authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

7.584. Article 12.3 requires authorities, "whenever practicable", to provide timely opportunities for all interested Members and parties to see "information" that fulfils the following three cumulative requirements: (a) the information is "relevant" to the presentation of their cases; (b) the information is not "confidential" as defined in Article 12.4; and (c) the information is "used" by the authority.[998] Several past panels have held that Article 6.4 of the Anti-Dumping Agreement (which is analogous to Article 12.3 of the SCM Agreement) does not require authorities to actively disclose information. Rather, the obligation is triggered only when interested parties request an authority to show any information that meets the three cumulative requirements referred to above.[999]

7.585. Indonesia's arguments on this claim are limited to bare assertions. Indonesia does not identify the precise information that the Commission allegedly did not provide or disclosed "late". Indonesia refers broadly to the Commission's alleged failure to provide "necessary information to provide alternative methodologies to determine the existence of price undercutting", and to the allegedly late disclosure of information regarding "price elasticity and changes in the EU market".[1000] These broad references, unaccompanied by citations to the provisional and the definitive Regulations or evidence on the record, do not sufficiently identify what information is at issue.

7.586. Indonesia also fails to establish that the three cumulative conditions that trigger Article 12.3 of the SCM Agreement were fulfilled, namely whether the information at issue was (a) "relevant"; (b) "not confidential", and (c) "used" by the Commission. Indonesia has further not explained why the timing of the Commission's disclosure of the relevant information could be characterized as "late". Finally, Indonesia has not asserted that any interested party requested the Commission to show the information in question. Indonesia has also not submitted any self-standing arguments in relation to Articles 12.1 and 15.1 of the SCM Agreement. For these reasons, we conclude that Indonesia has not established a *prima facie* case supporting its claims under Articles 12.1, 12.3, and 15.1 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, we conclude as follows:

a. In relation to the Commission's determination that the GOI provides a countervailable subsidy to biodiesel producers through the OPPF:

   i. Indonesia has not established that the Commission acted inconsistently with to Article 1.1(a)(1) of the SCM Agreement by determining that the disbursements from the OPPF to the biodiesel producers constituted a financial contribution by a government or public body;

   ii. Indonesia has not established that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by determining that the disbursements from the OPPF to biodiesel producers constituted financial contributions in the form of grants;

   iii. Indonesia has not established that the Commission acted inconsistently with Article 1.1(b) of the SCM Agreement by determining that the disbursements by the OPPF to biodiesel producers conferred a benefit to Indonesian biodiesel producers;

[998] Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 145; *EC – Fasteners (China)*, para. 479; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.107; *Panel Reports, Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.394; *China – Broiler Products (Article 21.5 – US)*, para. 7.280.

[999] Panel Reports, *Dominican Republic – AD on Steel Bars (Costa Rica)*, appealed 18 September 2023, para. 7.395; *EC – Fasteners (China)*, para. 7.480; *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.87; and *EU – Footwear (China)*, paras. 7.646 and 7.648.

[1000] Indonesia's first written submission, para. 555.

iv. Indonesia has not established that the Commission acted inconsistently with Articles 19.1, 19.4 and 21.1 of the SCM Agreement, or Article VI:3 and Article XVI:1 of the GATT 1994, by failing to properly allocate the alleged subsidy amounts resulting from the OPPF payments, or otherwise failing to accurately determine the per unit subsidy amount or impose countervailing duties at the level not exceeding that amount;

v. Indonesia has not established that the Commission acted inconsistently with Articles 1.1(a)(1)(ii), 14, 19.3, 19.4 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, by failing to adjust the amount of the alleged subsidy "to account for discounts granted as well as export levies, transport and credit costs"[1001]; by failing to adequately explain its benefit calculation method or ascertain as accurately as possible the amount of subsidization bestowed on the investigated producer; or by failing to levy countervailing duties in the appropriate amounts; and

vi. Indonesia has not established that the Commission acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the disbursements from the OPPF, confer a benefit to the recipients which is *de jure* specific. In light of this finding, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the disbursements from the OPPF are *de facto* specific.

b. In relation to the Commission's determination that the GOI provide a countervailable subsidy to biodiesel producers through the provision of CPO:

i. the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that, through a set of measures, including an export tax and export levy, and by *de facto* acting as a price setter in the domestic CPO market, the GOI induced the domestic CPO producers to sell CPO locally and thereby entrusted or directed private CPO suppliers to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration. In light of this finding, we refrain from ruling on Indonesia's additional claim that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that the provision of CPO to biodiesel producers in Indonesia is a type of function which "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments", as specified in Article 1.1(a)(1)(iv);

ii. the Commission acted inconsistently with Articles 1.1(a)(2) and 32.1 of the SCM Agreement by determining that, through a set of measures, including an export tax and export levy, and by *de facto* acting as a price setter in the domestic CPO market, the GOI provides income or price support to the biodiesel industry;

iii. in light of our findings that the Commission acted inconsistently with Article 1.1(a)(1)(iv) and Article 1.1(a)(2) of the SCM Agreement, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by determining that CPO suppliers provide CPO to biodiesel producers in Indonesia for less than adequate remuneration, thereby conferring a benefit upon Indonesian biodiesel producers;

iv. in light of our findings that the Commission acted inconsistently with Article 1.1(a)(1)(iv) and Article 1.1(a)(2) of the SCM Agreement, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement by determining that the

[1001] Indonesia's first written submission, paras. 135-145; second written submission, para. 81.

provision of CPO and provision of income or price support to the biodiesel industry are specific;

v. Indonesia has not established that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in respect of information concerning PTPN;

vi. Indonesia has not established that the Commission acted inconsistently with Article 12.7 of the SCM Agreement by disregarding any information submitted by independent CPO suppliers when making findings concerning whether PTPN depreciated CPO prices in Indonesia; and

vii. the Commission acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available in respect of independent CPO suppliers on the ground that the GOI purportedly failed to ensure submission of independent CPO suppliers' Appendix B responses.

c. In relation to the Commission's determination that imports of biodiesel from Indonesia cause a threat of material injury to EU biodiesel producers:

i. Indonesia has not established that the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement by failing to ensure price comparability, when examining the effect of Indonesian imports on the prices of domestic like products, and by failing to consider the existence of significant price undercutting for the product as a whole;

ii. the Commission acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement by failing to make an objective examination, on the basis of positive evidence, of the effect of Indonesian imports on the prices of domestic like products and improperly found significant price depression, in breach of Articles 15.1 and 15.2 of the SCM Agreement;

iii. the Commission acted inconsistently with Articles 15.1 and 15.4 of the SCM Agreement by failing to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry;

iv. the Commission acted inconsistently with Articles 15.1 and 15.7 of the SCM Agreement by concluding that the totality of threat factors that the Commission examined indicated that "the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia";

v. the Commission acted inconsistently with Article 15.7 of the SCM Agreement by failing to properly consider the existence of a change in circumstances in its threat of injury determination;

vi. Indonesia has not established that the Commission acted inconsistently with Article 15.2 of the SCM Agreement in considering that there had been a significant increase in the volume of Indonesian imports;

vii. in light of inconsistencies in the preceding steps of inquiry into the existence of a threat of material injury and in the absence of a valid finding of material injury or threat thereof, we refrain from ruling on Indonesia's additional claims that the Commission acted inconsistently with Articles 15.5 and 15.7 of the SCM Agreement in assessing whether the subject imports or other known factors were the cause of a threat of material injury to EU biodiesel producers; and

viii. in light of inconsistencies in the preceding steps of inquiry into the existence of a threat of material injury and in the absence of a valid finding of material injury or threat thereof, we refrain from ruling on Indonesia's claim that the Commission

acted inconsistently with Article 15.8 of the SCM by failing to exercise "special care" in the application of countervailing measures.

d. In relation to the rejection of a price undertaking offer in the investigation:

   i. Indonesia has not established that the Commission acted inconsistently with Article I:1 of the GATT 1994 and Articles 15.8 and 18.3 of the SCM Agreement by declining Wilmar's price undertaking offer after it had accepted a price undertaking in respect of Argentine exporters.

e. In relation to the Commission's non-disclosure of certain information:

   i. Indonesia has not established that the Commission acted inconsistently with Articles 12.1, 12.3, 12.4, and 12.4.1 of the SCM Agreement by failing to require the relevant EU producers to provide a non-confidential summary of submitted information; and

   ii. Indonesia has not established that the Commission acted inconsistently with Articles 12.1, 12.3, and 15.1 of the SCM Agreement by failing to provide necessary information to interested parties, including necessary information to propose alternative methodologies to determine the existence of price undercutting; or by providing a late disclosure of essential information concerning, among others, price elasticity and changes in the EU market.

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

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the SCM Agreement.