

## II

(Non-legislative acts)

## REGULATIONS

## COMMISSION IMPLEMENTING REGULATION (EU) 2019/1344

of 12 August 2019

**imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union <sup>(1)</sup>, and in particular Article 12 thereof,

After consulting the Member States,

Whereas:

**1. PROCEDURE****1.1. Initiation**

- (1) On 6 December 2018, the European Commission (the 'Commission') initiated an anti-subsidy investigation with regard to imports into the European Union (the 'Union') of biodiesel originating in Indonesia (the 'country concerned') pursuant to Article 10 of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not member of the European Union ('the basic Regulation'). It published a Notice of Initiation in the *Official Journal of the European Union* <sup>(2)</sup> (the 'Notice of Initiation').
- (2) The Commission initiated the investigation following a complaint lodged on 22 October 2018 by the European Biodiesel Board ('EBB' or the 'complainant') on behalf of producers representing 32 % of total Union production. Producers representing 63 % of the total Union production of biodiesel supported the complaint.
- (3) Prior to the initiation of the anti-subsidy investigation, the Commission notified the Government of Indonesia ('GOI') that it had received a properly documented complaint, and invited the GOI for consultations in accordance with Article 10(7) of the basic Regulation. The GOI accepted the offer for consultations, which were held on 3 December 2018. During the consultations as well as subsequent exchanges with the GOI, due note was taken of the comments submitted by the GOI. However, no mutually agreed solution could be reached.
- (4) After the publication of the Notice of Initiation, the Commission received comments regarding the initiation from the Wilmar Group, an exporting producer ('Wilmar'). In its comments, Wilmar submitted that:
  - (a) the complaint did not include sufficient evidence of subsidisation to warrant an opening of procedure;
  - (b) the GOI has not put in place any subsidy scheme to the benefit of the biodiesel industry; and
  - (c) even if a subsidy scheme of the GOI was to be found, Wilmar did not receive any subsidy under that scheme.

<sup>(1)</sup> OJ L 176, 30.6.2016, p. 55.

<sup>(2)</sup> OJ C 439, 6.12.2018, p. 16.

- (5) The GOI similarly argued at the later stage of the investigation that the complaint did not include sufficient evidence of subsidisation to warrant an opening of procedure.
- (6) With reference to the various subsidy schemes identified in the complaint, Wilmar preliminarily alleged that EBB failed to provide sufficient evidence of the existence of any subsidy and that therefore the complaint is unfounded.
- (7) With particular reference to the export tax and levy imposed by the GOI on crude palm oil ('CPO'), Wilmar submitted that the complainant failed to provide sufficient evidence of the required entrustment or direction of Indonesian CPO producers by the GOI.
- (8) Furthermore, Wilmar submitted that none of the subsidy schemes identified in the complaint are export subsidies. In addition, according to Wilmar, the alleged subsidy schemes did not induce Indonesian biodiesel producers to sell biodiesel for export, rather they seek to reach out to the domestic Indonesian blending targets of biodiesel with mineral diesel <sup>(?)</sup>.
- (9) Finally, Wilmar submitted that the complaint failed to provide sufficient evidence of threat of material injury caused by Indonesian biodiesel imports into the Union and that, in any event, imports of Indonesian biodiesel did not create any such injury.
- (10) Concerning the evidence of injurious subsidisation at initiation stage, the Commission made the open version of the complaint available and provided its analysis on the evidence available at that stage in the memorandum on sufficiency of evidence, on the basis of which the investigation was initiated. Therefore, contrary to what Wilmar alleged, the Commission considered and substantiated in the memorandum that there was sufficient evidence tending to show the existence of injurious subsidisation.
- (11) On 19 June 2019 the Commission received a submission from Wilmar arguing inter alia that the Union industry was not under a threat of material injury from imports of Indonesian biodiesel.
- (12) However, the Notice of Initiation specified that any information for the stage of provisional findings should be submitted within 70 days from the date of its publication. This deadline expired on 14 February 2019. Therefore, the part of the submission dealing with threat of injury could not be addressed at provisional stage and will be addressed instead at the definitive stage of the investigation. Moreover, section 5.2 of the Notice of Initiation specified that any comment on the complaint, including matters pertaining to injury and causality should be submitted within 37 days from the date of its publication. Interested parties having filed written submissions or provided any data after 14 February 2019 are invited to indicate together with their comments on the provisional measures whether they still consider those submissions relevant for the current investigation, indicating how such information should be taken into account for the definitive stage.

### 1.2. Investigation period and period considered

- (13) The investigation of subsidisation and injury covered the period from 1 October 2017 to 30 September 2018 (the 'investigation period' or the 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2015 to the end of the investigation period (the 'period considered'). Where appropriate, the Commission also examined post-IP data.

### 1.3. Interested parties

- (14) In the Notice of Initiation, interested parties were invited to contact the Commission in order to participate in the investigation. In addition, the Commission specifically informed the complainant, other known Union producers, the known exporting producers and the GOI, the known importers, suppliers and users, traders, as well as associations known to be concerned about the initiation of the investigation and invited them to participate.
- (15) Interested parties had an opportunity to comment on the initiation of the investigation and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.

---

<sup>(?)</sup> In this Regulation, mineral diesel refers to a fossil-based, conventional diesel.

#### 1.4. Sampling

- (16) In its Notice of Initiation, the Commission stated that it might sample the interested parties in accordance with Article 27 of the basic Regulation.

##### 1.4.1. Sampling of Union producers

- (17) In its Notice of Initiation, the Commission stated that it had provisionally selected a sample of Union producers. The Commission selected the sample on the basis of the highest representative quantity of production, which could reasonably be investigated within the time available.
- (18) The provisional sample consisted of three Union producers and represented a broad geographical spread. The sampled Union producers accounted for more than 18 % of the total production volume of the Union industry. The Commission invited interested parties to comment on the provisional sample.
- (19) The Commission received comments on the provisional sample from Wilmar. Wilmar commented on the size of the sample, saying that three producers was not large enough a sample, and requested that another company group consisting of two producers, Biopetrol, be added to the sample of Union producers.
- (20) The Commission considered that the sample with the three largest producers of biodiesel in the Union is representative (including geographically) and a larger sample could not be reasonably investigated within the time available. Therefore, the claim was rejected.

##### 1.4.2. Sampling of importers

- (21) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked unrelated importers to provide the information specified in the Notice of Initiation.
- (22) Two unrelated importers provided the requested information and agreed to be included in the sample. One of them imported negligible amounts and did not resell it during the IP, so the Commission only investigated the other unrelated importer. In view of the low number of unrelated importers that cooperated the Commission decided that sampling was not necessary.

##### 1.4.3. Sampling of exporting producers in Indonesia

- (23) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked all exporting producers in Indonesia to provide the information specified in the Notice of Initiation. In addition, the Commission asked the authorities of Indonesia to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation.
- (24) Four exporting producers in the country concerned provided the requested information and agreed to be included in the sample. The responding companies or groups of companies accounted for 100 % of exports to the Union during the investigation period. Due to the limited number of exporting producers and the high level of cooperation, the Commission decided not to carry out sampling but rather to investigate all Indonesian exporting producers.

##### 1.4.4. Questionnaire replies and verification visits

- (25) The Commission sent questionnaires to the GOI, to the four exporting producers, to the three sampled Union producers, and to two unrelated importers of biodiesel.
- (26) The Commission received questionnaire replies from the GOI, all groups of exporting producers, all sampled Union producers and both unrelated importers.
- (27) The Commission sought and verified all the information deemed necessary for a determination of subsidy, resulting injury (including threat of injury) and Union interest. A verification visit took place at the premises of the GOI, the Ministry of Trade of the Republic of Indonesia in Jakarta, during which officials from other relevant ministries also participated.

- (28) Verification visits under Article 26 of the basic Regulation were carried out at the premises of the following companies:

Union producers and related companies:

- Masol Iberia Biofuel, S.L.U., El Grao (Castellón) and Campa Iberia S.A.U., Barcelona, Spain
- Saipol, Grand-Couronne, France
- Verbio Vereinigte BioEnergie AG, Leipzig, Germany

Unrelated importer:

- Gunvor BV, Geneva, Switzerland (\*)

Exporting producers in Indonesia and related companies:

- Wilmar Group:
  - PT Wilmar Nabati Indonesia, Medan
  - PT Wilmar Bioenergi Indonesia, Medan
  - Wilmar Trading Pte. Ltd., Singapore
- Musim Mas Group:
  - PT Intibenua Perkasatama, Medan
  - PT Musim Mas, Medan
  - Inter-Continental Oils & Fats Pte. Ltd., Singapore
  - Campa Iberia S.A.U., Barcelona, Spain
  - IM Biofuel Italy S.R.L., Milan, Italy
- PT Ciliandra Perkasa, Jakarta, and First Resources Trading Pte. Ltd., Singapore
- Permata Group:
  - PT Pelita Agung Agrindustri, Medan
  - PT Permata Hijau Palm Oleo, Medan
  - Virgoz Oils & Fats Pte. Ltd., Singapore

- (29) Following the reply to the questionnaires, the deficiency letters and the verification visits, and as further explained in recitals (219) to (227) below, the Commission observed that the GOI and Wilmar did not fully cooperate with the investigation. More precisely:

- (a) PT Perkebunan Nusantara ('PTPN'), a CPO producer wholly owned by the GOI, did not respond to Appendix B to the GOI's questionnaire within the stipulated deadline, albeit being one of the undertakings that have been requested to reply; and,
- (b) Wilmar did not provide a complete answer to Table 2 of the Deficiency Letter, and particularly provided the requested data only partially.

- (30) The Commission therefore issued an Article 28 letter to both the GOI and Wilmar Group, limited to the specific information they did not provide. Hence, the Commission used facts available with respect to the missing information.

## 2. PRODUCT CONCERNED AND LIKE PRODUCT

### 2.1. Product concerned

- (31) The product concerned is fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or as included in a blend, originating in Indonesia (the 'product concerned').
- (32) The investigation indicated that biodiesel produced in Indonesia is primarily palm oil methyl ester ('PME'), which is derived from palm oil. Biodiesel produced in the Union is instead mainly rapeseed methyl ester ('RME') but made also from other feedstock, including waste oils as well as virgin oils.

(\*) The verification of the unrelated importer, based in Switzerland, was conducted with regard to imports into the EU.

- (33) PME and RME both belong to the category of fatty-acid mono-alkyl esters. The term 'ester' refers to the transesterification of vegetable oils, namely, the mingling of the oil with alcohol, which produces biodiesel and, as a by-product, glycerine. The term 'methyl' refers to methanol, the most commonly used alcohol in the process. Fatty-acid mono-alkyl esters are also known as 'fatty-acid methyl esters' or FAME.
- (34) Although PME and RME are both fatty-acid mono-alkyl esters, they also have partially different physical and chemical properties, and notably they have a different cold filter plugging point ('CFPP'). The CFPP is the temperature at which a fuel will cause a fuel filter to plug due to the crystallization or jellification of some fuel components. For RME, the CFPP can be  $-14^{\circ}\text{C}$  while for PME it is about  $13^{\circ}\text{C}$ . The market often describes biodiesel at a particular CFPP as FAMEX, such as FAME0 or FAME5.
- (35) The product concerned is currently falling under CN codes ex 1516 20 98 (TARIC codes 1516 20 98 21, 1516 20 98 29 and 1516 20 98 30), ex 1518 00 91 (TARIC codes 1518 00 91 21, 1518 00 91 29 and 1518 00 91 30), ex 1518 00 95 (TARIC code 1518 00 95 10), ex 1518 00 99 (TARIC codes 1518 00 99 21, 1518 00 99 29 and 1518 00 99 30), ex 2710 19 43 (TARIC codes 2710 19 43 21, 2710 19 43 29 and 2710 19 43 30), ex 2710 19 46 (TARIC codes 2710 19 46 21, 2710 19 46 29 and 2710 19 46 30), ex 2710 19 47 (TARIC codes 2710 19 47 21, 2710 19 47 29 and 2710 19 47 30), 2710 20 11, 2710 20 15, 2710 20 17, ex 3824 99 92 (TARIC codes 3824 99 92 10, 3824 99 92 12 and 3824 99 92 20), 3826 00 10 and ex 3826 00 90 (TARIC codes 3826 00 90 11, 3826 00 90 19 and 3826 00 90 30).

## 2.2. Like product

- (36) The investigation showed that the following products have the same basic physical, chemical, and technical characteristics as well as the same basic uses:
- (a) the product concerned;
  - (b) the product produced and sold on the domestic market of Indonesia;
  - (c) the product produced and sold in the Union by the Union industry.
- (37) The Commission decided that, for the purpose of this investigation, those products are therefore like products within the meaning of Article 2(c) of the basic Regulation.

## 3. SUBSIDISATION

### 3.1. Subsidies and subsidy programmes within the scope of the current investigation

- (38) On the basis of the information available, including information contained in the complaint, the Notice of Initiation and the replies to the Commission's questionnaire, the Commission investigated the alleged subsidisation by the GOI through the following subsidy programmes:
- (a) direct transfer of funds, such as direct subsidies granted through the Biodiesel Subsidy Fund;
  - (b) government support to the biodiesel industry including through the provision of CPO for less than adequate remuneration;
  - (c) government support to the biodiesel industry including through revenue forgone or not collected such as income tax benefits for listed investments, industrial estate subsidies, pioneer industry tax benefits, import duty facility and tax exemption on VAT;
  - (d) provision of export financing and guarantees on preferential terms by the Indonesian Eximbank.

### 3.2. Government support to the biodiesel industry through direct transfer of funds via the 'Biodiesel Subsidy Fund'

#### 3.2.1. The complaint and the subsidy scheme

- (39) The complainant claimed that the GOI supports the biodiesel industry by providing grants to the Indonesian biodiesel producers in the amount of the difference between the GOI's reference price for biodiesel and the price at which oil companies purchase biodiesel, namely the reference price for diesel oil.

- (40) The investigation established that the 'Biodiesel Subsidy Fund', which is part of the Oil Palm Plantation Fund ('OPPF'), was established in 2015 by Presidential Regulation No. 61/2015.
- (41) Presidential Regulation 61/2015 entrusted an agency, the Oil Palm Plantation Fund Management Agency (the 'Management Agency') to collect export levies on the exportation of palm oil commodities by virtue of Minister of Finance Regulation No. 133/PMK.05/2015.
- (42) The money collected by the customs authorities through the export levies on palm oil products constitutes the funds of the OPPF and the latter is formally controlled by the Management Agency.
- (43) The higher in the value chain each specific product is, the higher the export levy: the export levy on CPO during the investigation period was set at 50 USD/tonne while on derivatives, including biodiesel, at 20 USD/tonne.
- (44) By Presidential Regulations 24/2016 and 26/2016, the GOI clarified that the mandate of the Biodiesel Subsidy Fund includes the procurement and utilization of biodiesel on the domestic market. Particularly, the GOI stipulates that the OPPF shall be used to support purchases of biodiesel by entities appointed by governmental bodies.
- (45) More precisely, Presidential Regulation 26/2016 stipulates in its Article 9(1) that '[t]he Director General of EBTKE shall appoint the Petrofuel Entity which shall carry out the procurement of biodiesel as meant in Article 4 in the framework of financing by the Fund Management Agency by observing the policy of the Steering Committee of the Fund Management Agency' and in the following Article 9(8) that '[b]ased on the approval from the Minister as meant in paragraph (7), the Director General of EBTKE on behalf of the Minister shall appoint: a. the biodiesel producers which are going to participate in the procurement of biodiesel; and b. the allocation of volume of biodiesel for each biodiesel producer'. Moreover, the Steering Committee of the Management Agency is composed exclusively of officials of various ministries of the GOI.
- (46) The biodiesel producers which choose to participate and have been allocated a quota pursuant to that regulation are under the obligation to sell the monthly amount of biodiesel to the so-called 'Petrofuel Entity'. So far, the GOI has appointed the following as Petrofuel Entity:
- (a) PT Pertamina ('Pertamina'), a State-owned oil and gas company, and
  - (b) PT AKR Corporindo Tbk ('AKR'), a private oil and gas company.
- (47) The OPPF envisages a specific payment mechanism, whereby Pertamina (and for some small volumes, AKR) pays biodiesel producers the diesel reference price (as opposed to the actual biodiesel price which, during the IP, would have been higher), whereas the difference between such diesel reference price and the biodiesel reference price is paid to the biodiesel producers out of the OPPF by the Management Agency.
- (48) The reference price for diesel and biodiesel is determined by the Minister of Energy and Mineral Resources, as per Article 19 of Presidential Regulation 61/2015, in a following way:
- (a) The diesel reference price is based on prices reported by Platts Singapore for oil (MOPS) <sup>(5)</sup> and the production cost of diesel in Indonesia.
  - (b) Pursuant to Decree of the Minister of Finance No 2026/2017, the biodiesel reference price is based on the CPO domestic price, to which transformation costs are added (of 125 USD/MT until 5 May 2017, and since then, of 100 USD/MT). During the verification visit, the GOI explained that the amount of transformation costs added to the CPO domestic price is subject to an yearly review, which however does not necessarily result in a change in that amount. The GOI in fact explained that if the annual review indicates that the amount of transformation cost is still appropriate, no change is made.
- (49) More precisely, each biodiesel producer – including all the exporting producers – invoices Pertamina (or AKR, as the case may be) the volume of biodiesel which the buyer is required to use under the blending obligation, and Pertamina (or AKR) pays to the producer the diesel reference price for that period. The investigation revealed that the vast majority of the sales by the biodiesel producers were made to Pertamina and a small portion to AKR. Moreover, the sales to AKR were fully identical to the ones made to Pertamina in terms of prices and all other conditions attached. Consequently, the Commission focused its analysis below on the sales to Pertamina.

<sup>(5)</sup> MOPS (short for the Mean of Platts Singapore) is the average of a set of Singapore-based oil product price assessments published by S&P Global Platts.

- (50) The producer of biodiesel, in order to obtain reimbursement of the price difference between the price paid by Pertamina and AKR (based on the diesel reference price) and the reference price for biodiesel, shall then send an additional invoice for the same volume to the Management Agency, enclosing a list of documents. Once the Management Agency has received the invoice, and after verification of the elements contained therein, the Management Agency shall pay to the relevant biodiesel producer the difference between the reference price for diesel (paid by Pertamina or AKR, as the case may be) and the reference price of biodiesel set for that period.
- (51) In this investigation, the Commission examined whether the set of measures adopted by the GOI to support the Indonesian biodiesel industry through the payments by the Management Agency amount to a countervailable subsidy.
- (52) In order to establish the existence of a countervailable subsidy, three elements must be present: (a) a financial contribution or income/price support; (b) a benefit, and (c) specificity (Article 3 of the basic Regulation).

### 3.2.2. Analysis

#### 3.2.2.1. Financial contribution

- (53) At the outset, the Commission observed that during the investigation period all the exporting producers chose to participate in the procurement of biodiesel and thus were under the obligation to sell biodiesel to Pertamina and AKR. The Commission also observed that during the investigation period the reference price for biodiesel was higher than the reference price for mineral diesel. As a result, during the investigation period all the exporting producers received payments from the OPPF.
- (54) Article 3(1)(a)(i) of the basic Regulation states that there is a financial contribution by the government where the government practice involves a direct transfer of funds. In line with the provision of the WTO Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement'), Article 2 of the basic Regulation stipulates that 'government' means a government or any public body within the territory of the country of origin or export.
- (55) The WTO Appellate Body in the Report on the US-Anti-Dumping and Countervailing Duties (China) found that the term 'public body' means an entity that 'possesses, exercises or is vested with governmental authority' <sup>(6)</sup>.
- (56) The Commission observed that the OPPF has been created by an act of the GOI and the Management Agency has been explicitly entrusted by the GOI with the duty to make payments to biodiesel producers.
- (57) First, Article 11 of Presidential Regulation 66/2018 defined the remit of the OPPF by broadening it as follows: '(1) The collected Fund shall be used for: a. development of Oil Palm Plantation human resources; b. Research and development of Oil Palm Plantation; c. Promotion of Oil Palm Plantation; d. rejuvenation of Oil Palm Plantation; and e. Oil Palm Plantation facilities and infrastructures. (2) The use of Fund collected for the interests as referred to in paragraph (1), including for the fulfilment of Oil Palm Plantation products for the need of food, Oil Palm Plantation downstream industry development, and procurement and use of biodiesel.'
- (58) Second, in its Article 18(1), that regulation expressly stipulates that 'the use of fund for provision and utilization of biodiesel referred to in Article 11 paragraph (2) is purported to cover the difference between market index price of diesel and the market index price of biodiesel.'
- (59) Hence, the Commission observed that the legal acts implementing the OPPF expressly confirm that its funds are used for the benefit of the biodiesel producers.
- (60) For that purpose, pursuant to Article 1(4) of Presidential Regulation 61/2015 the GOI granted the Management Agency the right to use the export levies and export taxes imposed on palm oil and its derivatives and imposed the duty to procure and use biodiesel. The collection is however practically carried out by the customs authorities. The Commission therefore took the view that the Management Agency possesses, exercises or is vested with governmental authority.

<sup>(6)</sup> Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB, 11 March 2011, para. 317. See also Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019, para. 5.96.

- (61) Consequently, the Commission concluded that the legal framework set out above effectively grants the Management Agency the exercise of governmental functions with respect to the biodiesel sector. The Commission therefore concluded that the Management Agency acts as a public body in the sense of Article 2(b) of the basic Regulation read in conjunction with Article 3(1)(a)(i) of the basic Regulation and in accordance with the relevant WTO case-law.
- (62) With regard to the required 'direct transfer of funds', the investigation established that after having received an invoice from the biodiesel producers together with all the appropriate documentation <sup>(7)</sup> and carried out appropriate verifications, the Management Agency directly pays the amount due (i.e. the differential between the diesel reference price and the biodiesel reference price) to the biodiesel producers. The Commission further noted that it was undisputed by both the GOI and all the exporting producers that the Management Agency made direct cash/bank transfers to those producers selling biodiesel to Pertamina and AKR to cover for the difference between the reference price for mineral diesel paid by Pertamina and AKR and the reference price for biodiesel. Hence, the Commission took the view that the grants made by the Management Agency amount to a 'direct transfer of funds' within the meaning of Article 3(1)(a)(i) of the basic Regulation.
- (63) In this regard, the argument put forward by the GOI that the financial resources employed by the Management Agency to pay out the biodiesel producer were entirely privately sourced and that therefore there was no financial contribution must be rejected. The Commission in fact observed that the basic Regulation, in line with the SCM Agreement, does not take into account the origin or nature (public or private) of the funds transferred by the government. Rather, an evaluation of the existence of a financial contribution involves consideration of the nature of the transaction through which something of economic value is transferred by a government. In other words, what matters is that the transfer of funds is attributable to the State (as opposed to private funds used at the discretion of private operators) <sup>(8)</sup>. A wide range of transactions falls within the meaning of 'financial contribution' in Article 1.1(a)(1). According to paragraphs (i) and (ii) of Article 1.1(a)(1), a financial contribution may be made through a direct transfer of funds by a government, or the foregoing of government revenue that is otherwise due <sup>(9)</sup>. As already explained, the Management Agency, as a public body, made direct transfer of funds to the biodiesel producers from the OPPF, which is nurtured from the compulsory collection of export levies and export taxes on public and private operators, and therefore fully complied with the definition of financial contribution of the Appellate Body.
- (64) In addition to the above, the Commission further observed that the funds available to the OPPF originate from the collection of the export levies and export taxes imposed on CPO and its derivatives. The GOI during the verification visit explained that the export levy is collected by the customs authorities before exportation of the goods and, despite its claim that it is collected exclusively for the purposes of financing the OPPF, could not prove that it is collected outside the specific accounts of the GOI's budget. Absent any evidence to the contrary, the Commission concluded that the levy is collected as part of the general budget of the State. The fact that the levy is then directed to the OPPF is just the manner how the GOI uses the public revenue collected from the export levies and export taxes. In any event, the OPPF consists of funds which are collected by means of export levies and export taxes imposed by the GOI and the funds are controlled by the Management Agency. Therefore, they amount to public resources, regardless of whether they are an integral part of the State's budget.
- (65) As regards the GOI's argument that the transfer of funds from the OPPF to biodiesel producers does not confer any benefit to the recipients as biodiesel producers paid more into the OPPF than what they received, the Commission observes the following. First, the remit of the OPPF is wider than supporting the biodiesel industry. Rather, the OPPF is an expression of a wider policy of the GOI encompassing the whole palm oil value chain.

<sup>(7)</sup> Pursuant to Article 13 of Regulation of the Minister of Energy and Mineral Resources 26/2006, the biodiesel producer shall enclose to the invoice the following documentation: (i) copy of Decision of the Directorate General of New Renewable Energy and Energy Conservation ('EBTKE') on behalf of the Minister that the company is allowed to participate in the procurement of biodiesel and the respective volume allocation of biodiesel based on the capacity of the respective producers; (ii) copy of contract for procurement of biodiesel between Pertamina and the relevant biodiesel producer; (iii) certificate signed by Pertamina and the relevant biodiesel producer, stamped by the GOI and including information about the place of delivery, the volume and type of biodiesel provided/distributed, and the amount of transport fees; and (iv) copy of the agreement between the Fund Management Agency and the relevant biodiesel producer.

<sup>(8)</sup> Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869, paras. 284 and 309.

<sup>(9)</sup> Appellate Body Report, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357, para. 52.

All exporters of CPO (and processed goods) in fact pay the levy into the fund when their product is exported. CPO can be used in a wide variety of application, such as food consumption, cosmetics and the chemical industry. The export levies collected for the OPPF are therefore not exclusively linked to transfer of funds to the biodiesel industry and no automatic offset can be done.

- (66) Second, and as already explained above in recital (64), the funds used by the Management Agency derive entirely from the general budget of the GOI (which are allocated to the OPPF). The collection of the export levy is carried out by customs and the levies are paid into the general budget of the State. The funds used are therefore not equivalent to voluntary payments made by biodiesel producers, which are then used entirely for the benefit of the biodiesel producers (without any discretion by the biodiesel producers, who do not have any saying on how the OPPF is used). The funds are collected by the GOI through compulsory export levies and export taxes, some paid by biodiesel producers, by also CPO producers and other producers of associated CPO products. The GOI then decides to use such resources for the benefit of biodiesel producers through the OPPF.
- (67) The Commission also observed that in their responses to the questionnaire, the exporting producers indicated that most of the CPO utilised in the production of biodiesel is locally sourced, and therefore not subject to neither export tax nor export levy. The Commission therefore assumed that the exports of CPO for which the exporting producers (or, more precisely, their related CPO producers) paid export taxes and levies concerned value chains other than the biodiesel value chain.
- (68) The Commission therefore concluded that the export taxes and levies collected by the GOI from such exports are therefore not linked to the biodiesel industry as such, so that the GOI's argument that the OPPF does not confer any benefit to the recipients as biodiesel producers paid more into the OPPF than what they received is rejected. In fact, contrary to the GOI's allegation, for the biodiesel value chain the exporting producers were better off in the sense that they received from OPPF more than they have paid into it.
- (69) In light of the foregoing, the Commission concluded that the disbursements made by the Management Agency to the biodiesel producers qualify as 'financial contribution in the form of a direct transfer of funds from a government' pursuant to Article 3(1)(a)(i) of the basic Regulation. It is undisputed that in the purchases by Pertamina and AKR of biodiesel pursuant to the blending requirements the Management Agency covered the difference between the price paid by Pertamina and AKR (on the basis of the reference price for mineral diesel) and the (higher) reference price for biodiesel. In this respect, the biodiesel producers received a grant from the GOI amounting for such difference <sup>(10)</sup>.

#### 3.2.2.2. Benefit

- (70) For the reasons set out below, the Commission took the view that the direct transfers made by the Management Agency confer a benefit to the exporting producers.
- (71) Indeed, the exporting producers are put in a better situation than they would be absent the scheme. To put it simply, the transfer of funds made by the Management Agency amount to grants and the market does not provide for free grants. Those grants place the biodiesel producers in a better position than they otherwise would have been in the marketplace <sup>(11)</sup>. Absent the scheme the biodiesel producers would only obtain the payment from Pertamina and AKR at the price of mineral diesel.
- (72) In light of the above, the Commission considered that the money paid by the Management Agency to the biodiesel producers for the biodiesel sold in order to cover the difference between the diesel reference price paid by Pertamina and the biodiesel reference price is a benefit in their favour in the sense of Article 3(2) of the basic Regulation.

<sup>(10)</sup> See Appellate Body Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-in Tariff Program, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7, paras. 5.119 and 5.120.

<sup>(11)</sup> Panel Report, United States – Subsidies on Upland Cotton, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299, para. 7.1116.

## 3.2.2.3. Specificity

- (73) First, the Commission observed that the OPPF is available for a limited number of industries, all relating to the CPO value chain. This limitation originates directly from the applicable legislation. First, the support of the palm oil value chain is the main explicit aim of Presidential Regulation 61/2015 establishing the OPPF. In its preamble, it is stated that the OPPF is needed 'to ensure the continuous development of oil palm plantation, it requires a national strategy supported by management of fund for continuous development of oil palm plantation'. In its article 1 that legislation further specifies that 'Oil Palm Plantation means all activities of management of natural resources, human resources, production facility, equipment and machinery, cultivation, harvest, processing, and marketing related to Oil Palm Plantation'.
- (74) In Article 11 it is then stipulated that 'The collected Fund shall be used for: a. development of Oil Palm Plantation human resources; b. Research and development of Oil Palm Plantation; c. Promotion of Oil Palm Plantation; d. rejuvenation of Oil Palm Plantation; and e. Oil Palm Plantation facilities and infrastructures'.
- (75) The Commission therefore concluded that the OPPF is de jure specific pursuant to article 4(2)(a) of the basic Regulation as the legislation pursuant to which the granting authority operates, explicitly limits access to the subsidy to certain enterprises, namely those active in the CPO value chain.
- (76) In any event, even if there would be no de jure specificity, the Commission took the view that the GOI directs the Management Agency to support only de facto the biodiesel industry. The evidence collected in the course of the investigation in fact and referred to in paragraph (122) below indicates that the vast majority of money paid by the Management Agency is devoted to paying biodiesel producers the differential between the MOPS and the biodiesel reference price.
- (77) The Commission therefore took the view that the GOI's manages the OPPF in such a way that makes it de facto specific. According to Article 4(2)(c) of the basic Regulation, a subsidy can be de facto specific if certain criteria are met, such as, the 'use of a subsidy programme by a limited number of certain enterprises; predominant use by certain enterprises; the granting of disproportionately large amounts of subsidy to certain enterprises; the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy'. In this case the Commission observed that the behaviour of the OPPF perfectly fits in this list. Particularly, as explained above, the fund is predominantly used by the biodiesel industry and the granting authority exercised its discretion in doing so.
- (78) This finding is also in line with the WTO case law. In *EC and certain Member States – Large Civil Aircraft*, the Panel explained that 'The ordinary meaning of the word "predominant" includes "constituting the main or strongest element; prevailing". Thus, "predominant use {of a subsidy programme} by certain enterprises" may be simply understood to be a situation where a subsidy programme is mainly, or for the most part, used by certain enterprises' <sup>(12)</sup>. In that decision, the Panel further explained that 'where a subsidy programme operates in an economy made up of only a few industries, the fact that those industries may have been the main beneficiaries of a subsidy programme may not necessarily demonstrate "predominant use". Rather, use of the subsidy programme by those industries may simply reflect the limited diversification of economic activities within the jurisdiction of the granting authority. On the other hand, the same subsidy programme operating in the context of a highly diversified economy that is used mainly, or for the most part, by only a few industries would tend to indicate "predominant use"' <sup>(13)</sup>. In the case at hand the subsidy is available for the palm oil value chain only, but within that industry for a wide array of applications. However, if the reasoning of the Panel is applied to the facts of this case, the Commission considered that the fact that the most part of the OPPF is used to finance the biodiesel payments qualifies as 'predominant use' as defined above since the biodiesel industry is the main beneficiary. The Commission further observes that the biodiesel industry is one of the many industries in a diversified economy <sup>(14)</sup> and that the OPPF has been supporting almost exclusively the biodiesel industry since its setting up.

<sup>(12)</sup> WT/DS316/R of 30 June 2010, *EC and certain Member States – Measure Affecting Trade In Large Civil Aircrafts*, para 7.494.

<sup>(13)</sup> WT/DS316/R of 30 June 2010, *EC and certain Member States – Measure Affecting Trade In Large Civil Aircrafts*, para 7.495.

<sup>(14)</sup> According to recent data from the Indonesian central bank, no single economic activity accrues for more than 20 % of the Indonesian GDP. Sources at <https://www.bi.go.id/en/iru/economic-data/real-sector/Contents/Default.aspx>, accessed on 17.7.2019.

- (79) In light of the above, the Commission therefore concluded that the GOI's set of measures were directed to benefit the domestic biodiesel industry. In addition to being de iure specific under Article 4(2)(a) of the basic Regulation, they are also de facto specific under Article 4(2)(c) of the basic Regulation.

### 3.2.3. Conclusion

- (80) The Commission provisionally found that through a set of measures the GOI provided support to the biodiesel industry including through direct transfer of funds via the 'Biodiesel Subsidy Fund'. The GOI conferred a benefit to the recipients which is specific, thus amounting to a countervailable subsidy.

### 3.2.4. Calculation of the subsidy amount

- (81) In accordance with Article 5 of the basic Regulation, the Commission calculated the amount of countervailable subsidy for each exporting producer in terms of the benefit conferred on the recipient found to exist during the IP. The Commission assessed the benefit as being the total amount of grant received from the OPPF during the IP. In accordance with Article 7(2) of the basic Regulation, the Commission allocated those subsidy amounts over the total turnover generated by the sales of biodiesel of the exporting producers during the investigation period.
- (82) The subsidy rate provisionally established with regard to this set of measures during the investigation period for the exporting producers amounts to:

Company	Subsidy rate
PT Ciliandra Perkasa	7,91 %
PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group)	11,83 %
PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group)	12,76 %
PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group)	12,23 %

## 3.3. Government support to the biodiesel industry including through the provision of palm oil (CPO) for less than adequate remuneration

### 3.3.1. The complaint and the subsidy scheme

- (83) The complaint contended that the CPO prices are distorted in Indonesia because of the GOI's intervention. In particular, the complaint indicated that the GOI has implemented a policy of imposing high export taxes on CPO. CPO is the main raw material used for the production of biodiesel in Indonesia, and represents around 85 % of total production costs of biodiesel. According to the complaint, in doing so the GOI is ensuring that the price of raw materials for the production of biodiesel remains significantly lower than global prices, to the benefit of the Indonesian biodiesel producers.
- (84) Moreover, according to the complaint, the GOI introduced in May 2015 an export levy of USD 50 per tonne on CPO and lower on downstream processed palm oil products, the specific rate depending on the product.
- (85) The complainant claimed that by imposing high export taxes and levies on CPO, the GOI has a depressing effect on the domestic palm oil price in Indonesia, conferring a discernible benefit to biodiesel producers. It also encourages private CPO producers to sell their products to Indonesian biodiesel producers. By consequence, the complainant alleges that the GOI entrusts or directs Indonesian palm oil producers to provide CPO to biodiesel producers for less than adequate remuneration.
- (86) The investigation showed that indeed the GOI imposes both an export tax and an export levy on CPO.

- (87) The export tax was first implemented in 1994. Since its introduction, it has been amended a number of times. In the latest version (Decree N° 140/PMK.010/2016), the export tax consists of a progressive tariff schedule on crude palm oil as well as on 22 other products, including biodiesel (which is consistently given a lower rate than CPO). Indonesian exporters pay a sliding tax linked to the GOI's reference price for CPO exports. So when the GOI's reference export price increases, so does the export tariff.
- (88) When the reference price is below USD 750 per tonne, the applicable export tax rate is 0 %. During the investigation period, the CPO price remained below the USD 750 per tonne threshold and therefore no export tax was payable.
- (89) In addition to the export tax, during the investigation period the GOI imposed an export levy on CPO and the downstream products. The export levy during the investigation period was set at USD 50 per ton for CPO and at USD 20 per ton for biodiesel.
- (90) In addition to the export tax and levy on CPO and downstream products, the GOI also intervenes in the CPO market by de facto controlling, through the State owned company PTPN, the domestic CPO prices, ensuring that CPO is sold at an artificially low level. Moreover, the GOI provides subsidies to CPO producers in order to ensure that they comply with the policy of providing CPO at artificially low prices.

### 3.3.2. *The application of the provisions of Article 28(1) of the basic Regulation*

- (91) The Commission informed the GOI that it might have to resort to the use of facts available under Article 28(1) of the basic Regulation when examining the existence and the extent of the alleged support granted to the biodiesel industry including through the provision of CPO for less than adequate remuneration.
- (92) At initiation, the Commission requested the GOI to forward Appendix B attached to the anti-subsidy questionnaire (questionnaire for palm oil suppliers) to all producers and distributors of palm oil, which have provided palm oil to the exporting producers. Appendix B consisted of a word document ('Appendix B\_Input supplier Palm Oil') and an excel file ('Mini questionnaire intended for Suppliers'). Following a request of the GOI, given the significant number of companies providing the main input for the product concerned, in the spirit of good cooperation and in order to collect at least some relevant data for the investigation, the Commission by email of 7 January 2019 agreed to limit the scope of its request asking the GOI to forward Appendix B and the mini-questionnaire to the ten biggest CPO suppliers in terms of volume per exporting producer.
- (93) The Commission, in its deficiency letter to the GOI of 1 March 2019, took note of the fact that it had not received any reply to Appendix B of the questionnaire from the palm oil suppliers of PT Musim Mas, PT Intibenua Perkasatama, PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo. In particular, the Commission underlined that it had not received a reply even from the state-owned CPO suppliers including PTPN. Other CPO suppliers, including those related to the exporting producers, complied with that request.
- (94) In the reply to the deficiency letter, the GOI stated that it had fulfilled its obligation to communicate Appendix B and mini questionnaires to the relevant Indonesian CPO suppliers. As evidence the GOI submitted the postal record showing delivery receipts to relevant Indonesian CPO suppliers. No other evidence of the GOI's attempts to contact these providers, in particular PTPN, was provided. A similar explanation was provided during the verification visit at the GOI. Notwithstanding the above, PTPN never submitted a duly completed Appendix B to the Commission.
- (95) Consequently, with regard to the alleged government provision of CPO for less than adequate remuneration, the GOI did not provide the necessary information and evidence as requested by the Commission in its questionnaire and during the verification visit.
- (96) The absence of sufficient cooperation did not allow the Commission to collect all the information it considered relevant for its findings in this investigation. More specifically, the Commission could not obtain from the GOI information on the palm oil market based on direct information provided by CPO suppliers nor does it have complete information regarding PTPN's role on this market with regard to the biodiesel industry.

- (97) The GOI claimed that it had provided aggregate data concerning PTPN, which would also include the data requested in Appendix B of the questionnaire. In this respect, the Commission observed that the GOI provided data with regard to PTPN in response to the questionnaire, which included information on its management structure, annual reports and transaction data. However, the Commission noted that it did not receive any of the detailed information which it requested in the Appendix B of the questionnaire which would have allowed it to acquire a complete understanding of the role of PTPN on the palm oil market and of the other relevant producers.
- (98) After having received the letter informing the GOI of the possible application of Article 28 of the basic Regulation, the GOI submitted a reply to the Appendix B for PTPN on 30 June 2019. The Commission however observed that the reply was submitted long after the deadline for the submission of that information (12 March 2019, extended by the Commission to 14 March 2019) and after the verification visit at the GOI's premises had taken place. The Commission therefore considered that the submission was not submitted in good time, was not verifiable and the GOI has not acted to the best of its ability in accordance with Article 28 of the basic Regulation.
- (99) In the absence of information to the contrary received from the GOI, the Commission partially relied on facts available for its findings regarding those aspects of the investigation in accordance with Article 28 of the basic Regulation.

### 3.3.3. Analysis

- (100) In order to establish the existence of a countervailable subsidy, three elements must be present: (a) a financial contribution or income/price support; (b) a benefit, and (c) specificity (Article 3 of the basic Regulation) <sup>(15)</sup>.
- (101) For the first element, the Commission analysed if the set of measures adopted by the GOI lead to a financial contribution in the form of government's provision of CPO for less than adequate remuneration to the Indonesian biodiesel exporting producers, following Article 3(1)(a) of the basic Regulation, and/or whether the set of measures adopted by the GOI falls under the category of income/price support of the biodiesel industry, following Article 3(1)(b) of the basic Regulation.

#### 3.3.3.1. Financial contribution

- (102) At the outset, the Commission observed that all exporting producers purchased CPO domestically from either related or unrelated companies to process into refined bleached deodorized palm oil and then biodiesel.
- (103) Article 3(1)(a)(iv), second indent, of the basic Regulation states that a financial contribution exists if a government: 'entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i), (ii) and (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments'. The type of functions described by Article 3(1)(a)(iii) of the basic Regulation occurs where 'a government provides goods or services other than general infrastructure, or purchases goods...'. Those provisions mirror paragraphs (iii) and (iv) of Article 1.1(a)(1) of the SCM Agreement and should be interpreted and applied in the light of the relevant WTO case law.
- (104) The WTO panel in *US – Export Restraints* <sup>(16)</sup> ruled that the ordinary meaning of the two words 'entrust' and 'direct' in Article 1.1(a)(1)(iv) of the SCM Agreement require that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction). It rejected the US 'cause-and-effect-argument' and asked for an explicit and affirmative action of delegation or command.

<sup>(15)</sup> For a similar analysis, see Commission Implementing Regulation (EU) 2016/387 of 17 March 2016 imposing a definitive countervailing duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India (OJ L 73, 18.3.2016, p. 1).

<sup>(16)</sup> Panel Report, *US – Export Restraints* (WT/DS194/R), circulated on 29 June 2001, para. 8.29.

- (105) However, in a subsequent case <sup>(17)</sup>, the Appellate Body held that the replacement of the words ‘entrusts’ and ‘directs’ by ‘delegation’ and ‘command’ is too rigid as a standard. According to the Appellate Body, ‘entrustment’ occurs where a government gives responsibility to a private body and ‘direction’ refers to situations where the government exercises its authority over a private body.
- (106) In both cases, the government uses a private body as proxy to effectuate the financial contribution, and ‘in most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement’. At the same time, paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement does not allow Members to impose countervailing measures to products ‘whenever the government is merely exercising its general regulatory powers’ or where government intervention ‘may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market’. Rather, entrustment and direction implies ‘a more active role of the government than mere acts of encouragement’.
- (107) Moreover, the WTO did not consider that ‘leaving discretion to a private body is necessarily at odds with entrusting or directing that private body [...]’ <sup>(18)</sup>. While there may be cases where the breadth of discretion left to the private body is such that it becomes impossible to properly conclude that that private body has been entrusted or directed (to carry out a particular task), this is a factual/evidentiary matter to be addressed on a case-by-case basis.’
- (108) In line with those WTO rulings, not all government measures capable of conferring benefits equate to a financial contribution under Article 3 of the basic Regulation and Article 1.1 (a) of the SCM Agreement. There must be evidence of a government policy or programme to promote the industry under investigation (in this particular case the biodiesel/biofuels industry), by exercising authority over or giving responsibility to public or private bodies (here the CPO producers) to provide CPO for less than adequate remuneration to the biodiesel industry.
- (109) In a nutshell, the relevant WTO rulings provide that:
- (i) the determination of whether there is a ‘financial contribution’ under Article 1.1(a)(1) of the SCM Agreement should focus on the *nature* of the government action, rather than on the *effects* or the *results* of the government action <sup>(19)</sup>. In other words, it is well-acknowledged that governments intervene in the market as *regulators* and, when so doing, they cause *effects* on the market and its operators. In this sense, e.g. a government may impose export taxes legitimately in order to generate revenue in case of a very competitive commodity in the international markets. In contrast, there is no such legitimate imposition of export restrictions when it becomes evident that the use of such instrument together with other mechanisms to keep commodities domestically and force suppliers to sell below market prices is part of a broader scheme engineered by the government to support a particular industry or set of industries to boost their competitiveness. Thus, the nature of the government action, including its context, object and purpose, is relevant in assessing the ‘financial contribution’ element;
  - (ii) ‘entrustment’ or ‘direction’ would involve an explicit and affirmative action addressed to a particular party in relation to a particular task or duty, this being very different from the situation in which a government intervenes in the market in some way, which may or may not have a particular *result* given the factual circumstances and exercise of free choice by the actors in that market. Ultimately, the key question behind the concepts of entrustment or direction is whether the conduct in question, i.e. the financial contribution in the form of provision of goods for less than adequate remuneration, can be attributed to the government or still is the free choice of the private operators in view of market considerations, such as regulatory constraints <sup>(20)</sup>;

<sup>(17)</sup> WT/DS296/AB/R of 27 June 2005, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea, para 110 and 111. WT/DS299/R of 17 June 2005, European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea, para 7.25 adopted a similar approach.

<sup>(18)</sup> WT/DS296/AB/R of 27 June 2005, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea, para 7.38.

<sup>(19)</sup> Panel Report, *US – Export Restraints* (WT/DS194/R), circulated on 29 June 2001, paras. 8.33-8.34.

<sup>(20)</sup> Panel Report, *US – Export Restraints*, paras. 8.29-8.31.

- (iii) Article 1.1(a)(1)(iv) of the SCM Agreement is, in essence, an anti-circumvention provision and, thus, a finding of entrustment or direction requires that the government gives responsibility to a private body or exercises its authority over a private body in order to effectuate a financial contribution. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction <sup>(21)</sup>. However, governments are likely to have other means at their disposal to exercise authority over a private body some of which may be 'more subtle' than a command or may not involve the same degree of compulsion <sup>(22)</sup>;
- (iv) There must be 'a demonstrable link' between the government act and the conduct of the private body <sup>(23)</sup>. There is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence (such as implicit and informal acts of delegation or command), provided that such evidence is probative and compelling <sup>(24)</sup>. In this respect, evidence of the government's intention to support the downstream industry (for example, through publicly stated policies or government decisions, or other governmental actions), or the existence of other government measures ensuring a particular result on the market (e.g. an export restraint together with a government measure preventing operators subject to those restraints from stocking their products), may be relevant to determine the existence of a 'financial contribution' under Article 1.1(a)(1)(iv) of the SCM Agreement (in particular as an indirect manner for the government to provide goods, as provided in sub-paragraph (iii)). In some circumstances, 'guidance' by a government *can* constitute direction <sup>(25)</sup>. The presence of particular *effects* in the market (such as reduction of prices) may also be a factor to be taken into account together with all other available evidence, including the possibility of anticipating those effects in a particular context. Finally, depending on the circumstances, a private body may decide not to carry out a function with which it was so entrusted or directed, despite the possible negative consequences that may follow. This does not show, however, on its own, that the private body was not entrusted or directed <sup>(26)</sup>.
- (110) In line with that case-law, the Commission has reviewed very carefully the nature of the GOI's intervention, i.e. whether the GOI's intervention involves the entrustment of or direction to CPO producers, the nature of the entrusted bodies, i.e. whether the CPO producers are private bodies within the meaning of Article 3(1)(a)(iv) of the basic Regulation, and the action of the entrusted or directed bodies, i.e. whether the entrusted or directed CPO producers provide CPO to the Indonesian biodiesel industry for less than adequate remuneration and hence act as a proxy for the GOI. Moreover, the Commission has verified whether the function carried out would normally be vested in the government, i.e. whether the provision of CPO for less than adequate remuneration to biodiesel producers in Indonesia is a normal government activity, and whether such function does not, in real sense, differ from the practices normally followed by governments, i.e. whether the actual provision of CPO by producers, in real sense, differs from what the government would have done itself.

### 3.3.3.2. Entrustment or direction of CPO producers by the GOI

- (111) In view of the WTO case-law referred to in recitals (104) to (109), the Commission analysed first whether the GOI's support to the Indonesian biodiesel industry is effectively an objective of a government policy and not merely a 'side effect' of the exercise of general regulatory powers. The investigation examined in particular whether the price distortions found were part of the government's objectives, or whether the lower prices of CPO were rather an 'inadvertent' by-product of general governmental regulation.
- (112) The support to the biodiesel industry is achieved by a number of measures, and mainly through the export tax and levy imposed on CPO and the biodiesel subsidy fund.
- (113) The export tax regime on CPO was first introduced by the GOI in 1994 and has undergone, since then, several significant changes.

<sup>(21)</sup> Appellate Body Report, *US – DRAMS (WT/DS296/AB/R)*, circulated 27 June 2005, para. 116.

<sup>(22)</sup> Appellate Body Report, *US – DRAMS*, para. 115.

<sup>(23)</sup> Appellate Body Report, *US – DRAMS*, para. 112.

<sup>(24)</sup> See Panel Report, *Korea – Commercial Vessels (WT/DS273/R)*, circulated on 7 May 2005, para. 7.373.

<sup>(25)</sup> Appellate Body Report, *US – DRAMS (WT/DS296/A/R)*, para. 114.

<sup>(26)</sup> Appellate Body Report, *US – DRAMS (WT/DS296/A/R)*, para. 124.

- (114) Originally, the purpose of the export tax was to secure local demand for, and to ensure price stability of cooking oil. In Regulation 128/PMK.011/2011 the objective was to protect domestic supply of cooking oil and to develop manufacturing industries downstream. The legislation specifically stated the following: 'in the context of supporting the downstream efforts of the palm oil industry to increase added value downstream it is necessary to restructure Export Duty tariff'.
- (115) The Indonesian export tax regime has undergone several changes since 1994, including changes to the minimum CPO price for which the export tax would be active, rate alterations, and changes to the way the rate is calculated from a percentage of sales prices to a nominal amount. The export tax was, in fact, originally introduced by Ministry of Finance's Decree 439/KMK.017/1994. In July 1997, Decree No. 300/KMK.01/1997 changed the calculation methodology of the export tax and CPO exports were subject to a tax ranging between 7,5 % and 22,5 % depending on the GOI's reference price. In September 2007, the export tax calculation methodology was further revised through Decree No. 94/PMK.011/2007 and Decree No 128/PMK.011/2011. In the latest Regulation No 13/2017, applicable during the IP, the Ministry of Finance defines a progressive export tax tariff ranging from USD 0/tonne - when the international crude palm oil (CPO) price is below USD 750 - up to USD 200/tonne when the CPO price is above USD 1 250.
- (116) During the investigation period, and pursuant to Decree No. 13/2017, export taxes on CPO and other palm oil products are expressed in USD instead of a percentage of the price. Moreover, Indonesia's export tax will kick in when the government's reference price exceeds a certain level of price. Consequently and as submitted by the GOI in the context of the US investigation <sup>(27)</sup>, 'higher export prices command higher tariff rates'. As a result, the GOI linked the export system directly to international CPO prices, and not to other concerns, such as production levels or environmental impact. It follows that the effects on prices paid by the exporting producers is not incidental but the direct and intended result of the measures designed by the GOI <sup>(28)</sup>. According to the legislation applicable during the investigation period, the applicable rate of export tax on CPO was the following:

Table 1

**Export tax on CPO**

Price range USD	New system USD/ton
< 750	0
750-800	3
800-850	18
850-900	33
900-950	52
950-1 000	74
1 000-1 050	93
1 050-1 100	116
1 100-1 150	144
1 150-1 200	166
1 200-1 250	183
> 1 250	200

Source: The Complaint

<sup>(27)</sup> US Decision Memorandum for the Preliminary Affirmative Determination of the Countervailing duty Investigation of Biodiesel from the Republic of Indonesia; August 21, 2017, C-560-831 Investigation, p. 15, footnote 95.

<sup>(28)</sup> See for a similar conclusion, *idem*, p. 15.

- (117) As explained above, in 2015 the GOI also introduced an export levy on CPO and its derivatives. The rate of export levy during the investigation period was USD 50 per tonne on CPO and USD 30 per tonne on refined products. The introduction of the export levy coincided with a period where Indonesian prices were nearly identical to world prices. The introduction of the export levy allows biodiesel producers to purchase CPO at lower prices than would otherwise be available. In fact, domestic consumption significantly increased in 2016 compared to 2015 (see Table 2).
- (118) A number of documents show that the GOI explicitly pursued the support and development of the biodiesel industry as a policy objective, in particular by seeking to reduce the domestic price of the input materials (CPO) and thereby providing a financial contribution to the producers of biodiesel.
- (119) In this respect, the GOI made public statements indicating that support to the biodiesel industry is indeed the objective, or one of the main objectives, of the export tax regime. The Indonesian Directorate General for Customs and Excise has publicly explained that 'the aims of export duties, (which) is to ensure the availability of raw materials and to spur the growth of the domestic downstream palm oil industry' <sup>(29)</sup>. The Commission therefore took note that the export tax system was devised and enacted precisely to support the downstream industries which use palm oil, of which biodiesel manufacturing is an integral part.
- (120) This finding is also supported by other public sources, which have analysed the export tax system put in place by the GOI. For example, the WTO in its latest trade policy review on Indonesia concluded that 'The policy objectives regarding export taxes on commodities include price stabilization, fostering the development of downstream processing facilities, and reducing the rate of depletion of non-renewable resources in mining.' In its report, the WTO further remarked that 'according to the [GOI's] authorities, export taxes on primary commodities can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries. In this way, export taxes provide an incentive for the development of domestic manufacturing or processing industries with higher value-added exports.'
- (121) The OECD also reached the same conclusion in its 2010 report on the economic impact of export restraints on raw materials finding that 'export taxes on palm oil were imposed in Indonesia and Malaysia in order to support the development of biodiesel and cooking oil industries' and the European Parliament found that 'Indonesia and Thailand also used export taxes to reduce the domestic price of palm oil and rice, respectively' <sup>(30)</sup>.
- (122) With regard to the export levy, as explained above in recitals (64) to (65) the GOI, without being able to provide any evidence supporting this claim, explained that it is collected to fund the OPPF. The Commission however considered it to be in essence a support mechanism for the biodiesel industry. Although the OPPF remit is broader than just supporting the biodiesel industry, as explained in recital (77) the Commission found evidence that de facto this was the OPPF's main activity during the investigation period: the vast majority of the OPPF's money was in fact used to support the biodiesel industry.
- (123) In light of all the above considerations, the Commission took the view that the objective of the export restraints system put in place by the GOI is indeed to directly and indirectly support the biodiesel industry and that this is not merely a 'side effect' of the exercise of general regulatory powers. Far from being a regulatory measure with a government revenue purpose, the export restraints were designed, introduced and monitored by the GOI with the specific purpose of keeping CPO prices at lower level for the benefit of the downstream industries <sup>(31)</sup>.
- (124) In addition to the export restraint system put in place by the GOI, the GOI further intervenes in the market in order to de facto control CPO prices through the State-owned company PTPN.
- (125) The GOI claims that PTPN acts as a rational market operator when selling CPO on the domestic market and that it operated independently on the market. However, the evidence available to the Commission shows that PTPN acts under strong influence of the GOI when selling CPO on the domestic market, acting de facto as a price setter.

<sup>(29)</sup> Customs and Excise News Magazine, Volume 47, No. 9, September 2015.

<sup>(30)</sup> Export taxes and other restrictions on raw material and their limitation through free trade agreements: Impact on developing countries, 2016.

<sup>(31)</sup> Similarly, see judgement of the General Court of 10 April 2019, T-300/16, Jindal Saw, ECLI:EU:T:2019:235, para. 117.

- (126) As a preliminary remark, as already explained in recitals (93) to (96), the Commission pointed out that PTPN did not cooperate with the investigation and has not submitted the information requested. Representatives of PTPN were, however, present during the verification visit at the GOI. On that occasion, both PTPN itself and the GOI gave some explanations concerning PTPN's functioning, but without providing any supporting evidence to their claims. Therefore, the Commission based its analysis on facts available.
- (127) The Commission sought information about State ownership as well as formal indicia of government control in PTPN. It also analysed whether control had been exercised in a meaningful way. For this purpose, the Commission had to partially rely on facts available due to the refusal of the GOI and PTPN to provide evidence on the decision making process within the structures of PTPN.
- (128) PTPN is a 100 % state owned group of companies which produces different commodities, including CPO. In addition, the Commission found that the GOI directly controls PTPN. During the verification visit, the GOI and PTPN explained that the former appoints all of the latter's corporate bodies. More precisely, the GOI and PTPN explained that:
- (a) The GOI directly appoints PTPN's the entire Board of Directors;
  - (b) The Board of Directors is subject to the supervision of a 'Board of Commissioners', appointed exclusively by the GOI as well; and,
  - (c) Ultimately, all corporate bodies report to the GOI.
- (129) In addition to the above, the investigation also showed that the Board of Directors is responsible for all relevant decisions taken by PTPN's group companies, including decision on pricing strategy for the sale of CPO as well as accepting the offers for CPO in the context of the auctioning system further described in recital (132). In light of the corporate governance system outlined above, the Commission therefore concluded that the GOI effectively directs all the decision making process of PTPN, therefore exercising decisive influence on the latter.
- (130) On the basis of available information, the Commission therefore concluded that PTPN is under the control of the GOI.
- (131) The investigation further obtained evidence that the GOI exercised meaningful control over PTPN when setting and accepting CPO prices, and that PTPN acts as a price setter for the Indonesian domestic CPO prices.
- (132) Indeed, PTPN organises daily auctions for its CPO. To have access to the online platform, companies need to register. The evidence collected in the course of the investigation indicates that the only requirements that companies have to comply with in order to register are of financial nature in order to guarantee their solvency. The Commission concluded that the price at which CPO is sold in these auctions is set by the GOI and does not reflect undistorted market conditions.
- (133) The Commission took this view because of the decision making process of PTPN. Particularly, the GOI explained that PTPN, before launching the daily bidding process, identifies a 'price idea' for the day. The Commission, however, verified that PTPN is not under the obligation to reject offers below the 'price idea'. Contrary to that, when the price offered by prospective buyer is below that 'price idea' the matter is referred to the Board of Directors which can decide to accept the offer. The Commission confirmed during the verification visit that these acceptances take place on a regular basis. In any event, the fact that the decisions on prices are taken by PTPN's management board where the GOI is solely represented indicates that the GOI exercises meaningful control over PTPN and its conduct relating to pricing decisions.
- (134) In light of the fact that PTPN's Board of Directors is appointed by and reports to the GOI, the Commission concluded that the latter effectively sets the price of CPO on the domestic market.
- (135) The investigation also showed that as a result of the meaningful control of the GOI PTPN does not act as a rational operator on the market. Based on the information available, it appears that PTPN, by following the GOI directives, has been loss making in the past years. Any rational operator, even more so a rational operator with such a pivotal importance on the CPO market, acting rationally would have maximised its profit rather than being loss making.

- (136) The investigation also showed that, by imposing an export tax and an export levy on CPO, the GOI further puts PTPN into an economically irrational situation, inducing it to sell CPO domestically for a lower price than it could have obtained in the absence of those export restraints. PTPN is therefore deprived of a rational choice and induced to comply with the policy objective behind the export tax and levy.
- (137) In light of all the above, the Commission therefore concluded that PTPN is a public body <sup>(32)</sup>. The evidence available indicates that PTPN is exercising governmental functions when selling CPO on the market and indicating the price to be followed by all other CPO suppliers on the market, which is consistently and systematically followed. As explained in recital (142) below, the investigation indeed showed that no CPO supplier to the exporting producers sold at prices higher than the price set by PTPN. This price setting is in line with the scope and content of GOI's policies relating to the CPO and biodiesel sectors. Since CPO suppliers failed to provide sufficient information to the contrary, the Commission concluded that they aligned their prices to those set by PTPN in order to comply with the stated policy objectives of keeping CPO artificially low.
- (138) In any event, were PTPN to be considered as a private body, the same evidence would indicate that at the very least PTPN has been entrusted or directed by the GOI to fix CPO prices at an artificially low level in the sense of Article 3(1)(a)(iv) of the basic Regulation.
- (139) Additionally, the investigation indicated that the daily domestic market price of CPO closely reflected the award price of the daily auctions of PTPN.
- (140) The Commission observed that the tender data are publicly available to all companies registered within the PTPN informatics system, regardless of whether they have participated in individual tenders and whether they have been successful in their bids. The Commission could verify that PTPN publishes the result of the daily tender on its online platform always at 15:30h on the day of the tender, indicating the exact award unit price for CPO.
- (141) All exporting producers confirmed that they have daily negotiations for the purchase of CPO with non-state-owned supplier, and that those negotiations are generally carried out once the results of the PTPN tenders are available, and the starting price of the negotiation is the PTPN daily prices. Exporting producers also explained that price differences between the PTPN prices and the price negotiated with the independent CPO supplier are mainly due to different logistic costs. In this respect, the exporting producers explained that PTPN tenders are issued for deliveries mainly in Dumai (on the island of Sumatra) and Belawan, which is ideally located for logistics. Other independent suppliers may be located in more remote areas, such as, for example the island of Borneo, and therefore logistics costs increase. Hence, the exporting producers explained that the PTPN price takes into account an adjustment for transport costs.
- (142) The Commission could verify that the unit price paid by the exporting producers to non state-owned CPO producers was during the IP always the same or lower than the PTPN price for that day.
- (143) Hence, and on the basis of all the available evidences, the Commission concluded that, de facto, all independent CPO suppliers in Indonesia, irrespective of their size, align their prices to the daily PTPN prices and that any deviation therefrom mainly derives from logistic costs.
- (144) WTO case law explained the concept of direction of a private body as the exercise of authority by a government over a private body. The Appellate Body in *US – Countervailing Duty on DRAMS*, explained that direction entails indeed an exercise of authority by the government, but also clarified that an interpretation of 'direction' limited to 'command' would be too narrow as '(...) governments are likely to have other means at their disposal to exercise authority over a private body. Some of these means may be more subtle than a 'command' or may not involve the same degree of compulsion'.

<sup>(32)</sup> WT/DS379/AB/R (US – Anti-Dumping and Countervailing Duties on Certain Products from China), Appellate Body Report of 11 March 2011, DS 379, paragraph 318. See also WT/DS436/AB/R (US – Carbon Steel (India)), Appellate Body Report of 8 December 2014, paragraphs 4.9 - 4.10, 4.17 – 4.20 and WT/DS437/AB/R (United States – Countervailing Duty Measures on Certain Products from China) Appellate Body Report of 18 December 2014, paragraph 4.92; and Appellate Body Report, United States – Countervailing Duty Measures on Certain Products from China, WT/DS437/AB/RW, adopted 16 July 2019, para. 5.96.

- (145) The Commission took the view that by organising a transparent price setting mechanism, the GOI is exercising one of those more subtle means of direction of the Indonesian CPO suppliers referred to by the Appellate Body. Based on the available evidence, the Commission considered that by making public the daily unit price of CPO, the GOI effectively sets a maximum price at which the commodity will be sold on that specific day. The existing transparency in the market allows buyers to align their behaviour in practice by not purchasing CPO from suppliers that request a price higher than the one set by the GOI.
- (146) Also, the investigation indicated that in terms of negotiating power the market is significantly imbalanced in favour of CPO buyers. The market for CPO is in fact rather fragmented, with 40 % of the supply coming from individual farmers, between 6 % to 9 % from PTPN and the remaining part coming from 'larger' suppliers (compared to the individual farmers) but still having modest market shares. Contrary to that, and particularly with respect to the biodiesel industry, purchasers are larger undertakings with a need for significant volumes of raw materials that they generally cannot entirely fulfil with their in-house supply. In this context, any purchaser will have a significant degree of buying power, such that it can resist any attempt from its supplier to ask for a price higher than that set by the GOI. Hence, the Commission concluded that by communicating transparently the daily CPO prices, the GOI is, through PTPN, effectively setting the maximum daily CPO prices in Indonesia. Such a reference price amounts to the guidance for CPO suppliers to sell CPO in Indonesia in line with the pursued public objectives.
- (147) Additionally, the Commission considered that by imposing an export tax and an export levy on CPO, the GOI puts Indonesian CPO producers into an economically irrational situation, which induces them to selling their goods domestically for a lower price than they could obtain in the absence of those export restraints. They are therefore deprived of a rational choice and induced to comply with the policy objective behind the export tax and levy.
- (148) Although the export tax was not due during the investigation period, the export levy was. This resulted in CPO suppliers being restricted in their behaviour as by imposing that levy, the GOI effectively restricts the freedom of action of CPO suppliers by de facto limiting their business decision at what price to sell their product and where. Absent the export levy, CPO producers acting rationally would have tried to maximise their profit, by selling even more volumes of CPO on the export market rather than sell it domestically.
- (149) By imposing those restraints, the GOI therefore prevents CPO suppliers from maximising their income that they would be able to get in the absence of the export levy.
- (150) In line with the conclusion of the Appellate Body in *US – Countervailing Duty on DRAMS*, the Commission took the view that the GOI directs CPO suppliers within the meaning of article 1.1(a)(iv) of the SCM Agreement. In that case, in fact the Appellate Body concluded that 'it may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, "guidance" by a government can constitute direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case'. In this case the Commission, also supported by the available evidence, concluded that the GOI created a system that induces suppliers to sell CPO at a specific price, thereby directing them to do so. As explained in recitals (168) to (169) below, the Commission established that the price published by PTPN constitutes the maximum price on the domestic market of Indonesia and is de facto followed by all CPO and biodiesel producers on the market. Finally, with reference to the requirement of some sort of government's participation, it must be recalled that PTPN is a public body and therefore its activity can be considered as the GOI's activity on the market and PTPN's activity clearly qualifies as that 'demonstrable link' between the policy and the conduct of private bodies involved, which are acting as a proxy for the GOI to carry out its policy.
- (151) Therefore, through those measures the GOI induces the CPO suppliers to keep CPO in Indonesia as they cannot sell at better prices which would prevail in Indonesia absent those measures.

- (152) In this sense, the input producers are ‘entrusted’ or ‘directed’ by the GOI to provide goods to the domestic users of CPO, and notably biodiesel producers, for less than adequate remuneration. The CPO producers are given the responsibility to create an artificially low-priced domestic market in Indonesia.
- (153) In other words, when applying the set of measures described, the GOI knows how the CPO suppliers will respond to the measures and what consequences will result from them. The Commission also found evidences that the GOI is proactively intervening in the CPO market in order to encourage private CPO suppliers to comply with the mandate imposed on them. One press article for example explained that ‘The Indonesia Government continues its support for the sustainable management of oil palm plantations through the disbursement of IDR 6,35 billion in replanting funds to 135 Asian Agri partnered smallholders’. In that article, the president director of the OPPF stated that ‘Oil palm is a top sector that contributes significantly to the Indonesian economy. After 25 years, we need to rejuvenate the palm oil industry to ensure high productivity according to industry needs, sustainable development, and improved welfare for smallholders and communities’<sup>(33)</sup>. This statement clearly show how the GOI is supporting the CPO producers essentially for the benefit of the biodiesel producers.
- (154) Additionally, another press article indicates that ‘Indonesia currently runs a subsidized palm replanting program for small farmers to help boost yields without expanding plantation size. The government aims to replant 2,4 million hectares of palm cultivation area by 2025’<sup>(34)</sup> further indicating how the GOI is subsidising the CPO producers to induce them to abide to the policy objectives.
- (155) While the CPO supplier may lower their domestic production slightly to respond to the export taxes and other restrictive measures, the production did not stop, nor did it significantly decrease. Contrary to that, and save for 2015, Indonesian CPO production consistently increased by over 5 % per year, and in 2018 reached 41 500 Mt. In this regards, press article indicate how ‘In addition to rebalancing public finances, the B20 programme also aims to boost domestic consumption of palm oil, on the back of a decline in prices this year’<sup>(35)</sup> providing evidence that the GOI, in order to guarantee that CPO suppliers comply with the mandate they have been imposed, supports them by artificially increasing their sales.
- (156) The Commission concluded that this is the result of the GOI entrusting and directing the CPO producers to provide CPO for less than adequate remuneration.
- (157) In this respect the Commission took the view that the sole fact that export taxes and/or levies as such are not explicitly mentioned in Article 3(1)(a) of the basic Regulation does not exclude them from having the potential nature of a financial contribution and would therefore fall within the definition of a subsidy under the basic Regulation and the SCM Agreement. The Commission provided ample evidence that the export tax and levy on CPO was used as a tool to induce CPO producers to comply with the state policy objectives in a manner amounting to a countervailable subsidy as specified under Article 3(1)(a) of the basic Regulation.

#### 3.3.3.3. Entrustment or direction of private bodies within the meaning of Article 3(1)(a)(iv) of the basic Regulation

- (158) The Commission then assessed whether the CPO producers in Indonesia are private bodies entrusted or directed by the GOI within the meaning of Article 3(1)(a)(iv) of the basic Regulation.
- (159) The investigation showed that, a part PTPN, all CPO producers in Indonesia are either independent farmers or private corporations not connected to the GOI. Independent CPO producers represent more than 90 % of the market and all exporting producers sourced a proportion of their CPO needs from them.

<sup>(33)</sup> <https://www.asianagri.com/en/medias/media/press-release/indonesian-oil-palm-estate-fund-agency-bdpdps-handed-the-idr-6-75-billion-of-replanting-fund-to-asian-agri-s-smallholders>

<sup>(34)</sup> <https://www.reuters.com/article/us-indonesia-palmoil/palm-oil-watchdog-to-create-separate-standards-for-smallholders-indonesia-director-idUSKCN1SU1DL>

<sup>(35)</sup> <https://www.theborneopost.com/2018/11/18/indonesia-boosts-domestic-palm-oil-consumption-as-currency-pressures-mount/>

- (160) Therefore, the Commission considered that, on the basis of the information available, all CPO producers are private bodies which were entrusted by the GOI within the meaning of Article 3(1)(a)(iv) of the basic Regulation to provide CPO for less than adequate remuneration.

#### 3.3.3.4. Provision of CPO for less than adequate remuneration

- (161) In the next step, the Commission verified whether the CPO producers actually carried out the Indonesian governmental policy to provide CPO for less than adequate remuneration. That necessitated a detailed analysis of the market developments in Indonesia against an appropriate benchmark.
- (162) Through the set of measures, the GOI induced the CPO producers to sell locally at lower prices than otherwise, i.e. absent those measures, the producers would have exported the CPO at the higher world market price or simply they would have adjusted their supply and prices to the market constraints.
- (163) The Commission also considered that notwithstanding the fact that the GOI claims that the price set by PTPN for its CPO is fair because the price idea is based on the Malaysian CPO index, domestic prices in Indonesia are lower than market prices. To reach this conclusion, the Commission compared the Indonesian domestic CPO prices with the Malaysian prices. The outcome of this exercise indicated that the Indonesian domestic CPO prices are consistently lower than the Malaysian CPO prices and the average price of CPO during the investigation period was USD 540 per tonne in Indonesia against USD 599 per tonne in Malaysia.
- (164) In that respect, the GOI in its reply to the questionnaire provided historical data concerning the development of domestic CPO prices compared to international prices.
- (165) The Commission has not verified the CIF adjustment methodology used by the GOI to produce the above table. However, the data provided clearly indicates that Indonesian domestic prices have constantly been lower than international market prices, even if in the event the applied methodology would be favourable to the GOI.
- (166) A similar finding can also be obtained by comparing the development of the domestic CPO prices during the investigation period with the development of the price of the CPO exported from Indonesia.
- (167) The Indonesian domestic CPO prices, based on the information provided by the GOI, during the investigation period were by approximately 10 % consistently lower than the Indonesian CPO export prices, based on the Indonesia Export Statistics.
- (168) With respect to CPO prices charged by non-state owned suppliers, the investigation has also indicated that all CPO purchases in Indonesia are carried out at the daily PTPN prices, adjusted to transport costs. Hence, especially for spot purchases, the PTPN price represented de facto the maximum price of CPO for that day. The information provided by the exporting producers in their replies to the questionnaire confirmed this finding. The Commission verified a number of transactions, and for all of them it observed that the price per unit paid to the relevant independent supplier was lower or the same of the daily PTPN price. In no instance of the verified transactions, the Commission could observe a price higher than the PTPN price for that day.
- (169) Hence, the Commission took the view that the actions of the GOI directs the CPO suppliers to provide CPO at less than adequate remuneration to, inter alia, biodiesel producers by de facto setting a maximum price on the Indonesian domestic CPO market.

#### 3.3.3.5. The function which would normally be vested in the government and the practice, which, in no real sense, differs from practices normally followed by governments

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

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

### 3.3.3.6. Conclusion

- (172) In light of the above, the Commission concluded that the set of measures adopted by the GOI lead to a financial contribution in the form of government’s provision of CPO for less than adequate remuneration to the Indonesian biodiesel exporting producers under Article 3(1)(a)(iv) of the basic Regulation.

### 3.3.3.7. Price or income support

- (173) In addition to the above, and for the reasons set out below, the Commission considered that the set of measures taken by the GOI intervening in the CPO market could also qualify as an income and price support granted by the GOI in favour of the Indonesian biodiesel producers in the sense of Article 3(1)(b) of the basic Regulation.

- (174) Indeed, the categories of ‘financial contribution’/‘income or price support’ are not mutually exclusive. In fact, the Appellate Body has confirmed that the ‘range of government measures capable of providing subsidies [under “financial contribution”] is broadened still further by the concept of “income or price support” in paragraph (2) of Article 1.1(a) <sup>(37)</sup>. This interpretation is also consistent with the object and purpose of the SCM Agreement, which is ‘to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures’ <sup>(38)</sup>. Therefore, a finding that a measure amounts to a financial contribution does not prevent that the same measure could also be qualified as income or price support. Similarly, a finding that a measure does not meet the necessary requirements to be qualified as entrustment or direction in the sense of Article 3(1)(a)(iv) of the basic Regulation may well fall under the broader category of income or price support under Article 3(1)(b) of the basic Regulation.

- (175) The origin of the terms ‘income or price support’ are found in Article XVI of the GATT, the provision to which Article 3(1)(b) of the basic Regulation cross-refers to. Article XVI of the GATT refers to ‘any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory’. In this sense, income or price support is another form of subsidisation <sup>(39)</sup>.

- (176) The terms ‘any form’ indicate the broad scope of this category, in the sense that it includes all forms chosen by the government that result in providing income or price support. In this sense, the dictionary meaning of ‘form’ refers to ‘one of the different modes in which a thing exists or manifests itself; a species, kind, or variety’ also a ‘manner, method, way’ <sup>(40)</sup>. Thus, ‘any form’ includes any way or manner in which the government provides income or price support to someone <sup>(41)</sup>.

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

<sup>(37)</sup> Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571, para. 52.

<sup>(38)</sup> 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, DSR 2002:IX, p. 3779, para. 73, footnote 65.

<sup>(39)</sup> See Opinion of AG Van Gerven of 7 March 1989, *Fediol v Commission*, C-70/87, ECLI:EU:C:1989:110, footnote 33.

<sup>(40)</sup> Oxford English Dictionary online, entries I.5.b and I.10.

<sup>(41)</sup> GATT Panel on Subsidies and State Trading, Report on Subsidies, L/1160, 23 March 1960 (The panel agreed that ‘a system under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy’).

- (177) 'Support' denotes 'the action of contributing to the success or maintaining the value of something' <sup>(42)</sup>. The term 'support' is often used in the context of agriculture, as referring to government support programmes <sup>(43)</sup>. Thus, the meaning of 'support' in Article 3(1)(b) of the basic Regulation refers to the action of the government that contributes to the success or maintaining the value of prices or of the income received by someone.
- (178) The Commission acknowledges that any action by government may have incidental side-effects of random magnitude on the income of someone or may result in prices being supported somehow <sup>(44)</sup>. For such a support to fall under Article 3(1)(b) of the basic Regulation, there must be a demonstrable link between the government actions and the resulting effects of income or price support to someone. Such a link should be established on the basis of the totality of the evidence available, including the nature, design and expected operation of the measures taken by the government.
- (179) Finally, the reference 'in the sense of Article XVI of the GATT 1994' implies all forms of income or price support that directly or indirectly increase exports of 'any product' from a WTO Member's territory or reduce imports of this product within its territory. This effect, potential or actual, is explicitly contemplated in Article XVI:1 of the GATT 1994: '...including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory'.
- (180) In sum, Article 3(1)(b) of the basic Regulation, similarly to Article 1.1(b) of the SCM Agreement, covers government measures of any form that result in the provision of income or price support to someone and that has as an effect, potential or actual <sup>(45)</sup>, increasing exports of any product from a WTO Member's territory or reducing imports of this product within its territory.
- (181) In line with this interpretation, in addition to examining whether the set of measures adopted by the GOI could be characterised as 'financial contribution', the Commission also analysed whether the GOI's set of measures could also be characterised as income or price support falling under Article 3(1)(b) of the basic Regulation. In so doing, the Commission first examined whether the GOI intends to support the creation and development of the biodiesel industry; second, what kind of measures the GOI adopted to support the biodiesel industry; and third, whether those measures qualified as 'any form of income/price support' in the sense of Article XVI of GATT 1994. In sum, the Commission will examine whether the GOI intended as a declared policy objective to support the development of the biodiesel industry, the instruments used by the government for such purpose and whether those instruments or actions by the GOI could be characterised as income or price support in the sense of Article XVI of the GATT 1994.

**(a) *The GOI's intention to support the domestic biodiesel industry as a public policy objective***

- (182) The GOI, by means of Presidential Regulation 66/2018, has an explicit policy to support the development of the domestic biodiesel industry. Some public statements of the GOI already reported above in para (119) indicate that the GOI's intends to control CPO prices for the benefit of the biodiesel producers: 'The policy objectives regarding export taxes on commodities include price stabilization, fostering the development of downstream processing facilities (...) or 'the aims of export duties, (which) is to ensure the availability of raw materials and to spur the growth of the domestic downstream palm oil industry'
- (183) The Commission also found evidence that the GOI has had over the years a clear policy of fostering and supporting the expansion of the biodiesel industry. In a press article, the Director General for renewable energy stated that Indonesia aims to make the use of biodiesel blended fuels compulsory for all vehicles and heavy machinery from 1 September 2018. In that press article it is further stated that 'Indonesian fuel stations will not

<sup>(42)</sup> Oxford English Dictionary online, entry I.3.b.

<sup>(43)</sup> SCM Agreement, Article 15.4 ('...whether there has been an increased burden on government support programmes'); see also Agreement on Agriculture, Article 6 and Annexes II and III ('domestic support').

<sup>(44)</sup> Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369, para. 7.86.

<sup>(45)</sup> 'Potential' effects refer to those effects which naturally follow from the overall architecture, design and structure of the measure, without the need of 'observed' or actual effects on the market.

be allowed to sell unblended diesel fuel once the new rules apply, adding that companies found selling unblended fuel will be fined' <sup>(46)</sup>. In that regard, another press article explains that 'Indonesia plans to require all diesel fuel used in the country contain biodiesel starting next month [September 2018] to boost palm oil consumption, slash fuel imports, and narrow a yawning current account gap'. (emphasis added) <sup>(47)</sup>

- (184) In another press article, it was further explained that 'In Indonesia, the Jakarta Post reports that the government is pulling out all the stops in trying to boost demand for palm oil biodiesel, now exploring the conversion of state-owned power provider PLN's diesel-based facilities to biodiesel. It is also looking at the possibility of allowing privately-owned power providers who are using biodiesel rather than fossil diesel to produce electricity to see that power directly to PLN. The government has already boosted the amount of biodiesel blended by railroads and heavy machinery in addition to road transportation' <sup>(48)</sup>.
- (185) The above aim to support the biodiesel industry was further confirmed by public statements made by the deputy minister for food and agriculture. In a press article he declared that 'Indonesia's biodiesel production could grow by 40 % to hit 7M tonnes in 2019, up from an estimated 5M tonnes this year [2018], as a result of **a new programme to boost local biodiesel consumption**'. (emphasis added) <sup>(49)</sup>
- (186) The GOI has explicitly announced its support to the biodiesel industry through the set-up of the OPPF whose policy remit is de facto to solely support the biodiesel industry. This support has continued until after the investigation period, as during that period and until August 2018 the OPPF paid out money to biodiesel producers. This objective of the OPPF was also clearly spelled out in public statements. In a press article, the OPPF stated that it is 'confident that it can shoulder additional subsidies paid out to producers under the government's new biodiesel policy for the rest of the year' and the president director of the fund further stated that 'the fund has collected Rp 6,4 trillion from the palm oil export levy in the first half of 2018, which is nearly 60 percent of this year's Rp 10,9 trillion target, most of which is used as incentives to support renewable energy production'. In that same article it was also explained that 'But the policy [the blending mandate] will also swell the subsidies paid to 19 biofuel producers, including Wilmar and the Sinar Mas Group. The fund, also known as BPDPKS, estimates that the policy would double biofuel demand in the second half of this year to 2,1 million kilolitres' <sup>(50)</sup>.
- (187) Therefore, the Commission concluded that the GOI's intention to support the creation and development of the Indonesian biodiesel industry is manifest.

**(b) Government actions for the development of the biodiesel industry**

- (188) Through several instruments, the GOI intervenes in the CPO market in order to boost the development of the biodiesel industry. First, the GOI has a system of export restraints in place (through export taxes and export levies) which is used as a tool to depress CPO prices in Indonesia to the benefit of the downstream industries, including biodiesel producers. Second, the GOI, through the State-owned company PTNP, de facto sets the CPO prices at artificially low levels prices, which other CPO suppliers follow in accordance with the stated policy to support the development of the biodiesel industry. The GOI also uses other measures, such as direct subsidies to CPO producers, to ensure that CPO producers comply with the policy objectives.
- (189) All these actions have to be understood in the broader context of encouraging the development of the biodiesel industry, such as through mandatory blending requirements as well as the set-up of the OPPF for the benefit of biodiesel producers. Indeed, the GOI has established a system, which artificially creates a high demand for biodiesel through the blending mandate. The GOI has implemented the so-called B20 blending mandate <sup>(51)</sup>. Under this programme, for a number of applications, such as for example public transport, operators are under

<sup>(46)</sup> <https://www.reuters.com/article/us-indonesia-biodiesel/indonesia-to-make-biodiesel-use-compulsory-from-september-1-official-idUSKBN1KM4WK>, accessed on 17.7.2019.

<sup>(47)</sup> <https://www.reuters.com/article/us-indonesia-biodiesel/indonesia-bets-big-on-biodiesel-to-limit-costs-of-oil-imports-idUSKBN1KS0CC>, accessed on 17.7.2019.

<sup>(48)</sup> <https://www.biofuelsdigest.com/bdigest/2019/01/08/indonesia-wants-to-push-for-power-production-from-palm-oil-biodiesel/>, accessed on 17.7.2019.

<sup>(49)</sup> <https://www.ofimagazine.com/news/indonesian-biodiesel-production-could-grow-by-40>, accessed on 17.7.2019.

<sup>(50)</sup> <https://jakartaglobe.id/context/indonesia-oil-palm-estate-fund-adequate-to-support-b20-biodiesel-policy/>, accessed on 17.7.2019.

<sup>(51)</sup> Blending mandate enacted pursuant to Ministry of Energy and Mineral Resources regulation 12/2015.

the legal obligation to use as fuel a blend of mineral diesel and biodiesel which contains at least 20 % of biodiesel. This blending mandate is bound to increase to 30 % in the near future. In this regard, the Commission considered that absent the combined blending obligation and OPPF, there would be a lower demand for biodiesel in Indonesia and therefore the revenues deriving from the sale of biodiesel would necessarily be significantly lower.

(190) Therefore, the Commission concluded on the basis of the information available that the GOI has put in place a set of measures in order to intervene in the market ensuring a particular result, i.e. that the biodiesel producers benefit from artificially low prices for CPO, which represents around 90 % of their costs of production.

**(c) The set of measures adopted by the GOI qualifies as ‘any form of income/price support’ in the sense of Article XVI of the GATT 1994**

(191) By the set of measures described above, the GOI provides income support to the biodiesel industry. The regulatory conditions adopted by the GOI do not have as a side effect that CPO suppliers sell this input to biodiesel producers at lower prices than those available internationally. Such a result is intended and successfully achieved through the GOI's actions. The set of measures put in place by the GOI allows biodiesel producers to have access to their main raw material and cost element at a price below the world market price, which then is translated into artificially higher profits resulting mainly from exports to third markets. In this sense, the GOI's actions contribute to the income received by biodiesel producers. Without such actions, the biodiesel producers would not benefit from the distorting effects on CPO derived from the State intervention.

(192) All those measures show that the Indonesian biodiesel industry is supported and artificially stimulated by the GOI. This finding is corroborated by the increasing number of biodiesel producers in Indonesia as well as by the sharp increase of the production capacity and exports in the past 10 years, as shown in the table below:

Table 2

**Development of Indonesian Biodiesel Industry (million litres)**

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Production capacity (nameplate)	3 128	3 921	3 921	4 881	5 670	5 670	6 887	10 898	11 547	11 357
Capacity use (%)	10,5 %	19,9 %	46,2 %	46,5 %	52,0 %	69,9 %	24,0 %	33,5 %	29,6 %	34,3 %
Production	330	780	1 812	2 270	2 950	3 962	1 653	3 656	3 416	3 900
Exports of biodiesel from Indonesia	204	563	1 440	1 608	1 942	1 569	343	476	187	1 772
Exports as % of production	62 %	72 %	79 %	71 %	66 %	40 %	21 %	13 %	5 %	45 %
Consumption	119	223	359	669	1 048	1 845	860	3 008	2 572	3 300
Ending Stocks	22	16	29	27	11	559	1 009	1 181	1 839	1 439
Number of producers	20	22	22	22	26	26	27	30	32	31

Source: Questionnaire reply of the GOI, Indonesia Biofuels Annual 2018 GAIN Report and export statistics from Global Trade Atlas (2018 data, apart from export statistics, based on estimates)

(193) As can be seen from this table, the biodiesel industry has been a predominantly export-oriented sector. When the exports decreased in the past mainly because of the existence of trade defence measures in the Union, inventories increased significantly.

(194) Therefore, the Commission concluded that the GOI provides income or price support to the biodiesel industry in accordance to Article 3.1(b) of the basic Regulation.

### 3.3.3.8. Benefit

- (195) Because most of the GOI's measures aimed at artificially lowering the domestic price of CPO, the Commission examined whether the GOI's support to the biodiesel industry conferred a benefit by reference to the difference between the prices paid by domestic biodiesel producers when purchasing CPO locally and a benchmark based on the prevailing market conditions for CPO.
- (196) The Commission considered that such a difference resulted in a benefit to the Indonesian biodiesel producers which could source the main raw material in their production process at a price below the international market price. This comparative method also ensured that there was no double counting of other subsidies countervailed in the present investigation and which also provide income/price support to Indonesian biodiesel producers.
- (197) The purchase prices needed to be compared with an appropriate benchmark. Under Article 6(d) of the basic Regulation the adequacy of remuneration shall be determined in relation to prevailing market conditions for the product in question in the country of provision, i.e. Indonesia, including price, quality, availability, marketability, transportation and other conditions of purchase <sup>(52)</sup>.
- (198) The Commission considered that the FOB CPO export prices from Indonesia to the rest of the world as found in the Indonesia Export Statistics are an appropriate benchmark as they are set according to free market principles, reflect prevailing market conditions in Indonesia, and are not distorted by government intervention. The Commission reached this view as the imports of CPO in Indonesia were marginal and thus not representative, and hence could not identify any undistorted domestic price for CPO. Additionally, the Commission considered that the benchmark used is the closest proxy to what an undistorted Indonesian domestic price would be absent the GOI's intervention. Finally, the Commission analysed also other possible benchmarks, such as the CIF CPO price at Rotterdam port. Since this price comprised of a mix of CPO originating in many countries other than Indonesia, the Commission considered it a less appropriate benchmark as far as the prevailing market conditions in Indonesia are concerned. In any case, the Commission observed that the price difference between the various benchmarks is minimal.
- (199) The Commission calculated the average per month of the IP of the FOB world export prices from Indonesia and considered that the prices so calculated are the closest proxy for undistorted Indonesian domestic prices for CPO.
- (200) The Commission then compared the domestic price of CPO paid by the Indonesian producers with the benchmark calculated as explained in recital (199).
- (201) The total amount of the difference represents the 'savings' obtained by the Indonesian producers of biodiesel that purchase CPO in the Indonesian distorted domestic market compared to the price which they would have paid in the absence of distortions. Ultimately, this total amount represents the benefit conferred on the Indonesian producers by the GOI during the investigation period.

### 3.3.3.9. Specificity

- (202) The GOI's set of measures were directed to benefit certain industries, including the domestic biodiesel industry. Indeed, even though the distortions on CPO also benefit downstream products other than biodiesel, the benefit is available only to certain industries in Indonesia, namely those active in the palm oil value chain. This finding is supported by policy statements of the GOI itself as well as in the subsequent legislative acts implementing and amending the discipline of the export tax and levy. For example, Regulation 128/PMK.011/2011 specifically stated the following: 'in the context of supporting the downstream efforts of the palm oil industry to increase added value downstream it is necessary to restructure Export Duty tariff. They are, therefore, specific under Article 4(2)(a) of the basic Regulation.

### 3.3.4. Conclusion

- (203) Through a set of measures, including the export taxes and levy, and by de facto acting as a price setter on the market, the GOI induced the domestic CPO producers to sell CPO locally and 'entrusted' or 'directed' them to provide this raw material in Indonesia for less than adequate remuneration. The measures at issue achieved the

<sup>(52)</sup> See WT/DS436/AB/R United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products From India, 8 December 2014, para. 4.244.

desired effect to distort the domestic market of CPO in Indonesia and to depress the price to an artificially low level to the advantage of the downstream biodiesel industry. The function to provide CPO for less than adequate remuneration is normally vested in the government in view of the public objective to support the biodiesel industry and the practice of the CPO suppliers to carry it out does not, in any real sense, differ from practices normally followed by governments when pursuing similar policy objectives through other forms of support (such as grants or revenue foregone).

- (204) The Commission thus concluded that the GOI provided a financial contribution within the meaning of Article 3(1)(a)(iv) of the basic Regulation, as interpreted and applied in line with the relevant WTO standard under Article 1.1(a)(1)(iv) of the SCM Agreement. In the alternative, the Commission further concluded that the GOI provides income or price support to the biodiesel producers through its intervention in the CPO market, in accordance with Article 3(1)(b) of the basic Regulation, read in light of Article 1.1(a)(2) of the SCM Agreement.
- (205) The Commission further concluded that such a financial contribution confers a specific benefit to the recipients.
- (206) In light of all the above, the Commission found that through a set of measures the GOI provided support to the biodiesel industry including through the provision of palm oil (CPO) for less than adequate remuneration. The GOI conferred a benefit to the recipients which is specific, thus amounting to a countervailable subsidy.

### 3.3.5. Calculation of the subsidy amount

- (207) In accordance with Article 5 of the basic Regulation, the Commission calculated the amount of countervailable subsidy for each exporting producer in terms of the benefit conferred on the recipient found to exist during the IP. The Commission assessed the benefit as being the sum of the differences between the prices paid for domestically purchased CPO and the benchmark price of CPO calculated per month of the IP. In accordance with Article 7(2) of the basic Regulation, the Commission allocated those subsidy amounts over the total turnover of the CPO-based production of the exporting producers during the investigation period as appropriate denominator, because the subsidy conferred a benefit to the entire production of CPO-based products and not only to the product concerned or the production destined to exports.
- (208) The subsidy rate established with regard to this set of measures during the investigation period for the exporting producers amounts to:

Company	Subsidy rate
PT Ciliandra Perkasa	0,13 %
PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group)	4,40 %
PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group)	5,15 %
PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group)	3,43 %

## 3.4. Government Support via revenue forgone: the Bonded Zone scheme

### 3.4.1. The subsidy scheme

- (209) The Bonded Zones scheme was introduced by the GOI with Ministry of Finance Regulation 147/PMK.04/2011 and further amended by Minister of Finance Regulations 255/PMK.04/2011 and 120/PMK.04/2013.
- (210) Bonded Zones are defined as areas within the customs territory of the Republic of Indonesia where import duty and VAT on imported goods is suspended (for import duty) or exempted (for VAT). Both the suspension and the exemption apply for capital goods, raw materials and supporting material.
- (211) During the verification visit, the GOI explained that there are not pre-defined areas of the territory of the Republic of Indonesia identified as bonded zones, rather companies can apply and, if the application is accepted, their premises become a bonded zone.

#### 3.4.1.1. Eligibility

- (212) During the verification visit, the GOI also explained that the bonded zone scheme is only available to 'export oriented companies', meaning companies generating more than 50 % of their turnover from exports. During the verification visit the GOI also explained that, pursuant to Regulation of the Ministry of Finance no 4/2014 the requirement above can be exempted so that also non-export oriented companies can benefit from the scheme. The evidence collected during the investigation however could not identify any objective criteria set out in the legislation for granting such an exemption. Rather, a courtesy translation of the legislation states that *'The recommendation referred to in Article 1 can be provided after considering:*
- (a) the product of the applying company whether a substitute market of direct import of similar good in order to supply domestic market demand;*
  - (b) any decrease of export; and/or*
  - (c) protection of domestic industries producing products similar to the products of Bonded Zone in consideration of the capability of local industry to supply domestic demand.'*
- (213) With respect to the above, during the verification visit the GOI explained that companies in the biodiesel industry are normally granted the exemption from the requirement of generating more than 50 % of their turnover from export. According to the explanation provided during the verification visit, this is to support the biodiesel companies in view of attaining the blending mandates imposed by the GOI.
- (214) The Commission therefore concluded that the granting of the above-mentioned exemption is entirely at the discretion of the GOI.
- (215) Lastly, the GOI explained that this scheme is available only for companies that import goods into the Republic of Indonesia for further processing. Hence, mere importers cannot apply to obtain a bonded zone status.

#### 3.4.1.2. Advantages conferred by being in Bonded Zones

- (216) Within the Bonded Zone the importation process is suspended until the companies sell the finished goods within the territory of the Republic of Indonesia. In other words, import duty is suspended on products imported into the bonded zones until they are sold on the Indonesian domestic market. If a product remains in the bonded zone (such as, machinery) or is directly exported the import duty is never due.
- (217) Similarly to import duty, also the payment of VAT due on imported goods is suspended until the finished goods are sold on the domestic market. If a product remains in the bonded zone (such as, machinery) or is directly exported the VAT is never due.
- (218) Under this scheme, the import duty and VAT exemption is granted on imports of capital goods, such as machinery used in the production process of biodiesel, raw materials and spare parts.

#### 3.4.1.3. The application of the provisions of Article 28(1) of the basic Regulation

- (219) Concerning the information requested by the Commission in the course of the procedure regarding the Bonded Zones scheme, Wilmar did not fully cooperate with the Commission. The Commission therefore informed Wilmar that it might have to resort to the use of facts available under Article 28(1) of the basic Regulation when examining the existence and the extent of the alleged support granted to the biodiesel industry through the exemption of import duty on machineries and goods imported into the Bonded zone.
- (220) In the deficiency letter sent on 15 February 2019, the Commission asked Wilmar to provide certain information concerning imports of inputs and machinery since the date of setting up of each of the related entities (biodiesel producers and the CPO suppliers). In its reply to the Deficiency Letter, Wilmar provided a partial reply to that information request, claiming that it encountered technical difficulties in collecting the full set of data requested. A similar explanation was given during the verification visit. The Commission was therefore able to verify only a limited set of data.
- (221) Consequently, with regard to the alleged support granted to the biodiesel industry through the exemption of import duty on machineries and goods imported into a bonded zone, Wilmar did not provide the necessary information and evidence as requested by the Commission in its deficiency letter and during the verification visit.

- (222) The absence of necessary and relevant information and/or documents as described above significantly impedes the investigation. Indeed, it caused serious difficulties for the Commission to arrive at accurate and substantiated findings with respect to this subsidy scheme.
- (223) Wilmar commented that the information requested was in the first place not necessary within the meaning of Article 28 of the basic Regulation and that in any event the partial information it has submitted complied with Article 28(3) of the basic Regulation. Wilmar also claimed that it does not hold the information it did not provide.
- (224) In this respect, the Commission observed that the claim that Wilmar could not track that information cannot be accepted as it depends on a technical issue making the retrieval of that information allegedly too burdensome to retrieve. The Commission therefore was of the view that the Wilmar Group is in possession of that information, and could have retrieved it to provide a complete reply to the deficiency letter.
- (225) Secondly, the information requested is necessary, especially in light of the fact that a relevant amount of data concerning the amount of duty exempted on the import is missing entirely. This therefore prevents the Commission to determine the precise amount of subsidy received by the Wilmar Group under this scheme.
- (226) The Commission further observed that Wilmar's claim that it did not further request that information is not acceptable. During the verification visit the Commission asked whether the missing information was available and took note that it was not.
- (227) The Commission therefore partially relied on facts available for its findings regarding those aspects of the investigation in accordance with Article 28 of the basic Regulation.

### 3.4.2. Analysis

#### 3.4.2.1. Financial contribution

- (228) For the reason set out below, the Commission considered that the import duty exemption on machineries granted by the bonded zones scheme constitutes a financial contribution by the GOI to the exporting producers in the form of revenue forgone.
- (229) As indicated above in recitals (216) to (218), undertakings in bonded zones enjoy (i) the exemption of import duty on imported machinery and raw materials, and (ii) the exemption of VAT on imported machinery and raw materials. Both import duty and VAT remain exempted until the imported good is sold on the domestic market. This means that companies in bonded zones may never pay neither import duty nor VAT on goods that never leave the bonded zone, such as machinery, or that are directly exported.
- (230) The Commission also observed that all exporting producers benefitted from this scheme, exclusively when importing machinery and spare parts for their biodiesel plants. Since the main raw material for the production of biodiesel is in fact CPO, and CPO is all locally sourced, the potential amounts not collected on imported raw materials appear to be negligible.
- (231) In light of the above, the Commission therefore observed that the exporting producers essentially never paid the import duty and the VAT on the machinery they imported. The machinery in fact, is imported into the relevant bonded zone for the purpose of setting up the production facility and once installed it never leaves the zone.
- (232) Therefore, the Commission concluded that the exemption of import duties on imports of machinery and equipment amounts to revenue foregone or not collected in sense of Article 3(1)(ii) of the basic Regulation. With respect to the exemption of VAT, the Commission considered that the GOI also foregoes public revenue, since under normal circumstances, the exporting producers would pay the VAT first to the State and then they will compensate such VAT when selling domestically <sup>(53)</sup>.

<sup>(53)</sup> Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/AB/R and Add.1/WT/DS497/AB/R and Add.1, adopted 11 January 2019, paras. 5.212 – 5.221.

## 3.4.2.2. Benefit

- (233) The investigation showed that the machineries used in the Bonded Zones are generally imported and that once installed never leave the Bonded Zone. Hence the import duty on such machineries in effect never becomes payable. With respect to the VAT exemption on imported machineries and spare parts, the Commission found that exporting producers also benefited from retaining the advantage of cash availability <sup>(54)</sup>.
- (234) In light of the above, the Commission therefore considered that this scheme confers a benefit to the exporting producers as they are placed in a better financial position than they would be absent the scheme. In fact, absent the scheme they would have paid the duty and VAT upon importation of the machineries and spare parts.

## 3.4.2.3. Specificity

- (235) The scheme is specific because it is available only to certain companies depending on their export performance and location in specific geographic areas within the jurisdiction of the granting authority, in accordance with Articles 4(2)(a) and 4(3) of the basic Regulation.

## 3.4.3. Conclusion

- (236) The Commission found that through a set of measures the GOI provided support to the biodiesel industry including through the revenue forgone relating to the Bonded Zone scheme and the exemption of import duty and VAT on imported machineries and spare parts. The GOI conferred a benefit to the recipients which is specific, thus amounting to a countervailable subsidy.

## 3.4.4. Calculation of the subsidy amount

- (237) The Commission calculated the benefit to the exporting producers deriving from this scheme with regard to the exemption of import duty on imported machinery as the total amount of unpaid duty, allocated to the IP on the basis of the useful life of the underlying assets. With regard to the exemption of VAT on imported machinery and raw materials the benefit was negligible and therefore did not materially affect the final results.
- (238) The subsidy rate established with regard to this set of measures during the investigation period for the exporting producers amounts to:

Company	Subsidy rate
PT Ciliandra Perkasa	0,03 %
PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group)	0,12 %
PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group)	0,16 %
PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group)	0,11 %

## 3.5. Other schemes

- (239) The Complaint identified a number of additional subsidies and subsidy programmes, and particularly, through revenue forgone or not collected such as income tax benefits for listed investments, industrial estate subsidies, pioneer industry tax benefits and the provision of export financing and guarantees on preferential terms by the Indonesian Eximbank.
- (240) As the Commission did not find evidence of any exporting producers making use of them, they will be all treated together in this section.

<sup>(54)</sup> Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1/WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R, paras. 7.491 – 7.494.

### 3.5.1. *Income tax benefits for listed investments*

- (241) The Complaint claimed that these scheme grants income tax facilities for investments in certain business fields and or certain region to boost direct foreign and domestic investments in Indonesia. Particularly, the Complaint claims that this scheme grants:
- (a) 30 % net tax deduction of the total investment, charged for 6 years for 5 % annually;
  - (b) An accelerated depreciation and amortization;
  - (c) An income tax charge for dividend paid to foreign tax subject at 10 %, or lower tariff according to effective Double Taxation Avoid Agreement; and
  - (d) A loss compensation for more than 5 years but not more than 10 years.
- (242) The investigation broadly confirmed the claims laid down in the Complaint. The investigation in fact revealed that the program was established on January 1, 2007, pursuant to Government Regulation No. 1/2007 and was renewed and modified on April 6, 2015 by Government Regulation No. 18/2015, which was later amended by Government Regulation No. 9/2016. Although Government Regulation No. 18/2015 repeals Government Regulation No.1/2007, companies receiving benefits under Government Regulation No. 1/2017 could continue receiving such benefits until their original expiration date.
- (243) Pursuant to this scheme, companies which carry out investments in specific regions of the territory of the Republic of Indonesia and in specific industrial sector can benefit from the following incentives:
- (a) 30 % net tax deduction of the total investment, charged for 6 years for 5 % annually;
  - (b) An accelerated depreciation and amortization;
  - (c) An income tax charge for dividend paid to foreign tax subject at 10 %, or lower tariff according to effective Double Taxation Avoid Agreement; and
  - (d) A loss compensation for more than 5 years but not more than 10 years.
- (244) During the verification visit, the GOI explained that the scheme is available for investments in regions other than Java or Sulawesi, and that the relevant location for eligibility is that where the investment is carried out and not where the seat of the company carrying out the investment is. The GOI also confirmed that the CPO value chain, including biodiesel producers, is eligible for this scheme.
- (245) The investigation showed that, for various reasons, none of the exporting producers made use of this scheme. Companies either were loss making and therefore they had no income tax to be deducted or not eligible due to not fulfilling the condition of specific region of the investments.
- (246) As no exporting producer made use of the scheme the Commission did not further analyse this scheme.

### 3.5.2. *Industrial estate subsidy*

- (247) The Complainant claims that under the industrial estate scheme, the GoI subsidizes the Indonesian biodiesel producers through various incentives. Particularly, the Complaint claims that the GOI established the so called 'industrial estate subsidy' pursuant to Regulation No. 142/2015. Under this scheme, any '*Industrial Company*' located in an '*Industrial Estate*' is granted taxation incentives and may additionally be granted regional incentives.
- (248) According to the Complaint, this programme provides a financial contribution to the Indonesian biodiesel producers in the form of revenue foregone by the GOI and provides a benefit to the Indonesian biodiesel exporters equal to the tax saving. Also, the Complaint claims that this scheme is specific since only certain enterprises within an industrial estate can qualify for the programme under the conditions laid down in the Regulation.
- (249) The investigation indicated that this scheme has been set up by the GOI to support the industry activity established in specific geographical areas, defined by Article 1.4 of Government Regulation No. 142 of 2015 as a central industry activity zone which is equipped with supporting infrastructure developed and managed by the Industrial Estate Company..

- (250) The investigation also indicated that this scheme may provide benefit to the recipients as Ministry of Finance Regulation 105/2016 provides for certain facilities on corporate income tax, as well as VAT and import duty exemptions.
- (251) The investigation however showed that none of the exporting producers have used this scheme and therefore the Commission did not further analyse this scheme.

### 3.5.3. Pioneer Industry Tax Benefit

- (252) The Complaint claims that the pioneer industry tax benefits programme, the GOI provides a series of tax incentives to increase direct investment to the so-called 'Pioneer Industries'. Particularly, the Complaint claims that this scheme was established in 2011 with Minister of Finance Regulation No. 130/2011. It was then revised several times. This programme has been recently revised on 29 March 2018 through Minister of Finance Regulation No. 35/2018.
- (253) According to the Complaint, this scheme provides a financial contribution to the beneficiaries in the form of revenue forgone by the GOI as well as a benefit to the former in terms of tax savings.
- (254) The investigation indicated that the scheme in object essentially consists of a corporate tax reduction for undertaking engaged in certain business activities (the so called Pioneer Industries) listed in Minister of Finance Regulation No 159/2015 as amended by Minister of Finance Regulation No.103/2016. The investigation also revealed that in addition to be active in a 'pioneer industry' as defined by the Ministry of Finance, undertakings, in order to be eligible for this scheme, must invest at least IDR 1 000 000 000 000,00 (one trillion rupiah) for all sectors of pioneer industries excluding the information, communication and technology (ICT) sector that introduces high technology. The corporations in the ICT sector could invest minimum IDR 500 000 000 000,00 (five hundred billion rupiah) to be eligible for the benefit. In addition to the above, some other eligibility criteria apply and namely depositing a minimum of 10 percent of the investment plan in Indonesian banks, maintaining a debt to equity ratio at least 4:1, and having the status of Indonesian legal entity since 15 August 2011.
- (255) The investigation however showed that none of the exporting producers have used this scheme and therefore the Commission did not further analyse this scheme.

### 3.5.4. The provision of export financing and guarantees on preferential terms by the Indonesian Eximbank

- (256) The Complaint claims that Lempabaga Pembiayaan Ekspor Indonesia ('Eximbank'), a 100 % state-owned bank acts as a Ministry of Finance's special financial institution intending to support Indonesia's foreign trade. According to the complainant, in this capacity, Eximbank provides preferential export financing to Indonesian palm oil downstream industries, which includes biodiesel producers.
- (257) According to the Complaint, Eximbank's goal is to support the government policies in the framework of encouraging the national export programme by means of the provision of national export financing and that in its 2017 Annual report, Eximbank further indicated that it commits to actively support the Indonesian palm oil related industries, which form the main part of its client base.
- (258) The Complaint further claims that the wide range of financial services, such as export financing, export guarantees, export insurance and advisory services provided by Eximbank qualify as financial contribution on the part of the GOI. The Complaint additionally adds that pursuant to Law 2/2009 indicates that the Eximbank's function is to provide financing for any transactions or project that is not viable for commercial banking for the purpose of boosting exports. In this context, the Complaint claims that according to Eximbank's 2017 Annual report, Eximbank held financing and receivable assets with nominal interest rates as low as 0 %, denominated both in Rupiah as well as in foreign currencies. The Complaint therefore claims that, despite not being able to precisely identify the interest rate applied by Eximbank to the biodiesel producers, it nonetheless claims that they would be below market price and therefore constitute a benefit in their favour.
- (259) The investigation indicated that Eximbank has been established by the GOI pursuant to Law 2/2009 and provides financing in the form of working capital and/or investment. More precisely, the investigation revealed that Eximbank is engaged in the following activities:
- Guarantees provided to Indonesia exporters, overseas importers and tenders related to project performance;
  - Insurance facilities for exporters in the event existing export insurance agencies cannot provide services; and,
  - Advisory services by coaching and advisory services to banks, financial institutions, exporters manufacturers of export goods, especially small- and medium-sized enterprises and cooperatives.

- (260) The investigation revealed that none of the exporting producers but one had a contractual relationship with Eximbank. Notwithstanding the above, the Commission verified all the loans entered into between the exporting producers and any state owned bank. In this regard, the Commission could verify that the interest rate applied by the state owned banks on loans is comparable to international benchmarks, both for the loans denominated in Indonesian Rupiahs ('IDR') and the loans denominated in US dollars. With regard to the loans denominated in IDRs, the Commission compared the interest rate payable by the exporting producers during the life of the loan with the yields of Indonesian bonds of similar duration as available on Bloomberg. The Commission observed that the two are comparable.
- (261) Consequently, given the fact that the Commission did not establish that a benefit had been conferred by this scheme, it did not analyse further the scheme.

### 3.6. Conclusion on subsidisation

- (262) The Commission calculated the amount of countervailable subsidies for each exporting producer in accordance with the provisions of the basic Regulation by examining each subsidy or subsidy programme, and added these figures together to calculate a total amount of subsidisation for each exporting producer for the investigation period. To calculate the overall subsidisation below, the Commission first calculated the percentage subsidisation, being the subsidy amount as a percentage of the company's total turnover. This percentage was then used to calculate the subsidy allocated to exports of the product concerned to the Union during the investigation period. The subsidy amount per tonne of product concerned exported to the Union during the investigation period was then calculated, and the margins below calculated as a percentage of the Costs, Insurance and Freight ('CIF') value of the same exports per tonne.
- (263) Given the full cooperation of Indonesian exporting producers, the amount for 'all other companies' was provisionally set at the level of the highest amount established for the cooperating companies.

Company	Subsidy rate
PT Ciliandra Perkasa	8,0 %
PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group)	16,3 %
PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group)	18,0 %
PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group)	15,7 %
All other companies	18,0 %

## 4. INJURY

### 4.1. Definition of the Union industry and Union production

- (264) During the investigation period, 44 producers in the Union that were members of the EBB and a further 196 known non-member producers manufactured the like product. All these producers constitute the 'Union industry' within the meaning of Article 9(1) of the basic Regulation.
- (265) As indicated in recitals (17) to (20), the Commission selected three Union producers in the sample representing 18 % of the total Union production of the like product.
- (266) The Commission established the total Union production of biodiesel during the investigation period at around 13 million tonnes based on information submitted by the EBB concerning the Union industry.
- (267) The EBB compiles data concerning production that it receives from its members, which account for around 70 % of the biodiesel production in the Union. With regard to non-member producers accounting for around 30 % of the biodiesel production in the Union, it gathers the information concerning production from the relevant national industry associations and from other publicly available sources.

- (268) The methodology and correctness of the data gathered by the EBB was subject to a verification visit under Article 26 of the basic Regulation carried out at the premises of the EBB.

Table 3

**Union production (tonnes)**

	2015	2016	2017	IP
Total Union production	11 789 896	11 958 862	13 071 053	13 140 582
<i>Index</i>	100	101	111	111

Source: EBB

- (269) Total Union production gradually increased by 11 % between 2015 and 2017. It remained stable between 2017 and the end of the investigation period. When compared to Union consumption indicated in table 4 below, the production of the Union industry did not keep up with demand, the difference being imported biodiesel.

**4.2. Union consumption**

- (270) The Commission established the Union consumption of biodiesel by adding imports of biodiesel into the Union to the sales of the Union industry on the Union market.
- (271) Union consumption developed as follows:

Table 4

**Union consumption (tonnes)**

	2015	2016	2017	IP
Total Union consumption	11 791 953	11 435 468	14 202 128	15 634 102
<i>Index</i>	100	97	120	133

Source: EBB, EU import statistics

- (272) The Union's biodiesel consumption was stable until 2016. It increased in 2017 and the investigation period by 33 % as compared with 2015. The consumption of biodiesel depends on two major factors, the consumption of diesel fuel and the content of biodiesel in this fuel.
- (273) The steadily increasing demand and the Union production results from the energy policy of the Union. The Renewable Energy Directive 2009/285 ('the RED')<sup>(55)</sup> established that 'each Member State shall ensure that the share of energy from renewable sources in all forms of transport in 2020 is at least 10 % of the final consumption of energy in transport in that Member State' ('blending mandate'). The Directive allows each Member State to set their own country-specific mandates.
- (274) The Second Renewable Energy Directive 2018/2001 ('RED II') was published on 21 December 2018<sup>(56)</sup>, after the end of the investigation period. The Directive continues the policy of renewable fuels being used in the transport sector, continues the target of 10 % renewables in transport, and sets out biofuels sustainability criteria for all biofuels produced or consumed in the EU
- (275) The fact that more biodiesel is being mixed into mineral diesel is an important element in the analysis of biodiesel market trends in the Union. The cost of production and prices of biodiesel are generally higher than the cost of production and prices of mineral diesel. The EU legislation makes producers of fuels (refineries) purchase biodiesel to mix it with fossil-based fuel.

<sup>(55)</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (OJ L 140, 5.6.2009, p. 16).

<sup>(56)</sup> Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82).

- (276) The consumption of biodiesel is directly linked to measures introduced in each Member State in order to comply with the blending mandate to mix certain levels of biodiesel in fossil fuels. The consumption of biodiesel is set to increase as and when more Member States transpose EU directive targets into their national legislation.
- (277) Another important factor relates to the consumption of diesel fuel for road transport in the Union. This consumption is driven by the Union's general economic situation, which drives the need to transport goods and persons.
- (278) Another factor relating to the consumption of diesel fuel (and as a consequence biodiesel) in the Union is the fuel efficiency of the diesel trucks, buses and diesel cars. Higher fuel efficiency directly leads to a lower diesel consumption. Another factor is a switch from diesel engines to engines using other types of fuel, such as petrol, LPG/CNG, hybrid and fully electric engines.

#### 4.3. Imports from the country concerned

##### 4.3.1. Volume and market share of the imports from the country concerned

- (279) The Commission established the volume of biodiesel imports and their market share based on Surveillance 2 <sup>(57)</sup> database.
- (280) Biodiesel imports into the Union from the country concerned developed as follows. The IP has been split into quarters to show the effect of the annulment of the duties in March 2018:

Table 5

#### Import volume (tonnes) and market share

	2015	2016	2017	IP
Volume of imports from Indonesia (tonnes)	13 340	31 115	24 984	516 088
<i>Index</i>	100	233	187	3 869
Market share	0,1 %	0,3 %	0,2 %	3,3 %
<i>Index</i>	100	241	156	2 918

Source: Surveillance 2 database

Table 6

#### Quarterly import volume (tonnes) from Indonesia in the IP

	Q4 2017	Q1 2018	Q2 2018	Q3 2018
Volume of imports from Indonesia (tonnes)	0	25 275	227 114	263 678

Source: Surveillance 2 database

- (281) Because of the anti-dumping duties concerning imports from Indonesia imposed on 26 November 2013 by Regulation (EU) 1194/2013 <sup>(58)</sup>, there were only minor imports from Indonesia to the Union between 2015 and February 2018.

<sup>(57)</sup> Database of specific products under 'surveillance' or monitoring imported into the Union customs territory maintained by the Directorate-General for Taxation and Customs Union.

<sup>(58)</sup> Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ L 315, 26.11.2013, p. 2).

- (282) However, these duties were annulled by a judgment of the European Court of Justice in March 2018 <sup>(59)</sup> and as a result, imports increased dramatically thereafter as can be seen in Table 6.

#### 4.3.2. Prices of imports from the country concerned and price undercutting

- (283) As set out above, there have been imports from Indonesia throughout the period considered. The evolution of prices in the period considered, from 2015 to the investigation period was as follows.

Table 7

#### Import price

	2015	2016	2017	IP
Import prices from Indonesia (EUR per tonne)	853	619	803	671

Source: Surveillance 2 database

- (284) During the IP, there was a difference of around 15 % between those import prices and the EU sales prices (Table 10). From 2015 to 2017 the difference was between 5 % and 10 %.
- (285) The Commission determined the price undercutting during the investigation period by comparing:
- (1) the corresponding weighted average prices per product type of the imports from the Indonesian producers to the first independent customer on the Union market, established on a Cost, Insurance, Freight ('CIF') basis, with appropriate adjustments for importation costs; and
  - (2) the weighted average sales prices per product type of the sampled Union producers charged to unrelated customers on the Union market.
- (286) The Commission made price comparisons on a type-by-type basis for transactions at the same level of trade, duly adjusted where necessary, and after deduction of rebates and discounts.
- (287) The comparison on a type-by-type basis focused on a comparison of the CFPP, irrespective of the feedstock used. Another characteristic that the Commission took into account was whether a product was subject to 'double-counting' in most Member States. For Germany, where a different way of calculating the efficiency of CO<sub>2</sub> emission reduction is in place, the Commission also took into account this specificity of the German market.
- (288) The Commission noted that some Indonesian exporters reported exports to the EU without a certificate (known as a 'RED certificate') which is required under the Renewable Energy Directive to allow the biodiesel to count towards the blending mandate in the EU. The Commission considered that these sales were in direct competition with Union industry sales with such a RED certificate, as these imports were in free circulation and the technical specifications of the product are the same.
- (289) The Commission established that in most cases the final customer purchasing biodiesel is not aware of, nor concerned by, the feedstock that was used in the production, but requires a product that fulfils a certain maximum CFPP level. This level would vary depending on the season and climatic conditions. During summer months and in warmer regions, higher CFPP levels can be sold, while lower CFPP level biodiesel is required during winter months and in colder regions.

<sup>(59)</sup> On 15 September 2016, the General Court of the European Union ('the General Court') delivered judgments in cases T-80/14, T-111/14 to T-121/14 (5) and T-139/14 (6) ('the judgments') annulling Articles 1 and 2 of the definitive Regulation to the extent that they apply to the applicants in those cases ('the exporting producers concerned'). The Council of the European Union had initially appealed the judgments. However, following the Council's decision to withdraw its appeals, the cases were removed from the European Court of Justice's Register on 2 and 5 March 2018 (Orders of the President of the Court of 15 February 2018 in Joined Cases C-602/16 P and C-607/16 P to C-609/16 P, and of 16 February 2018 in cases C-603/16 P to C-606/16 P). Consequently, the judgments became definitive and binding as from the date of their delivery.

- (290) Given the higher CFPP level of pure PME (normally CFPP +13), it is not normally blended with mineral diesel by itself, but is usually mixed with other biodiesels with lower CFPP first to produce a blend at CFPP +5 or CFPP 0 which is then blended with mineral diesel.
- (291) The amount of PME used in a blend depends on the season and location across Europe. In southern Europe CFPP -5 is used in the winter, and CFPP +5 in the summer. In northern Europe CFPP -10 is used in winter, and CFPP 0 in summer. The higher the CFPP, the larger the percentage of PME that can be used in the blend of biodiesels <sup>(60)</sup>.
- (292) To calculate price undercutting at the level of each exporting producer, the Commission first compared the imports from Indonesia, which are pure palm oil biodiesel, to the pure palm oil biodiesel sales of the Union industry.
- (293) Consequently, that type of biodiesel sold by the Union industry was in direct competition with the biodiesel imported from Indonesia, in line with the WTO panel report on Biodiesel from Indonesia <sup>(61)</sup>. That comparison covered around 20 % of all sales by the sampled Union producers. According to WTO case law, there is no requirement providing for any specific percentage of the domestic industry sales to be considered in the price effects analysis <sup>(62)</sup>.
- (294) The Commission expressed the result of this direct comparison of PME imports to PME sales as a percentage of the sampled Union producers' turnover of PME sales during the investigation period. It showed a weighted average undercutting margin by the imports of exporters from the country concerned on the Union market of between 6,0 % and 11,6 %.
- (295) The remainder of the sales of the sampled Union producers have a lower CFPP, which allow these products to be used at lower temperatures. Because the above-mentioned comparison between Indonesian imports and Union industry sales only covered around 20 % of the sales of the sampled Union producers, the Commission made two other types of price comparisons to assess the reliability of this undercutting finding.
- (296) In the second option, the Commission broadened the comparison by including biodiesel with a CFPP of around 0 degrees ('FAME0'), the most common type of biodiesel sold by the sampled Union producers, in the comparison. For this purpose, the prices of FAME0 were adjusted downwards taking account of the market value of the difference in physical properties. This market value was assessed based on the price difference between FAME10 and FAME0 on the Union market. This comparison covered 55 % of all sales of the Union industry and showed undercutting of 7,4 %.
- (297) This comparison takes into account that biodiesel at CFPP0 - FAME0 - is usually a blend of various types of biodiesel, often including up to 20 % of PME. The Commission therefore considered that the sales price of FAME0 on the Union market is affected by the price of the biodiesels blended to make it and therefore a comparison is appropriate, to check the like-for-like comparison.
- (298) In the third option, the Commission compared all imports of the Indonesian exporting producers with all sales of the sampled Union producers, regardless of the product type. This comparison showed undercutting of 17,5 % <sup>(63)</sup>.
- (299) This comparison showed that imports of PME from Indonesia at subsidised prices would have the effect of lowering the price of most blends sold on the Union market.
- (300) Consequently, all three types of price comparisons showed significant levels of price undercutting. Therefore, irrespective of the methodology used, the Commission provisionally established that the prices of Indonesian imports significantly undercut the prices of the Union industry.
- (301) In addition, in recital (328) the Commission analysed whether the Union industry prices were depressed by the subsidised imports.

<sup>(60)</sup> WT/DS480/R European Union - Anti-Dumping Measures on Biodiesel from Indonesia, para 7.152

<sup>(61)</sup> WT/DS480/R European Union - Anti-Dumping Measures on Biodiesel from Indonesia, paras 7.143-7.161.

<sup>(62)</sup> WT/DS480/R European Union - Anti-Dumping Measures on Biodiesel from Indonesia, para 7.160.

<sup>(63)</sup> In WT/DS480/R, para 7.160 Indonesia argued that a comparison between Indonesian imports and blended CFPP 0 biodiesel sold by the Union industry representing 37 % of all Union sales was insufficient. Indonesia further argued that the Commission should have compared the sales prices of the remaining 63 % of the Union sales. This comparison, like the price difference referred to in recital (284), confirms that there is significant undercutting during the IP.

#### 4.4. Economic situation of the Union industry

##### 4.4.1. General remarks

- (302) In accordance with Article 8(5) of the basic Regulation, the examination of the impact of the dumped imports on the Union industry included an evaluation of all economic indicators having a bearing on the state of the Union industry during the period considered.
- (303) As mentioned in recitals (17) to (20), sampling was used for the determination of injury and the negative impact on the level of the sales prices, quantities sold, market share and profits of the Union industry.
- (304) For the injury determination, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission evaluated the macroeconomic indicators based on data contained in the questionnaire replies from the sampled Union producers and based on the information provided by the EBB.
- (305) The Commission verified the methodology of collection of data submitted by the EBB and that the information was supported by adequate documentation and research procedures.
- (306) Both sets of data were found to be representative of the economic situation of the Union industry.
- (307) The macroeconomic indicators are: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the amount of subsidisation, and recovery from past subsidisation or dumping.
- (308) The microeconomic indicators are: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital.

##### 4.4.2. Macroeconomic indicators

###### 4.4.2.1. Production capacity and capacity utilisation

- (309) The total Union production capacity and capacity utilisation developed over the period considered as follows:

Table 8

#### Production capacity and capacity utilisation

	2015	2016	2017	IP
Production capacity (tonnes)	16 009 878	16 561 814	16 594 853	17 031 230
<i>Index</i>	100	103	104	106
Capacity utilisation	74 %	72 %	79 %	77 %

Source: EBB

- (310) Production capacity increased slowly throughout the period considered, to take account of growing demand. However, since the Union industry was only able to benefit from the market growth to a very limited extent due to the significant increase in subsidised imports, in particular during the investigation period, the increase in production capacity is significantly lower than the demand growth.
- (311) Similarly, as in the case of the information on production, in recital (309), the EBB compiles data concerning capacity from its members, including national associations, and with regard to non-members, it gathers the information concerning capacity from other publicly available sources.
- (312) The production capacity figures do not include a significant part of capacity that is considered idle. The EBB explained that a number of installed biodiesel plants have not been operational for several years and should be considered as long-term out-of-use. These plants, although nominally installed, would only be able to restart production after investment in technical adaptation and after a significant period.

- (313) Capacity utilisation of the Union industry increased by 3 percentage points from 74 % to 77 % in the period considered. The industry achieved the highest levels of capacity utilisation during 2017 and the investigation period.

#### 4.4.2.2. Sales volume and market share

- (314) The Union industry's sales volume and market share developed over the period considered as follows:

Table 9

#### Sales volume and market share

	2015	2016	2017	IP
Sales volume on the Union market (tonnes)	11 305 117	10 920 665	13 004 462	12 741 791
<i>Index</i>	100	97	115	113
Market share	95,9 %	95,5 %	91,6 %	81,5 %

Source: EBB, import and export statistics

- (315) The Union industry's sales dropped between 2015 and 2016, increased in 2017 but then fell back slightly in the investigation period.
- (316) The factors driving sales are the same factors driving Union consumption. Imports did not affect the sales level to a significant extent in the years 2015-2016, which was a reason for the rather stable levels of both sales and market share.
- (317) The removal of duties on imports from Indonesia changed the picture of the market in 2018. After the removal of duties the Union industry significantly lost market share compared to 2016 (almost 15 %), in particular between 2017 and the investigation period.

#### 4.4.2.3. Growth

- (318) While the market in the Union was growing by 33 % during the period considered, the sales quantity and production of the Union industry increased by only 13 % and 11 % respectively. The Union industry was therefore only able to benefit from the market growth during the investigation period to a very limited extent, since a significant part of this growth was absorbed by increasing quantities of imports, such as the subsidised imports from Indonesia.

#### 4.4.2.4. Employment and productivity

- (319) Employment and productivity developed over the period considered as follows:

Table 10

#### Employment and productivity

	2015	2016	2017	IP
Number of employees	2 763	2 762	2 733	2 841
<i>Index</i>	100	100	99	103
Productivity (tonne/employee)	4 267	4 329	4 782	4 625
<i>Index</i>	100	101	112	108

Source: EBB

- (320) Employment by the Union industry remained stable throughout the period considered. Productivity increased between 2016 and 2017 and then slightly decreased by four percentage points.

4.4.2.5. Magnitude of the amount of the countervailable subsidies and recovery from past subsidisation or dumping

- (321) The impact of the subsidised imports from Indonesia on the Union industry will likely be substantial, given the significant volumes and low prices of these imports.
- (322) On 26 November 2013, the EU imposed definitive anti-dumping duties on imports of biodiesel from Indonesia. The duties ranged between 8.8 % and 20,5 %.
- (323) As stated in recital (282), those anti-dumping duties were annulled in March 2018 and as a result, the imports from Indonesia started notably to increase. As noted in recital (280) the market share of Indonesian imports reached 3,3 % in the investigation period, almost exclusively in the second half of the investigation period.
- (324) As a consequence of the increasing imports at low prices significantly undercutting or depressing the Union industry's prices, the Union industry lost market share and was not able to benefit from the market growth.

4.4.3. *Microeconomic indicators*

4.4.3.1. Prices and factors affecting prices

- (325) The weighted average unit sales prices of the sampled Union producers to unrelated customers in the Union developed over the period considered as follows:

Table 11

**Sales prices in the Union**

	2015	2016	2017	IP
Average unit sales price in the Union on the total market (EUR/tonne)	715	765	832	794
<i>Index</i>	100	107	116	111
Unit cost of production (EUR/tonne)	728	767	827	791
<i>Index</i>	100	105	114	109

Source: Sampled Union producers

- (326) The weighted average unit sales price of the sampled Union producers to unrelated customers increased by 16 % between 2015 and 2017. Prices subsequently decreased by 5 percentage points between 2017 and the investigation period.
- (327) The unit cost of production of the sampled Union producers followed the trend of prices, and increased by 14 % between 2015 and 2017. Costs subsequently decreased by 5 percentage points between 2017 and the investigation period.
- (328) The biodiesel market is a price-sensitive commodity market. In such a commodity market a price undercutting of around 10 % does exercise a significant downward pressure on prices. Due to this price pressure, the Union industry could not benefit from the decreasing costs during the investigation period, because it had to fully pass on this cost decrease to its customers to avoid an even larger loss of market share.
- (329) As a result, the Union industry could not improve their unsatisfactory profit margin due to the price pressure exercised by significant quantities of low-priced subsidised imports in an otherwise favourable market situation.

## 4.4.3.2. Labour costs

(330) The average labour costs of the sampled Union producers developed over the period considered as follows:

Table 12

**Average labour costs per employee**

	2015	2016	2017	IP
Average labour costs per employee (EUR)	71 573	65 237	65 874	65 730
<i>Index</i>	100	91	92	92

Source: Sampled Union producers

(331) Average labour costs went down between 2015 and 2016, and subsequently remained stable until the end of the investigation period.

## 4.4.3.3. Stocks

(332) Stock levels of the sampled Union producers developed over the period considered as follows:

Table 13

**Stocks**

	2015	2016	2017	IP
Closing stocks (tonnes)	85 725	92 291	87 864	88 457
<i>Index</i>	100	108	102	103

Source: Sampled Union producers

(333) Stock levels of the sampled Union remained relatively stable throughout the period considered. Given that the product concerned is sold in bulk, a single delivery can comprise a significant volume of more than 10 000 tonnes and can have a significant impact on the stock level, depending on the precise transaction date. Therefore the level of stocks is a less meaningful indicator for the Union industry.

## 4.4.3.4. Profitability, cash flow, investments, return on investments and ability to raise capital

(334) Profitability, cash flow, investments and return on investments of the sampled Union producers developed over the period considered as follows:

Table 14

**Profitability, cash flow, investments and return on investments**

	2015	2016	2017	IP
Profitability of sales in the Union to unrelated customers (% of sales turnover)	- 0,1 %	0,9 %	0,8 %	0,8 %
<i>Index</i>	- 100	900	800	824
Cash flow (EUR)	23 004 159	26 458 832	35 102 719	26 286 866
<i>Index</i>	100	115	153	114

	2015	2016	2017	IP
Investments (EUR)	19 697 707	8 039 845	38 946 892	13 265 279
<i>Index</i>	100	41	198	67
Return on investments	- 3 %	18 %	16 %	17 %
<i>Index</i>	- 100	600	533	573

*Source:* Sampled Union producers

- (335) The Commission established the profitability of the three sampled Union producers by expressing the pre-tax net profit of the sales of the like product to unrelated customers in the Union as a percentage of the turnover of those sales. The profitability is based on cost of goods sold.
- (336) The profitability was around break-even during the whole period considered, remaining below 1 % of turnover.
- (337) In spite of low profit levels, the Union industry was generating a positive cash flow from its operations in the whole period considered. It was able to self-finance its activities.
- (338) The Union industry continued to invest during the whole period considered. Investments strongly fluctuated during the whole period, reaching their highest level in 2017.
- (339) The return on investments is the profit in percentage of the net book value of investments. The return on investment was low but positive while the industry was profitable, between 2016 and the end of the investigation period.
- (340) The financial performance of the Union industry in terms of profits during the investigation period limited its ability to raise capital.

#### 4.4.4. Conclusion on injury

- (341) Imports from Indonesia were negligible throughout the period considered until March 2018 when the existing anti-dumping duties were discontinued. As a result, during the investigation period the imports increased significantly reaching 3,3 %.
- (342) Union consumption was constantly increasing during the period considered, reaching an increase by 33 % for the entire period. This positive development was only partially reflected in the Union industry production and sales volume which increased only by 11 % and 13 % respectively during the same period. As a result, the imports, including those from Indonesia, increased their market share.
- (343) During the period considered the injury indicators showed a mixed picture. Production and sales of the Union industry to a certain extent followed the market demand, but were only able to benefit from the market growth towards the end of the period considered to a very limited extent.
- (344) Investments fluctuated throughout the period considered. The number of employees in the Union industry remained stable throughout the period considered, which in combination with an increasing production led to an increasing productivity per employee.
- (345) However, the profitability of the Union industry remained poor throughout the period considered. This indicates that the Union industry did not manage to reach the level of normal profitable operations.
- (346) Despite an increase of sales and production, caused by increasing consumption, the Union industry did not show indications of improving its economic situation. Whilst not being conclusive on the existence of material injury during the investigation period, the Commission will examine whether there is, at the very least, a threat of material injury.

## 5. THREAT OF INJURY

### 5.1. Introduction

- (347) In accordance with Article 8(8) of the basic Regulation, the Commission examined whether the subsidised imports from Indonesia constitute a threat of material injury to the Union industry.

(348) In the analysis of a threat of material injury to the Union industry, in accordance with Article 8(8), second subparagraph, of the basic Regulation, the Commission considered such factors as:

- the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- a significant rate of increase of subsidised imports into the Union market indicating the likelihood of substantially increased imports;
- sufficient freely disposable capacity on the part of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased subsidised exports to the Union, account being taken of the availability of other export markets to absorb any additional exports;
- whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports; and
- the level of inventories.

#### **5.2. The nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom**

(349) In recital (263), the Commission provisionally concluded on the existence of countervailable subsidies in accordance with the provisions of the basic Regulation. Those subsidies show that the imports of the product concerned benefit from governmental support. The significant undercutting and price depression found during the investigation period is expected to affect the delicate economic situation of the Union industry already observed during the investigation period even more negatively in the near future.

(350) Moreover, as explained in recital (203), the GOI's measures supporting the domestic biodiesel industry ensure that biodiesel exports remain very competitive because of the lower costs of obtaining CPO (as opposed to Union producers who cannot benefit from such low prices). It is therefore foreseeable that the subsidised imports of the product concerned, because of the nature of the GOI's support measures, will continue to negatively affect the Union industry's economic situation.

#### **5.3. Significant rate of increase of subsidised imports into the Union market indicating the likelihood of substantially increased imports**

(351) There is a clear link between the sudden and substantial increase of imports to the Union market from Indonesia since March 2018 and the removal of the anti-dumping duties in the same month. This indicates the ability of the Indonesian exporting producers to quickly react to the changing market conditions.

(352) Therefore, in view of the attractiveness of the Union market for the Indonesian exports, the Commission considered that after the termination of anti-dumping duties in March 2018, the fact that the volume of biodiesel imports from Indonesia has increased significantly indicates the likelihood that such imports will continue to increase.

#### **5.4. Sufficient freely disposable capacity and absorption capacity of third countries**

(353) According to information provided by the GOI, the production capacity of the Indonesian biodiesel producers significantly exceeds the domestic demand by around 300 %. More than half of this production capacity is spare capacity, which the Indonesian exporters will have to export if they want to increase their currently low capacity utilisation.

(354) The spare capacity of the Indonesian biodiesel producers during the investigation period is established at around 40 % of EU consumption. This figure is based on verified information provided by the GOI.

(355) In November 2017, the USA imposed provisional anti-dumping duties and countervailing duties against imports of biodiesel from Indonesia. They were largely confirmed by definitive duties in April 2018 ranging between 92 % and 277 % for the anti-dumping duties ranging between 34 % and 65 % for the countervailing duties.

- (356) The magnitude of the level of duties imposed in the USA means this market will not be able to absorb a significant part of the Indonesian spare capacity. There are no other known export markets that could absorb the very large Indonesian spare capacity, since the USA and the Union together account for around two thirds of the global consumption of biodiesel.
- (357) In the absence of other significant markets available to the Indonesian producers, they are likely to direct their spare capacities to the Union market, causing further injury to the Union industry.

#### 5.5. Price level of subsidised imports

- (358) The biodiesel from Indonesia that arrived in the Union market during the investigation period was imported at substantially lower prices than the prices charged by the Union industry. As explained in recital (294), the Commission established weighted average undercutting margins for the investigation period of between 6,0 % and 11,6 %. A comparison of all product categories also shows undercutting of 15 % – 17,5 %.

#### 5.6. Level of inventories

- (359) The evolution of level of inventories of the sampled Union producers is described in detail in recital (332). As explained, due to the fact that the product concerned is sold in bulk, the level of inventories is a less meaningful indicator for the threat of injury analysis.

#### 5.7. Conclusion

- (360) In view of the analysis of factors concerning the threat of injury listed in recital (348), the Commission concluded that the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing subsidised imports of biodiesel from Indonesia, which supports a provisional finding of threat of injury under Article 8(8) of the basic Regulation.

### 6. CAUSATION

#### 6.1. Effects of the subsidised imports

- (361) As stated in recital (280), there were only negligible imports to the Union from Indonesia in the years 2015-2017 as well as during the first months of the investigating period. However, the imports increased significantly during the second half of the investigation period. As indicated in recital (280) the market share of the Indonesian imports for the investigation period is 3,3 %. As shown in recital (294), the Indonesian biodiesel imports were undercutting the Union industry prices by at least 6,0 % to 11,6 % during the investigation period, and such undercutting could be even higher depending on the approach to be followed. The Commission also established that the Indonesian biodiesel imports depressed the Union industry prices during the investigation period.
- (362) Due to the significant and sudden increase of the subsidised imports of Indonesian biodiesel at prices below those of the Union industry, the Union industry lost market share in the investigation period, and could not improve its unsatisfactory profit margin in an otherwise favourable market situation.
- (363) Therefore, the Commission concluded that those subsidised imports had a negative impact on the situation of the Union industry.
- (364) Moreover, not only do the Indonesian biodiesel producers have significant spare capacity, which can be directed to the Union, but the closure of the second biggest export market of Indonesia – the USA –has directed excess production from Indonesia to the Union, which constitutes 40 % of the worldwide consumption. Thus, the Union has become the most attractive destination for Indonesian subsidised imports of biodiesel, to the detriment of the Union industry.
- (365) Therefore, the Commission considered that the subsidised imports of Indonesian biodiesel are causing a threat of material injury to the Union industry.

## 6.2. Other known factors

- (366) The Commission also examined whether other known factors, individually or collectively, are capable of attenuating the causal link established between the subsidised imports and the threat of injury provisionally found to exist to the effect that such link would no longer be genuine and substantial.

### 6.2.1. Imports from third countries

- (367) Other than imports from Indonesia, imports from only three other countries, Argentina, Malaysia and the People's Republic of China ('the PRC'), had a significant market share during the period considered. The volume of imports from other third countries developed over the period considered as follows:

Table 15

### Imports from third countries

Country		2015	2016	2017	IP
Argentina	Volume (tonnes)	31 340	0	394 005	1 525 081
	Index	100	0	1 257	4 866
	Market share	0,3 %	0 %	2,8 %	9,8 %
	Average price	633	0	636	621
Malaysia	Volume (tonnes)	349 571	273 427	378 395	404 058
	Index	100	78	108	116
	Market share	3,0 %	2,4 %	2,7 %	2,6 %
	Average price	880	975	1 007	899
the PRC	Volume (tonnes)	1 159	38 496	217 313	272 146
	Index	100	3 320	18 742	23 472
	Market share	0 %	0,3 %	1,5 %	1,7 %
	Average price	818	763	812	778
All other countries except Argentina, Indonesia, Malaysia and the PRC	Volume (tonnes)	90 620	169 864	181 209	174 938
	Index	100	187	200	193
	Market share	0,8 %	1,5 %	1,3 %	1,1 %
	Average price	771	789	894	852

Source: Surveillance 2 database

- (368) Imports from Argentina reached a market share of 2,8 % in 2017, increasing to almost 10 % during the investigation period. These imports were subject to an earlier investigation, which resulted in the imposition of a definitive countervailing duty <sup>(64)</sup> and the acceptance of undertaking offers <sup>(65)</sup> in February 2019. The investigation showed that, at that time, subsidised imports threatened to cause material injury to the Union industry at the end of the investigation period of that case, i.e. the end of 2017.

<sup>(64)</sup> Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina (OJ L 40, 12.2.2019, p. 1).

<sup>(65)</sup> Commission Implementing Decision (EU) 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina (OJ L 40, 12.2.2019, p. 71).

- (369) Imports from Argentina were to a certain extent responsible for the negative development of some injury indicators, such as the loss of market share of the Union industry and their inability to fully benefit from the growing consumption in the Union during the investigation period. Notably, the average import price from Indonesia of 671 EUR per tonne in the investigation period was higher than the import price from Argentina during the investigation period, which was 621 EUR per tonne.
- (370) However, the threat of injury from Argentinian imports in the past including their very low prices was addressed by imposing countervailing duties and accepting undertaking offers in February 2019. Therefore, Indonesian imports have become the main cause for a threat of injury to the Union industry since then and Argentinian imports do not weaken the causal link between the subsidized imports and threat of material injury to the effect of rendering the link non-genuine or non-substantial.
- (371) Imports from Malaysia were at a stable level throughout the period considered with a market share between 2,4 % and 3,0 % and prices were considerably higher (899 EUR per tonne) than Indonesian prices (671 EUR per tonne), and even higher than the Union's sales prices. Therefore, they do not weaken the causal link.
- (372) Imports from the PRC continuously increased during the period considered, reaching a market share of 1,7 % in the investigation period. However, imports from the PRC are considerably lower in volume than from Indonesia and prices from the PRC are considerably higher (778 EUR per tonne) than Indonesian prices (671 EUR per tonne). Therefore, they do not weaken the causal link.
- (373) Imports from third countries other than Argentina, Indonesia, the PRC and Malaysia never exceeded a combined market share of 1,5 %. Therefore, none of these other countries could have had any significant influence on the Union industry, in particular given the limited quantities of such imports.
- (374) Based on the above analysis, the Commission concluded that the imports from other countries did not weaken the causal link between the subsidized imports and the threat of injury to the Union industry during the investigation period.

#### 6.2.2. Export performance of the Union industry

- (375) None of the sampled Union producers exported biodiesel during the period considered. The below export statistics are therefore based on Eurostat, and provide an estimate for the whole Union industry. The data is the published exports of biodiesel from the EU under CN codes 3826 00 10 and 3826 00 90:

Table 16

#### Export performance of the Union industry

	2015	2016	2017	IP
Export volume (tonnes)	199 740	336 394	323 085	462 368
<i>Index</i>	100	168	162	231

Source: Eurostat

- (376) The level of exports of the Union industry was limited. It did not exceed 4 % of its sales in any year of the period considered. The export performance of the Union industry cannot have been weakening the causal link between the subsidised imports and the threat of injury.

#### 6.3. Conclusion

- (377) The Commission identified a link between the increasing imports of subsidised imports from Indonesia during the period considered and the threat of material injury.

- (378) The Commission distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the subsidised imports from Indonesia.
- (379) The Commission found that the other identified factors such as imports from other third countries and export performance of the Union industry did not weaken the causal link, either individually or collectively. The Commission notes that while the subsidised imports from Argentina were also a factor contributing to the threat of injury during and shortly after the investigation period, this issue had been addressed in the meantime by imposing countervailing duties and accepting undertaking offers in February 2019.
- (380) In fact imports from Indonesia have continued to increase after February 2019, showing that they remain the main cause of the threat of injury:

Table 17

**Import volume (tonnes) from Indonesia after the IP**

	10/2018	11/2018	12/2018	1/2019	2/2019	3/2019	4/2019	5/2019
Imports from Indonesia (tonnes)	53 204	7 020	78 866	63 409	41 757	129 511	113 831	56 283

Source: Surveillance 2 database

**7. UNION INTEREST**

- (381) In accordance with Article 31 of the basic Regulation, the Commission examined whether it could clearly conclude that it was not in the Union interest to adopt countervailing measures corresponding to the total amount of countervailable subsidies in this case, despite the determination of injurious subsidisation. The Commission based the determination of the Union interest on an analysis of all the various interests involved, including those of the Union industry, importers and consumers.

**7.1. Interest of the Union industry**

- (382) Biodiesel is an important element of an effort to reduce greenhouse gas emissions and improve the sustainability of the energy supply in the European Union.
- (383) The Union industry mainly uses feedstock produced by Union agriculture. The upstream agricultural oil sector also largely depends on the biodiesel industry. Imports of biodiesel from Indonesia would therefore not only affect the biodiesel industry, but also the agricultural sector in the Union.
- (384) The Commission found that the situation of the Union industry is fragile since it has not recovered from the dumping previously suffered. The Commission therefore provisionally concluded that the imposition of measures would be in the interest of the Union industry.

**7.2. Interest of unrelated importers**

- (385) As referred to in recital (22), only two unrelated importers replied to the questionnaire sent by the Commission. Both importers stated that they are against the imposition of measures. The importer Gunvor further commented that the situation of the Union industry is caused by an inefficient production system and management.
- (386) The Commission observes that importers of biodiesel, including the two co-operating companies, are very often traders on the Union market that not only import and export biodiesel worldwide, but also trade biodiesel purchased from Union producers. Both co-operating importers purchase biodiesel from Indonesia, other third countries and the Union industry. They therefore only to a certain extent depend on supplies from Indonesia for their business operations.

- (387) However, the Union producers, especially the larger ones, rely to a significant extent on their own distribution channels. The Commission therefore does not expect the importers would be able to fully replace the level of imports affected by measures with biodiesel purchased from Union producers.
- (388) The Commission concluded that the imposition of duties would not be in the interest of importers. The possible negative effect on importers can however partially be balanced by the increased volume of trade of biodiesel purchased from the Union industry.

### 7.3. Interest of users/consumers

- (389) No users or consumers cooperated with the investigation despite the explicit invitation to do so in the Notice of Initiation.
- (390) Producers of diesel fuel, that is refineries, purchase the biodiesel, imported or produced by the Union industry. Due to the legal requirements referred to in recitals (273) and (274), refineries need to add biodiesel to the mineral diesel sold on the market.
- (391) It is therefore the final consumer that would be affected should the price of diesel at the pump increase following imposition of measures. The price of mineral diesel is, with rare exemptions, lower than price of biodiesel. Given that the amount of biodiesel blended with mineral diesel is normally no more than 10 %, the negative effect of any price increase of biodiesel is diluted before being passed on to the consumer.

### 7.4. Trade-distorting effects of subsidies/restoring effective competition

- (392) Under Article 31(1) of the basic Regulation, special consideration shall be given to the need to eliminate the trade-distorting effects of injurious subsidisation and to restore effective competition.
- (393) The investigation has established that the Indonesian producers sell significant quantities of subsidised biodiesel at artificially low prices to the Union market. If this situation continues, the Indonesian exporters will maintain their unfair competitive advantage, further weakening the already vulnerable situation of the Union industry. As a result, the subsidised Indonesian imports will increase their trade-distorting effects over time, and continue to deny a level playing field to the Union industry.

### 7.5. Conclusion on Union interest

- (394) The Commission provisionally concluded that the imposition of duties would have an effect of increasing consumer prices. However, because of the limited content of biodiesel in the final product purchased by consumers (typically no more than 10 %), this negative effect on the price of diesel fuel would only be a small proportion of the direct change in the price of biodiesel.
- (395) On the basis of the above, the Commission provisionally concluded that there were no compelling reasons that it was not in the Union interest to impose countervailing measures corresponding to the total amount of counter-vailable subsidies on imports of biodiesel originating in Indonesia.

## 8. REGISTRATION

- (396) On 22 May 2019 the complainants submitted a request for imports from Indonesia to be registered, under Article 24(5) of the basic Regulation.
- (397) The complainants requested registration on the grounds of:
- (a) Evidence of massive subsidisation of the Indonesian biodiesel industry;
  - (b) an actual and significant risk of severe injury that would be difficult to repair if the imports continue to increase with the same trends; and
  - (c) a need to register imports as soon as possible in order to preclude the recurrence of injury due to the seasonality of imports.

- (398) The Commission examined the request in the light of Article 16(4) of the basic Regulation which sets out the conditions for collecting duties on registered imports. The Commission's examination also took into account comments received on the request for registration from the GOI, from the importer Gunvor and from the Wilmar group of exporting producers.
- (399) Article 16(4)(c) of the basic Regulation requires the Commission to consider whether there is sufficient evidence that there will be critical circumstances where, for the product concerned, injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefitting from countervailable subsidies.
- (400) In addition, Article 16(4)(d) of the basic Regulation requires the Commission to assess whether 'it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports'.
- (401) As explained in section 4 above, the Commission did not conclude that the Union industry suffered from material injury during the investigation period. Rather, as explained in sections 5 and 6 above, the Commission found that there is a threat of injury caused by the subsidised imports.
- (402) Consequently, the Commission could not determine that injury difficult to repair is caused by the subsidised imports in the sense of Article 16(4)(c) of the basic Regulation.
- (403) The Commission therefore concluded that the conditions for registration were not met.
- (404) Since the Commission had sufficient evidence that the requirement under Article 16(4)(c) is not met, the Commission did not register imports of biodiesel from Indonesia for the three week pre-disclosure period under Article 24(5a) of the basic Regulation.

## 9. PROVISIONAL COUNTERVAILING MEASURES

- (405) Based on the conclusions reached by the Commission on subsidisation, injury, causation and Union interest, and in accordance with Article 15(1) of the basic Regulation, a provisional countervailing duty should be imposed on imports of biodiesel originating in Indonesia.

### 9.1. Provisional measures

- (406) Provisional countervailing measures should be imposed on imports of biodiesel originating in Indonesia, in accordance with the rules in Article 12(1) of the basic Regulation which states that the provisional duty shall correspond to the total amount of countervailable subsidies as provisionally established.
- (407) On the basis of the above, the provisional countervailing duty rates, expressed on the CIF Union border price, customs duty unpaid, should be as follows:

Company	Provisional countervailing duty
PT Ciliandra Perkasa	8,0 %
PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group)	16,3 %
PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group)	18,0 %
PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group)	15,7 %
All other companies	18,0 %

- (408) The individual company countervailing duty rates specified in this Regulation were established on the basis of the findings of this investigation. Therefore, they reflected the situation found during this investigation with respect to these companies. These duty rates are exclusively applicable to imports of the product concerned originating in the country concerned and produced by the named legal entities. Imports of the product concerned produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, should be subject to the duty rate applicable to 'all other companies'. They should not be subject to any of the individual countervailing duty rates.

- (409) A company may request the application of these individual countervailing duty rates if it changes subsequently the name of its entity. The request must be addressed to the Commission <sup>(66)</sup>. The request must contain all the relevant information enabling to demonstrate that the change does not affect the right of the company to benefit from the duty rate which applies to it. If the change of name of the company does not affect its right to benefit from the duty rate which applies to it, a notice informing about the change of name will be published in the *Official Journal of the European Union*.

#### 10. INFORMATION AT PROVISIONAL STAGE

- (410) In accordance with Article 29a of the basic Regulation, the Commission informed interested parties about the planned imposition of provisional duties. This information was also made available to the general public via DG TRADE's website. Interested parties were given three working days to provide comments on the accuracy of the calculations specifically disclosed to them.
- (411) Comments were received from the Wilmar Group, the Permata Group and P.T. Ciliandra Perkasa. The Commission took the comments into account that were considered of a clerical nature and corrected the rates accordingly.

#### 11. FINAL PROVISIONS

- (412) In the interests of sound administration, the Commission will invite the interested parties to submit written comments and/or to request a hearing with the Commission and/or the Hearing Officer in trade proceedings within a fixed deadline.
- (413) The findings concerning the imposition of provisional duties are provisional and may be amended at the definitive stage of the investigation,

HAS ADOPTED THIS REGULATION:

#### Article 1

1. A provisional countervailing duty is imposed on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, in pure form or as included in a blend, currently falling within CN codes ex 1516 20 98 (TARIC codes 1516 20 98 21, 1516 20 98 29 and 1516 20 98 30), ex 1518 00 91 (TARIC codes 1518 00 91 21, 1518 00 91 29 and 1518 00 91 30), ex 1518 00 95 (TARIC code 1518 00 95 10), ex 1518 00 99 (TARIC codes 1518 00 99 21, 1518 00 99 29 and 1518 00 99 30), ex 2710 19 43 (TARIC codes 2710 19 43 21, 2710 19 43 29 and 2710 19 43 30), ex 2710 19 46 (TARIC codes 2710 19 46 21, 2710 19 46 29 and 2710 19 46 30), ex 2710 19 47 (TARIC codes 2710 19 47 21, 2710 19 47 29 and 2710 19 47 30), 2710 20 11, 2710 20 15, 2710 20 17, ex 3824 99 92 (TARIC codes 3824 99 92 10, 3824 99 92 12 and 3824 99 92 20), 3826 00 10 and ex 3826 00 90 (TARIC codes 3826 00 90 11, 3826 00 90 19 and 3826 00 90 30) and originating in Indonesia.

2. The rates of the provisional countervailing duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 and produced by the companies listed below shall be as follows:

Company	Provisional countervailing duty	TARIC additional code
PT Ciliandra Perkasa	8,0 %	B786
PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group)	16,3 %	B787
PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group)	18,0 %	B788
PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group)	15,7 %	B789
All other companies	18,0 %	C999

3. The release for free circulation in the Union of the product referred to in paragraph 1 shall be subject to the provision of a security deposit equivalent to the amount of the provisional duty.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

<sup>(66)</sup> European Commission, Directorate-General for Trade, Directorate H, Rue de la Loi 170, 1040 Brussels, Belgium.

*Article 2*

1. Interested parties shall submit their written comments on this regulation to the Commission within 15 calendar days of the date of entry into force of this Regulation.
2. Interested parties wishing to request a hearing with the Commission shall do so within 5 calendar days of the date of entry into force of this Regulation.
3. Interested parties wishing to request a hearing with the Hearing Officer in trade proceedings shall do so within 5 calendar days of the date of entry into force of this Regulation. The Hearing Officer shall examine requests submitted outside this time limit and may decide whether to accept such requests if appropriate.

*Article 3*

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 1 shall apply for a period of four months.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 August 2019.

*For the Commission*  
*The President*  
Jean-Claude JUNCKER

---