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

WT/DS442

AB-2017-1

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

particular, profit on the basis of what the investigating authority considered to be reasonable for the sector at issue.[7]

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

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

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

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

III. Request for findings and completion of the analysis

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

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

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

ANNEX A-2

EUROPEAN UNION'S NOTICE OF OTHER APPEAL*

Pursuant to Article 16.4 and Article 17.1 of the *DSU* the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Anti*

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

- Third, the panel erred in the interpretation and application of Article 6.7 ADA, by considering that the European Union had not disclosed the results of the investigation to PTMM, *inter alia*, by imposing, in practice, an obligation to disclose a description of the investigation process rather than the results of the verification visit, requiring moreover that such a description should be sufficiently detailed so as to enable the Panel to trace back any correction that was made to the information supplied to specific evidence that was verified or not during the investigation or other events, and by setting out a list of items that must always be disclosed in order to comply with Article 6.7 ADA, regardless of the specific facts of each case. Accordingly, the European Union requests the Appellate Body to reverse the Panel's findings and conclusion with regard to the interpretation and application of Article 6.7 ADA.[4]

- Fourth, the panel erred in the interpretation and application of the DSU, particularly Article 12.1 of the DSU, and its Additional Working Procedures Concerning Business Confidential Information, because it bracketed information that was already in the public domain and failed to require Indonesia to advance justifications for its requests for specific instances of bracketing and to provide non-confidential summaries of the bracketed information sufficient to permit a reasonable understanding of the matter. At the same time the Panel also violated Article 12.7 of the DSU because by unduly over-bracketing it submitted an incomplete report to the DSB. For the same reasons, the Panel acted inconsistently with Article 10.1 of the DSU, which requires that the interests of other Members be fully taken into account during the panel process. Finally, by failing to require the necessary justifications and make the appropriate adjudications, and by failing to comply with its own BCI Procedures, the Panel acted inconsistently with its obligation to make an objective assessment, pursuant to Article 11 of the DSU.[5]

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[3] Panel Report, paras. 8.1.a.i-iii, paras. 1.9-1.11, and paras. 7.17-7.29.
[4] Panel Report, paras. 7.224-7.229, 7.235-7.236, and 8.1.d.
[5] Panel Report, paras. 7.64, 7.74 and 7.80, 7.82, 7.83.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF INDONESIA'S APPELLANT'S SUBMISSION

1 INTRODUCTION[1]

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

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

2 BACKGROUND

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

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

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

2.4. In calculating the export price for both producer/exporters in its provisional and final determinations, the Commission characterized the sales comp7 (d)8diles-1.4 (p)-5 (sal)-7 (e)-5 (s

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

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

3 THE ISSUE BEFORE THE PANEL

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

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3.2.

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

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

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

5 THE LEGAL STANDARD UNDER ARTICLE 2.4

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

5.2. The process of determining the ex-factory normal value and export price requires the "netting back" from the starting price charged to the first unrelated customer. This is done by making adjustments to ensure that comparisons are not distorted by factors extraneous to the central issue of price discrimination between markets. If a domestic customer and an export customer both appeared to buy the goods at the factory gate, the price charged to the export customer should be no less than the price charged to the domestic customer. Under Article 2.4, "allowances should *not* be made for differences that do *not* affect price comparability". This means noe5(i)6.2 (ex)9.3 2 Td [(t)-7 (hH)8TJ 0( )]TJ /wenthe gohA6.7 ppe2.lp t te2.hB2 (,)(r)4.4 (dy)-2.4 (2 (x)(a

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

6 THE PANEL ERRED IN INTERPRETING AND APPLYING ARTICLE 2.4

6.1. The Panel failed to articulate the correct legal standard under Article 2.4 for examining

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

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

6.11. Ultimately, the Panel's ruling means that investigating authorities may simply ignore the relationship between a sales entity and a producing entity and proceed on the basis that they are independent of each other. This would, in effect, deprive producer/exporters of their right to have their dumping margins based on their actual sales processes and their actual reven 63 (63 (63 .3l10.044 Tw

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

7.4. This approach is inconsistent with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU. WTO law does not permit a panel to reach a conclusion on a claim divorced from arguments and evidence of complaining parties. Indonesia was entitled to have its arguments and evidence addressed by a panel with an open mind on the case, not one that had already concluded

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

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

7.11. The Panel also engaged in a *de novo* review of certain organizational charts filed by PT Musim Mas as part of its questionnaire response. The Commission never even mentioned these charts. The Panel engaged in a *de novo* analysis of the evidence to determine that the "marketing and sales department" in PT Musim Mas's chart was not ICOF-S. The Panel essentially determined what the investigated company sought to depict when it prepared the charts. This makes no sense. Besides being an impermissible *de novo* review, the Panel's analysis is also inconsistent 7ged i

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ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION

1 FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

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

8. There can be no doubt that an Article 12.12 request can be made between Panel establishment and composition.

9.

the DSU. All of these errors constitute a violation of the obligation to make an objective

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

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

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

26. The Panel designated as BCI and redacted from the public version of its report information which was already in the public domain. The decision to bracket this information prejudges the comprehension of the Panel report. Furthermore, the Panel erred by not requiring justifications for Indonesia's requests for specific bracketing, as well as by not requiring non-confidential summaries of the bracketed information.

27. The above constitutes an error in the interpretation and application of Article 12.1 of the DSU and Paragraphs 1 and 9 of the Panel's Additional Working Procedures Concerning BCI. For the same reasons, the Panel also acted inconsistently with Article 12.7 of the DSU by over-bracketing and, therefore, under-reporting to the DSB, as well as with Article 10.1 of the DSU. Finally, it also acted inconsistently with Article 11 of the DSU by failing to require justifications to Indonesia and by failing to comply with its own Procedures.

ANNEX B-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

1 INTRODUCTION

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

2 BACKGROUND AND THE MEASURES AT ISSUE

2. The contested measure expired on 12 November 2016, as communicated to the Panel and

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

10. Indonesia's claim of error is also based on a partial and incorrect reading of the Panel Report, further examined below. Indonesia disputes the sequence, whereby the Panel established the Article 2.4 legal standard, examined the EU's actions and only then analysed Indonesia's arguments, criticizing the drafting technique chosen by the Panel rather than the legal standard applied. However, the Report should be read in a holistic way.

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

18. Regarding the section of the Panel Report challenged, the Panel examined the price components of both export price and normal value, to determine whether their comparison was fair. Rightly basing itself on the P&L submitted by PTMM, the Panel found that PTMM incurred the same costs for both domestic sales and export sales, the only difference being the involvement of ICOF-S with regard, exclusively, to export sales. The Panel did not assess the correctness of the value of the allowance made, since Indonesia did not dispute it.

19. Contrary to Indonesia's argument that the deduction of SG&A costs and profits within a SEE depends on the location of the related trader (in or outside of t

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

5 SECTION 7.3.5.1. OF THE PANEL REPORT

26. Indonesia accuses the Panel of pre-judging the EU's compliance with Article 2.4 before addressing its arguments, claiming a violation of Article 2.4 and (potentially) of Article 11 of the DSU. The fact that the Panel was then, supposedly, influenced by its own analysis was a breach of the burden of proof and Indonesia's due process rights under Article 17.6 of the ADA and Article 11 of the DSU.

27. First, these claims are directed against the structure and procedure, rather than the substance of the Panel Report. Second, Section 7.3.5.1 must be assessed in the context of Section 7.3 of the Report as a whole. Before Section 7.3.5.1., the Panel set out the disputed issue, the parties' positions, and the applicable legal standard, demonstrating understanding of the matter. After it, the Panel examined Indonesia's arguments regarding the compliance of the mark-up adjustment with Article 2.4 in light of the relationship between PTMM and ICOF-S.

28. Many of the arguments, submitted by Indonesia, are matters of EU, rather than W.547 T Tw 15.613 03.3

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

33. Indonesia's extreme approach to the problem would mean that any document that is on the record but not expressly referenced in the measure that is "ambiguous" can be brought to a panel by the complainant, but in no case are the defendant or the panel allowed to engage in *ex post* explanation or *de novo*

2 THE EU'S APPEAL ON THE LAPSE OF THE PANE

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

2.12. Finally, the EU raises six claims under Article 11 of the DSU. First, the EU erroneously challenges the interpretation and application of Article 12.12 under Article 11 of the DSU. This is an issue of law under Article 17.6. Second, the EU unjustifiably criticizes the Panel for adopting the standard of review it did. However, this standard complies with the Panel's duty under Article 11 of the DSU. Third and fourth, the EU incorrectly faults the Panel for not addressing issues concerning the second prong of the legal standard under Article 12.12 - whether the Panel suspended its

3.6. Moreover, contrary to what the EU alleges, Indonesia is not seeking to obtain an authoritative

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

I. ARTICLE 2.4 OF THE AD AGREEMENT[1]

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

2. The essential requirement for any adjustment under Article 2.4 is that the relevant factor must affect price comparability. The United States

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

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

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

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

IV. ARTICLE 12.12 OF THE DSU

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

13. The United States submits that the circumstance in Article 12.12 arises only when there is a panel to which the complaining party may direct its "request," and only if the panel has decided to exercise its discretion to accede to that request. Neither can occur before a panel has been composed. Further, the "work" of the panel refers to the examination by the panel, once composed, of the matter referred to it. Therefore, Indonesia's request *to the Secretariat* to suspend a meeting *to compose* the panel would not constitute a request *to the panel* that it "suspend its *suspend its* Te4.9 (pa)5 (3 (t)-2 (i Te)15.5 (e)13.3 ([(th)e)67 -1.213 (a)7 (s)7 (c)6.3 (e)se)2.1 (Tw 0.587 0

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

PROCEDURAL RULING OF 13 JUNE 2017

1 REQUESTS BY INDONESIA

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

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

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

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

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

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

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

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

[3] European Union's other appellant's submission, para. 1.
[4] European Union's other appellant's submission, para. 2.

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

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

2.12. Indonesia explains that it seeks BCI protection for the following two categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any additional information submitted as BCI by either party to the Panel, in the course of the Panel

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

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

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

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

3 ANALYSIS

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

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

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

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

[8] Panel Exhibit IDN-47.

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

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

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

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

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

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

3.5. Indonesia explains that it seeks BCI protection for the following two broad categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any inTJ -6-'5-7

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

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

3.8. Furthermore, in our view, the potential risk of harm to the two companies in question, highlighted by Indonesia, should r .3 (e) haro(h)12.4 (o (on)12.3 (s)ton)12.3 Td [(m)5.7 (to7 (ia)72.3 (J 27.

b. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant and third participant shall have responsibility in this regard for its employees as well as for any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

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