indonesia disagrees and contends that the relevant characteristics of the Decision on Argentine undertaking were not different from those of Wilmar's undertaking offer. We address below the parties' arguments concerning each of these characteristics of the undertakings in question, with a view to determining whether the Commission granted to Argentine biodiesel an advantage that it improperly denied to Wilmar.

7.6.2.1 The number of exporters covered by the two undertaking offers

7.555. The parties do not dispute that the scopes of coverage of the two undertaking offers were different: Wilmar's offer pertained to Wilmar alone, whereas the Argentine price undertaking offer covered "virtually all" exporting producers.[964] Indonesia, however, contends that any difference in the number of exporters covered in the undertaking offers is irrelevant to the issue of whether the acceptance of one and the rejection of the other was inconsistent with Article I:1, as the terms contained in both offers were otherwise the same.[965]

7.556. We disagree with Indonesia. Indonesia has not explained why an investigating authority's view as regards the acceptability of a price undertaking cannot meaningfully depend on whether that undertaking covers "virtually all" exports or only a limited portion thereof. In our view, the portion of exports covered in an undertaking offer may legitimately inform the extent to which an authority considers the offer to be practicable. Hence, we consider the different scopes of coverage of the two price undertakings at issue to be a meaningful difference between such undertakings.

7.6.2.2 The adequacy of the proposed minimum import price

7.557. The European Union asserts that while the Argentine exporters' proposed MIP sufficiently offset the amount of countervailable subsidies, Wilmar's proposed MIP did not.[966] Indonesia argues that the Commission did not explain why Wilmar's proposed MIP was inadequate, even though it was based on a similar methodology to that of the Argentine MIP.[967]

7.558. We note that Indonesia wrongly asserts that the Commission did not explain why it found Wilmar's proposed MIP inadequate. The Commission provided the following explanation:

> By applying the proposed price formula, the MIP for the period October-December 2019 would be [CONFIDENTIAL]. During the investigation period, your client charged a price of [CONFIDENTIAL], and the Union industry charged [CONFIDENTIAL] for palm-oil based biodiesel. While raw material prices may have fluctuated to a certain extent since then, there is no evidence that they decreased by such a margin that the proposed MIP would be sufficient to eliminate the subsidy. Indeed, the average import price in Q3 2019 was 631EUR/tonne. The average post IP price (Q4 2018 to Q3 2019) is 651 EUR/tonne. For comparison, the average IP price was 671 EUR/tonne. The MIP

[962] European Union's response to Panel's question No. 85, para. 260.
[963] European Union's second written submission, para. 453.
[964] European Union's first written submission, para. 951; Indonesian's first written submission, para. 505.
[965] Indonesia's second written submission, para. 277.
[966] European Union's response to Panel question No. 85, para. 261.
[967] Indonesia's response to Panel's question no. 84, pp. 49-50.

> proposed is inappropriate, as it is not sufficient to offset the amount of countervailable subsidies.[968]

7.559. The definitive Regulation describes the exchanges between the Commission and Wilmar regarding the sufficiency of the proposed MIP as follows:

> The Commission sent the applicant a letter, setting out the reasons to reject the undertaking offer and giving the applicant the opportunity to comment. The Commission received comments from the applicant with regard to the MIP, the annual level and risks of cross-compensation, also in the context of the EBB's additional comments on the initial undertaking offer. Together with its comments, the applicant also revised certain elements of the undertaking offer outside the applicable deadline.
>
> In its comments, the applicant did not agree with the Commission's conclusion that the MIP is not sufficient to offset the amount of countervailable subsidies. The applicant did not change the methodology of calculating the proposed MIP. The Commission maintained its findings and therefore rejected the claim.[969]

7.560. Indonesia, therefore, fails to take into account the Commission's explanation as to why Wilmar's proposed MIP was inadequate. Although it does not address the Commission's explanation set out above directly, we note Indonesia's assertion that Wilmar's formula for calculating the MIP was identical "at a basic level" to the MIP formula in the Argentine undertaking, as both had a component for undistorted raw material costs.[970] However, we do not consider that mere resemblance between the two formulas "at a basic level" makes both formulas identical or that the inclusion of a component for undistorted raw material costs in a formula means that the formula will necessarily yield an MIP that offsets the amount of the relevant subsidies regardless of other components.[971] As the Commission considered the MIP foreseen in the Decision on Argentine undertaking to be adequate but considered Wilmar's proposed MIP to be inadequate, the sufficiency of the proposed MIP was also, in our view, a meaningful difference between the two undertaking offers at issue.

7.6.2.3 Did Indonesia show that the Commission did not accord the same "advantage" to Indonesian biodiesel?

7.561. As noted in paragraph 7.553 above, we cannot conclude that the Commission denied to Wilmar the "advantage" accorded by the Decision on Argentine undertaking if Indonesia fails to show that Wimar's offer was substantively equivalent to the Decision on Argentine undertaking in relation to the terms of each offer and the manner in which those terms would operate in the circumstances of each case. The discussion above reveals at least two meaningful differences between the Decision on Argentine undertaking and Wilmar's price undertaking offer.[972] Indonesia has not explained why the terms of Wilmar's price undertaking offer were substantively equivalent to the Decision on Argentine undertaking despite these differences. Therefore, we consider that Indonesia has failed to show that Wilmar sought, but was improperly denied, the "advantage" accorded to Argentine biodiesel under the Decision on Argentine undertaking. Accordingly, we reject Indonesia's claim under Article I:1 of the GATT 1994. [973] We also reject Indonesia's claims under Articles 18.3 and

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[968] Documents concerning Wilmar's price undertaking offer (Exhibit IDN-38), pp. 53-54. (redactions original)

[969] Definitive Regulation (Exhibit IDN-2), recitals 495 and 496.

[970] Indonesia's response to Panel's question no. 24, p. 49.

[971] We note that whether a particular formula yields an MIP that offsets the relevant subsidies may depend on the particular circumstances of a case.

[972] The European Union also argues that the price undertaking offers at issue were different in relation to the proposed annual import volume cap and the proposed monitoring mechanism. (European Union's response to Panel question No. 85, paras. 261-262). Indonesia submits that the two price undertaking offers were not different in relation to those aspects. (Indonesia's second written submission, paras. 279-282). However, we need not decide on these alleged additional differences, as our findings set out above sufficiently show that Indonesia has failed to establish that Wilmar's price undertaking offer was substantively equivalent to the Decision on Argentine undertaking.

[973] We note that the European Union argues that we may dismiss Indonesia's claim on the basis that Indonesia has not established a violation of Article VI of the GATT 1994 before pursuing a claim under other provisions of the GATT 1994. (European Union's first written submission, para. 952 (referring to Appellate Body

15.8 of the SCM Agreement as Indonesia has not submitted additional arguments concerning those provisions.

7.7 Whether the Commission failed to provide meaningful non-confidential summaries of EU producers' submissions

7.562. Indonesia claims that the Commission acted inconsistently with Articles 12.1, 12.3, 12.4, and 12.4.1 of the SCM Agreement by failing to require the sampled EU producers to provide meaningful non-confidential summaries of data on their cost of production and profitability during the post-IP.[974] The European Union submits that the EU producers did provide their confidential replies in a non-confidential summary form and, where appropriate, indicated a statement of reasons why summarization was not possible, in conformity with Article 12.4.1 of the SCM Agreement.[975]

7.7.1 Factual background

7.563. On 13 August 2019, the Commission transmitted sets of questions to three sampled EU producers (namely Masol Iberia Biofuel, S.L.U. (Masol), Saipol, and Verbio Vereinigte BioEnergie AG (Verbio)). The Commission requested a confidential version from each producer as well as a meaningful non-confidential summary of their responses.[976] One set of questions (List A questions) sought information on cost of production and profits for the post-IP (i.e. October 2018 to June 2019).[977]

7.564. On 10 September 2019 and 23 September 2019, Wilmar conveyed to the Commission that the sampled EU producers had not provided a meaningful non-confidential summary of that information. Wilmar indicated that it needed the information to compare the trends regarding cost of production and profitability in the post-IP with those during the investigation period and requested the Commission to seek more meaningful summaries from the relevant EU producers.[978]

7.7.2 Did the Commission fail to require meaningful non-confidential summaries?

7.565. Indonesia argues that the Commission failed to require the relevant EU producers to provide a non-confidential summary of submitted information in violation of Articles 12.1, 12.3, 12.4, and 12.4.1 of the SCM Agreement. Indonesia presents its case principally under Article 12.4.1 of the SCM Agreement, which provides:

> The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

7.566. Article 12.4.1 is thus aimed at ensuring confidentiality, transparency, and due process.[979] The first and second sentences of Article 12.4.1 of the SCM Agreement require authorities to ensure that parties submitting any information on a confidential basis provide a non-confidential summary of that information that is "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". We agree with the Appellate Body that the sufficiency

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Report, *EC – Fasteners*, paras. 392-397). In the circumstances of this case, resolving Indonesia's claim does not require us to determine whether the Article I:1 of the GATT 1994 could apply in the absence of a review under Article VI of the GATT 1994.

[974] Indonesia's first written submission, paras. 550-551 (referring to Post-IP questions (Exhibit IDN-15)).

[975] European Union's first written submission para. 1031; response to Panel question No. 94, para. 316.

[976] Post-IP development questions (Exhibit IDN-15), list A, pp. 1-2.

[977] Post-IP development questions (Exhibit IDN-15).

[978] Wilmar's letter of 10 September 2019 (Exhibit IDN-32); Wilmar's letter of 23 September 2019 (Exhibit IDN-33).

[979] Appellate Body Report, *EC – Fasteners (China)*, para. 542.

of a non-confidential summary will depend on the nature of the summarized information and the summary must allow other parties a meaningful opportunity to defend their interests.[980]

7.567. Indonesia's arguments relate to the Commission's alleged failure to provide a meaningful non-confidential summary of the three EU producers' responses to the post-IP questionnaire.[981] Thus, we understand that Indonesia's claim pertains exclusively to the first and second sentences alone. Indonesia has not alleged a violation of the third and fourth sentences of Article 12.4.1. on the basis that producers failed to provide an explanation that any of the information at issue was not susceptible of summary. Indeed, Indonesia's panel request refers exclusively to the first and second sentences Article 12.4.1 of the SCM Agreement.[982] We therefore evaluate whether Indonesia has established that the Commission acted inconsistently with the first and second sentences of Article 12.4.1 of the SCM Agreement in relation to each of the three EU producers at issue, Masol, Saipol and Verbio.

7.568. The European Union maintains that the three EU producers provided non-confidential summaries of their responses where appropriate, or otherwise provided a statement of reasons why summarization was not possible.[983]

7.7.2.1 EU producer Masol

7.569. The EU producer Masol did not provide a non-confidential summary of the information regarding post-IP cost of production and profitability requested in the List A questions. In the non-confidential version of its response, Masol redacted all information related to cost of production and profitability, indicating that the requested information "could be of significant advantage to a competitor" and was not "susceptible of public summary".[984]

7.570. As Masol did not provide a non-confidential summary of the information that it had redacted, the issue of to whether Masol's summary fulfilled the requirements of Article 12.4.1 of the SCM Agreement does not arise. Given that Indonesia has not presented a claim or arguments under the third and fourth sentence of Article 12.4.1, we decline to express any view as to the sufficiency of Masol's explanation regarding why the information at issue was not susceptible of summary.[985] Accordingly, we find that Indonesia has not established that the Commission acted inconsistently with Article 12.4.1 of the SCM Agreement in relation to the EU-producer Masol.

7.7.2.2 EU producers Saipol and Verbio

7.571. The EU producers Saipol and Verbio each submitted documents as non-confidential versions of their List A responses, but the manner in which they responded was identical. We first examine whether Saipol and Verbio provided adequate non-confidential summaries on cost of production. We then examine whether Saipol and Verbio provided non-confidential summaries on profitability.

7.572. We note that in the non-confidential versions of their responses to List A questions, Saipol and Verbio provided summaries of monthly cost of production figures for the post-IP, i.e. from

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[980] Appellate Body Report, *EC – Fasteners (China)*, paras. 541-542. See also Panel Reports, *China – GOES*, para. 7.188; *China – Broiler Products*, para. 7.50; *China – Autos (US)*, para, 7.25.

[981] Indonesia's first written submission, para. 539.

[982] The relevant portion of Indonesia's panel request provides as follows:

> (k) Articles 12.1, 12.3, 12.4 and 12.4.1 of the SCM Agreement because the EU failed to provide a meaningful non-confidential summary of the EU producers' responses to the post-investigation period questionnaire.

We note that nothing in this language refers to the issue of the sufficiency of any explanation provided by EU producers as to why the confidential information at issue was not susceptible of summary.

[983] European Union's first written submission para. 1031; response to Panel question No. 94, para. 316.

[984] Masol's, Saipol's, and Verbio's responses to post-IP development questions (open version) (Exhibit EU-74), pp. 5-6.

[985] Indonesia noted in passing that Masol did not substantiate why it could not summarize the cost of production and profitability information in the same way as Verbio and Saipol were able to. However, Indonesia's complaint remained that the Commission "should have either insisted on the EU producer providing indexes or disregarded the data submitted by it" and did not focus on the sufficiency of Masol's explanation as to why the requested information was not susceptible of summary in the absence of a basis for such arguments. In any event, such a claim would not have a basis in Indonesia's panel request.

October 2018 to June 2019. Saipol and Verbio summarized this information by taking the monthly cost of production for October 2018 as the baseline and indexing the cost of production for each subsequent month against that baseline.[986] According to Indonesia, Saipol's and Verbio's non-confidential summaries were not meaningful enough, as they did not allow Indonesian interested parties to compare trends regarding cost of production in the post-IP with those during the investigation period. Indonesia contends that the Commission should have required Saipol and Verbio to "express the absolute amounts of the post-IP as an index compared to the absolute amount for the IP".[987]

7.573. We reject Indonesia's claim that the non-confidential summaries of Saipol's and Verbio's cost of production information did not fulfil the requirements of Article 12.4.1 of the SCM Agreement. The Commission requested Saipol and Verbio to provide information regarding their monthly costs of production for the period from 1 October 2018 to 30 June 2019.[988] The Commission did not request Saipol and Verbio to present any comparison of the cost of production observed in the post-IP with the cost of production observed during the investigation period. Further, nothing in the Saipol's and Verbio's responses reveals that they submitted, in confidence, any comparison of the cost of production observed in the post-IP with the cost of production observed during the investigation period.[989] In complaining that the Commission erroneously failed to require Saipol and Verbio to submit post-IP data as an index of investigation-period data, Indonesia is effectively seeking a non-confidential summary version of a comparison between the two data sets, even though the Commission itself had not requested that comparison.

7.574. We note that Article 12.4.1 pertains to non-confidential summaries of "the information submitted in confidence". We consider that information that is not requested in the relevant questionnaire (i.e. a comparison between costs of production during the investigation period and in the post-IP), and therefore not provided by the relevant interested parties, cannot constitute information that would be "submitted" in response, in confidence or otherwise.[990] This would be the case even if a comparison between the costs of production during the investigation period and in the post-IP was relevant to the injury analysis. In this regard, we agree with the views of the panel in *China – Autos (US)* that whether a non-confidential summary is adequate should be judged in relation to the requirements of Article 12.4.1, and not in relation to the analysis of injury that the authority will undertake in its investigation.[991]

7.575. Therefore, we disagree that the Commission erred in failing to require Saipol and Verbio to summarize information that was requested in List A questions (i.e. cost of production figures for the post-IP) in relation to information that was not requested in the List A questions (i.e. cost of production for the investigation period).

7.576. We next consider Saipol's and Verbio's responses regarding profitability. In contrast to the List A questions asking for information regarding cost of production, the List A questions regarding profitability instructed EU producers to "comment on/analyse any major difference in the profitability for the above-mentioned period (i.e. 1 October 2018 to 30 June 2019) compared to the investigation period (1 October 2017 to 30 September 2018)".[992] Thus, the Commission requested raw data on profitability for the post-IP alone, but also asked the three EU producers to comment on/analyse

[986] Masol's, Saipol's, and Verbio's responses to post-IP development questions (open version) (Exhibit EU-74), p. 10.

[987] Indonesia's second written submission, para. 305.

[988] The Commission's question was as follows: "Please provide the full cost of production for the product in question on a monthly basis from October 2018 to June 2019, as well as in total for the period. In this regard please confirm that costs of production have been allocated or apportioned on a consistent basis with that used for your original questionnaire submission." (Masol's, Saipol's, and Verbio's responses to post-IP development questions (open version) (Exhibit EU-74), p. 13)

[989] Indonesia has not drawn our attention to any aspect of the record which would indicate that Saipol and Verbio submitted, in confidence, any comparison of the cost of production observed in the post-IP with the cost of production observed during the investigation period.

[990] We also note that, as the European Union argues, Indonesia has not presented any arguments as to why Saipol's summary of cost of production information for the post-IP was not an adequate summary of the actual cost of production information in relation to that period in and of itself. Indonesia's complaint is limited to the argument that the summary did not allow for a comparison of the summarized information with the corresponding information for the investigation period. (European Union's response to Panel question No. 94, para. 316)

[991] Panel Report, *China – Autos*, para. 7.29.

[992] Post-IP development questions (Exhibit IDN-15), list A, p. 1.

how the profitability for the post-IP compared with the profitability for the investigation period. Accordingly, the EU producers should either have provided a non-confidential summary of their comments/analysis as regards any major difference in the profitability for the post-IP and the investigation period, or alternatively, explained why the requested comments/analysis was not susceptible of non-confidential summary.

7.577. We note that Saipol and Verbio both redacted their comments/analysis in their questionnaire responses. Instead, the relevant portions of Saipol's and Verbio's responses each contain statements indicating that the disclosure of the relevant information "could be of significant advantage to a competitor".[993] Thus, neither Saipol or Verbio provided non-confidential summaries of the information that had been submitted in confidence. Therefore, the question as to whether Saipol's and Verbio's summaries regarding profitability fulfilled the requirements of Article 12.4.1 of the SCM Agreement does not arise. At the same time, given that Indonesia has not presented a claim or arguments under the third and fourth sentence of Article 12.4.1, we decline to express any view as to whether Saipol and Verbio sufficiently explained why that information was not susceptible of summary.

7.578. Based on the foregoing, we conclude that Indonesia has not established its claim that the Commission acted inconsistently with Article 12.4.1 in relation to the EU-producers, Saipol or Verbio.

7.8 Whether the Commission failed to provide necessary information concerning the price effects analysis

7.579. Indonesia argues that the Commission acted inconsistently with Articles 12.1, 12.3, and 15.1 of the SCM Agreement because: (a) the Commission "failed to provide necessary information to interested parties, including necessary information to propose alternative methodologies to determine the existence of price undercutting"; and (b) the Commission "provided a late disclosure of essential information concerning, among others, price elasticity and changes in the EU market".[994]

7.580. Indonesia asserts that Articles 12.1, 12.3, and 15.1 of the SCM Agreement, read together, require an authority to provide necessary information to interested parties and to give them ample opportunity to comment on that information. For Indonesia, this follows from the "objective examination" standard in Article 15.1. By preventing interested parties from commenting on necessary information, an authority precludes an objective examination of that information.[995]

7.581. The European Union argues that the Commission's price undercutting analysis in the provisional Regulation and the final disclosure contained a "significant level of detail[]". The European Union asserts that the Commission thus gave the parties access to all relevant information and provided ample opportunity to interested parties to present their case.[996] For the European Union, Indonesia has not identified with any precision what Indonesia refers to as "essential information concerning, among others, price elasticity and changes in the EU market" and thus has not met its burden of proof to establish its claim.[997]

7.582. Indonesia has identified Articles 12.1, 12.3, and 15.1 of the SCM Agreement in respect of its claim. Among these provisions, Article 12.3 of the SCM Agreement pertains most closely to the issue raised by Indonesia's claim. We therefore begin by evaluating whether Indonesia has established that the Commission acted inconsistently with Article 12.3.

7.583. Article 12.3 provides:

> The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the

[993] Masol's, Saipol's, and Verbio's responses to post-IP development questions (open version) (Exhibit EU-74), p. 8.
[994] Indonesia's first written submission, paras. 559-560; opening statement at the first meeting of the Panel, para. 131.
[995] Indonesia's first written submission, para. 558.
[996] European Union's first written submission para. 1035 (referring to Provisional Regulation (Exhibit IDN-1), recitals 285-301; Final disclosure (Exhibit EU-69), recitals 124-149).
[997] European Union's first written submission para. 1036.

authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

7.584. Article 12.3 requires authorities, "whenever practicable", to provide timely opportunities for all interested Members and parties to see "information" that fulfils the following three cumulative requirements: (a) the information is "relevant" to the presentation of their cases; (b) the information is not "confidential" as defined in Article 12.4; and (c) the information is "used" by the authority.[998] Several past panels have held that Article 6.4 of the Anti-Dumping Agreement (which is analogous to Article 12.3 of the SCM Agreement) does not require authorities to actively disclose information. Rather, the obligation is triggered only when interested parties request an authority to show any information that meets the three cumulative requirements referred to above.[999]

7.585. Indonesia's arguments on this claim are limited to bare assertions. Indonesia does not identify the precise information that the Commission allegedly did not provide or disclosed "late". Indonesia refers broadly to the Commission's alleged failure to provide "necessary information to provide alternative methodologies to determine the existence of price undercutting", and to the allegedly late disclosure of information regarding "price elasticity and changes in the EU market".[1000] These broad references, unaccompanied by citations to the provisional and the definitive Regulations or evidence on the record, do not sufficiently identify what information is at issue.

7.586. Indonesia also fails to establish that the three cumulative conditions that trigger Article 12.3 of the SCM Agreement were fulfilled, namely whether the information at issue was (a) "relevant"; (b) "not confidential", and (c) "used" by the Commission. Indonesia has further not explained why the timing of the Commission's disclosure of the relevant information could be characterized as "late". Finally, Indonesia has not asserted that any interested party requested the Commission to show the information in question. Indonesia has also not submitted any self-standing arguments in relation to Articles 12.1 and 15.1 of the SCM Agreement. For these reasons, we conclude that Indonesia has not established a *prima facie* case supporting its claims under Articles 12.1, 12.3, and 15.1 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, we conclude as follows:

a. In relation to the Commission's determination that the GOI provides a countervailable subsidy to biodiesel producers through the OPPF:

   i. Indonesia has not established that the Commission acted inconsistently with to Article 1.1(a)(1) of the SCM Agreement by determining that the disbursements from the OPPF to the biodiesel producers constituted a financial contribution by a government or public body;

   ii. Indonesia has not established that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by determining that the disbursements from the OPPF to biodiesel producers constituted financial contributions in the form of grants;

   iii. Indonesia has not established that the Commission acted inconsistently with Article 1.1(b) of the SCM Agreement by determining that the disbursements by the OPPF to biodiesel producers conferred a benefit to Indonesian biodiesel producers;

[998] Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 145; *EC – Fasteners (China)*, para. 479; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.107; *Panel Reports, Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.394; *China – Broiler Products (Article 21.5 – US)*, para. 7.280.

[999] Panel Reports, *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.395; *EC – Fasteners (China)*, para. 7.480; *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.87; and *EU – Footwear (China)*, paras. 7.646 and 7.648.

[1000] Indonesia's first written submission, para. 555.

iv. Indonesia has not established that the Commission acted inconsistently with Articles 19.1, 19.4 and 21.1 of the SCM Agreement, or Article VI:3 and Article XVI:1 of the GATT 1994, by failing to properly allocate the alleged subsidy amounts resulting from the OPPF payments, or otherwise failing to accurately determine the per unit subsidy amount or impose countervailing duties at the level not exceeding that amount;

v. Indonesia has not established that the Commission acted inconsistently with Articles 1.1(a)(1)(ii), 14, 19.3, 19.4 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, by failing to adjust the amount of the alleged subsidy "to account for discounts granted as well as export levies, transport and credit costs"[1001]; by failing to adequately explain its benefit calculation method or ascertain as accurately as possible the amount of subsidization bestowed on the investigated producer; or by failing to levy countervailing duties in the appropriate amounts; and

vi. Indonesia has not established that the Commission acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the disbursements from the OPPF, confer a benefit to the recipients which is *de jure* specific. In light of this finding, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the disbursements from the OPPF are *de facto* specific.

b. In relation to the Commission's determination that the GOI provide a countervailable subsidy to biodiesel producers through the provision of CPO:

i. the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that, through a set of measures, including an export tax and export levy, and by *de facto* acting as a price setter in the domestic CPO market, the GOI induced the domestic CPO producers to sell CPO locally and thereby entrusted or directed private CPO suppliers to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration. In light of this finding, we refrain from ruling on Indonesia's additional claim that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that the provision of CPO to biodiesel producers in Indonesia is a type of function which "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments", as specified in Article 1.1(a)(1)(iv);

ii. the Commission acted inconsistently with Articles 1.1(a)(2) and 32.1 of the SCM Agreement by determining that, through a set of measures, including an export tax and export levy, and by *de facto* acting as a price setter in the domestic CPO market, the GOI provides income or price support to the biodiesel industry;

iii. in light of our findings that the Commission acted inconsistently with Article 1.1(a)(1)(iv) and Article 1.1(a)(2) of the SCM Agreement, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by determining that CPO suppliers provide CPO to biodiesel producers in Indonesia for less than adequate remuneration, thereby conferring a benefit upon Indonesian biodiesel producers;

iv. in light of our findings that the Commission acted inconsistently with Article 1.1(a)(1)(iv) and Article 1.1(a)(2) of the SCM Agreement, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the

[1001] Indonesia's first written submission, paras. 135-145; second written submission, para. 81.

provision of CPO and provision of income or price support to the biodiesel industry are specific;

v. Indonesia has not established that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in respect of information concerning PTPN;

vi. Indonesia has not established that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by disregarding any information submitted by independent CPO suppliers when making findings concerning whether PTPN depreciated CPO prices in Indonesia; and

vii. the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in respect of independent CPO suppliers on the ground that the GOI purportedly failed to ensure submission of independent CPO suppliers' Appendix B responses.

c. In relation to the Commission's determination that imports of biodiesel from Indonesia cause a threat of material injury to EU biodiesel producers:

i. Indonesia has not established that the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement by failing to ensure price comparability, when examining the effect of Indonesian imports on the prices of domestic like products, and by failing to consider the existence of significant price undercutting for the product as a whole;

ii. the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement by failing to make an objective examination, on the basis of positive evidence, of the effect of Indonesian imports on the prices of domestic like products and improperly found significant price depression, in breach of Articles 15.1 and 15.2 of the SCM Agreement;

iii. the Commission acted inconsistently with Articles 15.1 and 15.4 of the SCM Agreement by failing to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry;

iv. the Commission acted inconsistently with Articles 15.1 and 15.7 of the SCM Agreement by concluding that the totality of threat factors that the Commission examined indicated that "the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia";

v. the Commission acted inconsistently with Article 15.7 of the SCM Agreement by failing to properly consider the existence of a change in circumstances in its threat of injury determination;

vi. Indonesia has not established that the Commission acted inconsistently with Article 15.2 of the SCM Agreement in considering that there had been a significant increase in the volume of Indonesian imports;

vii. in light of inconsistencies in the preceding steps of inquiry into the existence of a threat of material injury and in the absence of a valid finding of material injury or threat thereof, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 15.5 and 15.7 of the SCM Agreement in assessing whether the subject imports or other known factors were the cause of a threat of material injury to EU biodiesel producers; and

viii. in light of inconsistencies in the preceding steps of inquiry into the existence of a threat of material injury and in the absence of a valid finding of material injury or threat thereof, we refrain from ruling on Indonesia's claim that the Commission

acted inconsistently with Article 15.8 of the SCM by failing to exercise "special care" in the application of countervailing measures.

d. In relation to the rejection of a price undertaking offer in the investigation:

   i. Indonesia has not established that the Commission acted inconsistently with Article I:1 of the GATT 1994 and Articles 15.8 and 18.3 of the SCM Agreement by declining Wilmar's price undertaking offer after it had accepted a price undertaking in respect of Argentine exporters.

e. In relation to the Commission's non-disclosure of certain information:

   i. Indonesia has not established that the Commission acted inconsistently with Articles 12.1, 12.3, 12.4, and 12.4.1 of the SCM Agreement by failing to require the relevant EU producers to provide a non-confidential summary of submitted information; and

   ii. Indonesia has not established that the Commission acted inconsistently with Articles 12.1, 12.3, and 15.1 of the SCM Agreement by failing to provide necessary information to interested parties, including necessary information to propose alternative methodologies to determine the existence of price undercutting; or by providing a late disclosure of essential information concerning, among others, price elasticity and changes in the EU market.

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 SCM Agreement, they have nullified or impaired benefits accruing to Indonesia under that agreement.

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 SCM Agreement.