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

(DS442)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

March 3, 2017

SERVICE LIST

Participants

H.E. Mr. Marc Vanheukelen, Permanent Mission of the European Union
H.E. Mr. R.M. Michael Tene, Permanent Mission of the Republic of Indonesia

Third Participants

H.E. Ms. Anjali Prasad, Permanent Mission of India
H.E. Mr. Choi Kyong-lim, Permanent Mission of the Republic of Korea
H.E. Ms. Mariam MD Salleh, Permanent Mission of Malaysia
Mr. Pitak Udomwichaiwat, Permanent Mission of Thailand
H.E. Mr. Kemal Madenoğlu, Permanent Mission of Turkey

TABLE OF CONTENTS

TABLE OF REPORTS

SHORT TITLE	FULL CASE TITLE AND CITATION
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Continued Suspension (Panel)	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R
China – Auto Parts (Panel)	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – Rare Earths (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013

Dominican Republic – Import and Sale of Cigarettes (Panel)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III (US) (Panel)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr. 1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr. 1, adopted 22 December 2008
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Bed Linen (Article 21.5 – India) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1

EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti- Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EC – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
Guatemala – Cement I (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4

Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
Japan – Apples (AB)	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Alcoholic Beverages (AB)	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Certain EC Products (AB)	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Offset Act (Byrd Amendment) (AB)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016
US – Wool Shirts and Blouses (Panel)	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R
US – Zeroing (EC) (Article 21.5 – EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by Indonesia and the European Union ("EU"). In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that are relevant to this dispute.

II. INDONESIA'S CLAIMS OF ERROR WITH REGARD TO THE PANEL'S ANALYSIS UNDER ARTICLE 2.4 OF THE AD AGREEMENT

2. Indonesia argues that the Panel applied an incorrect legal interpretation of Article 2.4 of the AD Agreement in determining that the investigating authorities' deduction to the export price for a commission paid by one of the participating producers to a trading company was not improper.[1] In particular, Indonesia claims that the Panel erred in finding that a determination of whether the producer and a trading company formed part of a single economic entity ("SEE") was not dispositive because transactions between such entities may be at "arm's length."[2] The United States' views regarding the appropriate interpretation of Article 2.4, which are generally reflected in the Panel's analysis, are presented below.

3. Article 2.4 provides in relevant part:

> A fair comparison shall be made between the export price and the normal value. . . . Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[3]

4. Article 2.4 of the AD Agreement requires investigating authorities to conduct a comparison between "the export price and normal value."[4] Such comparison is typically made at the ex-factory level. Article 2.4 further requires that "due allowance" be made "for differences which affect price comparability."[5] This is the essential requirement for any adjustment under Article 2.4: the relevant factor must "affect price comparability."[6] Thus, under Article 2.4, making a "fair comparison" requires a consideration of how "differences in conditions and terms of sale, taxation, levels of trade, quantities, [and] physical characteristics" impact price comparability.

5. In this respect, the Appellate Body has stated that, "[u]nder Article 2.4, the obligation to ensure 'fair comparison' lies on the investigating authorities, and not the exporters. It is those

---

[1] *See* Indonesia's Appellant Submission, paras. 3.1, 3.184.
[2] *See* Indonesia's Appellant Submission, para. 3.86.
[3] AD Agreement, Art. 2.4.
[4] AD Agreement, Art. 2.4.
[5] AD Agreement, Art. 2.4
[6] AD Agreement, Art. 2.4.

authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports."[7]

6. But while it is the investigating authority that must ensure a fair comparison, it is the interested parties who have the burden to substantiate any adjustments they request for differences affecting price comparability. As the Appellate Body has found, an investigating authority does not have to accept a request for an adjustment that has not been substantiated.[8]

7. Indonesia argued before the Panel that the export price should be adjusted to subtract sales commissions only if the intermediary is in fact an independent trader and not part of an SEE.[9] The Panel, however, was not persuaded that the existence of an SEE is dispositive of whether a sales commission qualifies as a difference which affects price comparability under Article 2.4.[10] In particular, the Panel noted the possibility that a transaction between two entities within an SEE "could reflect an expense that must be recovered and thus would impact price comparability."[11]

8. The United States agrees with the Panel that whether an entity constitutes an SEE would not be dispositive of the need for adjustments under Article 2.4, and that depending on the underlying facts, transactions between affiliated entities may impact price comparability. An investigating authority must ensure price comparability regardless of whether affiliated or non-affiliated parties are involved. As explained above, a comparison between normal value and export price is usually made at the ex-factory level. If, for example, the producer sells in the home market directly to its customers, but sells through a trading company (affiliated or not) to its export market, the differences in the circumstances of sale may warrant an adjustment to ensure that comparison is made at the ex-factory level in both markets. Therefore, the United States considers that the Panel did not err in finding that an investigating authority's determination regarding the existence of an SEE is not dispositive of whether an adjustment for a commission paid is appropriate under Article 2.4 of the AD Agreement, and that reversal of the Panel's findings on that basis would not be appropriate.

III. INDONESIA'S CLAIMS OF ERROR WITH REGARD TO THE PANEL'S ANALYSIS UNDER ARTICLE 17.6 OF THE AD AGREEMENT AND ARTICLE 11 OF THE DSU

9. Indonesia argues that the Panel's findings under Article 2.4 of the AD Agreement should also be reversed because the Panel failed to apply the appropriate standard of review pursuant to Article 17.6 of the AD Agreement and Article 11 of the DSU.[12] In particular, Indonesia claims that the Panel engaged in improper *de novo* review of evidence from the investigation and failed to properly consider Indonesia's arguments and evidence.[13]

---

[7] *US – Hot-Rolled Steel (AB)*, para. 178 (emphasis omitted).
[8] *See EC – Fasteners (China) (AB)*, para. 488.
[9] *See* Indonesia's First Written Submission, paras. 4.67-4.72.
[10] *See* Panel Report, para. 7.103.
[11] Panel Report, para. 7.103.
[12] *See* Indonesia Appellant Submission, para. 4.1.
[13] *See* Indonesia Appellant Submission, paras. 4.2–4.7.

10. Article 11 of the DSU provides that:

> The functioning of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[14]

11. The standard under Article 11, as consistently articulated by the Appellate Body, requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[15] The Appellate Body has found that a panel may not "make affirmative findings that lack a basis in the evidence contained in the panel record" but that, within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."[16]

12. Panels have discretion in weighing both the evidence and arguments presented by the parties. As explained by the Appellate Body:

> [The Appellate Body] will not "interfere lightly" with a panel's fact-finding authority. Rather, for a claim under Article 11 to succeed, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts." In other words, "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU", but only those that are so material that, "taken together or singly", they undermine the objectivity of the panel's assessment of the matter before it.[17]

13. Article 11 challenges should not be taken lightly or raised merely as a claim in the alternative to other substantive appeals. The United States recalls that an allegation by a party that a panel has failed to make an objective assessment of a matter before it is "very serious".[18] As such, the Appellate Body has held parties alleging such violations to a high evidentiary standard. Article 11 challenges must be clearly articulated and substantiated with specific arguments, including an explanation of why the alleged error has a bearing on the objectivity of the panel's assessment. A complaint premised primarily on a party's disagreement with the

---

[14] DSU, Art. 11.
[15] *China – Rare Earths (AB)*, para. 5.178 (citing to *Brazil – Retreaded Tyres (AB)*, para. 185 (referring to *EC – Hormones (AB)*, paras. 132 and 133); *Australia – Salmon (AB)*, para. 266; *EC – Asbestos (AB)*, para. 161; *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 170, 177, 181; *EC – Sardines (AB)*, para. 299; *EC – Tube or Pipe Fittings (AB)*, para. 125; *Japan – Apples (AB)*, para. 221; *Japan – Agricultural Products II (AB)*, paras. 141, 142; *Korea – Alcoholic Beverages (AB)*, paras. 161, 162; *Korea – Dairy (AB)*, para. 138; *US – Carbon Steel (AB)*, para. 142; *US – Gambling (AB)*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 313; and *EC – Selected Customs Matters (AB)*, para. 258).
[16] *EC – Hormones (AB)*, para. 135; *China Rare Earths (AB)*, para. 5.178.
[17] *China Rare Earths (AB)*, para. 5.79 (citations omitted).
[18] *China Rare Earths (AB)*, para. 5.203.

Panel's reasoning and weighing of evidence, for example, does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU.[19]

14. The United States also recalls that it is unacceptable for an appellant to simply recast factual arguments that it made before the panel in the guise of an Article 11 claim on appeal. Instead, an appellant must identify specific errors regarding the objectivity of the panel's assessment.[20] It therefore is incumbent on a participant raising a claim under Article 11 on appeal to explain why the alleged error meets the standard of review under that provision.[21]

15. While Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency of disputed measures with the covered agreements, Article 17.6 of the AD Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

> (i) [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

16. In examining the relationship between Article 17.6(i) of the AD Agreement and Article 11 of the DSU, the Appellate Body has observed that "it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'."[22] Accordingly, "there is no 'conflict' between Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement; rather, the two provisions complement each other."[23]

17. The Appellate Body has found that the "objective assessment" made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[24] But the Appellate Body also admonished that, to succeed in an Article 11 challenge, "[a]n appellant must persuade [the Appellate Body], with sufficiently

---

[19] *See China Rare Earths (AB)*, para. 5.203.
[20] *See EC – Fasteners (China) (AB)*, para. 442; *China Rare Earths (AB)*, para. 5.178.
[21] *See China Rare Earths (AB)*, para. 5.178 (quoting *EC – Fasteners (China) (AB)*, para. 442 (emphasis original)).
[22] *US – Hot-Rolled Steel (AB)*, para. 55.
[23] *EC – Bed Linen (AB)*, footnote 136.
[24] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186.

compelling reasons, that [it] should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts."[25]

18. Here, Indonesia alleges that the Panel failed to engage in an "objective assessment of the matter," as required by DSU Article 11, because it concluded that the "EU authorities did not act inconsistently with Article 2.4" of the AD Agreement *before* addressing Indonesia's arguments and evidence.[26] The United States does not view a panel's task to be resolving claims independent of the specific arguments that are raised by the parties. Thus, the Panel's statement that the EU authorities did not act inconsistently with Article 2.4 could only be understood as an intermediate conclusion reached before considering Indonesia's specific arguments. Nevertheless, not every error rises to the level of a breach of Article 11. In this case, the Panel did in fact address Indonesia's arguments later in its written report.[27] If the Appellate Body determines that the analytical framework used by the Panel resulted in legal error, then the proper outcome is reversal of the Panel's legal conclusion under Article 2.4. If the analytical framework did not result in an erroneous legal conclusion, then the Panel's statement and intermediate conclusion before considering Indonesia's specific arguments would not be so material to the Panel's assessment to rise to the level of a breach of Article 11.

19. Indonesia also argues that the Panel did not address *all* of Indonesia's arguments and evidence.[28] With respect to this claim, the United States notes that it is important that panels engage in an objective assessment of the matter, which will likely include addressing arguments and evidence raised by parties. However, the fact that a panel does not specifically refer to every piece of evidence presented by a party in its report is not sufficient to establish a panel's failure to undertake an objective assessment of that evidence.[29] Very likely, such omissions may indicate that the panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that a party considers it should have.[30] Nor does the fact that a panel did not address an argument presented by a party necessarily rise to the level of an Article 11 violation.[31] A panel has no obligation under Article 11 to address in its report every argument raised by a party.[32]

20. Finally, with respect to Indonesia's claim that the Panel engaged in impermissible *de novo* review of evidence that was not addressed by the EU authorities in their report, the United States notes that, in order to find a breach of Article 11, the Appellate Body must find that the Panel had "substitute[d] its own judgment" for that of the EU authorities.[33]

---

[25] *EC – Tube or Pipe Fittings (AB)*, para. 125 (citing *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 170).
[26] Indonesia's Appellant Submission, paras. 4.37, 4.50.
[27] *See* Panel Report, paras. 7.99-7.160.
[28] *See* Indonesia's Appellant Submission, para. 4.236.
[29] *See, e.g., China – Rare Earths (AB)*, para. 5.178; *EC – Fasteners (AB)*, paras. 441-442; *Brazil – Retreaded Tyres (AB)*, para. 202.
[30] *See, e.g., China – Rare Earths (AB)*, para. 5.221.
[31] *See, e.g., China –Rare Earths (AB)*, para. 5.224.
[32] *See, e.g., China –Rare Earths (AB)*, para. 5.224.
[33] *US – Washing Machines (AB)*, para. 5.258.

IV. THE APPELLATE BODY SHOULD REJECT THE EU'S APPEAL THAT THE PANEL ERRED IN MAKING RECOMMENDATIONS AND THAT INDONESIA'S APPEAL SHOULD BE DISMISSED BECAUSE THE CONTESTED MEASURE HAS ALLEGEDLY EXPIRED

21. In its report, the Panel found the EU anti-dumping measure challenged by Indonesia and within the Panel's terms of reference, as established by the DSB, to be inconsistent with Article 6.7 of the AD Agreement. Pursuant to DSU Article 19.1, the Panel recommended that the measure be brought into conformity with the EU's WTO obligations.[34] The EU now argues that the Panel erred in making recommendations and that Indonesia's appeal should be dismissed because the contested measure had expired before the Panel's report was circulated.[35] As explained below, however, the alleged expiry of the EU measure is not a fact found by the Panel, and the Appellate Body may not consider new facts on appeal, as its review of the panel report is limited to issues of law and legal interpretation. Therefore, the EU's appeal must be rejected.

22. The EU informed the Panel of the alleged expiry of the measure via an email sent on November 16, 2016, almost two months after the Panel issued its final report to the parties and approximately one month before the report was circulated to the Members.[36] To the extent this email is not part of the panel record provided to the Appellate Body, the EU also appeals "the Panel's failure to place that communication on the record"[37] and requests the Appellate Body to request the Director-General of the WTO to add the email to "the record of the Panel proceedings and/or these appeal proceedings as an uncontested fact."[38] The EU further claims that there are "several strong indications" in Article 3 of the DSU that an appeal is not appropriate when the measures at issue are withdrawn or expire during panel proceedings.[39] For example, the EU argues that: "Article 3.2 provides that the dispute settlement system of the WTO serves to preserve the rights and obligations of Members under the covered agreements. *Once the measure at issue is withdrawn/expires there is nothing left to 'preserve'*."[40] The EU also argues that there is "no sense" in the Panel making a recommendation "if the measure (and hence violation) has ceased to exist."[41]

23. In response, Indonesia notes that Article 17 of the DSU governs the Appellate Body's jurisdiction over appeals of panel reports, and that the EU has failed to point to any basis in Article 17 to suggest that Indonesia's appeal is improper.[42] Likewise, none of the subparagraphs in Article 3 of the DSU provide a basis to limit or restrict the Appellate Body's jurisdiction due to the expiry of a contested measure.[43] Indonesia further argues that the Panel's making of

[34] *See* Panel Report, para. 7.236
[35] *See* EU's Other Appellant Submission, paras. 21, 23.
[36] *See* EU's Other Appellant Submission, paras. 21, 23; *see also* Panel Report, para. 1.8.
[37] EU's Other Appellant Submission, footnote 20.
[38] EU's Other Appellant Submission, para. 3.
[39] EU's Other Appellant Submission, para. 6; *see also id.*, paras. 9-18 (citing DSU Articles 3.1-3.5, 3.7-3.10).
[40] EU's Other Appellant Submission, para. 10 (emphasis in original).
[41] EU's Other Appellant Submission, para. 23.
[42] *See* Indonesia's Other Appellee Submission, para. 4.10.
[43] *See* Indonesia's Other Appellee Submission, para. 4.16.

recommendations was appropriate because the expiry of the contested measure "came too late, after the panel record had closed."[44]

24. The United States agrees with Indonesia that evidence regarding the alleged expiry of the contested measure is not part of the Panel record and that "[t]he Appellate Body cannot, therefore, make any decisions, whether procedural or on the merits, on the basis of that evidence."[45] The EU sent its email almost two months after the Panel concluded its interim review and issued the final report to the parties.[46] This is far too late for evidence to be submitted and evaluated in a panel proceeding.

25. The Appellate Body and panels have consistently refused to consider new evidence submitted at such a late stage in panel proceedings, including during, or following, the interim review period.[47] As the Appellate Body explained in *EC – Sardines*:

> The interim review stage is not an appropriate time to introduce new evidence. . . . At that time, the panel process is all but completed; it is only – in the words of Article 15 [of the DSU] – "precise aspects" of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence.[48]

26. It was thus appropriate that the November 16, 2016 email, as "new and unanswered evidence"[49] submitted well after the interim review period had elapsed, was not considered by the Panel in its assessment of the matter because the Panel's assessment had concluded months before. The alleged expiry of the EU measure is not, therefore, a "fact" forming part of the record in these panel proceedings.[50]

27. Given that the alleged expiry of the EU measure was not considered by the Panel and was not a fact found by the Panel as part of its report,[51] such evidence may not be considered by the Appellate Body on appeal. Article 17.6 of the DSU limits the scope of the Appellate Body's review to "issues of law covered in the panel report and legal interpretations developed by the

---

[44] Indonesia's Other Appellee Submission, para. 4.52.
[45] Indonesia's Other Appellee Submission, para. 4.57.
[46] *See* Panel Report, para. 1.8.
[47] *See, e.g.*, *EC – Sardines (AB)*, para. 301; *EC – Approval and Marketing of Biotech Products*, para. 6.134; *EC – Bananas III (Article 21.5 – US) (Panel)*, para. 6.16; *China – Auto Parts (Panel)*, paras. 6.36-6.37; *EC – IT Products*, para. 6.48; *EC – Large Civil Aircraft (Panel)*, para. 6.311; *US – Offset Act (Byrd Amendment) (AB)*, para. 222; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 171.
[48] *EC – Sardines (AB)*, para. 301.
[49] *EC – Sardines (AB)*, para. 301.
[50] EU's Other Appellant Submission, para. 3.
[51] *See* DSU, Art. 12.7 ("Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, *the report of a panel shall set out the findings of fact*, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.") (italics added).

panel."[52] Accordingly, the Appellate Body itself has found that it has no authority to consider new evidence on appeal.[53] The circumstances of the present appeal require the same conclusion.

28. Even aside from its untimeliness, the evidence submitted by the EU was also not relevant to the matter being examined by the Panel. The Panel was established by the DSB with standard terms of reference under DSU Article 7.1 "to examine . . . the matter referred to the DSB" by the complaining party in its panel request. As the Appellate Body has explained in *EC – Customs*, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "*at the time of establishment of the Panel.*"[54] Any evidence, to be relevant, must therefore relate to the legal situation that exists as of that date. Again, as the Appellate Body explained in *EC – Customs*, a panel was correct not to examine certain post-panel establishment evidence because, although the evidence "might have arguably supported the view that uniform administration [i.e., WTO-consistency] had been achieved by the time the Panel Report was issued, we fail to see how [the evidence] showed uniform administration *at the time of the establishment of the Panel*."[55] The alleged expiry of the EU anti-dumping measure just before circulation of the panel report is not relevant to the legal situation as of the date of the Panel's establishment. It is an alleged change to that measure years after the panel was established. The irrelevance of the evidence brought forward by the EU would be another, independent reason to reject its appeal.

29. Further, nothing in the DSU suggests that the Appellate Body could modify the record of the Panel's proceedings unilaterally, or request the Director-General to do so. Indeed, the DSU itself contains no reference to a panel "record." Therefore, the Panel was under no DSU obligation to maintain a "record", and no issue of law or legal interpretation[56] exists in relation to whether a document has or has not been included in the "record" which the Appellate Body through its Working Procedures has requested that the WTO Director-General transmit to it when an appeal is lodged. Nor would the "requests" by the EU fall within the Appellate Body's authority under DSU Article 17.13 to "uphold, modify or reverse the legal findings and conclusions of the panel."[57] Therefore, the EU's "requests" in relation to the "record" should be rejected as not properly the subject of an appeal nor within the scope of the Appellate Body's authority on appeal.

30. In light of the foregoing, there would appear to be no basis for the Appellate Body to consider the alleged expiry of the EU measure in its assessment of legal issues before it. The Panel did not address the expiry of this measure in its report, and the expiry is not a finding "covered in the panel report" that may be examined on appeal. The Appellate Body may not

---

[52] DSU, Art. 17.6.
[53] *See, e.g., US – Offset Act (Byrd Amendment) (AB)*, para. 222; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 171.
[54] *See, e.g., EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel").
[55] *Id*., para. 259.
[56] *See* DSU, Art. 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").
[57] DSU, Art. 17.13 ("The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.").

consider new facts on appeal. Therefore, the Appellate Body's analysis of the EU's appeal should end there.

31. In that event, the Appellate Body need not evaluate the substance of the EU's arguments regarding whether the Panel erred in making a recommendation on an allegedly expired measure or whether Indonesia's appeal should be "dismissed" because it relates to such a measure. In particular, the Appellate Body need not examine certain statements (in the nature of *obiter dicta*) in prior Appellate Body reports regarding whether a panel should decline to make recommendations regarding expired measures it finds to be WTO-inconsistent, and whether the text of Article 19.1 of the DSU plainly requires that a recommendation be made on a WTO-inconsistent measure within the panel's terms of reference.

32. Were the Appellate Body to consider it necessary to reach the substantive matters raised by the EU on appeal, the United States considers the Panel's making of findings and recommendations on the contested measure to be consistent with the requirements of the DSU, as the measure falls within the terms of reference that were set when the Panel was established. For similar reasons, the United States views the EU's request that the Appellate Body dismiss Indonesia's appeal to be inappropriate and without legal authority.

33. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the Dispute Settlement Body ("DSB") establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request.[58] Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[59] As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[60]

34. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "*at the time of establishment of the Panel.*"[61] It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel should make findings. The parties do not

[58] DSU, Art. 7.1.
[59] DSU, Art. 6.2; *see US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.
[60] *EC – Chicken Cuts (AB)*, para. 156.
[61] *See, e.g.*, *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id*., para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products*, para. 7.456.

contest on appeal that the EU measure fell within the Panel's terms of reference and thus formed part of the matter before it.

35. The DSU addresses the role and duties of a panel with respect to the matter referred to it by the DSB. Specifically, Article 11 requires that the panel should make an objective assessment of the "matter", including an objective examination of the facts and the applicability of and conformity with the covered agreements.[62] The panel also must issue a report under Article 12.7 setting out its "findings of fact, the applicability of relevant provisions and the basic rationale" for those findings.[63]

36. With respect to the panel's recommendation, Article 19.1 sets out in mandatory terms that, where a panel "concludes that a measure is inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring *the measure* into conformity with that agreement."[64] Thus, pursuant to Article 19.1, a panel is *required* to make a recommendation where it has found a measure within its terms of reference to be inconsistent with the relevant Member's obligations.

37. Therefore, the panel in this dispute was authorized and charged by the DSU to make a recommendation with respect to the measures within its terms of reference found to be WTO-inconsistent, i.e., the challenged measures, as they existed at the time of the Panel's establishment. The expiration or withdrawal of one of the legal instruments identified in Indonesia's panel request does not alter the scope of the Panel's terms of reference, nor the Panel's mandate under the DSU. The United States thus agrees with Indonesia that the Panel acted in accordance with its obligations under the DSU by making findings and recommendations with respect to the EU's anti-dumping measure, notwithstanding the expiry of that measure.[65]

38. Other panels and the Appellate Body have reached similar conclusions.[66] For example, in *China – Raw Materials*, the complainants challenged "export duties" and "export quotas" "comprised of basic framework legislation and implementing regulations . . . and specific measures . . . [issued] on an annual or time-bound basis."[67] As the three co-complainants requested, the panel made findings on the measures as they existed at the time of the panel's establishment and, with respect to measures found to be WTO-inconsistent, made a

[62] DSU, Art. 11.
[63] DSU, Art. 12.7.
[64] DSU, Art. 19.1 (emphasis added).
[65] *See* Indonesia's Other Appellee Submission, paras. 4.51, 4.59-4.60.
[66] *See, e.g., EC – IT Products*, para. 7.167 ("[W]e note that any repeal would have taken place after the panel was established and its terms of reference were set. Therefore, the Panel considers that it may make recommendations with respect to these measures."); *US – Wool Shirts and Blouses (Panel)*, para. 6.2 ("In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate . . . notwithstanding the withdrawal of the US restraint."); *see also Indonesia – Autos*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *China – Raw Materials (AB)*, para. 260.
[67] *China – Raw Materials (AB)*, para. 264.

recommendation under Article 19.1 of the DSU. The Appellate Body found that the panel had acted correctly.[68]

39. In support of its argument that a panel errs in making recommendations on expired measures, the EU mistakenly cites to the Appellate Body report in *US – Certain EC Products*.[69] However, in that dispute, the issue of whether it was appropriate for the panel to make recommendations regarding an expired measure was *not* raised on appeal. The Appellate Body's comments on that issue therefore were not relevant to its legal findings to any issue on appeal.[70] Instead, the EU had challenged on appeal only the panel's determination that a later-in-time measure passed by the United States was not within its terms of reference, and that the measure properly forming part of the matter at issue had ceased to exist.[71] The 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.[72]

40. Similarly, in *US – Upland Cotton* and *EC – Bananas III (Article 21.5 – US)*, referenced by Indonesia, the Appellate Body was not presented with this legal issue on appeal.[73] In *US – Upland Cotton*, the issue raised on appeal was whether an expired measure could be "at issue" under DSU Article 6.2, not whether the panel could make recommendations with respect to such a measure.[74] The Appellate Body's reference to its statements in *US – Certain EC Products* came only after it had concluded its analysis regarding Article 6.2, and in the context of explaining why the findings of that dispute did not apply in the current circumstances.[75] Similarly, in *EC – Bananas III (Article 21.5 – US)*, the Appellate Body discussed, in dictum, whether a panel can make a recommendation on an expired measure.[76] But the Appellate Body in that proceeding found that, contrary to the EU's appeal, the panel had *not* in fact made a new recommendation during the Article 21.5 proceedings, because the panel's original recommendations and rulings remained operative.[77] Therefore, the issue of whether a recommendation under DSU Article 19.1 may be made on an expired measure was not at issue in

[68] *See China – Raw Materials (AB)*, para. 260 ("While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations.").
[69] *See* EU's Other Appellant Submission, footnote 23.
[70] *See US – Certain EC Products (AB)*, paras. 8-11; *see also id.*, para. 128(a).
[71] *See US – Certain EC Products (AB)*, paras. 10-11; *see also id.*, para. 59(a) (issues on appeal were: "Whether the Panel erred in finding that the measure at issue in this dispute is the 3 March Measure, which is the 'increased bonding requirements as of 3 March on EC listed products', that this measure is no longer in existence, that the 19 April action is legally distinct from the 3 March Measure and that the 19 April action is not within the terms of reference of the Panel.").
[72] The United States would also note that the situations in the present dispute and that dispute were quite different. In *US – Certain EC Products*, the measure at issue had ceased to exist prior to panel establishment. *See US – Certain EC Products (AB)*, paras. 61, 79-82. Therefore, the situation is not comparable to the one faced by the Panel in this dispute, in which expiration of the underlying measure did not occur until well after the interim review period had elapsed, just before public circulation of the report.
[73] *See* Indonesia's Other Appellee Submission, para. 4.33, footnote 172.
[74] *US – Upland Cotton (AB)*, para. 267.
[75] *See US – Upland Cotton (AB)*, para. 272.
[76] *See EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)*, para. 271.
[77] *See EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)*, para. 272.

that appeal. Thus, the Appellate Body has not, in any report to date, made findings on an issue properly under appeal that contradict the plain meaning of DSU Article 19.1.

41. Defining the scope of a dispute based on the measures as they existed at the time of panel establishment — and requiring a recommendation to be made thereon — is not only consistent with the requirements of the DSU, it also benefits the parties by balancing the interests of complainants and respondents. Just as a complainant may not obtain findings on substantively new measures introduced after the establishment of a panel,[78] so too the respondent may not avoid findings and recommendations by altering or revoking its measures after the date of panel establishment.[79] A complainant therefore may obtain a recommendation that is prospective, and can be invoked both with respect to unchanged measures and with respect to any later-in-time measures a responding party may impose — whether they are imposed after the adoption of panel and Appellate Body reports, or simply after the establishment of a panel.

42. The United States sympathizes with the EU's frustration in the continuation of a dispute that appears, on the basis of Indonesia's appellee submission, to have been successfully resolved. And we would urge Indonesia to strongly consider whether it is necessary to continuing pressing this appeal. In the circumstance where a contested measure has expired and the complainant agrees it is unlikely to be re-imposed, parties should consider whether a mutually agreed solution may be reached pursuant to DSU Article 3.6.[80] Indeed, the DSU encourages such solutions,[81] and the Appellate Body may consider exploring with the parties whether such a solution is possible here.

43. If Indonesia and the EU are able to reach a resolution, then there would be no need to spend the scarce time and resources of the Secretariat and the Appellate Body Members to continue the appellate proceedings. Consuming these resources in such a situation would only unnecessarily delay the resolution of other disputes that remain unresolved and require further consideration under the DSU. As WTO Members are aware, the hearings and reports in several new appeals — including this one — will already be significantly delayed in part due to the unavailability of resources.

44. However, if the parties cannot arrive at a mutually satisfactory solution, then these proceedings should continue in a way that preserves the rights and obligations of both parties under the DSU.[82] The United States considers that, contrary to the EU's assertions, denying

[78] *See, e.g., EC – Chicken Cuts (AB)*, paras. 155-162.
[79] *See, e.g., EC – IT Products*, para. 7.167; *US – Wool Shirts and Blouses (Panel)*, para. 6.2; *Indonesia – Autos*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *China – Raw Materials (AB)*, para. 260.
[80] Indonesia's allusion to the "practical implications" that the termination of the measure will have suggest that it may be considering such issues. *See* Indonesia's Other Appellee Submission, para. 4.60.
[81] *See, e.g.*, DSU, Art. 3.7 ("A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.").
[82] *See* DSU, Art. 3.2 ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements . . . .").

Indonesia a recommendation with respect to the measure at issue would prejudice its rights under the DSU.

45. If panels and the Appellate Body, contrary to DSU Article 19.1, fail to make recommendations on WTO-inconsistent measures because they have expired or changed during the course of panel or appellate proceedings, a responding party could theoretically avoid compliance with its WTO obligations by withdrawing a contested measure during the proceedings, and then later re-imposing it. Without a recommendation under Article 19.1 of the DSU, the responding Member would have no prospective implementation obligation with respect to that WTO-inconsistent measure,[83] and the complaining Member would have no right to request review of the respondent Member's action under Article 21.5 of the DSU.[84] Therefore, contrary to the EU's argument that "[o]nce the measure at issue is withdrawn/expires there is nothing left to 'preserve'" under DSU Article 3.2,[85] such an outcome would necessarily diminish the rights of affected parties under the covered agreements, as well as the obligations of the offending party.[86]

46. For similar reasons, the United States also has concerns with the EU's request that the Appellate Body dismiss Indonesia's appeal based on the alleged expiry of the underlying anti-dumping measure. Despite the arguments raised by the EU with respect to DSU Article 3, nothing in the DSU supports the Appellate Body having such an authority.

47. Like the panel, the Appellate Body is authorized and 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 the matter was referred by the DSB to the panel for examination, into conformity with the relevant WTO agreements. The DSU requires the Appellate Body to address issues raised by the parties regarding a panel's legal findings and conclusions. DSU Articles 17.12 and 17.6 provide that the Appellate Body "*shall address*" each of the "issues of law covered in the panel report and legal interpretations developed by the panel" that are raised during appellate proceedings.[87] In doing so, the Appellate Body may "uphold, modify or reverse the legal findings and conclusions of the panel," pursuant to DSU Article 17.13.[88] Where the Appellate Body "concludes that a measure is inconsistent with a covered agreement," DSU Article 19.1 provides that the Appellate Body "*shall recommend* that the Member concerned bring the measure into conformity with that agreement."[89]

---

[83] *See, e.g., China – Raw Materials (AB)*, para. 260 ("While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations.").
[84] *See* DSU, Art. 21.5 ("Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures.").
[85] EU's Other Appellant Submission, para. 10 (emphasis omitted).
[86] DSU, Art. 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").
[87] DSU, Art. 17.12 (emphasis added), 17.6.
[88] DSU, Art. 17.13.
[89] DSU, Art. 19.1 (emphasis added).

48. The Appellate Body's duty to address Indonesia's appeal consistent with these obligations is not affected by the expiry of an underlying regulation. Under the DSU, the scope of the matter at issue on appeal, like the panel's terms of reference, is set at the time of panel establishment. As explained above, the terms of reference in this dispute cover the EU's anti-dumping measure as it existed at the time of the Panel's establishment, and the Panel appropriately made legal findings and recommendations with respect to that measure. It is those findings, directed to the challenged measure as it existed when the Panel was established, that the Appellate Body is tasked with addressing under DSU Articles 17 and 19. The Appellate Body's role is not to provide its own review of the underlying facts or to address any compliance steps that may have been taken by the responding Member after establishment of the panel.[90] And there is nothing in the DSU to suggest that the relevant "matter" at issue in a dispute, as set under DSU Articles 6.2 and 7.1, can change on appeal.

49. The United States thus agrees with Indonesia that "if a measure was validly within a panel's jurisdiction, the Appellate Body also has jurisdiction with respect to that measure"[91] — and only with respect to that measure. Moreover, as explained by Indonesia, the various subparagraphs of DSU Article 3 cited by the EU do not provide a basis to limit the scope of appellate review.[92] As the EU has acknowledged, DSU Article 17 "govern[s]" appellate review,[93] and the general provisions of Article 3 do not supersede that article.

50. Based on the foregoing, the Appellate Body should reject the EU's appeal as it relates to the expiry of the underlying measure. As the United States initially explained, there is no need for the Appellate Body to reach the EU's substantive arguments on this issue, because the underlying evidence upon which they are based was submitted too late to be considered during panel proceedings and thus does not form part of the factual record to be considered on appeal. If the Appellate Body nonetheless deems it appropriate to consider the EU's additional arguments regarding the Panel's recommendation and the validity of Indonesia's appeal, the United States urges the Appellate Body to reject those arguments because they are inconsistent with a proper interpretation of the DSU.

V. EU'S CLAIMS OF ERROR WITH REGARD TO THE PANEL'S FINDING THAT THE DSB AUTHORITY FOR THE PANEL PROCEEDINGS HAD NOT LAPSED

51. The EU also appeals the Panel's finding that the DSB authority for the panel proceedings had not lapsed.[94] The EU claims that the authority for the Panel lapsed because Indonesia asked, in an email message to Secretariat staff, to "suspend" a meeting in connection with the composition of the panel, and because after the meeting was held in abeyance, more than twelve months passed before Indonesia sought to resume the panel composition process.[95] While

[90] *See, e.g.,* Indonesia's Other Appellee Submission, para. 4.57 ("[T]he Appellate Body's mandate and the rules governing the prohibition of new evidence in appellate review do not permit the Appellate Body to take into account the expiry of the measure and either determine its jurisdiction or reverse the Panel's recommendations based on that fact. It is well established that the Appellate Body must base its review on the factual record as established by the Panel. No new evidence is admitted in appellate proceedings.").
[91] Indonesia's Other Appellee Submission, para. 4.14.
[92] *See* Indonesia's Other Appellee Submission, paras. 4.14, 4.16.
[93] EU's Other Appellant Submission, para. 5.
[94] *See* EU's Other Appellant Submission, para. 24.
[95] EU's Other Appellant Submission, para. 51.

sympathetic to certain practical concerns expressed by the EU, the United States respectfully disagrees with the understanding of DSU Article 12.12 that underlies the EU's appeal.

52. Article 12.12 of the DSU states:

> The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.[96]

The United States submits that the EU has wrongly interpreted the relevant terms of Article 12.12, including its interpretation of the term "panel," and what it means in the context of this provision for a panel to "suspend" its "work."

53. Pursuant to DSU Article 11, the Panel's "function" is to assist the DSB by "mak[ing] an objective assessment of the matter before it, including . . . the applicability of and conformity with the relevant covered agreements."[97] DSU Article 3.2 establishes that such an assessment of "the existing provisions of those [covered] agreements [shall be made] in accordance with customary rules of interpretation of public international law."[98] Those customary rules of treaty interpretation are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*").[99]

54. Because determining what it means to suspend "the work of the panel" is dependent upon discerning the proper meaning of the term "panel,"[100] the United States will begin with the interpretation of that term. The ordinary meaning of "panel" (or "the panel") is not in dispute.[101] The United States agrees with the EU that there is no express limitation imposed in the text of the DSU on the meaning of the term "panel," and that in some instances, "panel" may refer to a panel that has been composed and in others, it may refer to a panel that has been established but not composed.[102] The United States notes, however, that it is precisely because "panel" refers to both circumstances in various places in the DSU that the interpretation of "panel" *as used in Article 12.12* does not end with a facial inquiry into the ordinary meaning of the term. Rather, the context provided by the additional language in Article 12.12 and other provisions of the DSU also must be examined.

55. The last sentence of Article 12.12 describes a situation in which the work of the panel "has been suspended for more than 12 months." The first sentence sets out how such a

---

[96] DSU, Art. 12.12.
[97] DSU, Art. 11.
[98] DSU, Art. 3.2.
[99] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 221, 8 I.L.M. 679; *see US – Gasoline (AB)*, pp. 16-17.
[100] Article 31 of the *Vienna Convention* provides that an agreement shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
[101] EU's Other Appellant Submission, para. 30.
[102] EU's Other Appellant Submission, para. 55.

suspension may arise: "at the request of the complaining party for a period not to exceed 12 months." The request is made to, and would be acted upon in its discretion, by the panel ("[t]he panel may suspend its work"). The second sentence confirms the "suspension" is one the panel decides upon at the complaining party's request ("[i]n the event of *such a* suspension").[103] Thus, 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.

56. The context of Article 12 as a whole also is instructive. The articles of the DSU proceed sequentially from the initial phases of the dispute settlement process to the final stages of that process. Depending on the stage of the process and the content of the relevant rules, the term "panel" in the various provisions may be interpreted differently.

57. Article 6, for example, governs the "establishment of panels," including the timing of their establishment and the method by which their establishment must be requested.[104] As a matter of both timing and logic, these actions necessarily would precede the composition of a panel and therefore would refer to an uncomposed panel. Article 7, on the other hand, may refer to both composed and uncomposed panels when it describes the "terms of reference of panels."[105] For example, Article 7.1 states that "[p]anels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel."[106] Therefore, whether or not a panel has been composed, within 20 days of establishment the terms of reference are determined and govern thereafter the scope of the dispute for purposes of any panel that has been "established," including one that has subsequently been composed.

58. Article 7.2, however, provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[107] By requiring panels to "address" certain provisions of the covered agreements, the use of the term "panel" in Article 7.2 necessarily refers to a panel that has been composed, for the obvious reason that a panel that has been established only cannot "address" anything.

59. With respect to the interpretation of "panel" in Article 12 specifically, both the stage of the process and the specific rules it provides assist in interpreting the terms contained in Article 12.12. Article 8, for example, which deals with panel composition, precedes Article 12, which deals with panel procedures.[108] Therefore, the placement of the rules on panel procedures in Article 12 suggests that a panel already would have been composed at the point when the "panel procedures" would apply. The specific provisions found in the various paragraphs of Article 12 support this interpretation as well. For example, Article 12.1 establishes that a panel shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties; a panel could neither "follow" those Procedures nor decide otherwise nor consult if it has

[103] DSU, Art. 12.12 (emphasis added).
[104] DSU, Art. 6
[105] DSU, Art. 7.
[106] DSU, Art. 7.1.
[107] DSU, Art. 7.2.
[108] *See* DSU, Art. 8.

not been composed.[109] Article 12.3 even more explicitly refers to "panelists" when it describes a process and schedule for fixing the timetable during the panel process.[110] Logically, there would be no "panel*ists*" fixing the timetable if the panel had not yet been composed.

60. Based on the above, the "work" of the panel in the context of Article 12.12 refers to the examination by the panel, once composed, of the matter referred to it by the DSB under the procedures established in Article 12. Therefore, Indonesia's request *to the Secretariat* to suspend a meeting *to compose* the panel would not constitute a request *to the panel* that it "suspend its *work*" pursuant to Article 12.12.[111] Nothing in the text of the DSU, or in the email correspondence from Indonesia to the Secretariat, supports the EU's argument to the contrary.

61. The EU raises a contextual argument regarding the interpretation of the term "panel" in Article 12.12 based on its relationship with Article 12.9.[112] To bolster its argument that reference to the "panel" in Article 12.12 means only a panel that has been established, not necessarily composed, the EU notes that Article 12.9 (governing timeframes to submit the panel report) and Article 12.12 both refer to the "establishment," not composition, of a panel.[113] Because "composition" is used elsewhere in the DSU, the EU argues, the use of "establishment" alone is significant.[114]

62. The United States agrees that use of the term "establishment" in Article 12.12 is meaningful. Because a panel is established by the DSB (Article 6.1) to assist the DSB in discharging its responsibilities to make recommendations to bring a WTO-inconsistent measure into conformity with WTO rules (Articles 7.1, 11, 19.1) through issuance of findings in a written report (Article 15), in order to terminate a panel's authority to undertake that work, the DSU removes the legal basis for the panel's establishment. However, the fact that the legal authority of a panel relates to whether a panel is established does not imply that a panel that has not been composed may undertake any "work," much less "suspend" that work. Rather, the reference to establishment instead makes clear that in the event the composed panel has suspended its work for more than 12 months, the authority for its very existence — vested at panel establishment — must lapse.

63. Second, with respect to the contention that the time limit in Article 12.9 would be rendered meaningless were the twelve-month limitation in 12.12 read to apply only to composed panels,[115] the United States observes that the language regarding the time limit imposed in Article 12.9 is precatory, not binding, providing that in no case "should" the proceedings exceed nine months.[116] Therefore, the premise for the EU's arguments in this respect – that in no case

[109] DSU, Art. 12.1.
[110] DSU, Art. 12.3.
[111] We note in this respect that, as Indonesia has pointed out, when parties to disputes have requested suspension of a panel's work in the past, typically the intention to do so is clear and the suspension is formally initiated by the panel. *See* Indonesia's Other Appellee Submission, paras. 3.58-3.59.
[112] *See* EU's Other Appellant Submission, paras. 63-65.
[113] *See* EU's Other Appellant Submission, para. 63.
[114] *See* EU's Other Appellant Submission, para. 63.
[115] *See* EU's Other Appellant Submission, para. 63.
[116] DSU, Art. 12.9.

may the proceedings, including any 12 month suspension, exceed 21 months – fails. It simply is not the case that such a mandatory time limit is imposed by the DSU on panel proceedings.

64. For these reasons, the situation described in the last sentence in DSU Article 12.12 arises only after a panel has been composed, the complaining party makes a request to that panel to suspend its work, and the panel decides to exercise its discretion to accept that request and suspends its work accordingly. The United States thus agrees with the Panel's finding that its authority had not lapsed based on Indonesia's communication to the Secretariat prior to panel composition.

65. We note that the EU raises several policy concerns which it considers support its interpretation of Article 12.12, including considerations relating to: (1) the reputational consequences of unresolved proceedings for a responding Member,[117] and (2) the limited resources both Members and the Secretariat have to dedicate to a given dispute.[118] While such policy considerations cannot lead to a different interpretation and application of DSU Article 12.12, the United States nonetheless considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome and in that respect provides the following additional comments.

66. Regarding the first issue, there does not seem to be any serious cause for concern about a "reputational stain" somehow adhering to a responding Member as a result of a dispute brought before the WTO. If Members have not, through consultations or other means, managed to resolve a trade issue between them, parties regularly request the establishment of panels in an effort to achieve formal resolution of the dispute. Not all of these disputes proceed to the circulation of a final panel report. Often, disputes are successfully resolved only after the establishment of a panel. The provisions of the DSU both allow and encourage the opportunity for such a result to occur.[119] Therefore, the EU's suggestion that in all cases it would be in a responding party's interest to expedite the panel process so that accusations against it can be resolved does not reflect the nature of dispute settlement under the DSU.

67. Regarding resource constraints and the burden imposed on Members and the Secretariat to devote resources indefinitely to a dispute, the United States understands the dilemma to which the EU refers. However, we do not consider that dissolving the panel process would address these concerns. To the contrary, the likelihood that the same issue might be raised multiple times as formally "new" disputes would seem to risk exacerbating the strains on limited WTO resources rather than easing them. And if the EU believed it was prejudiced by the length of time taken to compose a panel, the United States respectfully suggests that an adequate remedy may be found under the DSU. Pursuant to Article 12.4, the EU could have explained those circumstances to the Panel and, in light of those concerns, the Panel would have been required to provide the parties with sufficient time to prepare their written submissions.[120]

---

[117] *See* EU's Other Appellant Submission, para. 46.
[118] *See* EU's Other Appellant Submission, para. 48.
[119] *See, e.g.*, DSU, Arts. 11 ("Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."), 12.7.
[120] *See* DSU, Art. 12.4.

68. Finally, the United States considers that reading into Article 12.12 a limitation on the ability of a complaining party to pause in its use of dispute settlement procedures would undermine the aim of the dispute settlement system to secure a positive solution to the dispute (DSU Article 3.7).[121] Where a party may be actively engaged in trying to resolve a dispute through alternative means, even after panel establishment, such action would be consistent with the preference expressed under the DSU.[122] Indeed, under DSU Article 11, a panel is charged with giving the parties an adequate opportunity to develop a mutually satisfactory solution.[123] The understanding of Article 12.12 proposed by the EU instead would appear to limit such opportunities.

VI. EU'S CLAIMS OF ERROR WITH REGARD TO THE PANEL'S ANALYSIS UNDER ARTICLE 6.7 OF THE AD AGREEMENT

69. The EU claims that the Panel erred in its interpretation and application of Article 6.7 of the AD Agreement. According to the EU, the Panel's interpretation is in error because it "imposes, in practice, an obligation to disclose a description of the investigation process rather than the results of the verification visit."[124] While the United States takes no position on whether the facts presented support a conclusion that the EU authorities failed to meet the requirements of Article 6.7, the United States presents its views of the appropriate interpretation of Article 6.7 below.

70. Article 6.7 of the AD Agreement requires investigating authorities conducting verification to "make the results of any such investigations available, or . . . provide disclosure thereof pursuant to paragraph 9, to the firms which they pertain and may make such results available to the applicants."[125] Article 6.9 in turn provides that an investigating authority "shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures."[126]

71. The United States agrees with the EU and the Panel that under its ordinary meaning, the term "results" in Article 6.7 refers to "outcomes" of the verification process.[127] The United States also agrees with the EU that Articles 6.7, 6.8, and 6.9 form a continuum of obligations under Article 6,[128] and that each obligation is grounded in the context of the specific provision.

72. Articles 6.7 and 6.9 of the AD Agreement promote transparency and procedural fairness by ensuring that "disclosure … take[s] place in sufficient time for the parties to defend their interests."[129] Failure to provide such disclosure could prevent an interested party from effectively defending its interests in the proceeding, and potentially, before national courts. In this respect, the United States agrees with the panel in *Korea – Certain Paper*, which noted that

[121] *See* DSU, Art. 3.7.
[122] *See, e.g.*, DSU, Arts. 3.4, 3.7, 4.5, 12.7.
[123] *See* DSU, Art. 11.
[124] EU's Other Appellant Submission, para. 81.
[125] AD Agreement, Art. 6.7 (incorporating Article 6.9).
[126] AD Agreement, Art. 6.9.
[127] EU's Other Appellant Submission, para. 102; Panel Report, para 7.224.
[128] *See* EU's Other Appellant Submission, para. 103.
[129] AD Agreement, Art. 6.9.

disclosing both verified and unverified information could "be relevant to the presentation of the interested parties' cases."[130]

73. Similarly, a basic tenet of the AD Agreement, as reflected in Article 6, is that the investigating authority "must provide timely opportunities for all interested parties to see all information . . . relevant to the presentation of their cases that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation";[131] and "shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests . . . [and these opportunities] must take account of the need to preserve confidentiality."[132] Articles 6.4 and 6.2 have specific obligations which may apply to the disclosure of verification results. Therefore, bearing in mind the obligations of Article 6.5, the United States considers that failing to disclose information under Article 6.7, particularly as it relates to the "essential facts" of an investigation under Article 6.9, would deprive parties of the full opportunity to defend their interests.

74. Therefore, at a minimum, Article 6.7 requires that the authority's verification report include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. For example, the United States believes that the term "essential facts," as defined in Article 6.9, relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations.[133] Accordingly, the United States believes that information verified or corrected at verification relating to these "essential facts" must be disclosed pursuant to Article 6.7 and Article 6.9. On the other hand, trivial or immaterial aspects of what occurred at the verification need not be disclosed.

75. Finally, the EU notes that the panel in *Korea – Certain Paper* emphasized that Article 6.7 does not require verification results to be provided in any particular *format* (e.g., written disclosure).[134] The United States agrees that the text of Article 6.7 contains no requirements on form or format. What Articles 6.7 and 6.9 require is disclosure of verification "results" and the "essential facts under consideration." To the extent the EU characterizes the lack of such disclosure as a question of form, not substance, the United States disagrees with that characterization.

VII. EU'S CLAIMS OF ERROR WITH REGARD TO THE PANEL'S HANDLING OF BUSINESS CONFIDENTIAL INFORMATION

76. The EU argues that the Panel's handling of business confidential information ("BCI") in this dispute was inconsistent with Articles 12.1 and 12.7 of the DSU, as well as the Additional Working Procedures Concerning Business Confidential Information ("Additional Working Procedures").[135] In particular, the EU claims that the Panel improperly bracketed as BCI

[130] *Korea – Certain Paper*, para. 7.192.
[131] AD Agreement, Art. 6.4.
[132] AD Agreement, Art. 6.2.
[133] *See, e.g.*, *China – Broiler Products*, para. 7.93; *China – X-Ray Equipment*, paras. 7.398-7.405; *EC – Salmon (Norway)*, para. 7.807.
[134] *See* EU's Other Appellant Submission, para. 109 (citing *Korea – Certain Paper*, para. 7.188).
[135] *See* EU's Other Appellant Submission, para. 182.

information that was already in the public domain, failed to require Indonesia to justify its requests for specific instances of bracketing, and did not require Indonesia to provide non-confidential summaries of the bracketed information.[136]

77. As a general matter, the United States considers that if a party submits information designated as confidential during the course of panel proceedings, the panel should not disclose that information, including in its written report. To the extent a party has incorrectly designated information as confidential that is available in the public domain, the United States considers that the other party should be afforded the opportunity to contest that designation during panel proceedings. Indeed, the Panel in this dispute adopted such procedures in its Additional Working Procedures,[137] and the EU made such an objection.[138]

78. Where the parties disagree as to the appropriate designation, the United States additionally notes, however, that if information designated by one party as confidential is in fact available in the public domain, the other party may submit to the panel the information that is available in the public domain. Thus, as a practical matter, all parties would be able to reference such publicly available information without referencing the exhibits a party believes were incorrectly designated as confidential. For example, if a company's annual financial report was submitted by a party as a confidential exhibit, but is publicly available on the company's web-site, another party could print out a copy from the website and submit it on the record with a reference to the relevant website address. This would allow the panel to cite to the publicly available version of such information in its report, and thus obviate the need to rely on material another party has requested be kept confidential.

79. Turning to the specific legal arguments raised by the EU, the United States notes that Article 12.1 of the DSU provides: "Panels shall follow the Working Procedures in Appendix 3 *unless the panel decides otherwise* after consulting the parties to the dispute."[139] In other words, as the panel in *Canada – Continued Suspension* explained, a panel "has the possibility to depart from any provision of Appendix 3, its only obligation being to consult the parties to the dispute first."[140] The discretion provided for under Article 12.1 — and, by extension, the Additional Working Procedures — would not appear to provide an adequate legal basis for the EU's claim on appeal that the Panel erred, as a matter of law, in the handling of BCI in its report.

80. Notably, the EU has not claimed that the Panel failed to consult with the parties regarding the bracketing of the relevant information. To the contrary, the EU describes correspondence between the parties and the Panel with respect to the EU's concerns regarding the bracketing of

[136] *See* EU's Other Appellant Submission, para. 181.
[137] *See* Additional Working Procedures Concerning Business Confidential Information, para. 9 ("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."); *id.*, para. 7 ("[I]f a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.").
[138] *See* EU's Other Appellant Submission, para. 170.
[139] DSU, Art. 12.1 (emphasis added).
[140] *Canada – Continued Suspension (Panel)*, para. 7.44.

public domain information.[141] Even if, *arguendo*, the Panel's bracketing could be considered contrary to Appendix 3 of the DSU or the Additional Working Procedures, there is no basis to say that the Panel's decision to do "otherwise" after consulting the parties is inconsistent with the requirements of Article 12.1.[142]

81. The EU also argues that the Panel acted inconsistently with Article 12.7, which requires the Panel to "submit its findings in the form of a written report to the DSB," setting out "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations."[143] According to the EU, the Panel impermissibly "reduced the scope of the obligations imposed upon it by the DSU by over-bracketing and therefore under-reporting to the DSB."[144]

82. Article 12.7 provides, in relevant part:

> Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.[145]

83. The United States considers that it cannot be the case that all factual findings by a panel must be disclosed in its written report to the DSB — and the EU agrees, given its support for the protection of business confidential information and highly sensitive business information in the *Large Civil Aircraft* disputes. Rather, in determining whether a panel has complied with Article 12.7 in relation to findings of fact, there must be consideration of the degree to which a fact is material to the "basic rationale behind any findings and recommendations."[146] That is, a panel must set out those facts without which the report would not provide this required "rationale."[147] Under this standard, the Appellate Body may wish to evaluate the information identified by the EU to determine whether it is sufficiently material to the basic rationale of the panel's findings that the bracketing of the information renders the report insufficient to provide that rationale within the meaning of Article 12.7.

VIII. CONCLUSION

84. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.

[141] *See* EU's Other Appellant Submission, para. 170.
[142] DSU, Art. 12.1.
[143] EU's Appellant Submission, para. 182.
[144] EU's Appellant Submission, para. 182.
[145] DSU, Art. 12.7.
[146] DSU, Art. 12.7.
[147] DSU, Art. 12.7.