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EUROPEAN UNION – COUNTERVAILING DUTIES ON IMPORTS OF BIODIESEL FROM INDONESIA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS618/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 26 April 2024

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

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

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the European Union considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

- a. The European Union shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Indonesia shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
 - b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
 - c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel will provide reasons for the ruling either at the time that the ruling is made or subsequently in its Report. In either event, the Report will reflect these reasons.
 - d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Indonesia should be numbered IDN-1, IDN-2, etc. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5, the first exhibit in connection with the next submission thus would be numbered IDN-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
 - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request by a party for interpretation from one WTO language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.
 - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least three (3) days before the meeting, together with an

estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

- c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
 - d. The Panel may subsequently pose questions to the parties.
 - e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
 - f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
 - ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.
16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the European Union shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

Third-party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.
18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session three weeks in advance of this session.
19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
- (3) Each third party shall provide, no later than three working days before the third-party session, a list of members of its delegation who will attend the session.
20. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO language other than English, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from English to any other WTO language.

21. The third-party session shall be conducted as follows:
- a. All parties and third parties may be present during the entirety of this session.
 - b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
 - c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
 - d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
 - e. The Panel may subsequently pose questions to any third party.
 - f. Following the third-party session:
 - i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.
23. Each party shall submit one integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions, its first and second oral statements, and may also include a summary of its responses to questions following the first and second substantive meetings and comments thereon following the second substantive meeting. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.
24. Each party's integrated executive summary shall be limited to 20 pages.
25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.
28. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.
29. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Report

30. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

31. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:
- a. Each party and third party shall submit all documents to the Panel by submitting them via the Disputes On-Line Registry Application (DORA) <https://dora.wto.org> by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party, and the third parties.
 - b. By 5:00 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall submit one paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047). The DS Registrar shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.
 - c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.
 - d. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).
 - e. If any party or third party is unable to meet the 5:00 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no

later than 5:30 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impractical, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9:30 a.m. the next working day on an electronic medium reasonably acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.

- f. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.
- g. Parties and third parties are responsible, through their DORA account administrators, for creating and updating their DORA accounts. The DS Registry is available to provide assistance with managing the DORA accounts.

Correction of clerical errors in submissions

- 32. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2**ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING
BUSINESS CONFIDENTIAL INFORMATION***Adopted on 26 April 2024*

1. For the purpose of this proceeding, business confidential information (BCI) is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the European Commission as confidential in the course of the countervailing proceeding at issue in this dispute.
2. Without prejudice to the provisions of paragraphs 3 and 4, no person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party, or an outside advisor to a party or a third party for the purposes of this dispute. However, an outside advisor is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceeding at issue in this dispute, or an officer or employee of an association of such enterprises.
3. Where a third party receives written submissions pursuant to the Working Procedures, it shall receive a version of those submissions and any exhibits with BCI redacted. The BCI-redacted versions of written submissions and exhibits received by third parties shall be sufficient to convey a reasonable understanding of the nature of the information at issue. The written submissions and exhibits, and their BCI-redacted versions, shall be submitted at the same time.
4. A third party may request access to the BCI version of a BCI-redacted written submission or exhibit received pursuant to the Working Procedures. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI. A party requested by a third party to provide that third party with access to BCI must provide such access promptly.
5. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.
6. When a party or third party includes BCI in a submission or exhibit, the cover and/or first page of the document containing BCI, and each page of the document, shall be marked to indicate the presence of such information. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific information in question shall be placed between double square brackets, as follows: [[xx.xxx.xx]]. BCI presented in the form of, or as part of, an exhibit shall be marked to indicate, in addition to the above, that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit [MEMBER SYMBOL]-1 (BCI)).
7. An alternative approach may be taken to that described in paragraph 6 for documents previously treated by the investigating authority of the Respondent party as confidential or business proprietary information for purposes of the countervailing duty proceeding at issue in this dispute. For such documents, a party may mark on the cover of the document "This document was submitted to or created by the [name of investigating authority] and retains its original confidentiality markings". Where a party has so marked a document, information marked as business proprietary information by the original confidentiality markings, or words to that effect (including headers and bracketing), shall be deemed to comply with the requirement set out in paragraph 6.

8. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, when BCI is submitted: (a) in electronic format using the Disputes Online Registry Application (DORA), the BCI document category needs to be selected to restrict access to the authorized users; and (b) on a storage medium, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

10. When a party or third party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in their documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6.

11. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI, information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

12. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

13. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. The Panel issued its Interim Report to the parties on 17 April 2025. The European Union submitted a written request for review of precise aspects of the Interim Report on 8 May 2025. Indonesia did not request the Panel to review any aspects of the Interim Report at that time. Indonesia subsequently submitted written comments on the European Union's written request on 22 May 2025. Neither party requested the Panel to hold an interim review meeting.

1.2. In accordance with Article 15.3 of the DSU, this Annex responds to the issues raised by the parties in the context of the interim review. Apart from the specific changes described in the following section, we have also corrected a number of typographical errors and other non-substantive errors throughout the Report, including those identified by the parties, which are not referred to specifically below. The footnote numbers and paragraph numbers in the Final Report have changed due to certain revisions. The text below refers to the numbering in the Interim Report, with the numbering in the Final Report in parentheses for ease of reference, if different.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE EUROPEAN UNION

2.1 Footnote 33 to paragraph 7.8

2.1. The European Union requests the Panel to add language to footnote 33 to reflect that the applicable biodiesel blending rate was higher, at 30%, for power plants during the investigation period. Indonesia does not object to the proposed change. In line with the European Union's request, we have revised footnote 33 to indicate that the B20 blending mandate requires "at least a 20% blending rate with mineral diesel", in accordance with MEMR Regulation 12/2015.

2.2 Paragraph 7.120

2.2. The European Union requests the Panel to delete the language "in an effort" as it appears twice in the introductory paragraph 7.120, submitting that the language is superfluous. According to the European Union, the GOI's use of export restraints and intervention in the CPO market to *de facto* control domestic CPO prices reflected "positive actions" taken by the GOI to develop the biodiesel industry via the provision of cheaper CPO, among other tools. Indonesia did not comment in this respect. The Panel has made the requested change as it does not alter the paragraph's meaning.

2.3. The European Union additionally submits that paragraph 7.120 does not reflect the set of measures considered in the Commission's determination as it does not refer to the fact that the GOI provided subsidies directly to CPO producers during the POI. In support of its comment, the European Union refers to recital 90 of the Provisional Regulation which states:

In addition to the export tax and levy on CPO and downstream products, the GOI also intervenes in the CPO market by *de facto* controlling, through the State owned company PTPN, the domestic CPO prices, ensuring that CPO is sold at an artificially low level. Moreover, the GOI provides subsidies to CPO producers in order to ensure that they comply with the policy of providing CPO at artificially low prices.¹

2.4. The European Union requests that we refer to subsidies provided directly to CPO producers as part of the "set" of measures that the Commission considered in determining that the GOI entrusts or directs CPO producers to provide CPO to biodiesel producers.

¹ Provisional Regulation (Exhibit IDN-1), recital 90.

2.5. Indonesia disagrees with the proposed change, submitting that the Interim Report properly characterizes the relevant "set of measures".

2.6. We note that before the Panel, Indonesia argued that the Commission "determined that *through the export restraints on CPO and the sales of CPO by PTPN* the GOI entrusted CPO producers to sell CPO for less than adequate remuneration to biodiesel producers"², thus identifying export restraints and GOI involvement in PTPN as relevant to the Commission's assessment of entrustment or direction. In its first written submission, we note that the European Union addressed the export restraint system³, *de facto* control of PTPN and price setting⁴, and also direct subsidies that were provided by the GOI to CPO producers.⁵ We note that the European Union also said the following in respect of direct subsidies in its first written submission to the Panel:

[T]he Commission identified that whilst any support to the CPO industry cannot, in isolation, be regarded as directing CPO producers to provide CPO for LTAR, 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".⁶

2.7. Turning to the Commission's determination, as we have noted, in its assessment of direction or entrustment in the Provisional Regulation, the Commission similarly identified export restraints put in place by the GOI, alleged GOI intervention in the CPO market through PTPN, and subsidies provided to CPO producers for the purported purpose of ensuring compliance with the policy of providing CPO at artificially low prices. In its assessment of financial contribution, 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".⁷ Next, the Commission discussed the GOI's further intervention in the market in order to *de facto* control CPO prices through PTPN.⁸ Following its evaluation of these *two* aspects, 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 also that "PTPN's activity clearly qualifies as th[e] 'demonstrable link' between the policy and the conduct of private bodies involved".⁹ The Commission then 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".¹⁰ The Panel took the view that the Commission based its determination of entrustment or direction on its assessment of the export restraints and GOI involvement through PTPN.

2.8. We note that the Commission's discussion of subsidies being provided to oil palm plantations only appears *after* reaching the conclusion that CPO producers are "entrusted" or "directed" by the GOI, with the Commission stating that the direct subsidies to CPO producers "encourage" or "guarantee" that CPO suppliers "comply with the mandate imposed on them".¹¹

2.9. In view of the manner in which the Commission considered the direct subsidies to CPO producers, as well as the European Union's own observation that support to the CPO industry was analysed to merely *confirm the existence of* "entrustment" or "direction", the Panel took the view that the Commission had not relied on subsidies to CPO producers to establish the existence of entrustment or direction, and therefore did not refer to the direct subsidies in the Interim Report, in the evaluation of the Commission's determination of entrustment or direction.

2.10. Notwithstanding, in response to the European Union's comment, the Panel has included language in paragraph 7.120 to additionally reflect the Commission's observation that the GOI provided subsidies directly to CPO producers to ensure that CPO producers comply with the

² Indonesia's first written submission, para. 213. (emphasis added)

³ European Union's first written submission, paras. 158-162.

⁴ European Union's first written submission, paras. 163-169.

⁵ European Union's first written submission, paras. 170-171.

⁶ European Union's first written submission, para. 273. (emphasis added)

⁷ Provisional Regulation (Exhibit IDN-1), recital 123.

⁸ Provisional Regulation (Exhibit IDN-1), recitals 124-146.

⁹ Provisional Regulation (Exhibit IDN-1), recital 150.

¹⁰ Provisional Regulation (Exhibit IDN-1), recital 152.

¹¹ Provisional Regulation (Exhibit IDN-1), recitals 153 and 155.

policy of providing CPO at artificially low prices. The Panel will additionally provide its analysis of the Commission's observations regarding these subsidies in paragraph 7.161 of its Final Report. We discuss our decision to add paragraph 7.161 to the Final Report in paragraphs 2.50.-2.52. below.

2.3 Paragraph 7.121

2.11. The European Union submits that the Panel's description of the "set" of measures applicable to the Commission's determination of "income or price support" is incorrect. The European Union submits that Commission analysed the following "set" of measures when evaluating the existence of income or price support to biodiesel producers: (a) the export restraint system; (b) the provision of CPO at artificially low prices through price setting by PTPN and inducing the CPO suppliers to follow those prices; (c) direct subsidies to CPO producers to ensure that CPO producers comply with the policy objectives; and (d) actions to stimulate domestic demand through the OPPF and the blending mandate. The European Union submits that this set of measures is not the same as the "set" of measures that the Commission evaluated when determining that the GOI entrusts or directs private CPO producers provide CPO to biodiesel producers. Accordingly, the European Union requests the Panel to modify paragraph 7.121 so as not to say that "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".

2.12. Indonesia disagrees that the Panel's description of the set of measures applicable to the Commission's determination of "income or price support" is incorrect. Indonesia submits that the recitals 191 and 192 of the Provisional Regulation reveal that the Commission analysed the exact same set of measures in determining "income or price support" as it did when determining that the GOI entrusts or directs private CPO producers provide CPO to biodiesel producers.

2.13. The European Union argues that recitals 188 and 189 of the Provisional Regulation identify the relevant measures that were analysed in determining "income or price support". The European Union further submits that, in paragraph 319 of its first written submission, it had clearly identified the applicable measures that the Commission relied upon in its determination of "income or price support".

2.14. As the European Union points out, we acknowledge that the European Union had referred to four categories of measures related to the Commission's determination of "income or price support", in paragraph 319 of its first written submission, stating as follows:

As to the measures, these are described in recitals (188) to (190) of the Provisional Regulation, and notably include the export restraint system, the provision of CPO at artificially low prices through price setting by PTPN and inducing the CPO suppliers to follow those prices, direct subsidies to CPO producers to ensure that CPO producers comply with the policy objectives, and actions to stimulate domestic demand through the OPPF and the blending mandate.¹²

2.15. This passage makes plain reference to recitals 188–190 of the Provisional Regulation. We begin by noting that the Commission states the following in recital 188 of the Provisional Regulation:

Through several instruments, the GOI intervenes in the CPO market in order to boost the development of the biodiesel industry. First, the GOI has a system of export restraints in place (through export taxes and export levies) which is used as a tool to depress CPO prices in Indonesia to the benefit of the downstream industries, including biodiesel producers. Second, the GOI, through the State-owned company PTNP, de facto sets the CPO prices at artificially low levels prices, which other CPO suppliers follow in accordance with the stated policy to support the development of the biodiesel industry. The GOI also uses other measures, such as direct subsidies to CPO producers, to ensure that CPO producers comply with the policy objectives.¹³

¹² European Union's first written submission, para. 319

¹³ Provisional Regulation (Exhibit IDN-1), recital 188.

2.16. The Commission referred to three categories of measure in this passage: first, to export restraints in place; second, to alleged *de facto* price setting through PTPN; and third, to "direct subsidies to CPO producers, to ensure that *CPO producers* comply with the policy objectives". The three categories correspond to the types of measures that the Commission had identified at the outset of its discussion of the subsidy scheme, "Government support to the biodiesel industry including through the provision of palm oil (CPO) for less than adequate remuneration".¹⁴

2.17. The European Union submits that recital 189 of the Provisional Regulation identifies *further* GOI actions that the Commission analysed as part of the "set" of measures, in the determination of "income or price support". Specifically, the European Union contends that, as part of the analysis, the Commission also evaluated "actions to stimulate domestic demand through the OPPF and the blending mandate". The Commission states the following in recital 189 of the Provisional Regulation:

All these actions have to be understood in the broader context of encouraging the development of the biodiesel industry, such as through mandatory blending requirements as well as the set-up of the OPPF for the benefit of biodiesel producers. Indeed, the GOI has established a system, which artificially creates a high demand for biodiesel through the blending mandate. The GOI has implemented the so-called B20 blending mandate (51). Under this programme, for a number of applications, such as for example public transport, operators are under the legal obligation to use as fuel a blend of mineral diesel and biodiesel which contains at least 20% of biodiesel. This blending mandate is bound to increase to 30% in the near future. In this regard, the Commission considered that absent the combined blending obligation and OPPF, there would be a lower demand for biodiesel in Indonesia and therefore the revenues deriving from the sale of biodiesel would necessarily be significantly lower.¹⁵

2.18. We disagree with the European Union's contention that recital 189 expands upon the "set" of the measures that the Commission had evaluated in reaching its determination of "income or price support", for the following reasons.

2.19. First, we observe that recital begins by referring to "[a]ll these actions". The phrase "[a]ll these actions" must be understood to refer to the actions discussed in the preceding recital 188. These are (a) the export restraints; (b) PTPN involvement in the CPO market; and (c) the use of direct subsidies to CPO. This suggests that these three elements were the "set" of measures that the Commission was going to evaluate. This "set" would be evaluated, "in the broader context of encouraging the development of the biodiesel industry". The Panel therefore understands that the "set" of measures applicable to its determination of "income or price support" was identified as three GOI "actions": the imposition of export restraints, intervention through PTPN; and the use of direct subsidies. The Panel interpreted this to mean that consideration of the "context", in which this "set" of actions took place did not expand upon the list of actions constituting the measure.

2.20. Second, we note that the Commission used language at the very outset of its analysis of "price or income support" which suggests that the Commission would evaluate the same "set" of measures that it had just finished evaluating in determining that the GOI entrusts or directs private CPO producers provide CPO to biodiesel producers. As we have reflected in our change to paragraph 7.120 of the Report, the Commission evaluated the GOI's imposition of export restraints, and alleged intervention in PTPN, in its assessment of whether the GOI entrusts or directs private CPO producers. The Commission also 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. The Commission's evaluation of "price or income support" begins at recital 173 of the Provisional Regulation, in which the Commission states as follows:

In addition to the above, and for the reasons set out below, the Commission considered that *the set of measures taken by the GOI intervening in the CPO market could also qualify* as an income and price support granted by the GOI in favour of the Indonesian biodiesel producers.¹⁶

¹⁴ Provisional Regulation (Exhibit IDN-1), recitals 86-90.

¹⁵ Provisional Regulation (Exhibit IDN-1), recital 189.

¹⁶ Provisional Regulation (Exhibit IDN-1), recital 173. (emphasis added)

2.21. Based on the plain language in recital 173, the Panel views that the Commission's analysis of price or income support is based on the *same* aspects that were identified as the "set" of measures analysed in its financial contribution analysis. As we have noted, the Commission evaluated the GOI's imposition of export restraints, and alleged intervention in PTPN, in its assessment of whether the GOI entrusts or directs private CPO producers. The Commission also 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. This further supports the understanding that the Commission limited its evaluation of "price or income support" to considering the system of export restraints in place, GOI involvement in PTPN to allegedly set CPO prices at low levels and whether direct subsidies to CPO producers ensured that CPO producers provided CPO at artificially low prices. This supports the understanding that other elements not directly related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO, were not analysed. Hence, for example, the provision of OPPF payments made *to biodiesels producers* would not be part of the "set" of measures.

2.22. Third, language in recital 190 of the Provisional Regulation further confirms our understanding that the Commission's determination of "income or price support" was focused only on GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO. In recital 190, the Commission states:

Therefore, 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 a particular result, i.e. that the biodiesel producers benefit from artificially low prices for CPO, which represents around 90% of their costs of production.*¹⁷

2.23. As this passage makes clear, the focus of its analysis of "income or price support" concerns "measures" that enable the provision of CPO at low prices. We also recall that the Commission's analysis of "income or price support" falls within a subsection which is part of the broader section, "Government support to the biodiesel industry including through the provision of palm oil (CPO) for less than adequate remuneration".

2.24. Fourth, the core of the Commission's evaluation of "income or price support" appears in recital 191, in which the Commission determines the following:

By the set of measures described above, the GOI provides income support to the biodiesel industry. The regulatory conditions adopted by the GOI do not have as a side effect that CPO suppliers sell this input to biodiesel producers at lower prices than those available internationally. Such a result is intended and successfully achieved through the GOI's actions. *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 biodiesel producers. Without such actions, the biodiesel producers would not benefit from the distorting effects on CPO derived from the State intervention.*¹⁸

2.25. The passage makes clear that the Commission was evaluating the extent to which actions taken by the GOI to provide biodiesel producer with access to lower cost CPO could contribute to biodiesel producers' incomes. The Commission does not discuss whether other elements, such as support provided to biodiesel producers through OPPF payments, contributed to biodiesel producers' incomes.

2.26. We will therefore disagree with the European Union's contention that the "set" of measures considered by the Commission in determining "income or price support" should be understood to include "actions to stimulate domestic demand [for biodiesel] through the OPPF and the blending mandate". These actions are not directly related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO, and were not analysed by the Commission as such. The Panel therefore rejects the European Union's request to modify paragraph 7.121. The Panel has, however, made minor adjustments to paragraphs 7.122(a) and (b) for clarity.

¹⁷ Provisional Regulation (Exhibit IDN-1), recital 190. (emphasis added)

¹⁸ Provisional Regulation (Exhibit IDN-1), recital 191. (emphasis added)

2.4 Paragraph 7.126

2.27. The European Union requests the Panel to add the following additional language after the first sentence of paragraph 7.126.

Through those measures the GOI induced the CPO suppliers to keep CPO in Indonesia as they cannot sell at better prices which would prevail in Indonesia absent those measures. The GOI was also proactively intervening in the CPO market by subsidizing palm plantations in order to encourage private CPO suppliers to comply with the mandate imposed on them.

2.28. Indonesia submits that the addition of this language is not necessary.

2.29. The Panel declines the European Union's requested change as formulated. The Panel has modified the language in the first sentence to indicate 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"¹⁹. In addition, for consistency, the Panel added the following additional sentence to the end of the paragraph: "[t]he Commission further found that the GOI provided subsidies directly to CPO producers to ensure that CPO suppliers comply with the policy of providing CPO at artificially low prices".

2.5 Paragraph 7.128

2.30. The European Union requests the Panel to add language to paragraph 7.128 to indicate that the Commission further found that the GOI provided subsidies directly to CPO producers to ensure that CPO suppliers comply with the policy of providing CPO at artificially low prices. Indonesia asks the Panel to disregard the European Union's comment.

2.31. The Panel has made the proposed change consistent with an earlier change in paragraph 7.120 to reflect the Commission's discussion of subsidies to CPO producers. The Panel will additionally provide its analysis of the Commission's discussion of subsidies that the GOI provided directly to CPO producers in paragraph 7.161 of its Report.

2.6 Paragraph 7.136(d)

2.32. The European Union requests the Panel to modify paragraph 7.136(d) to state that the unit price was analysed during the "investigation period", not during the "investigation". Indonesia does not object to the change. The Panel has made the proposed change.

2.7 Paragraph 7.146

2.33. The European Union requests the Panel to remove language from the first sentence of paragraph 7.146 stating that there is no specific evidentiary standard to provide evidence of an explicit instruction. The European Union instead prefers that the Panel include a second sentence, "[t]he European Union considered that the findings of the Appellate Body that there is no specific evidentiary standard supported this interpretation", after the first sentence in paragraph 7.146. Indonesia objects to the proposed insertion, submitting that the European Union has not provided any reference to the alleged Appellate Body finding that "there is no specific evidentiary standard". Indonesia considers that the insertion of this language would therefore be erroneous and misleading.

2.34. The Panel has made the suggested change to remove language from the first sentence of paragraph 7.146, and adding a second sentence, as the changes does not alter its analysis.

2.35. The European Union further requests the Panel to refer to additional reference to Indonesia's and the European Union's arguments regarding the legal standard that should apply in relation to Article 1.1(i)(1)(iv) of the SCM Agreement. The European Union also requests the Panel to modify the citation in footnote 275 (280) of the Report and to otherwise reflect the European Union's argument contained in paragraph 266 of its first written submission, i.e. that entrustment or direction cannot be found to exist based solely on the economic effects of a

¹⁹ Emphasis added.

government measure, although the behaviour of private entities is not irrelevant, particularly in cases where that behaviour is not economically rational. Indonesia does not object to the inclusion of additional citation to the European Union's first written submission but objects to modifying language in this paragraph.

2.36. In response, the Panel has modified certain language and included references to Indonesia's arguments (demonstrating an explicit and affirmative action of delegation or command and consideration of the existence of a "command and control" relationship) in paragraphs 7.143 and 7.144. of the Report. The Panel has also referred to the European Union's argument that such demonstrations are not required in the third sentence of paragraph 7.146 of the Report. Finally, the Panel has made adjustments to paragraph 7.146 to reflect the European Union's argument that entrustment or direction cannot be found to exist based solely on the economic effects of a government measure, although the behaviour of private entities is not irrelevant. The Panel has also split the concluding part of paragraph 7.146 of the Report to create a new paragraph 7.147.

2.8 Paragraph 7.147 (7.148)

2.37. The European Union requests that the Panel reflect the arguments set out in its response to Panel question No. 38 that, according to public sources 30% of production was required domestically. The European Union argues that CPO producers only resorted to exporting CPO once domestic demand was satisfied. According to the European Union, this confirms that the objective of ensuring biodiesel producers had access to CPO domestically for LTAR was successful. Indonesia does not object to the introduction of references to the European Union's responses. The Panel has added the following sentence and reference to the end of paragraph 7.147 (7.148):

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

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).

2.9 Paragraph 7.156 (7.157)

2.38. The European Union requests the Panel to review its analysis of what is required to establish that a government "gives responsibility" to or "exercises authority" over a private body to provide goods. According to the European Union, "to require that the freedom of suppliers is denied conflicts with the idea expressed by the Appellate Body that the fact that private bodies keep some freedom do[es] not run counter a finding of entrustment or direction". We note that, in its comments, the European Union refers to the "idea expressed by the Appellate Body" and also the Panel Report, in *US – Countervailing Duty Investigation on DRAMS*.²⁰ Indonesia opposes the European Union's request and sees no reason to change the current language in paragraph 7.156 (7.157).

2.39. We recall our agreement with the approaches taken in prior disputes, including the view expressed by the panel in *US – Export Restraints* that entrustment and direction do not cover "the situation 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".²¹ That panel continued to explain as follows:

[G]overnments intervene in markets in various ways, and with various policy or profit objectives, and these interventions might have various results, including results that are not intended by, or that are even undesirable for, the government. We do not see how a scenario of this type would comprise the three elements that we consider to be

²⁰ The European Union also refers to the Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.38 ("we do not consider that leaving discretion to a private body is necessarily at odds with entrusting or directing that private body").

²¹ Panel Report, *US – Export Restraints*, para. 8.31.

germane to the definition of entrustment or direction. That is, the fact that two different government actions might happen to have the same result in a given situation does not transform the nature of the actions, i.e., it does not mean that the two actions are effectively one and the same. Otherwise put, the distinction that we make between entrustment or direction and a government intervention which might or might not have a particular effect in a particular market at a particular time is not merely semantic.²²

2.40. Based on this, we shared the view that 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. In this way, an investigating authority could determine whether and the extent to which the totality of governmental actions (for instance, through the alleged "set" of measures at issue in this dispute) achieved an outcome by constraining the behaviour of producers in the domestic market, as opposed to there being a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market. We are of the view that such an approach focuses on the nature of the governmental action taken rather than simply the reaction of private entities to a given governmental measure.

2.41. Toward clarifying our position, we have made minor adjustments to the language in paragraph 7.156 (7.157) to reflect our focus on whether the scope and intensity of governmental actions taken is to deny suppliers the ability to sell their products freely. Our approach is guided by, and fully consistent with, the approach taken by the panel in *US – Export Restraints*.

2.42. We note the European Union's reference to paragraph 7.38 of the panel report in *US – Countervailing Duty Investigation on DRAMS*. As reflected therein, Korea had argued that Article 1.1(a)(1)(iv) would not apply if a private body were merely entrusted or directed to consider some action, or to assist some action, rather than "carry out" some action. Korea maintained that any discretion left to the private body is fundamentally at odds with this notion of "carry out" and would not support a finding of entrustment or direction to "carry out" an action in the sense of Articles 1.1(a)(1)(i)-(iii) of the SCM Agreement. The panel found that leaving discretion to a private body is not necessarily at odds with entrusting or directing that private body, offering the example that a government could entrust or direct a private body to make a loan, but leave the terms of that loan to the discretion of the private body. We note that the panel further observed that there could very well be cases where the breadth of discretion left to the private body is such that it becomes impossible to properly conclude that that private body has been entrusted or directed (to carry out a particular task), and this is a factual/evidentiary matter to be addressed on a case-by-case basis.

2.43. We distinguish the circumstances that were being discussed by that panel – in the context of whether a government entrusted or directed a private body to make a loan while leaving the bank with discretion to define the terms of that loan – from the circumstances of the present case, which concerns the extent to which the government has entrusted or directed a private body to sell or provide its good to a particular recipient, or not at all. Accordingly, we do not consider that the findings cited by the European Union offer any guidance in this case.

2.10 Paragraph 7.158 (7.159)

2.44. The European Union requests the Panel to modify language in this paragraph to refer to 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. Indonesia asks the Panel to disregard the European Union's comment.

2.45. The Panel has aligned language mentioning directs subsidies to CPO producers with references that were also included in paragraphs 7.120, 7.126, and 7.128 of this Report.

2.11 Paragraph 7.159 (7.160)

2.46. The European Union submits that the Commission had found that the GOI also intervenes in the market supporting the CPO producers so that they can perform the public function of providing CPO for less than adequate remuneration, thus meeting the policy objective of developing the

²² Panel Report, *US – Export Restraints*, para. 8.31. (emphasis omitted)

biodiesel industry via cheap inputs. The European Union requests the Panel to take this into account in its examination. Indonesia asks the Panel to disregard the European Union's comment.

2.47. The Panel recalls that it has made minor changes to paragraphs 7.120, 7.126 and 7.128 and 7.158 (7.159) of this Report to reflect the Commission's discussion of subsidies that the GOI provides directly to CPO producers. The Panel has also included a new paragraph 7.162 of the Final Report to discuss the relevance of these subsidies to the Panel's evaluation.

2.12 Paragraph 7.160 (7.161)

2.48. The European Union disagrees with the Panel's "statement" in paragraph 7.160 (7.161) that "[t]he 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". The European Union submits that the Commission's determination showed that the GOI had an objective to develop the biodiesel industry and a set of GOI's positive actions taken for this purpose. According to the European Union, the GOI's actions include an export restraint system (to direct CPO suppliers to sell domestically first), a *de facto* control of domestic CPO prices (evidence showing price alignment through the setting up of a transparent auction system) and GOI support to CPO producers to comply with the policy objectives. The European Union has not requested a specific change be made to this paragraph. Indonesia asks the Panel to disregard the European Union's comment.

2.49. The language cited by the European Union in paragraph 7.160 (7.161) constitutes the Panel's finding following its analysis and review of the evidence before it, as reflected in paragraphs 7.158 (7.159) and 7.159 (7.160), as well as paragraphs 7.162 (7.164) through 7.169 (7.171). In these paragraphs, the Panel addresses the particular aspects identified by the European Union as the "set" of actions taken by the GOI: the use of export restraints and GOI involvement in domestic CPO producer PTPN. The Panel has also addressed the Commission's discussion of direct subsidies provided by the GOI to independent CPO producers. We see no need to respond to the European Union's comment.

2.13 Paragraph 7.161 (7.163)

2.50. The European Union requests the Panel to revise paragraph 7.161 (7.163) in certain respects. First, the European Union refers to recital 153 of the Definitive Regulation which states the following:

[T]he Commission observed that according to public sources, the domestic consumption of CPO amounts to 30% of the production. This means that CPO producers entirely satisfy the domestic demand and, after having satisfied that demand, they resort to export. The fact that 70% of the CPO production is exported therefore does not contradict the finding that CPO suppliers are deprived of a rational choice, but to the contrary. If Indonesian CPO suppliers would behave rationally, they would not satisfy the domestic demand, and they would export all, or a significantly larger proportion of, their production where they could achieve greater profit. Those potential extra-profits from exports are limited by the export restraints used by the GOI to induce CPO suppliers to sell domestically and satisfy the local needs. Hence, the fact that all the domestic demand is satisfied rather indicates that the GOI achieved its objective to source the domestic market at prices favourable to biodiesel producers.²³

2.51. The European Union submits that it is undisputed by Indonesia that CPO suppliers are directed to satisfy domestic demand first and thus, the freedom of CPO suppliers is restricted by the GOI intervention. The European Union further submits that the Panel seems to ignore the Commission's findings that the CPO suppliers' freedom was not apparent, since CPO suppliers aligned their prices to the one set by the public body, PTPN. The European Union requests the Panel to revise the terms used in paragraph 7.161 (7.163), submitting that the Panel does not seem to follow a proper legal standard on entrustment/direction, which is not about "requiring" private entities to behave in a particular manner, but rather to induce or direct them in a particular way.

²³ Definitive Regulation (Exhibit IDN-2), recital 153.

2.52. Indonesia asks the Panel to disregard the European Union's comment.

2.53. The Panel recalls its finding from paragraph 7.160 (7.161) of its Report that the Commission's analysis is flawed as it remains focused solely on the economic *effects* of various GOI measures, without adducing evidence that the GOI mandates or directs CPO suppliers (explicitly or otherwise) to provide CPO to biodiesel producers. To the extent that the export tax and/or levy and the *de facto* price setting of domestic CPO prices do not "deprive" CPO producers from exporting a portion of CPO produced in Indonesia, the Panel rejects the argument that the measures operate in a manner that entrusts or directs CPO producers to provide a good (CPO) in the sense of Article 1.1(a)(1)(iii). Therefore, the Panel disagrees with the European Union that the Commission established that the GOI entrusts or directs CPO producers in the sense of Article 1.1(a)(1)(iv). The Panel also observed that the Commission did not adduce evidence that any aspect of the GOI's actions restricts the freedom of CPO suppliers to provide CPO to purchasers other than the Indonesian biodiesel industry. The Panel therefore rejects the European Union's request for changes.

2.14 Paragraph 7.164 (7.166)

2.54. The European Union submits that the Panel applies the wrong legal standard in paragraph 7.164 (7.166), in stating that "[t]he 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". The European Union considers that this standard is "at odds with" previous-case law. The European Union maintains that the Commission in the underlying investigation found that the provision of CPO to biodiesel producers by private entities was not the free choice of the CPO suppliers bearing in mind the regulatory constraints. The European Union also refers to the GOI's policy objective to support the biodiesel producers by providing cheap CPO. The European Union reiterates its arguments that the GOI restricted the choices of supply of CPO, so that CPO suppliers satisfied local demand first before exporting, and that CPO producers followed the price set by PTPN (which was found to be a public body). Finally, the European Union submits that the GOI "compensated" CPO producers by providing them with subsidies so that CPO producers could implement the stated policy objective.

2.55. The European Union also cites to the Appellate Body's Report in *US – Countervailing Duty Investigation on DRAMS* in support of its view that governments are likely to have other means at their disposal to exercise authority over a private body some of which may be "more subtle" than a command or may not involve the same degree of compulsion.²⁴ Hence, the European Union recalls its argument that there is no need to show denial of freedom to show entrustment or direction.

2.56. Finally, the European Union submits that the Panel appears to ignore that the Commission's findings of entrustment/direction were made in the context of lack of cooperation by the GOI, thus requiring the Commission to resort to the use of facts available. In such a context, the European Union argues that the Commission's findings are sufficient to plausibly demonstrate that the actions of the CPO suppliers should be attributed to the GOI, and not just to private operators acting in a regulated environment.

2.57. Indonesia asks the Panel to disregard the European Union's comments.

2.58. We note that the European Union, in essence repeats its arguments that it presented in these proceedings, which we have already addressed in our analysis. The Panel is not persuaded by the European Union's contention that the freedom of the private bodies to act is "constrained" as, for instance, CPO suppliers are not precluded from providing CPO to purchasers other than the Indonesian biodiesel industry. The Panel also notes the European Union's reference to the Appellate Body's Report in *US – Countervailing Duty Investigation on DRAMS* and the notion that there may be more subtle means for a government to exercise authority over entities. However, it is well-established that the enquiry into whether a government entrusts or directs private entities in the sense of Article 1.1(a)(1)(iv) is a factual/evidentiary matter to be addressed on a case-by-case basis, as the Commission has itself recognized.²⁵ The Panel refers to its analysis in the preceding paragraphs of its Report that the GOI does not mandate or direct CPO suppliers (explicitly or otherwise) to provide CPO to biodiesel producers pursuant to any of the measures that were

²⁴ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.

²⁵ Provisional Regulation (Exhibit IDN-1), recital 107.

considered, and we therefore find that the GOI's actions do not constitute "entrustment" or "direction" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. We therefore reject the European Union's request to modify this paragraph.

2.15 Paragraph 7.165 (7.167)

2.59. The European Union refers to the following text in the Interim Report:

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.

2.60. The European Union requests the Panel to correct this statement. The European Union maintains that the Commission explained PTPN's decision process in recital 133 of the Provisional Regulation and provided Exhibit EU-46 (BCI) containing the explanations of the process provided by PTPN representatives during the verification visit to the GOI.

2.61. Indonesia maintains that the Panel's statement is an accurate reflection of what is stated in recitals 126 and 127 of the Provisional Regulation and therefore asks the Panel to disregard the European Union's comment.

2.62. The text which the European Union asks the Panel to review reflects what the Commission itself states in recitals 126 and 127 of the Provisional Regulation, i.e., "[o]n that occasion, both PTPN itself and the GOI gave some explanations concerning PTPN's functioning, but without providing any supporting evidence to their claims", and "the Commission had to partially rely on facts available due to the refusal of the GOI and PTPN to provide evidence on the decision making process within the structures of PTPN."

2.63. The text of the Interim Report merely repeats what the Commission itself observed about the extent of the evidence and explanation provided by the GOI about the functioning of PTPN. The Panel therefore declines the European Union's request to "correct" the cited language.

2.64. The European Union further requests the Panel to revise the finding that "[t]he Commission did not obtain 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". The European Union submits that there was no cooperation by CPO suppliers and the Commission could not use the information provided by some CPO suppliers. The European Union submits that paragraph 3 of Annex II of the Anti-Dumping Agreement applies *mutatis mutandis* to anti-subsidy investigations, which it argues supports the rationale that *a contrario* information which is not verifiable does not form part of the record that the investigating authority has to consider in its determination. Thus, the European Union maintains that the Panel's statement in footnote 307 (319) of the Report is incorrect. Footnote 307 (319) states as follows:

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's 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.

2.65. Indonesia asks the Panel to disregard the European Union's request.

2.66. The Panel considers it is factually accurate that the Commission did not consider information from independent suppliers as to whether they had been profitable in the face of measures put in place by the GOI. The Panel therefore retains the language while making a minor modification to state that the Commission did not "consider" similar information from independent CPO suppliers.

2.67. The Panel is not persuaded by the European Union's objections to footnote 307 (319). The European Union submits that information from three independent CPO suppliers regarding their profitability was not verifiable and therefore is not part of the record. However, the European Union has not explained why this information from three suppliers, provided in audited accounts, was not in itself verifiable, even to the extent those suppliers may not have provided complete responses regarding other information. We note the paragraph 3 of Annex II of the Anti-Dumping Agreement, to which the European Union refers, provides that "[a]ll information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made".

2.16 Paragraph 7.168 (7.170)

2.68. The European Union submits that the Panel in paragraph 7.168 (7.170) conflates the effects of the export restraints in place, which the European Union acknowledges were directly linked to international prices, with the effects of the GOI's intervention on the market via PTPN, which the European Union contends, ensured a low price for CPO. The European Union maintains that the Panel improperly concludes that PTPN's participation on the market had nothing to do with the low CPO prices in Indonesia. The European Union submits that this is incorrect and ignores an important mechanism used by the GOI to ensure price control. Indonesia asks the Panel to disregard the European Union's comment.

2.69. We note that the European Union criticizes the Panel's conclusions as being incorrect. More fundamentally, the European Union appears to ask the Panel to reconsider the very argument that the Panel calls into question in paragraph 7.168 (7.170). As an alternative to the explanation that PTPN's participation in the market was responsible for ensuring that CPO suppliers sell CPO at "at artificially low levels", the Panel reached the conclusion that the alignment of prices could simply be explained by the effects of the export restraints. Hence, the Panel explained: "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." We consider that the European Union's criticism is only valid to the extent we reject the possibility of this alternative explanation. We disagree with the European Union's suggestions based on our review of the available evidence and the Commission's own observations. We therefore decline to make any changes to this paragraph.

2.17 Paragraph 7.172 (7.174) and paragraph 7.173 (7.175)

2.70. The European Union requests the Panel to modify paragraph 7.172 (7.174) to reflect the manner in which Indonesia formulated its position that an investigating authority must demonstrate from a historic perspective that this function has in fact been exercised, to fulfil the requirements of Article 1.1(a)(iv) of the SCM Agreement. The Commission notes, for instance, Indonesia's statement in paragraph 190 of its first written submission that "the Commission should have analysed whether, from a traditional and historic perspective, the GOI has engaged in the provision of raw materials, and specifically CPO, to 'national companies'".²⁶ The European Union also refers the Panel to Indonesia's response to Panel question No. 34 following the first meeting.

2.71. The European Union further requests the Panel to modify paragraph 7.173 (7.175) on similar grounds. The European Union requests the Panel to clarify why it does not consider it necessary to engage with the additional issue raised by Indonesia's claim of whether the Commission 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). The European Union notes that Indonesia's arguments raise questions as to what is meant by a function "which would normally be vested in the government" and "a practice that, 'in no real sense, differs from practices normally followed by governments'". The European Union maintains that Indonesia presented this aspect of its claim as a condition precedent for any finding of "entrustment" or "direction" and an intrinsic part of the relevant legal standard. The European Union suggests that the Panel should have examined this matter as it is bound to do so by Articles 7 and 11 of the DSU, while also acknowledging that a panel is not bound to follow a particular order of analysis. The

²⁶ Indonesia's first written submission, para. 190.

European Union invites the Panel to make explicit findings on this aspect of Indonesia's claim. Alternatively, the European Union requests the Panel to, at a minimum, summarise the European Union's response to Indonesia's arguments.

2.72. Indonesia considers that the Panel is justified in exercising judicial economy on this point in light of the Panel's finding that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that the GOI "entrusted" or "directed" private CPO suppliers to provide CPO to biodiesel producers in Indonesia in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement.

2.73. We recall that Indonesia advanced several arguments in claiming that the Commission erred by finding that the private CPO producers were entrusted or directed by the GOI in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement. One aspect of those arguments pertained to the issue of whether the Commission established that the provision of CPO is a function "which would normally be vested in the government" and is "a practice that, 'in no real sense, differs from practices normally followed by governments'". As we have indicated in paragraph 7.173 (7.175), we do not consider it necessary to engage with the additional interpretative questions raised by Indonesia's claim to resolve the dispute, and we therefore decline to do so. To the extent that we have decided not to address the parties' arguments on this issue we recall that the parties have provided integrated executive summaries of their arguments, which are appended in Annexes B-1 and B-2 to this Report.

2.18 Paragraph 7.175 (7.177)

2.74. The European Union requests the Panel to modify the description of measures in paragraph 7.175 (7.177), consistent with its request made in respect of paragraph 7.121²⁷, pertaining to the Panel's description of the set of measures applicable to determination of "income or price support". The European Union maintains that the applicable measures are: (a) the export restraint system; (b) the provision of CPO at artificially low prices through price setting by PTPN and inducing the CPO suppliers to follow those prices; (c) direct subsidies to CPO producers to ensure that CPO producers comply with the policy objectives; and (d) actions to stimulate domestic demand through the OPPF and the blending mandate. Indonesia reiterates that it disagrees that the Panel's description of the applicable measures is incorrect.

2.75. We recall our disagreement with the European Union's contention that the "set" of measures considered by the Commission in determining "income or price support" should be understood to include "actions to stimulate domestic demand [for biodiesel] through the OPPF and the blending mandate". These actions are not directly related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO and were not analysed by the Commission as such. We have, however, modified paragraph 7.175 (7.177) to clarify our view that the Commission considered the same set of measures in determining "income or price support" as it did when determining that the GOI entrusts or directs private CPO producers provide CPO to biodiesel producers. Thus, we have reflected as among the "set" of measures, the GOI's provision of direct subsidies to CPO producers.

2.19 Paragraph 7.185 (7.187)

2.76. The European Union submits that the Commission's determination was not simply based on the economic effects stemming from cheaper prices for the provision of CPO, but also on the other measures issued by the GOI which support the biodiesel industry. In this regard, the European Union refers to recital 192 of the Provisional Regulation, in which the Commission states:

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[.]²⁸

2.77. The European Union requests the Panel to take this into account and make an objective and full assessment of the Commission's determination. Indonesia requests the Panel reject the implicit

²⁷ See paras. 2.11-2.26 above.

²⁸ Provisional Regulation (Exhibit IDN-1), recital 192.

allegation that the Panel failed to make an objective and full assessment of the Commission's determination of "income support" to the biodiesel industry.

2.78. The Panel first refers to paragraph 7.181 (7.183) of its Report, in which it acknowledges the quoted passage from recital 192 of the Provisional Regulation. We disagree with the European Union that the cited language demonstrates that the Commission's determination extended beyond considering whether the GOI provides "income support" to the biodiesel industry by providing access to "artificially low" prices for CPO. As we discussed extensively in our response to the European Union's comments to paragraph 7.121²⁹, and paragraph 7.175 (7.177)³⁰, we disagree with the European Union's contention that the measures should be understood to include "actions to stimulate domestic demand [for biodiesel] through the OPPF and the blending mandate", as these actions are not directly related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO.

2.79. As we have noted, the Commission makes clear that the focus of its analysis of "income or price support" is on "a set of measures" to "ensur[e] a particular result, i.e. that the biodiesel producers benefit from artificially low prices for CPO". Indeed, as noted above³¹, the Commission's analysis of "income or price support" falls within a subsection which is part of the broader section, "Government support to the biodiesel industry including through the provision of palm oil (CPO) for less than adequate remuneration". Our understanding is also confirmed in recital 190 of the Provisional Regulation, in which the Commission states:

Therefore, 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 a particular result, i.e. that the biodiesel producers benefit from artificially low prices for CPO, which represents around 90 % of their costs of production.*³²

2.80. Finally, we referred to the central recital 191 to the Commission's evaluation of why the "set" of measures adopted by the GOI "qualifies as 'any form of income/price support' in the sense of Article XVI of the GATT 1994":

By the set of measures described above, the GOI provides income support to the biodiesel industry. The regulatory conditions adopted by the GOI do not have as a side effect that CPO suppliers sell this input to biodiesel producers at lower prices than those available internationally. Such a result is intended and successfully achieved through the GOI's actions. *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 biodiesel producers. Without such actions, the biodiesel producers would not benefit from the distorting effects on CPO derived from the State intervention.*³³

2.81. We therefore analyse whether the "set" of measure directly related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO, qualify as providing "income or price support" to the biodiesel industry, consistent with the Commission's finding. However, we disagree with the European Union's contention that the measures should be understood to include "actions to stimulate domestic demand [for biodiesel] through the OPPF and the blending mandate", as these actions are not directly related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO.

2.82. We therefore disagree that the Panel failed to make an objective and full assessment of the Commission's determination by focusing on whether the GOI provides "income or price support" to the biodiesel industry by providing biodiesel producers with access to their main raw material and

²⁹ See paras. 2.11-2.26 above.

³⁰ See paras. 2.74-2.75 above.

³¹ See para. 2.23 above.

³² Provisional Regulation (Exhibit IDN-1), recital 190. (emphasis added)

³³ Provisional Regulation (Exhibit IDN-1), recital 191. (emphasis added)

cost element, CPO, at lower prices. We accordingly decline the European Union's request for changes to paragraph 7.185 (7.187) of the Report.

2.20 Footnote 341 to paragraph 7.192 (7.194)

2.83. The European Union submits that it disagrees with the Panel's rejection of its interpretation of the word "support" in footnote 341 to paragraph 7.192 (7.194) and requests the Panel to make an interpretation of the provision in light of the Vienna Convention, as opposed to just be directed by the previous interpretations made by other panels in this respect. In particular, the European Union submits that Article 1.1(b) of the SCM Agreement refers to "any form" of income or price support and thus argues that it does not follow from the text of the provision to restrict income/price support only to direct government intervention. Indonesia asks the Panel to disregard the European Union's request.

2.84. The Panel has made several clarifications to its analysis in response to the European Union's request. The Panel has deleted footnote 341 as it appeared in the Interim Report and included the text found there as paragraph 7.191 of the Final Report. The Panel has also modified the sequence of certain paragraphs and added text in paragraph 7.189 (7.191) and paragraph 7.191 (7.193) through paragraph 7.193 (7.195) of its Report for clarification.

2.21 Paragraph 7.196 (7.198)

2.85. The European Union submits that the Panel's statement in paragraph 7.196 (7.198) that "[t]here is otherwise no contention that the measures fix the price of biodiesel at a particular level to constitute 'price support'" is incorrect. The European Union submits that, in the context of the OPPF programme, the Commission found that the biodiesel price is set by the GOI at an artificially high level. The European Union submits that the Commission thus made findings that the GOI provides "price support" through "the set-up of the OPPF for the benefit of biodiesel producers" and the Panel should reflect this in its findings.

2.86. Indonesia asks the Panel to disregard the European Union's comment.

2.87. As with our changes to paragraph 7.121³⁴ and paragraph 7.175 (7.177)³⁵, discussed above, we disagree with the European Union's contention that the measures at issue related to the Commission's findings of "income or price support" include "actions to stimulate domestic demand [for biodiesel] through the OPPF and the blending mandate". As we explain, the Commission's determination of income or price support is limited to assessing the GOI's actions to ensure that biodiesel producers benefit from *artificially lower prices for CPO*, not other measures such as the OPPF or blending mandate. These other measures are not directly related to GOI's actions to ensure that biodiesel producers benefit from artificially lower prices for CPO. We have also noted the Commission's own statement at recital 191 of the Provisional Regulation that "[b]y the set of measures described above, the GOI provides *income support* to the biodiesel industry"³⁶. We therefore disagree with the European Union that the Commission identified the OPPF payments as a measure in the context of its analysis of income or price support related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO. We also disagree that the Commission analysed whether measures gave rise to "price support". We therefore reject the European Union's request for changes to paragraph 7.196 (7.198) of the Report.

2.22 Paragraph 7.197 (7.199)

2.88. The European Union provides two comments in respect of paragraph 7.197 (7.199). First, the European Union submits that it disagrees with the Panel's legal interpretation of Article 1.1(a)(2) and the finding that "any form of income ... support" requires 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". The European Union submits that "income support" does not necessarily require measures directly tied to income levels but may include a set

³⁴ See paras. 2.11-2.26 above.

³⁵ See paras. 2.74-2.75 above.

³⁶ Emphasis added.

of measures that are designed and operate to obtain the same result. The European Union submits that, otherwise, the scope of this provision becomes too narrow.

2.89. Second, the European Union requests the Panel to expand its analysis in this paragraph to consider whether the Commission acted inconsistently in finding that the GOI provides "price support" through "the set-up of the OPPF for the benefit of biodiesel producers". The European Union submits that, even under the Panel's interpretation of the applicable legal standard under Article 1.1(a)(2), the OPPF payments work to maintain the income of biodiesel producers artificially (by "covering the gap between a market price for biodiesel and the cash disbursements") and thus the OPPF payments constitute "price support".

2.90. Indonesia asks the Panel to disregard the entirety of the European Union's request.

2.91. Regarding the first aspect of the European Union's comments, the Panel has made several clarifications to its analysis in response to the European Union's request for modifications to footnote 341 and paragraph 7.192 (7.194)³⁷ of the Report. These changes affirm our view that a finding of "income support" requires 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. Regarding the second aspect of the European Union's comments, the European Union has already made comments in relation to paragraph 7.121³⁸, paragraph 7.175 (7.177)³⁹, and paragraph 7.196 (7.198).⁴⁰ In response to those comments, we have explained our view that the Commission's determination of "income or price support" is limited to assessing the GOI's actions to ensure that biodiesel producers benefit from *artificially lower prices for CPO*, not other measures such as the OPPF or bending mandate. These other measures are not directly related to GOI actions to ensure that biodiesel producers benefit from artificially lower prices for CPO. We have affirmed our view. For these reasons, we decline the European Union's request to make any changes to paragraph 7.197 (7.199).

2.23 Paragraph 7.247 (7.249)

2.92. The European Union requests the Panel to "review its understanding of the facts" as reflected in the last sentence of this paragraph of the Interim Report. The European Union asserts that CPO suppliers were not "interested parties" and that the Commission did not apply Article 12.7 of the SCM Agreement to CPO suppliers. The European Union requests the Panel to "deal with" its argument that the Commission did not resort to facts available under Article 12.7 as regards CPO suppliers, but rather used information available from other sources, and also was entitled to draw certain inferences from the lack of response by CPO suppliers.

2.93. Indonesia asks the Panel to disregard the European Union's comment.

2.94. In the last sentence of paragraph 7.247 (7.249) of the Interim Report, the Panel made the factual finding that "the Commission found that the CPO suppliers set their prices under the GOI's influence based on a resort to facts available". The Panel set out in that paragraph several aspects of the Commission's provisional and definitive Regulations that supported that factual finding. Further, in the next paragraph, the Panel set out several statements in the European Union's own submissions that confirmed that factual finding. The European Union's comments do not engage with any of the several aspects of the provisional and definitive Regulations as well as the European Union's own submissions based on which the Panel reached that factual finding. Accordingly, the European Union has failed to demonstrate how or why the Panel should "review its understanding of the facts".

2.95. The Panel now turns to the European Union's request that the Panel address its argument that the Commission did not resort to facts available under Article 12.7 as regards CPO suppliers, but rather used information available from other sources. The Panel considers that the European Union's comment is internally contradictory. On the one hand, the European Union concedes that the Commission's findings in relation to independent CPO suppliers "used information available from other sources" and involved "inferences from the lack of response by CPO suppliers".

³⁷ See paras. 2.83-2.84 above.

³⁸ See paras. 2.11-2.26 above.

³⁹ See paras. 2.74-2.75 above.

⁴⁰ See paras. 2.85-2.87 above.

At the same time, the European Union also maintains that the Commission "did not resort to facts available in the sense of Art. 12.7 of the SCM Agreement as regards CPO suppliers".

2.96. In the European Union's own words, given the absence of "direct information from CPO suppliers", the Commission used "information available from other sources" and "dr[ew] certain inferences" in making findings regarding such CPO suppliers. That, in the Panel's understanding, reflects nothing but a resort to facts available under Article 12.7. In this regard, the Panel noted the following in footnote 421 (corresponding text now in new paragraph 7.251) of the Interim Report:

We note that past panels have explained, and we agree, that 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 facts available in accordance with Article 12.7 of the SCM Agreement. (Panel Reports, *EC – Salmon (Norway)*, para. 7.348; *Korea – Stainless Steel Bars*, appealed 22 January 2021, para. 7.194).⁴¹

2.97. The Panel considers that the fact that independent CPO suppliers were not interested parties does not mean that the Commission's determinations regarding such suppliers made on the basis of the facts available do not need to comply with Article 12.7 of the SCM Agreement. In the Panel's view, it cannot be the case that an investigating authority can make determinations concerning certain entities on the basis of facts available and yet eschew the disciplines in Article 12.7 by not recognizing such entities as "interested parties". The Panel also recalls that in paragraph 7.261 (7.264) of the Interim Report, the Panel found that Article 12.7 of the SCM Agreement does not *a priori* exclude the possibility that an investigating authority may legitimately require an interested Member or interested party to furnish information regarding another entity. This finding implies, as a corollary, that an investigating authority may, depending on the circumstances, legitimately resort to facts available in respect of information concerning an entity that is not an interested party. In sum, the Panel does not view Article 12.7 of the SCM Agreement as being applicable *only* in situations involving the use of facts available in respect of information concerning interested parties.

2.98. The Panel notes that in its comments on the last sentence of paragraph 7.247 (7.249) as well as on certain other paragraphs of the Interim Report, the European Union emphasizes that the Commission did not apply facts available "to" independent CPO suppliers.⁴² The European Union appears to have wrongly assumed that the Panel found the Commission applied Article 12.7 of the SCM Agreement "to" independent CPO suppliers. The Panel found in paragraph 7.247 (7.249) that "the Commission found that CPO suppliers set their prices under the GOI's influence based on a resort to facts available" and in paragraph 7.249 (7.252) that "the Commission did resort to facts available in relation to information concerning independent CPO suppliers". Neither of these findings suggest that the Panel took the view that the Commission applied facts available "to" independent CPO suppliers. Rather, these findings simply reflect the Panel's conclusion that the Commission made certain determinations pertaining to independent CPO suppliers on the basis of the facts available. As discussed in paragraph 2.91 above, the Panel reached this conclusion in view of several aspects of the provisional and definitive Regulations as well as the European Union's own submissions.

2.99. The Panel further notes that its findings are not premised on independent CPO suppliers being interested parties. Indeed, as the Panel notes in footnote 435 (455), "the independent CPO suppliers themselves were not interested parties and ... lack of cooperation from such suppliers in their own

⁴¹ The Panel recalls that in this case, the Commission requested the GOI, i.e. the interested Member, to ensure the submission of certain information concerning independent CPO suppliers, but did not receive adequate information. As the European Union itself acknowledges, because it did not receive adequate information concerning independent CPO suppliers from the interested Member, the Commission filled the resulting "gaps" in necessary information using "information available". In the Panel's view, and in line with the view expressed by previous panels, this represents nothing but a resort to facts available in relation to information concerning independent CPO suppliers.

⁴² European Union's comments on paras. 7.247 ("CPO suppliers were not considered as 'interested parties' and the Commission did not apply Art. 12.7 of the SCM Agreement **to** them in view of the shortcomings of their cooperation"); 7.250 ("Art. 12.7 does not apply **to** CPO suppliers as a party from which the Commission requested information"), and 7.251 ("[t]he Commission did not apply facts available in the sense of Art. 12.7 **to** the independent CPO suppliers in view of the lack of cooperation by the GOI/PTPN").

right was not, and could not have been, the basis for resort to facts available." Rather, the Panel explains in section 7.4.6.3.2.2 that the basis for the Commission's resort to facts available was the GOI's failure to ensure the submission of information pertaining to independent CPO suppliers. Therefore, the fact that independent CPO suppliers were not interested parties in the underlying investigation does not affect the Panel's findings.

2.100. Thus, the Panel does not consider that the Interim Report failed to address any relevant aspect of the European Union's submissions. In any event, the Panel has made certain additions and modifications to various aspects of section 7.4.6.3.2 that respond to the relevant comments of the European Union. Such modifications do not affect the substance of the Panel's analysis or findings. The modifications are intended to make the relevant aspects of the Panel's analysis clearer and more easily comprehensible.

2.24 Paragraph 7.250 (7.253)

2.101. The European Union requests the Panel to correct the second sentence of this paragraph, asserting that the sentence misrepresents the European Union's position. Drawing the Panel's attention to its response to Panel question No. 90, the European Union asserts that the Commission invoked "Article 12.7 of the SCM Agreement due to the behaviour of the GOI as regards its own entities", i.e. PTPN (as opposed to independent CPO suppliers). The European Union also asserts that in its second written submission, it explained that when filling the gaps caused by the insufficiency of the responses in relation to PTPN and the lack of cooperation from other CPO suppliers, "the Commission could properly have regard to facts available notwithstanding that it could only rely on Article 12.7 on the grounds of the behaviour of the Government of Indonesia as regards PTPN". In the European Union's view, this makes it clear that the Commission applied Article 12.7 as regards the GOI's shortcomings with respect to PTPN. The European Union also requests the Panel to revise the fourth sentence of this paragraph to align it more closely with paragraph 307 of the European Union's response to Panel question No. 90.

2.102. Indonesia asks the Panel to disregard the European Union's comment.

2.103. The paragraph describes the European Union's position as to the basis on which the Commission resorted to facts available. The European Union's comments only reaffirm the Panel's understanding of the European Union's position on this point as reflected in this paragraph. In paragraphs 306 and 307 of its response to the Panel question No. 90, the European Union submitted:

[S]ince the Commission had to have recourse to facts available, and since there was no cooperation from CPO suppliers, this impacts the nature of the evidence on the record. Hence, the lack of cooperation meant that one of the evidential lacuna which had to be filled through information available concerned the operation of the CPO market as well as the role of PTPN. Equally, the absence of cooperation from other CPO suppliers shows that there was a Government policy in place. This is reflected in recitals (120) and (148) of the Definitive Regulation.

The European Union insists that invoking Article 12.7 of the SCM Agreement due to the behaviour of the GOI as regards its own entities falls plainly within the scope of that provision. Once an investigating authority is placed in the situation of needing to have recourse to facts available, Article 12.7 of the SCM Agreement does not preclude the investigating authority from using facts available to complete the evidential picture required for its investigation, including lacunae caused by the additional and separate lack of cooperation from other entities from which the investigating authority sought information.

2.104. Further, the European Union submitted:

In the present investigation, the necessary information that was missing related to the role and function of PTPN on the domestic market for CPO. As explained above, other domestic suppliers also failed to sufficiently respond to the questionnaires.

The "gap" in the information required was caused by both the insufficiency of the responses in relation to PTPN and the lack of cooperation from other CPO suppliers. When filling that "gap" the Commission could properly have regard to facts available notwithstanding that it could only rely on Article 12.7 on the grounds of the behaviour of the Government of Indonesia as regards PTPN.⁴³

2.105. The quotation above reveals the European Union's position to be as follows: due to the insufficiency of PTPN's response, the Commission could validly resort to facts available in the sense of Article 12.7 of the SCM Agreement. Once the Commission resorted to facts available on that basis, the Commission could also have used "facts available to complete the evidential picture required for its investigation, including lacunae caused by the additional and separate lack of cooperation" of independent CPO suppliers. In other words, the European Union has maintained before the Panel that the basis for the Commission's use of facts available to fill lacunae concerning independent CPO suppliers was the GOI's failure to provide information concerning PTPN. The paragraph, as originally formulated, reflects precisely this understanding. Therefore, the Panel sees no reason to revise this paragraph.⁴⁴

2.25 Paragraph 7.251 (7.254)

2.106. The European Union requests the Panel to correct its understanding of the Commission's determination as reflected in this paragraph. The European Union asserts that the Commission did not apply facts available in the sense of Article 12.7 to the independent CPO suppliers in view of the lack of cooperation by the GOI/PTPN. Rather, in the European Union's view, the Commission applied Article 12.7 to the GOI because of the lack of cooperation by PTPN and, separately, noted that the independent CPO suppliers failed to provide the requested information. Thus, in the European Union's view, the Commission needed to make its findings on the basis of the information available about the CPO market.

2.107. Indonesia asks the Panel to disregard the European Union's comment.

2.108. In this paragraph, the Panel refutes the European Union's view that the Commission first resorted to facts available due to the GOI's lack of cooperation in relation to PTPN, and then on the same basis (i.e. the GOI's lack of cooperation in relation to PTPN) also used facts available in relation to information concerning independent CPO suppliers. Contrary to the European Union's position, the Panel took the view that the GOI's lack of cooperation in respect of PTPN could not logically have been the basis for the Commission's resort to facts available in relation to independent CPO suppliers. The Panel has revised and simplified the language in this paragraph to make its reasoning in this regard clearer. However, the Panel disagrees with the European Union that the paragraph reflects a misunderstanding of the Commission's determination. Rather, as the Panel notes at the beginning of the paragraph, it is merely the case that the Panel does not agree with the European Union's characterization of events leading to the Commission's resort to facts available in relation to independent CPO suppliers.⁴⁵

2.26 Paragraph 7.255 (7.258)

2.109. The European Union requests the Panel to review the Panel's conclusion set out in this paragraph. The European Union asserts that the Commission only applied Article 12.7 on the basis of the GOI's lack of cooperation with respect to PTPN. The European Union notes that the Commission also asked the GOI for information about the CPO market, which was not provided by the GOI.

2.110. Indonesia asks the Panel to disregard the European Union's comment.

2.111. The Panel notes that the European Union's comment on this paragraph reiterates the concerns that the European Union expressed in its comments on paragraphs 7.247, 7.250, 7.251 and 7.255 (paragraphs 7.249, 7.252, and 7.253) of the Interim Report. For the same reasons as

⁴³ European Union's second written submission, paras. 480-481. (fn omitted)

⁴⁴ The Panel notes that paragraphs 2.96.-2.99 also respond to certain aspects of the European Union's comments on this paragraph.

⁴⁵ The Panel notes that paragraphs 2.96.-2.99 also respond to certain aspects of the European Union's comments on this paragraph.

those explained in the Panel's analysis of the European Union's comments on these paragraphs, the Panel does not consider it necessary to modify this paragraph.

2.27 Paragraph 7.272 (7.275)

2.112. The European Union disagrees with the third sentence of this paragraph. The European Union asserts that a lack of cooperation from independent CPO suppliers can constitute part of the evidence used to conclude that they were entrusted/directed. Referring to the panel report in *Korea – Commercial Vessels*, the European Union argues that a finding of entrustment or direction could be premised on circumstantial evidence.

2.113. Indonesia asks the Panel to disregard the European Union's comment.

2.114. The Panel has introduced a footnote (new footnote 471) to the sentence that the European Union comments on, with a view to addressing the European Union's point. The footnote does not alter the Panel's substantive analysis or findings.

2.28 Paragraph 7.343 (7.346)

2.115. The European Union requests the Panel to add references to the evidence provided by the European Union showing how PME imports exercised price pressure on FAME0 prices. The European Union refers the Panel to the European Union's response to Panel question No. 128 at paragraph 147, and Exhibits EU-101, EU-102, and EU-103.

2.116. Indonesia disagrees that there is a need to refer to the European Union's explanations in response to Panel question No. 128 and submits that this constitutes an attempt at *ex post* rationalisation since the references were not reflected in the record of the investigation. Indonesia contends that the additional references are not necessary to understand the Panel's rationale.

2.117. The Panel notes that paragraph 7.343 (7.346) of the Interim Report refers to the Commission's explanation of how imports of PME exert price pressure on FAME0 prices, which provides context for the Commission's finding under method 1 that the price of PME imports has implications for the broader EU biodiesel market. Insofar as the European Union's reply to Panel question No. 128 repeats the argument that PME exercises a downward pressure on the price of FAME0 blends, the Panel does not consider it necessary to add an additional reference to this reasoning. Paragraph 147 of the European Union's response to Panel question No. 128 is also responsive to the question of whether a competitive relationship exists between PME imports and FAME0 blends. The Panel recalls the Commission's findings that "the sales price of FAME0 on the Union market is affected by the price of the biodiesels blended to make it and therefore a comparison is appropriate, to check the like-for-like comparison"⁴⁶, and "[i]mports of PME thus directly compete with other types of biodiesel produced in the European Union which would otherwise be blended in larger quantities to achieve the same blend result".⁴⁷ As the Panel observes in paragraph 7.350 (7.353), these findings did not evidence the existence of a close competitive relationship between PME and FAME0. In the circumstances, the Panel agrees with Indonesia that the additional reference sought by the European Union to the explanations at paragraph 147 which assert the existence of a competitive relationship between PME and FAME0 are an *ex-post* rationalisation. The Panel therefore declines to make an additional reference to the European Union's replies to Panel question No. 128.

2.118. Exhibit EU-101 is a table comparing prices of FAME0 and PME during the investigation period. The Panel observes that this document does not form part of the record of the underlying investigation and appears to have been prepared in support of the European Union's response to Panel question No. 128. Since this document was not considered by the Commission during the underlying investigation and would only serve to confirm the Commission's adequately reasoned findings how imports of PME exercise downward pressure on FAME0 prices, the Panel declines to add a reference to this exhibit.

2.119. Exhibits EU-102 and EU-103 are a post-verification visit communication from the European Biodiesel Board to the Commission, and a Company Verification Report concerning Gunvor, an

⁴⁶ Provisional Regulation (Exhibit IDN-1), recital 297.

⁴⁷ Definitive Regulation (Exhibit IDN-2), recital 254.

unrelated importer, prepared by the Commission. The Panel observes that these documents appear to form part of the record of the underlying investigation. As it relates to the European Union's present request, both exhibits support the Commission's finding that the price of PME exercises downward pressure on the price of FAME0. While these documents merely confirm the Commission's adequately reasoned findings, the Panel considers that it is appropriate to add references to these exhibits since they are relevant to the point at issue and form part of the record of the underlying investigation.

2.29 Paragraph 7.350 (7.353)

2.120. The European Union notes the Panel's interim conclusion in paragraph 7.343 (7.346) concerning the competitive relationship between PME and other biodiesels as inputs to blends. The European Union also refers to its own arguments noted in paragraphs 7.301 and 7.349 (paragraphs 7.304 and 7.352) of the Interim Report which relate to the percentage of PME which can be included in FAME0 blends, and the existence of a certain degree of competition between Indonesian PME and FAME0 blends throughout the year. Finally, the European Union underscores the explanations it provided in response to Panel question No. 128 regarding (a) the ability of PME to exercise downward price pressure on blends; and (b) the substitution effect of PME *vis-à-vis* other FAME-type biodiesels such as RME, which would have otherwise been blended in higher quantities. In view of these observations, the European Union maintains that the Commission's determination regarding method 2: (i) does disclose how PME as an input competes with finished CFPP0 biodiesel (FAME0) through downward price pressure and thus establishes price comparability; and (ii) establishes substitutability between PME and FAME0. The European Union further maintains its arguments reflected in paragraph 7.349 (7.352) of the Interim Report which contend that since *"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"*, the adjustment for CFPP levels under method 2 is a perfectly reasonable and plausible way to ensure that comparability between the two basket of products is properly reflected.

2.121. Indonesia submits that the European Union's comments attempt to relitigate an issue that has extensively been debated during the proceedings. Indonesia also comments that even if PME and CFPP 0 biodiesel did compete (*quod non*), this does not evidence how price comparability is taken into account. Indonesia refers to its arguments that at blend level, the price advantages of PME are neutralized through the incorporation of higher CFPP biodiesel. Further, Indonesia says that the European Union does not explain how these findings would have evidenced substitutability, since Indonesian PME cannot be used where FAME0 is required. According to Indonesia at most the Panel's findings refer to some potential substitutability between PME and other types of biodiesel (e.g. RME, SME, etc.), which in practice needs to take into account the different CFPP levels to reach a CFPP 0.

2.122. The Panel considers that the aspects of the Interim Report highlighted by the European Union do not undermine the Panel's observation that the effects of PME as an input on the price of CFPP 0 blends do not evidence price comparability and substitutability between PME and FAME0. Therefore, the Panel declines to make an adjustment to this paragraph.

2.30 Paragraph 7.351 (7.354)

2.123. The European Union disagrees with the Panel's observation that it was not apparent from the text of the Commission's determinations how the price adjustment under method 2 considered and accounted for the impact of climatic conditions on the use of PME and FAME0. The European Union refers to the aspects of the Commission's determinations which note that (a) the main difference in physical properties between biodiesel types is CFPP; (b) the CFPP required by customers varies depending on the season and climatic conditions, which impacts the type of biodiesel that can be sold in different countries of the European Union; and (c) the price of FAME0 sales was reduced to the price level of PME sales in order to take account of the market value of the difference in physical properties. The European Union therefore maintains that a holistic reading of the text of the Commission's determinations shows how the adjustment considered and accounted for the impact of climatic conditions on the use of the two products. The European Union also submits that Indonesia has not brought a convincing *prima facie* case of how the price adjustment would have been manifestly implausible in order to account for the impact of climatic conditions for the use of the two products.

2.124. Indonesia submits that the European Union's comments attempt to relitigate an issue that has extensively been debated during the proceedings. Indonesia notes that the adjustment for the difference in CFPP level simply does not account for the impact of climatic conditions, as the same adjustment applies throughout the periods of the year and throughout all regions of the European Union, whereas climatic conditions mean that different volumes of Indonesian PME can be incorporated into blends depending on regions and periods of the year. Indonesia submits that the price impact of Indonesian PME in warmer regions in the summer cannot be equated to the price impact of Indonesian PME in colder regions in the winter.

2.125. The European Union's comments amount to a repetition of arguments already made in the course of the dispute. The Panel considers that the aspects of the Commission's determinations highlighted by the European Union do not evidence how the price adjustment under method 2 considered and accounted for the impact of climatic conditions on the use of the two products. The Panel therefore declines to make an adjustment to this paragraph.

2.31 Paragraph 7.364 (7.367)

2.126. The European Union requests the Panel to consider that under method 1 the Commission found undercutting with a range between 6,0% and 11,6%⁴⁸ (see recital 294 of the Provisional Regulation). If the examination of price undercutting under method 1 is valid, the European Union questions whether the ultimate findings made by the Commission are undermined, as the Panel found. Thus, the European Union requests the Panel to reconsider its interim finding that the Commission's consideration of price depression was undermined by its reference to the average undercutting found on the basis of the three undercutting methods.

2.127. Indonesia notes that in the Interim Report the Panel considers both methods 2 and 3 to be flawed. Indonesia comments that the European Union did not rely on method 1 or any other method in isolation in its analysis of price depression. Indonesia reiterates that undercutting under method 1 in any event concerns a fraction of the market, from which price depression effects for the entire biodiesel market cannot be derived. Finally, Indonesia notes that a finding of price undercutting alone would not be sufficient to establish price depression, since those are two separate lines of inquiry.

2.128. The Panel recalls its findings that the Commission's determination of price depression was based on consideration of all three methods. As such, the Panel does not consider that a finding of validity as regards method 1 in the Commission's examination of price undercutting warrants a reconsideration of the interim findings in this paragraph concerning the Commission's examination of price depression.

2.32 Paragraph 7.390 (7.393)

2.129. The European Union submits that the Interim Report does not appear to address the first, overarching rebuttal formulated by the European Union in relation to the relevance of the "fragile" situation of the domestic industry in the context of an analysis under Article 15.7 of the SCM Agreement. The European Union submits that while the existence of a fragile situation can indeed be a solid starting point for a threat of injury determination, the Commission is not barred from providing a reasoned and reasonable explanation as to how the situation of the industry is likely to change in the imminent future resulting in material injury. The European Union contends that Indonesia does not contest the projections made by the Commission to find a threat of material injury in this case. The European Union maintains that the Panel should look at the issue of "fragility" first and foremost by addressing this preliminary overarching argument.

2.130. Indonesia submits that the European Union misunderstands Indonesia's argument to be that a threat of injury would require a demonstration that the domestic industry is in a fragile situation. Indonesia says that it does not make such an argument, but notes that in the present case, the Commission's threat of injury analysis was premised on the fact that the European Union industry was in a fragile situation. Indonesia notes the Panel's interim finding that the Commission's determination in that regard was flawed. Accordingly, Indonesia submits that the entire threat of injury analysis is flawed as it is based on a wrong premise. In other words, Indonesia

⁴⁸ Provisional Regulation (Exhibit IDN-1), recital 294.

contends that the threat of injury analysis cannot stand if the European Union has not properly assessed the state of the domestic industry as a starting point.

2.131. The Panel understands the European Union's submission to be that the fragile state of the domestic industry is a distinct issue, which is not essential to the analysis under Article 15.7 of the SCM Agreement. This is because a threat of injury can exist even when the domestic industry is not in a fragile situation. The Panel recalls that the Commission based its determination of the threat of injury on the fragile state of the domestic industry. The European Union's comments on the Interim Report do not challenge the Panel's description of the Commission's basis for the determination of the threat of injury. The European Union does not dispute therefore that the Commission chose the fragile state of the domestic industry as the starting point of its analysis under Article 15.7 of the SCM Agreement. That fragile state of the domestic industry underpinned the Commission's overall conclusion why the threat it predicted would occur. In other words, while fragility may not always be relevant to an examination of threat of injury, it was integral to the Commission's examination in this case. Therefore, the Panel does not consider it necessary to separately address the relevance of the fragile (or not) situation of the domestic industry in the context of an analysis under Article 15.7 of the SCM Agreement.

2.33 Paragraph 7.406 (7.409)

2.132. The European Union draws the Panel's attention to its comments on paragraph 7.390 of the Interim Report. The Panel understands the European Union to refer to the text of the Interim Report which states 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 ... is in fact fragile." Indonesia also refers the Panel to its responses formulated in the context of paragraph 7.390 (7.393). The Panel refers to its response to the parties' comments on paragraph 7.390 (7.393). The Panel recalls that the Commission's determination concerning the fragile state of the domestic industry was integrated into its examination of the factors in Articles 15.4 and 15.7 of the SCM Agreement. As such, the Panel did not isolate the determination of fragility from the Commission's overall examination of the state of the domestic industry and threat of injury.

2.34 Paragraph 7.412 (7.415)

2.133. The European Union draws attention to the Panel's interim finding that the Commission overemphasised the significance of the decrease in profitability of 5% seen in the second quarter of 2019. The European Union submits that: (a) it is undisputed that, following the exceptional profitability of post-IP Q1 2018, the industry's profitability constantly declined throughout the rest of the post-IP; and (b) there is no explanation for decrease in profitability of 5% other than the Indonesian imports, which were entering the European Union in significant quantities. The European Union submits that there was no overreliance on this decrease in profitability, which the Panel does not appear to have appreciated properly in view of the prospective nature of a threat of injury assessment. The European Union also submits that the Panel should address why the constant decreasing trend of profitability post-IP was not considered of decisive importance in the context of the fragility analysis. The European Union also maintains that the Panel failed to properly assess the high "relative weight" of the 5% decrease in profitability the second quarter of 2019.

2.134. Indonesia submits that explanations were provided for the fluctuations in profitability seen throughout the post-IP. Indonesia contends that the European Union disregarded the overall 3.8% profitability seen in this period and focused on a single quarter. Indonesia also refers to its arguments regarding the impact of imports of biodiesel from Argentina during the post-IP.

2.135. The Panel assessed the 5% decrease in profitability and observed that this decrease related to only one quarter and that overall profitability during the post-IP was 3.8%. The Panel recalls its interim findings that the European Union disregarded evidence which provided explanation for the lower profits observed in the post-IP and disregarded the high profits of one producer as exceptional. That evidence is referenced in the preceding paragraphs of the Interim Report. This uneven approach to the probative value of these elements of evidence undermined the objectivity of the Commission's consideration of profitability. The European Union's comments do not undermine the central finding in this paragraph, i.e. that the Commission was not objective in its consideration of evidence because it disregarded relevant alternative explanations for the fluctuations in profitability,

focused on the decrease in profits seen in a single quarter and disregarded the overall positive profitability of 3.8% seen during the post-IP.

2.35 Paragraph 7.449 (7.452)

2.136. The European Union submits that the Panel's finding that "the post-IP data included by the Commission in its examination does not show that the imports continued increasing after the investigation period" is mathematically incorrect. The European Union states that the total volume of Indonesian imports during the investigation period (515,068 MT) was lower than the total volume of imports from Indonesia during the post-IP (581,078 MT). The European Union also highlights that the volume of subject imports during the first two quarters of 2019 (that fell in the post-IP) had already amounted to 85% of total volume of imports during the investigation period.

2.137. Indonesia disagrees with the European Union and asserts that the import volume figures demonstrated that imports from Indonesia had resumed following the termination of unlawful anti-dumping duties and were stabilizing (and in fact slightly declining).

2.138. The Panel does not consider it necessary to revise this paragraph. While the European Union correctly asserts that "as a matter of pure mathematics" the total volume of Indonesian imports during the investigation period was lower than the total volume of imports from Indonesia during the post-IP, the Panel does not consider that this demonstrates that imports were continuing to increase after the investigation period. The total import volume during the post-IP is a sum of import volumes observed during three full quarters. However, of the four quarters of the IP, the volume of Indonesian imports in the first two quarters was either zero or very limited due to the existence of anti-dumping measures, that were lifted only in March 2018 (i.e. well after the start of the second quarter of the IP). Furthermore, a quarterly comparison between the second quarter of 2018 (i.e. the first quarter within the investigation period that was unaffected by anti-dumping measures) and the second quarter of 2019 (i.e. the last quarter of the post-IP) shows that the import level was lower during the latter. As this paragraph of the Interim Report also notes, at no point in the post-IP did the import level exceed the level observed in the third quarter of 2018.

2.139. Therefore, the Panel considers that a purely mathematical comparison between the sums of imports observed during the investigation period and the post-IP does not invalidate the Panel's finding that "the post-IP data included by the Commission in its examination does not show that the imports continued increasing after the investigation period". For the same reasons, the percentage of the total volume of imports during the investigation period that the import volumes during the first two quarters of the post-IP represented also does not invalidate the Panel's finding that the European Union's comment pertains to.

2.36 Paragraph 7.450 (7.453)

2.140. The European Union disagrees with the Panel's analysis in this paragraph. The European Union asserts that the "sudden, sharp" increase of the imports during the last quarter of the IP, paired with the elements of available spare capacity, lack of alternative export markets, and significant undercutting was sufficient for the Commission to reach a finding of likelihood of substantial increase in imports in the future and an affirmative finding under Article 15.7 of the SCM Agreement. The European Union refers in this regard to its comments on paragraph 7.449 (7.452) showing that the post-IP imports were already higher than during the investigation period and were already reaching a substantial level similar to the import level during the investigation period.

2.141. Indonesia disagrees with the European Union and states that the European Union is seeking to relitigate the matter. Indonesia highlights that the data on the record confirmed that Indonesian imports were not increasing regardless of the allegations regarding spare capacity, lack of alternative export markets and significant undercutting.

2.142. The Panel does not consider it necessary to revise this paragraph. For the same reasons as those set out above, the Panel does not consider that its findings to be affected by the European Union's assertion that the post-IP imports were already higher than during the investigation period and were already reaching a substantial level observed during the investigation period. The Panel also considers that in light of the import volume data from the post-IP, the

"sudden, sharp" increase of the imports during the last quarter of the investigation period was not a sufficient basis for the Commission's finding that imports were likely to continue increasing. Furthermore, the Panel recalls its finding in paragraph 7.509 of the Interim Report 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 this reason, the Panel does not agree with the European Union's comment that the import levels observed by the Commission together with "available spare capacity, lack of alternative export markets, and significant undercutting" provided a valid basis for the Commission's finding of likelihood of substantial increase in imports in the future.

2.37 Paragraph 7.461 (7.464)

2.143. The European Union asserts that it disagrees with the findings in this paragraph of the Interim Report. The European Union argues that since (a) there was a sharp increase in subject imports during the IP; and (b) there were "continuous imports" during the post-IP, that had already reached a level similar to the import level observed during the IP, the European Union's view that the continuation of imports at that level posed a threat of material injury is not an *ex post* rationalisation.

2.144. Indonesia notes that the European Union does not seek to contradict the fact that the record indicates that the European Union determined that there would likely be a future increase in imports from Indonesia and that this was the root cause of the threat of injury.

2.145. The Panel does not consider it necessary to revise this paragraph. The Panel already explained in this paragraph that the preliminary and definitive Regulations 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 and that the Commission had rather gone further and explicitly concluded that there existed "the likelihood that such imports will continue to increase". Nothing in the preliminary and definitive Regulations establishes that the affirmative threat of injury determination would have been valid even in the absence of the Commission's explicit finding regarding "the likelihood that such imports will continue to increase". The preliminary and definitive Regulations also do not explain why the continuation of import volumes at a level that the Commission had already observed (during and after the IP), and that had not yet caused material injury, would nonetheless do so in the future. Thus, the European Union's argument that the fact the imports increased sharply during the investigation period (following the removal of anti-dumping duties) and remained at a high level after the investigation period established the existence of a threat of injury is an *ex post* rationalization.

2.38 Paragraph 7.549 (7.552)

2.146. The European Union invites the Panel to clarify the meaning of its *arguendo* approach in light of the European Union's view that because Indonesia has failed to argue that Article 18.3 of the SCM Agreement was applied inconsistently with the provisions of Article VI of the GATT 1994, the Panel may dismiss Indonesia's claim under Article I:1 of the GATT 1994 without further analysis. Indonesia does not respond to the European Union's comment.

2.147. The Panel notes that footnote 950 (973) of the Interim Report addressed the European Union's view regarding this issue. The Panel does not consider it necessary to provide additional explanations in that regard.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA****I. INTRODUCTION AND MEASURES AT ISSUE**

1. Indonesia considers that the Biodiesel Definitive CVD Regulation, the Biodiesel Provisional CVD Regulation and the investigation leading to the imposition of the countervailing measures are inconsistent with the Agreement on Subsidies and Countervailing Measures and Article XXIII of the General Agreement on Tariffs and Trade 1994.

II. DETERMINATIONS CONCERNING THE OIL PALM PLANTATION FUND ("OPPF")**A. Determination that the OPPF's payments constitute a financial contribution**

2. Oil Palm Plantation Fund ("OPPF") is funded through export levies on the exportation of CPO and its derivatives such as biodiesel. As soon as an Indonesian biodiesel producer sells biodiesel in Indonesia to a petrofuel entity under the Public Service Obligation ("PSO"), it is entitled to a full price for its biodiesel to be paid by petrofuel entities and by the OPPF. Applicable regulations in Indonesia restrict the use of OPPF funds for specific purposes, the largest being the payment for the purchases of biodiesel by petrofuel entities under the PSO. Indonesian biodiesel producers when exporting goods subject to export levies have a legal certainty that any funds that they pay as export levies to OPPF will return to them as a payment for biodiesel sold under the PSO. Thus, actions of the OPPF Management Agency that collects export levies from biodiesel exporters to return them back as a payment for biodiesel are at best comparable to that of the handler of an escrow account for the benefit of Indonesian biodiesel producers. OPPF payments do not involve financing by the GOI to biodiesel producers and do not constitute a government practice which involves a direct transfer of funds. Thus, the Commission acted contrary to Article 1.1(a)(1) of the SCM Agreement when it considered that payments from OPPF to the biodiesel producers entailed a financial contribution by a government or public body.

B. Determination that OPPF payments constitute grants

3. A grant is a direct transfer of money that is not subject to a reciprocal obligation upon the recipient such that the latter has to provide a grantor nothing in return.¹ It follows from Regulation 41/2018, the Financing Agreements for the Procurement of Biofuel Type Biodiesel as well as from invoices that biodiesel producers issue to OPPF that in exchange for OPPF payment the Government of Indonesia ("GOI") receives a consideration in the form of biodiesel delivered to petrofuel entities under the PSO. Assuming the Panel finds that OPPF payments constitute a financial contribution by the GOI, then the Commission's conclusion that OPPF payments are grants is not based on an unbiased and objective examination of positive evidence on the record and is contrary to Article 1.1(a)(1)(i) of the SCM Agreement.

C. Determination that the OPPF's payments conferred a benefit on biodiesel producers

4. The EU acted contrary to Article 1.1(b) of the SCM Agreement because it determined that OPPF payments conferred a benefit on biodiesel producers and in particular because the EU selected a wrong counterfactual to analyse the situation of the recipient on the marketplace, absent the financial contribution. Namely, to conclude that payments from the OPPF conferred a benefit on biodiesel producers, the EU alleged that, absent the OPPF, biodiesel producers would either receive the price of mineral diesel or there would be no

¹ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616.

sales of biodiesel. The Commission's rationale is based on an incorrect counterfactual, which without any adequate reasoning or explanation considers the withdrawal of both the blending mandate and the OPPF, rather than withdrawal of the OPPF alone.

D. The European Commission erred in its assessment of the role of the export levies

5. In examining whether payments from the OPPF confer a benefit, the funds received from the OPPF should not be considered in isolation from the funds contributed to the OPPF. Absent contributions from the export levy, there would simply be no fund to be distributed from the OPPF. This would have demonstrated that payments received from the OPPF have been compensated by export levies so that there is no "benefit".

E. The failure to properly allocate the alleged subsidy amounts resulting from OPPF payments

6. The Commission acted contrary to Article 19.4 of the SCM Agreement when it levied a countervailing duty on imported biodiesel in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. Namely the EU erroneously allocated alleged OPPF subsidy to export sales of biodiesel disregarding the fact that OPPF payments are contingent solely on the domestic sales of biodiesel to petrofuel entities, and are not contingent on – or paid in conjunction with – exports of biodiesel. At the same time, 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. Thus, no countervailing duty may be imposed on an imported product if no subsidy is found to exist with respect to that imported product, since in such cases the amount of subsidy found to exist with respect to the imported product would be zero.

F. The failure to adjust the amount of the subsidy to account for discounts granted as well as transport and credit costs

7. The EU acted contrary to 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 because it failed to adjust the amount of the alleged subsidy to account for discounts granted as well as export levies, transport and credit costs and 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..

G. Erroneous finding that OPPF payments were *de jure* and *de facto* specific

8. The Commission acted contrary to Articles 1.2, 2.1 and 2.4 of the SCM Agreement by finding that through a set of measures the GOI provided support to the biodiesel industry, including through a direct transfer of funds via the 'Biodiesel Subsidy Fund', conferring a benefit to the recipients which is *de jure* and *de facto* specific. Indonesia considers that the Commission's determinations are not precise enough to warrant a finding of specificity. This is evidenced by the fact that the Commission refers in very broad terms to "industries, [...] relating to the palm oil (CPO) value chain". Moreover, there is no such thing as "value chain" specificity in Article 2 of the SCM Agreement.

III. DETERMINATIONS CONCERNING THE ALLEGED GOVERNMENT SUPPORT FOR THE PROVISION OF CRUDE PALM OIL ("CPO")

A. Determinations concerning the existence of a financial contribution

9. The CPO market in Indonesia operates as an open market system where prices are determined by supply and demand dynamics. The domestic trading of CPO is guided by daily tenders organized by the state-owned company PT Perkebunan Nusantara (PTPN) and its

subsidiary PT. KPBN. These tenders involve online auctions where participants place bids, and PTPN can either accept the highest bid or re-offer its target price to the top three buyers. The prices accepted by PTPN are influenced by several factors, including price data from the Bursa Malaysia Derivatives Exchange (MDEX), exchange rates, export levies, global CPO supply-demand situations, and buyers' expectations based on previous tenders.²

1. The provision of CPO is not a function normally vested in the government

10. Article 1.1(a)(1)(iv) of the SCM Agreement applies to situations where (i) governments have entrusted or directed a private body to carry out the lending function, the fiscal function, the supply function, or the purchasing function, i.e. "functions which would normally be vested in the government"; and (ii) that practice, i.e. the carrying out, or the exercise, of the aforementioned functions by a private body, "in no real sense, differs from practices normally followed by governments."³

11. The first requirement for Article 1.1(a)(1)(iv) to become relevant is the determination as to whether there is a private body. The second requirement is that this particular private body must carry out or exercise one of the four functions that are normally "vested in the government" in the legal order of the relevant Member. The third requirement is that the government must have "entrusted or directed" that particular private body to carry out these functions. The fourth requirement is that the carrying out of this function by the private body does not differ in any real sense from practices normally followed by governments.⁴

12. Neither the Biodiesel Provisional CVD Regulation nor the Biodiesel Definitive CVD Regulation provide any further detail in terms of the reasoning that prompted the Commission to conclude that "the provision of CPO located on Indonesian soil to the Indonesian biodiesel industry is a function which is normally vested in the government".⁵ The Commission never provided *any* reasoning as to whether the provision of CPO would be ordinarily part of governmental practice in the legal order of *Indonesia*. Its conclusions in Recitals (170)-(171) cannot be considered as sufficiently "reasoned and adequate" and the Commission cannot be deemed to have made a proper finding of entrustment or direction within the meaning of Article 1.1(a)(iv) of the SCM Agreement. On that basis, the EU acted inconsistently with its obligations under Article 1.1(a)(iv) of the SCM Agreement.⁶ The assumption that underpins the Commission's determination is that through the enactment of fiscal measures of general application, such as the export tax and the export levy, private actors, such as CPO producers, no longer act on their own volition and based on their free choice, but rather as instruments in the hand of the government in so far as they have been entrusted or directed by the GOI. Accordingly, in the Commission's view, the supply to market operators of a product such as CPO, is no longer considered an ordinary commercial activity conducted by private parties, but rather the "carrying out of a function normally vested in the government".⁷

13. By determining that the provision of CPO by private bodies is a function normally vested in the government, and that this supply differs in no real sense, from practices normally followed by governments, the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement.⁸

² Indonesia's First Written Submission, paras. 173-174.

³ Indonesia's First Written Submission, para. 180.

⁴ Indonesia's First Written Submission, para. 185.

⁵ Indonesia's First Written Submission, para. 188.

⁶ Indonesia's First Written Submission, paras. 188-194.

⁷ Indonesia's First Written Submission, para. 196.

⁸ Indonesia's First Written Submission, para. 207.

2. The Government of Indonesia did neither induce domestic CPO producers to sell CPO locally nor 'entrusted' or 'directed' them to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration

14. The Commission's main argument is that Indonesian CPO producers were "induce[d] (...) to selling their goods domestically for a lower price than they could obtain in the absence of those export restraints". In other words, the Commission considers that "inducing" private actors through governmental measures such as taxation and the alleged setting of a maximum price for a particular commodity is tantamount to "entrustment or direction".⁹ The Commission was required to establish that the GOI either directed, i.e. exercised its authority in order to compel or command (or govern), or entrusted, i.e. gave responsibility for the task of supplying CPO, CPO producers in Indonesia. The Commission failed to do so, and therefore that the EU's findings in respect of the alleged GOI entrustment of CPO producers to sell CPO for LTAR as inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement.

15. The determination that private actors such as CPO producers can be entrusted or directed by means of (i) export restraints in the form of fiscal measures; and (ii) an alleged maximum price on CPO, rests upon an over-extensive interpretation of those terms for which there is no basis in the SCM Agreement or relevant Appellate Body reports. The systemic implications of the EU's approach are significant. Specifically, it would mean that investigating authorities could consider that measures of general application – such as fiscal measures – amount in fact to the entrustment or direction of a particular industry. In other words, rather than requiring a specific command-and-control relationship, the mere fact that a company is subject to a particular tax is sufficient for it to be considered to be subject to the entrustment or direction on the part of the government.¹⁰

3. The Government of Indonesia did not provide income or price support to the biodiesel industry

16. The Commission acted inconsistently with Article 1.1(a)(2) of the SCM Agreement in finding that a "set of measure have [sic] the objective of regulating and depressing domestic prices, and that is not simply a side-effect of the GOI's policy". The Commission's findings confuse different policies, each with a legitimate purpose, which have no impact on CPO prices and which do not promote exports of biodiesel and the determination that Indonesia provided income or price support to biodiesel producers is inconsistent with Article 1.1(a)(2) and Article 32.1 of the SCM Agreement.¹¹

B. Determinations concerning the existence of a benefit

17. The Commission considered that the alleged financial contribution or income or price support provided by the GOI conferred a benefit upon Indonesian biodiesel producers. Indonesia considers that, in doing so, it acted inconsistently with Article 1.1(b) of the SCM Agreement as an unbiased and objective investigating authority would have concluded that there was insufficient evidence for such a conclusion.

18. First, the comparison of domestic Indonesian CPO prices with Malaysian domestic prices and Indonesian export prices is insufficient to establish that CPO was supplied for less than adequate remuneration. Second, the Commission has failed entirely to explain why Indonesian domestic prices were disregarded. There was no reason to disregard the domestic CPO prices, which reflect the prices secured by PTPN in competitive tenders and are therefore market-determined prices. Third, even assuming the Commission was right to select an out-of-country benchmark (quod non), the benchmark selected by the Commission does not reflect the prevailing market conditions in Indonesia and does not reflect the conditions pursuant to which the goods or services at issue would, under market conditions, be exchanged in Indonesia. Indeed, no adjustment was made to any of the benchmarks

⁹ Indonesia's First Written Submission, para. 208.

¹⁰ Indonesia's First Written Submission, paras. 223-233.

¹¹ Indonesia's First Written Submission, paras. 240-247.

used and such benchmarks therefore do not reflect as such the prevailing market conditions in Indonesia.¹² By disregarding Indonesian in-country prices without reasoned and adequate justification and by relying on unadjusted out-of-country benchmarks to determine that CPO is provided for less than adequate remuneration on the Indonesian market, the Commission acted inconsistently with Article 14(d) of the SCM Agreement.¹³

C. Determinations concerning specificity

19. The Commission's determinations in respect of specificity rest on a finding of enterprise or industry specificity in the sense of Article 2.1(a) of the SCM Agreement. The Commission's determinations are not precise enough to warrant a finding of specificity. In any event the Commission failed to clearly substantiate its determinations on the basis of positive evidence in violation of Article 2.4 SCM Agreement.

20. First, the Commission refers, in a single recital, to "the domestic biodiesel industry", "the palm oil value chain" and "the palm oil industry". As such, it remains unclear as to what enterprises or industries the Commission considered the subsidies to be addressed. Second, neither the Biodiesel Provisional CVD Regulation nor the Biodiesel Definitive CVD Regulation provide any kind of indication as to how the Commission determined that there is a limitation on access to the relevant subsidy. Third, the Commission refers to "the set of measure" [sic] and "distortions on CPO". As such, by necessity, the Commission suggests that there is some kind of "implicit" specificity that manifests itself through the policies and instruments adopted by the GOI. This, by definition, is insufficient to conclude that there is an industry that is known and particularized since the supposed addressees of the alleged benefit are nowhere explicitly identified.¹⁴

21. In conclusion, the determination that the provision of CPO and the provision of income or price support are specific is inconsistent with Article 1.2, Article 2.1 and Article 2.4 of the SCM Agreement.

IV. DETERMINATIONS CONCERNING THE EXISTENCE OF A THREAT OF MATERIAL INJURY AND THE EXISTENCE OF A CAUSAL LINK

A. Determination concerning the impact of imports from Indonesia on the prices of domestic like products

22. The EU failed to consider differences in cold filter plugging point ("CFPP") levels between EU and Indonesian biodiesel, which is the key criterion for customers. Differences in CFPP levels result in different physical characteristics, uses, prices and consumers' perceptions. Indonesian biodiesel consists of palm oil methyl ester ("PME") with a CFPP 13. This CFPP level makes it unsuitable for blending with mineral diesel in the EU and requires blending with other types of lower CFPP biodiesel. Indonesian PME is therefore an input, rather than a finished product. Conversely, EU biodiesel consists of lower CFPP biodiesels, which can be blended with mineral diesel directly and command a price premium. By failing to consider the impact of differences in CFPP level, the EU failed to consider the competitive relationship between Indonesian and EU biodiesel and its implications on price determinations, as was already faulted by the Panel in *EU – Biodiesel (Indonesia)*.¹⁵

1. Determination concerning the price comparability of imports from Indonesia and the domestic like products

23. None of the methods relied on to allege price undercutting are WTO-compliant.

¹² Indonesia's First Written Submission, paras. 253-258.

¹³ Indonesia's First Written Submission, paras. 259-260.

¹⁴ Indonesia's First Written Submission, paras. 266-272.

¹⁵ Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.158. See also Indonesia's Second Written Submission, paras. 139-145.

24. The first method compared prices of Indonesian PME with a CFPP 13 against prices of EU PME with a CFPP 10.¹⁶ Competition between EU and Indonesian PME remains however nuanced, because the difference in CFPP level has implications in terms of physical characteristics and level of trade.¹⁷ Regardless of whether they were sold to the same customers, which is not determinative of a direct competitive relationship, record evidence confirms that EU PME, contrary to Indonesian PME, was suitable for direct blending with mineral diesel.¹⁸ In any event, Methods 1 concerns a single EU producer, operating a specific, niche segment of the market.¹⁹ Omitting the vast majority of the EU's industry sales cannot provide a robust basis for the price effects analysis,²⁰ and cannot evidence "significant" undercutting.

25. The second method compared prices of Indonesian PME with a mix of prices for EU PME and biodiesel with a CFPP0 ("FAME0"). FAME0 prices were adjusted downward by EUR 100 to EUR 130 per ton, to reflect the price difference between biodiesel with a CFPP10 ("FAME10") and FAME0.²¹ This method is, in practice, identical to the one faulted the Panel in *EU – Biodiesel (Indonesia)*, as it fails to consider the nuanced competitive relationship resulting from the fact that Indonesian PME is an input to FAME0.²²

26. The third method compared all Indonesian imports with all sales by sampled EU producers, without any adjustment.²³ This method simply denies all differences all differences in physical characteristics, uses and consumers' perception, which affect price comparability,²⁴ as faulted by the Panel in *China – X-Ray Equipment*.²⁵

27. Finally, the EU confirmed that the second and third methods merely seek to "confirm" the first method. To the extent any of these methods would be flawed, the entire undercutting allegations would therefore be flawed, since the first method would not be confirmed and the second and third methods are not stand-alone methods.²⁶

28. Therefore, the price undercutting calculations are in breach of Articles 15.1 and 15.2 of the SCM Agreement. They do not ensure price comparability, nor cover the product concerned as a whole.²⁷

2. Determination concerning the effect of allegedly subsidized imports on prices of EU producers

29. The EU failed to consider that, due to its higher CFPP, Indonesian PME cannot be used as such in the EU, but is an input to biodiesel blends that can then be blended with mineral diesel. The EU also failed to consider that the lower price of Indonesian PME is justified by its higher CFPP. The EU finally failed to consider that competition will be affected by both climatic and seasonal conditions, due to CFPP differences. This affects the competitive relationship between Indonesian and EU biodiesel and, correspondingly, the EU's price effect determination.

30. Indonesian PME must be blended with more expensive, lower CFPP biodiesel. Although blends may compete with EU biodiesel, it is not the price of Indonesian PME that has

¹⁶ Indonesia's First Written Submission, para. 289.

¹⁷ Indonesia's First Written Submission, paras. 291-296. See also Indonesia's Second Written Submission, paras. 151-156.

¹⁸ Indonesia's Second Written Submission, paras. 147-150.

¹⁹ Indonesia's First Written Submission, para. 297. See also Indonesia's Second Written Submission, paras. 157-160.

²⁰ Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.133.

²¹ Indonesia's First Written Submission, para. 289.

²² Indonesia's First Written Submission, paras. 298-301. See also Indonesia's Second Written Submission, paras. 161-167.

²³ Indonesia's First Written Submission, para. 289.

²⁴ Indonesia's First Written Submission, paras. 302-306.

²⁵ Panel Report, *China – X-Ray Equipment*, paras. 7.68 and 7.85.

²⁶ Indonesia's Second Written Submission, paras. 168-171. Indonesia's Responses to the Panel's Questions following the Second Substantive Meeting, Questions 125 and 126.

²⁷ Indonesia's First Written Submission, paras. 307-308.

explanatory effects for the price of EU biodiesel, but the price of blends. The price of blends, however, is influenced by both the higher price of lower CFPP biodiesel and the lower price of higher CFPP biodiesel. As a result, the lower price of Indonesian PME – justified by its CFPP level – is neutralized at blend level.²⁸

31. Finally, aside from flawed price undercutting calculations, price depression allegations have no basis in the record of the investigation. Sampled EU producers were never able to adjust their prices to improve profitability, even absent Indonesian imports in "favorable" market conditions. Indonesian imports did not, suddenly, prevent EU biodiesel producers from implementing price increases,²⁹ which can occur regardless of whether costs are up or down.

32. Therefore, the price effects analysis breaches Articles 15.1 and 15.2 of the SCM Agreement as there was no objective examination based on positive evidence of such effects.³⁰

B. Determination concerning the fragile economic condition of the domestic industry as a basis for the threat of injury determination

33. The premise of the EU's threat of injury analysis lies in the fallacy that the EU industry was in a "fragile economic condition",³¹ while Indonesian imports had no impact on the EU industry.³² The record does not support such fragility,³³ as injury indicators generally improved during the IP and stabilized during the Post-IP. Profitability remained limited, but improved overall during the Post-IP.³⁴ In particular, no fragility arises from lower market shares, in a context of growing consumption, production and sales with the EU industry continuing to dominate the market. Likewise, low profitability did not prevent positive cash flows, investments and returns on investments. Rather than an unrealistic target profit of 11%, the profitability of the EU industry precisely revealed the profit levels that the EU industry could achieve absent injurious imports.³⁵ The quarterly analysis of Post-IP profitability was also conducted in a biased manner, as the EU overstated the importance of factors that supposedly improved the profitability of the smallest of the sampled EU producers during Q4 2018, but disregarded factors that reduced the profitability of the largest sampled EU producers in Q1 and Q2 2019.³⁶

34. The EU has also not established what "change in circumstances" would result in a materialization of injury. Whereas the Provisional and Definitive Regulations refer to the "continuation of Indonesian imports" and the EU referred on an *ex post facto* basis to the repeal of anti-dumping duties, neither a mere "continuation of imports" that never produced injurious effects, nor an event that took place in the past can establish a "change in circumstances" that would be "clearly foreseen and imminent".³⁷

²⁸ Indonesia's First Written Submission, paras. 325-326. See also Indonesia's Second Written Submission, paras. 174-175. See also Indonesia's Responses to the Panel's Questions following the Second Substantive Meeting, Question 123.

²⁹ Indonesia's First Written Submission, paras. 332-334. See also Indonesia's Second Written Submission, paras. 176-181.

³⁰ Indonesia's First Written Submission, paras. 327, 331, 335 and 336.

³¹ Indonesia's First Written Submission, paras. 355-356. See also Indonesia's Second Written Submission, paras. 184-187.

³² Indonesia's Opening Statement at the Second Substantive Meeting, para. 87.

³³ Indonesia's First Written Submission, paras. 357-374.

³⁴ Indonesia's First Written Submission, paras. 350-354.

³⁵ Indonesia's Second Written Submission, paras. 188-195.

³⁶ Indonesia's Second Written Submission, paras. 196-202.

³⁷ Indonesia's Second Written Submission, paras. 203-206. See also Indonesia's Opening Statement at the Second Substantive Meeting, para. 88.

35. Therefore, the EU breached Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement by basing its threat of injury determination on a non-existing "fragile economic condition", to which Indonesian imports never contributed.³⁸

C. Determinations concerning the factors supporting the existence of a threat of material injury

36. As acknowledged by the EU, Indonesian imports were expected to remain at the same level. Thus, no evidence suggested "further" exports were imminent, as required under Article 15.7 of the SCM Agreement.³⁹

37. As regards the nature of the alleged subsidies in question and the trade effects likely to arise therefrom, alleged subsidies resulting from the OPPF, due to their links to growing domestic supplies, and imports into bonded zones, due to their extremely limited level, could not lead to the conclusion that further exports were imminent. Alleged CPO subsidies could not have that effect either, since the export levy also applied to biodiesel, offset – at least partially – the benefit of alleged CPO subsidies and could not incentivize further exports.⁴⁰

38. As regards the rate of increase of Indonesian imports and the likelihood of substantially increased imports, no conclusion could be extrapolated from the IP rate of increase, which followed the removal of unlawful anti-dumping duties. Post-IP, imports reduced slightly and were lower on a monthly average basis. Further increases were in fact restricted by climatic and seasonality factors, due to the high CFPP of PME, and regulatory developments in the EU, due to the RED II Directive which the investigation found would cap the volume of Indonesian imports, and in Indonesia, due to growing biodiesel blending mandates.⁴¹

39. As regards freely disposable production capacity in Indonesia and likelihood of redirection towards the Union market, the EU relied solely on information interpreted by the complainant. It disregarded that capacities were dedicated to the fulfilment of domestic blending mandates, with an announced increase from B20 to B30, which was fully on course to be implemented. The EU also disregarded practical constraints that reduced the level of available capacities, namely remote geographic locations of certain plants and the use of production lines for different products. The EU finally disregarded the existence of other export markets, particularly China.⁴²

40. As regards the alleged price depression or suppression effect of imports from Indonesia and likelihood of increase demand for further imports, the EU never established, but speculated the existence of price depression. Price levels of Indonesian PME are justified by its higher CFPP and cannot increase demand, as the requirement to blend Indonesian PME with more expensive, lower CFPP means that price advantages are neutralized.⁴³

41. Therefore, the EU breached 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.⁴⁴

³⁸ Indonesia's First Written Submission, paras. 375-377.

³⁹ Indonesia's Second Written Submission, paras. 208-209. See also Indonesia's Opening Statement at the Second Substantive Meeting, para. 90.

⁴⁰ Indonesia's First Written Submission, paras. 387-393. See also Indonesia's Second Written Submission, paras. 210-214.

⁴¹ Indonesia's First Written Submission, paras. 396-403 and 405-410. See also Indonesia's Second Written Submission, paras. 216-225.

⁴² Indonesia's First Written Submission, paras. 413-420. See also Indonesia's Second Written Submission, paras. 227-236.

⁴³ Indonesia's First Written Submission, paras. 423-424. See also Indonesia's Second Written Submission, paras. 237-238.

⁴⁴ Indonesia's First Written Submission, paras. 394-395, 404, 411-412, 421-422 and 425-426.

D. Determination concerning the existence of a causal link between imports from Indonesia and the alleged threat of injury

42. Volume-wise, put in context, namely the removal of unlawful anti-dumping duties, the increase in Indonesian imports was reasonable as Indonesian imports gained 3,1% of market share, i.e., less than a third of market shares lost by the EU industry.⁴⁵ The EU industry did not suffer negative effects as a result of Indonesian imports, as evidenced by the Post-IP improvement in production, sales figures and market shares, with stable capacity utilization levels.⁴⁶

43. Price-wise, historical data shows that Union producers have been unable to improve profitability, with or without Indonesian imports. There is simply no evidence suggesting that Indonesian imports had any impact on the Union industry having low profit levels.⁴⁷

44. Post-IP figures confirm the absence of any causal link, as the EU industry improved its market share and profitability, despite the continued presence of Indonesian imports.⁴⁸

45. Therefore, the EU breached Articles 15.1, 15.2, 15.5 and 15.7 of the SCM Agreement because it failed to establish any genuine causal link between its alleged threat of injury and Indonesian imports, whether volume- or price-wise, whether during or after the IP.⁴⁹

E. Determination that the alleged threat of injury is caused through the effects of subsidization, rather than by other known factors of injury

46. At the outset, the Commission never explained why the threat of injury would be caused "through the effects of subsidization". Subsidy schemes alleged by the EU cannot lead to further imports from Indonesia, but incentivize domestic sales.⁵⁰

47. Regardless, any alleged threat of injury could only be caused by imports from Argentina. The EU successively conducted investigations on Argentinean biodiesel, and then Indonesian biodiesel, covering the same products, over a time period differing by one single month.⁵¹ In the Argentina investigation, in stark contradiction with the findings in the Indonesia investigation, the EU clearly found that Indonesian imports were unlikely to be the main cause of injury in the imminent future.⁵²

48. Indonesian imports did not overnight become main threat of injury. Argentinean imports – which correspond to FAME0 directly competing with EU biodiesel –⁵³ continued to enter the EU in higher volumes and to represent a higher market share, while entering the EU market at prices below those of Indonesian imports, both during and after the IP.⁵⁴ Furthermore, Indonesian imports never exceeded the 5% market share considered unlikely to threaten injury in the Argentina investigation, nor 600,000 tons, whereas 1,2 million tons of imports were considered non-injurious in the undertakings accepted from Argentinean producers.⁵⁵ Indonesian imports would never have reached that level in the EU, due to

⁴⁵ Indonesia's First Written Submission, paras. 439-445.

⁴⁶ Indonesia's Second Written Submission, paras. 243-248.

⁴⁷ Indonesia's First Written Submission, paras. 447-451. See also Indonesia's Second Written Submission, paras. 249-250.

⁴⁸ Indonesia's First Written Submission, paras. 453-459. See also Indonesia's Second Written Submission, paras. 251-252.

⁴⁹ Indonesia's First Written Submission, paras. 446, 452 and 460-461.

⁵⁰ Indonesia's First Written Submission, para. 472.

⁵¹ Indonesia's First Written Submission, paras. 474-476.

⁵² Indonesia's First Written Submission, paras. 477-479.

⁵³ Indonesia's First Written Submission, paras. 489-492.

⁵⁴ Indonesia's First Written Submission, paras. 482-484.

⁵⁵ Indonesia's First Written Submission, paras. 485-488. See also Indonesia's Second Written Submission, paras. 258-260.

seasonal and climatic restrictions, the cap to be imposed under the RED II Directive and the growing domestic blending mandates.

49. Finally, the threat of injury caused by Argentinean imports was not addressed through countervailing duties, which consist in reality of an undertaking combining a volume threshold and a minimum import price ("MIP"). First, the volume cap is significantly higher than the volume of Indonesian imports and, despite a cooling effect due to uncertainties preceding the adoption of undertakings, Argentinean imports resumed in significant volumes following such adoption.⁵⁶ Second, the MIP is not designed to offset injury, but subsidization. As a result, despite the MIP, imports from Argentina were still injurious during the IP and the Post-IP.⁵⁷

50. Therefore, the EU breached Articles 15.1, 15.5, 15.7 and 15.8 of the SCM Agreement by failing to consider that any threat of injury was actually caused by imports from Argentina, and not Indonesia.⁵⁸

V. REJECTION OF A PRICE UNDERTAKING OFFER

51. Article I:1 of the GATT 1994 requires WTO Members to refrain from discriminating among like products originating in or destined for different countries. As per the Appellate Body in *EC – Seal Products*, it sets out a fundamental non-discrimination obligation under the GATT 1994.⁵⁹ By accepting undertakings from virtually all exporting producers from Argentina under the Argentina Undertaking Decision, and by rejecting the undertaking submitted by the Indonesian exporter on questionable grounds, the Commission failed to accord, immediately and unconditionally, an advantage to biodiesel originating in Indonesia. In doing so, the rejection of the undertaking of the Indonesian exporter modified the conditions of competition between like imported products, i.e. biodiesel, to the detriment of Indonesian biodiesel, in violation of Article I:1 of the GATT 1994. In doing so, the EU moreover acted inconsistently with Article 15.8 of the SCM Agreement as it failed to exercise special care in the present investigation.⁶⁰

VI. PROCEDURAL CLAIMS

A. Erroneous use of "facts available" with regard to PTPN and all producers and distributors of CPO

52. The Commission relied on facts available in respect of CPO producers and suppliers and PTPN but disregarded relevant evidence submitted by other interested parties in the investigation, in violation of Article 12.7 and 12.11 of the SCM Agreement.⁶¹

53. The Appellate Body has constrained the investigating authority's discretion to resort to "facts available" and, in particular, has limited an investigating authority's discretion to disregard evidence that has been provided and to rely only on parts of the entirety of the evidence provided. In particular, Article 12.7 of the SCM Agreement does not allow investigating authorities to simply reject information that has been submitted solely because certain requested information is allegedly missing from these submissions or because the investigating authority is displeased with the content of the information that has been submitted.⁶²

⁵⁶ Indonesia's Second Written Submission, paras. 262-263.

⁵⁷ Indonesia's First Written Submission, paras. 493-496. See Indonesia's Second Written Submission, para. 261. See also Indonesia's Second Written Submission, paras. 264-271. See also Indonesia's Responses to the EU's Answers to the Panel's Questions Following the Second Substantive Meeting, paras. 36-40.

⁵⁸ Indonesia's First Written Submission, paras. 473, 497 and 499.

⁵⁹ Indonesia's First Written Submission, para. 502.

⁶⁰ Indonesia's First Written Submission, paras. 508-509.

⁶¹ Indonesia's First Written Submission, para. 513.

⁶² Indonesia's First Written Submission, paras. 514-519.

54. Indonesia considers that by using "facts available" in the context of the alleged government provision of CPO for less than adequate remuneration, based on the ground that the GOI allegedly did not provide the necessary information and evidence as requested by the Commission in its questionnaire and during the verification visit, the Commission has acted inconsistently with Article 12.7 of the SCM Agreement.⁶³ The Commission was not entitled to disregard all the information submitted by other interested parties. Neither the GOI nor PTPN (i) refused access to necessary information within a reasonable period of time provided by an investigating authority; (ii) failed to provide such information within a reasonable period; nor (iii) significantly impeded the investigation.⁶⁴

B. Failure to provide meaningful non-confidential summaries of the EU producers' response to the post-investigation period questionnaire

55. The EU acted inconsistently with Articles 12.1, 12.3, 12.4 and 12.4.1 of the SCM Agreement because the Commission failed to provide a meaningful non-confidential summary of the EU producers' responses to the post-investigation period questionnaire.⁶⁵

56. Article 12.1 of the SCM Agreement requires the investigating authority to give notice to all interested Members and all interested parties in a countervailing duty investigation "of the information which the authorities require and *ample opportunity* to present in writing all evidence which they consider relevant in respect of the investigation in question" (emphasis italicized added). In *EU – PET (Pakistan)* the Panel emphasized the importance of Article 12.1 of the SCM Agreement and its emphasis on the provision of written information.⁶⁶

57. The EU acted inconsistently with Articles 12.1, 12.3 and 15.1 of the SCM Agreement because the Commission failed to provide the necessary information to interested parties, including necessary information to propose alternative methodologies to determine the existence of price undercutting and because the Commission provided a late disclosure of essential information concerning, among others, price elasticity and changes in the EU market.⁶⁷

58. In the Biodiesel CVD Investigation, 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 because the Commission provided a late disclosure of essential information concerning, among others, price elasticity and changes in the EU market. Accordingly, the EU acted inconsistently with Articles 12.1, 12.3 and 15.1 of the SCM Agreement.⁶⁸

⁶³ Indonesia's First Written Submission, para. 523.

⁶⁴ Indonesia's First Written Submission, para. 538.

⁶⁵ Indonesia's First Written Submission, para. 539.

⁶⁶ Indonesia's First Written Submission, para. 540.

⁶⁷ Indonesia's First Written Submission, para. 555.

⁶⁸ Indonesia's First Written Submission, paras. 559-560.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****1. INTRODUCTION**

1. The European Union's investigating authority ("the Commission") found that the Indonesian subsidised imports threatened to cause material injury to the Union industry and decided to impose countervailing duties on imports of biodiesel originating in Indonesia.
2. The measure at issue in this dispute is the definitive countervailing duty imposed on imports of biodiesel originating in Indonesia by means of Commission Implementing Regulation (EU) No 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia ("Definitive Regulation").
3. Indonesia challenges certain elements of the definitive countervailing duty imposed on imports of biodiesel originating in Indonesia. It brings claims under a plethora of WTO provisions. The European Union requests the Panel to find that the European Union acted consistently with all its obligations under the SCM Agreement and the GATT 1994.

2. STANDARD OF REVIEW

4. Panels and the Appellate Body have understood the standard of review, as required by Article 11 of the DSU, 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.

3. BURDEN OF PROOF

5. 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. Each party asserting a fact should provide proof thereof. The role of the Panel is not to make the case for either party, but it may pose questions to the parties "in order to clarify and distil the legal arguments".

4. CLAIMS CONCERNING THE EUROPEAN UNION'S DECISION TO COUNTERVAIL THE DISBURSEMENTS MADE BY THE GOI THROUGH THE OPPF TO THE EXPORTING PRODUCERS OF BIODIESEL**4.1. Introduction**

6. In order to promote the use of biodiesel, in 2015, the GOI implemented the so-called "B20 blending mandate" ("the blending mandate"). Operators were under the legal obligation to use as fuel a blend of mineral diesel and biodiesel which contains at least 20% of biodiesel (B20) (increased to 30% in January 2020).
7. The investigation showed that, in 2015, the GOI created the "Biodiesel Subsidy Fund" as part of the Oil Palm Plantation Fund ("OPPF"). The GOI entrusted the Oil Palm Plantation Fund Management Agency (the "Management Agency"), a public agency composed exclusively of officials of various ministries of the GOI, with the management of the OPPF. In particular, the Management Agency was entrusted to collect compulsory export levies on the exportation of palm oil commodities. The money collected by the customs authorities through the export levies on palm oil products constitutes the funds of the OPPF, which is formally controlled by the Management Agency. The investigation showed that the OPPF's funds collected through export levies were almost exclusively (around 97%) used to support the biodiesel industry during the investigation period.
8. During the investigation, there were two oil and gas companies appointed as petrofuel entities (entities which supports purchases of biodiesel): (i) PT Pertamina ("Pertamina"), a State-owned company, and (ii) PT AKR Corporindo ("AKR"), a private

company. Biodiesel producers willing to supply biodiesel (PME) to the petrofuel entities and previously selected by the Management Agency committed to sell monthly an amount of biodiesel to Pertamina and AKR. Pertamina and AKR would then blend the PME with mineral diesel to obtain the B20 diesel to be used in the sectors subject to the B20 mandate.

9. The Commission found that the OPPF envisages a specific payment mechanism, whereby Pertamina and AKR in exchange for the provision of biodiesel pay biodiesel producers the so-called "diesel reference price". The diesel reference price set by the GOI is based on prices reported by Platts Singapore for oil (MOPS) and the production cost of diesel in Indonesia. Any difference between such "diesel reference price" and the so-called "biodiesel reference price" is paid to the biodiesel producers out of the OPPF by the Management Agency. The "biodiesel reference price" is also set by the GOI on the basis of the CPO domestic price, to which transformation costs and profits are added.
10. The investigation confirmed that through this mechanism (the OPPF programme) the GOI supported biodiesel producers through direct disbursements made by the Management Agency out of the OPPF, which was funded by the payment of compulsory export levies.
11. The European Union considers that the GOI's support is a countervailable subsidy because the disbursements made by the Management Agency to the biodiesel producers amount to a financial contribution in the form of direct transfer of funds, which confers a benefit and is specific to the biodiesel companies.

4.2. The OPPF disbursements amount to a financial contribution by a government or public body (Article 1.1(a)(1)(i) of the SCM Agreement)

12. Indonesia's claim that "the Commission acted contrary to Article 1.1(a)(1) of the SCM Agreement when it considered that payments from OPPF to the biodiesel producers entailed a financial contribution by a government or public body" should be rejected.
13. First, the funds collected in the OPPF and disbursed by the Management Agency constitute public funds. The compulsory collection of export levies makes the OPPF funds public resources, as any other funds collected by the GOI going into the State budget. The OPPF was controlled by the Management Agency, a public body, which then decided how those funds were disbursed. The export levy was collected as part of the general budget of the State. In particular, the GOI could not provide any indication that the collection of the export levy was made directly into a specific account of the OPPF that would be distinct from the general State budget. Then the GOI transfers the money collected by the customs authorities in the form of export levies to the bank account of the Management Agency.
14. Second, the OPPF and its Management Agency are public bodies for purposes of the SCM Agreement. There is no provision in the SCM Agreement which qualifies as subsidies only the amounts received by companies from a government or public body that are in excess of the amounts paid by the same companies in the form of income tax, VAT, customs duties, etc.
15. The European Commission carefully and dutifully assessed the information on the record and reasonably reached the conclusion that the OPPF's disbursements to the biodiesel producers amounted to a "financial contribution" in the form of a "direct transfer of funds", as well as that the OPPF disbursements could also be characterised as "grants". It is impossible to reconcile Indonesia's position with either the provisions of the SCM Agreement, or the facts of the present case.
16. On the one hand, Indonesia's claim should be rejected because it is premised on a wrong interpretation of the SCM Agreement. A subsidy which is granted subject to some condition linked to the conduct of the subsidised company, is still a subsidy. The fact that certain types of grants are contingent on the fulfilment of certain requirements does not prevent them from being qualified as "direct transfers of funds" in the form of "grants" or "conditional grants", falling under Article 1.1(a)(1)(i) of the

SCM Agreement. Therefore, it is not true that the "existence of a reciprocal obligation" suffices by itself to "preclude the characterisation of a payment as a grant".

17. And, even if it was accepted that the OPPF disbursements should not be characterised as "grants", they would still be captured by the European Commission's finding that they constitute a "direct transfer of funds", which Indonesia does not challenge.
18. On the other hand, the facts of the investigation show that Indonesia's claim should be rejected. Indonesia collected funds from the exportation of one good and disbursed them in order to support the production and sale of a different good. This means that Indonesia's statement that the OPPF Management Agency "*collected export levies from biodiesel producers to return them back to biodiesel producers*" is factually inaccurate. The OPPF disbursements constituted grants because it was the applicable Indonesian legislation and not any specific contracts, which gave the biodiesel producers the right to receive the disbursements from the OPPF. The information on the record also shows that the biodiesel producers received much more money from the OPPF disbursements than they paid in export levies.
19. Furthermore, it would be absurd for the Government of Indonesia to set up the OPPF program in the first place, if each biodiesel producer would give and then take back from the OPPF the same amount of money, or if the biodiesel producers would pay to the OPPF more money than what they would take out of it. If this is indeed how the OPPF program operates, then it would not be able to achieve the aim assigned to it by the Government of Indonesia, which is "to ensure that there is enough volume of biodiesel in Indonesia" and "to ensure that domestic prices are attractive enough for domestic biodiesel producers".

4.3. The OPPF's disbursements conferred a benefit to the biodiesel producers

20. The European Union requests the Panel to reject all claims raised by Indonesia against the Commission's determination concerning the disbursements made by the GOI through the OPPF to the exporting producers of biodiesel.
21. First, the European Commission did not "err in its choice of the counterfactual". The "blending mandate" is inextricably linked to the OPPF disbursements as a matter of domestic Indonesian law. Both the market information on the record and the information relating to Indonesia's domestic legislation show that there could not be a realistic "counterfactual" where the "blending mandate" would continue to exist without the existence of the OPPF disbursements. Otherwise, if the GOI imposed the "blending mandate" on the petrofuel entities without the support of the OPPF disbursements, the GOI would push the petrofuel entities to insolvency. If Pertamina was to purchase biodiesel at the biodiesel reference price, it would be loss making.
22. Second, the European Commission did not err in its assessment of whether the biodiesel producers were "better off" because of the OPPF disbursements. The OPPF disbursements conferred a benefit to the biodiesel producers for purposes of the SCM Agreement. There is sufficient information on the record which reasonably leads to the conclusion that, in the absence of the GOI's intervention and the OPPF disbursements, the biodiesel producers would not have been able to obtain the same level of prices in the domestic market in Indonesia.
23. The investigation showed that the biodiesel reference prices set by the GOI did not reflect market reality and, in contrast, shielded the biodiesel producers from the fluctuations and risks of international market prices; and the conduct of the biodiesel producers confirmed that the receipt of the OPPF disbursements was a better option than selling biodiesel to the domestic market without the OPPF disbursements, or exporting biodiesel outside Indonesia.
24. Third, the European Commission did not err in its assessment of the role of the export levies. The factual basis on which Indonesia's claim rests is incorrect: the biodiesel producers received much more money from the OPPF disbursements than they paid in export levies. Besides the factual inaccuracy, Indonesia's legal theory does not have any basis in the SCM Agreement. There is no provision in the SCM Agreement which qualifies as subsidies only the amounts received by companies from a government or

public body that are in excess of the amounts paid by the same companies in the form of income tax, VAT, customs duties, etc.

25. Furthermore, according to Article 1.1 of the SCM Agreement, part of the definition of "subsidy" is that a "benefit is conferred". Article 14 of the SCM Agreement does not provide any situation where a "benefit is not conferred" in the case of "grants". This means that the receipt of a "grant" always "confers a benefit" for purposes of Article 1.1(b) of the SCM Agreement. The question of the *quantity* of such "benefit" is a separate issue and does not affect the definition of the "subsidy" for purposes of Article 1.1 of the SCM Agreement.
26. The investigation of the European Commission concluded that the OPPF disbursements constituted direct transfer of funds in the form of "grants". Therefore, the OPPF disbursements "conferred a benefit" to the biodiesel producers. Indonesia's request to "offset" part of the OPPF disbursements received by the biodiesel producers with the amounts that they paid as export levies, even if accepted, might have an impact on the *quantity* of the benefit received by the biodiesel producers. However, it would not be relevant for the determination of whether the OPPF disbursements "conferred a benefit" for purposes of Article 1.1(b) of the SCM Agreement and, consequently, qualify as "subsidies" for purposes of Article 1.1 of the SCM Agreement.
27. Fourth, there is no error in the allocation of the subsidy amounts resulting from the OPPF disbursements (Article 19.4 of the SCM Agreement). The European Commission correctly based its calculation of the subsidy rates on the total value of the recipients' sales of biodiesel i.e., both the domestic sales inside Indonesia and the exports of biodiesel outside Indonesia. The OPPF disbursements supported the production of biodiesel by the recipient companies. 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 and neither separate cost accounting or financial procedures depending on the destination of the produced biodiesel. In this respect, when the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product, in accordance with paragraph 3 of Annex IV to the SCM Agreement.
28. Fifth, there is no error in the treatment of alleged discounts, transport costs and credit costs.
29. Regarding the alleged "price discounts", the European Union requests the Panel to reject outright this claim of Indonesia because it is not proven as a matter of fact; and as a matter of due process and in accordance with Article 11 of the DSU, because the GOI and the interested Indonesian companies did not raise it with the European Commission, nor did they provide any relevant factual evidence or arguments during the investigation.
30. Concerning the reimbursement of transportation costs, Indonesia's claim is not premised on a correct interpretation of the SCM Agreement; quite to the contrary, its potential acceptance would lead to the cancellation of the SCM Agreement. Moreover, in light of the standard of review in the present case, there should not be a *de novo* review of the Commission's application of the European Union's domestic "Guidelines for the calculation of the amount of subsidy in countervailing duty investigations" because these Guidelines are not within the terms of reference of the Panel. Also, 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 petrofuel entities. Not including those amounts would mean that some costs incurred by those exporters would be automatically covered by a subsidy. Article VI:3 of the GATT 1994 explicitly includes "any special subsidy to the transportation of a particular product" as potentially subject to countervailing duties.
31. In relation to the alleged "credit costs", Indonesia's claim should be rejected because it is factually incorrect (the purported "credit cost" cannot exist in the absence of the OPPF disbursements); and for the reasons mentioned in the Definitive Regulation.
32. Sixth, the Commission did not err in the specificity analysis of the OPPF subsidy.

33. Indonesia's claim for a need to be "precise enough" for a finding of specificity should be dismissed. The terms "certain enterprises" under Article 2.1 of the SCM Agreement means that the relevant enterprises must be "known and particularized", but not necessarily "explicitly identified".
34. The OPPF disbursements benefitted such a "class of enterprises that are known and particularised", namely the biodiesel producers who received the OPPF disbursements. The vast majority of money paid by the Management Agency was devoted to paying biodiesel producers the differential between the MOPS and the biodiesel reference price. The OPPF fund was thus predominantly used by the biodiesel industry and the granting authority exercised its discretion in doing so. Indonesian legislation strictly regulates the use of the OPPF funds and provides that they can be disbursed only for the support of the biodiesel companies. Therefore, the "class of enterprises" who receive the benefit is clearly identified by Indonesia itself.

5. CLAIMS CONCERNING THE EUROPEAN UNION'S DECISION TO COUNTERVAIL THE PROVISION OF CPO FOR LESS THAN ADEQUATE REMUNERATION

5.1. Introduction

35. In the Definitive Regulation, the Commission found that the GOI supported the domestic biodiesel industry since it "entrusted or directed" domestic CPO suppliers to provide CPO for less than adequate remuneration ("LTAR") to the domestic biodiesel industry.

5.2. Overview of the basis for the determination

36. The determination that the GOI had established a subsidy scheme in favour of domestic biodiesel producers is based on findings demonstrating the existence of a "set of measures" and, hence, on multiple elements which were assessed holistically and which complemented one another.
37. First, the Commission found that support to the biodiesel industry was provided through an export tax and an export levy imposed on CPO, collectively referred to as the "export restraint system". The export tax was set by reference to a "reference price" established by the GOI so that the higher the export prices the higher the export taxes. The GOI linked the export tax system directly to international CPO prices, and not to other concerns, such as production levels or environmental impact. The rate of export levy during the investigation period was USD 50 per tonne on CPO and USD 30 per tonne on refined products.
38. Second, the Commission concluded that GOI intervened in the CPO market by *de facto* controlling domestic CPO prices through the group of public companies PT Perkebunan Nusantara ("PTPN"), thereby ensuring that CPO was sold at an artificially low level to domestic biodiesel producers. PTPN is a 100 % State-owned group of companies which supplied 6 – 9 % of CPO in the investigation period. The GOI directly appoints PTPN's entire Board of Directors, which is responsible for all relevant decisions taken by PTPN's group companies and which is subject to the supervision of a "Board of Commissioners", which is also appointed exclusively by the GOI. All corporate bodies report to the GOI.
39. The Commission made a number of findings which sustain the overall conclusion that the GOI used its *de facto* control of PTPN to set prices such that CPO was supplied to local biodiesel producers for LTAR. Evidence shows that the domestic prices for CPO were consistently lower than the international benchmarks. It was confirmed during the investigation that PTPN was not obliged to refuse a price offer lower than the daily price but could, on obtaining approval from its Board of Directors, accept it. As a result, by making public the daily unit price of CPO, the GOI effectively set a maximum price at which the commodity will be sold on that specific day. Also, it would have been more profitable for CPO suppliers to sell for export than to domestic biodiesel producers. Thus, the behaviour of the CPO suppliers was not economically rational.
40. Third, the Commission noted that direct subsidies were granted to CPO producers in order to encourage them to comply with the objectives of the government to encourage the development of the biodiesel industry, for example through mandatory

blending requirements as well as the establishment of the OPPF for the benefit of biodiesel producers.

5.3. The provision of CPO located on Indonesian soil to the Indonesian biodiesel industry is a function which is "normally vested in the government" (Article 1.1(a)(1)(iv) of the SCM Agreement)

41. The implementation of a policy of ensuring the provision of CPO to local biodiesel producers for LTAR is a function "normally vested in government" and the practice, in no real sense, differs from practices normally followed by governments. Hence it falls within the scope of Article 1.1 (a) (1) (iv) of the SCM Agreement. The function that has been entrusted is the government policy of providing support to a specific industry through the supply of a core input (CPO) and thereby sacrificing revenue.
42. When applying Article 1.1(a)(1)(iv) of the SCM Agreement, the concept of a function that would "normally be vested in the government" cannot be artificially isolated from the second part of that phrase: "and the practice, in no real sense, differs from the practice of governments." The specific objective of this provision of the SCM Agreement is to prevent circumvention. An overly formulaic and narrow interpretation of the requirements in Article 1.1(a)(1)(iv) would run counter to the important function it is designed to fulfil within the overall architecture of Article 1.1 of the SCM Agreement.
43. In line with this, the European Union disagrees with Indonesia's continued assertion that the findings of the Appellate Body in *US – AD/CVD (China)* imply that the historic performance of functions by the government in the WTO member in question is determinative of whether Article 1.1(a)(1)(iv) may be found to be applicable. There is no obligation on an investigating authority to assess whether the precise function has previously been exercised by the government of that WTO member.
44. In the present dispute, the GOI ensured the supply of a raw material input (CPO) for LTAR – a raw material input which accounts for 85% of the costs of production of CPO based biodiesel. The relevant function and government practice is not, therefore, simply the supply of CPO but the implementation of a set of measures designed to provide CPO at a regulated price.
45. The Commission considered that the implementation of a policy that entailed sacrificing revenue that could, under ordinary market conditions have been obtained, in order to create favourable conditions for a specific domestic industry is a form of conduct which falls within the material scope of Article 1.1(1)(a)(iv).
46. The GOI through a set of measures, induced private entities to provide 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, on its behalf. Hence the Commission determined that CPO suppliers were exercising functions "normally vested in government" when selling CPO on the market and following prices set by PTPN.
47. As private operators acting in an economically rational manner do not sacrifice revenues, this is a practice that in no real sense differs from the practice of governments.

5.4. The EU properly determined that the Government of Indonesia "induced" the domestic CPO producers to sell CPO locally and "entrusted" or "directed" them to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration

48. The European Union maintains that the Commission properly concluded on the basis of the evidence on the record that the relevant function - subsidisation of an industry through the supply of a key raw material input at a regulated price – was 'entrusted' to domestic CPO suppliers.
49. Indonesia is applying an incorrect legal standard and has, in any event, mischaracterised the legal standard applied by the Commission. Indonesia's interpretation that the legal standard for finding entrustment or direction requires the demonstration of a "control-and-command" would excessively narrow the scope of

application of Article 1.1(a)(1)(iv) of the SCM Agreement and create risks of circumvention. To ensure the efficacy of this provision, more subtle forms of "direction" and "entrustment" should not be excluded from its scope.

50. In substance, Indonesia's presentation of the basis of the Commission's factual findings that the GOI "entrusted" or "directed" CPO producers to provide CPO to biodiesel in Indonesia for LTAR is partial and its reasons for contesting those findings are unsubstantiated.
51. The GOI's support to the Indonesian biodiesel industry was an objective of a government policy as opposed to merely a "side effect" of the exercise of general regulatory powers. Moreover, there was an affirmative link between the GOI and the selling of CPO at LTAR on its findings that there was *de facto* price setting by PTPN, which was followed by CPO suppliers *in lieu* of setting their prices independently, and in particular, *in lieu* of basing their prices on international prices. The Commission identified that whilst any support to the CPO industry cannot, in isolation, be regarded as directing CPO producers to provide CPO for LTAR, 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".
52. The Commission did not rely exclusively on PTPN's uncontested status as a State-owned entity as the basis for its determination that PTPN was setting prices. Even if prices may be influenced that those which purchasers are willing to pay, this asserts a downwards pressure on the prices and does not undermine the finding that PTPN was setting a ceiling. The existence of some residual market freedom does not suffice to invalidate a finding of "entrustment or direction" since private operators may be induced to behave in certain ways whilst formally retaining the ability or discretion to act otherwise. The highly transparent nature of the price setting mechanism should be taken into account.
53. Furthermore, the evidence shows systematic price alignment and a level of prices that is consistently below international benchmarks.

5.5. The finding that the GOI provides income or price support is consistent with Article 1.1(a)(2) of the SCM Agreement in conjunction with Article XVI:1 of the GATT 1994

54. The European Union maintains that the conjunction "or" in Article 1.1(a) of the SCM Agreement does not operate such as to preclude an alternative analysis. A finding that a measure amounts to a financial contribution does not prevent that the same measure could also be qualified as income or price support. The Commission conducted a separate analysis relying on the applicable legal standard as regards each of the respective provisions.
55. The European Union identifies the factual basis for the conclusion that "income or price support in the sense of Article XVI of GATT 1994" was provided by the GOI. By ensuring the provision of the main raw material to producer biodiesel at prices that are lower than those on international markets (and kept artificially low), the biodiesel industry was able to produce biodiesel more cheaply and hence could maximise profits when exporting that biodiesel. Moreover, by stimulating domestic demand, production was also artificially stimulated further increasing the revenues available for that same industry.
56. The European Union considers that Indonesia's arguments are unsubstantiated or wrong and, hence, its claims should be rejected.
57. First, there is a relationship between the OPPF, the blending mandates and the level of CPO prices in Indonesia. The export restraint system combined with the price setting through PTPN and direct subsidy schemes to CPO producers ensure that the core raw material for producing palm-oil based biodiesel is kept at an artificially low price for the benefit of the biodiesel producers. As to the blending mandate, this stimulates domestic demand ensuring that the biodiesel industry is able to command higher revenues than it would otherwise have been able to. The package of measures introduced by the GOI have led overall to CPO prices which are lower than international benchmarks and which are LTAR. Collectively, therefore, these

mechanisms reflect the single, comprehensive and pervasive policy to support the domestic biodiesel industry.

58. Second, the analysis conducted to qualify the measures of "financial contribution" and a form of "income or price support" was separate, alternative and had regard to the relevant elements of the legal standard for applying Article 1.1(a)(2) of the SCM Agreement. The European Union considers that the issue for the Panel to determine is whether that legal characterisation is correct and not whether it is precluded, since it was formulated in the alternative.
59. Third, the European Union disagrees that the policy of the GOI has had no impact on CPO prices and refers to its submissions above as regards the effect of supplying CPO for LTAR.
60. The European Union does not contest that certain of the measures, for instance the blending mandate, are specifically designed to stimulate domestic consumption. However, this does not preclude the inclusion of such a support within the "set of measures" amounting to "income or price support" for the domestic biodiesel industry.

5.6. The European Union properly determined that CPO suppliers and producers provided CPO for less than adequate remuneration resulting in a "benefit" being conferred

61. The assessment of the existence of a "benefit" under Article 1.1(b) of the SCM Agreement is contingent on the existence of either a "financial contribution" or any form of "income or price support" having first been demonstrated. In a situation where the "financial contribution" and/or "income or price support" includes price setting by the government, it has been held that to demonstrate a "benefit" it is not necessarily sufficient to rely on the mere fact that it was the government who determined the prices.
62. Since most of the GOI's measures aimed at artificially lowering the domestic price of CPO, the relevant market is the market for CPO. The Commission compared its chosen benchmark (the FOB CPO export prices from Indonesia to the rest of the world as found in the Indonesia Export Statistics) with the domestic CPO priced by the exporting producers, on a transaction-by-transaction basis, and allocated the difference as the benefit granted to the exported product. The finding that a benefit was conferred reflected therefore, the difference in price which constituted a form of "advantage" for the domestic biodiesel industry in the sense that this price differential resulted in those domestic biodiesel producers being "better off".
63. In accordance with the legal standard, the Commission was required to assess whether the GOI's support to the biodiesel industry conferred a benefit by reference to the difference between the prices paid by domestic biodiesel producers when purchasing CPO locally and a benchmark based on the prevailing market conditions for CPO in Indonesia
64. It is evident from the interpretation of the SCM Agreement in previous disputes that a "proxy" for the prevailing market conditions in the relevant WTO Member is not *per se* precluded by the SCM Agreement. Reliance on a "proxy" to reproduce the prevailing market conditions for CPO in Indonesia was warranted and appropriate in the circumstances of this dispute where domestic prices were distorted. In short, to conduct a "meaningful benefit analysis" it was necessary for the Commission to avoid a situation in which it compared distorted prices with distorted prices by using a proxy.
65. The Commission needed to identify a benchmark that would reproduce the "prevailing market conditions" in Indonesia as they would have been without being altered by the GOI's intervention. The Commission had already identified that the domestic prices set by PTPN through the tender process could not be considered as reflecting undistorted market conditions. It is in the light of this factual context that the methodological approach of relying on export prices of Indonesia, expressed at FOB level as reported in Indonesia's export statistics, as a "proxy" must be assessed.
66. Indonesia's claim appears to be partly premised on a mistaken factual position as regards the "proxy" used. The Commission did not rely on "Malaysian domestic CPO prices" but conducted an additional comparison with those prices in view of the claim

advanced by the GOI during the investigation that Malaysian prices were used to set the prices in the domestic market.

5.7. The European Union properly found that the provision of CPO for LTAR and the provision of income or price support to the biodiesel industry are specific

67. First, European Union's position as to the applicable legal standard is that an assessment of "specificity", under one of subparagraph of Article 2.1 of the SCM Agreement, implies a case specific exercise. The specificity principle set out in Article 2.1(a) of the SCM Agreement focuses on whether the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. The Appellate Body has considered that these limitations must be "express, unambiguous, or clear from the content of the relevant instrument, and not merely 'implied' or 'suggested'".
68. Regarding findings of specificity, there is no requirement that a subsidy refers to a single industry to be specific. Rather it can also refer to "a class of enterprises or industries that are known and particularized". The set of measures are "specific because they benefit the enterprises active in the palm oil value chain". The Commission had acted consistently with this legal standard.
69. Second, the European Union requests the Panel to reject all claims raised by Indonesia against the Commission's determination concerning the GOI's provision of CPO for LTAR
70. In the first place, the assessment of "specificity" is not intended to be conducted in total isolation and hence without any regard to the description and framing of the relevant subsidies. The Panel may and indeed should have regard to the recitals framing the subsidies themselves.
71. In the second place, there is an affirmative finding that the subsidies were "directed to benefit...the biodiesel industry". The fact that the Commission acknowledged that there might be additional beneficiaries, notably other enterprises active in the "palm oil value chain" does not detract from this positive finding.
72. In the third place, the Provisional Regulation reflects that the subsidies were limited to "only" certain industries – namely those "active" in a value chain associated with an identified product/raw material ("palm oil"). Hence, only domestic users of palm oil could "benefit" from the financial contribution that took the form of the provision of CPO for LTAR. These findings do rely on positive evidence. The export restraint system is clearly circumscribed to the "palm oil value chain".
73. Second, given that the central interpretative question is whether or not the subsidy was "limited" to certain enterprises, the characterisation of that limitation by reference to a value chain is sufficient. It is evident that enterprises with no need to rely on CPO as an input (upstream or downstream) would not derive any benefit from the subsidies as described.
74. Third, Indonesia contends that the Commission failed to indicate the basis of its determination that there is a limitation on access to the relevant subsidy. In support of this, Indonesia affirms that the "set of measures" which the Commission characterises as a subsidy programme "are simply an expression of the exercise of general regulatory powers on the part of the GOI". This argument was considered and rejected by the Commission. The provision of CPO for LTAR cannot be characterised as a "side-effect" or by product of the exercise of general regulatory powers.
75. Fourth, the addressees of the benefit are explicitly identified as domestic biodiesel producers together with other enterprises active in the palm oil value chain.

6. CLAIMS CONCERNING THE EU'S DETERMINATION OF EXISTENCE OF A THREAT OF MATERIAL INJURY AND CAUSAL LINK

6.1. Allegedly flawed determination concerning the impact of imports from Indonesia on the prices of domestic like products

76. The Commission did not carry out any manifestly inappropriate price comparison and did not fail to take into account evidence on the record relevant for the purpose of its assessment.
77. As a first preliminary remark, the biodiesel produced in Indonesia is "primarily palm oil methyl ester ('PME'), which is derived from palm oil", and the biodiesel produced in the European Union is "rapeseed methyl ester ('RME') but made also from other feedstock, including waste oils as well as virgin oils". Both products belong to the same category of "fatty-acid mono-alkyl esters" or "fatty-acid methyl esters" ("FAME").
78. As a second preliminary remark, the price undercutting analysis carried out by the Commission in the Original Biodiesel Investigation was based on a single comparison method. Because Union producers were involved in only minuscule sales of PME and therefore a price comparison with Indonesian biodiesel was not considered to be reasonable, the Commission compared Indonesian imports of PME at CFPP 13 with the CFPP 0 biodiesel sold by the sampled domestic producers. As in *EU – Biodiesel (Indonesia)*, the methodology adopted for the adjustment is reasonable and based on positive evidence.
79. The Commission engaged in an objective examination based on positive evidence of the effects of Indonesian biodiesel on the prices of the domestic like products.
80. First, the Commission considered the price effects of the Indonesia imports by finding significant undercutting pursuant to three methods.
81. As summarised in recital (268) of the Definitive Regulation:

The Commission conducted several price comparisons in order to capture all the possible configurations of product types, ensuring full comparability to the extent possible. The Commission also explained that the market situation during the investigation period was different to the situation examined by the WTO panel (with now direct sales of PME by Union producers). The Commission also examined the interaction and competitive relationship between Indonesian imports of PME and Union sales and concluded that PME, being among the cheapest types of biodiesel, is capable of exercising a price pressure on Union sales.
82. Second, the Commission found that Indonesian imports were depressing the prices of the domestic industry, which was not able to benefit from the decrease in cost and improve its extremely fragile profitability.
83. In carrying out its consideration of undercutting, the Commission mainly relied on Method 1. There is no error made by the Commission in relation to the level of trade of Indonesian and domestic products. The reliability of Method 1 cannot be put into question by the fact that it covers a 20% portion of the sales of the sampled domestic producers. The Commission used Method 2 and Method 3 to assess the reliability of its main undercutting findings.
84. Even assuming that Method 1 were to cover only a limited portion of domestic sales, *quod non*, the Commission fully explained and demonstrated – via undercutting Method 2 – the ability of imported PME to exert price pressure on blends.
85. Third, the European Union maintains that Indonesia's allegation ignores the important circumstance according to which the costs of the domestic industry declined for the first time during the investigation period. The existence of very low imports from Indonesia during the first three years of the injury investigation period does not automatically disqualify the Commission's consideration of price effects, including of

the existence of price depression. The absence of Indonesian imports in 2015 to 2017 should be read considering the nature of the threat of injury analysis and does not prevent a finding of price depression. It is undisputed that during the last part of the injury investigation period Indonesian imports did dramatically re-enter the Union market. Absent the low-priced Indonesian imports, the situation of the domestic industry could have evolved differently in a positive direction. Accordingly, Indonesian imports have a clear and compelling explanatory force in relation to the price effects on the domestic industry.

6.2. Indonesia's claims concerning the allegedly flawed threat of injury determination

86. First, the European Union has thoroughly demonstrated that the Commission's consideration of the factors listed in Article 15.7 (i) to (iv) of the SCM Agreement complies with the relevant legal standard.
87. The panel in *US – Coated Paper (Indonesia)* concluded that "nothing in Article 3.7 [of the WTO Anti-dumping Agreement] and Article 15.7 [of the SCM Agreement] that would require an investigating authority to have found negative price effects during the POI as a prerequisite for concluding that negative price effects will occur in the imminent future." (emphasis added).
88. The European Union takes the view that nothing in the text of Article 15.7 SCM Agreement would prevent an investigating authority to carry out the assessment of the impact of the further subsidized exports on the domestic industry by reference to post-IP Article 15.4 injury indicators.
89. In the Provisional and Definitive Regulations, the Commission concluded that during the period considered, imports from Indonesia constituted a threat of material injury to the Union industry.
90. In the Provisional Regulation, the Commission carried out the analysis of injury based on positive evidence required under Article 15.1 of the SCM Agreement. Union consumption increased by 33% during the period considered, and by 10% between 2017 and the IP. Between 2017 and the IP, Indonesian imports increased from 24 984 tonnes to 516 088 tonnes (i.e. a 1966% increase) and from 0.3% to 3.3% market share. The Commission observed an overall decrease of the prices of Indonesian imports during the period considered, from 853 EUR/tonnes in 2015 to 671 EUR/tonnes during the IP.
91. Moreover, its analysis of the macro-economic indicators 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". Concerning the analysis of the micro-economic indicators, the Commission noted that the price undercutting of the imports exercised a significant downward pressure on Union industry prices, which prevented the Union industry from benefiting from the decreasing costs during the IP and, in turn, from improving their profitability.
92. The fact that Union industry was not able to improve its economic situation during the period considered, while not conclusive on the existence of injury, at the very least warranted a further analysis of the existence of threat of material injury.
93. In the Definitive Regulation, in relation to production and consumption, the Commission reiterated its findings that the domestic industry, despite having spare capacity, was not able to increase production to keep up with increased demand due to the presence on the market of subsidized imports of biodiesel.
94. The Commission was further able to confirm the findings of the Provisional Regulation in relation to the macro-economic indicators and its provisional findings in relation to micro-economic indicators.
95. On the basis of its analysis of the injury indicators, the Commission concluded in the Provisional Regulation 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", and in turn supported a finding of threat of injury.

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96. Regarding Article 15.7(i), the Commission recalled in the Provisional regulation that the following trade effects were likely to arise from the subsidies: (i) significant undercutting and price depression affecting the delicate situation of the domestic industry even more significantly in the near future; and (ii) a negative impact on the economic situation of the European Union industry, who could not benefit from the competitiveness measures enacted by the GOI.
 97. As regards Article 15.7(ii), the Commission also noted, in the Provisional Regulation, that following the removal of anti-dumping duties in March 2018, imports from Indonesia had massively increased, demonstrating thus a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation.
 98. Pursuant to Article 15.7(iii), the Commission concluded on the existence of spare capacity indicating the likelihood of substantially increased subsidized exports. Spare capacity in Indonesia amounted to 40 % of EU consumption during the investigation period. Since the USA and the Union together accounted for around two thirds of the global consumption of biodiesel and taking into account the existence of high anti-dumping and countervailing duties imposed in the United States ("US") against Indonesian biodiesel, no other known export markets could absorb the very large Indonesian spare capacity. The implementation of the B30 mandate would absorb all production capacity of biodiesel in the country.
 99. Lastly, the viability of China as an alternative export market was excluded by the Commission on the basis of the following data: (a) evidence that China imported PME opportunistically only when it was cheaper than mineral diesel and not pursuant to any long term plans; (b) the non-existence of any official blending mandate in China; and (c) the fact that "during the post-IP, China accounted for only about 27 % of Indonesian exports, while the Union accounted for about 71 %".
 100. Concerning Article 15.7 (iv), the Commission took into account the price effects of imports in the context of its threat of injury analysis by referring to the undercutting margins established. On the one hand, findings on significant undercutting were "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". On the other hand, due to the price pressure from subsidised Indonesian imports, 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.
 101. Second, the European Union respectfully requests the Panel to find that Indonesia failed to establish that the European Union acted inconsistently with Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement in its determination concerning the fragile economic condition of the domestic industry.
 102. Pursuant to Article 15.1 of the SCM Agreement, the European Union has objectively examined, based on positive evidence, all relevant economic factors and indices having a bearing on the state of the industry, thereby considering positive evidence submitted by interested parties during the investigation. The European Union has also complied with Article 15.4 of the SCM Agreement by analysing the overall state of the domestic industry and by concluding that the situation of the domestic industry had further deteriorated post-IP.
 103. At the very outset, Indonesia's claim that threat of material injury can only be found in cases where the Union industry was in a fragile situation during the investigation period is incorrect. What is important in a determination of threat of injury is that the investigating authority adequately explains, based on the evidence before it, why the situation it predicts can be projected to occur. Indonesia does not contest the projections made by the Commission to find a threat in this case. Indonesia is unable to demonstrate why a domestic industry, such as the one at hand, which is unable to generate profits during a prolonged period of time, despite the existence of other favourable market conditions, would not be – by this sole fact – "fragile".

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104. In substance, the entirety of Indonesia's claim is based on a selective and decontextualized presentation of the facts. Indonesia's proposition that there were "slight losses of market share" is incorrect, because the market share of domestic industry declined from 95,9% to 91,6% between 2015 and 2017 before dropping by 15 percentage points to 81,5% in the IP. Indonesia fails to properly describe the evolution, in relative terms, of production and sales vis-à-vis consumption. Indonesia cannot credibly claim, neither on the basis of the investigation data, nor on the basis of the representation of such data in the above graph that "in relative terms, production capacity, production and sales still evolved in line with, even if not to the full extent of, the increase in consumption" (original emphasis). Contrary to what Indonesia argues, the inability of the domestic industry to benefit from the positive market developments is not the mere physiological consequence of the reappearance of imports. Indonesia conveniently ignores from the fact that the reappearance of imports coincided with significant undercutting and price depression to a significant degree. Accordingly, despite its statement of principle that the evaluation of injury requires an assessment of the overall status of the industry rather than of individual factors, it is precisely Indonesia that fails to engage in a holistic evaluation of all relevant indicators.
105. Indonesia is unable to demonstrate why a domestic industry, such as the one at hand, which is unable to generate profits during a prolonged period of time, despite the existence of other favourable market conditions, would not be – by this sole fact – "fragile". Regardless, it cannot in any event be denied that, during the last part of the period considered (i.e. 2017-IP) did have negative price effects on the domestic industry and, for this reason, "explanatory force" for the fragile situation of the domestic industry.
106. The European Union respectfully submits that Indonesia fails to demonstrate that an objective and unbiased investigating authority could have not concluded, based on the totality of post-IP data, that the situation of the domestic industry further deteriorated. It is apparent that (i) production post IP was slightly down, as well as capacity utilisation rates; (ii) sales volume did not improve; (iii) the unit cost of production dropped slightly post-IP whereas the unit sale price remained stable; and (iv) profits drops significantly during Q2 2019.
107. Third, the European Union respectfully requests the Panel to find that Indonesia failed to establish that the European Union acted inconsistently with Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement in its determination concerning the factors supporting the existence of a threat of material injury.
108. In the first instance, the Commission's determination concerning the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom (Article 15.7(i)) was appropriate, and Indonesia has failed to show any error in this respect. All subsidies found lower the operating costs of the exporting producers, resulting in benefits which could be used in exports to the Union market.
109. In the second instance, the Commission's properly considered the significant rate of increase of subsidized imports into the European Union indicating the likelihood of substantially increased importation (Article 15.7(ii)). There is no error in the way the Commission assessed the rate of increase in imports. The Commission objectively examined and considered the seasonal and regulatory requirements linked to biodiesel that could have had an impact on the likelihood of future imports.
110. In the third instance, Indonesia did not put forward credible arguments demonstrating the incorrectness of the evidence relied by the Commission to conclude on the existence of spare capacity and the unavailability of alternative domestic or export markets to the EU (Article 15.7(iii)). Exhibit EU-67 (EBB Submission of 6 September 2019) contains the responses submitted by EBB to the Commission's List B post-IP questionnaire. Exhibit EU-68 (EBB Submission of 29 April 2019) includes at Section II.3 a detailed overview of the Indonesia's available spare capacity, local consumption and limited export market opportunities other than the European Union. Indonesia does not explain why the evidence contained in the two above-mentioned exhibits would have not allowed an unbiased and diligent investigation authority to conclude on the existence of the conditions related to Article 15.7(iii).

111. In sum, the exhibits cited by Indonesia have doubtful evidentiary value, do not put into question the solidity of the Commission's overall findings and manifestly fails to meet the relevant legal standard on the burden of proof.
112. In the fourth instance, the Commission properly considered, in line with Article 15.7(iv), the trends in the prices at which imports were entering, the effect of those prices on domestic prices and the demand for further imports. In particular, the fact that Indonesian's imports massively increased in a few months at the end of the period considered and continued in significant quantities post-IP, contradicts the statement that such imports would not attract further demand, especially in view of their low price.

6.3. Allegedly flawed determinations concerning the existence of a causal link

113. The "causal relationship" between the subsidized imports and the injury requires the existence of a "genuine and substantial relationship of cause and effect" between those elements. Importantly, the Panel in *US – Coated Paper (Indonesia)* found that other factors may have contributed to the vulnerable situation of the domestic industry does not rule out the existence of a causal link between the imports and the threat of a future injury to the domestic industry of the like product.
114. In the Provisional and Definitive Regulations, the Commission separately addressed (i) the effects of subsidized imports from Indonesia; from (ii) the effects of other factors.
115. On (i), the Commission considered that the subsidized imports from Indonesia were causing a threat of material injury to the domestic industry. The elements are: the massive surge of Indonesian imports in the second half of the investigation period, the significant undercutting and price depression caused by such imports, the subsequent loss of market share of the domestic industry and its inability to improve its unsatisfactory profit margin in a otherwise favourable market situation, the existence of spare capacity in Indonesia and the unavailability of alternative export markets.
116. On (ii), the Commission analysed the imports from Argentina, Malaysia and China and provisionally concluded on the existence of a causal link between subsidised Indonesian imports and the threat of material injury. In view of the imposition of countervailing duties and the acceptance of undertakings in February 2019, Argentinian imports could no longer be represent a threat of material injury in the near future. In relation to Malaysian imports, it is apparent from the Provisional Regulation that they had decreasing market share and significantly higher prices and were therefore incapable of attenuating the causal link. Imports from China had increasing market share during the period considered but significantly higher prices than Indonesian ones (778 EUR/tonne) and could not weaken the casual link either.
117. In the Definitive Regulation, the Commission rebutted to arguments from interested parties on the impact of Argentinian and other countries' imports; integrated its causation analysis with data concerning the volume, estimated market share and average price of imports from Argentina, Indonesia, Malaysia and China; and assessed the relevance of other known factors put forward by interested parties, most notably price of raw materials and performance differences among sampled domestic producers.
118. The Commission conclude again that even if the imports from China were to affect negatively the Union industry, these effects are not such that they would attenuate the causal link between the subsidised imports from Indonesia and the threat of injury found. In relation to Argentina, Argentinian imports could not be considered as a price-setter during the post-IP and reiterated that, since there were already measures against such imports, they could no longer be among the threats to the Union industry. In relation to Malaysia, the Commission noted that whilst imports increased in quantity and decreased in price post-IP, the quantities remained below those of Indonesia, and the prices remained higher, despite being subject to a 6,5 % conventional customs duty. In view of the above elements, the Commission found that imports from China and Malaysia could not attenuate the casual link.

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119. After thoroughly addressing the arguments raised by interested parties, in particular on prices of raw materials and internal competition in the European Union, the Commission confirmed the existence of a causal link between the subsidised Indonesian imports and the threat of material injury to the domestic industry of the like product.
 120. First, Indonesia argues that the European Union acted inconsistently with Articles 15.1, 15.2, 15.5 and 15.7 of the SCM Agreement in its determination concerning the existence of a causal link between imports from Indonesia and the alleged threat of injury.
 121. In the first instance, the European Union rejects the Indonesia's argument that the Commission incorrectly considered that the volume of Indonesian imports was threatening to cause injury to the domestic industry.
 122. Imports from Indonesia were indeed low during most of the period considered. However, once the anti-dumping measures on biodiesel from Indonesia were lifted, imports increased significantly during the second half of the investigation period (from 24 982 tonnes in 2017 to 516 088 tonnes during the IP). Prices also dropped from EUR 803/tonne in 2017 to EUR 671/tonne during the IP), and were undercutting and depressing Union industry's prices. As a result, Indonesia's market share increased rapidly from 0,2% in 2017 to 3,3% during the IP. Thus, the Commission observed that the subsidised imports had a negative impact on the situation of the Union industry already during the investigation period. Moreover, the Commission confirmed that the Indonesian imports were causing a threat to the Union industry because the Union market had become the most attractive destination for Indonesian subsidised imports, due to the closure of the second biggest market for Indonesian biodiesel (the United States, which also had adopted trade defence measures). Therefore, the Commission concluded that there was a causal relationship between the Indonesian subsidised imports and the threat of material injury.
 123. Indonesia's argument can be rejected simply on the basis that the subsidised imports towards the end of the period considered were already causing some negative effects to the Union industry and confirmed that there were reasons for the imminent threat.
 124. Indonesia's argument that the subsidised imports did not "steal" market shares and only satisfied the demand which the Union production could not is misplaced. There is no alternative explanation to show why the domestic producers did not increase their production in line with their production capacities other than they could not do so in view of the pressure exercise by the Indonesian imports.
 125. Indonesia wrongly alleges that any increase in Indonesian imports was "logical" and thus expected once the EU terminated the anti-dumping measures on imports of Indonesian biodiesel and could not be deemed to threaten injury.
 126. Contrarily to what Indonesia argues, the loss of market share by the domestic industry and parallel the sharp increase of subject imports is not a mere coincidence. This becomes clear when all the relevant positive evidence on the record is properly considered, including the one related to the existence of significant undercutting and price depression caused by subject imports, which clearly competed – under any plausible scenario – with the biodiesel manufacture by the domestic industry.
 127. In the second instance, Indonesia's argument that the Commission incorrectly considered that the price of Indonesian imports was threatening to cause injury to the domestic industry is completely misplaced.
 128. The key causation issue in the case at hand is not whether the Indonesian imports (subject to anti-dumping measures during the period considered) could be a cause for the low profitability of the Union industry, but that the increase in subsidised imports from Indonesia (once the anti-dumping measures were terminated) were found to likely cause injury to the Union industry.
 129. The European Union has thoroughly demonstrated above the objectiveness and correctness of its consideration of price effects and Indonesia did not bring forward any new element demonstrating the flaws in the Commission's price effects analysis.

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130. In the third instance, Indonesia submits that figures from the post-IP confirm the lack of any causal link between imports from Indonesia and the alleged threat of injury.
 131. The European Union wishes to refer to its rebuttals confirming the correctness of the findings in the Definitive Regulation that the situation of the domestic industry had further deteriorated.
 132. Arguments about the lack of correlation between the evolution of profitability and the subsidised imports after the investigation period are also incorrect. The 10,8% profits achieved during the last quarter of 2018 (i.e. the winter of 2018-2019) were exceptional and due to the fact that one sampled Union producer could increase its prices due to the uncertain transport situation in the region. Thus, Indonesia's allegation does not show a lack of a consistent link between the subsidised imports and its impact on the domestic industry, as the reason for those abnormally high profits in one quarter was properly explained in the Definitive Regulation.
 133. These elements demonstrate that the development of the post-IP does not weaken the causal link between subject imports and the threat of injury to the domestic industry of the like product.
 134. Second, Indonesia further argues that the European Union acted inconsistently with Articles 15.1, 15.5, 15.7 and 15.8 of the SCM Agreement in its determination of that the alleged threat of injury is caused through the effects of subsidization, rather than by other known factors of injury.
 135. In the first instance, contrary to what the Indonesia alleges, in the Argentinean Regulation, the Commission did not find unlikely that Indonesian imports would cause a threat of injury to the Union industry; rather, it found that, even if they could be a cause for the deterioration of the Union industry, Indonesian imports were not sufficient to attenuate the causal relationship between the Argentinean imports and the likely threat to the Union industry with respect to the data and evidence examined in the Argentinean investigation.
 136. With respect to the Indonesia's allegations concerning the undertakings applicable to the large majority of Argentinean exporters, it is sufficient to note that those undertakings concern "minimum import prices" which are considered non-injurious (and yet were limited in volume). The Commission considered that the price recorded post-IP did not accurately reflect what the Argentinian price could have looked like once the effects of the undertakings were fully implemented. Thus, the Argentinean imports of biodiesel were not capable of being a threat of material injury to the domestic industry at the time the Commission assessed this matter in the context of the Indonesian investigation.
 137. In the second instance, Indonesia failed to demonstrate that Argentinian imports attenuates the causal link between Indonesia and the threat of material injury.
 138. Insofar the volume of imports is concerned, the decrease of Argentinian imports from 9,8% during the IP to 5,7% post-IP is a first indication confirming the Commission's findings that the countervailing duties and the undertakings were starting, at least partially, to produce their effects and that such imports were therefore incapable to represent – both from a legal and a factual standpoint – a threat of injury in the near future.
 139. In relation to the price of Argentinian imports, the profitability of the sampled domestic producers plummeted on a quarterly basis post-IP to negative levels.
 140. Both the first and the second calculations submitted by Indonesia are based on a flawed factual and legal premise.
 141. Indeed, in an Article 15.7 case, the causation analysis needs to assess whether the development of other factors in the imminent future can weaken the genuine and substantial link between subject imports and the threat of injury. This condition is clearly not met by the Argentinian post-IP price, which was deemed to be not entirely reflective of the level of price resulting from the full implementation of the undertakings.

142. The Commission did not act inconsistently with Article 15.1 of the SCM Agreement by concluding, based on all positive evidence available on the administrative record of the investigation, that imports from Argentina did not amount to the main, let alone the sole, cause of threat of injury to the domestic industry of the like product.
143. No violation of Article 15.5 of the SCM Agreement exists either. In particular, the proposition that, absent the Indonesian imports, Argentinian imports would have continued to injure the domestic industry is incorrect. The record evidence indicates that Argentinian imports had lost market share between the IP and the post-IP (from 9.8% to 5.7%), while the effects of the undertaking were starting to materialise on the European Union market in terms of price. By the same token, the European Union explained in paragraphs 182 to 184, Indonesia's characterisation of the Argentinian Regulation and the Undertaking Decision is incorrect. Accordingly, Indonesia's contention that its imports could not break the causal link between Argentinian imports and the threat of injury alleged is incorrect.

7. CLAIMS CONCERNING THE EU'S REJECTION OF AN UNDERTAKING OFFER

144. The Commission properly examined and rejected the Undertaking Offer submitted by the Wilmar Group, as required under Article 18.3 of the SCM Agreement. Indonesia has failed to show on which basis the European Union failed to accord, immediately and unconditionally, to accord an advantage to biodiesel originating in Indonesia. Any attempt by Indonesia to show discrimination under Article I of the GATT 1994 should be equally dismissed.
145. The Commission properly examined Wilmar's offer but, *inter alia*, it considered the acceptance of the proposed undertaking to be impractical and the MIP proposed and the annual report of MIP inappropriate. Absent any evidence to the contrary, the Panel should leave such a finding untouched.

8. CLAIMS CONCERNING CERTAIN PROCEDURAL ASPECTS

8.1. The European Union made no error in its reliance on "facts available"

146. It is common ground between the parties that, for the purposes of assessing whether there was a provision of CPO for LTAR, the Commission had recourse to facts available. In particular, the Commission relied upon Article 28 of the Basic Regulation which mirrors the requirements under the SCM Agreement.
147. Contrary to the position advanced by Indonesia, reliance on facts available was necessary and justified in the circumstances of this investigation and hence the Commission's decision to avail itself of this mechanism is fully consistent with the applicable legal standard.

8.2. The basis for the investigating authority's recourse to facts available

148. During the investigation, the Commission sought to obtain necessary information concerning the operation of the market for CPO from different entities. Requests for information were directed towards: the Government of Indonesia ; four exporting producers of CPO based biodiesel; three sampled Union producers; and two unrelated importers of biodiesel.
149. Even if a further reply to Appendix B for PTPN was provided on 30 June, the Commission concluded that this information was not submitted in good time and was not verifiable. On that basis, the GOI had "not acted to the best of its ability" to cooperate in the investigation.
150. Thus, 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.

8.3. The application of Article 12.7 of the SCM Agreement in this dispute

151. Article 12.7 of the SCM Agreement should be interpreted to mean that recourse to "facts available" may only be had where the failure to provide necessary information

is attributable either to an "interested Member" or an "interested party". This provision should, like the analogue provisions in the Anti-Dumping Agreement, be understood as a detailed expression of the principle of good faith.

152. The Commission relied on Article 12.7 of the SCM Agreement on the basis that an interested Member (Indonesia) had refused access to, or otherwise not provided, necessary information within a reasonable period.
153. First, the European Union invites the Panel to reject the assertion that the Commission was precluded from relying on Article 12.7 of the SCM Agreement on the basis that the GOI had done its "utmost".
154. The Commission was lacking information it reasonably considered to be "necessary" as regards the formulation of the bids for CPO and hence the extent to which they reflected competitive market prices. In those circumstances, and given the failure to provide information by CPO suppliers themselves, the Commission could have recourse to facts available to avoid a situation in which its investigation was hindered by the lack of cooperation on the part of those suppliers. Evidently, where, as is the case with PTPN, the supplier in question is a State-owned entity, this reflects directly on the GOI. However, the Commission was also entitled to rely on a lack of "necessary" information including from sources outside the immediate control of the GOI (non-state-owned entities) as a basis for having recourse to facts available.
155. Second, Indonesia challenges the basis on which the Commission chose to verify certain suppliers and not others. The Commission recalls that it analysed the replies of those suppliers who provided information in a timely manner.
156. Third, Indonesia asserts that there was no ground for the Commission to complain that it did not have a clear understanding of the role of PTPN since the GOI "fails to see what else there is to understand." Indonesia asserts, in essence, that ample information was provided and relies on its submissions of 30 June 2019 and 30 August 2019 in this respect. The European Union disagrees. The obligation to provide the necessary information denotes that such information will be provided in a timely manner such that it may be duly verified.
157. Fourth, Indonesia claims that "in light of the efforts by the GOI and CPO suppliers, the Commission was not entitled to disregard all the information submitted by other interested parties." The European Union recalls that the Commission had regard to the information that was submitted in the course of the investigation by those interested parties who responded to the questionnaires on a timely basis, it reached determinations on the basis of the positive evidence before it.

8.4. Alleged violations of Articles 12.1, 12.3, 12.4, 12.4.1 and 15.1 of the SCM Agreement

158. First, the European Union respectfully submits that Indonesia's claim that the Commission failed to request the three sampled domestic producers to provide meaningful non-confidential summaries of their post-IP questionnaire responses is based on a selective and incorrect appreciation of the facts.
159. The post-IP questionnaire sent to the sampled domestic producers required these companies to provide a non-confidential version of the response, in line with Article 12.4.1 of the SCM Agreement (Exhibit EU-73). Open versions of the replies were submitted to the Commission which included, where appropriate, a statement of the reasons why summarization was not deemed possible, in conformity with Article 12.4.1 of the SCM Agreement (Exhibit EU-74). Interested parties had access to sufficiently clear data allowing them to comment on the post-IP performance of the domestic industry. The procedural rights of interested parties were not jeopardised by the Commission's reasonable decision to disclose post-IP data in an aggregate – yet sufficiently granular – form.
160. Second, Indonesia's argument that the Commission fail to provide necessary information concerning undercutting and other price determinations should be rejected. The European Union has already demonstrated the significant level of details of the Commission's undercutting analysis as disclosed to interested parties.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA**

1. Good morning Mr. Chairman and distinguished members of the Panel, Parties, Third Parties, and members of the Secretariat.
2. Argentina welcomes the opportunity to appear today before the Panel and present its views on some of the issues raised by the Parties in this proceedings on *European Union – Countervailing Duties on Imports of Biodiesel from Indonesia*.
3. Argentina will not focus on the specificities of facts and evidence provided by both Parties. It will exercise its right instead by commenting on certain considerations concerning the interpretation of certain provisions of the SCM Agreement in the context of the current dispute.
4. On the standard of review, we consider appropriate to recall that Article 11 of the DSU establishes the applicable standard of review for a WTO panel in the task of assessing a determination made by an investigating authority of a Member. This article mandates panels to conduct an objective assessment in accordance with the covered agreements. Even when WTO jurisprudence has held that a panel "*must neither conduct a de novo review nor simply defer to the conclusions of the national authority*"¹, at the same time, its examination must be "critical and searching" to determine that the conclusions of an investigating authority are "reasoned and adequate" and, consequently, "coherent and internally consistent". As the *Appellate Body in U.S. – Softwood Lumber VI* stated:

"The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it".²

5. In this short intervention Argentina would like to address firstly the nature of export restraints. The Commission expressed that "*[T]he support to the biodiesel industry is achieved by a number of measures, and mainly through the export tax and levy imposed on CPO and the biodiesel subsidy fund*"³. Referring to that conclusion in the First Written Submission the EU posited that there is a "financial contribution" given the "*existence of a mechanisms established by the GOI to induce CPO producers to sell their CPO to local biodiesel producers for LTAR*".⁴ Such "mechanism" would comprise an "export restraint system" which purportedly encompasses both an export tax and an export levy imposed on CPO.⁵
6. Argentina warns against the unqualified and automatic consideration of export restraints as "financial contributions" in the terms of Article 1.1(a)(1) of the SCM Agreement. That would run against a well established WTO jurisprudence that in a well-reasoned analysis concluded that export restraints could not constitute government-entrusted or government-directed provision of goods under Article 1.1(a)(1)(iv) of the SCM Agreement *per se* and, therefore, could not possibly qualify as a financial contribution.⁶

¹ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

² *Ibidem*, para. 93

³ Commission Implementing Regulation (EU) No. 1344/2019 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, 13 August 2019, pp. 1-52, ("Provisional Regulation"), Exhibit IDN-1, recital (113).

⁴ EU FWS, Para. 246.

⁵ EU FWS, Paras. 151 and 246.

⁶ Report of the Panel, *U.S. – Export Restraints*, para. 8.75.

7. In *US – Export Restraints*, the Panel differentiated the "nature" from the "effects" of an export restraint. It rejected that the "effect" through which such restraints induced domestic producers to sell their products to domestic purchasers/users, should be equivalent to a government direct action. The Panel clarified that in order to determine whether there is a financial contribution or not, the analysis should focus on the "nature" of a government action rather than on its "effects".⁷ This well-elaborated conclusion cannot be ignored in the present case where one of the elements of the alleged mechanism is export restraints.
8. In light of the aforementioned Argentina respectfully asks the Panel to have a cautious approach and duly consider this differentiation when examining the analysis of the claims concerning export restraints, in particular.
9. Next, Argentina would like to provide some views in relation to the finding that "[T]he Commission considered that the imposition of export restraints (such as export taxes and levies) is one of the means or tools used by the GOI to provide CPO for less than adequate remuneration".⁸
10. The assessment of whether the provision of a good or service is made at LTAR entails a comparison with the remuneration deemed to be "adequate".
11. In the context of an analysis of goods or services provided at LTAR Argentina considers that Article 14(d) of the SCM Agreement provides useful guidance to contribute to determine whether the provision of goods or services at LTAR confer a benefit. Article 14(d) establishes that:

"The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".⁹ (emphasis added)

12. From the text of the article, the "prevailing market conditions" are foreseen as a relevant element to determine the adequacy of a remuneration. In *Canada – Renewable Energy*, the Appellate Body held that:

*"[W]e are of the view that the Panel should have started, rather than concluding, its benefit analysis with the definition of the relevant market. The definition of the relevant market is central to, and a prerequisite for, a benefit analysis under Article 1.1(b) the SCM Agreement. The existence of a benefit can properly be established only by comparing the prices of goods and services in the relevant market where they compete. It would seem logical for a panel that is tasked with a benefit determination to begin its analysis by defining the relevant market, which will be used for the purposes of undertaking the benefit analysis."*¹⁰ (emphasis added).

13. However, Argentina is of the view that in the task of determining the existence of a LTAR under the SCM Agreement, it should be avoided to resort to other market conditions than those prevailing in the market in question. The Panel in *U.S. – Softwood Lumber VII* reached to the conclusion that:

⁷ Report of the Panel, *U.S. – Export Restraints*, paras. 8.33-8.35, *inter alia*.

⁸ Commission Implementing Regulation (EU) N° EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia ("Definitive Regulation"), Exhibit IDN-2, recital (103).

⁹ Article 14(d) of the SCM Agreement.

¹⁰ Report of the Appellate Body, *Canada – Renewable Energy*, para. 5.169.

*"To determine the adequacy of remuneration for the government-provided good in question, Article 14(d) requires that an investigating authority use a benchmark that relates to the 'prevailing market conditions' for that good in the country of provision. Article 14(d) therefore requires that an investigating authority select a benchmark that relates to the prevailing market conditions for the government-provided good in question in the country of provision. In other words, as a previous panel observed, the benchmark must reflect the 'factual situation' found to exist in respect of the government-provided good."*¹¹ (emphasis added)

14. Even when Article 14(d) would not apply to the current case directly because the OPPF does not purchase goods from biodiesel producers but rather -and purportedly- disburses amounts in the form of payments to them, the Article could offer a guidance when comparing the LTAR with the prevailing market conditions.
15. Following the reasoning of the Appellate Body that it doesn't seem appropriate to transpose other market conditions to those prevailing in the market under analysis, Argentina contends that the "relevant market" should be considered under the actual conditions of functioning, including any degree of intervention by the Indonesian government in the market. In that regard, the Panel Report in *Canada – Softwood Lumber VII* established that:

*"We note that the central inquiry under Article 14(d) in choosing an appropriate benchmark for assessing benefit is whether government intervention results in price distortion such that recourse to out of country prices is warranted. At the same time, the market from which the benchmark is selected need not be completely free of any government intervention. The Appellate Body has found that the concept of 'price distortion' is not equivalent to any impact on prices as a result of any government intervention. Rather, an investigating authority must determine whether in country prices are distorted on a case by case basis, taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record".*¹² (Emphasis added)

16. The conclusion of the Panel in *Canada – Softwood Lumber VII* could apply to the present case. In other words, the existence of a blending mandate leading to more CPO being transacted in the domestic market at a certain price should not be deemed *per se* as violating the provision of Article 1.1 of the SCM Agreement unless it is rightfully determined that that mandate entails a financial contribution that concedes a benefit that would not exist otherwise. A case-by-case analysis should be required for that purpose .
17. Finally, Argentina intends to address the mention to the anti-subsidy investigation involving the European Union and our country, which ended with a Price Undertaking implemented through Commission Implementing Decision (EU) 2019/245. Argentina is of the view that different circumstances between that and this case advise against the comparison Indonesia is presenting. Argentina production conditions and domestic market regime and operation are sensibly different from Indonesia's. To name just an example, there is no institution comparable to the OPPF in Argentina. Bringing this matter along the rest of the claims would distract the Panel from the main task of considering the consistency of the

¹¹ Report of the Panel, *U.S. – Softwood Lumber VII*, para. 7.20.

¹² Report of the Panel, *U.S. – Softwood Lumber VII*, para. 7.145. In the same sense: Appellate Body Report, *U.S. – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.146.

measure challenged by Indonesia and without adding to the relief sought after with the claims pursued.

18. Argentina thanks the Panel and the Parties for the consideration given to the present submission. Argentina hopes its views may be helpful and assist the Panel in its current task. Argentina is open to receive and answer any response the Panel or the Parties may have.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTY WRITTEN SUBMISSION

A. STANDARD OF REVIEW

1. The Panel is required to make an "objective assessment of the matter before it"¹ and to determine whether the Commission discharged its obligations as an investigating authority by making "reasoned and adequate" conclusions, "in the light of the evidence on the record".²

B. FINANCIAL CONTRIBUTION UNDER ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

2. It is important that Article 1.1(a)(1)(iv) of the SCM Agreement is properly interpreted so that its anti-circumvention objective³ is given meaningful effect, and is not unduly constrained by overly narrow legal interpretations.

3. A key point of divergence between the parties is the standard to establish that a relevant function under Article 1.1(a)(1)(iv) **"would normally be vested in the government"**. That phrase is not defined in the SCM Agreement and nor has its meaning been comprehensively addressed in previous disputes.

4. Australia finds no support for a narrow legal standard which is automatically determined by government practice, as argued by Indonesia. Indeed, the Appellate Body statement upon which Indonesia relies, refers to "what would ordinarily be considered governmental practice *in the legal order* of the relevant [WTO] Member"⁴ – and not to the concept of *actual* practice. Such a narrow interpretation is also inconsistent with the ordinary meaning of the word "vests", which does not limit the *evidence* through which it must be demonstrated. A narrow interpretation is also incongruous with the final line of Article 1.1(a)(1)(iv), which broadly refers what is "normally followed by governments".

5. Any reasoning based upon the "normally vested" criterion must also be properly applied to the facts at question. Australia finds it hard to reconcile the Commission's reasoning – which seeks to define "provision of raw materials" as governmental function through the "exercise of sovereign rights" – with the actual good that was supplied (i.e. CPO). While Australia forms no conclusions on the facts, CPO would generally seem to have the characteristics of a manufactured (i.e. processed) product, rather than a raw material.

6. The parties also diverge to some extent on the scope of the legal standard of the phrase **"entrusts or directs"** under Article 1.1(a)(1)(iv). In Australia's view, the ordinary meaning of those terms do not exclude subtle or informal forms of communication, where properly supported on the evidence.

7. Accordingly, Australia agrees with the Appellate Body that "an interpretation of the term 'entrusts' that is limited to acts of 'delegation' is too narrow"⁵ and "an interpretation of the term 'directs' that is limited to acts of 'command' is also too narrow".⁶ Following from

¹ Article 11 of the DSU.

² Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

³ Appellate Body Report, *US – Softwood Lumber IV*, para. 52 as quoted with approval in Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.

⁴ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297 (emphasis added). See also, Indonesia's first written submission, para. 184. Australia further observes that the Appellate Body's statements were not specifically directed at the meaning of the phrase "normally ... vested in the government". This reduces the persuasiveness of the Appellate Body's statement, in relation to the meaning of that term.

⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 110.

⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 111.

that reasoning, Australia considers that it is possible, in appropriate circumstances, for inducement to support a finding of entrustment or direction.

8. Evidence in support of "entrustment or direction" should support a "demonstrable link between the government and the conduct of the private body".⁷ As the Appellate Body has also stated, "government 'entrustment' or 'direction' cannot be inadvertent or a mere by-product of governmental regulation".⁸ In some cases, "[i]dentifying [governmental] motive and intent" through reliable evidence, may assist in the examination of entrustment and direction.

II. EXECUTIVE SUMMARY OF AUSTRALIA'S ORAL STATEMENT

A. FINANCIAL CONTRIBUTION "OR" INCOME OR PRICE SUPPORT

9. The parties disagree over whether the concepts of "financial contribution" and "income or price" support in Article 1.1 of the SCM Agreement are mutually exclusive. In the context of Articles 1.1(a)(1) and 1.1(a)(2), Australia considers that those concepts are *not* mutually exclusive. The word "or" sits between those two provisions; the former provision is closed list of subsidies and the latter is an open concept that broadens that list. Australia considers in order for those concepts to be mutually exclusive, both provisions would need to be closed concepts. Given this is not the case, the context supports an *inclusive* interpretation of the word "or" between sub-paragraphs (1) and (2) of Article 1.1(a) of the SCM Agreement.⁹

B. THE CALCULATION OF "BENEFIT"

10. Another issue in dispute is whether the European Union acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in determining that the provision of CPO conferred a benefit upon Indonesian biodiesel producers.

11. To determine whether a benefit exists, Article 14 is "relevant context" for interpreting Article 1.1(b). Article 14(d), in particular, contains guidelines for determining whether government purchases or provisions of goods make a recipient "better off" than it would otherwise be in the marketplace. This is ultimately a comparative exercise between the price of the good and an appropriately selected benchmark.¹⁰

12. The Appellate Body has stated that "the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision" are "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement".¹¹ However, alternative benchmarks to in-country prices may be appropriate in certain circumstances.¹² The analysis necessary to arrive at an appropriate benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information.¹³

⁷ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112. See also, Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.103.

⁸ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114. (footnote omitted)

⁹ This understanding is supported by the Panel's findings in Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.1354, which determined that income support as direct government intervention in the market could also, depending on the circumstances, amount to a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement.

¹⁰ See e.g. Appellate Body Reports, *Canada – Renewable Energy*, para. 5.163; *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.134-5.135.

¹¹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154, (emphasis added).

¹² See e.g. Panel Report, *US – Softwood Lumber VII*, para. 7.145; Appellate Body Report, *US – Softwood Lumber IV*, para. 106. In-country prices of the relevant good will not be appropriate where they deviate from market-determined prices as a result of government intervention in the market: Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

¹³ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157. The Appellate Body has also recognised that the second sentence of Article 14(d) requires that the chosen benchmark must relate or refer to, or be connected with, the "prevailing market conditions" in the relevant country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale. Appellate Body Report, *US – Softwood Lumber IV*, para. 103. See also, Appellate Body Report,

III. EXECUTIVE SUMMARY OF AUSTRALIA'S RESPONSES TO PANEL QUESTIONS TO THE THIRD PARTIES

13. Response to Question 5: The exercise of "free choice" by actors in the market cannot of itself preclude a finding of entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement. The legal analysis of entrustment or direction - and a WTO Member's responsibility for such - must focus on the acts of the WTO Member in question, rather than the effects of those acts, such as the reactions of market actors.¹⁴

14. Response to Question 6: Entrustment or direction under Article 1.1(a)(1)(iv) occurs where a government has given responsibility to a private body (i.e. entrustment) or exercised its authority over a private body (i.e. direction) in order to effectuate a financial contribution.¹⁵ That determination "hinge[s] on the particular facts of the case"¹⁶, irrespective of the label that is given to the government conduct in question (e.g. "inducement" or "incentive" etc), and implies "a more active role of the government than mere acts of encouragement".¹⁷

15. Response to Question 7: While actual governmental practice might be a relevant evidentiary factor in considering whether a function is "normally vested in the government" under Article 1.1(a)(1)(iv), it is not automatically the determining factor for that criterion.

16. Evidence that a practice is not permissible in the legal order of a government would also logically tend to suggest that such a practice is not "normally vested in the government". The analysis of any such evidence of permissibility - or lack thereof - is fact-specific and is not necessarily determined through any one particular type of evidence.

17. Response to Question 11: Broadly, Australia considers the failure of an "interested Member" to ensure the submission of information concerning entities unrelated to the "interested Member" may, in some cases, provide an investigating authority with a valid basis to resort to facts available under Article 12.7 of the SCM Agreement. This assessment will depend upon the particular facts of the matter.

US – Carbon Steel (India), para. 4.150, which reinforces the need for benchmark prices to be market-determined.

¹⁴ Panel Report, *Korea – Commercial Vessels*, para. 7.370.

¹⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

¹⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116 and fn. 188. Australia also refers to paragraph 24 of its third party written submission, which outlines further principles on the nature of entrustment or direction.

¹⁷ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

ANNEX C-3**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. DETERMINATION CONCERNING THE OIL PALM PLANTATION FUND****A. The Origin of Funds Does Not Determine the Existence of a Financial Contribution**

1. Canada disagrees with Indonesia's claim that the origin of the relevant funds is determinative when assessing whether a financial contribution has been provided under Article 1.1(a)(1) of the SCM Agreement. Canada agrees with the European Union that in an Article 1.1(a)(1) analysis, "what matters is that the transfer of funds is attributable to the government or public body".

2. The existence of a financial contribution depends on whether such transfer of economic value listed in Article 1.1(a)(1) can be considered the conduct of, and therefore attributed to, the relevant WTO Member. What matters is whether there is a link between the "conduct"—i.e. the form of financial contribution—and the government.

3. A finding of subsidization under the SCM Agreement does not require government ownership or possession of financial resources. If there is a sufficiently direct indication of a government practice that involves a transfer of financial resources, such a transfer does not necessarily have to emanate from government ownership or possession over such resources. In the present case, the fact that the OPPF Management Agency—a public body—"makes" or decides when, and how much of the funds to transfer to biodiesel producers is sufficient to attribute the transfer of funds to Indonesia.

B. Indonesia's Claim Regarding Payments with Reciprocal Obligations is Unsupported

4. Indonesia relies on the panel's findings in *US – Softwood Lumber VII* to support its claims that if a payment is linked and conditioned in the same legal instrument to the performance of certain reciprocal obligations, such payment cannot constitute a grant. Canada considers Indonesia's reliance on *US – Softwood Lumber VII* misplaced.

5. In *US – Softwood Lumber VII*, the panel found that the obligation for log harvesters to perform silviculture and forest management activities in Québec and New Brunswick, and the subsequent reimbursement of the costs for those services by the governments, are directly tied to the governments' provision of a good (i.e., Crown timber) and should have been treated "as part of the same transaction".¹ The panel's reference to "reciprocal obligations" in this regard represents, on the one hand, a government provision of a good, and on the other, a consideration that includes (among other things) the performance of a particular service for the governments.

6. The main problem with Indonesia's argument is that there does not appear to be any reciprocal obligation between the biodiesel producers and the OPPF. Canada understands the reciprocal obligations here are between the biodiesel producers that sell the biodiesel, and the petrofuel entities that purchase it at the mineral diesel reference price. The OPPF then supplements this payment through a direct transfer of funds to the biodiesel producers up to the amount of the higher biodiesel reference price. The OPPF has an obligation to supplement the price received by the biodiesel producers, but the biodiesel producers do not appear to have any corresponding obligation towards the OPPF.

¹ Panel Report, *US – Softwood Lumber VII*, paras. 7.620-7.628.

C. The Benefit Analysis Must Consider the Adequacy of Remuneration for Biodiesel Producers Taking Into Account the Prevailing Market Conditions

7. In this case, the payments made by the OPPF are conditional on the sale of biodiesel to domestic petrofuel entities. These payments thus form part of the remuneration for the sale of biodiesel. They are not provided simply as unconditional grants. The benefit calculation must therefore consider the total remuneration received by the recipient to properly assess whether, with the financial contribution, the recipient is truly better off than it otherwise would be. From this perspective, assessing the existence of a benefit while ignoring the relevant conditions may lead to an imprecise evaluation.

8. To accurately assess whether biodiesel producers are better off than they would otherwise be in the absence of the OPPF payments, the Commission was required, in line with the guidelines of Article 14, to assess whether the total remuneration received by biodiesel producers for the sale of biodiesel to petrofuel entities is more than adequate, thereby conferring a benefit to biodiesel producers. Whether the total remuneration is more than adequate should be assessed relative to what biodiesel producers would otherwise obtain in the domestic market for its products in the absence of those payments.

9. This assessment should begin by defining the relevant market. Article 14(d) provides further relevant context. It requires that the adequacy of remuneration for the provision or purchase of a good is to be determined "in relation to prevailing market conditions for the good [] in question in the country of provision...". The relevant market is not a market free of government interference-i.e., an undistorted or perfectly competitive market. Rather, it refers to markets as they exist,² and may require consideration of the relevant regulatory framework under which the market operates.³

10. Amongst the prevailing market conditions in this case is the blending mandate that legally requires certain operators to use as fuel a blend of at least 20 percent biodiesel. Because of this mandate, even in the absence of the OPPF payments, the petrofuel entities, as the blenders, would still be required to purchase biodiesel in the market. From this perspective, a proper benchmark analysis must take the blending mandate into account as a relevant condition prevailing in the Indonesian market.

II. DETERMINATION CONCERNING THE ENTRUSTMENT AND DIRECTION OF PRIVATE CRUDE PALM OIL PRODUCERS

A. Entrustment or Direction Cannot be Based on the Effects of an Export Tax or Levy

11. Central to the Commission's finding on entrustment or direction is a "set of measures" that allegedly "induced" domestic crude palm oil ("CPO") producers to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration. From the Commission's perspective, the auction prices published by PT Perkebunan Nusantara ("PTPN") constituted the maximum domestic price for CPO, while the export tax and levy "effectively" restricted the freedom of action of CPO suppliers by "*de facto*" limiting their business decisions as to what price to sell their product and where, forcing CPO suppliers into an "economically irrational" situation that induces them to "sell[]" their goods domestically for a lower price than they could obtain in the absence of those export restraints".

12. The Commission's reasoning is reminiscent of the USDOC's rationale rejected by the panel in *US – Softwood Lumber VII*.⁴ Canada recalls that entrustment or direction requires that a government "give responsibility to", or "exercise authority over", a private body to effectuate a financial contribution. Past panels have invariably found that Article 1.1.(a)(iv)

² See Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.184-5.186, 5.190; Panel Report, *US – Softwood Lumber VII*, para. 7.650.

³ Panel Report, *US – Softwood Lumber III*, para. 7.50.

⁴ Panel Report, *US – Softwood Lumber VII*, para. 7.606.

does not cover situations in which the government intervenes in the market in some way (including through export restraints), which may or may not have a particular result simply based on the given factual circumstances and the reaction of actors in the market. A government does not entrust or direct 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. The fact that export taxes or levies may affect a private body's ability to export does not establish that the government gives responsibility to or exercises authority over a private body to carry out the function of providing goods to domestic users.

13. Insofar as the Commission's finding regarding entrustment or direction is premised on the effects of the export levy or tax imposed on the export of crude palm oil, its finding pursuant to subparagraph (iv) is flawed. While these measures may have an effect on the provision of CPO within Indonesia, the fact that private CPO suppliers retain the freedom to sell their products both domestically or for export, and to sell to any downstream purchasers on commercial terms, not just to biodiesel producers, means that there can be no finding of entrustment or direction on such basis. Such evidence directly contradicts the Commission's conclusion that CPO suppliers are "compelled", "commanded", or "given responsibility to" provide CPO to biodiesel producers in order to effectuate a financial contribution. As is well-recognized by the Appellate Body and past panels, entrustment or direction cannot be inadvertent or a mere by-product of government regulation.⁵

B. Inducement or Encouragement Not Sufficient Bases to Find Entrustment or Direction

14. Canada recalls that the SCM Agreement reflects a delicate balance between Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures. This balance must be borne in mind in the application of sub-paragraph (iv). Findings of government entrustment or direction cannot be so broad as to allow investigating authorities unfettered discretion to apply countervailing measures whenever a government is merely exercising its general regulatory powers, which often may have the effect of changing the incentives for private actors operating in the market.

15. While evidence of inducement or encouragement may indicate possible government entrustment or direction, it is not sufficient as evidence of government entrustment or direction in and of itself. The investigating authority must still examine the design, structure, and intended operation of the set of measures to ascertain if the nature of the measures is such that it amounts to the government "giving responsibility to", or "exercising authority over", a private body to effectuate a financial contribution.

16. The Appellate Body has further considered that entrustment or direction imply a more active role than mere acts of encouragement. Past panels have also considered that evidence which demonstrates merely that the government encouraged or facilitated private investment would not be sufficient to conclude the government entrusted or directed such private action.⁶ In this regard, a finding of entrustment or direction based on incentives alone would amount to a finding based on the "effect" or "result" of a government measure and would render the "financial contribution" requirement under Article 1.1(a)(1) inutile.

C. Totality of Circumstantial Evidence Must Be Examined

17. Article 1.1(a)(1)(iv) further requires a demonstrable link between the government and the conduct of the private body. While it is possible to establish entrustment or direction based on circumstantial evidence, a panel has an obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of

⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 114, 116; Panel Reports, *US – Countervailing Measures (China)*, para. 7.402; and *US – Supercalendered Paper*, para. 7.38.

⁶ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.59.

evidence in isolation.⁷ If there are errors in an investigating authority's examination of individual pieces of evidence, this will undoubtedly affect an examination of the *totality* of the evidence.⁸ The Appellate Body has considered that certain intermediate findings may be so central to the ultimate conclusion of an investigating authority that an error at an intermediate stage of reasoning may invalidate the final conclusion.⁹

18. In consideration of these principles, the Panel may wish to consider the adequacy and reasonableness of the Commission's inference that PTPN functions as a price-setter, and whether there is sufficient evidence of a demonstrable link between its function as a price-setter and the entrustment or direction of private CPO suppliers to supply CPO domestically. A central question to consider is whether there is, overall, sufficient evidence that CPO suppliers are required to provide CPO domestically to biodiesel producers. The fact that private CPO suppliers retain the freedom to sell CPO both domestically or for export, and to sell to any downstream purchasers, not just to biodiesel producers, militates against a finding of entrustment or direction.

D. Order of Analysis under Article 1.1(a)(1)(iv)

19. The Parties disagree over the precise meaning of the phrases "functions ... which would normally be vested in the government" and "the practice, in no real sense, differs from practices normally followed by governments", and the legal standards these phrases impart. Canada does not consider it necessary for this Panel to make a finding regarding the precise meaning of the phrases at issue to positively resolve the present dispute.

20. According to the text of subparagraph (iv), the first question to address is whether the government entrusts or directs a private body to effectuate a financial contribution identified in subparagraphs (i) to (iii). The Parties' arguments with respect to whether the resulting action of the private body is a type of function "normally ... vested in the government" and is a "practice ... normally followed by governments" is only relevant if the Panel concludes that the Commission's finding of entrustment or direction based on the set of measures it has identified is reasoned and adequately explained. In other words, a conclusion by the Panel that the Commission's finding of entrustment or direction is flawed would be sufficient to positively resolve this dispute with respect to whether there is a financial contribution pursuant to Article 1.1(a)(1)(iv).

⁷ Appellate Body Report, *Japan – DRAMs (Korea)*, para. 131 (citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 157).

⁸ Ibid. (citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 154).

⁹ Ibid. para. 135.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. The OPPF Payments****A. Grants**

1. It is common for grants to include preconditions to receive a benefit, and the term "grants" in Article 1.1 (a)(1)(i) of the Agreement on Subsidies and Countervailing Measures (the "ASCM") does not exclude grants with a certain precondition from its scope. This is clearly supported by the Appellate Body's remark that grants can take many forms, including "conditional grants".¹
2. In this dispute, there are no reciprocal obligations between the Government of Indonesia (the "GOI") and Indonesian biodiesel producers. To receive the Oil Palm Plantation Fund (the "OPPF") payments, the biodiesel producers are merely required to submit to the GOI an invoice and documents demonstrating the delivery of biodiesel to petrofuel entities. In other words, the provision of biodiesel by biodiesel producers to petrofuel entities is a precondition for the OPPF payments prescribed in the relevant regulation. This precondition does not preclude the OPPF payments from being a grant—they are simply grants with a condition attached.

B. Benefit

3. A past panel clarified that a "benefit" under Article 1.1(b) of the ASCM "is an 'advantage' to the recipient of the financial contribution. The term 'benefit', as used in Article 1.1(b), 'implies some kind of comparison' to determine whether the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".² The panel in the same case also held that a grant, which essentially is a gift from a government, "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".³
4. In this dispute, to the extent that the OPPF payments constitute a grant, the biodiesel producers, when they receive the payments, are given greater resources which are equal to the amount of the payments. In other words, biodiesel producers are placed in an economically better position than if they had not received the money. Accordingly, they receive a benefit the amount of which is equal to the amount of such payments.

C. Source of Funds

5. Japan submits that the source of funding for a financial contribution, in general, has little relevance to the subsidizing nature of a payment and the amount of benefit. Article 1.1 (a)(1)(iv) of the ASCM provides that subsidies can include payments or provision of goods or services for less than adequate remuneration that are carried out by a private body at the entrustment or direction of a government. The logical consequence of this provision is that the source of funds needs not to be government funds. What matters is whether the fund is under the control of a government and the transfer of that fund is attributable to the government.
6. In the present case, at the time the export levies paid by the biodiesel producers are collected by the GOI, those funds became under the control of, and attributable to, the government. Therefore, whether or not the source of funds is contributions from the biodiesel producers is not relevant to the subsidizing nature of the payment, and there

¹ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn. 1292 to para. 616.

² Panel Report, *India – Sugar and Sugarcane*, para. 7.257.

³ *Ibid.* para. 7.259.

is no need to adjust the amount of benefit, taking into account export levies paid by those producers.

II. The Provision of CPO

A. "Functions ... which would normally be vested in the government"

7. In light of the "anti-circumvention" function of Article 1.1 (a)(1)(iv) of the ASCM ensuring that governments do not evade their obligations by using a private body as a proxy to provide a financial contribution, whether a function carried out by a private body is one "which would normally be vested in the government" within the meaning of Article 1.1(a)(1)(iv) of the ASCM should be determined based on whether the government *would normally* have the *authority or power* to perform such a function, rather than whether it is *actually* performing that function or specifically stipulated as such under the relevant legal instruments. Therefore, historical or actual past practice and labels to describe the governmental action in the relevant legal order cannot be a decisive factor, but only one of the factors to consider for this enquiry.
8. In this dispute, the transaction price of biodiesel (a major downstream product of Crude Palm Oil (the "CPO")) is generally guaranteed by the government through the OPPF, and the CPO itself is subject to export tax and export levies. Japan is of the view that these facts indicate that the GOI substantially intervenes in the CPO and biodiesel markets, and that they may support an understanding that the GOI would normally have the authority to do so and therefore the provision of CPO in Indonesia would be vested in the GOI.

B. "Entrust[ment] or Direct[ion]"

9. The plain meaning of the terms "entrusts" and "directs" of Article 1.1(a)(1)(iv) of the ASCM requires that a government give responsibility to private bodies or exercise its authority over them to effectuate one of the financial contributions listed in items (i) through (iii) of Article 1.1(a)(1). The terms "entrusts" and "directs" appear to presuppose a "demonstrable link" between a government's action and a private body's conduct that falls under any of items (i) through (iii).⁴ In light of the "anti-circumvention"⁵ function of Article 1.1(a)(1)(iv) of the ASCM, the demonstrable link should not be limited to a form of delegation or command, but may be established by circumstantial evidence which implies, among others, some form of "threat" or "inducement" by the government,⁶ and can include an incentive.
10. However, the mere fact that policies and regulations are intended to support and promote domestic industry *in some way* does not suffice to establish the requisite link between the government's action and a private body's conduct. Japan notes that the Appellate Body's findings that an "entrustment" or "direction" implies "a more active role than mere acts of encouragement" and "it cannot be inadvertent or a mere by-product of government regulation".⁷ In other words, the evidence must indicate that a government took some kind of more proactive action than mere encouragement to give responsibility to private bodies or exercise its authority over them to effectuate one of the financial contributions listed in items (i) through (iii). Such evidence must in all cases be probative and compelling,⁸ whatever the nature or form of the government actions is, and subject to a careful objective assessment of all relevant facts of the specific case.

⁴ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112.

⁵ *Ibid.* para. 113.

⁶ This is supported by the Appellate Body's statement in *US – Countervailing Duty Investigation on DRAMs* paras. 114 to 116, where it also explained that entrustment or direction must be more than a mere by-product of government regulation. See also Panel Report, *Korea – Commercial Vessels*, paras. 7.370 and 7.373.

⁷ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114.

⁸ Panel Report, *Korea – Commercial Vessels*, para. 7.372.

11. In addition, while the existence of free choice could be a factor to consider when determining the application of entrustment and direction, in situations where a particular policy result occurs, as planned, from government intervention, such intervention can still be considered as "entrustment" or "direction", even when some private actors exercise their own "choices". Even if each private actor appeared to independently make its own choice, its decision might be in reality motivated or guided by a series of policy announcements. Indeed, the Appellate Body also admitted that "in some circumstances, 'guidance' by a government can constitute direction".⁹

III. Benchmark

12. The situations in which investigating authorities can consider an alternative benchmark other than the primary benchmark of private prices in the country of provision,¹⁰ should be "very limited".¹¹
13. However, the use of an alternative benchmark can be justified where government intervention has distorted the domestic price of raw materials.¹² Such determination must be made on a case-by-case basis according to the particular facts underlying an investigation,¹³ and an investigating authority must properly establish and explain that in-country prices are distorted before using an alternative benchmark.¹⁴ Japan considers that when a government entrusts or directs a private body to set raw material prices in the domestic market at an artificially low level, thereby distorting the market in which private prices are formed, this is an appropriate limited circumstance to permit the use of an alternative benchmark. The market distortion in such a scenario could be regarded as analogous to when the government is the sole supplier of the raw material.
14. However, even if it is appropriate to use an alternative benchmark, investigating authorities must make necessary adjustments to any alternative benchmark so that it reflects the conditions of the market in the country of provision or purchase.¹⁵ If the authorities consider that no adjustment is necessary, an adequate explanation for that decision should be provided at the very least.

IV. Injury Analysis

A. Threat of Material Injury

15. A threat of material injury under Article 15.7 of the ASCM must not be used as a loophole for the determination of material injury; it requires a higher standard of consideration,¹⁶ special care¹⁷ and should only be applied in limited circumstances. Such an analysis must be conducted not only by referring to the requirements prescribed in Article 15.7 but also all other provisions of Article 15.¹⁸ Each of the provisions of Article 15 is equally important, and findings under each provision should be logically consistent and provide reasonable support for the ultimate conclusion.
16. In addition, the Article 15.7 provides that a "determination of a threat of material injury shall be based on facts", and such analysis, by nature of the issue, involves uncertain future facts. Japan submits that in some cases, it may be beneficial to rely on both information during the period of investigation (the "POI") and post-POI information which includes the more recent data beyond the POI and makes future predictions of the

⁹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.

¹⁰ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.154 and 4.157.

¹¹ Appellate Body Report, *US – Softwood Lumber IV*, paras. 101-102.

¹² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157 and fn. 754 for relevant aspects to consider for assessment.

¹³ Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

¹⁴ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.62.

¹⁵ See Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.184.

¹⁶ See e.g. Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 100.

¹⁷ ASCM, Article 15.8.

¹⁸ See footnote 45 of the ASCM; Appellate Body Report, *China – GOES*, para. 125.

trend of import volume and production capacity. The probative value of such information depends on the specific circumstances of each individual case. Japan considers, however, that the probative value of the post-POI information is not necessarily inferior to that of the information during the POI.

B. Price Effect Analysis

17. Article 15.2 of the ASCM provides that, when an investigating authority considers the effect of subsidized imports on domestic prices, to ultimately determine injury, it must consider whether there has been significant price undercutting, significant price depression or significant price suppression.¹⁹
18. Firstly, pursuant to the standard of an objective examination based on positive evidence under Article 15.1 of the ASCM, the investigating authority is required to provide an explanation of how the price trends show the existence of the price effect.²⁰
19. Secondly, price comparability between the subject imports and domestic like products must be examined any time that a price comparison is performed, while recognizing the need for adjustments that are dependent on the factual circumstances of the case and the evidence.²¹ In this respect, the investigation into the competitive relationship at the same level of trade is required.²² Failure to conduct such investigation would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices.²³
20. Lastly, the Article 15.2 also requires the price effect to be "significant". The Appellate Body clarified that whether a price effect is "significant" depends on the circumstances of the individual case and consideration of the nature of the product or product type at issue, the extent and duration of the price undercutting, or the relative market share of the product type for which the investigating authority has found price undercutting.²⁴
21. The Panel will need to carefully examine whether the European Commission properly took into account all relevant factors affecting price comparability, particularly if those factors can form a meaningful basis for establishing injury under Article 15.5 of the ASCM. Such factors include the differences in product features that affect price, market share, whether the baskets of subject imports and domestic like products contain products that are not in a competitive relationship with each other, and whether the investigating authority offered compelling explanations as to how and to what extent the two categories of product are competing with each other in the market.
22. Japan does not take any particular position on the facts of this dispute, but recalls that the Appellate Body finding was clear that, to make an objective examination, considering the underlying factual circumstances in that case, "an investigating authority may not disregard evidence suggesting that the dumped imports have no, or only a limited, effect on domestic prices", especially when there is a disparity in the market shares of the dumped imports of the respective product types as well as a significant difference in the prices of the product types".²⁵ If the comparison of the prices of the imported product against the prices of 20% of the domestic producers' sales could provide a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry within the meaning of Article 15.5 of the ASCM, the comparison should be carried out.

¹⁹ Panel Report, *US – Ripe Olives from Spain*, paras. 7.256 and 7.258.

²⁰ Appellate Body Report, *China – HP-SSST*, para. 5.159.

²¹ Panel Report, *China – Broiler Products*, para. 7.479.

²² Ibid. para. 7.481.

²³ Appellate Body Report, *China – GOES*, para. 200.

²⁴ Appellate Body Report, *China – HP-SSST*, para. 5.161.

²⁵ Ibid. para. 5.181.

C. Impact on the Domestic Industry

23. When examining the impact of the subsidized imports on the domestic industry, an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry should be considered. A non-exhaustive list of economic factors and indices is set out in Article 15.4 of the ASCM and no single economic factor necessarily gives decisive guidance.²⁶
24. Accordingly, careful consideration and adequate and reasonable explanation by investigating authorities are required for an analysis under the Article 15.4, and with respect to each specific factor and indicator. Furthermore, as the inquiry involves an assessment of the *impact* of the subsidized import, there must be a reasoned and adequate explanation as to whether and to what extent there is a change in relevant economic factors and indices.

V. Facts Available

25. The right of an investigating authority to make determinations based on the facts available under Article 12.7 of the ASCM is not intended to punish non-cooperating interested parties, but to fill gaps in the factual record.²⁷ The Article 12.7 does not justify a decision of the investigating authority made without any factual basis.²⁸ The determination may be done on the basis of facts available only after the investigating authority engaged in a process of reasoning and evaluation, which involves a comparison of all verified data.²⁹
26. Whether there is a legitimate basis for relying on facts available should be determined by whether an interested Member or an interested party concerned has refused access to or does not provide the necessary information within a reasonable period or significantly impeded the investigation. It cannot be based solely on the fact that an interested Member or an interested party failed to ensure the submission of information concerning entities unrelated to the Member or the party to an investigating authority, or that a company that was not an interested Member or an interested party failed to cooperate with an investigating authority.³⁰
27. In addition, as a past panel stated, the role of Article 12.4 of the ASCM is to protect the confidentiality of the provided information by having the confidential information provider, rather than the authority itself, prepare a summary of the confidential information.³¹ The Appellate Body has also stated that, under Article 6.5.1 of the Anti-Dumping Agreement, the authorities bear the obligation to require non-confidential summaries from the parties, and negated a proposition that the authorities' obligation could be fulfilled through summaries provided by the authorities themselves.³²
28. Therefore, it would be contrary to the procedures set out in Article 12.4.1 of the ASCM for an investigating authority itself to prepare and provide a summary of the confidential information submitted on behalf of the interested Member or the interested party who actually provided the confidential information.

²⁶ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.301.

²⁷ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 291 and 293; and Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419.

²⁸ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417.

²⁹ Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.213-7.214. See also Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.431 and 4.435 and Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.179.

³⁰ Appellate Body Report, *US – Hot Rolled Steel*, paras. 104-105.

³¹ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.394.

³² Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.441.

ANNEX C-5**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION****Question 11**

At recital 159 of the Definitive Regulation, the Commission noted:

[T]he 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.

In this regard, did the failure of the GOI to ensure the submission of information concerning entities unrelated to the GOI provide the Commission with a valid basis for resort to facts available under Article 12.7 of the SCM Agreement? In this context, please also comment on the findings of the Appellate Body set out in paragraph 105 of the Appellate Body Report in *US – Hot Rolled Steel* (DS184).

1. In *US – Hot Rolled Steel* the Appellate Body considered the appeals by the United States and Japan of certain issues of law and legal interpretations in the panel report in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*.¹ Paragraph 105 of the Appellate Body Report, to which the Panel refers in its question, is part of the Appellate Body's analysis of "the appropriate meaning of the word 'cooperate' in paragraph 7 of Annex II of the *Anti-Dumping Agreement* and the proper *legal* characterization of the uncontested facts in terms of that meaning".²
2. Russia takes note that the reference made by the Panel illustrates the past practice of the application of the Anti-Dumping Agreement. Yet, Russia believes that in the instances concerning countervailing duty investigations, where the SCM Agreement is a relevant agreement, certain caution should be taken into account when incorporating the practices elaborated under the Anti-Dumping Agreement. The interpretation of the SCM Agreement and its application should be derived from the text of the SCM Agreement, based on customary rules of interpretation, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.
3. Article 12.7 of the SCM Agreement reads as follows:

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.

4. Thus, Article 12.7 of the SCM Agreement provides a valid basis for an investigating authority to make its determinations on the basis of the facts available when it does not have necessary information on the record of the investigation. In the context of countervailing duty investigations, as reflected by the panel in *US – Anti-Dumping and Countervailing Duties (China)*, there are three instances where "recourse to facts available is permissible", i.e. "where an interested Member or interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation".³

¹ *US – Hot Rolled Steel*, Appellate Body Report, para. 1.

² *US – Hot Rolled Steel*, Appellate Body Report, para. 97, emphasis original.

³ Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 16.9.

5. Russia holds the view that due attention should be paid to the difference of circumstances that permit the recourse to the facts available, *i.e.* to the difference of the situations described in Article 12.7 of the SCM Agreement.
6. From the formulation of the Panel's Question 11 we understand that only two alternative situations described in Article 12.7 of the SCM Agreement are in the focus of the Panel's attention in this dispute: when an interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period. Therefore, we will further discuss only these two situations in our response.
7. The Russian Federation believes that the presence of these two alternatives in Article 12.7 of the SCM Agreement deserves attention. Indeed, should the drafters of the SCM Agreement see no difference between the reasons why the necessary information is not on the record, they could simply state that determinations can be made on the basis of the facts available in any case where an investigating authority does not have necessary information on the record. However, it is not the case, as Article 12.7 of the SCM Agreement does expressly include the said alternatives.
8. Russia views that the presence of these two alternatives in Article 12.7 of the SCM Agreement reflects the intention to introduce the distinction between a situation when an interested party or interested Member refuses access to the information and does not provide it within a reasonable period for reasons other than its decision to refuse to do it. Indeed, there can be a number of instances when an interested party is ready to provide information, *i.e.* does not refuse to do it, but nevertheless does not provide it. Article 12.7 of the SCM Agreement does not explain what these instances can be. Nevertheless, it includes the alternatives, which requires attention.
9. Russia believes that the core difference between these alternatives lies in whether an interested Member or interested party has acted to the best of its ability. It may either refuse to provide necessary information, and thereby refuse access to it, or have other, *inter alia*, objective and (or) legal reasons preventing the provision of requested information.
10. Russia also draws the Panel's attention to Article 12.11 of the SCM Agreement, which provides that "[t]he authorities shall take due account of **any difficulties** experienced by interested parties ... in supplying information requested".⁴ Furthermore, Article 12.1 of the SCM Agreement stipulates an obligation of the investigating authority to provide to interested Members and all interested parties "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question". Russia views that these provisions may be considered as a relevant context for interpretation of Article 12.7 of the SCM Agreement. The instances where an interested party does not possess the requested information indeed create a difficulty for that party to submit that information to the investigating authority. In the same logic, the obligation of the investigating authority to provide an "ample opportunity to present in writing all evidence" to interested parties or interested Members would also inform the situation when the requested information is not in their possession.
11. Based on the contextual reading of Article 12.7 together with Articles 12.11 and 12.1 of the SCM Agreement, it appears that the question whether an interested party concerned has acted to the best of its ability, as well as whether it is in possession of the requested information, should inform how the investigating authority makes its determination on the basis of the facts available.
12. For instance, in case when an interested party refuses access to requested information, an investigating authority is authorized to base its determination on the facts available. This does not mean that the investigating authority has unlimited freedom in this matter. In a situation when an interested party does provide the

⁴ Emphasis added.

information, an investigating authority should do its best to consider it, to base its determination on that information to the extent possible (provided that it is verifiable, appropriately submitted so that it can be used without undue difficulties), and to ensure that the cooperation of that interested party is duly taken into account.

13. In sum, the failure of an interested Member or interested party to submit the necessary information provides a valid basis for resort to facts available under Article 12.7 of the SCM Agreement. At the same time, an investigating authority should take due account of all the relevant factors and circumstances of the case, including but not limited to the efforts of the interested Member or interested party to provide the necessary information, known reasons for its failure to provide the information to the fullest extent, the availability of the information to the interested Member or interested party, etc. Depending on these factors, for the interested Member or interested party who cooperates and provides information to the best of its ability, the use of the facts available should not lead to the same results as if it had refused to do so or significantly impeded the investigation.

Question 12

In the first substantive meeting of the Panel with the parties, the European Union indicated that CPO suppliers unrelated to the GOI were not recognized by the Commission as "interested parties" in the sense of Article 12.9 of the SCM Agreement. At the same time, in recitals 120 and 148 of the Definitive Regulation, the Commission referred to "the lack of cooperation of CPO suppliers" as a part of the basis for the Commission's resort to facts available. Please explain whether the failure of an entity that was neither an "interested Member" nor an "interested party" to cooperate be a valid basis for an investigating authority's resort to facts available? Please explain referring to the text of Article 12.7 of the SCM Agreement.

14. Russia would like to note that when making its determinations with regard to Article 12.7 of the SCM Agreement the Panel should address, *inter alia*, two issues: (i) whether entities unrelated to the interested Member or interested party are themselves interested parties and are required to provide necessary information and (ii) whether and how particular circumstances of the interested Member's or interested party's conduct are taken into account when a determination is made on the basis of the facts available.
15. Article 12.9 of the SCM Agreement provides a list of parties that can be qualified as "interested parties" during the investigation. The list includes (i) an exporter or foreign producer or the importer of **a product subject to investigation**, or a trade or business association a majority of the members of which are producers, exporters or importers of such product, and (ii) a producer of **the like product** in the importing Member or a trade or business association a majority of the members of which produce **the like product** in the territory of the importing Member. Importantly, the list of interested parties in Article 12.9 of the SCM Agreement includes the entities relating to production of, or trade in, the product under consideration or like product.
16. Article 12.7 of the SCM Agreement allows to base determinations on the facts available "when an **interested Member or interested party** refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation".⁵ It follows, based on the legal text of Article 12 of the SCM Agreement, that the behaviour of those unrelated entities, who are not interested parties, cannot lead to a less favourable result of the investigation for an interested Member or interested party who provides the information available to it to the investigating authority.
17. When information is requested from an interested Member or interested party, the failure of an unrelated entity to provide it to them does not create legal grounds for

⁵ Emphasis added.

the investigating authority to conclude that "an interested Member or interested party refused to provide the necessary information". Since in such case the interested Member or interested party still cannot provide to the investigating authority the information that it does not possess, Russia believes that all the relevant factors and circumstances for resort to facts available as discussed in its response to Question 11 shall be taken into account.

ANNEX C-6**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED KINGDOM****I. INTRODUCTION**

1. The United Kingdom welcomes the opportunity to participate as a third party in this dispute. During the course of the proceedings, the United Kingdom provided the Panel with its views on the interpretation of various provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

II. THE OIL PALM PLANTATION FUND ("OPPF")**A. Financial contribution "by" a government**

2. The term "i.e.," in Article 1.1(a)(1)(i) means "that is (to say)". As such, the term "i.e., where" at the end of the *chapeau* of Article 1.1(a)(1) suggests that, where the elements of any one of the four subparagraphs are satisfied, there will be a financial contribution *by* a government (or public body) within the meaning of that provision.

3. The ordinary meaning of "practice" in Article 1.1(a)(1)(i) includes the "performance, execution or achievement" of something. The ordinary meaning "transfer" includes the "conveyance... from one place, person, etc.... to another". The ordinary meaning of "funds" includes "[a] sum of money, esp. one saved or made available for a particular purpose". Thus, there will be a direct transfer of funds under Article 1.1(a)(1)(i) where a government or public body conveys to a recipient a sum of money meant for a particular purpose, irrespective of the source of that money.

4. This understanding is consistent with the object and purpose of the SCM Agreement, which is to discipline market-distorting subsidies provided by governments (and public bodies). Given that government (and public body) funds derive from a wide variety of sources (e.g., taxes, tariffs, etc.), it would artificially limit the scope of the SCM Agreement if Article 1.1(a)(1)(i) were interpreted to exclude certain subsidies on the basis of the source of the funds being transferred.

5. Therefore, properly interpreted, Article 1.1(a)(1)(i) is concerned only with whether a government or public body transferred funds, and is agnostic as to the source of those funds. The Panel should consider whether the Commission provided a reasoned and adequate explanation why the OP PF payments meet the Article 1.1(a)(1)(i) legal standard. In this regard, the United Kingdom recalls that Indonesia does not appear to dispute the finding by the Commission that the OP PF Management Agency is a public body or that it made disbursements directly to biofuel producers.

B. Direct transfer of funds in the form of a grant under Article 1.1(a)(1)(i) SCM Agreement**1. The meaning of "grant"**

6. The ordinary meaning of "grant" means a bestowal or conferment of something beneficial such as a gift or an assignment of money by an administrative body. "Gift" and "assignment of money" imply a transfer of possession without an expectation or receipt of an equivalent exchange. Thus, the concept of equivalent exchange may be used as an analytical tool to assist an investigating authority to assess whether a direct transfer is a grant (with conditions) or something else.

7. In determining whether there is an equivalent exchange an authority should consider the design and structure of the financial instrument. In particular, it may consider whether the condition requires the repayment of the funds transferred, or whether the fund transfer

is contingent on the grantee transferring something of substantially equivalent value to the grantor. Where a condition requires action in respect of a third-party this would not usually indicate an equivalent exchange.

8. The distinction between a condition and an equivalent exchange may not always be clear and a case-by-case assessment will be required. An "equivalent exchange" would typically require substantively comparable action by the recipient of the payment in respect of the grantor.

9. This view is consistent with previous adjudicator findings, which have referred to certain payments as entailing a "reciprocal obligation" that conferred a direct and comparable benefit on the government making the payment.¹ Payments with "reciprocal obligations", included loans and equity infusions, and should be distinguished from grants with mere conditions attached.

10. To receive the OPPF payment, biodiesel producers must provide documentation demonstrating the sale of biofuel, at a constructed market price,² to a petrofuel entity. The Panel should consider whether this amounts to an "equivalent exchange". If this falls short of an equivalent exchange, it may indicate that the Commission was correct to characterise the payment as a grant.

2. Whether an investigating authority is required to specify the type of direct transfer of funds

11. Nothing in the ordinary meaning of subparagraph (i) suggests that an investigating authority is required to specify the type of direct transfer of funds. While three different types of transfer of funds are listed, the use of the term "e.g." makes clear that these are just examples. As examples, these terms cannot confer an obligation on the investigation authority. Rather, they illustrate the different types of direct transfer of funds that could be found to exist.

12. This is consistent with the context in Article 1.1(a)(1). Each financial contribution listed includes one or more examples. For instance, the second clause in subparagraph (i) lists "loan guarantees" as the sole example of an "indirect transfer of funds". The drafters would have referred to a loan guarantee rather than an "indirect transfer of funds" if they had intended to require an instrument to be characterised as a loan guarantee. This confirms that the examples are illustrative, and there is no obligation to classify a financial contribution beyond a direct transfer of funds.

13. The object and purpose of Article 1.1(a)(1) is to set out the scope of government action that constitutes a financial contribution, and thereby a subsidy,³ for the purposes of the Agreement. An additional requirement to categorise a financial contribution beyond a direct transfer of funds would add nothing to this function, while imposing an additional burden on the investigating authority.

14. Article 1.1(a)(1)(i) of the Agreement requires only a reasoned and adequate explanation that there is a direct transfer of funds. Any additional characterisation of the payment as a grant, equity infusion or loan, accurate or not, would not change this.⁴

¹ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 616-617.

² The United Kingdom understands that sales must be made at the mineral diesel reference price, which is a price constructed by the GOI on the basis of reported oil prices and the cost of producing diesel in Indonesia.

³ Where a benefit is also conferred.

⁴ However, where an investigating authority chooses not to identify a "direct transfer of funds" as a grant, this may impact on its benefit analysis.

III. PROVISION OF CRUDE PALM OIL ("CPO")

A. Financial contributions under Article 1.1(a)(1)(iv) SCM Agreement

1. Entrustment or direction

15. The ordinary meaning of "entrust" includes "to assign the responsibility for something", such as a particular task, to a particular person. To "direct" means to "give authoritative instructions" to do a thing. This suggests that, under Article 1.1(a)(1)(iv), entrustment or direction involves either the assignment of responsibility, or the provision of authoritative instructions, by a government to a private body to carry out one of the functions in paragraphs (i) to (iii).

16. Article 1.1(a)(1)(iv) serves as an anti-circumvention provision. It prevents governments from being able to "evade their obligations under the SCM Agreement" by using private bodies to carry out actions that would constitute financial contributions under paragraphs (i) to (iii) if taken by the government itself.⁵ To fulfil this object and purpose, Article 1.1(a)(1)(iv) must be capable of capturing other acts beyond those for which there is delegation or command by a government.

17. This is consistent with previous adjudicator findings that an interpretation limited only to delegation or command would be "too narrow".⁶ Previous adjudicators have also found that while entrustment or direction cannot be inadvertent or a "mere by-product" of government regulation,⁷ government regulations and "guidance" could result in entrustment or direction.⁸

18. Thus, the United Kingdom considers that the terms "entrustment" and "direction" do not *require* "delegation" or "command" by the government. Instead, the Panel should consider whether the Government of Indonesia assigned responsibility or provided authoritative instructions.

19. In this light, the Panel should assess, without conducting a *de novo* review,⁹ whether the Commission's entrustment or direction determination was objective and unbiased. The assessment should be case-specific, considering the totality of the facts and evidence before the Commission.¹⁰ The Panel is not required to provide an exhaustive explanation of all government action that could constitute "entrustment" or "direction", or else to establish a minimum threshold for such a finding.

2. Functions "which would normally be vested in the government"

20. The modal verb "would" indicates that Article 1.1(a)(1)(iv) is referring generally to functions that the government *might* perform in a hypothetical situation. The ordinary meaning of "normally" is "under normal or ordinary conditions". Therefore, a function that "would normally" be vested refers to a function that the government *might* ordinarily carry out had it not entrusted or directed that function to a private body.

21. To "vest" means to "place, settle, or secure (something) in the possession of a person or persons". As such, a function that is "vested" refers to a function that is held by a government. The actual exercise of that function is not required for it to have been "vested".

⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.

⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 111.

⁷ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114 and Panel Report, *US – Softwood Lumber VII*, para. 7.603.

⁸ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.

⁹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 138.

¹⁰ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.38; and Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.

22. The object and purpose of Article 1.1(a)(1)(iv) is to prevent a WTO Member from evading subsidy disciplines by entrusting or directing a private entity to act in its place.¹¹ The relevant terms should be interpreted with this function in mind.

23. Subparagraphs (i) to (iii) set out the types of action that constitute a financial contribution by a government for the purposes of the SCM Agreement. Article 1.1(a)(1)(iii) captures the provision of goods or services by a government, other than general infrastructure. Notably, there is no limitation relating to the historical practice of the government in question.

24. In this light, the United Kingdom is not persuaded that the scope of Article 1.1(a)(1)(iv) is limited to cover only those goods historically provided by the government in question. This would impermissibly limit the phrase, and the provision more broadly, contrary to its ordinary meaning read in light of its object and purpose

25. The Panel need not offer an exhaustive interpretation of Article 1.1(a)(1)(iv) and the scope of all functions "which would normally be vested in the government" in order to resolve this dispute. Instead, consistent with the above interpretation, the Panel should assess whether the investigating authority's determination was objective and unbiased on the basis of all relevant evidence.

B. Recourse to out-of-country benchmarks under Article 14(d) of the SCM Agreement

26. The ordinary meaning of "*market* conditions" in Article 14(d) includes the conditions in "an area of economic activity in which the forces of supply and demand interact" to determine prices.¹² The ordinary meaning of "prevailing" includes "current". Thus, "prevailing market conditions... in the country of provision" refers to current conditions of supply and demand in the relevant WTO Member.

27. The ordinary meaning of "in relation to" requires a "comparative exercise". It suggests that a "rigid comparison" is not required, and broader consideration of the "connection [or] association" between the remuneration actually received and that which would have been received under prevailing market conditions is sufficient.¹³ This indicates that the drafters did not intend to exclude the use of an out-of-country benchmark, provided that there is sufficient connection between the chosen proxy and the (would be) prevailing market conditions in the country of provision.¹⁴

28. The Article 14 *chapeau* is relevant context. It refers to "*any* method used by the investigating authority to calculate benefit" and refers to the subparagraphs of Article 14 as "guidelines".¹⁵ This suggests that more than one methodology is available to calculate benefit.¹⁶

29. The object and purpose of Articles 1(b) and 14(d) is to determine whether a subsidy recipient is "better off" than it would have been absent the financial contribution or income or price support.¹⁷ It is well-established that the relevant comparator to determine whether the recipient is "better off" is the market.¹⁸ Thus, where in-country prices do not reflect market conditions, e.g., because they are distorted by government intervention, use of an in-country price as a benchmark cannot reveal whether the recipient is "better off". Interpreting the rules rigidly, so as to require this, would be "circular".¹⁹

¹¹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.

¹² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150.

¹³ Appellate Body Report, *US – Softwood Lumber IV*, para. 89.

¹⁴ Appellate Body Report, *US – Softwood Lumber IV*, para. 89.

¹⁵ Article 14 of the SCM Agreement. (emphasis added)

¹⁶ Appellate Body Report, *US – Softwood Lumber IV*, para. 91.

¹⁷ Appellate Body Report, *US – Softwood Lumber IV*, para. 93.

¹⁸ Appellate Body Report, *Canada – Aircraft*, paras. 157 and 158.

¹⁹ Appellate Body Report, *US – Softwood Lumber IV*, para. 93.

30. Thus, in the United Kingdom's view, Article 14(d) permits the use of out-of-country benchmarks, where the prices in the relevant Member do not reflect market conditions.

31. Turning to the present dispute, the United Kingdom considers that prices that are not determined by forces of supply and demand, such as those distorted by a government's intervention in the market, are not market conditions.²⁰ Such prices, therefore, would not constitute "prevailing market conditions" in the country of provision within the meaning of Article 14(d).

32. While the United Kingdom agrees with previous adjudicators that Article 14(d) indicates that consideration of in-country prices should be the "starting point" for determining a benchmark,²¹ it is essential that investigating authorities retain flexibility to deviate from an in-country benchmark, where domestic prices are distorted. When assessing whether an investigating authority's decision not to rely on in-country prices was justified, a panel should be cautious to avoid imposing an unjustified or excessive burden on the investigating authority to prove distortions.

33. An investigating authority's assessment of the suitability of in-country prices should be case-specific. An authority has discretion to conduct this assessment as it deems appropriate, considering "the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record".²² There may also be practical constraints on investigating authorities in obtaining data relating to domestic prices during an investigation. A Panel should have regard to any such constraints when assessing the adequacy of a determination to reject in-country prices.

C. Relationship between financial contribution and income or price support

34. The term "or" is a conjunction which functions to "coordinate two (or more) sentence elements between which there is an alternative or possibilities". In Article 1.1, "or" coordinates two alternative scenarios: the existence of a financial contribution and the existence of income or price support. In this context, the term "or" indicates that fulfilling one of these two alternatives, would be sufficient to find that a subsidy exists, providing that a benefit is also conferred. However, this does not clarify whether drafters intended the provisions to be mutually exclusive.

35. The word "either" is not included in the chapeau of Article 1.1 or in Article 1.1(a)(1), which are relevant context. Use of this term would have made clear that the two provisions were mutually exclusive. This omission suggests that the provisions are not intended to be mutually exclusive.

36. In addition, the broad scope of both Articles 1.1(a)(1) and (2) suggests that the two provisions are not mutually exclusive. Article 1.1(a)(1) sets out a broad range of government support that would constitute a "financial contribution", while Article 1.1(a)(2) refers to "any form of income or price support". The United Kingdom agrees with the EU that the term "any" suggests that the types of measures which can be defined as "price or income support" are broad.²³

37. The object and purpose of Article 1.1(a), as a definitional provision, is to set out the scope of the type of government support that can be considered a subsidy, provided it confers a benefit. Given that meeting the definition of subsidy does not in and of itself signify a violation of the SCM Agreement, the United Kingdom considers that this would support a broad reading of Article 1.1.

²⁰ See, e.g., Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 443 and 446; *US – Countervailing Measures (Article 21.5 – China)*, para. 5.137.

²¹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150.

²² Appellate Body Report, *US – Countervailing Measures (Article 21.5 – China)*, para. 5.141.

²³ European Union's first written submission, para. 310.

38. The United Kingdom notes previous adjudicator findings that transactions may be "complex and multifaceted" and that a single transaction could constitute different types of financial contribution.²⁴ The same factual considerations may apply in relation to Article 1.1(a)(1) and (2), in that both provisions may apply to a broad range of potentially complex and multifaceted measures, which by their nature could constitute a "financial contribution" as well as "income or price support".

39. Therefore, the United Kingdom considers that an investigating authority is not prohibited from finding that a measure is income or price support after having also found that it a financial contribution. The Panel should assess whether the Commission was correct to find that the provision of CPO met the respective legal standards. A positive finding under either provision would be sufficient to establish a subsidy, providing that a benefit is also conferred. Thus, if the Panel finds that the Commission acted consistently with Article 1.1(a)(iv)²⁵, it may wish to exercise judicial economy with respect to Indonesia's claim under Article 1.1(a)(2).

²⁴ Appellate Body Report, *Canada – Renewable Energy*, para. 5.120.

²⁵ This is on the basis that the Panel addresses Article 1.1(a)(1) before Article 1.1(a)(2).

ANNEX C-7**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION****I. CLAIMS REGARDING ARTICLE 1.1(A)(1)(I) OF THE SCM AGREEMENT**

1. In brief, *nothing* in Article 1.1(a)(1)(i) precludes a transfer of funds by a government or public body from constituting a financial contribution on the basis of the origin of the funds. As a matter of logic, levies and taxes owed to the government cease to be privately held once paid.

2. Furthermore, most if not nearly all, funding for government and public programs derives from sources outside the government, including revenues generated by the collection of levies and taxes. Nevertheless, the origin of funds from a source outside the government is not dispositive to the question of whether a government disbursement of funds constitutes a "financial contribution". Rather, an investigating authority may find the existence of a "financial contribution" under Article 1.1(a)(1)(i), so long as the evidence before it supports that there is a government practice which involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion) that is attributable to a government or public body.

3. The broad language used and multiple methods of conveying value described in Article 1.1(a)(1) reveal an intention to capture within the meaning of "financial contribution" a wide array of transfers of value. The examples listed in Article 1.1(a)(1)(i) indicate that a direct transfer of funds typically involves financing by the government to the recipient through transactions like *e.g.*, grants, loans, and equity infusions. There is no language indicating that the provision contemplates the origin of the funds transferred such that the origin of the funds would preclude consideration as a "financial contribution" under Article 1.1(a)(1)(i). Accordingly, based on the text of Article 1.1(a)(1)(i), the relevant inquiry is whether there is a government practice which involves a direct transfer of funds that is attributable to a government or public body.

4. Previous disputes also support this interpretation of Article 1.1(a)(1)(i). The report in *US – Large Civil Aircraft (Second Complaint)* (AB) agreed that the focus of Article 1.1(a)(1) is the government conduct which constitutes a financial contribution. Recognizing that the term "funds" is not limited to money, but encompasses "financial resources and other financial claims more generally", that report concluded that "direct transfer of funds" "captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient." Likewise, in *US – Carbon Steel (India)* (AB), the report 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.

5. This reasoning reflects a correct understanding and reasonable interpretation of the terms of Article 1.1(a)(1)(i). Indeed, a restrictive interpretation of Article 1.1(a)(1)(i), as proposed by Indonesia would frustrate the object and purpose of the SCM Agreement by creating an obvious circumvention risk where an otherwise actionable subsidy could be converted to a non-actionable subsidy simply because the government used revenues generated by private funds, *e.g.*, the collection of taxes and levies. This approach to Article 1.1(a)(1)(i) would create a loophole for tax- or levy-paying recipients to shield unfair subsidization.

II. CLAIMS REGARDING ARTICLE 1.1(B) OF THE SCM AGREEMENT

6. Article 1.1 of the SCM Agreement provides that a subsidy shall be deemed to exist if there is a "financial contribution by a government" and "a benefit is thereby conferred". In its entirety, Article 1.1(b) provides only that "a benefit is thereby conferred". Notably,

Article 1.1(b) says nothing about how to determine whether a benefit has been conferred, or how to measure the benefit.

7. The term "benefit" is not defined by the SCM Agreement. Therefore, Article 14 of the SCM Agreement "constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b)." With regard to the ordinary meaning, "benefit" is defined as "do good to, be of advantage to; improve" and "receive benefit; profit". The title of Article 14 – "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" – similarly reflects the advantage provided to the recipient of a financial contribution. As such, the concept of "benefit" relates to situations in which a firm receives "an improvement" or "an advantage," rather than a detriment or disadvantage.

8. Therefore, based on the ordinary meaning of the term and the context provided by Article 14, outlined above, a "benefit" arises when the recipient has received something that makes the recipient better off than it otherwise would have been absent that financial contribution. Thus, the focus of the benefit analysis centers on "benefit to the recipient".

9. Although the guidelines in Article 14 enumerate instances which shall not be considered as conferring a benefit, Article 14 lacks any "guideline" for the financial contribution in the present dispute, *i.e.*, a "direct transfer of funds" in the form of a grant. In the absence of any such text, a grant simply bestows a benefit to the recipient.

10. Therefore, nothing in the text of Article 1.1(b) or Article 14 of the SCM Agreement requires an investigating authority to offset a portion of the benefit received from a subsidy grant program.

III. CLAIMS REGARDING ENTRUSTMENT OR DIRECTION UNDER ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

11. A proper interpretation of Article 1.1(a)(1)(iv) supports the conclusion that Article 1.1(a)(1)(iv) encompasses a range of government action that would normally be vested in government, and does not require an explicit and affirmative action of delegation or command for an investigating authority to make a finding of entrustment or direction.

12. Article 1.1(a)(1)(iv) refers to "one or more of the type of functions ... which would normally be vested in the government". Article 1.1(a)(1)(iv) does not refer to one or more of the type of functions which are vested in the government. The term "would" as it is used in Article 1.1(a)(1)(iv) is a modal verb in the present unreal conditional form. The present unreal conditional form "is used to talk about what you would generally do [or what would generally be the case] in imaginary situations". The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs the precise function carried out by the private body, but that the government normally would perform that type of function, and also "the practice, in no real sense, differs from the practices normally followed by governments".

13. The phrase "in no real sense" also suggests that Members were seeking to avoid circumvention. The practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by governments, but rather must be determined to, "in no real sense," differ from such practices – *i.e.*, not differ in any real sense. Entrustment or direction in Article 1.1(a)(1)(iv) captures subsidies that differ "in no real sense" from those provided by a government itself, except for the fact that they are provided through private bodies.

14. Therefore, a determination of entrustment or direction involves consideration of both the types of functions that "*would* normally be vested in the government" alleged to have entrusted or directed a private body and also the "practices normally followed by governments" other than that government. Such determinations of entrustment or direction will hinge on the particular facts of the case, but the relevant provisions also allow for a broad degree of generality.

15. Further, there is no requirement on WTO Members to demonstrate both control and command under Article 1.1(a)(1)(iv) of the SCM Agreement. An examination of the ordinary meaning of "entrusts" or "directs" establishes that explicit and affirmative action is not required. "Entrust" is defined, in relevant part, as "[i]nvest with a trust; give (a person, etc.) the responsibility for a task ... [c]ommit the ... execution of (a task) to a person." This definition encompasses a range of actions. The word "entrust" implies that a degree of discretion is given to the person being entrusted.

16. Definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target;" "Give authoritative instructions to; to ordain, order (a person) *to do*, (a thing) *to be done*; order the performance of" or "Regulate the course of; guide with advice". Additional definitions of "direct" include "Inform or guide (a person) as to the way; show or tell (a person) the way (to);" and "govern the actions ... of." Thus, the ordinary meaning of "direct" also encompasses a wide range of actions. These actions are not limited to commanding a person or entity to do something in particular.

17. The proper interpretation of "entrusts or directs" is one that takes account of the full range of government actions that fall within the ordinary meaning of this term, including: a government investing trust in a private body to carry out a task, a government giving responsibility to a private body to carry out a task, a government informing or guiding a private body as to how to carry out a task, a government regulating the course of a private body's conduct, as well as a government delegating or commanding a private body to carry out a task.

18. Lastly, the United States observes that Indonesia's interpretation, which would preclude an investigating authority from finding entrustment or direction based on the presence of free choice by market actors, is inconsistent with the ordinary meaning of the terms under Article 1.1(a)(1)(iv) of the SCM Agreement as discussed above. That is, adopting an interpretation of "entrusts" or "directs" which requires the elimination of the possibility of free choice by private entities would be contrary to the element of discretion in the meaning of "entrust" and the element of inform or guide in "direct". This would narrow the terms' scope to a very limited range of government actions, inconsistent with the ordinary meaning of "entrusts or directs".

IV. CLAIMS REGARDING ARTICLE 12.7 OF THE SCM AGREEMENT

19. One scenario which may trigger resort to Article 12.7 of the SCM Agreement is where information is not provided within "a reasonable period". Definitions of "reasonable" include "Proportionate" and "Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate". Therefore, the use of the term "reasonable" implies a degree of flexibility that is determined on a case-by-case basis. What will constitute a "reasonable period" will be based on the circumstances of a particular case.

20. Simultaneously, the SCM Agreement permits investigating authorities to establish deadlines for questionnaire responses to foreign producers or interested Members. Although it does not explicitly use the word "deadlines", the first sentence of Article 12.1.1 contemplates that investigating authorities may impose appropriate time limits. Indeed, investigating authorities must be able to control the conduct of their investigation to effectively reach a final determination.

21. The "facts available" refer to those facts that are in the possession of the investigating authority and on its written record. Thus, an Article 12.7 determination "cannot be made on the basis of non-factual assumptions or speculation". The extent to which the investigating authority must evaluate the possible "facts available", and the form that evaluation may take, "depend[s] on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation".

22. In addition, the fact of an interested party's non-cooperation may be relevant to the investigating authority's selection of "facts available" under Article 12.7. Indeed, a non-cooperating party's knowledge of the consequences of failing to provide information can be taken into account by the investigating authority when relying on "facts available" to reach a determination.

23. Therefore, a proper interpretation of Article 12.7 of the SCM Agreement preserves the requisite flexibility of investigating authorities to effectively conclude investigations.

V. CLAIMS REGARDING ARTICLE 15.5 OF THE SCM AGREEMENT

24. Article 15.5 of the SCM Agreement defines the investigating authority's obligation to conduct an examination of known factors other than dumped imports. The purpose of the examination of other known factors is to ensure the existence of a causal link between the subsidized imports and the injury to the domestic industry.

25. The premise of Article 15.5 is that other known factors may "at the same time [be] injuring the domestic industry" – that is, there can be multiple causes of injury. The provision is to ensure the imports remain "a" cause of injury despite consideration of the contributions from other sources – not to ensure imports are the sole or primary cause of injury. "Separate and distinguish", however, is not text found in Article 15.5 of the SCM Agreement. In fact, Article 15.5 does not dictate the methodology that an investigating authority must employ for its examination of other known factors. An investigating authority has the flexibility to base its conclusions on a qualitative assessment, a quantitative assessment, or another type of assessment that it considers appropriate so long as the assessment results in a demonstration of the causal link between subsidized imports and material injury that does not attribute to subsidized imports the injury caused by other factors.

26. In some cases, factors cited by a party are found by the investigating authority to either not be causing injury at all to the domestic industry, or not to be causing injury "at the same time" as the dumped or subsidized imports. In such cases, the investigating authorities are not obligated under Article 15.5 of the SCM Agreement to undertake an additional analysis of those factors since there would be no injury to attribute to them.

27. Based on the above discussion, the United States observes that the Panel must determine if the investigating authority demonstrated in its investigation that it examined other "known factors" within the meaning of Article 15.5 of the SCM Agreement, i.e., factors that were also causing injury to the domestic industry "at the same time" as were the subject imports, and based its causation analysis on an examination of all relevant evidence.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS

U.S. Response to Question 12

28. In some cases, the application of facts available by an investigating authority may only have an effect on the party or Member whose conduct gave rise to the need to apply facts available. However, there could also be cases in which an investigating authority applies facts available based on the conduct of a party or a Member, or even a non-party, but the *effect* of the facts available may implicate the other party or Member. Indeed, nothing in the text of Article 12.7 obligates the investigating authority to ensure that the effect of the application of facts available is limited to only the Member or party whose conduct gave rise to the need to resort to facts available in the first place.

29. Article 12.7 is practical and logical in the context of a CVD investigation where an investigating authority is typically gathering different information from different parties for different elements of its countervailable subsidy determination. If either a Member or party does not provide necessary information, this could impact the investigating authority's analysis of one or more elements of its CVD determination, which could, in turn, potentially have an effect on Members and parties that are not the Member or party that did not provide that information.

30. Notably, the application of facts available as a result of a party or Member's inability to obtain information from a non-party is not inconsistent with Article 12.7, which provides for the application of facts available when a Member or interested party fails to provide the necessary information. That is, Article 12.7 does not limit the application of facts available to circumstances where the necessary information is within the possession of the Member or party from which the information is requested. Rather, Article 12.7 plainly states that facts available may be used when a Member or interested party "otherwise does not provide, necessary information". Although the earlier phrase "refuses access" in Article 12.7 might imply possession of the necessary information by the party or Member, "otherwise does not provide" does not necessarily imply possession. The phrase "otherwise does not provide" suggests that the party might be asked for information it does *not* possess, but could reasonably be expected to find or obtain access to.
