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AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER

REPORT OF THE PANEL

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China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Broiler Products (Article 21.5 – US)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS427/RW and Add.1, adopted 28 February 2018
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EEC – Cotton Yarn	GATT Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995, BISD 42S/17
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, DSR 2016:VI, p. 3077
EU – Fatty Alcohols (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R and Add.1, adopted 29 September 2017, as modified by Appellate Body Report WT/DS442/AB/R, DSR 2017:VI, p. 2765
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
India – Solar Cells	Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
Ukraine – Ammonium Nitrate	Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/AB/R and Add.1, adopted 30 September 2019
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US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727

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US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R, DSR 2015:III, p. 1341
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Upland Cotton (Article 21.5 – Brazil)	Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, p. 997
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title	Title
IDN-1	Statement of Essential Facts	Statement of Essential Facts No. 341 alleged dumping of A4 copy paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia, and the Kingdom of Thailand and alleged subsidization of A4 copy paper exported from the People's Republic of China and the Republic of Indonesia (December 2016)
IDN-3	Anti-Dumping Notice No. 2017/39	A4 copy paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia, and the Kingdom of Thailand, findings in relation to a dumping investigation, Public notice under Subsections 269TG(1) and (2) of the Customs Act 1901, Anti-Dumping Notice No. 2017/39 (18 April 2017, published 19 April 2017)
IDN-4	Final Report	Report No. 341, alleged dumping of A4 copy paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia, and the Kingdom of Thailand and alleged subsidization of A4 copy paper exported from the People's Republic of China and the Republic of Indonesia (17 March 2017, published 19 April 2017)
IDN-5	Submission of the Government of Indonesia (20 February 2017)	Submission of the Government of Indonesia to the Anti-Dumping Commission No. 196 (20 February 2017)
IDN-9	Indah Kiat's Verification Report	Indah Kiat Pulp and Paper TBK's Verification Report (August 2016)
IDN-10	Pindo Deli's Verification Report	Pindo Deli Pulp and Paper Mills' Verification Report (August 2016)
IDN-15		Sinar Mas Group's submission (29 December 2016)
IDN-18		Australia Senate Economics Legislation Committee, Customs Amendment (Anti-Dumping) Bill (June 2011)
IDN-28 (BCI)		Attachment G-6 to Indah Kiat's questionnaire response
AUS-4	Extracts of Customs (International Obligations) Regulation 2015	Extracts of Customs (International Obligations) Regulation 2015, Compilation No. 3 (20 December 2015)
AUS-26 (BCI)		RISI, hardwood pulp prices in Asia by source (2010-2015)
AUS-27A (BCI)		Hawkins Wright, hardwood pulp prices in China by source (December 2002-August 2016)
AUS-27B (BCI)		Hawkins Wright, hardwood pulp prices in South Korea by source (December 2002-August 2016)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ADC	Australian Anti-Dumping Commission
BCI	business confidential information
CTMS	cost to make and sell
CIF	costs, insurance, and freight
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
FOB	free on board
GAAP	generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Indah Kiat	PT Indah Kiat Pulp and Paper Tbk
NME	non-market economy
Pindo Deli	PT Pindo Deli Pulp and Paper Mills
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 1 September 2017, Indonesia requested consultations with Australia pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 31 October 2017.

1.2 Panel establishment and composition

1.3. On 14 March 2018, Indonesia requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 27 April 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in document WT/DS529/6, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS529/6 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 12 July 2018, the parties agreed that the panel would be composed as follows:

Chairperson:	Mr Hugo Perezcano Díaz
Members:	Mr Marco Tulio Molina Tejeda Ms Tomoko Ota

1.6. Canada, China, Egypt, the European Union, India, Israel, Japan, the Republic of Korea, the Russian Federation, Singapore, Thailand, Ukraine, the United States, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, on 5 October 2018, the Panel adopted its Working Procedures[5], Additional Working Procedures on Business Confidential Information (BCI)[6], and the partial timetable.[7] The Panel, in consultation with the parties, subsequently revised the timetable on 26 February 2019 and 2 June 2019, and revised the timetable again on 18 July 2019.[8] Pursuant to the Working Procedures, these documents were circulated to the DSB in the course of this proceeding.

1.8. The Panel held a first substantive meeting with the parties on 18 and 19 December 2018. A session with the third parties took place on 19 December 2018. The Panel held a second substantive meeting with the parties on 14 and 15 May 2019. On 24 July 2019, the Panel issued the descriptive

[1] Request for consultations by Indonesia, WT/DS529/1 (Indonesia's consultations request).
[2] Request for the establishment of a panel by Indonesia, WT/DS529/6 (Indonesia's panel request).
[3] DSB, Minutes of Meeting held on 27 April 2018, WT/DSB/M/412.
[4] Constitution note of the Panel, WT/DS529/7.
[5] Working Procedures of the Panel, WT/DS529/9.
[6] Additional Working Procedures on Business Confidential Information, WT/DS529/10.
[7] Timetable for the Panel proceedings, WT/DS529/8.
[8] Revised timetable for the Panel proceedings, WT/DS529/8/Add.1; Revised timetable for the Panel proceedings, WT/DS529/8/Add.2.

part of its Report to the parties. The Panel issued its Interim Report to the parties on 23 September 2019. The Panel issued its Final Report to the parties on 11 November 2019.

1.3.2 Requests for enhanced third-party rights

1.9. At the organizational meeting held on 21 September 2018, Australia requested additional rights for third parties in this proceeding. Australia confirmed its request in writing on 15 October 2018. On 3 October 2018, China submitted a request for enhanced third-party rights. The Panel gave an opportunity to third parties to comment on Australia's and China's requests, and a subsequent opportunity to the parties to provide comments. On 16 October 2018, Canada, the European Union, Japan, the Republic of Korea, the Russian Federation, and the United States submitted comments. In its comments, the Russian Federation requested additional third-party rights similar to those indicated in China's request. Indonesia objected to the requests for additional third-party rights while Australia generally supported China's request for enhanced third-party rights. The Panel issued the decision on 29 November 2018, in which it denied the granting of additional participatory rights.[9]

1.10. Subsequently, at the third-party session, which took place on 19 December 2018, the European Union requested that the third parties be allowed to observe the second substantive meeting of the Panel with the parties. The request was submitted in writing on 11 January 2019. Indonesia objected to the European Union's request; Australia supported the request. The Panel denied the request in its decision issued on 24 April 2019.[10]

1.11. Pursuant to the Working Procedures, the decisions of the Panel were circulated to the DSB in the course of the proceeding.

1.3.3 *Amicus curiae* submission

1.12. On 23 January 2019, the Panel received an *amicus curiae* submission from the Environmental Investigation Agency and Kaoem Telapak, dated 22 January 2019 and addressed to the Chairman of the Panel in these proceedings. In the communication of 28 January 2019, the Panel forwarded the *amicus curiae* submission to the parties inviting them to provide comments on the acceptability and content of the submission. Indonesia provided comments on 15 February 2019; Australia submitted its comments on 15 February 2019 and on 1 March 2019 as part of its second written submission.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns Australia's measures imposing anti-dumping duties on certain exporters of A4 copy paper from Indonesia, namely PT Indah Kiat Pulp and Paper Tbk (Indah Kiat) and PT Pindo Deli Pulp and Paper Mills (Pindo Deli). Indonesia challenges the anti-dumping duties on Indah Kiat and Pindo Deli, as set forth in Anti-Dumping Notice No. 2017/39 dated 18 April 2017 and issued by the Assistant Minister for Industry, Innovation, and Science and Parliamentary Secretary to the Minister for Industry, Innovation, and Science accepting the recommendations and the reasons for the recommendations set out by the Commissioner of the Australian Anti-Dumping Commission (ADC) in Report No. 341 (hereinafter, the Final Report) dated 17 March 2018 and posted to the public record on the website of the Commission on 19 April 2017.[11] Under these measures, Australia imposed anti-dumping duties on certain exporters of A4 copy paper from Indonesia at the rate of 35.4% for Indah Kiat and at the rate of 38.6% for Pindo Deli.[12]

[9] Decision of the Panel concerning the requests for enhanced third-party rights, WT/DS529/12.

[10] Decision of the Panel concerning the European Union's request for third parties to observe the second substantive meeting of the Panel, WT/DS529/13.

[11] Anti-Dumping Notice No. 2017/39, (Exhibit IDN-3). Indonesia explains that the Anti-Dumping Commission's complete findings are set forth in the Final Report, (Exhibit IDN-4) and Statement of Essential Facts, (Exhibit IDN-1). (Indonesia's first written submission, para. 14 and fn 9; see also Indonesia's panel request, section A).

[12] Indonesia's first written submission, paras. 15-16.

2.2 Other factual aspects

2.2. On 9 March 2018, following the recommendation from the Anti-Dumping Review Panel, the anti-dumping duty rate for Indah Kiat was reduced from 35.4% to 30% and the anti-dumping duty rate for Pindo Deli was reduced from 38.6% to 33%, applicable from the date of publication of the Anti-Dumping Notice No. 2017/39 (19 April 2017).[13] The parties agree that, despite these changes, the aspects of Anti-Dumping Notice No. 2017/39 and the Final Report that are challenged by Indonesia remain in effect.[14]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Indonesia requests that the Panel find that Australia's measures are inconsistent with Australia's obligations under the Anti-Dumping Agreement and GATT 1994, namely:

a. Article 2.2 of the Anti-Dumping Agreement because Australia disregarded the Indonesian producers' domestic sales prices and calculated a constructed normal value based on a finding of a "particular market situation", which rested on an incorrect interpretation of that term.

b. Article 2.2 of the Anti-Dumping Agreement because Australia disregarded the Indonesian producers' domestic sales prices based on an incorrect interpretation of Article 2.2 of the Anti-Dumping Agreement and calculated a constructed normal value even though a proper comparison of domestic prices to export prices was possible.

c. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because in constructing the normal value for the Indonesian producers under investigation, Australia did not calculate the cost of production for A4 copy paper on the basis of the records kept by those producers even though the records were in accordance with generally accepted accounting principles and reasonably reflected the actual cost of production of A4 copy paper, and because Australia therefore failed to properly calculate the cost of production and properly construct the normal value for those producers.

d. Article 2.2 of the Anti-Dumping Agreement because Australia failed to construct the normal value for the Indonesian producers under investigation on the basis of the cost of production of A4 copy paper in the country of origin, i.e. Indonesia.

e. *Chapeau* of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because having calculated the dumping margin for the Indonesian producers inconsistently with Article 2 of the Anti-Dumping Agreement, Australia collected anti-dumping duties in excess of the actual dumping margin, if any, of the Indonesian producers.[15]

3.2. Indonesia further requests, pursuant to the second sentence of Article 19.1 of the DSU, that the Panel "make use of its discretion to suggest ways in which Australia should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-Dumping Agreement and GATT 1994".[16] Indonesia considers that the measures at issue should be withdrawn.

3.3. Australia requests that the Panel reject Indonesia's claims in this dispute in their entirety.

[13] Australia's first written submission, paras. 87-88; responses to Panel questions Nos. 1(a) and (b) following the first meeting of the Panel; and Indonesia's responses to Panel questions Nos. 1(a) and (b) following the first meeting of the Panel.

[14] Indonesia's response to Panel question No. 1(c) following the first meeting of the Panel, p. 6; Australia's response to Panel question No. 1(c) following the first meeting of the Panel, paras. 5-7.

[15] Indonesia's first written submission, paras. 178-183.

[16] Indonesia's first written submission, para. 185.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their integrated executive summaries, provided to the Panel in accordance with paragraph 24 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of China, the European Union, Japan, the Republic of Korea, the Russian Federation, Thailand, and the United States are reflected in their integrated executive summaries, provided in accordance with paragraph 27 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, and C-7). Canada, Egypt, India, Israel, Singapore, Ukraine, and Viet Nam did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 7 October 2019, Australia submitted written requests for the review of precise aspects of the Interim Report while Indonesia indicated that it does not seek interim review. Neither party requested an interim review meeting. On 10 October 2019, Indonesia submitted comments on Australia's requests for review. Our discussion and disposition of those requests are set out in Annex A-1.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that agreement's provisions in accordance with the customary rules of interpretation of public international law. The principles codified in Articles 31 and 32 of the Vienna Convention are generally accepted as such customary rules.

7.1.2 Standard of review

7.2. Article 11 of the DSU provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

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

7.3. Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the

present dispute. The Appellate Body has explained that when a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings support the overall determination.[17] In reviewing an investigating authority's determination, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation[18] and must take into account all such evidence submitted by the parties to the dispute.[19] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[20]

7.4. In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has clarified that while the text of this provision is couched in terms of an obligation on a panel, in effect it defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.[21] Therefore, a panel must assess if the establishment of the facts by the investigating authority was proper and if the evaluation of those facts by that authority was unbiased and objective.[22] If these broad standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[23]

7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[24] Therefore, as the complaining party in this proceeding, Indonesia bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[25] Finally, it is generally for each party asserting a fact to provide proof thereof.[26]

7.2 Whether the Anti-Dumping Commission's decision to disregard Indonesian producers' domestic sales as the basis for normal value was inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.2.1 Introduction

7.6. Indonesia claims that the ADC's determination of the normal value of A4 copy paper produced by Indah Kiat and Pindo Deli is inconsistent with Article 2.2 of the Anti-Dumping Agreement. In its dumping determination, the ADC used a constructed value, rather than domestic market sales, to determine the normal value. The ADC's disregard of domestic market sales was premised on the finding that the market situation in the Indonesian A4 copy paper market was such that sales in that market were not suitable for use in determining the normal value.[27]

[17] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.
[18] Article 17.5(ii) of the Anti-Dumping Agreement requires a panel to examine the matter based on the facts made available to the authorities.
[19] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[21] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[22] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[23] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[24] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 337.
[25] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[26] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 337.
[27] Final Report, (Exhibit IDN-4), section 6.5, p. 36.

7.7. Indonesia claims the ADC's determination is inconsistent with Article 2.2 of the Anti-Dumping Agreement because the situation found was not a "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement. Separately, Indonesia argues that the ADC acted inconsistently with Article 2.2 by disregarding domestic market sales on this basis, even though a proper price comparison was possible. According to Indonesia, the ADC failed to examine the issue of whether domestic market sales "permit a proper comparison" and, thus, improperly disregarded domestic market sales solely on the basis of finding a "particular market situation" existed. Indonesia further argues that because the basis of the ADC's "particular market situation" finding was distorted input costs, which Indonesia asserts affect both domestic and export prices, the ADC could not possibly find that the disregarded domestic market sales did "not permit a proper comparison", as required by Article 2.2.

7.8. In the sections that follow, we address each of these closely interrelated arguments in turn, after briefly summarizing the relevant facts.[28]

7.2.2 The Anti-Dumping Commission's determination to disregard domestic sales as the basis for normal value

7.9. In the course of the ADC's investigation, Paper Australia Pty Ltd (Australian Paper) claimed that a particular market situation existed in the Indonesian market and, as a result, domestic sales of A4 copy paper in Indonesia were "not suitable for determining normal values" under Australian legislation.[29] The applicant alleged that A4 copy paper prices in Indonesia were artificially low due to the influence of the Government of Indonesia on raw material inputs and subsidies provided during the investigation period.[30]

7.10. The ADC found that a market situation in the Indonesian A4 copy paper market existed such that sales in that market were not suitable for use in determining normal value under Australian legislation.[31] On this basis, the ADC disregarded the domestic sales of Indah Kiat and Pindo Deli in determining the normal value. The ADC's assessment of the alleged market situation in Indonesia for A4 copy paper is set out in section A2.9 ("Market situation in the Indonesian paper market") of Appendix 2 ("Particular market situation findings") of its report and runs for 23 pages.[32] Section A2.2 ("Findings") of Appendix 2 states in full in respect of Indonesia:

> The Commission has found that:
>
> ...
>
> There is a market situation in the Indonesian A4 copy paper market:
>
> The [Government of Indonesia] exerts significant influence over the Indonesian timber and pulp industries through various programs and policies including those relating to provision of land for plantations and an export ban on logs. The Commission considers that these programs and policies have rendered Indonesian domestic A4 copy paper prices unsuitable for determining normal values.[33]

7.11. Section A2.4 ("Framework for assessing market situation claims") of Appendix 2 states, in relevant part:

> The Act does not prescribe what is required to reach a finding of market situation however it is clear that a market situation will arise when there is some factor or factors

[28] Indonesia presents these arguments as two separate claims that the ADC's determination to disregard domestic market sales as the basis for the normal value was inconsistent with Article 2.2 of the Anti-Dumping Agreement. As these arguments relate to the same provision, i.e. Article 2.2 of the Anti-Dumping Agreement, and are closely interrelated, we examine them as such.

[29] Final Report, (Exhibit IDN-4), section 6.5, p. 36.

[30] Final Report, (Exhibit IDN-4), section 6.5, p. 36.

[31] Final Report, (Exhibit IDN-4), section 6.5, p. 36.

[32] Final Report, (Exhibit IDN-4), section A2.9, pp. 165-188.

[33] Final Report, (Exhibit IDN-4), section A2.2, p. 146.

impacting the relevant market in the country of export generally with the effect that sales in that market are not suitable for use in determining normal value.

In considering whether sales are not suitable for use in determining a normal value under [Australian legislation] because of the situation in the market of the country of export the Commission may have regard to factors such as:

- whether the prices are artificially low; or
- whether there are other conditions in the market that render sales in that market not suitable for use in determining prices under [Australian legislation].

Government influence on prices or input costs could be one cause of artificially low pricing. Such government influence could come from any level of government.

In assessing whether a market situation exists due to government influence, the Commission will assess whether government involvement in the domestic market has materially distorted market conditions. If market conditions have been materially distorted then domestic prices may be artificially low or not substantially the same as they would be in a competitive market.

Prices may also be artificially low or lower than they would otherwise be due to government influence on the costs of inputs. The Commission looks at the effect of any such influence on market conditions and the extent to which domestic prices can no longer be said to prevail in a normal competitive market. Government influence on costs will disqualify the associated sales if those costs are shown to affect domestic prices.

The Manual provides further guidance on the circumstances in which the Commission will find that a market situation exists.[34]

7.12. Section A2.9.1 ("Conclusions and findings") of Appendix 2 states, in its entirety:

The Commission concludes that there is a market situation in the Indonesian A4 copy paper market such that the domestic price for Indonesian A4 copy paper is not suitable for the determination of normal values under [Australian legislation]. Findings in support of this conclusion include:

- The [] involvement [of the Government of Indonesia] in forestry and pulp industries through its support for the development of timber plantations and its prohibition on the export of timber logs has directly resulted in the distortion of the domestic price for A4 copy paper; and
- The domestic price of Indonesian A4 copy paper is significantly below comparable regional benchmarks.[35]

7.13. In the course of the investigation, the Government of Indonesia argued the ADC had no basis to make a "particular market situation" finding, citing a lack of evidence in relation to the alleged oversupply of timber or pulp in the Indonesian market.[36] The Government of Indonesia also disputed the relevance of various government policies identified by the ADC, which the Government of Indonesia considered insufficient to support the ADC's conclusion that such policies artificially lowered the price of inputs.[37] Indonesian producers in turn argued that the ADC had no evidence to show that the alleged distortions impacted domestic and export prices differently, thereby resulting in domestic prices being distorted and unsuitable for comparison with export prices.[38] In support of this line of argument, the Government of Indonesia made a submission to the ADC asserting that

[34] Final Report, (Exhibit IDN-4), section A2.4, pp. 147-148.
[35] Final Report, (Exhibit IDN-4), section A2.9.1, p. 165.
[36] Submission of the Government of Indonesia (20 February 2017), (Exhibit IDN-5), p. 5.
[37] Submission of the Government of Indonesia (20 February 2017), (Exhibit IDN-5), p. 5.
[38] Sinar Mas Group's submission (29 December 2016), (Exhibit IDN-15), p. 2. We note that Sinar Mas Group includes three exporters under investigation: Indah Kiat, Pindo Deli and PT Pabrik Kertas Tjiwi Kimia.

the nature of the A4 copy paper process is such that, even if input prices for hardwood timber were distorted, the same inputs were used to manufacture A4 copy paper sold to the Indonesian domestic market and the A4 copy paper exported to the Australian market.[39]

7.14. The ADC responded to the above arguments in its report. The ADC considered that the distortions in the Indonesian forestry industry were demonstrated in the ADC's log pricing assessment and the extent of Indonesia's pulp exports.[40] The ADC indicated that it considered that the distorted supply of timber would have an effect on downstream transactions, notwithstanding whether those transactions take place in competitive markets.[41] Citing the provision of land and the log export ban, the ADC noted that it quantified the distortion in the Indonesian log market and was satisfied that the significant distortions found in that assessment impacted the pulp and paper industries such that domestic sales of A4 copy paper were unsuitable for use in determining normal value.[42] The ADC further responded that a comparative examination of effects on domestic and export prices would be contrary to the legislative scheme, pursuant to which normal values, export prices, and comparison of these are determined under separate sections of Australian legislation.[43] We understand from the ADC's explanation that the decrease in pulp prices and consequently A4 copy paper prices arose from the distortions the ADC found to exist in the Indonesian log market.

7.2.3 Whether the Anti-Dumping Commission's determination of a situation in the market for A4 copy paper was inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.2.3.1 Introduction

7.15. Indonesia maintains that, in disregarding domestic market sales, the ADC relied on a situation with certain features that do not constitute a "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement. In particular, Indonesia argues that the situation relied upon by the ADC cannot qualify as a "particular market situation" because the proper interpretation of that expression necessarily excludes (a) situations where input costs are distorted; (b) situations not having an exclusively unilateral impact on domestic market sales; and (c) situations arising from government action. Indonesia argues that each of these features disqualifies the situation at issue from constituting a "particular market situation" consistent with Article 2.2 of the Anti-Dumping Agreement.

7.16. While Indonesia disputes the underlying factual findings made by the ADC in reaching its market situation determination, Indonesia does not challenge the ADC's establishment and evaluation of the facts except insofar as the ADC's factual findings were guided by an allegedly erroneous understanding of the meaning of the term "particular market situation".[44] Thus, Indonesia's claim turns on the legal interpretation of the term "particular market situation" rather than the factual findings underlying the ADC's determination with respect to the situation found to exist on the domestic market for A4 copy paper in Indonesia.

7.17. With this understanding, we first turn to consider the merits of the interpretative arguments Indonesia has advanced in support of its view that the term "particular market situation", as used in Article 2.2 of the Anti-Dumping Agreement, necessarily excludes the three situations described above.

7.2.3.2 "Particular market situation" is an undefined term in the Anti-Dumping Agreement

7.18. Article 2.2 of the Anti-Dumping Agreement states:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting

[39] Submission of the Government of Indonesia (20 February 2017), (Exhibit IDN-5), p. 4.
[40] Final Report, (Exhibit IDN-4), section A2.9.6.6, p. 184.
[41] Final Report, (Exhibit IDN-4), section A2.9.6.6, p. 184.
[42] Final Report, (Exhibit IDN-4), section A2.9.6.8, p. 185.
[43] Final Report, (Exhibit IDN-4), section A2.9.6.1, pp. 177-179.
[44] Indonesia's opening statement at the first meeting of the Panel, para. 9; responses to Panel questions Nos. 3 and 34 following the first meeting of the Panel, pp. 8-9.

> country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
>
> [2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

7.19. No panel or Appellate Body report has previously interpreted the phrase "particular market situation" as it appears in Article 2.2 of the Anti-Dumping Agreement. A GATT panel did interpret this phrase in a dispute regarding Article 2:4 of the Tokyo Round Anti-Dumping Code in the case *EEC – Cotton Yarn*.[45] The GATT panel rejected Brazil's claim that the European Community (EC) should have discarded domestic market prices because they did not permit a proper comparison due to a "particular market situation" arising from frozen exchange rates imposed to control high inflation. The GATT panel specifically emphasized that the existence of a "particular market situation" alone was not sufficient to discard domestic sales:

> In the Panel's view, the wording of Article 2:4 made it clear that the test for having [recourse to constructed value] was not whether or not a "particular market situation" existed *per se*. A "particular market situation" was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison. … Even assuming *arguendo* that an exchange rate was relevant under Article 2:4, it would be necessary, in the Panel's view, to establish that it affects the domestic sales themselves in such a way that they would not permit a proper comparison.[46]

7.20. Both parties have set forth their understanding of the ordinary meaning of the phrase "particular market situation" in context and in light of the object and purpose of the Anti-Dumping Agreement. Indonesia argues that the provision relates to an "exceptional set of circumstances affecting comparability of domestic market prices in such a way as to affect them unilaterally and, thus, prevent them from being compared to export prices".[47] Australia, by contrast, argues that the proper interpretation of the term "particular market situation" is any condition, state or combination of circumstances in respect of the buying and selling of the like product in the market of the exporting country that is distinguishable and not general.[48] Indonesia argues that Australia's interpretation would expand the circumstances for disregarding domestic market sales in the determination of normal value far beyond what was intended in the Anti-Dumping Agreement.[49] Australia claims that Indonesia seeks to promote a more restrictive interpretation of core terms in the Anti-Dumping Agreement than is warranted.[50] Australia argues that the ordinary meaning of the term "particular market situation" is broad[51], and emphasizes that Article 2.2 makes the application

[45] Article 2:4 of the Tokyo Round Anti-Dumping Code stated:
When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

[46] GATT Panel Report, *EEC – Cotton Yarn*, adopted 30 October 1995, paras. 478-479. (underlining original)

[47] Indonesia's first written submission, para. 72.

[48] Australia's first written submission, paras. 106 and 112.

[49] Indonesia's first written submission, para. 72; second written submission, paras. 9-11.

[50] Australia's first written submission, para. 95.

[51] Australia's first written submission, para. 106.

of alternative means of determining the normal value mandatory if one of the three conditions therein is satisfied, including the condition that incorporates the "particular market situation".[52]

7.21. We begin by observing that a "situation" is a "state of affairs" or a "set of circumstances".[53] This term is qualified by the terms "particular" and "market" functioning as adjectives in Article 2.2 of the Anti-Dumping Agreement. The situation in question must arise in, or relate to the "market"[54], and the market situation must be a "particular" one. It follows from the qualifier "particular" that the market situation must be "distinct, individual, single, specific".[55] Thus, a fact-specific and case-by-case analysis of the particular market situation is necessarily called for. In addition, we agree with the observation of the GATT panel in *EEC – Cotton Yarn* that a "particular market situation" is only relevant insofar as it has the effect of rendering domestic sales unfit to permit a proper comparison.[56] The phrase "particular market situation" does not lend itself to a definition that foresees all the varied situations that an investigating authority may encounter that would fail to permit a "proper comparison". In our view, the drafters' choice to use such a phrase should be treated as a deliberate one. Consequently, while the expression "particular market situation" is constrained by the qualifiers "particular" and "market", it nevertheless cannot be interpreted in a way that comprehensively identifies the circumstances or affairs constituting the situation that an investigating authority may have to consider.

7.22. There is no dispute between the parties that the underlying circumstances in this case concern or relate to the market for A4 copy paper. However, they disagree as to what makes a situation *particular*. Indonesia argues that the circumstances must be *exceptional* and, moreover, affect "the comparability of domestic market prices in such a way as to affect them unilaterally and, thus, prevent them from being compared to export prices".[57] Australia argues that the circumstances must be distinguishable and not general.[58] In our view, the market situation must be distinct, individual, single, specific but that does not necessarily make it unusual or out of the ordinary — i.e. exceptional.[59]

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[52] Australia's first written submission, para. 101.

[53] Oxford Dictionaries online, definition of "situation" http://www.oed.com/view/Entry/180520?redirectedFrom=situation (accessed 16 September 2019).

[54] Oxford Dictionaries online, definition of "market" https://www.oed.com/view/Entry/114178?rskey=Cd0jFA&result=1#eid (accessed 16 September 2019):
"market, n."
II. Trade, business, and other extended uses.
4. a. The action or business of buying and selling; a commercial transaction, a purchase or sale; a (good or bad) bargain. Now hist. and Sc.
6. A geographical area of commercial activity; the potential demand for a commodity or service provided by such an area. Now also: the potential demand for a commodity or service within a demographic group; the commercial activity of such a group in total. Frequently with the area or group specified. See also home market n.
7. a. Sale as controlled by demand; esp. the demand for a commodity, product, etc. Now also concr.: those people who form the demand for a particular product, commodity, or service. Also fig.
8. a. The arena in which commercial dealings in a particular commodity or product are conducted; the trade in a particular commodity or product. on (also in) the market: offered for sale. to put (something) on the market: to offer for sale. Also fig. Frequently with commodity or product specified (either attributive or with in); for common collocations, as art, land, money, property market: see the first element. See also stock-market n.
b. The state of trade in a commodity or product at a particular time or in a particular context; esp. the condition of trade with respect to demand. Also with commodity or product specified (see sense 8a).

[55] Oxford Dictionaries online, definition of "particular" http://www.oed.com/view/Entry/138260?rskey=Ssayz3&result=1&isAdvanced=false (accessed 16 September 2019).

[56] GATT Panel Report, *EEC – Cotton Yarn*, adopted 30 October 1995, paras. 478-479.

[57] Indonesia's first written submission, para. 72.

[58] Australia's first written submission, paras. 97-112.

[59] We note that the phrase "particular market situation", as used in the English version of Article 2.2 of the Anti-Dumping Agreement, is further qualified by the definite article "the"; the phrase "situación especial del Mercado" as used in the Spanish version of Article 2.2 of the Anti-Dumping Agreement, is further qualified by the indefinite Article "una"; and in the French version of Article 2.2 of the Anti-Dumping Agreement, the phrase "situation particulière du marché" is qualified by the definite Article "la". The parties agree that whether the

7.23. In the following subsections, we address three specific arguments of Indonesia in respect of the interpretation of the phrase "particular market situation".

7.2.3.3 Situations that distort input costs

7.24. We first address Indonesia's contention that a correct interpretation of "particular market situation" necessarily excludes situations that distort input costs, specifically situations that lower input costs. We observe that Indonesia makes two arguments in this respect. The first relates to the alleged incapability of low input costs to prevent a proper comparison.[60] The second relates to silence in the negotiating history of the "particular market situation" condition in contrast to historical discussions around the issue of "input dumping".[61] We address these arguments in turn.

7.25. Indonesia argues that "a 'particular market situation' must render domestic prices unfit for comparison to export prices". Moreover, according to Indonesia, "[w]hen low priced inputs are used to produce merchandise for domestic sales and export [sales] in the exact manner prices remain comparable".[62] Indonesia reasons that its interpretation of "particular market situation" takes account of the context provided by the proximity of the phrase "not permit a proper comparison".[63] On this basis, Indonesia asks the Panel to rule on the "specific issue of whether a low-price input used identically to produce merchandise for the domestic and export markets can constitute a 'particular market situation'".[64] In this respect, Indonesia asserts that "a 'particular market situation' … must be *capable* of preventing a proper comparison of domestic to export prices".[65] A situation of a low-priced input identically used in the production for export and domestic sales categorically does not have this capability, according to Indonesia.[66] Indonesia asserts that in this situation the price of domestic sales and exports would be equally affected.[67] Accordingly, Indonesia argues that the prevention of a proper comparison cannot arise "because of" this type of situation.[68]

7.26. Australia submits that Indonesia's interpretation conflates the condition "particular market situation" with the condition "not permit a proper comparison" such that part of the analysis of whether "such sales do not permit a proper comparison" becomes an integral part of the "particular market situation" analysis.[69]

7.27. In our assessment, the phrases "particular market situation" and "permit a proper comparison" function together to establish a condition for disregarding domestic market sales as the basis for normal value. Specifically, that domestic sales "do not permit a proper comparison" must be "because of the particular market situation". If domestic sales *do* permit a proper comparison, then they cannot be disregarded as the basis for normal value, regardless of the existence of the particular market situation and its effects, whatever those may be. We find no functional purpose is served by incorporating into the meaning of "particular market situation" part of the function that will necessarily be served by the terms "because of" and "not permit a proper comparison". Accordingly, we find that "capable of preventing a proper comparison" is not a necessary qualification for a situation to constitute the "particular market situation". Indeed, incorporating such a meaning into the term "particular market situation" would alter the functioning of this provision. Thus, we find that the term "particular market situation" does not require or contemplate an analysis relating to the capability of causing domestic sales to not permit a proper comparison in the abstract. Rather,

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article is definite or indefinite should be assigned no particular significance for purposes of interpreting the phrase "particular market situation" in this dispute. Likewise, we do not find it necessary to draw any conclusions from the use of the definite or indefinite articles before the phrase "particular market situation" for the purposes of this dispute. (Indonesia's response to Panel question No. 25 following the second meeting of the Panel, paras. 66-67; Australia's response to Panel question No. 25 following the second meeting of the Panel, paras. 124-126).

[60] Indonesia's first written submission, paras. 73-78.

[61] Indonesia's first written submission, paras. 58-71.

[62] Indonesia's first written submission, para. 77.

[63] Indonesia's opening statement at the second meeting of the panel, paras. 3 and 24.

[64] Indonesia's responses to Panel question No. 2(b) following the first meeting of the Panel, p. 8.

[65] Indonesia's responses to Panel question No. 2(a) following the first meeting of the Panel, p. 7. (emphasis original)

[66] Indonesia's responses to Panel question No. 2(a) following the first meeting of the Panel, p. 7; second written submission, paras. 18-19.

[67] Indonesia's second written submission, paras. 15-16.

[68] Indonesia's second written submission, para. 18.

[69] Australia's second written submission, para. 51.

the terms "because of" and "not permit a proper comparison" in Article 2.2 already properly and adequately fulfil this function.

7.28. Turning to the specific issue posited by Indonesia of a low-priced input used identically to produce merchandise for the domestic and export markets[70], we are again unpersuaded that a categorical disqualification from constituting the "particular market situation" can be sustained as a matter of interpretation. We understand that Indonesia is arguing that a situation that equally affects the cost of producing merchandise for sale in domestic and export markets will necessarily equally affect the sales prices in both markets and will, therefore, permit a proper comparison between domestic market sales and export sales. First, we find no legitimate interpretative basis for incorporating this proposed meaning into the term "particular market situation", particularly where such considerations are more appropriately examined in relation to the terms "because of" and "permit a proper comparison" as suggested by the above analysis. Second, we do not accept as a given that an equal impact on cost of merchandise produced for domestic and export markets would *necessarily* affect sales prices in both markets equally such that a proper comparison between domestic sales and export sales would not be prevented. We consider that these assertions are not appropriate elements for an interpretation of the term "particular market situation", but rather are better suited to an analysis of whether domestic sales do not permit a proper comparison *because of* a particular market situation identified by an investigating authority. We will return to these points in our examination of Indonesia's arguments relating to the meaning of the term "permit a proper comparison".

7.29. Indonesia argues that the negotiating history of the 1967 Anti-Dumping Code and subsequent negotiations that maintained the term "particular market situation" as it now appears in Article 2.2 of the Anti-Dumping Agreement confirm that the "particular market situation" provision cannot be used to address distortions in the cost of inputs.[71] Indonesia contrasts the discussion that was generated by the issue of "input dumping" with the silence in the negotiating history in connection with the "particular market situation" provision.[72] Indonesia cites the 1984 paper of the Ad-Hoc Group on Implementation of the Anti-Dumping Code ("Draft Recommendation Concerning Treatment of the Practice Known as Input Dumping") as demonstrating that input cost issues have generated active discussions without resulting in any agreement to regulate "input dumping".[73] In contrast, Indonesia refers to silence in the negotiating history regarding the inclusion of the phrase "particular market situation" in the 1967 Anti-Dumping Code and continued silence in subsequent negotiating history when use of the phrase was continued.[74] Indonesia argues that if the terms "particular market situation" had been intended to apply to situations of low-priced inputs, their inclusion in the 1967 Anti-Dumping Code and in subsequent anti-dumping agreements would have generated a more active discussion as could be observed when the issue of "input dumping" was discussed.[75]

7.30. Australia argues that "input dumping" is not at issue in this case, and in any event the "Draft Recommendation Concerning Treatment of the Practice Known as Input Dumping" cited by Indonesia was never adopted by the Committee on Anti-Dumping Practices.[76] In regard to negotiating history, Australia argues there is no basis in the rules of treaty interpretation to claim that "silence in the negotiating history" supports a narrow interpretation of "particular market situation".[77]

7.31. We note that under the customary rules of interpretation, preparatory work, including negotiating history and certain other materials, are supplementary means of interpretation and have relevance only to confirm the meaning reached by the interpreter, or to determine the meaning when the ordinary meaning, context and object and purpose of a particular provision give rise to an interpretation that is ambiguous or obscure or leads to a result that is absurd or unreasonable.[78] We

[70] We note that Australia denies that this description accurately characterizes the situation the ADC found to exist in respect of the A4 copy paper market in Indonesia. For purposes of testing Indonesia's interpretive legal theory in connection with this aspect of Indonesia's claim, it is not necessary for us to resolve this factual issue.

[71] Indonesia's first written submission, paras. 58-71.

[72] Indonesia's first written submission, paras. 68-71.

[73] Indonesia's first written submission, para. 69 (referring to Draft Recommendation Concerning Treatment of the Practice Known as Input Dumping, ADP/W/83/Rev.2).

[74] Indonesia's first written submission, paras. 59-68.

[75] Indonesia's first written submission, paras. 68-71.

[76] Australia's first written submission, para. 160.

[77] Australia's first written submission, para. 159.

[78] Articles 31 and 32 of the Vienna Convention.

do not consider that the meaning of the phrase "particular market situation" is ambiguous or obscure or that it leads to a result that is absurd or unreasonable. Therefore, it is not necessary to resort to supplementary materials in order to confirm or determine the meaning of the phrase "particular market situation". In any event, we note that the "Draft Recommendation Concerning Treatment of the Practice Known as Input Dumping" defined the issue it was addressing as "where materials or components that are used in manufacturing an exported product are purchased at … dumped or below cost prices". We find the issue addressed by the paper, i.e. below cost or dumped inputs for exported product, is distinctly different from the situation at issue in this dispute, i.e. a situation that decreases input cost of the product under consideration in an anti-dumping investigation. Furthermore, the paper does not address the meaning of "particular market situation", and the silence surrounding the inclusion of the phrase does not allow us to draw any conclusions as to the meaning of it.

7.32. In the light of the above examination, we find that Indonesia has failed to demonstrate that a situation of a low-priced input used identically to produce merchandise for the domestic and export markets is necessarily disqualified from constituting a "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement. Accordingly, the mere fact that the ADC's finding of a "particular market situation" was based, in part, on the existence of low input prices does not render that finding inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.2.3.4 Situations not having an exclusively unilateral impact on domestic market sales

7.33. We next address Indonesia's submission that a correct interpretation of "particular market situation" necessarily excludes situations not having an exclusively unilateral impact on domestic market sales.

7.34. Indonesia argues that the phrase "particular market situation" is correctly interpreted to mean "an exceptional set of circumstances affecting comparability of domestic market prices in such a way as to affect them unilaterally and, thus, prevent them from being compared to export prices".[79] Indonesia finds support for this interpretation in the understanding that "market" connotes that the situation is "taking place in a geographic region"[80], and that "market" is used in the singular rather than the plural, suggesting that the situation relates to the domestic market only.[81] In Indonesia's understanding, a particular market situation, correctly interpreted, must have an "effect [that] is one-sided and on the domestic market".[82] In Indonesia's view, a situation that affects the domestic market significantly, but export markets less so cannot be a "particular market situation" because the impact on prices must be exclusively unilateral.[83] Indonesia argues that the other two bases in Article 2.2 of the Anti-Dumping Agreement for disregarding domestic sales (i.e. sales outside of the ordinary course of trade and low volume sales) both concern circumstances affecting sales in the *domestic* market, and neither situation relates to circumstances that also affect export prices.[84] Indonesia considers that an exclusively unilateral effect is a common element of these other two bases for disregarding domestic sales, and Indonesia argues that this supports the argument that the "particular market situation" should also be interpreted to exclude situations that do not have an exclusively unilateral effect on domestic prices.[85]

7.35. Australia argues that the ordinary meaning of "particular market situation" does not incorporate the concept of "unilateral" or anything like it.[86] According to Australia, Indonesia erroneously asserts that the other conditions in Article 2.2 could not "also affect export prices", are "one-sided" and are "[only] on the domestic market".[87] Australia claims that it is quite possible for there to be export sales that are, in whole or in part, not in the ordinary course of trade or exhibit "low volume".[88] Australia argues that examination of the existence of each of the conditions focuses on the domestic market exclusively, with no requirement to consider whether export sales are

[79] Indonesia's first written submission, para. 72.
[80] Indonesia's first written submission, para. 37.
[81] Indonesia's first written submission, para. 38.
[82] Indonesia's first written submission, para. 40.
[83] Indonesia's response to Panel question No. 5 following the first meeting of the Panel, p. 11.
[84] Indonesia's first written submission, paras. 39-40.
[85] Indonesia's first written submission, para. 40.
[86] Australia's first written submission, para. 158.
[87] Australia's first written submission, paras. 166-167.
[88] Australia's first written submission, paras. 164-166.

similarly affected.[89] Australia submits, in terms of context, that a "particular market situation" is a condition co-located with two other conditions that comprise specific circumstances in respect of sales of the like product in the market of the exporting country.[90] Australia maintains that the existence of a particular market situation is unaltered by whether it affects prices in the domestic market exclusively, affects prices in the domestic market and export market differently, or affects prices in the domestic market and export market identically.[91] Australia considers the impact on export prices to be irrelevant to the determination of particular market situation, which Australia argues is focused instead on whether a situation causes "such sales" (i.e. domestic market sales) to "not permit a proper comparison".

7.36. We consider that the text of Article 2.2 confirms that this provision, including the "particular market situation", is focused on the domestic market. Article 2.2, in relevant part, reads:

> When there are no sales of the like product in the ordinary course of trade *in the domestic market* of the exporting country or when, because of the particular *market* situation or the low volume of the sales *in the domestic market* of the exporting country, *such sales* do not permit a proper comparison ...[92]

7.37. The word "market" in "the particular market situation" refers to the domestic market because the term "such sales" refers to domestic market sales that may be rendered unfit to permit a proper comparison, as we will explain further below. In our view, however, it does not follow that a situation arising in the domestic market of the exporting country that affects domestic sales in such a way that does not permit a proper comparison cannot be considered to constitute "the particular market situation" simply because it also affects export sales. We do not consider the presence of some effect on export sales automatically forecloses the possibility that the effect on domestic sales will, nevertheless, be such that a proper comparison is not permitted. As we will discuss in relation to Indonesia's argument in respect of the interpretation of "permit a proper comparison", the "proper comparison" language allows for an assessment of the relative effect upon domestic and export sales of the "particular market situation". Incorporating the requirement of an exclusively unilateral effect into the phrase "particular market situation", as Indonesia suggests, would, in our view, deprive the "permit a proper comparison" language of its intended function.

7.38. We note that Article 2.2 uses the term "sales" three times. The first use of the term is in the phrase "no sales of the like product in the ordinary course of trade in the domestic market of the exporting country". The second time the word is used, it also refers to "the sales *in the domestic market".* It follows therefore that the third use of the term "sales" in the phrase "such sales" equally refers to the sales in the domestic market. This conclusion is supported by the structure of the sentence in Article 2.2. The main clause of Article 2.2 is conditionally operative, and two subordinate clauses set forth the conditions for the main clause being operative. The main clause can be simplified as follows: *The margin of dumping shall be determined by comparison with the comparable price of the like product when exported to an appropriate third country or with the cost of production in the country of origin.*[93] The subordinate clauses modify the verb "shall be determined". The first subordinate clause tells us that the main clause is operative *when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country*. The qualifier "such" in the phrase "such sales" in the second subordinate clause makes clear that the reference is to "sales of the like product in the ordinary course of trade in the domestic market of the exporting country" mentioned in the first subordinate clause. The second subordinate clause pertains to when sales of the like product in the ordinary course of trade in the domestic market of the exporting country are present but do not permit a proper comparison of the domestic sales price with the export price for one of the two reasons: (i) because of the particular market situation, or (ii) because

[89] Australia's first written submission, paras. 166-167.

[90] Australia's first written submission, paras. 102-103; see also paras. 141-142 (Australia arguing that "particular market situation" and sales outside the ordinary course of trade are "both situations [that] relate to determining whether the domestic price is suitable to use as the basis for the 'normal value'" and that similar factors are relevant for determining whether domestic sales "permit a proper comparison"); response to Panel questions Nos. 22 and 23 following the second meeting of the Panel, paras. 118-120.

[91] Australia's response to Panel question No. 6 following the first meeting of the Panel, paras. 25-26.

[92] Emphasis added; fn omitted.

[93] The full text of the main clause is: "the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

of their low volume in the domestic market of the exporting country. This confirms also that the word "market" in "the particular market situation" refers to the "*market of the exporting country*", i.e. the domestic market, as we stated above.

7.39. We are also not persuaded that the other bases for disregarding domestic market sales as a basis for normal value support Indonesia's suggested interpretation. First, in our view, none of the underlying phenomena appear to be inherently restricted to impact domestic sales exclusively. High production costs during a period could result in all domestic sales being below cost and therefore outside the ordinary course of trade making the "no sales in the ordinary course of trade" provision applicable despite the fact that export sales may also be affected. Second, the "low volume of sales in the domestic market" condition in the first instance is measured in relation to the volume of export sales such that the phenomenon of low volume of sales in the domestic market may well arise as a consequence of a relatively high volume of sales in the export market. The language of Article 2.2 focuses on domestic market sales simply for the reason that the provision is concerned with whether the domestic market sales are an appropriate basis for determining normal value, not because the effects of the underlying phenomena are necessarily exclusively unilateral in nature.

7.40. In the light of the above examination, we find that Indonesia has failed to demonstrate that a domestic market situation that does not impact domestic sales unilaterally (i.e. that also, in some way, impacts export sales) cannot constitute the "particular market situation", within the meaning of Article 2.2. To this extent, there is no legal basis to support Indonesia's claim that the ADC's "particular market situation" finding was inconsistent with Article 2.2 because it rests on a factual finding concerning a situation that allegedly did not exclusively affect domestic sales.

7.2.3.5 Situations arising from government action

7.41. We next address Indonesia's argument that a situation arising from government action is necessarily disqualified from constituting the "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement.

7.42. Indonesia argues that it is impermissible to interpret the terms "particular market situation" in a way that interjects the Anti-Dumping Agreement "into the sphere of regulating government behaviour which is expressly regulated in the [Agreement on Subsidies and Countervailing Measures (SCM Agreement)]".[94] Indonesia further argues that Australia's action amounted to "specific action against a subsidy" and that the prohibition of such action under Article 32.1 of the SCM Agreement should be read as context to limit the scope of the term "particular market situation" to exclude situations arising from government action.[95]

7.43. Australia agrees that, in accordance with customary rules of treaty interpretation, the provisions of the SCM Agreement may be relevant context to the interpretation of the Anti-Dumping Agreement.[96] Australia argues, however, that Article 32.1 of the SCM Agreement does not support Indonesia's argument because it does not preclude specific action against dumping where the constituent elements of dumping are found, irrespective of whether the dumping arises from a subsidy.[97] According to Australia, footnote 56 of the SCM Agreement clarifies this understanding of Article 32.1 of the SCM Agreement, and the Appellate Body in *US − Offset Act (Byrd Amendment)* has confirmed this interpretation.[98]

7.44. We understand footnote 56 of the SCM Agreement and Article 18.1 of the Anti-Dumping Agreement to provide that Article 32.1 of the SCM Agreement does not prevent application of anti-dumping duties to a situation where, in addition to fulfilment of the other required elements under the Anti-Dumping Agreement, the export price is found to be less than normal value, even if the reason for the difference can be traced to a subsidy. Article 32.1 of the SCM Agreement reads:

[94] Indonesia's first written submission, para. 46.
[95] Indonesia's response to Panel question No. 10(d) after the first meeting of the Panel, p. 15.
[96] Australis's second written submission, para. 126.
[97] Australia's second written submission, paras. 128-133.
[98] Australia's second written submission, paras. 128-138 (referring to Appellate Body Report, *US − Offset Act (Byrd Amendment)*, para. 262.

> No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

7.45. Footnote 56, clarifying Article 32.1 of the SCM Agreement, reads:

> This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

7.46. Article 18.1 of the Anti-Dumping Agreement reads:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

7.47. The GATT 1994 and the Anti-Dumping Agreement authorize specific action against dumping of exports where the requisite elements are satisfied, irrespective of whether the exports at issue also benefit from a subsidy. This action does not constitute specific action against a subsidy under Article 32.1 of the SCM Agreement because the authority to take the specific action derives from the satisfaction of the requisite elements for specific action against dumping of exports. The converse analysis is equally applicable in relation to specific action against a subsidy and in connection with Article 18.1 of the Anti-Dumping Agreement, irrespective of whether the subsidy benefits exports that may also be dumped. In this way, Article 32.1 of the SCM Agreement and Article 18.1 of the Anti-Dumping Agreement are interpreted harmoniously with each other. This understanding is confirmed by the clarification provided in footnote 56 of the SCM Agreement (and the corresponding footnote 24 of the Anti-Dumping Agreement). Specific action against dumping of exports constitutes "action under other relevant provisions of GATT 1994, as appropriate" in the meaning of footnote 56 of the SCM Agreement. Therefore, Article 32.1 of the SCM Agreement is not intended to preclude such action.

7.48. In our view, this understanding is consistent with the reasoning offered by the Appellate Body in *US – Offset Act (Byrd Amendment)*:

> [A]ction is specific to dumping (or a subsidy) when it may be taken *only* when the constituent elements of dumping (or a subsidy) are present[.] … Footnotes 24 and 56 are clarifications of the main provisions, added to avoid ambiguity; they confirm what is implicit in Article 18.1 of the Anti-Dumping Agreement and in Article 32.1 of the SCM Agreement, namely, that an action that is not "specific" within the meaning of Article 18.1 of the Anti-Dumping Agreement and of Article 32.1 of the SCM Agreement, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the SCM Agreement.[99]

7.49. As an initial point, we note that, to the extent Indonesia suggests that a "particular market situation" finding could constitute a "specific action" within the meaning of Article 32.1 of the SCM Agreement such that Article 32.1 acts to constrain the scope of situations that can be examined under this provision of Article 2.2 of the Anti-Dumping Agreement[100], we disagree because a "particular market situation" finding is not an action. Rather, such a finding is merely one element in a determination of whether the criteria in the Anti-Dumping Agreement for imposing an anti-dumping measure are satisfied. A finding of "particular market situation" on its own and in isolation does not entail any consequences that could be characterized as an action against a subsidy.[101]

7.50. In light of the above Appellate Body interpretation of Article 32.1 of the SCM Agreement, an anti-dumping measure taken in accordance with the Anti-Dumping Agreement and Article VI of the GATT 1994 would not be precluded by the operation of Article 32.1 of the SCM Agreement. Our task here is to determine whether Indonesia has demonstrated that the challenged measures are inconsistent with Article 2.2 of the Anti-Dumping Agreement. If the answer is affirmative, this may

[99] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 262.

[100] Indonesia's response to Panel question No. 10(d) following the first meeting of the Panel, pp. 15-16.

[101] We recall that Indonesia's panel request and our terms of reference do not include a claim under Article 32.1 of the SCM Agreement. We therefore refrain from considering Indonesia's arguments that the challenged measures are inconsistent with Article 32.1 of the SCM Agreement. (Indonesia's response to Panel question No. 10(d) following the first meeting of the Panel, pp. 15-16).

have implications in relation to Article 32.1 of the SCM Agreement, but Article 32.1 of the SCM Agreement does not assist us in making the relevant determination before us in respect of Article 2.2 of the Anti-Dumping Agreement. We are not persuaded, therefore, by Indonesia's argument that Article 32.1 of the SCM Agreement supports interpreting the term "particular market situation" to exclude situations that arise from circumstances that include government action that could be characterized as a subsidy if it were examined under the SCM Agreement. For greater clarity, we are not here finding that the question of whether a situation at issue that constitutes a subsidy under the SCM Agreement is relevant or irrelevant to the necessarily fact-specific and case-by-case analysis of whether a set of circumstances constitutes a particular market situation.

7.51. Indonesia also argues that there is a general principle that under the GATT 1994 and the Anti-Dumping Agreement the anti-dumping remedy is not concerned with government action, except where specific provisions expressly define an exception to this general principle.[102] Indonesia argues that Article VI:5 of the GATT 1994 ("same situation of dumping or export subsidization"), the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 ("multiple currency practices"), the second *Ad* Note to Article VI:1 of the GATT 1994 ("all domestic prices fixed by the State"), and Article 2.7 of the Anti-Dumping Agreement (referring to the second *Ad* Note to Article VI:1 of the GATT 1994) are narrow and clearly defined express exceptions from the general principle that the Anti-Dumping Agreement is not concerned with government action.[103] In support of its position, Indonesia cites the following reasoning of the panel in *EU – Biodiesel (Argentina)* in regards to the provision on multiple currency practices[104]:

> We therefore see no reason to extrapolate from this provision that the concept of "dumping" is generally intended to cover any distortion arising out of government action or circumstances such as those surrounding Argentina's export tax system and its impact on soybean prices as an input material for biodiesel.[105]

7.52. Australia counters that the panel in *EU – Biodiesel (Argentina)* was responding to the EU argument that the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 ("multiple currency practices") was relevant to the second condition of Article 2.2.1.1 ("reasonably reflect the costs associated with the production and sale"), and not in relation to the meaning of "particular market situation".[106] Australia argues that the term "particular market situation" does not include any language indicating that the situation must be independent of any government intervention.[107] Australia further argues that government action is not exclusively covered by the SCM Agreement, and that government intervention that results in market distortion can render the domestic price not suitable to determine the normal value and preclude a proper comparison.[108] Australia argues that the examples given by the second *Ad* Note to Article VI:1 of the GATT 1994 and Article 2.7 of the Anti-Dumping Agreement demonstrate that government actions are relevant to the determination of dumping consistent with the Anti-Dumping Agreement.[109] Australia also argues that the possibility of "double remedies" arising as demonstrated in *US – Anti-Dumping and Countervailing Duties (China)* and in connection with the situation described in Article VI:5 of the GATT 1994 ("same situation of dumping or export subsidization"), is directly contrary to Indonesia's argument that the effects of subsidies cannot be remedied under the Anti-Dumping Agreement.[110]

7.53. We are not persuaded of the existence of the general principle that Indonesia proposes. We note that the proposed general principle that anti-dumping measures otherwise available in accordance with the provisions of the GATT 1994 and the Anti-Dumping Agreement are nevertheless precluded where the difference, or part of the difference, between export price and normal value can be traced to government action is not found explicitly expressed in any text of the Anti-Dumping Agreement or the SCM Agreement. In light of our prior analysis in connection with the express provisions of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement and their clarifying footnotes, we find it implausible that such a general principle

[102] Indonesia's response to Panel question No. 10(a) following the first meeting of the Panel, pp. 13-14.
[103] Indonesia's response to Panel question No. 10(b) following the first meeting of the Panel, p. 14.
[104] Indonesia's response to Panel question No. 10(b) following the first meeting of the Panel, p. 14.
[105] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.240.
[106] Australia's second written submission, paras. 144-145.
[107] Australia's second written submission, para. 143.
[108] Australia's first written submission, paras. 161 and 135-139.
[109] Australia's first written submission, paras. 135-139.
[110] Australia's response to Panel question No. 26 following the first meeting of the Panel, paras. 64-67.

with preclusive effect on the scope of application of the Anti-Dumping Agreement would exist without an express basis in the text of either the Anti-Dumping Agreement or the SCM Agreement. Moreover, we find support in the text of Article VI:5 of the GATT 1994 for a contrary inference that is consistent with our prior analysis. Article VI:5 of the GATT 1994 provides:

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

7.54. We are not convinced by Indonesia's assertion that the existence of the proposed general principle can be inferred from the understanding that Article VI:5 constitutes an express exception to the general principle. We find that the text of Article VI:5 of the GATT 1994 does not support this claim. The provision does not contain any language to authorize application of anti-dumping duties to the situation of a price difference that constitutes dumping that arises from the situation of an export subsidy. Rather, Article VI:5 prohibits the "double remedy" of applying anti-dumping duties and countervailing duties to remedy twice the situation where an export subsidy creates a difference between export price and normal value that constitutes dumping. Article VI:5 does not authorize the imposition of anti-dumping duties that would otherwise be precluded by operation of Indonesia's proposed general principle. Instead, Article VI:5 creates a prohibition of "double remedies" to address a specific situation that arises only on the basis of an implicit assumption that anti-dumping duties could have been applied by reason of the price difference that constitutes dumping despite the fact that the same situation is also understood to constitute export subsidization. In other words, Article VI:5 represents a narrow exception to the general principle that anti-dumping duties and countervailing duties may be applied whenever the criteria set forth in the GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement are satisfied. This contradicts Indonesia's argument that Article VI:5 represents an express authorization and exception to a more general rule that dumping arising from government action cannot be addressed by the provisions of the Anti-Dumping Agreement. At the same time, we do not take the view whether government action that affects the market for the domestic like product can be addressed by treating government action as a sufficient condition for finding that a "particular market situation" exists. As we concluded in our above examination of "particular market situation", a fact-specific and case-by-case analysis of the particular market situation is necessarily called for.

7.55. Our reasoning is consistent with the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* where it was found that "double remedies" may also arise in connection with countervailing *domestic* subsidies and simultaneous application of a non-market economy (NME) methodology.[111] We find nothing in the reasoning of the Appellate Body in that case to suggest that the anti-dumping duties at issue in that dispute were precluded by reason of the existence of a general principle that the Anti-Dumping Agreement does not afford a remedy in circumstances where the difference between export price and normal value can be traced to a domestic subsidy. Rather, the anti-dumping duties were understood to be authorized under the Anti-Dumping Agreement, and to the extent that the difference between export price and normal value was attributable to the differential impact of the domestic subsidy on the export price and the normal value, this amount was deducted pursuant to Article 19.3 of the SCM Agreement from the "appropriate amount" that could be included in any countervailing duties applied to remedy the same subsidy.[112]

7.56. In the light of the above examination, we find that Indonesia has failed to demonstrate that a situation arising from government action in whole or in part is *necessarily* disqualified from constituting the "particular market situation", within the meaning of Article 2.2 of the Anti-Dumping Agreement. Accordingly, the mere fact that the ADC's finding of a "particular market situation" was based, in part, on certain Indonesian government policies affecting the timber and pulpwood sector, does not render that finding inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.2.3.6 Conclusion in respect of "particular market situation"

7.57. On the basis of the above findings, we determine that Indonesia has not demonstrated that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement when it found that a "particular market situation" existed in the Indonesian

[111] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 541.
[112] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 582.

domestic market for A4 copy paper. Indonesia's arguments have not persuaded us that a domestic market situation resulting in a lower cost for an input used to produce both exported and domestically sold product is necessarily excluded from constituting "the particular market situation". Nor are we persuaded that, as a general proposition, any situation which has or may have some impact on export sales in addition to domestic market sales is necessarily excluded from constituting "the particular market situation" because we consider that, in at least some cases, differences in the impact on domestic and export sales could prevent a proper comparison. Finally, we are also not persuaded that "the particular market situation" referenced in this provision necessarily excludes any situation that arises from a subsidy or other governmental action.

7.2.4 Whether the Anti-Dumping Commission properly determined that domestic market sales did "not permit a proper comparison"

7.2.4.1 Introduction

7.58. Indonesia asserts that, in disregarding domestic market sales, the ADC failed to make, or properly make, a determination that the domestic market sales affected by the particular market situation did "not permit a proper comparison", as required by Article 2.2 of the Anti-Dumping Agreement.[113]

7.59. The principal difference in the parties' interpretations of "permit a proper comparison" is that under Australia's interpretation it is sufficient to determine that domestic sales are "not suitable" for use as the basis for normal value[114], whereas under Indonesia's interpretation a comparison of domestic and export prices is required.[115] In view of this difference of interpretation, the parties dispute whether the ADC's determination to disregard domestic sales was inconsistent with Article 2.2.

7.60. As with its arguments in connection with "particular market situation", Indonesia is not here challenging the ADC's establishment and evaluation of the facts except insofar as the ADC's factual findings were guided by an allegedly erroneous understanding of the meaning of the phrase "permit a proper comparison".[116] Thus, Indonesia's argument turns in the first instance on the legal interpretation of the phrase "permit a proper comparison".

7.61. We first examine whether Indonesia's interpretative arguments demonstrate that the phrase "permit a proper comparison", as used in Article 2.2 of the Anti-Dumping Agreement, requires an investigating authority to examine whether the particular market situation found to exist affects export prices, in addition to domestic prices, in such a way that does not permit a proper comparison between the export price and the domestic price. We then evaluate the merits of Indonesia's argument that in any case such a requirement arises in the circumstance where a low-priced input is used identically to produce merchandise for domestic and export markets. Finally, we apply the proper interpretation to the relevant facts to determine whether the ADC's determination is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.2.4.2 Requirement to account for effects on export prices by the particular market situation when determining whether "a proper comparison" is permitted

7.62. We examine Indonesia's claim in respect of the interpretation of the phrase "permit a proper comparison" within the meaning of Article 2.2 of the Anti-Dumping Agreement. Indonesia asks the Panel to adopt an interpretation of "permit a proper comparison" which requires a consideration of the effect on both domestic prices and export prices.[117] The essential point of disagreement between the parties is whether, in the circumstances of this case, domestic sales prices, found to be distorted, will nevertheless permit a proper comparison with export prices and cannot, therefore, be

[113] Indonesia's first written submission, para. 115; opening statement at the first meeting of the Panel, paras. 26-29.
[114] Australia's first written submission, paras. 118-148; second written submission, paras. 80-93.
[115] Indonesia's first written submission, paras. 80-122; second written submission, paras. 32-38.
[116] Indonesia's opening statement at the first meeting of the Panel, para. 9; responses to Panel questions Nos. 3 and 34 following the first meeting of the Panel, pp. 8-9.
[117] Indonesia's second written submission, paras. 22 and 32-38.

disregarded as a basis for normal value. Australia disagrees that the distorted domestic sales prices in question can be suitable for use as a basis for normal value.[118]

7.63. Indonesia argues that, even if a "particular market situation" has properly been found to exist, Article 2.2 requires an investigating authority to use domestic sales prices as the normal value if domestic sales of the like product in the ordinary course of trade permit a proper comparison with the export price.[119] Australia agrees with Indonesia that, before discarding domestic market sales as a basis for determining normal value, it is necessary to determine that domestic market sales "do not permit a proper comparison" because of the particular market situation.[120] Thus, the parties appear to agree that, in addition to a finding that the particular market situation exists, Article 2.2 also requires a distinct finding that the domestic sales "do not permit a proper comparison" because of the particular market situation. We proceed to examine the content of that requirement.

7.64. Indonesia argues that the term "proper comparison" must be understood in respect of the usual comparison described in Article 2.1 between prices of domestic market sales and export prices to determine if dumping exists.[121] Indonesia argues that while a particular market situation may be capable of preventing proper price comparisons just like a low volume of sales may be, Article 2.2 requires the investigating authority in both scenarios to make an evidentiary finding.[122] Indonesia asks the Panel to agree that Article 2.2 requires an evidentiary finding whether an individual exporter's domestic prices can properly be compared to that individual exporter's export prices even where it is demonstrated that the domestic prices have been affected by the particular market situation.[123] According to Indonesia, because the proper comparison is between the individual producer's domestic and export prices, whether a proper comparison is permitted cannot be determined by examining only the domestic sales.[124] Indonesia notes the reasoning of the Appellate Body that "dumping" and "margin of dumping" are exporter-specific concepts which arise from the pricing behaviour of individual exporters and can be understood as "international price discrimination".[125] According to Indonesia, this reasoning supports the understanding that Article 2.2 requires examination of price comparability between domestic sales and export sales even in the context of a particular market situation. Indonesia argues that the purpose of the dumping inquiry is to determine whether international price discrimination is occurring[126], and therefore a proper comparison is possible if the particular market situation equally affects domestic and export prices.

7.65. Indonesia asks the Panel to rule on the "specific issue of whether a low-price input used identically to produce merchandise for domestic and export market prevents a proper comparison".[127] Indonesia finds support for its position on this point in the observation made by the Appellate Body in *US – Anti-dumping and Countervailing Duties (China)* to the effect that, when domestic subsidies are granted in market economies, "both the normal value and the export price will be lowered as a result of the domestic subsidy, so that the dumping margin should not be

[118] Australia's response to Panel question No. 19 following the first meeting of the Panel, paras. 124-125.
[119] Indonesia's first written submission, paras. 79, 81, 82, 102, 107, 115, and 122.
[120] Australia's second written submission, paras. 19-20.
[121] Indonesia's first written submission, para. 87.
[122] Indonesia's response to Panel question No. 2(b) following the first meeting of the Panel, p. 8.
[123] Indonesia's response to Panel question No. 3 following the first meeting of the Panel, p. 9.
[124] Indonesia's response to Panel question No. 3 following the first meeting of the Panel, p. 9.
[125] Indonesia's first written submission, paras. 90-100 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 87, 88, 90, 91, 94, 95, and fn 208). Indonesia finds additional support for the "pricing discrimination" understanding of dumping by reference to a WTO technical paper and an Australian legislative report, and in the submissions of several members in 1966 during the Kennedy Round negotiations when "particular market situation" was first included in the Anti-dumping Code. (Indonesia's first written submission, para. 91 (referring to WTO, Technical information on anti-dumping, https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed on 22 August 2018) and Australia Senate Economics Legislation Committee, Customs Amendment (Anti-Dumping) Bill (June 2011), (Exhibit IDN-18), para. 2.4 and fns 1-2); second written submission, paras. 27-31 (referring to Comments by the European Economic Community on Items I to V and IX to XIII, TN.64/NTB/W/12/Add.2 (24 June 1966); Comments by Japan on Items I to V and IX to XI, and XIII, TN.64/NTB/W/12/Add.6 (1 July 1966); Comments by the Government of Canada on Items I-V, IX-XI and XIII, TN.64/NTB/W/12/Add.3 (29 June 1966); and Comments by the United States on Items I-V, TN.64/NTB/W/12/Add.5 (30 June 1966)).
[126] Indonesia's first written submission, para. 106.
[127] Indonesia's response to Panel question No. 2(b) following the first meeting of the Panel, p. 8; response to Panel question No. 20 following the second meeting of the Panel, para. 38.

affected".[128] Indonesia reasons that a low cost input identically used in production for export and domestic sales will have the same effect on those sales as a 'domestic subsidy' would".[129]

7.66. Australia argues that the proper interpretation of the phrase "permit a proper comparison" is to allow a suitable and accurate comparison to: (a) ascertain whether the product is to be considered as being dumped, and (b) determine the margin of dumping.[130] Australia argues that the Anti-Dumping Agreement does not explicitly identify the factors that will determine whether or not using the domestic price as the basis for the "normal value" would allow an investigating authority to conduct "a suitable and accurate comparison".[131] Australia argues that Article 2.7 of the Anti-Dumping Agreement and the second *Ad* Note to Article VI:1 of the GATT 1994 (regarding imports "from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State") demonstrate that government intervention (both in respect of the like product and in respect of inputs to the like product) can result in the domestic price not being suitable to use as the basis for the normal value.[132] Australia refers to the statement of the Appellate Body in *EC − Fasteners (China)* that the second *Ad* Note to Article VI:1 "allows investigating authorities to *disregard domestic prices and costs* of such an NME in the determination of normal value and to resort to prices and costs in a market economy third country".[133] Australia also argues that prices fixed in a manner incompatible with normal commercial practice or according to criteria which are not those of the marketplace are not suitable to use as the basis for the normal value, as recognized by the Appellate Body in *US − Hot-Rolled Steel* where the Appellate Body considered a situation where the domestic sales were not in the "ordinary course of trade".[134]

7.67. Australia challenges Indonesia's reliance on certain statements of the Appellate Body in *US − Anti-Dumping and Countervailing Duties (China)* in support of the proposition "that domestic subsidies equally affect domestic and export price".[135] Australia argues that the Appellate Body's actual reasoning in that case was that "domestic subsidies" *could* affect both domestic and export prices such that "double remedies" (simultaneous application of anti-dumping and countervailing duties to offset the subsidy and then again to offset the price effect of the subsidy) *could* arise.[136] Australia argues that these statements do not support Indonesia's arguments that domestic and export prices are necessarily equally affected by a low input price.[137] Australia argues that the statements in the panel and Appellate Body reports in *US − Anti-Dumping and Countervailing Duties (China)* relied upon by Indonesia for the proposition that domestic subsidies affect both domestic and export prices are inapposite because that dispute was not about Article 2 of Anti-Dumping Agreement and did not involve a finding of "particular market situation".[138]

7.68. With respect to Articles 2.1 and 2.2 of the Anti-Dumping Agreement, we note that in *EC − Tube or Pipe Fittings*, the Appellate Body stated as follows:

> We begin our analysis with a review of the provisions that lead to the calculation of constructed normal value. Article 2.1 of the Anti-Dumping Agreement identifies a product as "dumped" where the product is introduced into the commerce of another country at "less than its normal value". "Normal value" is understood by virtue of that provision to be the "price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Where the price of the product in the home (exporting country) market is not "comparable" to the export price of the like product, Article 2.2 provides alternative bases for deriving "normal value":

[128] Indonesia's first written submission, paras. 120-121 (referring to Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, fn 519).
[129] Indonesia's first written submission, para. 121.
[130] Australia's first written submission, paras. 130-132.
[131] Australia's first written submission, para. 133.
[132] Australia's first written submission, para. 136.
[133] Australia's first written submission, para. 137 (referring to Appellate Body Report, *EC − Fasteners (China)*, para. 285). (emphasis added)
[134] Australia's first written submission, paras. 140 and 141 (referring to Appellate Body Report, *US − Hot-Rolled Steel*, paras. 140-141).
[135] Australia's first written submission, para. 170; response to Panel question No. 4(c) following the first meeting of the Panel, paras. 17-24 (referring to Indonesia's first written submission, para. 121).
[136] Australia's response to Panel question No. 4(c) following the first meeting of the Panel, para. 19.
[137] Australia's response to Panel question No. 4(c) following the first meeting of the Panel, para. 19.
[138] Australia's first written submission, para. 170.

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
>
> [2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

Article 2.2 makes clear that an alternative basis for deriving "normal value" must be relied upon by an investigating authority where one of three conditions exists:

(a) there are no sales in the exporting country of the like product in the ordinary course of trade; or

(b) sales in the exporting country's market do not "permit a proper comparison" because of "the particular market situation"; or

(c) sales in the exporting country's market do not "permit a proper comparison" because of their low volume.

Where one of these conditions exists, Article 2.2 further specifies two alternative bases for the calculation of "normal value":

(a) third-country sales, that is, the comparable price of the like product when exported to an "appropriate" third country, provided the price is "representative"; or

(b) constructed normal value, that is, the sum of:

(i) the cost of production in the country of origin;

(ii) a "reasonable amount" for SG&A; and

(ii) a "reasonable amount" for profits.[139]

7.69. In respect of the first condition, there is an absence of the domestic price "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country". In *US – Hot-Rolled Steel*, the Appellate Body stated that "Article 2.1 requires investigating authorities to exclude sales not made 'in the ordinary course of trade', from the calculation of normal value, precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter".[140] It follows that, when there are "no sales" in the "ordinary course of trade", no domestic price would exist to be compared with.

7.70. The second condition contemplates a situation in which there are sales of the like product in the ordinary course of trade in the domestic market of the exporting country but the volume of those sales is low, such that they may not permit a proper comparison of the domestic price with the export price.

[139] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-95.
[140] Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

7.71. In respect of the low volume condition, footnote 2 of the Anti-Dumping Agreement provides a useful and relevant clarification:

> Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

7.72. Thus, the situation of a low volume of domestic market sales may prevent a proper comparison between the domestic and the export price but, as provided for in footnote 2, it does not necessarily do so. Specifically, under the terms of footnote 2, if domestic sales are at least 5% of export sales, they shall normally not be considered to be low in volume within the meaning of Article 2.2; and a volume of domestic sales less than 5% of export sales may also be acceptable if the sales are of "sufficient magnitude to provide for a proper comparison". It follows that, when there are low volume sales, a further enquiry may determine whether such low volume sales "permit a proper comparison".

7.73. Where a "particular market situation" is found to exist, the investigating authority must examine whether "a proper comparison" of the domestic and the export price is permitted or not. We consider that the "proper comparison" language calls for an assessment in respect of the comparison of domestic and export prices.

7.74. The ordinary meaning of the term "proper" is "suitable for a specified or implicit purpose or requirement; appropriate to the circumstances or conditions; … apt, fitting; correct, right".[141] The term "comparison" can be understood as "the action, or an act, of comparing, or noting the similarities and differences of two or more things".[142] The function of the "permit a proper comparison" test is to determine whether the domestic price can or cannot be used as a basis for comparison with the export price to identify the existence of dumping. It is implied here in Article 2.2 that the words "a proper comparison" refer to the comparison between the domestic price and the export price. Thus, the purpose of an investigating authority's examination under the second clause of Article 2.2 of the Anti-Dumping Agreement is to determine whether domestic sales of the like product in the ordinary course of trade do not permit a proper comparison between the export price and the domestic sales price because of the particular market situation or the low volume.

7.75. While the proper comparison in Article 2.2 refers to the comparison between the domestic and export prices, a purely numerical comparison between the two prices may not reveal anything about whether the domestic price can be properly compared with the export price. Rather, it is necessary to conduct a qualitative comparison of the domestic and export prices. The phrase "because of the particular market situation" makes clear that the qualitative assessment of whether the domestic and export prices can be properly compared should focus on how the particular market situation affects that comparison. We therefore consider that the "proper comparison" language calls for an assessment of the relative effect of the particular market situation on domestic and export prices. We understand that, in certain circumstances, as a result of this assessment, the investigating authority may conclude that the particular market situation has no effect on the export prices.

7.76. Turning to the assessment of whether "a proper comparison" is not permitted because of the particular market situation, we note that the focus of the analysis is on whether the effect of the particular market situation is such that a proper comparison between domestic sales prices and export prices under examination is not permitted. In other words, the investigating authority must examine the domestic sales in order to determine whether a proper comparison between the two prices is permitted in spite of the effect of the particular market situation. The point is to determine if there is a *comparable* domestic price (i.e. if there is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" in the sense of GATT 1994 Article VI:1(b) and Article 2.1 of the Anti-Dumping Agreement).

[141] Oxford Dictionaries online, definition of "proper" https://www.oed.com/view/Entry/152660?rskey=KTB4na&result=1#eid (accessed 17 September 2019).

[142] Oxford Dictionaries online, definition of "comparison" https://www.oed.com/view/Entry/37450?rskey=sdGRr4&result=1#eid (accessed 17 September 2019).

That determination is fact-specific and should be made on a case-by-case basis by the investigating authority assessing the effect of particular market situation on the domestic price in relation to the effect on the export price, if any. This relative assessment is necessary because, as we explain in the following subsection, while a particular market situation may have an effect on both domestic and export prices, it does not follow that the impact on domestic and export prices will be the same. If the investigating authority finds that because of a particular market situation a proper comparison of the domestic price and the export price is not permitted, it is required to give a reasoned and adequate explanation of its conclusion.

7.2.4.3 Whether a proper comparison is necessarily permitted when a low-priced input is used identically to produce merchandise for domestic and export market

7.77. We now turn to Indonesia's argument that, where a low-priced input is used identically to produce merchandise for the domestic and the export market, a proper comparison will be permitted.[143] Indonesia argues that the low-priced input affects domestic and export sales in the same way. We recall that Indonesia finds support for its claim in the observation made by the Appellate Body in *US – Anti-dumping and Countervailing Duties (China)* to the effect that, when domestic subsidies are granted in market economies, "both the normal value and the export price will be lowered as a result of the domestic subsidy, so that the dumping margin should not be affected".[144]

7.78. We believe there is a logical analogy between the domestic subsidies at issue in that case and the low-priced input posited by Indonesia's argument. As Indonesia asserts, the Appellate Body adopted the rationale that domestic subsidies having the effect of decreasing costs could result in similarly decreased prices in the domestic and export markets. The Appellate Body found that under the NME methodology at issue in that case (where domestic prices and costs were disregarded in favour of market-based external values) a "double remedy" could arise as a consequence. However, a close reading of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* does not fully justify Indonesia's categorical claim that domestic and export prices are necessarily equally affected by domestic subsidies. In that case, the Appellate Body explained:

> In principle, we agree with the statement by the Panel that double remedies would *likely* result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties, but we are not convinced that double remedies *necessarily* result in every instance of such concurrent application of duties. This depends, rather, on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.[145]

7.79. Moreover, we asked the parties to respond to the following question:

> Explain your agreement or disagreement with the following statement: "Faced with a decrease in the cost of a significant input, a producer may decide to decrease some, all or none of the prices at which their product is offered for sale in various markets. The extent to which actual sales of the product can be made at the prices offered in the various markets will depend significantly on the market conditions in those markets."

Both parties expressed their agreement or general agreement with the statement.[146]

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[143] We note that Australia has objected to this characterization of the situation the ADC found in respect of the A4 copy paper market in Indonesia. For purposes of testing Indonesia's interpretive legal theory in connection with Indonesia's argument, it is not yet necessary for us to resolve whether Australia's measure matches this description. We will turn to that question in the following subsection.

[144] Indonesia's first written submission, paras. 120-121 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, fn 519).

[145] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 599. (fn omitted; emphasis original)

[146] Indonesia's response to Panel question No. 4 following the second meeting of the Panel; Australia's response to Panel question No. 4 following the second meeting of the Panel.

7.80. In our view, how domestic prices and export prices of an individual exporter[147] are affected notwithstanding an equal decrease in input costs is likely to depend significantly upon a number of factors, including the prevailing conditions of competition in each market and the existing relationship between price and cost. We consider that an exporter may find itself with different options in respect of how to take advantage of an input cost decrease depending on market conditions in each market. This is similar to a situation when a cost increase occurs and the exporter faces differing market conditions in domestic and export markets such that the exporter is able to pass on the cost increase to customers in one market but unable to do so in the other.

7.81. Accordingly, we are not persuaded that a low-priced input used identically to produce merchandise for domestic and export markets will necessarily have the same effect on domestic prices and export prices and therefore necessarily permit a proper comparison. Rather, we find that whether the exporter's domestic sales permit a proper price comparison with the export price is a question that can only be ascertained through an examination of relevant factual circumstances.

7.2.4.4 Whether the ADC should have examined if the domestic sales of A4 copy paper permitted a proper comparison because of the particular market situation

7.82. The parties disagree with respect to whether the ADC's determination addressed the question of whether the disregarded domestic market sales of Indah Kiat and Pindo Deli permitted or not "a proper comparison", within the meaning of Article 2.2. Indonesia asserts that the ADC, having found a "particular market situation" failed to examine whether, "because of" that situation, domestic sales did "not permit a proper comparison" of the export price and the domestic price.[148] Australia disputes this characterization, arguing that a determination that domestic prices are distorted and therefore not suitable for use as normal value means that they do not permit a proper comparison.[149] For the reasons explained below, we find that the ADC's determination was inconsistent with Article 2.2.

7.83. Indonesia asserts that the same hardwood fiber is used by Indah Kiat and Pindo Deli to manufacture A4 copy paper sold both in the Indonesian domestic market and exported to Australia.[150] Indonesia notes that:

> The Indonesian producers argued the Commission had no evidence domestic prices were distorted and unsuitable for comparison with export prices because the Commission had no evidence the alleged distortions impacted differently domestic and export prices.[151]

7.84. Indonesia contends that, beyond acknowledging the argument had been made, the Final Report does not address whether the situation in the domestic market actually made any difference to the determination of the margin of dumping that would arise from a comparison between each individual Indonesian exporter's domestic prices and its export prices.[152] According to Indonesia, "[t]he Commissioner's report is confined to addressing the question of whether the exporter's domestic prices are different from what they would have been in the absence of the government policies".[153]

7.85. Australia argued that the appropriate analysis of whether "because of the particular market situation … such sales do not permit a proper comparison" requires determining whether the domestic sales are "suitable" for establishing a normal value that will provide a "reliable foundation" that will "permit" a "proper comparison" with the export price.[154] According to Australia, because

[147] We note that Article 6.10 of the Anti-Dumping Agreement requires that, as a rule, an investigating authority shall determine an individual dumping margin for each exporter.

[148] Indonesia's first written submission, para. 115.

[149] Australia's first written submission, para. 4; closing statement at the first meeting of the Panel, paras. 8-11.

[150] Indonesia's first written submission, paras. 116-118.

[151] Indonesia's first written submission, para. 116, (referring to Sinar Mas Group's submission (29 December 2016), (Exhibit IDN-15), p. 2).

[152] Indonesia's first written submission, para. 116.

[153] Indonesia's first written submission, para. 116.

[154] Australia's response to Panel question No. 4 following the second meeting of the Panel, para. 23; first written submission, para. 120; and second written submission, para. 168.

Article 2.2 of the Anti-Dumping Agreement or Article VI of the GATT 1994 do not prescribe any specific methodology for determining the unsuitability of domestic prices, an investigating authority has discretion as to the choice of methodology as long as it evaluates the facts in an unbiased and objective manner, and provides a reasoned and adequate explanation supporting its determination.[155] Australia argued that the context provided by Article VI of the GATT 1994, the second *Ad* Note to Article VI:1 of the GATT 1994, and Articles 2.1 and 2.7 of the Anti-Dumping Agreement identify certain characteristics of unsuitability[156], including whether the domestic price has been fixed in a manner incompatible with normal commercial practice and/or fixed according to criteria which are not those of the marketplace.[157]

7.86. Thus, according to Australia, in deciding whether the price of A4 copy paper in Indonesia would allow a suitable and accurate comparison to ascertain whether the A4 copy paper was to be considered as being dumped and to determine the margin of dumping, it was relevant for the ADC to consider whether: (a) the domestic price of A4 copy paper was affected by government intervention that distorted costs and prices; and/or (b) the "particular market situation" meant that the domestic price of A4 copy paper was fixed in a manner incompatible with normal commercial practice; and/or (c) the "particular market situation" meant that the domestic price of A4 copy paper was fixed according to criteria which were not those of the marketplace.[158] Australia claims that this is exactly what the ADC did, when it found that, because of the "particular market situation", Indonesian domestic sales were not suitable for use in determining normal value.[159] Australia identifies relevant findings of the ADC to the effect that the policies of the Government of Indonesia have affected the forestry sector and resulted in reduced logs prices; that these policies benefitted the Indonesian pulp industry; that the cost of producing pulp was substantially less than a competitive benchmark; that the pulp is the largest component for the production of A4 copy paper; that Indonesian A4 copy paper producers benefitted from access to cheaper pulp; that Indonesian domestic A4 paper prices are artificially low and below comparable regional benchmarks; that the Government's involvement resulted in a distortion of the domestic price for A4 copy paper and that there was a market situation in the Indonesian A4 copy paper market.[160]

7.87. Consistent with Australia's argumentation, which in our view largely equates the analyses of "ordinary course of trade" and "permit a proper comparison", the ADC focused on whether the domestic sales and domestic prices were suitable for use as the basis for normal value. We consider that this approach fails to give meaning and effect to the phrase "permit a proper comparison". As set forth in the Final Report, the ADC "found that: there is a market situation in the Indonesian A4 copy paper market such that sales in that market are not suitable for use in determining a price".[161] The ADC further found "that there is a particular market situation in Indonesia such that domestic selling prices are not suitable for determining normal value".[162] We find a deficiency in the ADC's examination in this case because it focused exclusively on the domestic sales and domestic prices, without taking into account the export prices with which the domestic prices would be compared. In particular, the examination does not address the question whether the domestic prices could be properly compared with the export prices despite the effects of the particular market situation.

7.88. We observe that the effect of the particular market situation on the Indonesian market for A4 copy paper was solely through the decreased cost of purchasing (or making) pulp, which is an important input.[163] While we appreciate that the ADC's determination of market situation in respect of A4 copy paper sold in Indonesia accounted for a variety of fact-specific circumstances, we find that the salient aspect of the determination was that the price of A4 copy paper in Indonesia was

[155] Australia's second written submission, para. 170.
[156] Australia's first written submission, paras. 133-139.
[157] Australia's first written submission, paras. 133-144, (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 140-141); second written submission, paras. 171-176; and response to Panel questions Nos. 22 and 23 following the second meeting of the Panel, paras. 112-120.
[158] Australia's first written submission, paras. 133-143; second written submission, paras. 171-172; and response to Panel questions Nos. 22 and 23 following the second meeting of the Panel, paras. 112-120.
[159] Australia's first written submission, para. 144.
[160] Australia's first written submission, para. 144.
[161] Final Report, (Exhibit IDN-4), section 6.5, p. 36.
[162] Final Report, (Exhibit IDN-4), section 6.9.1, p. 50.
[163] Final Report, (Exhibit IDN-4), section A2.9.4, pp. 173-174.

affected by a decrease in the cost of pulp.[164] Australia does not dispute that the same pulp was used to produce A4 copy paper for sale in the domestic market and in the export market, and we find no evidence in the record to the contrary.[165]

7.89. We find that Australia did not examine whether domestic sales permitted a proper comparison between the domestic prices found to be affected by the decreased cost of pulp with the export prices for which the pulp cost was presumably equally decreased, despite assertions in the underlying proceeding which called for such an examination. In reviewing the ADC's determination, we are not to conduct a de *novo* review of the evidence, nor substitute our judgment for that of the investigating authority. As such, we make no determination whether the domestic sales permitted a proper comparison of the domestic prices and the export prices. Rather, we conclude that the ADC was obligated to undertake the necessary additional examination to determine whether, because of the particular market situation, the domestic sales of the individual exporters do not permit a proper comparison of the domestic prices and the export prices.

7.2.4.5 Conclusion in respect of "permit a proper comparison"

7.90. On the basis of the above findings, we determine that the ADC's disregard of Indah Kiat's and Pindo Deli's domestic sales (and consequently of their domestic prices) as the basis for normal value was inconsistent with the requirement to examine whether sales in the exporting country's market do not "permit a proper comparison" because of "the particular market situation" in Article 2.2 of the Anti-Dumping Agreement. Specifically, where a particular market situation was found to affect domestic market sales prices solely as a result of a decreased cost for an input that was used identically to produce merchandise for the domestic and export markets, the investigating authority was obligated to assess the effect of the particular market situation on the domestic price in relation to the effect on the export price when determining whether domestic prices permitted a proper comparison with those export prices.

7.2.5 Conclusion

7.91. For the reasons elaborated above, we find that Indonesia has not established that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement when it found that a "particular market situation" existed in the Indonesian domestic market for A4 copy paper. We further find that Australia's measure is inconsistent with Article 2.2, first sentence, of the Anti-Dumping Agreement because the ADC disregarded domestic sales of A4 copy paper of Indah Kiat and Pindo Deli as the basis for determining normal value without properly determining that such sales did "not permit a proper comparison".

7.3 Whether the Anti-Dumping Commission's decision not to use the hardwood pulp component of Indah Kiat's and Pindo Deli's records in constructing the normal value of A4 copy paper is inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement

7.3.1 Introduction

7.92. The core issue raised by Indonesia's claim is whether the ADC acted inconsistently with Australia's obligations under Article 2.2.1.1, first sentence, of the Anti-Dumping Agreement and Article 2.2 of the Anti-Dumping Agreement by disregarding Indah Kiat and Pindo Deli's recorded costs of hardwood pulp in constructing the normal value for those producers.[166] We recall that after having found a "particular market situation" to exist in the Indonesian A4 copy paper market, the ADC proceeded to construct the normal value of A4 copy paper for Indonesian exporters. In examining the relevant cost components of A4 copy paper, the ADC found that "the cost of producing pulp was substantially less than a competitive benchmark"[167] and that "the actual cost of

[164] Final Report, (Exhibit IDN-4), section A2.9.1, p. 165.
[165] Australia's response to Panel question No. 15 following the first meeting of the Panel, para. 103.
[166] We understand Indonesia's claim under Article 2.2 of the Anti-Dumping Agreement to be consequential to its claim under Article 2.2.1.1 since Indonesia does not rely on any separate and independent arguments as the basis for its claim under Article 2.2.
[167] The "competitive benchmark" is not described in the text of the Final Report. In response to the Panel's request to clarify what competitive benchmark the authority was referring to when it stated that "the cost of producing pulp was substantially less than a competitive benchmark", Australia has not referred the

pulp recorded by exporters in their records does not reasonably reflect a competitive market cost".[168] On that basis, the ADC considered that the pulp component of Indonesian producers' and exporters' records, including Indah Kiat and Pindo Deli, was "unsuitable for determining the cost to make A4 copy paper for the purposes of constructing normal values".[169]

7.93. Indonesia argues that the ADC's rejection of the recorded hardwood pulp costs of Indah Kiat and Pindo Deli is inconsistent with the first sentence of Article 2.2.1.1 because those records were in accordance with generally accepted accounting principles (GAAP) in Indonesia and reasonably reflected the cost associated with the production and sale of A4 copy paper in Indonesia.[170] However, Australia argues that the ADC was entitled to reject the relevant costs because, according to Australia, the first sentence of Article 2.2.1.1 envisages that, where the circumstances are not "normal and ordinary", an investigating authority is not required to calculate costs on the basis of the exporter or producer's records even if the two conditions in Article 2.2.1.1 are satisfied.[171] Australia further argues that the ADC found circumstances with regard to Indah Kiat and Pindo Deli to be not "normal and ordinary".[172] Indonesia contests Australia's characterization of the rationale underlying the ADC's rejection of the hardwood pulp costs, arguing that it amounts to *ex post facto* rationalization that should not be considered by the Panel.[173] According to Indonesia, the investigating authority disregarded the recorded costs because it considered they did not reasonably reflect the costs associated with the production and sale of A4 copy paper. In any event, Indonesia maintains that the term "normally" found in the first sentence of Article 2.2.1.1 does not establish a separate ground to disregard an exporter's records that reasonably reflect the costs of production and sale of the product under consideration.[174]

7.94. In examining the parties' submissions, we address the factual question of whether the ADC rejected recorded hardwood pulp costs because they did not reasonably reflect the costs associated with the production and sale of A4 copy paper, as Indonesia argues, or whether the ADC disregarded those costs on the basis of a different rationale. We address this question in the section that follows, before turning to evaluate the merits of Indonesia's claims on the basis of our findings on the rationale underlying the ADC's rejection of the hardwood pulp costs. However, before proceeding

Panel to the description of the competitive benchmark on the record of the investigation. However, Australia has clarified that the investigating authority was referring to "a number of regional benchmarks for hardwood pulp", which were purchased from RISI and Hawkins Wright. According to Australia, the data sets included: domestic prices in Japan, domestic prices in China, prices for hardwood pulp exported from Indonesia to East Asia, prices for hardwood pulp exported from South America to China, prices for hardwood pulp exported from Indonesia to Korea. Australia further clarified that, in establishing whether the exporters' records reflected "competitive market costs", additional comparisons were undertaken between the pulp benchmark (used later as a substitute for recorded pulp costs) and the exporters' recorded pulp costs. In response to the same question from the Panel, Indonesia stated that it believes "the benchmark to which Australia is referring is RISI and Hawkins Wright". (Australia's response to Panel question No. 27 following the first meeting of the Panel, paras. 199-200; Indonesia's response to Panel question No. 27 following the first meeting of the Panel, p. 22). The Final Report mentions RISI and Hawkins Wright data, and Australia later clarified its answer by referring the Panel to the RISI and Hawkins Wright data exhibited with its second written submission. (Australia's response to Panel question No. 7 following the second meeting of the Panel, paras. 43-44 (referring to RISI, hardwood pulp prices in Asia by source (2010-2015), (Exhibit AUS-26 (BCI)), Hawkins Wright, hardwood pulp prices in China by source (December 2002-August 2016), (Exhibit AUS-27A (BCI)), Hawkins Wright, hardwood pulp prices in South Korea by source (December 2002-August 2016), (Exhibit AUS-27B (BCI)))). The parties therefore share the understanding that "the competitive benchmark" included out-of-country benchmarks, and we have no reasons to consider otherwise.

[168] Final Report, (Exhibit IDN-4), section 6.9.1, p. 51.

[169] Final Report, (Exhibit IDN-4), section 6.9.1, p. 51.

[170] Indonesia's first written submission, paras. 123-154.

[171] Australia's first written submission, paras. 182-200; second written submission, paras. 197-203, 215, 221-223, and 226-234; response to Panel question No. 20(d) following the first meeting of the Panel, paras. 144-158; and responses to Panel question No. 13 following the second meeting of the Panel, paras. 66-81, and question No. 32, paras. 155-157.

[172] Australia's first written submission, paras. 202-221; second written submission, paras. 204-225; and response to Panel question No. 20(c) following the first meeting of the Panel, paras. 130-142.

[173] Indonesia's second written submission, para. 72; response to Panel question No. 20(b) following the first meeting of the Panel, pp. 20-21.

[174] Indonesia's second written submission, paras. 56-71; response to Panel question No. 20(a) following the first meeting of the Panel, pp. 19-20; and responses to Panel question No. 16 following the second meeting of the Panel, paras. 30-36, and question No. 32, paras. 94-96.

with this analysis, we first address Australia's contention that Indonesia has conceded that the ADC was not required to use Indah Kiat's recorded costs of pulp.[175]

7.95. According to Australia, Indonesia has conceded "that, rather than using the amounts in the records of Indah Kiat for hardwood pulp, there were 'other bases Australia could have taken'" to calculate the pulp costs when determining Indah Kiat's cost of production of A4 copy paper.[176] The implication is that Indonesia accepts that the ADC did not have to use Indah Kiat's reported pulp costs. Australia asserts that Indonesia made this admission when, in responding to certain Panel questions, Indonesia explained that "it would have been less distortive for Australia to have replaced the cost of woodchips" rather than the cost of pulp and that "[b]y replacing the cost of woodchips, the allegedly distorted input in Indah Kiat's costs is being accounted for while all of Indah Kiat's other costs, which are not affected by the 'particular market situation' remain the same".[177]

7.96. We understand Indonesia to have made the above statements in the context of its claim under Article 2.2 concerning the ADC's *selection of the substitute* for pulp costs, after it had decided to disregard Indah Kiat's recorded pulp costs. By making these statements, we do not find that Indonesia accepted that the ADC was entitled to disregard Indah Kiat's reported costs of pulp under the terms of Article 2.2.1.1.[178] The factual and legal bases of these two claims are different: under its Article 2.2.1.1 claim (which we examine in this section of our Report), Indonesia challenges the ADC's *rejection* of Indah Kiat's and Pindo Deli's recorded pulp costs, whereas under its Article 2.2 claim, Indonesia challenges the *substitute* for pulp costs selected by the ADC after the recorded costs were rejected. We note, furthermore, that Indonesia has clarified that "[t]he discussion surrounding how Australia might have calculated a benchmark in a manner consistent with Article 2.2 was intended to explain to the Panel other bases Australia could have taken, but the ultimate action Australia took, and its consistency with Australia's WTO obligations is ultimately what is at issue".[179] We therefore conclude that Indonesia's has not conceded that the ADC was not required to use Indah Kiat's recorded costs of pulp.

7.3.2 The Anti-Dumping Commission's rationale for rejecting the hardwood pulp component of Indah Kiat's and Pindo Deli's recorded costs

7.97. Indonesia initially considered that Australia relied on the second condition in Article 2.2.1.1, first sentence, to reject the hardwood pulp component of Indah Kiat's and Pindo Deli's recorded costs.[180] However, in responding to Indonesia's first written submission, Australia explained that the ADC relied on a provision of Australia's domestic regulations in its decision to disregard Indah Kiat's and Pindo Deli's recorded costs for hardwood pulp[181] and that the provision at issue "does not mirror the precise language of the underlying treaty" but implements Australia's treaty obligations.[182] According to Australia, "[t]he [ADC's] application of subsection 43(2) [of the Customs Regulation] was clearly consistent with discarding the amounts in the records kept by the exporter in circumstances that were outside the normal and ordinary".[183] Australia submits that "the [ADC] found that the amounts for hardwood pulp in the records of Indah Kiat and Pindo Deli did not 'reasonably reflect competitive market costs' within [the meaning of] subparagraph 43(2)(b)(ii) because they reflected the 'particular market situation'".[184] Australia clarifies that the phrase "competitive market costs" found in subsection 43(2) "facilitated the discarding of the distorted hardwood pulp component … in circumstances that were outside the normal and ordinary

[175] Australia's comments on Indonesia's responses to Panel questions Nos. 18 and 35 following the second meeting of the Panel, paras. 83-85.

[176] Australia's comments on Indonesia's responses to Panel questions Nos. 18 and 35 following the second meeting of the Panel, para. 84 (referring to Indonesia's response to Panel question No. 30(b) following the second meeting of the Panel, para. 93).

[177] Indonesia's responses to Panel question No. 18 following the second meeting of the Panel, para. 37, and question No. 35, para. 98; Australia's comments on Indonesia's responses to Panel questions Nos. 18 and 35 following the second meeting of the Panel, para. 83.

[178] As we explain in section 7.4.4, we understand Indonesia's argument regarding the replacement of Indah Kiat's woodchips costs to proceed on an *arguendo* basis. See fn 317 of this Report.

[179] Indonesia's response to Panel question No. 30(b) following the second meeting of the Panel, para. 93.

[180] Indonesia's first written submission, paras. 123-154.

[181] Australia's response to Panel question No. 20(c) following the first meeting of the Panel, para. 131.

[182] Australia's second written submission, para. 210.

[183] Australia's second written submission, para. 214. (underlining omitted)

[184] Australia's second written submission, paras. 217-218.

circumstances envisaged by the word 'normally' in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement".[185]

7.98. Indonesia considers that Australia's characterization of the rationale underlying the ADC's decision to reject the hardwood pulp costs is an "*ex post* defence" put forward by Australia for the purpose of this dispute.[186] According to Indonesia, the ADC's decision to reject the pulp costs was "unmistakably made pursuant to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement" because it was expressed in terms that are similar to the language of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.[187] Furthermore, Indonesia submits that "Australia applied the phrase 'competitive market costs' to mean the costs must, themselves, be reasonable" and draws a parallel between this aspect of the ADC's rationale and the basis for the European Union's rejection of the raw material costs of Argentinian biodiesel producers in *EU – Biodiesel (Argentina)*.[188] Indonesia also notes that, contrary to Australia's submission, the ADC's decision to reject Indah Kiat's and Pindo Deli's recorded costs could not have been based on the term "normally" in the first sentence of Article 2.2.1.1, because the word "normally" does not appear in the ADC's determination.[189]

7.99. In its Final Report, the ADC explained its decision to reject the exporters' records as follows:

> The Commissioner has found that there is a particular market situation in Indonesia such that domestic selling prices are not suitable for determining normal value under subsection 269TAC(1) and normal values must be constructed or determined on the basis of third country sales. The Commission constructed normal values under subsection 269TAC(2)(c) and in accordance with sections 43, 44 and 45 of the *Customs (International Obligations) Regulation 2015* (the Regulations).
>
> Subsection 43(2) of the Regulations provides that, if an exporter or producer of like goods keeps records relating to the like goods which are in accordance with generally accepted accounting principles in the country of export, and those records reasonably reflect competitive market costs associated with the production or manufacture of like goods, then the cost of production or manufacture must be worked out using the information in the exporter's records.
>
> Neither the Act nor the Regulations prescribe a method for assessing whether an exporter's records reasonably reflect competitive market costs associated with the production or manufacture of like goods. When undertaking this assessment, the Commission examines a number of factors, including whether the Government influenced the prices of any major inputs.
>
> Appendix 2 sets out the Commission's *findings in respect of a market situation in Indonesia*. The Commission found that the significant influence of the Government of Indonesia (GOI) within the forestry and pulp industries has distorted prices in the paper industry and the paper market in Indonesia.
>
> *In particular*, the Commission found that the cost of producing pulp was substantially less than a competitive benchmark. Consequently, the Commission considers that the actual cost of pulp recorded by exporters in their *records does not reasonably reflect a competitive market cost*. As pulp is proportionally the largest cost component for the production of the goods and like goods, the Commissioner considers that *the exporter's records do not reasonably reflect competitive market costs associated with the production or manufacture of like goods*. Consequently, the Commission considers that this renders this component of Indonesian producers' and exporters' records

[185] Australia's first written submission, para. 258.
[186] Indonesia's second written submission, para. 72.
[187] Indonesia's response to Panel question No. 20(b) following the first meeting of the Panel, p. 21.
[188] Indonesia's first written submission, para. 149; second written submission, paras. 69-71.
[189] Indonesia's response to Panel question No. 20(b) following the first meeting of the Panel, p. 21.

> unsuitable for determining the cost to make A4 copy paper for the purposes of constructing normal values.[190]

7.100. Indonesia emphasizes the fact that the word "normally" does not appear in the ADC's determination. However, we do not consider that it can be concluded, on this basis alone, that the absence of this word or the words "normal and ordinary"[191] from the ADC's finding means that its rationale was different to the one asserted by Australia. In this regard, we agree with Australia that "[t]he question before the Panel is whether the Anti-Dumping Commission acted in a manner consistent with Australia's obligations under the GATT 1994 and the Anti-Dumping Agreement, and not whether it used the precise words and phrases contained in those treaties".[192]

7.101. Indonesia further argues that the Commission's decision to reject the exporters' recorded costs "is unmistakably made pursuant to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement which states, in part, 'reasonably reflect the costs associated with the production and sale of the product under consideration'".[193] Article 2.2.1.1 provides, in relevant part, as follows:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.102. We agree with Indonesia that there is a certain similarity between the wording of the second condition of Article 2.2.1.1, first sentence ("reasonably reflect the costs associated with the production and sale of the product under consideration"), and the language used by the ADC to explain its finding. We note, however, that the basis of the ADC's determination is not focused on whether the recorded costs reasonably reflect "costs associated with the production" of A4 copy paper, but rather on whether those records reasonably reflect "*competitive market* costs associated with the production". Thus, the textual similarity between the second condition in the first sentence of Article 2.2.1.1 and the ADC's finding does not imply that the ADC rejected the exporters' records because it considered they did not "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of the second condition in the first sentence of Article 2.2.1.1.

7.103. The ADC rejected Indah Kiat's and Pindo Deli's recorded cost of pulp in reliance on subsection 43(2) of Australia's Customs (International Obligations) Regulations 2015.[194] The text of this provision[195] is different from the text of Article 2.2.1.1, first sentence. Subsection 43(2) is differently structured; the term "normally" is absent and the term "competitive market costs" is used instead of the word "costs".[196] We note, moreover, that, following the issuance of the Statement of Essential Facts, certain exporters contested the ADC's interpretation of subsection 43(2)(b)(ii) arguing that it was inconsistent with the Appellate Body's interpretation of Article 2.2.1.1 of the

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[190] Final Report, (Exhibit IDN-4), section 6.9.1, pp. 50-51. (fns omitted; emphasis added)

[191] In the course of this proceeding, Australia used the expressions "where the circumstances are not normal and ordinary" and "circumstances that were outside the normal and ordinary" to explain the rationale used by the ADC for the rejection of Indah Kiat's and Pindo Deli's costs. See, for example, Australia's first written submission, paras. 200-201, 213, 219, and 258; second written submission, paras. 214-215, and 220.

[192] Australia's second written submission, para. 207. (underlining omitted)

[193] Indonesia's response to Panel question No. 20(b) following the first meeting of the Panel, p. 21.

[194] Final Report, (Exhibit IDN-4), section 6.9.1, pp. 50-51.

[195] Subsection 43(2) of Australia's Customs (International Obligations) Regulations 2015 reads:

(2) If:

(a) an exporter or producer of like goods keeps records relating to the like goods; and

(b) the records:

(i) are in accordance with generally accepted accounting principles in the country of export; and

(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;

the Minister must work out the amount by using the information set out in the records.

(Extracts of Customs (International Obligations) Regulation 2015, (Exhibit AUS-4), p. 47).

[196] Australia has further explained that it "operates a dualist system" where "treaty obligations are given effect via domestic laws and regulations, which may or may not mirror the precise language of the underlying treaty". (Australia's response to Panel question No. 23 following the first meeting of the Panel, para. 167).

Anti-Dumping Agreement in *EU – Biodiesel (Argentina)*[197], which focused specifically on the second condition. The ADC responded by pointing out that the exporters' "interpretation of subsection 43(2)(b)(ii) fails to account for the difference between the text of Article 2.2.1.1 and the words of subsection 43(2)(b)(ii)".[198] This, supports the conclusion that the ADC engaged in an analysis that was different from that required under the second condition of Article 2.2.1.1, first sentence.[199]

7.104. Indonesia argues that "Australia applied the phrase 'competitive market costs' to mean the costs must, themselves, be reasonable" and that this rationale is similar to the European Union's "reasonableness test" found to be WTO-inconsistent in *EU – Biodiesel (Argentina)*.[200] We note that in the anti-dumping investigation at issue in *EU – Biodiesel (Argentina)*, the EU authorities decided to disregard the recorded cost of soybeans to calculate the cost of production of Argentinian biodiesel because those costs "were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system".[201] The European Union argued that it was entitled to disregard those costs on this basis because the second condition in Article 2.2.1.1 envisages that recorded costs could be rejected if they were not reasonable.[202] The panel, upheld by the Appellate Body, rejected the European Union's submissions, finding that the second condition of Article 2.2.1.1, first sentence, does not permit the exclusion of GAAP-consistent costs simply because they are not considered to be "reasonable" by the investigating authority.[203] However, the rationale of the ADC's rejection of the recorded costs is different. The ADC's determination does not refer to the *reasonableness of the costs* as a criterion for their rejection. Rather, the ADC grounded its rejection of the recorded costs on its finding that the *records* did not *reasonably reflect competitive market costs.* We, therefore, find that Australia did not use the phrase "competitive market costs" to mean the costs must, themselves, be reasonable.

7.105. We note further that, in "assessing whether an exporter's records reasonably reflect competitive market costs associated with the production or manufacture of like goods", the ADC explained that it examined "whether the Government influenced the prices of any major inputs". In the subsequent paragraph, the ADC noted that, in its findings in respect of *a market situation in Indonesia* in Appendix 2, it established that "the significant influence of the Government of Indonesia (GOI) within the forestry and pulp industries has distorted prices in the paper industry and the paper market in Indonesia".[204] It follows, that the rejection of pulp costs stemmed from the ADC's determination of the "particular market situation". This is consistent with Australia's explanation that the rejected pulp component of the recorded costs reflected the "particular market situation" in Indonesia's market.

7.106. The ADC went on to state: "[i]n particular, the Commission found that the cost of producing pulp was substantially less than a competitive benchmark".[205] In this context, the ultimate measure of whether the pulp component of the exporters' records was acceptable to the ADC was the comparison of the exporters' pulp costs with the *competitive market* benchmark. Therefore, the standard the ADC was applying to the records was something other than whether the records reasonably reflected the costs incurred.

7.107. For these reasons, we disagree with Indonesia that the ADC disregarded the pulp component of Indah Kiat's and Pindo Deli's records because the records did not reasonably reflect the costs associated with the production and sale of the product under consideration and we therefore find

[197] Final Report, (Exhibit IDN-4), section 6.9.8.1.1, p. 60.
[198] Final Report, (Exhibit IDN-4), section 6.9.8.1.1, p. 60.
[199] Subsection 43(2) of Australia's Customs (International Obligations) Regulation 2015 is not challenged in this dispute. Therefore, it is relevant for our consideration only insofar as it was applied by the investigating authority as a basis for the rejection of the pulp component of Indah Kiat's and Pindo Deli's records.
[200] Indonesia's first written submission, para. 149; second written submission, paras. 69-71.
[201] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.
[202] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.194-7.195.
[203] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.
[204] Final Report, (Exhibit IDN-4), section 6.9.1, p. 51.
[205] Final Report, (Exhibit IDN-4), section 6.9.1, p. 51.

that Australia's explanation of the ADC's rationale for disregarding the pulp component of Indah Kiat's and Pindo Deli's recorded costs does not constitute an *ex post facto* rationalization.

7.3.3 Whether the Anti-Dumping Commission rejected the hardwood pulp component of Indah Kiat's and Pindo Deli's recorded costs inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement

7.108. Indonesia argues that Article 2.2.1.1 requires an investigating authority to use a producer's actual costs unless they fail to meet one of the two express conditions: the records must be in accordance with GAAP in the producer's home country and must accurately reflect the cost incurred to produce the product under consideration.[206] Indonesia claims that Australia's rejection of the hardwood pulp component of the records is in breach of this provision since the records of Indah Kiat and Pindo Deli were in accordance with GAAP in Indonesia and reasonably reflected the cost associated with the production and sale of A4 copy paper in Indonesia.[207] In response, Australia argues that the circumstances in respect of Indah Kiat's and Pindo Deli's pulp records were not "normal and ordinary" since they reflected the particular market situation, and using those records would render the use of a constructed normal value inutile.[208] In Australia's view, therefore, the ADC rightly discarded the pulp component of the records in reliance on the term "normally", which provides a separate ground to disregard exporters' records in Article 2.2.1.1, first sentence.[209] Australia submits that interpreting the first sentence of Article 2.2.1.1 in a way that requires that the costs be calculated on the basis of records whenever the two conditions in Article 2.2.1.1 are satisfied renders the word "normally" redundant.[210] Indonesia disagrees with this interpretation and argues that the only circumstances in which an authority is allowed to disregard the records is when one of the two explicit conditions is not satisfied.[211] In Indonesia's view, even assuming that "the word 'normally' means the Anti-Dumping Agreement allows an investigating authority to disregard a producer's recorded costs when circumstances are not normal and ordinary, Australia's decision still is not consistent with Article 2.2.1.1".[212] Indonesia submits that if the term "normally" provides an additional exception for disregarding a producer's records, "that exception has limits and those limits are not implicated by the facts of this dispute".[213]

[206] Indonesia's first written submission, paras. 124 and 136 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.21).

[207] Indonesia's first written submission, paras. 123-154.

[208] Australia's first written submission, paras. 207-208. In this context, Australia argued, in relying on the Appellate Body's statements in *EU – Biodiesel (Argentina),* that the purpose of determining a constructed normal value is to establish an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales", and that "costs calculated pursuant to Article 2.2.1.1 … must be capable of generating such a proxy". (Australia's first written submission, paras. 202 and 208, fn 216 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para 6.24)).

[209] Australia's first written submission, paras. 204-208, 215-216, and 219 (underlining omitted); second written submission, paras. 219-221; and response to Panel question No. 20(c) following the first meeting of the Panel, paras. 130 and 137-142.

[210] Australia's first written submission, paras. 187-192 (underlining omitted); second written submission, para. 226; and response to Panel question No. 20(d) following the first meeting of the Panel, para. 150.

[211] Indonesia's response to Panel question No. 20(a) following the first meeting of the Panel, p. 20; second written submission, paras. 56-60.

[212] At the second meeting of the Panel, when we asked Indonesia whether "assuming for the sake of an argument, that the presence of the term 'normally' in Article 2.2.1.1 of the Anti-Dumping Agreement allows an investigating authority to disregard producers' recorded costs where the circumstances before an investigating authority are not normal and ordinary and that the Australian Anti-Dumping Commission genuinely relied on this ground in disregarding the pulp costs of Indah Kiat and Pindo Deli … the Australian Anti-Dumping Commission's decision to disregard the pulp costs [was] consistent with Article 2.2.1.1 of the Anti-Dumping Agreement", Indonesia responded "yes, it was" and made some additional clarifications. (Indonesia's response to Panel question No. 16 at the second meeting of the Panel). Later, however, Indonesia clarified in writing that even on the basis of such interpretation, it would still maintain that Australia's rejection of the hardwood pulp component of the records was inconsistent. (Indonesia's response to Panel question No. 16 following the second meeting of the Panel, para. 30; comments on Australia's response to Panel question No. 32 following the second meeting of the Panel, para. 53). We therefore proceed to rely on the most recent position of Indonesia elaborated in writing.

[213] Indonesia's response to Panel question No. 16 following the second meeting of the Panel, para. 36.

7.109. The main legal question raised by the parties' submissions is whether the term "normally" in the first sentence of Article 2.2.1.1 provides a separate basis to disregard an exporter's records, and, if so, whether the ADC's decision to disregard the pulp component of the records was inconsistent with relying on that legal basis. In order to answer this question, we believe we need to examine how the first sentence of Article 2.2.1.1 is intended to operate. We recall that Article 2.2.1.1, first sentence provides as follows:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.110. The first sentence of Article 2.2.1.1 establishes that an investigating authority "shall normally" use the records kept by the exporter as the basis for the calculation of costs of production, when those records satisfy two conditions: first, they must be "in accordance with the generally accepted accounting principles of the exporting country"; and second, they must "reasonably reflect the costs associated with the production and sale of the product under consideration". It follows, and it is undisputed by the parties, that the obligation to "normally" use the records kept by the exporter, does not apply when either of the two conditions is not satisfied. In such a situation, an investigating authority may use another source of data as the basis for the calculation of an exporter's cost of production.

7.111. The term "normally" is defined as "under normal or ordinary conditions; as a rule, ordinarily"; "in a normal manner, in the usual way".[214] This term modifies the verb "shall be calculated" and, thus, qualifies the obligation on the investigating authority to follow certain behaviour, i.e. to calculate the costs on the basis of an exporter's records. We agree with the panels in *China – Broiler Products* and in *EU – Biodiesel (Argentina)* that the term "normally" suggests that the obligation to use the records kept by an exporter to calculate the costs admits of derogation under certain circumstances.[215]

7.112. In examining the function of the adverb "normally" in the sentence, we find persuasive Australia's position that Indonesia's reading of Article 2.2.1.1, first sentence, as requiring that the exporters' records must be used unless one (or both) of the conditions in the first sentence of Article 2.2.1.1 are not satisfied would render the word "normally" redundant.[216] If Indonesia's interpretation were to be accepted, the first sentence of Article 2.2.1.1 would have the same meaning with or without the word "normally", which would be inconsistent with the principle that "interpretation must give meaning and effect to all the terms of a treaty".[217]

7.113. We recall further Indonesia's argument that "[b]y including the word 'provided' the drafters intentionally were conditioning application of the rule in Article 2.2.1.1 [] to the two conditions that followed".[218] Indonesia finds support for its argument in the panel's statement in *China – Broiler Products (Article 21.5 – US)* that the "use of the term 'normally' in a legal obligation indicates a rule

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[214] Oxford Dictionaries online, definition of "normally", https://www.oed.com/view/Entry/128277?redirectedFrom=normally (accessed 17 September 2019).

[215] Panel Report, *China – Broiler Products*, para. 7.161 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 273) (fns omitted); Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227. We note that the Appellate Body has stated that:

> Given the reference to "normally" in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply.

(Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.87; see also Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120).

[216] Australia's first written submission, paras. 187-192 (underlining omitted); second written submission, paras. 197 (referring to Indonesia's response to Panel question No. 20 at the first meeting of the Panel and response to Panel question No. 20(a) following the first meeting of the Panel, p. 20) and 226; response to Panel question No. 20(d) following the first meeting of the Panel, para. 150.

[217] Appellate Body Report, *US – Gasoline*, DSR 1996:I, p. 21.

[218] Indonesia's second written submission, para. 59.

from which derogations are permitted subject to the conditions set out in the legal provision".[219] We note in this respect that the panel did not state that derogations are permitted *only* subject to the conditions set out in the legal provision, nor did the panel engage in further analysis of the term "normally". Therefore, we do not think the panel's statement supports Indonesia's argument.

7.114. Like Indonesia, China argues that the flexibility derived from the word "normally" must be confined to the exceptions specified in Article 2.2.1.1, first sentence.[220] China finds support for this argument in the reasoning of the Appellate Body in *US − Clove Cigarettes*, where the Appellate Body found that while the obligation was qualified with the adverb "normally", an importing Member could depart from that obligation based on the explicit derogation provided for in paragraph 5.2 of the Doha Ministerial Decision.[221] China argues that the Appellate Body did not suggest that there were other bases for derogation from the rule except for the one specified explicitly in the provision.[222] We note that the Appellate Body's reasoning was specific to Article 2.12 of the Agreement on Technical Barriers to Trade and paragraph 5.2 of the Doha Ministerial Decision, which relate to the timing of the publication of technical regulations[223] − a matter that is quite different from the obligation to use an exporter's records to calculate the costs. In our view, the meaning of the term "normally" in Article 2.2.1.1, first sentence, must be ascertained in light of the specific context of the Anti-Dumping Agreement. We consider that the context of the term "normally" found in Article 2.2.1.1, first sentence, suggests that a different interpretation is appropriate.

7.115. We note the text of the Anti-Dumping Agreement contains five sentences that use the words "provided that" and an obligation introduced by the verb "shall". However, we have identified that only two of the five sentences use the word "normally" in addition to the words "provided that"[224], whereas the other three sentences condition the respective obligations on the circumstances introduced by the words "provided that" without qualifying the obligations by the term "normally".[225] In light of this context, we consider that the term "normally" in Article 2.2.1.1 was used by the drafters deliberately to introduce a difference to the meaning of the sentence and cannot be reduced to a mere reference to the conditions that follow the words "provided that", as argued by Indonesia. Rather, the term "normally", in our view, indicates that even where an exporter's records satisfy the two explicit conditions in Article 2.2.1.1, first sentence, there are circumstances in which the authority may depart from its obligation to use those records − an obligation that is operative only when the two explicit conditions are fulfilled.

7.116. While Australia argues that the presence of the word "normally" in Article 2.2.1.1, first sentence, means that "where the circumstances are not normal and ordinary, the investigating authority is not required to calculate costs on the basis of records kept by the exporter or producer under investigation, even if the two conditions in Article 2.2.1.1 are satisfied"[226], and Indonesia disagrees with this proposition[227], we do not believe that this dispute requires us to define precisely under what circumstances an investigating authority would be allowed to depart from the obligation to use the exporter's records on the basis of the term "normally".

7.117. As we already noted, the obligation to "normally" use the records kept by the exporter, becomes operative when both explicit conditions are satisfied: the "records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sales of the product under consideration". It follows that, to rely on the flexibility provided by the term "normally", the investigating authority has to consider whether the records satisfy the two explicit conditions and establish that, although the records are in accordance with GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration, it nonetheless finds a compelling reason,

[219] Indonesia's response to Panel question No. 20(a) following the first meeting of the Panel, p. 20 (referring to Panel Report, *China − Broiler Products (Article 21.5 − US)*, para. 7.29).
[220] China's third-party submission, para. 63.
[221] China's third-party submission, para. 62 (referring to Appellate Body Report, *US − Clove Cigarettes*, paras. 273 and 275).
[222] China's third-party submission, para. 62.
[223] Appellate Body Report, *US − Clove Cigarettes*, paras. 269-275.
[224] Article 2.2.1.1 (first sentence), and footnote 2 of the Anti-Dumping Agreement.
[225] Article 2.2, Article 2.2.1.1 (second sentence), and footnote 11 of the Anti-Dumping Agreement.
[226] Australia's first written submission, para. 194. (underlining omitted)
[227] Indonesia's second written submission, para. 61; response to Panel question No. 16 following the second meeting of the Panel, paras. 30-36.

distinct from the two explicit conditions, to disregard them. If the investigating authority were permitted to rely on the term "normally" to disregard the records without giving any consideration to the two explicit conditions, this would render those conditions in Article 2.2.1.1, first sentence, unnecessary. In such a case, the first sentence of Article 2.2.1.1 could simply read "[f]or the purpose of paragraph 2, costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation".[228] As Australia points out, the word "normally" has to be given meaning and effect.[229] By the same token, the two explicit conditions must also be given meaning and effect. We conclude that in relying on "normally", the investigating authority should give meaning to the whole of the obligation in Article 2.2.1.1, first sentence, and should therefore examine whether the records satisfy the two explicit conditions and provide a satisfactory explanation as to why, nonetheless, it finds compelling reasons to disregard them.

7.118. We find further support for the above understanding of the obligation in Article 2.2.1.1, first sentence, in the reasoning of the panel in *Ukraine – Ammonium Nitrate.* In that dispute, Ukraine relied on the term "normally" in the first sentence of Article 2.2.1.1 to defend its investigating authority's decision to disregard the producers' recorded gas costs because of the perceived distortions in the Russian domestic market for gas.[230] The panel rejected Ukraine's submission, finding that it was based on *ex post facto* rationalization, in part because the investigating authority *had not made a finding that both the first and second conditions of Article 2.2.1.1 were satisfied before deciding to reject the recorded costs*.[231] In our view, this line of reasoning suggests that the panel in *Ukraine – Ammonium Nitrate* similarly considered that, to the extent that the word "normally" allows for the possibility of rejecting exporters' or producers' recorded costs, the investigating authority must give consideration to the whole of the obligation in the first sentence of Article 2.2.1.1, including the two explicit conditions.

7.119. With these considerations in mind, we now turn to examine the ADC's determination to establish whether the ADC properly relied on the flexibility provided by the term "normally" in disregarding the hardwood pulp component of Indah Kiat's and Pindo Deli's recorded costs. We note that there is no specific finding in the Final Report regarding the consistency of Indah Kiat's and Pindo Deli's recorded pulp costs with GAAP in Indonesia.[232] The parties have also not pointed us to any such explicit finding made by the ADC in the Final Report.

7.120. As regards the second condition, we note that Australia argues that "[t]he [ADC] did not explicitly find that the cost of hardwood pulp recorded by Indah Kiat and Pindo Deli did not 'reasonably reflect the costs associated with the production and sale of the product under consideration', as stated in the second condition of Article 2.2.1.1".[233] Australia also does not argue that the ADC actually determined that the records of Indah Kiat and Pindo Deli "reasonably reflect the costs associated with the production and sale of the product under consideration", and we do not see any explicit finding to this effect in the Final Report.

7.121. Indonesia points out that, in respect of Indah Kiat, the ADC's verification team found that "the pulp costs (as part of the raw material costs) recorded in Indah Kiat's [cost to make and sell (CTMS)] spreadsheet for A4 photocopy paper reflect the actual costs incurred".[234] As far as Pindo Deli is concerned, we note that "the verification team did not conduct an on-site verification of [its] [CTMS] data". Nevertheless, the verification team compared this data to that of other exporters and found it to be "comparable".[235]

7.122. These statements from the verification reports reveal that the ADC performed some analysis that is potentially relevant to determining whether the second condition of Article 2.2.1.1, first sentence, was satisfied. However, we do not understand these statements found in the verification

[228] See also Indonesia's response to Panel question No. 32 following the second meeting of the Panel, para. 96.

[229] Australia's first written submission, paras. 189 and 192; second written submission, para. 202.

[230] Panel Report, *Ukraine – Ammonium Nitrate*, paras. 7.72-7.75 and 7.79-7.80.

[231] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.80.

[232] Final Report, (Exhibit IDN-4), section 6.9, pp. 50-65.

[233] Australia's second written submission, para. 211. (underlining omitted)

[234] Indonesia's first written submission, para. 153 (referring to Indah Kiat's Verification Report, (Exhibit IDN-9), section 4.3).

[235] Indonesia's first written submission, para. 153; Pindo Deli's Verification Report, (Exhibit IDN-10), section 4.1.

reports to constitute definitive findings of the ADC, but rather merely the ADC's initial exploration of the completeness and accuracy of the cost data. The preliminary character of the contents of the verification reports is confirmed by the titles of their final sections, including "Normal value – *Preliminary assessment*" or "*Preliminary* Dumping Margin" and the statement on the first pages: "[t]his report and the views or recommendations contained therein will be reviewed by the case management team and may not reflect the final position of the Anti-Dumping Commission".[236] Furthermore, it is uncontested that in the investigation at issue, some of the recommendations made by the verification teams were not followed by the ADC in its final determination. For example, although the verification team was "satisfied" that the prices paid in domestic sales of A4 copy paper are suitable for assessing the normal value[237], the ADC ultimately decided to construct normal value.

7.123. Finally, we recall that the ADC explained that, when undertaking the assessment "whether an exporter's records reasonably reflect competitive market costs associated with the production or manufacture of like goods", "the [ADC] examines a number of factors, including whether the Government influenced the prices of any major inputs".[238] We note that the ADC's reasoning in the Final Report leading to the rejection of Indah Kiat's and Pindo Deli's recorded pulp costs focused on government-induced distortions in the pulp costs in the paper market in Indonesia.[239] The relevant section of the Final Report does not contain any finding regarding the accuracy of the exporters' records.[240]

7.124. Having carefully reviewed the Final Report of the ADC, we find that the ADC did not establish that Indah Kiat's and Pindo Deli's records were GAAP-consistent and reasonably reflected costs associated with the production and sale of A4 copy paper. The ADC rejected the pulp cost component of their records for other reasons. Thus, the ADC, in its analysis, did not give effect to the whole of the obligation in Article 2.2.1.1, first sentence, including the two explicit conditions. In light of our above reasoning regarding the operation of the first sentence of Article 2.2.1.1, first sentence, the ADC's reliance on the term "normally" was inconsistent with Australia's obligations under that provision. Accordingly, we find that the ADC acted inconsistently with Australia's obligations under Article 2.2.1.1 when it disregarded the recorded hardwood pulp costs of Indah Kiat and Pindo Deli in the A4 copy paper investigation.

7.125. As noted in our introduction to these findings, Indonesia also claims that the ADC's decision to disregard the recorded hardwood pulp costs of Indah Kiat and Pindo Deli is inconsistent with Article 2.2 of the Anti-Dumping Agreement. Indonesia asks the Panel to make this finding "because in constructing the normal value for the Indonesian producers under investigation, Australia did not calculate the cost of production for A4 copy paper on the basis of the records kept by those producers even though the records were in accordance with [GAAP] and reasonably reflected the actual cost of production of A4 copy paper, and because Australia *therefore* failed to properly calculate the cost of production and properly construct the normal value for those producers".[241] We have already established above that the ADC acted inconsistently with Article 2.2.1.1 when it rejected the hardwood pulp component of Indah Kiat's and Pindo Deli's records. As we understand it, Indonesia has not provided any basis for its Article 2.2 claim that is separate and independent from its claim under Article 2.2.1.1 of the Anti-Dumping Agreement and, in that sense, Indonesia's claim under Article 2.2 is purely consequential. In this light, we do not believe it is necessary to make any findings on Indonesia's claim for the purpose of resolving this dispute. Accordingly, we exercise judicial economy and decline to rule on the merits of Indonesia's claim under Article 2.2 of the Anti-Dumping Agreement.

7.3.4 Conclusion

7.126. We find that Australia's measure is inconsistent with Article 2.2.1.1, first sentence, of the Anti-Dumping Agreement because the ADC has not established that both the first and second conditions in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement were satisfied when

[236] Indah Kiat's Verification Report, (Exhibit IDN-9), sections 7 and 8, and p. 1; Pindo Deli's Verification Report, (Exhibit IDN-10), sections 7 and 8, and p. 1.
[237] Indah Kiat's Verification Report, (Exhibit IDN-9), section 7; Pindo Deli's Verification Report, (Exhibit IDN-10), section 7.
[238] Final Report, (Exhibit IDN-4), section 6.9.1, p. 51.
[239] Final Report, (Exhibit IDN-4), section 6.9.1, pp. 50-51.
[240] Final Report, (Exhibit IDN-4), section 6.9.1, pp. 50-51.
[241] Indonesia's first written submission, para. 181. (emphasis added)

rejecting the pulp component of Indah Kiat's and Pindo Deli's records on the basis of the term "normally" and therefore has failed to give effect to the whole of the obligation in that provision.

7.127. Because Indonesia's claim under Article 2.2 of the Anti-Dumping Agreement that the ADC has not properly calculated the "cost of production" of A4 copy paper for Indah Kiat and Pindo Deli is based entirely on the ADC's rejection of the hardwood pulp component of their records, it is consequential to its claim under Article 2.2.1.1, and we therefore decline to make any findings.

7.4 Whether the Anti-Dumping Commission constructed the "cost of production" of A4 copy paper for Indah Kiat and Pindo Deli in a manner inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.4.1 Introduction

7.128. Indonesia submits that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement by substituting the actual cost of hardwood pulp recorded in Indah Kiat's and Pindo Deli's records with prices of exports of hardwood pulp made by Brazilian and South American producers to China and Korea.[242] According to Indonesia, the use of third-country export prices as a proxy for the actual costs of pulp of the Indonesian producers was inconsistent with the requirement in Article 2.2 to calculate the "cost of production in the country of origin".[243] In particular, Indonesia maintains that the adjustments made to the export price benchmarks used as a proxy for costs did not result in the ADC using the cost of production *in Indonesia* to construct the normal value of A4 paper.[244] Moreover, Indonesia argues that the benchmarks were not adjusted for different levels of profit to reflect the respective situations of Indah Kiat and Pindo Deli.[245] Finally, Indonesia argues that the benchmarks were not appropriate for deriving the cost of pulp in Indonesia because they were based on unreliable indicative data, which was misrepresented in the ADC's Final Report as "verified actual transaction prices".[246] Indonesia also argues that the ADC could have replaced the cost of woodchips rather than pulp costs in constructing Indah Kiat's cost of production of A4 copy paper and that would result in a less trade-distortive benchmark.[247]

7.129. Australia argues that the ADC acted consistently with Australia's obligations under Article 2.2 because there were no available domestic prices or import prices of pulp in Indonesia that could have been used to substitute the actual costs of pulp.[248] Australia clarifies that the only available domestic prices of pulp were confidential and therefore could not be used, and import prices of pulp would likely be affected by the identified market distortions.[249] Australia argues that the ADC was entitled to use the pulp benchmark to determine the full cost of pulp since the obligation to calculate "cost of production in the country of origin", as used in Article 2.2 of the Anti-Dumping Agreement, is broader than the obligation to use costs recorded in the records under Article 2.2.1.1.[250] According

[242] Indonesia's first written submission, paras. 155, 164, and 166; second written submission, para. 75; and opening statement at the second meeting of the Panel, para. 71.
[243] Indonesia's first written submission, paras. 164 and 167; opening statement at the second meeting of the Panel, para. 71.
[244] Indonesia's first written submission, paras. 155 and 168; second written submission, paras. 74-75; and response to Panel question No. 29 following the first meeting of the Panel, p. 24.
[245] Indonesia's opening statement at the second meeting of the Panel, para. 71; responses to Panel question No. 9 following the second meeting of the Panel, paras. 26 and question No. 30, paras. 91-93; and comments on Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 54-57.
[246] Indonesia's opening statement at the second meeting of the Panel, para. 70; responses to Panel question No. 9 following the second meeting of the Panel, paras. 23-24 and question No. 29, paras. 88-89.
[247] Indonesia's responses to Panel question No. 18 following the second meeting of the Panel, para. 37 and question No. 35, paras. 97-98.
[248] Australia's first written submission, paras. 222-228 (referring to Final Report, (Exhibit IDN-4), sections 6.9.2.2, A4.3, A4.3.1, A4.3.2, and A4.5.1, pp. 52, and 230-232).
[249] Australia's first written submission, paras. 225-227.
[250] Australia's response to Panel question No. 26 following the first meeting of the Panel, paras. 196-198 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73); second written submission, paras. 259-260, and fn 315 (referring to Appellate Body Reports, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 102; *US – Carbon Steel (India)*, para. 4.352; *US — Upland Cotton (Article 21.5 - Brazil)*, paras. 426-428; and Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.170); and responses to Panel questions Nos. 14 and 15 following the second meeting of the Panel, paras. 82-100.

to Australia, although based on external sources, the pulp benchmark used in the construction of normal value was adjusted to ensure that it was suitable to arrive at the cost of production of A4 copy paper *in Indonesia*.[251] Australia submits that the ADC was not obliged to adjust the pulp benchmark to reflect the level of profit[252], and that the data used for the pulp benchmark was reliable.[253]

7.130. We begin by addressing the key threshold question that is raised by the parties' submissions, namely, whether the ADC was entitled, under the terms of Article 2.2 of the Anti-Dumping Agreement, to replace the actual costs of pulp of the Indonesian A4 copy paper producers with a value derived from *third-country* export prices of pulp to China and Korea.

7.4.2 Whether the Anti-Dumping Commission was entitled to replace the recorded pulp costs of Indah Kiat and Pindo Deli with adjusted third-country export prices of pulp

7.131. Article 2.2 of the Anti-Dumping Agreement provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[254]

7.132. The expression "cost of production in the country of origin" in this provision has been understood as "a reference to the price paid or to be paid to produce something within the country of origin".[255] Normally, and as reflected in the obligation set out in the first sentence of Article 2.2.1.1, the cost of production in the country of origin should be calculated on the basis of cost information from an exporter's own records. However, as explained by the Appellate Body in *EU – Biodiesel (Argentina)*:

> In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs.[256]

7.133. We recall that the ADC did not use Indah Kiat's and Pindo Deli's pulp costs to calculate their respective costs of production of A4 copy paper for the purpose of constructing normal value. We have found in the previous section that in disregarding Indah Kiat's and Pindo Deli's costs, the ADC acted inconsistently with the first sentence of Article 2.2.1.1. Accordingly, in the light of the above Appellate Body statement from *EU – Biodiesel (Argentina)*, with which we agree, there was no legal basis for the ADC to have used third-country export prices of pulp as a proxy for Indah Kiat's and Pindo Deli's pulp costs when constructing normal value of A4 copy paper under the terms of Article 2.2. It follows that the ADC's use of Brazilian and South American export prices of pulp to China and Korea as a starting point for the calculation of the costs of pulp in Indonesia was inconsistent with Article 2.2.

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[251] Australia's first written submission, paras. 228-229 (referring to Final Report, (Exhibit IDN-4), sections 6.9.2.2, A2.9.2.3, A4.1, A4.2, A4.3.3, A4.5.1, A4.5.2, pp. 52, 167, and 230-233), 232-240, and 245-246; second written submission, paras. 235-260; and response to Panel question No. 11 following the second meeting of the Panel, paras. 49-61.

[252] Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 158-177; comments on Indonesia's responses to Panel questions Nos. 9, 10, 29 and 30 following the second meeting of the Panel, paras. 60-61, and 130-148.

[253] Australia's closing statement at the second meeting of the Panel, paras. 9-12; comments on Indonesia's responses to Panel questions Nos. 9, 10, and 29 following the second meeting of the Panel, paras. 53-58.

[254] Fn omitted.

[255] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.69.

[256] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (fn omitted)

7.134. Having concluded that the ADC was not entitled, under Article 2.2, to use third-country export prices of pulp as a basis for determining the cost of production of A4 copy paper in Indonesia, we note that a panel has "the discretion to address only those arguments it deems necessary to resolve a particular claim".[257] In this particular case, we do not consider that we need to address all of the arguments presented by Indonesia as to why the use of the pulp benchmark was inconsistent with Article 2.2. However, to assist the parties in resolving their dispute, we find it useful to address Indonesia's submissions concerning the absence of relevant profit adjustments to the pulp benchmark and the ADC's decision not to replace woodchips costs instead of pulp costs for Indah Kiat. We understand that Indonesia's arguments regarding these issues proceed by assuming *arguendo* that even if the ADC were allowed to replace some of the exporters' costs in constructing their cost of production of A4 copy paper in Indonesia, the ADC's use of the specific pulp benchmark it selected was still inconsistent with the requirement to calculate the "cost of production" under Article 2.2. For the purposes of our subsequent analysis, we therefore will similarly examine whether, even assuming that the ADC was allowed to replace some of the exporters' costs by out-of-country information, its use of the pulp benchmark was nonetheless inconsistent with Article 2.2. However, before moving on to this analysis, we address Australia's contention that Indonesia has conceded in this proceeding that the export pulp benchmark applied by the ADC was the proper amount to use for the hardwood pulp component of the cost of production of A4 copy paper.

7.135. Australia argues Indonesia has conceded that the pulp benchmark was the proper amount to use as a substitute for Indah Kiat's and Pindo Deli's pulp costs "because Indonesia has acknowledged that the prevailing export price of hardwood pulp was the proper amount to use for the hardwood pulp component of the 'cost of production'" and because "Australia has demonstrated that the 'pulp benchmark' used by the Anti-Dumping Commission was virtually identical to that prevailing export price".[258] While it is true that Indonesia originally argued that Australia could have used the export price of Indonesian pulp to derive the cost of pulp in Indonesia[259], the arguments of Indonesia have evolved in the course of this proceeding. In response to the Panel's request to confirm the understanding that "Indonesia seems to accept that the export price of Indonesian pulp could have been used as a suitable amount for the pulp costs to arrive at the cost of production of A4 copy paper in Indonesia", Indonesia clarified that this understanding is "not correct".[260] Therefore, we find that Indonesia has not conceded that the pulp benchmark was the proper amount to use for the hardwood pulp component of Indah Kiat's and Pindo Deli's cost of production of A4 copy paper.

7.4.3 Whether the absence of adjustments to the pulp benchmark for different levels of profit is inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.136. Indonesia argues that the pulp cost benchmark used to replace Indah Kiat's and Pindo Deli's actual pulp costs was incorrect because it included profit amounts that did not reflect the specific circumstances of each company, including "the fact that the Indonesian producers are integrated or affiliated with pulp producers".[261] In particular, Indonesia maintains that, for Indah Kiat, the pulp benchmark should not have included profit because it was an integrated company, while for Pindo Deli, the profit component of the benchmark should have been removed or adjusted.[262]

7.137. Australia responds that subtracting an amount for profit from the pulp benchmark would have meant that the cost of production of A4 copy paper derived for Indah Kiat and Pindo Deli would not have reflected the full cost of production of A4 copy paper in Indonesia and would not have been an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of

[257] Appellate Body Reports, *EC – Fasteners (China)*, para. 511; *EC – Poultry*, para. 135; and *India – Solar Cells*, para. 5.15.

[258] Australia's opening statement at the second meeting of the Panel, para. 101 (referring to Indonesia's opening statement at the first meeting of the Panel, para. 49; Australia's closing statement at the first meeting of the Panel, paras. 26-29; and second written submission, paras. 241-249).

[259] Indonesia's opening statement at the first meeting of the Panel, para. 49.

[260] Indonesia's response to Panel question No. 29 following the second meeting of the Panel, para. 88.

[261] Indonesia's opening statement at the second meeting of the Panel, para. 71.

[262] Indonesia's responses to Panel questions Nos. 30(a) and (b) following the second meeting of the Panel, paras. 91-92; comments on Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 55-57.

domestic sales".[263] In Australia's view, the pulp benchmark was appropriate to use because of its consistency with another exporter's costs of pulp, which were found not to be distorted.[264] Moreover, Australia points to the fact that neither the exporters, nor the Government of Indonesia requested that the ADC deduct an amount for profit from the pulp benchmark in the course of the investigation.[265]

7.138. After finding that "the actual cost of pulp recorded by exporters in their records [did] not reasonably reflect a competitive market cost"[266], the ADC constructed the cost of production of A4 copy paper for Indah Kiat and Pindo Deli using "a pulp cost benchmark that better reflects the competitive market cost of pulp".[267] The ADC explained that the domestic prices of pulp of the cooperative Indonesian exporters were considered to be affected by government influence and therefore unsuitable[268]; that it was not possible to use cost data from other Indonesian pulp producers to replace the rejected costs of Indah Kiat and Pindo Deli because the only cost data available to the ADC pertained to a different producer and was confidential[269]; and that appropriate import price information was lacking, and would also likely have been affected by government influence.[270]

7.139. The Final Report describes the benchmark as "consisting of quarterly import pulp prices into China and Korea based on an average CIF price for bleached eucalyptus kraft wood originating from Brazil and South America".[271] The data used to derive the benchmark prices was generated by two paper industry consultants contracted by the ADC to provide price information - RISI and Hawkins Wright.[272]

7.140. Indonesia has described the benchmark using various expressions including "the cost of producing pulp in South America and Brazil"[273] and "a pulp price in Brazil and South America".[274] Australia objects to Indonesia's descriptions of the benchmark and considers them to be incorrect in light of the ADC's description of the benchmark in the Final Report.[275] We recall that the ADC did not use the CIF price benchmark as the relevant cost proxy. Rather, the CIF price was the *starting basis* for deriving the cost substitute. In the course of the investigation, the ADC made certain adjustments to the CIF benchmark for Indah Kiat and Pindo Deli. These included adjustments that subtracted relevant amounts of ocean freight and inland transport costs[276], which we understand to have been associated with the exports from Brazil and South America. As Indonesia has pointed out, "[r]emoving ocean freight … results in a reference price FOB Brazil or South America as opposed to

[263] Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 158-159 (referring to Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.24, Panel Reports, *EU − Biodiesel (Argentina)*, para. 7.233; *Thailand − H-Beams*, para. 7.112; and *US − Softwood Lumber V*, para. 7.278). Australia originally understood Indonesia to argue that, after making an adjustment for profit to the pulp benchmark, the ADC should have used the cost of pulp reflected in Indah Kiat's records as the hardwood pulp component of the cost of production of A4 copy paper for both Indah Kiat and Pindo Deli. (Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 162-167). However, Indonesia later clarified that this was not a correct reflection of its position. (Indonesia's comments on Australia's response to Panel question No. 33 following the second meeting of the Panel, para. 54). In examining the issue of the adjustment for profit, we will therefore refrain from addressing Australia's arguments as to why Indah Kiat's and Pindo Deli's recorded costs were not suitable to use in the construction of the cost of production of A4 copy paper.

[264] Australia's response to Panel question No. 33 following the second meeting of the Panel, para. 161 (referring to Final Report, (Exhibit IDN-4), section 6.9.2.2, p. 52).

[265] Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 168-175.

[266] Final Report, (Exhibit IDN-4), section 6.9.1, p. 51.

[267] Final Report, (Exhibit IDN-4), section A4.1, p. 230.

[268] Final Report, (Exhibit IDN-4), section A4.3.1, p. 230.

[269] Final Report, (Exhibit IDN-4), section A4.5.1, p. 232.

[270] Final Report, (Exhibit IDN-4), section A4.3.2, pp. 230-231.

[271] Final Report, (Exhibit IDN-4), sections A4.2 and A4.3.3, pp. 230-231.

[272] Final Report, (Exhibit IDN-4), section A4.5.1, p. 232.

[273] Indonesia's opening statement at the first meeting of the Panel, para. 49.

[274] Indonesia's response to Panel question No. 28(a) following the first meeting of the Panel, p. 22.

[275] Australia's second written submission, paras. 237-240.

[276] Final Report, (Exhibit IDN-4), sections 6.9.8.1.3 and A4.4, pp. 62 and 231; Australia's first written submission, paras. 238 and 240.

CIF China and Korea".[277] Thus, when Indonesia refers to the "pulp price in Brazil and South America", we understand it to refer to the already adjusted benchmark.

7.141. The ADC also made other adjustments to the pulp benchmark. In particular, it adjusted the benchmarks used for Indah Kiat and Pindo Deli to reflect the verified proportion of pulp consumed in the production of A4 copy paper.[278] For Indah Kiat, which produced pulp itself and therefore used wet pulp in its production process, the ADC converted the benchmark from a dry pulp price to a wet pulp price.[279] The ADC further deducted an amount for selling, general and administrative expenses from Indah Kiat's pulp benchmark.[280] It is not disputed that the ADC did not adjust the pulp benchmark for profit to reflect the respective situations of Indah Kiat and Pindo Deli.[281]

7.142. Turning to Indonesia's submissions concerning the absence of an adjustment for profit, we will first examine Indonesia's arguments regarding the ADC's analysis in relation to Indah Kiat and will then turn to examine Indonesia's arguments in relation to Pindo Deli.

7.4.3.1 The adjustment for profit to the pulp benchmark for Indah Kiat

7.143. Indonesia contests the inclusion of profit in the pulp benchmark for Indah Kiat because it is an integrated paper producer, and "the production of pulp is merely an intermediate stage in [its] paper production process".[282] Therefore, Indonesia submits that the ADC should have subtracted profit from the "pulp benchmark" for Indah Kiat, and the failure to make this adjustment renders the ADC's establishment of the facts not proper and not unbiased and objective pursuant to Article 17.6(i) of the Anti-Dumping Agreement.[283]

7.144. On this basis, we proceed to examine the facts relating to the inclusion of profit in the pulp benchmark that were before the investigating authority when it made the determination. In its submissions, Indonesia has brought to our attention section 4.3, "Integrated processes", of the Verification Report for Indah Kiat, which states that "[t]he verification team was able to ascertain that pulp is transferred to the photocopy paper manufacturing division at actual cost, and therefore, the verification team is satisfied that the pulp costs (as part of the raw material costs) recorded in Indah Kiat's CTMS spreadsheet for A4 photocopy paper reflect the actual costs incurred".[284] This excerpt of the Verification Report confirms that the ADC had evidence before it that Indah Kiat's process of production of A4 copy paper was integrated and that the transfer of pulp between the manufacturing divisions of Indah Kiat was made without the inclusion of profit, at actual cost.

7.145. Australia explains that neither the exporters, nor the Government of Indonesia requested that the ADC deduct an amount for profit from the pulp benchmark in the course of the investigation.[285] According to Australia, such a request was necessary in order for the ADC to have

[277] Indonesia's first written submission, para. 168.

[278] Final Report, (Exhibit IDN-4), section 6.9.8.1.4, p. 62; Australia's first written submission, paras. 236-237 and 240.

[279] Final Report, (Exhibit IDN-4), sections 6.9.8.1.3, A4.4 and A4.5.1, pp. 61, and 231-232; Australia's first written submission, para. 238; and Indonesia's first written submission, para. 168.

[280] Final Report, (Exhibit IDN-4), section 6.9.8.1.3, p. 62; Australia's first written submission, paras. 238 and 240; and Indonesia's first written submission, para. 168. Although Australia argues that the ADC subtracted the amount for selling, general and administrative expenses from Pindo Deli's benchmark, we have not been able to identify that deduction in the text of the Final Report.

[281] Indonesia's opening statement at the second meeting of the Panel, para. 71; responses to Panel question No. 9 following the second meeting of the Panel, para. 26 and question No. 30, paras. 91-93; Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 158-177.

[282] Indonesia's response to Panel question No. 30(a) following the second meeting of the Panel, para. 91.

[283] Indonesia's response to Panel question No. 30(a) following the second meeting of the Panel, para. 91; comments on Australia's response to Panel question No. 33 following the second meeting of the Panel, para. 55.

[284] Although Indonesia pointed to Indah Kiat's Verification Report in the context of discussing the accuracy of the exporters' recorded costs, we consider it to be also relevant for the purposes of our examination of this specific issue. (See Indonesia's first written submission, para. 153 (referring to Indah Kiat's Verification Report, (Exhibit IDN-9), section 4.3)).

[285] Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 168-175.

been required to make the adjustment. Australia finds support for its view in the following statement made by the panel in *US − Coated Paper (Indonesia)*[286]:

> What an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending on the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including any additional information the investigating authority seeks so that it may base its determination on positive evidence on the record.[287]

7.146. We note that the panel in *US − Coated Paper (Indonesia)* dealt with an issue that is different from the one before us, namely, how an investigating authority should arrive at a benchmark for the purpose of calculating the amount of a subsidy in terms of benefit under Article 14(d) of the SCM Agreement. It is not clear to us that the considerations relating to the selection of a benchmark under that provision should be the same as those guiding an investigating authority's determination of the "cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement.[288] Having said that, we do not understand the above excerpt to limit the analysis that an investigating authority must undertake for the purpose of establishing a subsidy benchmark under Article 14(d) of the SCM Agreement to issues raised in requests made by interested parties, when the information supplied by the respondents and other positive evidence on the record identify a specific need for an adjustment of the benchmark. In our view, that same limitation cannot be found in Article 2.2 of the Anti-Dumping Agreement either. Rather, as we see it, it follows from the obligation in Article 2.2 that it is incumbent on the investigating authority to make all adaptations that are necessary, in the light of the facts before it, to arrive at the "cost of production in the country of origin".[289]

7.147. We recall Australia's own explanation that the "adaptations [made to the pulp benchmark] were in response to evidence obtained during the investigation as a result of the verification of Indonesian exporters, and in response to submissions made by [Sinar Mas Group] and the Government of Indonesia during the investigation".[290] In the circumstances where the record of the investigation revealed that the transfer of pulp between the divisions of Indah Kiat happens at actual cost, we do not consider relevant whether the request for the adjustment for profit was made by interested parties or not. In any case, while a request for such an adjustment was not made in clear and explicit terms, the exporters, in a submission in response to the Statement of Essential Facts, complained to the ADC that:

> [It had] used benchmark purchase prices of dry hardwood pulp in sheets, when the hardwood pulp (LBKP) used by Indah Kiat is self-produced wet pulp *which is obviously of much lower cost*. *It is totally inappropriate* to use a benchmark purchase price for dry hardwood pulp in sheets when the hardwood pulp used by Indah Kiat in its A4 copy paper production *is self-produced* wet pulp *going directly into paper production*.[291]

7.148. We find that, in the light of the outcome of the ADC's verification, the emphasized words can be reasonably understood as pointing to the inappropriateness of using unadjusted purchase prices for an integrated producer such as Indah Kiat.

7.149. Australia makes several additional arguments in response to Indonesia's challenge of the absence of an adjustment for profit. First, Australia argues that subtracting an amount for profit from the pulp benchmark "would have meant that the cost of production of A4 copy paper derived for Indah Kiat and Pindo Deli would not have reflected the full cost of production of A4 copy paper in Indonesia for Indah Kiat and Pindo Deli" and would not have been an "appropriate proxy for the

[286] Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 172-173 (referring to Panel Report, *US − Coated Paper (Indonesia)*, para. 7.36).

[287] Panel Report, *US − Coated Paper (Indonesia)*, para. 7.36.

[288] We note that the panel and Appellate Body in *Ukraine − Ammonium Nitrate* held a similar view. (Panel Report, *Ukraine − Ammonium Nitrate*, para. 7.102; Appellate Body Report, *Ukraine − Ammonium Nitrate*, para. 6.118).

[289] Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.73.

[290] Australia's response to Panel question No. 33 following the second meeting of the Panel, para. 169.

[291] Sinar Mas Group's submission (29 December 2016), (Exhibit IDN-15), p. 6. (bold type original; italics added)

price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales".[292] Second, Australia submits that the pulp benchmark was appropriate to use because of its consistency with the costs of pulp of another exporter under investigation, PT Riau Andalan Kertas.[293] Third, Australia counters Indonesia's argument that "the production of pulp is merely an intermediate stage in the paper production process"[294] by arguing that Indonesian producers of A4 copy paper do not devote all of their hardwood pulp to A4 copy paper production but also export pulp in significant quantities and that the prevailing export price is a key factor in determining the volume of paper production.[295]

7.150. We note that the Final Report provides no explanation as to why the ADC did not subtract profit from the pulp benchmark used as a substitute for Indah Kiat's recorded pulp costs or why the adjustments had to be limited by the circumstances Australia refers to in the above three arguments. In light of the absence of any such explanations, and given the facts on the record of the investigation discussed above, we find that the ADC's failure to adjust the level of profit included in the pulp cost benchmark used for Indah Kiat meant that the cost of production of A4 copy paper constructed for Indah Kiat was inconsistent with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement.

7.4.3.2 The adjustment for profit to the pulp benchmark for Pindo Deli

7.151. We will now consider whether the replacement of Pindo Deli's pulp costs with the pulp benchmark raises similar concerns. Indonesia asserts that "Australia did not remove profit from its calculation [of the pulp benchmark] and, therefore, its establishment of the facts [] would not be proper pursuant to Article 17.6(i)".[296] Indonesia argues that "Pindo Deli obtains pulp from affiliated parties, including Indah Kiat, and there is no evidence it did not do so in arm's length transactions in the ordinary course of trade".[297] On this basis, Indonesia submits that "using export prices that include profit is not representative of Pindo Deli's cost of production in Indonesia" and that "Australia should have used whatever benchmark it determined for Indah Kiat and made adjustments for whatever mark-up Indah Kiat added to its cost for its sales to Pindo Deli".[298] In clarifying its argument at a later stage, Indonesia explained that "profit must be subtracted from the benchmark for Pindo Deli's purchases in an amount that constitutes the actual mark-up Indah Kiat charged Pindo Deli".[299] In Indonesia's view, "[d]oing anything else would not merely be removing the effects of the 'particular market situation', it would be distorting commercial reality".[300]

7.152. As the complaining party in this proceeding, Indonesia bears the initial burden of demonstrating inconsistency of Australia's measure with Article 2.2 with regard to the adjustment for profit to Pindo Deli's benchmark.[301] In other words, Indonesia must present a "*prima facie* case ... based on 'evidence *and* legal argument' ... in relation to *each* of the elements of the claim".[302] Importantly, "[t]he evidence and arguments underlying a *prima facie* case ... must be sufficient to identify the challenged measure and *its basic import*, identify the relevant WTO provision and obligation contained therein, and *explain the basis for the claimed inconsistency of the measure with that provision*".[303] In our view, the arguments presented by Indonesia in respect of the lack of adjustment for profit to Pindo Deli's benchmark do not clearly explain the import of the challenged aspect of the measure and the basis for the claimed inconsistency of Australia's measure with

[292] Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 158-159 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24, Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; and *US – Softwood Lumber V*, para. 7.278). (underlining omitted)

[293] Australia's response to Panel question No. 33 following the second meeting of the Panel, para. 161.

[294] Indonesia's response to Panel question No. 30(a) following the second meeting of the Panel, para. 91.

[295] Australia's comments on Indonesia's responses to Panel questions Nos. 9 and 30 following the second meeting of the Panel, paras. 134-139.

[296] Indonesia's response to Panel question No. 9 following the second meeting of the Panel, para. 26.

[297] Indonesia's response to Panel question No. 30 (b) following the second meeting of the Panel, para. 92.

[298] Indonesia's response to Panel question No. 30 (b) following the second meeting of the Panel, para. 92.

[299] Indonesia's comments on Australia's response to Panel question No. 33 following the second meeting of the Panel, para. 57.

[300] Indonesia's response to Panel question No. 30 (b) following the second meeting of the Panel, para. 92.

[301] See Appellate Body Report, *EC – Hormones*, para. 98.

[302] Appellate Body Report, *US – Gambling*, para. 140 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323, at 336). (emphasis original)

[303] Appellate Body Report, *US – Gambling*, para. 141.

Article 2.2 and, in that respect, are insufficient for Indonesia to establish its *prima facie* case regarding this specific aspect of the claim.

7.153. Indonesia has argued *both* that the profit in the pulp benchmark for Pindo Deli must be *subtracted* or *removed* and that it should have been *adjusted*. We have not been able to deduce from Indonesia's arguments which specific kind of adjustment Indonesia considers the ADC had to make. To the extent Indonesia argues that the profit needed to be removed from the pulp benchmark for Pindo Deli, we find this argument to be in contradiction with Indonesia's own submission that Pindo Deli obtains pulp from affiliated parties, and that there is no evidence it did not do so in arm's length transactions.[304] It follows from Indonesia's explanation that Pindo Deli's cost of pulp is the price at which it obtains pulp from affiliated parties. If the pulp purchase transactions between Pindo Deli and its affiliates took place in accordance with normal commercial practices, as Indonesia claims, we fail to see why the price at which Pindo Deli obtained pulp would not be profitable for Pindo Deli's suppliers. In other words, we are unable to see why the cost of pulp for Pindo Deli (price it paid for pulp) would not include the profit component, and therefore why the profit component would need to be removed from the substituted pulp benchmark. Furthermore, to the extent Indonesia argues that the level of profit needed to be adjusted in the pulp benchmark for Pindo Deli, we do not see why the adjustment should relate to the "mark-up Indah Kiat added to its cost for its sales to Pindo Deli" in the circumstances where, as Indonesia itself explained, Pindo Deli buys pulp from Indah Kiat and another company, Lontar.[305] Indonesia has not provided any explanation regarding this point. We further note that Indonesia has not argued that the issue of profit adjustment was brought to the ADC's attention by interested parties.

7.154. In the absence of a clear and convincing explanation from Indonesia as to why and how the ADC had to make an adjustment for profit to Pindo Deli's benchmark, in light of the circumstances of this specific investigation, we find that Indonesia has not established that the absence of an adjustment for profit to the pulp benchmark used for Pindo Deli in the ADC's determination is inconsistent with the requirement to calculate the "cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement.

7.4.4 Whether the Anti-Dumping Commission acted inconsistently with Article 2.2 of the Anti-Dumping Agreement when it replaced Indah Kiat's pulp costs with the pulp benchmark based on third-country export prices instead of replacing woodchips costs

7.155. Indonesia argues that Article 2.2 of the Anti-Dumping Agreement requires the investigating authority to calculate the cost of production for the producer under investigation in Indonesia, and that by choosing to replace the pulp costs rather than woodchips costs for Indah Kiat, Australia failed to fulfil that requirement.[306] Indonesia argues that, even if the ADC needed to replace distorted costs, it should have replaced Indah Kiat's cost of woodchips (direct input into production of pulp) rather than pulp costs themselves.[307] The substitution of Indah Kiat's cost of pulp, in Indonesia's view, also resulted in the substitution of "other costs associated with manufacturing pulp, including electricity, water etc. that were not affected by the 'particular market situation'".[308] Indonesia points out that the ADC had Indah Kiat's woodchips costs on the record of the investigation.[309] According to Indonesia, "[b]y replacing the cost of woodchips, the allegedly distorted input in Indah Kiat's costs [would be] accounted for while all of Indah Kiat's other costs, which are not affected by the 'particular market situation' [would] remain the same".[310]

[304] Indonesia's response to Panel question No. 30 (b) following the second meeting of the Panel, para. 92.
[305] Indonesia's first written submission, fn 70.
[306] Indonesia's responses to Panel questions Nos. 18 and 35 following the second meeting of the Panel, paras. 37, and 97-98.
[307] Indonesia's responses to Panel question No. 18 following the second meeting of the Panel, para. 37 and question No. 35, para. 98.
[308] Indonesia's response to Panel question No. 35 following the second meeting of the Panel, para. 98.
[309] Indonesia's response to Panel question No. 18 following the second meeting of the Panel, para. 37 (referring to Attachment G6 to the Exporter's Questionnaire Response of Indah Kiat, (Exhibit IDN-28 (BCI))). See also Indonesia's second written submission, para. 80.
[310] Indonesia's response to Panel question No. 35 following the second meeting of the Panel, para. 98.

7.156. Australia acknowledges that the ADC had on its record the cost of woodchips used by Indah Kiat in the production of pulp.[311] However, Australia submits that it could only determine the value and volume of pulpwood, which is an input into production of woodchips, for one month.[312] Australia argues that nothing in the Anti-Dumping Agreement or Article 2.2 required the ADC to replace woodchips costs rather than pulp costs.[313] Australia points out that, where costs are not calculated on the basis of the records of the exporter or producer, Article 2.2 does not specify precisely what evidence an authority may resort to.[314] On this basis, Australia submits that it is irrelevant whether the ADC could have replaced woodchips costs instead of pulp costs.[315] Additionally, Australia argues that the pricing data was available to construct the pulp benchmark.[316]

7.157. We note that, in challenging this specific aspect of the ADC's determination, i.e. the ADC's choice to replace the cost of the main input into the production of A4 copy paper (pulp) rather than the cost of the input into production of the main input (woodchips), Indonesia proceeds by assuming *arguendo* that the ADC was allowed to replace Indah Kiat's recorded costs which were affected by the distortion resulting from the "particular market situation".[317] For the purposes of our analysis, we will proceed to address the argument on the same basis.[318] We note further that Indonesia has made this argument pursuant to Article 2.2 and not Article 2.2.1.1. So, we are not asked to examine whether the ADC acted inconsistently with Article 2.2.1.1 by rejecting Indah Kiat's recorded pulp costs instead of woodchips costs. Instead, we examine whether, taking into account the specific circumstances of Indah Kiat, the external pulp benchmark that the ADC utilized to replace Indah Kiat's cost of making pulp as a cost of making paper, was inconsistent with the requirement to use the "cost of production in the country of origin" under Article 2.2.

7.158. We recall that in *EU – Biodiesel (Argentina),* the Appellate Body explained that under certain circumstances the investigating authority may have recourse to information other than that contained in the exporter's records to construct the cost of production but even in those circumstances it remains bound by the obligation to derive the cost of production "in the country of origin":

> In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin". Indeed, Article 2.2 of the

[311] Australia's opening statement at the second meeting of the Panel, paras. 53-54 (referring to Attachment G6 to the Exporter's Questionnaire Response of Indah Kiat, (Exhibit IDN-28 (BCI))).

[312] Australia's response to Panel question No. 19 following the second meeting of the Panel, paras. 105-108.

[313] Australia's response to Panel question No. 34 following the second meeting of the Panel, paras. 179 and 181.

[314] Australia's response to Panel question No. 34 following the second meeting of the Panel, paras. 182-184 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73).

[315] Australia's response to Panel question No. 34 following the second meeting of the Panel, para. 181.

[316] Australia's response to Panel question No. 34 following the second meeting of the Panel, para. 180.

[317] Indonesia argues that "[b]y replacing the cost of woodchips, the allegedly distorted input in Indah Kiat's costs [would be] accounted for while all of Indah Kiat's other costs, which are not affected by the 'particular market situation' [would] remain the same". (Indonesia's response to Panel question No. 35 following the second meeting of the Panel, para. 98). We understand from this argument, that for the recorded cost of woodchips to be replaced, that component of the records had to be rejected under Article 2.2.1.1. It follows that, for the purposes of this argument, Indonesia has also assumed *arguendo* that the ADC could have rejected the recorded woodchips costs of Indah Kiat instead of the cost of making pulp.

[318] We note that because our reasoning proceeds on an *arguendo* basis, it is without prejudice to whether Article 2.2.1.1, first sentence, allows the investigating authority to disregard the recorded costs where those are found to be affected by the "particular market situation" or distorted, and whether Article 2.2 allows the investigating authority to replace distorted costs in constructing "the cost of production in the country of origin".

> Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects.[319]

7.159. It follows from the above explanation, that where the investigating authority uses information other than that contained in the records kept by the exporter or producer to construct the cost of production, it has to ensure that it adapts the information appropriately. Although we agree with Australia that Article 2.2 does not specify precisely to what evidence an authority may resort in constructing the cost of production, the words "in the country of origin" define the parameters of the investigating authority's inquiry.[320] The investigating authority is required by Article 2.2 to arrive at the "cost of production in the country of origin". By virtue of this requirement, the investigating authority shall consider available alternatives for replacing recorded costs. In particular, we consider that the investigating authority is obligated to, as much as possible, use replacement information that conforms to the requirement to use "the cost of production in the country of origin" for the exporter or producer under the investigation.

7.160. Turning to the specific circumstances of the investigation, we recall that in the course of its analysis of the situation in A4 copy paper market in Indonesia, the ADC identified the source of the distortion in the timber market:

> [It] considered that the primary source of any distortion in the A4 copy paper market would likely be within the Indonesian forestry sector because forestry and timber supply have been a primary focus of [the] policies and programs [of the Government of Indonesia].[321]

7.161. The ADC proceeded to quantify the distortion in the timber market (but not in the pulp or paper market):

> The Commission quantified the distortion in the Indonesian log market (see section A2.9.4.1 above) and is satisfied that the significant distortions found in that assessment impact on the pulp and paper industries such that domestic sales of A4 copy paper are unsuitable for use in determining normal value under subsection 269TAC(1).[322]

7.162. The ADC did not find, and Australia has not argued, that replacing Indah Kiat's cost of woodchips rather than the cost of producing pulp would not have corrected the identified distortion. Rather, with respect to the possibility of replacing woodchips costs, Australia stated that "[e]ven if other potential methods were available to calculate the "cost of production [of A4 copy paper] in [Indonesia]" in respect of Indah Kiat and Pindo Deli, nothing in the Anti-Dumping Agreement required the use by the Anti-Dumping Commission of a particular methodology".[323] As we have already explained above, we disagree with Australia and consider that, assuming *arguendo* that Article 2.2 allows the investigating authority to replace distorted costs in constructing "the cost of production in the country of origin", this provision also requires the investigating authority to consider available alternatives for replacing recorded costs so as to use the costs that are unaffected by the distortion to the extent possible.

7.163. The circumstances of the investigation, in our view, called for the ADC to consider an alternative to replacing Indah Kiat's cost of producing pulp with the pulp benchmark which replaces *all the costs* used in producing pulp with external information. We note the ADC's above findings to the effect that the source of the distortions was in Indonesia's timber market. Although Australia argued that the ADC was only able to determine the cost data for *pulpwood* (input into production of woodchips) for one month, we do not find this relevant to deciding whether the cost of *woodchips*

[319] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (fns omitted)
[320] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.
[321] Final Report, (Exhibit IDN-4), section A2.9.2.4, p. 168.
[322] Final Report, (Exhibit IDN-4), section A2.9.6.8, p. 185.
[323] Australia's response to Panel question No. 34 following the second meeting of the Panel, para. 179.

(input into production of pulp) could have been replaced. In this respect, we recall that Indah Kiat produces pulp itself and later transfers it to the paper manufacturing division[324] and we note that Indah Kiat's data relating to the value of woodchips consumed in the production of pulp was available on the ADC's record for the whole investigation period.[325] Furthermore, while Australia has argued that pricing data was available for the pulp benchmark[326], we note that the ADC's Final Report also contains information about the Malaysian woodchips trade data, which Australia used to quantify the distortions in the Indonesian log market.[327] In light of the evidence on the ADC's record and the ADC's own findings regarding the source of the distortion, we find that the ADC should have considered using a replacement cost for woodchips in combination with Indah Kiat's other costs for producing pulp which were not found to be affected by the distortion (labour, energy, etc.). If the ADC had undertaken such analysis, it should have explained its choice of the final benchmark in light of this alternative. The Final Report, however, contains no such explanation.

7.164. We are careful not to substitute our own judgment for that of the ADC as to what costs could have been feasibly utilized on the basis of the information before it. However, we recall that pursuant to the affirmative obligation under Article 2.2 to use the "cost of production in the country of origin", it is incumbent upon the investigating authority to explore the alternative methodologies that would allow it to arrive at "the cost of production in the country of origin" by utilizing those components of the producer's costs that are unaffected by the distortion, assuming *arguendo* that Article 2.2 allows for replacement of costs distorted by the effects of a particular market situation.

7.165. Given the facts on the record of the investigation, and in light of the absence of any explanation from the ADC as to why it did not replace the cost of woodchips and utilize Indah Kiat's other costs of producing pulp internally when constructing Indah Kiat's cost of production of A4 copy paper, we find that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement.

7.4.5 Conclusion

7.166. We find that Australia's measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement because, having improperly rejected the pulp component of Indah Kiat's and Pindo Deli's records, the ADC had no basis to use Brazilian and South American export prices of pulp to China and Korea for the calculation of Indah Kiat's and Pindo Deli's pulp costs when constructing the cost of production of A4 copy paper in Indonesia.

7.167. We further find that Australia's measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement because, despite having before it the evidence indicating that Indah Kiat is an integrated producer and obtains pulp at its cost, the ADC failed to provide a reasoned and adequate explanation as to why it did not subtract profit from the pulp benchmark used to replace Indah Kiat's recorded pulp costs in constructing the cost of production of A4 copy paper for Indah Kiat.

7.168. We find that Indonesia has not established that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement when it did not adjust the

[324] Indah Kiat's Verification Report, (Exhibit IDN-9), section 4.3.

[325] Attachment G6 to the Exporter's Questionnaire Response of Indah Kiat, (Exhibit IDN-28 (BCI)). While the attachment contains the terms "Raw Material", the parties agreed that these words refer to woodchips. (Indonesia's response to Panel question No. 18 following the second meeting of the Panel, para. 37; Australia's opening statement at the second meeting of the Panel, paras. 53-54). As explained in paragraphs 3.10-3.12 of Annex A-1, Exhibit IDN-28 (BCI) does not contain volume data for woodchips consumed in the production of pulp by Indah Kiat in 2015. The ADC's record before us does not reflect that such data would not have been available to the ADC. We further note that at the second meeting of the Panel and in subsequent responses to Panel's questions and comments on Indonesia's responses, Australia had an opportunity to explain why the ADC chose to replace the pulp costs rather than woodchips costs in constructing Indah Kiat's cost of production of A4 copy paper. Notably, Australia has not argued that it did not replace the woodchips costs because volume data for woodchips was lacking. Rather, Australia submitted that nothing in the Anti-Dumping Agreement required the ADC to use a particular methodology in constructing the cost of production of A4 copy paper for Indah Kiat and therefore it was not relevant whether the ADC could have replaced the woodchips costs rather than the pulp costs. (Australia's response to Panel question No. 34 following the second meeting of the Panel, paras. 179-181).

[326] Australia's response to Panel question No. 34 following the second meeting of the Panel, para. 180.

[327] Final Report, (Exhibit IDN-4), section A2.9.4.1, pp. 174-175.

pulp benchmark used to replace Pindo Deli's recorded pulp costs for profit in constructing the cost of production of A4 copy paper for Pindo Deli.

7.169. Finally, we find that Australia's measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement because the ADC failed to provide a reasoned and adequate explanation as to why it did not replace the cost of woodchips and utilize Indah Kiat's other costs of producing pulp internally when constructing Indah Kiat's cost of production of A4 copy paper, assuming *arguendo* that the ADC was allowed to replace distorted costs.

7.5 Whether Australia has calculated and imposed anti-dumping duties in excess of the margins of dumping permitted by Article 2 of the Anti-Dumping Agreement and therefore acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.170. Indonesia argues that Australia acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement by calculating and imposing anti-dumping duties in excess of those permitted by Article 2 of the Anti-Dumping Agreement as a result of its WTO-inconsistent calculation of the normal value of A4 copy paper of Indah Kiat and Pindo Deli.[328] We note that both parties agree that Indonesia's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are dependent on our findings on the merits of Indonesia's claims concerning consistency of the ADC's determination of normal value with Article 2 of the Anti-Dumping Agreement.[329] In response to the Panel's question regarding whether a finding under Article 9.3 would still be necessary to resolve the dispute, if the Panel were to find an inconsistency under Article 2.2 and/or 2.2.1.1 of the Anti-Dumping Agreement, Indonesia stated that "the Appellate Body has determined in a number of disputes that a finding under Article 9.3 is required even when other inconsistencies were found under Article 2".[330] Having reviewed the findings of the Appellate Body Indonesia has referred us to, we note that, in all those cases, the Appellate Body has made findings under Article 9.3 in addition to the findings under Article 2 of the Anti-Dumping Agreement without stating that a finding under Article 9.3 is *required* when a panel has found the challenged measures to be inconsistent with Article 2.[331]

7.171. We recall that we have found above that Australia acted inconsistently with its obligations under Article 2.2.1.1 of the Anti-Dumping Agreement when the ADC disregarded the hardwood pulp component of Indah Kiat and Pindo Deli in the construction of normal value. We have also found that Australia acted inconsistently with Article 2.2 of the Anti-Dumping Agreement when the ADC: (i) disregarded domestic sales of A4 copy paper of Indah Kiat and Pindo Deli as a basis for normal value because of the existence of a "particular market situation" without properly examining whether the domestic sales nonetheless "permitted a proper comparison"; and (ii) failed to construct "the cost of production in the country of origin" for Indah Kiat and Pindo Deli by using a third-country pulp cost benchmark when it was otherwise not entitled to, without making any adjustments for profit as regards Indah Kiat and without considering the alternative of replacing Indah Kiat's woodchips costs instead of pulp costs. Indonesia's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are contingent upon the findings we have made in relation to Article 2.2.1.1 and 2.2, and, in that sense, they are consequential. Accordingly, we do not believe that additional findings under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are necessary for the resolution of this dispute. We therefore decide to exercise judicial economy and decline to rule on the merits of Indonesia's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

[328] Indonesia's first written submission, paras. 170-177, fns 139 and 140; second written submission, para. 81.

[329] Australia's first written submission, para. 265; Indonesia's response to Panel question No. 31(a) following the first meeting of the Panel, p. 24.

[330] Indonesia's response to Panel question No. 31(b) following the first meeting of the Panel, pp. 24-25 (referring to Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 7.5; *US – Zeroing (EC)*, para. 263(a)(i); and *US – Zeroing (Japan)*, para. 190(c)).

[331] Appellate Body Reports, *EU – Biodiesel (Argentina)*, paras. 6.90-6.113, and 7.5; *US – Zeroing (EC)*, paras. 123-135, and 263(a)(i); and *US – Zeroing (Japan)*, paras. 148-156, 166 and 190(c).

7.5.1 Conclusion

7.172. For the reasons elaborated above, we decline to make findings as to whether Australia has acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by virtue of having calculated and imposed anti-dumping duties in excess of the dumping margin as established under Article 2 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. Regarding Australia's measure imposing anti-dumping duties on certain Indonesian exporters of A4 copy paper, as set forth in Anti-Dumping Notice No. 2017/39 dated 18 April 2017 accepting the recommendations and the reasons for the recommendations set out in the Final Report, we conclude:

a. Indonesia has not established that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement when it found that a "particular market situation" existed in the Indonesian domestic market for A4 copy paper;

b. Australia's measure is inconsistent with Article 2.2, first sentence, of the Anti-Dumping Agreement because the ADC disregarded domestic sales of A4 copy paper of Indah Kiat and Pindo Deli as the basis for determining normal value without properly determining that such sales did "not permit a proper comparison";

c. Australia's measure is inconsistent with Article 2.2.1.1, first sentence, of the Anti-Dumping Agreement because the ADC has not established that both the first and second conditions in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement are satisfied when rejecting the pulp component of Indah Kiat's and Pindo Deli's records on the basis of the term "normally" and therefore has failed to give effect to the whole of the obligation in that provision;

d. Australia's measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement because, having improperly rejected the pulp component of Indah Kiat's and Pindo Deli's records, the ADC had no basis to use Brazilian and South American export prices of pulp to China and Korea for the calculation of Indah Kiat's and Pindo Deli's pulp costs when constructing the cost of production of A4 copy paper in Indonesia; because, despite having before it the evidence indicating that Indah Kiat is an integrated producer and obtains pulp at its cost, the ADC failed to provide a reasoned and adequate explanation as to why it did not subtract profit from the pulp benchmark used to replace Indah Kiat's recorded pulp costs in constructing the cost of production of A4 copy paper for Indah Kiat; and because the ADC failed to provide a reasoned and adequate explanation as to why it did not replace the cost of woodchips and utilize Indah Kiat's other costs of producing pulp internally when constructing Indah Kiat's cost of production of A4 copy paper, assuming *arguendo* that the ADC were allowed to replace distorted costs; and

e. Indonesia has not established that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement when it did not adjust the pulp benchmark used to replace Pindo Deli's recorded pulp costs for profit in constructing the cost of production of A4 copy paper for Pindo Deli.

8.2. We decline to decide whether Australia's measure is also inconsistent with the requirement to calculate the "cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement because the ADC has disregarded the hardwood pulp component of Indah Kiat's and Pindo Deli's records in constructing the cost of production of A4 copy paper in Indonesia and whether Australia has acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by virtue of having calculated and imposed anti-dumping duties in excess of the dumping margin as established under Article 2 of the Anti-Dumping Agreement.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent

with the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Indonesia under that agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that Australia bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

8.5. Indonesia requests that the Panel exercise its discretion under the second sentence of Article 19.1 of the DSU to "suggest ways in which Australia should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-Dumping Agreement and GATT 1994".[332] Indonesia considers that the measures at issue should be withdrawn.[333]

8.6. We note that Article 19.1 of the DSU allows, but does not require, us to suggest ways in which the Member concerned could implement the Panel's recommendations. Furthermore, under Article 21.3 of the DSU, the implementation of DSB recommendations and rulings is left, in the first instance, to the discretion of the implementing Member.[334] We therefore deny Indonesia's request.

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[332] Indonesia's first written submission, para. 185.
[333] Indonesia's first written submission, para. 184.
[334] Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EU – Footwear (China)*, para. 8.12; *EC – Fasteners (China)*, para. 8.8; and *US – Hot-Rolled Steel*, para. 8.11.

WORLD TRADE ORGANIZATION

WT/DS529/R/Add.1

4 December 2019

(19-8158)

AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS529/R.

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ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

PANEL DOCUMENTS

ANNEX A-1

INTERIM REVIEW

1 INTRODUCTION

1.1. This annex to the Panel Report sets out our responses to the parties' requests made at the interim review stage, as foreseen in Article 15.3 of the DSU.

1.2. With regard to certain requests, we were guided by the consideration that the descriptions of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".[1] We further note that the integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit.

1.3. Furthermore, consistent with the approach of previous panels, we consider it not appropriate for the parties to re-argue, at the interim review stage, arguments already put before a panel.[2]

1.4. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments. Due to changes as a result of our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.5. In addition to the modifications specified below, we have also corrected a number of typographical and other non-substantive errors throughout the Report, including, where appropriate, some identified by the parties.

2 INDONESIA'S SPECIFIC REQUESTS FOR REVIEW

2.1. Indonesia has not submitted any request for review of the Interim Report.

3 AUSTRALIA'S SPECIFIC REQUESTS FOR REVIEW

3.1 Paragraph 1.7

3.1. Australia notes that in addition to the dates listed in paragraph 1.7 of the Report, the timetable was also revised on 7 June 2019 following a request from Indonesia. Indonesia does not object to the revision proposed by Australia. Having reviewed the record of this dispute, we note that, in response to Indonesia's request and having considered Australia's comments, the Panel informed the parties of extending the due dates for the parties' submissions by email on 2 June 2019. This has been reflected in paragraph 1.7 of the Interim Report. We therefore decline Australia's request to modify paragraph 1.7.

3.2 Paragraph 7.10

3.2. Australia notes that the Final Report (Exhibit IDN-4) referred to "domestic sales" rather than "domestic market sales". In addition, Australia notes that the ADC's 23-page assessment of the alleged market situation in Indonesia for A4 copy paper is set forth in Section A2.9 of Appendix 2 of the Final Report, rather than Appendix 2 in its entirety. Indonesia does not consider the suggested revisions of paragraph 7.10 are necessary, but Indonesia does not object to the revisions. We

[1] Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

[2] Panel Reports, *EU – Fatty Alcohols (Indonesia)*, para. 6.5; *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; and *India – Agricultural Products*, para. 6.5.

consider Australia's revisions more precisely describe the relevant portions of the ADC's Final Report and have made changes to paragraph 7.10 to implement such revision.

3.3 Paragraph 7.35

3.3. Australia requests paragraph 7.35 be amended to clarify that Australia argued, in terms of context, that the term "particular market situation" is co-located with the descriptions of two conditions that comprise specific circumstances in respect of sales of the like products in the market of the exporting country. Indonesia does not consider the suggested revisions of paragraph 7.35 are necessary, but Indonesia does not object to the revisions. We consider that Australia's suggested revisions more precisely describe Australia's referenced argumentation. We therefore accept Australia's proposed revisions with some minor textual modification. We have also included references to additional submissions of Australia relevant to our understanding of Australia's argumentation.

3.4 Paragraph 7.59

3.4. Australia requests a sentence of paragraph 7.59 be revised to elaborate conditions for its argument that it is sufficient to determine the domestic sales are "not suitable" for use as the basis for normal value. Additionally, Australia requests that the reference to Australia's submissions be expanded to include additional paragraphs of Australia's first written submission. Indonesia objects to the suggested revisions as not necessary for additional clarity or accuracy. We find that including the elements of additional text suggested, while not inaccurate, does not help to clarify the meaning of the sentence in question, and we, therefore, decline to make this revision. We do consider that the expanded reference to certain paragraphs of Australia's submission is relevant, and we have accepted the suggested revision to the references.

3.5 Paragraph 7.62

3.5. Australia requests that its argument be clarified in paragraph 7.62 to make clear that Australia has not taken the position that distorted prices cannot be suitable for use as a basis for normal value in all cases. Indonesia objects to the suggested revision, noting that Australia offers no reference to its submissions to support the suggested revision. We note that the sentence in question references Australia's response to question No. 19 following the first meeting of the Panel. We note also that question No. 19 was specific to this particular case, as question No. 19 referred to *the* domestic market sales in question, *the* Commission's determination, and *the* export sales. In Australia's response to this question, however, it made an argument based on an interpretation of Article 2.2 in contrast to Articles 2.1 and 2.3 to support its assertion that the ADC did not need to examine export sales in considering whether the domestic sales permitted a proper comparison. We consider that Australia's response did not offer a case-specific argument, but the question and response were nevertheless limited to addressing *the* domestic sales in question. We have, therefore, not accepted Australia's suggested revision, and we have instead revised the sentence at issue to more accurately reflect Australia's referenced submission.

3.6 Paragraphs 7.85 and 7.86 (7.85-7.87)

3.6. Australia takes issue with the summary of its argument in paragraph 7.85 (paragraphs 7.85 and 7.86), which characterized Australia's submissions as arguing that the applicable analysis in this case was similar to the analysis that would be undertaken to determine whether domestic sales were made in the ordinary course of trade. Australia proposes a revised summary of its argument in this respect. Australia also requests a revision along the same lines to paragraph 7.86 (7.87), which offers an assessment by the Panel of the ADC's determination in relation to the summary in the prior paragraph of Australia's argumentation. Indonesia objects to the suggested revisions, arguing that Australia's arguments were accurately described and that the proposed revisions are not necessary for additional clarity or accuracy. We recall that the descriptions of the parties' arguments are not intended to reflect the entirety of the parties' arguments, and that a panel has the discretion to address only those arguments it deems necessary to resolve a particular claim. The integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. We consider that certain portions of Australia's revised summary of its argumentation in paragraph 7.85 (paragraphs 7.85 and 7.86) offer a more precise and accurate summary of some of the relevant points as made by Australia in its submissions, and we have, therefore, divided paragraph 7.85 into

two paragraphs and accepted portions of those suggested revisions with minor alterations and additional references. We have not accepted the entirety of Australia's proposed revised summary where we considered that the points could be accurately further summarized more succinctly and where we considered that the points made were redundant of the remaining summary already set forth in paragraph 7.85 (paragraphs 7.85 and 7.86). We do not consider that Australia's proposed revisions to the Panel's assessment made in paragraph 7.86 (7.87) contribute to the accuracy and clarity of the paragraph. We have, however, made certain revisions to this paragraph for greater clarity.

3.7 Paragraph 7.92 (7.93)

3.7. Australia takes issue with the Panel's summary of its argument in paragraph 7.92 (7.93): "Australia argues that the ADC was entitled to reject the relevant costs because, according to Australia, the first sentence of Article 2.2.1.1 envisages that properly recorded costs may be disregarded where the circumstances are not 'normal and ordinary'". Australia submits that it did not use the words "properly recorded costs" in its submissions. The use of these words by the Panel, in Australia's view, gives the impression that Australia argued that an investigating authority must confirm that the two conditions in Article 2.2.1.1 are satisfied before concluding that circumstances are not normal and ordinary. Australia submits that it did not make such an argument. Australia therefore requests that paragraph 7.92 (7.93) be amended to reflect more precisely Australia's argument. Indonesia objects to Australia's proposed revision and considers that the Panel accurately described Australia's argument. We consider that Australia's revision more precisely characterizes Australia's argument and have made changes to paragraph 7.92 (7.93) and footnotes to that paragraph to reflect that revision.

3.8 Paragraph 7.107 (7.108), footnotes 201 (209), 202 (210) and 208 (216)

3.8. Australia asks us to introduce changes to paragraph 7.107 and introduce an additional footnote to that paragraph to reflect more precisely its argument that using Pindo Deli's and Indah Kiat's recorded pulp costs "would not have resulted in a constructed normal value that was an 'appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales', as required by the Appellate Body for the construction of costs under Article 2.2.1.1".[3] Australia further asks the Panel to provide more complete citations to its submissions in footnotes 201 (209), 202 (210) and 208 (216). Indonesia objects to the revisions proposed by Australia on the grounds that the Panel accurately described Australia's arguments and provided adequate citations. In our view, Australia's proposed revisions add clarity and precision to the cited arguments. We therefore accept Australia's proposed revisions with some minor textual modifications.

3.9 Paragraph 7.114 (7.115)

3.9. Australia submits that the Panel's reasoning in paragraphs 7.114 (7.115) and 7.116 (7.117) suggests that the Panel has found that the term "normally" does provide a separate legal basis to disregard an exporter or producer's records. However, this is not explicitly stated in the Interim Report. Australia requests that the Panel make its finding clear with respect to the legal question it poses at paragraph 7.108 (7.109), as to whether the term "normally" in the first sentence of Article 2.2.1.1 provides a separate basis to disregard an exporter's records. Indonesia objects to the proposed revision and argues that Australia asks the Panel to make the finding which its reasoning does not require. We agree with Australia that it follows from our reasoning in paragraphs 7.110-7.114 (7.111-7.115) that the term "normally" in the first sentence of Article 2.2.1.1 provides a separate basis to disregard an exporter's records. We have therefore modified the last sentence of paragraph 7.114 (7.115) to make this conclusion explicit.

3.10 Paragraph 7.162 (7.163) and footnote 317 (325)

3.10. Australia argues that paragraph 7.162 (7.163), which states in part that "Indah Kiat's data relating to the volume and value of woodchips consumed in the production of pulp was available on the ADC's record", and footnote 317 (325) inaccurately describe the information available on record of the ADC. Specifically, Australia argues that Exhibit IDN-28 (BCI), cited in footnote 317 (325),

[3] Australia's request for review of the Panel Interim Report, paras. 22-24 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para 6.24).

records only the value of woodchips (raw materials) consumed to produce pulp for the whole of the investigation period and does not record the volume of woodchips consumed to produce pulp, for the whole of the investigation period. Australia clarifies that the reference to "production" in Exhibit IDN-28 (BCI) is the volume of pulp produced, not the volume of woodchips consumed in the production of pulp. Australia argues that the ADC only had information available relating to the volume of woodchips consumed to produce pulp for the month of November 2015 – not for the whole investigation period. On this basis, Australia requests us to make modifications to paragraph 7.162 (7.163) to clarify that Exhibit IDN-28 (BCI) does not record the volume of woodchips consumed in the production of pulp in 2015 and that the ADC had on its record data relating to the volume of woodchips consumed in the production of pulp only for the month of November 2015.

3.11. Indonesia objects to Australia's request. Indonesia argues that Exhibit IDN-28 (BCI) contains both the total value of woodchips consumed and the per-unit value of woodchips. In Indonesia's view, the total volume of woodchips can be derived by dividing the total value of woodchips by the per-unit value of woodchips. For these reasons, Indonesia requests us to reject Australia's proposed revision.

3.12. In light of the parties' arguments, we have re-examined Exhibit IDN-28 (BCI) providing cost data for Indah Kiat's pulp-making in 2015, and specifically whether it provides both value and volume of woodchips consumed in the production of pulp. We find helpful Australia's clarification that the word "production" in this Exhibit refers to the volume of pulp produced and not the volume of woodchips consumed. Indonesia has not contested this clarification. In response to Australia's comments, Indonesia has not pointed us to a number in this Exhibit which represents the volume of woodchips consumed in the production of pulp. Rather, Indonesia argues that this number can be derived from the data contained in the Exhibit by dividing the total value of woodchips by the per-unit value of woodchips. We understand that the per-unit amount in Exhibit IDN-28 (BCI) refers to the value of woodchips required to produce one ton of pulp. By performing the calculation suggested by Indonesia we arrive at the volume of pulp produced rather than the volume of woodchips consumed by Indah Kiat. We are therefore not convinced by Indonesia's argument and accept Australia's request to modify paragraph 7.162 so that it reflects that Exhibit IDN-28 (BCI) provides the value of woodchips consumed in the production of pulp by Indah Kiat for the period of investigation, but not the volume of woodchips consumed. We have introduced subsequent changes to footnote 317 (325) reflecting the absence of volume data for woodchips in Exhibit IDN-28 (BCI) and the implications of that fact.

3.13. With regard to the second part of Australia's request, we note that, in the course of this proceeding, Australia argued that the ADC was able to determine the volume and value of *pulpwood* consumed by Indah Kiat to make woodchips only for the month of November 2015.[4] At the second meeting of the Panel, Australia explained in detail the difference between pulpwood (an input into production of woodchips) and woodchips (an input into production of pulp), and distinguished the two.[5] We explained in paragraph 7.162 (7.163) of the Interim Report that, in deciding whether Indah Kiat's cost of woodchips could have been replaced, we do not consider it relevant whether the ADC was only able to determine the cost data for *pulpwood* for one month. We therefore find that our statement in paragraph 7.162 (7.163) responds to Australia's argument made in the course of this proceeding. To the extent Australia now attempts to characterize its argument differently and argues that it was only able to determine the volume of *woodchips* consumed in the production of pulp for one month, we note that the interim review stage is not an opportunity for the parties to re-open arguments already put before a panel. We therefore decline the second part of Australia's request, i.e. to specify in paragraph 7.162 (7.163) that the ADC had on its record data relating to the volume of woodchips consumed in the production of pulp only for the month of November 2015.

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[4] Australia's opening statement at the second meeting of the Panel, para. 55; responses to Panel question No. 30 following the second meeting of the Panel, paras. 202-203, and question No. 19 following the second meeting of the Panel, paras. 105-108.

[5] Australia's opening statement at the second meeting of the Panel, paras. 52-54.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

EXECUTIVE SUMMARY OF INDONESIA'S FIRST WRITTEN SUBMISSION

I. AUSTRALIA'S FINDING THAT A PARTICULAR MARKET SITUATION EXISTED RESTS ON AN INCORRECT INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

A. A "Particular Market Situation" Is an Exceptional Set of Circumstances Affecting the Domestic Market

1. Australia determined that a "particular market situation" existed based on GOI forestry policies that allegedly resulted in a distorted price of hardwood timber, an input in the pulp production process. Australia's interpretation of "particular market situation" is incorrect.

1. The Ordinary Meaning of "Particular Market Situation" Means it Is an Exceptional Set of Circumstances Affecting Sales in a Geographic Region

2. "Particular market situation" is not defined in the Anti-Dumping Agreement. The term "particular" is however defined in the Oxford English Dictionary as "[d]istinguished in some way among others of the same kind; not ordinary; worthy of notice, remarkable; special". A "market" may be defined as "[a] geographical area of commercial activity". A "situation" is defined as: "[p]osition of affairs; combination of circumstances". Consequently, a "particular market situation" is an exceptional combination of circumstances taking place in a geographic region.

2. The Context Provided by Other Provisions of the Treaty Confirms a Particular Market Situation Exists in Limited Circumstances Affecting Price Comparability

3. Article 2.2, itself, provides context for understanding the meaning of the "particular market situation" provision. Article 2.2 provides two other limited exceptions to using domestic sales which apply to the unusual situation where a producer has either no domestic market sales or very few domestic market sales. Both exceptions also concern circumstances affecting sales in the domestic market, as a whole.

4. The Anti-Dumping Agreement, GATT Article VI and a number of other provisions of the GATT also provide context relevant to interpreting Article 2.2 and the meaning of "particular market situation". The fact that Article VI is an exception to Articles I and II indicates part of the context for interpreting Article VI and the Anti-Dumping Agreement is the right of other Members not to have their exports subjected to duties in excess of negotiated bound duties or to have their exports treated less favorably than exports from other countries. Therefore, Article VI and the Anti-Dumping Agreement represent a balance between a right to apply anti-dumping duties within certain limits and a right not to be subjected to anti-dumping duties going beyond those limits.

5. The SCM Agreement is also relevant to an understanding of the meaning of the "particular market situation" provision. The SCM Agreement is concerned with regulating government influence of market prices, i.e. governments may not provide goods to producers for below market prices. In contrast, the Anti-Dumping Agreement is concerned with international price discrimination by individual producers or exporters. Reading the "particular market situation" as Australia does impermissibly interjects the Anti-Dumping Agreement into the sphere of regulating government behavior which is expressly regulated in the SCM Agreement.

3. Object and Purpose

6. By promulgating express rules, an overarching goal of the WTO Agreement was to liberalize trade by lowering tariff barriers and to ensure against arbitrary trade distorting measures as succinctly stated in the Marrakesh Declaration.

7. Article 2 of the Anti-Dumping Agreement contains a number of additional rules on how dumping margins must be calculated by an investigating authority, including Article 2.2, Article 2.2.1, Article 2.2.1.1, Article 2.2.2, Article 2.3, Article 2.4, Article 2.4.1, Article 2.4.2, and Article 2.5. The cited provisions demonstrate the Anti-Dumping Agreement expressly provides the rules Members must follow before imposing an anti-dumping duty and support a narrow interpretation of the "particular market situation" provision.

8. The Agreement, thus, manifests an object and purpose of liberalizing trade, while permitting Members to respond to dumping with anti-dumping measures and delineating the extent of a permissible response by setting forth explicit rules and procedures that must be followed. A narrow interpretation of "particular market situation" as an exceptional combination of circumstances affecting the domestic market is consistent with the object and purpose of liberalizing trade and balancing the rights of Members. A narrow reading of "particular market situation" is consistent with the two other exceptions to using domestic prices found in Article 2.2, i.e., no sales in the ordinary course of trade and a low volume of sales. Each of those exceptions is narrow and, "particular market situation" should, likewise, be interpreted in a narrow manner. Australia's broad interpretation that a "particular market situation" can include a situation where a produce obtains low price inputs for the production of the merchandise under consideration is incorrect because it upsets the balance of liberalizing trade by allowing Members to ignore domestic market prices whenever a producer obtains and uses low price inputs. Nothing in the text or negotiating history supports a broad interpretation of the term "particular market situation" and Members agreed not to regulate "input dumping", which is similar to what Australia has interpreted the "particular market situation" provision as permitting.

4. Negotiating History

9. The negotiating history confirms the ordinary meaning and context of the term "particular market situation" was intended to be narrow in scope. The term "particular market situation" did not appear in the GATT 1947. It was not until the 1967 Anti-Dumping Code that the phrase first appeared but there does not appear to be any negotiating history indicating what the "particular market situation" provision meant and subsequent negotiating history sheds little additional light on the meaning of "particular market situation." The silence surrounding the term's sudden appearance in the 1967 Anti-Dumping code supports Indonesia's narrow interpretation.

10. Using the "particular market situation" provision, as Australia does, to address an alleged distortion in the cost of an input also conflicts with the idea that the parties did not intend for the Anti-Dumping Agreement to regulate "input dumping". The parties ultimately never included provisions covering input dumping in the Anti-Dumping Agreement.

11. The discussion input dumping generated stands in stark contrast to the silence surrounding introduction of the "particular market situation" provision and highlights why, if the provision had the meaning Australia gives it, there would have been evidence in the negotiating history to that effect. It defies common sense that there would have been no discussion about a provision with such broad implications for disregarding actual domestic prices.

B. Australia's "Particular Market Situation" Finding Is Inconsistent with Article 2.2

12. The nature of the "particular market situation" the Australian Anti-Dumping Commission found was due to purported GOI "influence" in the Indonesian timber and pulp industries. According to the Commission, this meant hardwood timber prices in Indonesia were distorted and A4 copy paper producers benefited from cheaper hardwood pulp prices. With respect to basing its "particular market situation" finding based on distortions to an input price the Commissioner noted government influence on prices or input costs could be one cause of artificially low pricing.

13. Indonesia argued Australia had no basis to make a "particular market situation" finding because Australia had no evidence of inter alia an oversupply of timber or pulp in the Indonesian market. Further, Indonesia disputed the relevance of various policies to which Australia cited as insufficient to support the conclusion that such policies artificially lowered the price of inputs.

14. Australia's action is all the more egregious when considering Australia investigated allegations of subsidization by the GOI and determined, to the extent there was subsidization, it did not rise to actionable levels. Australia then mis-interpreted the "particular market situation" provision of the

Anti-Dumping Agreement to achieve what Australia acknowledged it could not do pursuant to the SCM Agreement because Australia's subsidy investigation found there were no distortions. Consequently, Australia's action is inconsistent with Article 2.2 of the Anti-Dumping Agreement because it is based on an incorrect interpretation of "particular market situation".

II. AUSTRALIA ACTED INCONSISTENTLY WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT BY DISREGARDING HOME MARKET SALES EVEN THOUGH A PROPER PRICE COMPARISON WAS POSSIBLE

A. An Investigating Authority Cannot Disregard the Domestic Market Price When a Proper Price Comparison Is Possible

15. Article 2.2 does not permit an investigating authority to disregard domestic market sales prices if they are comparable to export prices even if a "particular market situation" exists.

1. When a "Particular Market Situation" Does Not Affect Price Comparability the Investigating Authority Cannot Disregard Domestic Market Sales Pursuant to the Ordinary Meaning of Article 2.2

16. An investigating authority may only disregard domestic market sales "[w]hen ..., because of the "particular market situation" ... in the domestic market of the exporting country, such sales do not permit a proper comparison". The plain meaning dictates that an investigating authority can use export sales to a third country or can construct the normal value based on the cost of production only when the "particular market situation" prevents a proper comparison.

17. The phrase "proper comparison" in Article 2.2 can only be understood in the context of the comparison Article 2.1 describes of "the export price of the product exported from one country to another" with "the comparable price in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

18. In order to consider when a comparison between prices of export sales and prices of domestic sales would not be "proper", it is necessary to consider the meaning of the word "proper". The Oxford English Dictionary defines "proper" as "[s]uitable for a specified or implicit purpose or requirement; appropriate to the circumstances or conditions; of the requisite standard or type; apt; fitting; correct, right". To determine why the comparison has to be "suitable" or "appropriate," one must consider why the comparison between prices in export sales and prices in domestic sales is being performed. Article 2.1 indicates that the reason for the comparison is to ascertain if a product is being dumped by examining the export price against the domestic market price.

2. Several Provisions of the Anti-Dumping Agreement Provide Relevant Context and Describe Dumping as International Price Discrimination by an Individual Exporter which Is Consistent with Article 2.2's Emphasis on Price Comparability Over the Mere Existence of a "Particular Market Situation"

19. The Anti-Dumping Agreement refers to "dumped", "dumping", "margin of dumping" or "dumping margin". While the Agreement uses a variety of different terms, the Appellate Body in *US − Stainless Steel (Mexico)* stated no significance attaches to that fact, the definition of "dumping" in Article 2.1 is expressed to apply "for the purposes of this Agreement" or for the purposes of the entire Agreement. The Appellate Body further stated that the concepts of "dumping" and "margin of dumping" "are interlinked and must be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement", and that "dumping" and "margin of dumping" have the same meaning throughout the Anti-Dumping Agreement".

20. Dumping, in turn, is "international price discrimination" reflecting the pricing practice of an exporting firm to charge a lower price for exported goods than it does for the same goods sold domestically". Likewise, a WTO technical paper states "[d]umping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country". Indeed, Australia's Senate Economics Legislation Committee endorsed this definition in a report on the Customs Amendment (Anti-Dumping) Bill 2011.

21. Articles 2.1 through 2.5 address various aspects of what the investigating authority must do to make an accurate comparison of domestic market prices to export prices. The purpose behind ensuring an accurate comparison, as indicated above, is to ascertain if there is dumping, i.e., price discrimination. The Anti-Dumping Agreement also makes clear that dumping is an exporter-specific inquiry without relation to government involvement which, as noted above, falls exclusively within the province of the SCM Agreement.

22. The WTO Appellate Body has concluded that "dumping" and "margin of dumping" are "exporter specific concepts" which arise from the pricing behavior of individual exporters, saying: "{d}umping arises from the pricing strategies of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets."

23. Therefore, dumping occurs when an individual exporter sells at a lower price in the export market than in its domestic market, and the margin of dumping is the difference or amount of discrimination between the export sales prices and the domestic sales prices for that individual exporter. It is important to note that the Anti-Dumping Agreement does not authorize the imposition of anti-dumping duties in response to exporters selling at *low* prices in the export market. Instead, the Anti-Dumping Agreement limits the imposition of anti-dumping duties to when an exporter sells at export prices that discriminate, i.e., are at prices below the domestic market price.

3. The Object and Purpose of the Anti-Dumping Agreement is to Allow Members to Address International Price Discrimination Subject to Specified Rules and Limits

24. As noted above, the object and purpose of liberalizing trade while permitting an exception for the imposition of anti-dumping duties subject to specific rules and procedures is relevant for interpreting Article 2.2. Another objective of the Anti-Dumping Agreement is to permit Members to impose anti-dumping duties only in response to price discrimination and to prevent Members from doing so when there is not price discrimination (or is not injury). Clear evidence of that objective is found in Article 2.2 and several other provisions of Article 2 referencing "price comparability". Indeed, the word "comparable" or "comparability" appears eight times in Article 2, including Article 2.1, Article 2.2, Article 2.4, and Article 2.5. Price comparability is so prominent in Article 2 because the purpose of the inquiry is to determine whether international price discrimination is occurring. If the Anti-Dumping Agreement were designed to prevent exporters from selling at low prices, there would be no need to examine price comparability.

4. GATT Case Law Confirms Article 2.2's Emphasis on Price Comparability

25. A relevant GATT panel decision exists which involved a dispute brought just before the entry-into-force of the WTO, involving a nearly identical predecessor provision to Article 2.2. In *EC – Imposition of Anti- Dumping Duties on Imports of Cotton Yarn from Brazil*, the respondent, EC, determined the dumping margin using the prices of domestic sales in Brazil (the complainant) as the normal value. The panel explained the key inquiry was not whether a "particular market situation" existed but whether it affected price comparability.

26. The panel's reasoning that the relevant inquiry is whether the "particular market situation" renders the domestic market sales unfit to compare to export sales is of direct relevance to this dispute and confirms the ordinary meaning Indonesia has advanced above. In the action subject to this dispute, Australia's investigating authority stopped the inquiry after determining a "particular market situation" existed, despite the undeniable evidence that price comparisons were possible.

B. Australia Resorted to Constructed Value Based on Finding a "Particular Market Situation" Existed and Not as Article 2.2 Requires on Whether a Proper Comparison Could Be Performed

27. Australia acted inconsistently with Article 2.2 because Australia did not examine whether, because of the alleged "particular market situation", the comparability of domestic market to export price was affected. Australia's failure to do so renders its action inconsistent with Article 2.2 of the Anti-Dumping Agreement.

28. Australia found a "particular market situation" existed based on GOI policies which allegedly lowered the price of hardwood timber. The Indonesian producers argued the Commission had no evidence domestic prices were distorted and unsuitable for comparison with export prices because

the Commission had no evidence the alleged distortions impacted differently domestic and export prices. Beyond acknowledging the argument had been made, the Commissioner's report does not address whether those alleged situations involving government policies in the domestic market actually made any difference to the determination of the margin of dumping that would arise from a comparison between each individual Indonesian exporter's domestic prices and its export prices. The Commissioner's report is confined to addressing the question of whether the exporter's *domestic* prices are different from what they would have been in the absence of the government policies. However, Article 2.2 does not permit deviation from using domestic prices as the basis of normal value if there is a situation in the market which merely makes domestic prices different to what they would be in the absence of that situation. Article 2.2 only permits a deviation from using domestic prices of a specific exporter as the basis of normal value for that specific exporter if there is a situation in the domestic market which has the effect that a comparison between the prices of the domestic sales with the prices of export sales of that export cannot accurately indicate whether the individual exporter is price discriminating between domestic sales and export sales.

29. The nature of the A4 copy paper production process is such that even if input prices for hardwood timber were distorted, the same inputs were used to manufacture the A4 copy sold to the Indonesian domestic market and the A4 copy paper exported to Australia.

30. Australia has given no explanation as to why the allegedly distorted low-priced inputs would not also affect export prices to Australia. Indeed, evidence the Commission gathered in the injury investigation showed imports from Indonesia were priced below those of the other imports suggesting that to the degree Indonesian producers obtained low price inputs, they affected export prices.

31. The Appellate Body in *United States − Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* found that a low-priced input will affect the export price as well as the domestic price in the analogous context of domestic subsidies in investigations involving market economies like Indonesia. A domestic subsidy is a subsidy that is not an export subsidy. Australia's "particular market situation" finding was equivalent to a finding that the GOI was providing a domestic subsidy in the form of goods for less than adequate remuneration.

III. AUSTRALIA'S FAILURE TO USE THE INDONESIAN PRODUCERS' RECORDS TO CALCULATE THE COST OF PRODUCTION IS INCONSISTENT WITH ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

A. The Well-Established Meaning of Article 2.2.1.1 Requires an Investigating Authority to Use the Producer's Costs if they Reasonably Reflect the Cost to Produce the Merchandise Under Consideration, Not Whether the Costs, Themselves, Are Reasonable

32. Article 2.2.1.1 limits how WTO Member countries may determine whether an exporter is dumping and the size of the margin of dumping. Australia acted inconsistent with the well-established meaning of Article 2.2.1.1 by disregarding the cost of pulp from the Indonesian producer's records and substituting a benchmark pulp price.

1. The Established Ordinary Meaning of Article 2.2.1.1 Requires an Investigating Authority to Use the Exporter's or Producer's Records if they Reasonably Reflect the Cost of Producing the Merchandise Under Consideration

33. In *EU − Biodiesel (Argentina*), the Appellate Body interpreted the ordinary meaning of Article 2.2.1.1 in a dispute involving nearly identical facts with this dispute as Indonesia informed Australia. The EU authorities determined that the prices of two inputs − soybeans and soybean oil − in the Argentine market were distorted because of Argentine government tax policies. Based on that distortion, the EU determined the Argentine producers' costs for the main raw material were not reasonably reflected in the companies' records.

34. The Appellate Body explained that Article 2.2.1.1 sets forth rules for calculating the cost of production for purposes of determining normal value as indicated by the reference to "paragraph 2" in the opening phrase of the first sentence. The first sentence of Article 2.2.1.1 also specifies that "costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation". The Appellate Body noted records are defined as: "'[a]n account of the past; a

piece of evidence about the past; ... a written or otherwise permanently recorded account of a fact or event; ... a document ... on which such an account is recorded'".

35. Article 2.2.1.1 then sets forth two conditions that the exporter's or producer's records must meet. The first condition to be met is the producer's or exporter's records must be kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country. The Indonesian producers' books and records were kept in accordance with Indonesian GAAP, so this condition is not at issue in this dispute.

36. The second condition, the interpretation of which is of critical importance to this dispute, is that the producer's or exporter's records must "reasonably reflect the costs associated with the production and sale of the product under consideration". The second condition is satisfied when the records reasonably reflect the costs incurred and not, as Australia interprets the provision, whether the costs, themselves, were reasonable.

37. The only plausible interpretation of Article 2.2.1.1 is evident from the construction of the first sentence. In the phrase "reasonably reflect", "reasonably" is an adverb that precedes the verb "reflect" and thereby modifies "reflect". "Reasonably" is not an adjective modifying the noun "costs". Indeed, the drafters of Article 2.2.1.1 could have used the adjective "reasonable" to modify the noun "costs". The fact the drafters did not do so must be seen as intentional.

38. As the Appellate Body reasoned, the phrase "costs associated with the production and sale of the product under consideration" is preceded by the phrase "reasonably reflect" which means "to mirror, reproduce, or correspond to something suitably and sufficiently". It is important to recall that "reasonably" modifies "reflect" (not "costs") and that "such records," which refers to the records of the exporter or producer under investigation, precedes "reasonably reflect" in the first sentence of Article 2.2.1.1. Put together, the second condition of Article 2.2.1.1 means the exporter's or producer's "records" need to "reasonably reflect" the "costs" of producing or selling the product subject to the investigation. But the reasonableness of the "costs" is not at issue, just whether the records report them in a suitable manner.

2. The Context Confirms Article 2.2.1.1 Is Focused on Whether the Records Reasonably Reflect the Cost of Producing the Merchandise Under Consideration and Not Whether Such Costs, themselves, Are Reasonable

39. As the Appellate Body noted, GAAP concerns general accounting and reporting practices and the first condition is concerned with the producer's or exporter's records being in conformity with general standards. The second condition is more specific and concerns "the records' reasonable reflection of the costs associated with the production and sale of the *product under consideration in a specific anti-dumping proceeding*".

40. The second and third sentences of Article 2.2.1.1 and footnote 6 of the Anti-Dumping Agreement support the above interpretation of the second condition of Article 2.2.1.1. As the Appellate Body has stated, those "provisions set out rules for an investigating authority's allocation and adjustment of costs". Importantly, the Appellate Body noted those provisions "imply it may be inappropriate to attribute certain company costs entirely to the production and sale of the product under consideration".

41. The Appellate Body also found as relevant context Article 2.2 which refers to the "cost of production in the country of origin". Article 2.2.1.1 expressly refers to Article 2.2 and the Appellate Body found "costs" should be understood consistently in the two articles. The interpretative consequence of such an understanding is that Article 2.2.1.1 "should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin".

42. Finally, the Appellate Body found as context that Article 2.2 relates to the establishment of normal value through a proxy for domestic sales prices. The interpretation of the second condition in the first sentence of Article 2.2.1.1 as relating to whether a company's costs reasonably reflect the cost of making the merchandise subject to the investigation is consistent with that context.

3. Requiring an Investigating to Use the Producer's Records if they Reasonably Reflect the Cost of Producing the Merchandise Under Consideration Is Consistent with the Object and Purpose of the Anti-Dumping Agreement

43. While acknowledging the Anti-Dumping Agreement does not have a preamble to guide the inquiry into object and purpose, the Appellate Body in *EU – Biodiesel (Argentina)* stated such things could be discerned from the content and structure of the Agreement. The Appellate Body reasoned the object and purpose "is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures". The Appellate Body concluded that an interpretation of Article 2.2.1.1 in accordance with the ordinary meaning of the terms in their context and in light of the object and purpose of the Anti-Dumping Agreement of the second condition of the first is:

> whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.

4. The Meaning of Article 2.2.1.1 as Requiring Use of a Producer's Actual Costs Is Well Established by WTO Case Law

44. Several panels have addressed the proper interpretation of Article 2.2.1.1 and have agreed with the Appellate Body's understanding as expressed in *EU – Biodiesel (Argentina*). In *EU – Biodiesel (Indonesia)*, the panel applied the interpretation of Article 2.2.1.1 made by the panel in *EU – Biodiesel (Argentina)*, which the Appellate Body upheld, and went on to find that replacing the producers' cost because an input allegedly was at a low price was inconsistent with Article 2.2.1.1. In *Ukraine – Ammonium Nitrate*, the panel also followed the Appellate Body's interpretation of the second condition in the first sentence of Article 2.2.1.1 and found the investigating authority was not warranted in rejecting Russian gas costs (an input into ammonium nitrate production) because government regulation of gas prices meant the costs incurred by Russian producers was lower compared to prices in other countries.

B. Australia Disregarded Pindo Deli's and Indah Kiat's Costs Because they Did Not Reflect "Competitive Market Costs" which Is Inconsistent with Article 2.2.1.1

45. The Australian investigating authority departed from using the information in the records of Pindo Deli and Indah Kiat (hereafter "the Indonesian producers") to calculate the cost of production of A4 copy paper based on the view that they did not reasonably reflect "competitive market costs" associated with the production or manufacture of A4 copy paper because the cost of hardwood pulp recorded in the companies' records did not reasonably reflect a competitive market cost.

46. Australia applied the phrase "competitive market costs" to mean the costs must, themselves, be reasonable – the exact manner the Appellate Body and panels have ruled to be inconsistent with Article 2.2.1. Indeed, Australia refused to reconcile its application of Australian domestic law with Article 2.2.1.1 despite the Indonesian producers' express argument that Australia's domestic law was inconsistent with Article 2.2.1.1.

47. Instead of examining whether the actual costs recorded in the Indonesian producers' records were, within acceptable limits, accurate and faithful records of the actual cost incurred to produce A4 copy paper, as the Appellate Body and a number of panels have reasoned Article 2.2.1.1 requires, the Commission examined whether the records reflected "competitive market costs". All of the record evidence established that the Indonesian producers records reasonably reflected the cost to produce A4 copy paper and Australia disregarded those costs because the input cost allegedly was distorted.

IV. AUSTRALIA DID NOT CALCULATE THE PRODUCER'S COST OF PRODUCTION IN INDONESIA WHICH IS INCONSISTENT WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

A. Article 2.2 Requires an Investigating Authority to Calculate a Cost of Production in the Country of Origin

48. Australia did not calculate the cost of production in Indonesia which is inconsistent with Article 2.2.

1. The Ordinary Meaning of Article 2.2 and the Requirement to Calculate the Cost of Production in the Country of Origin Is Well-Established

49. The Appellate Body and several panels have given careful thought to the interpretation of Article 2.2 of the Anti-Dumping Agreement as it relates to the requirement to calculate the cost of production in the country of origin. The uniform understanding stated by the Appellate Body *EU – Biodiesel (Argentina)* and the various panels to have considered this issue has been Article 2.2 requires the investigating authority to calculate the cost of production in the country of origin. Australia did not calculate a cost of production of A4 copy paper in Indonesia, and its action is inconsistent with Article 2.2.

B. Australia Did Not Calculate a Cost of Production in Indonesia which Is Inconsistent with Article 2.2 of the Anti-Dumping Agreement

50. Australia did not calculate a cost of production in Indonesia as Article 2.2 of the Anti-Dumping Agreement requires but instead calculated the cost of producing pulp in Brazil and South America. Australia made certain adjustments to a benchmark, however, they all related to deriving an FOB cost of production in Brazil or South America, not Indonesia.

V. AUSTRALIA CALCULATED AND IMPOSED ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN DUMPING PERMITTED BY ARTICLE 2 WHICH IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

51. Australia calculated and imposed anti-dumping duties in excess of those permitted by Article 2 which is inconsistent with Article 9.3 which sets a ceiling on the anti-dumping duties that may be imposed as the margin of dumping established in a manner consistent with Article 2.

A. Article 9.3 Sets a Ceiling on the Amount of Duties that May Be Imposed as the Dumping Margin Calculated Consistently with Article 2

52. The Appellate Body in *EU – Biodiesel (Argentina)* has stated that to succeed in a claim under Article 9.3, a complainant must show the anti-dumping duties were "imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2".

B. Australia Did Not Calculate Margins in a Manner Consistent with Article 2 which Resulted in the Imposition of an Impermissibly High Anti-Dumping Duty

53. Australia calculated the preliminary dumping margin using the Indonesian producers' domestic market and export sales prices. Australia calculated the revised preliminary dumping margin based on constructed normal value, substituting the actual costs recorded by the Indonesian producers for hardwood pulp with a benchmark price for Brazilian and South American producers. The difference in the two margins speaks is clear evidence of the degree to which Australia calculated a margin inconsistent with Article 2.

54. The preliminary antidumping duty margins Australia calculated using domestic market sales prices were 2.7 percent for one producer and 18.8 percent for the other. In the revised preliminary determination calculated using constructed normal value, the margins were 80.5 percent for one producer and 65.1 percent for the other. Consequently, Australia's inconsistencies with Article 2 led to the imposition of anti-dumping duties in excess of the margin in violation of Article 9.3.

EXECUTIVE SUMMARY OF INDONESIA'S OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. AUSTRALIA'S FINDING THAT A PARTICULAR MARKET SITUATION EXISTED RESTS ON AN INCORRECT INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

55. To paraphrase Australia's view, a "particular market situation" is broad and is any condition in the buying and selling that exists in the home market that is not general. However, Indonesia established in its First Written Submission that the ordinary meaning of "particular market situation" supported by the context, object and purpose, and negotiating history is limited in nature and is an exceptional combination of circumstances taking place in a geographic region. Australia's interpretation, therefore, is incorrect.

56. Indonesia also has established a "particular market situation" cannot relate to government intervention because the SCM Agreement expressly regulates situations when a government provides goods for less than adequate remuneration. In contrast, the Anti-Dumping Agreement is concerned with international price discrimination by individual producers or exporters. Australia responds by citing Article 2.7 of the Anti-Dumping Agreement and the second Ad note to Article VI:1 of the GATT 1994. The European Union refers to the Ad Note to Article VI of the GATT 1994, paragraphs 2 and 3 which refers to currency depreciation. But the two provisions to which Australia and the European Union cite are the only two provisions in the Anti-Dumping Agreement that speak to government intervention and they are express and detailed − unlike a "particular market situation" which is not defined and has no negotiating history supporting Australia's interpretation.

57. Australia claims its "particular market situation" determination is not based on the price of an input but every one of Australia's findings flows from that premise. The Commission did not cite a single policy that related directly to the pulp or paper industries.

II. AUSTRALIA ACTED INCONSISTENTLY WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT BY DISREGARDING HOME MARKET SALES EVEN THOUGH A PROPER PRICE COMPARISON WAS POSSIBLE

58. Australia agrees with the interpretation of Article 2.2 Indonesia set forth in its First Written Submission, but Australia applies it in a manner that renders the word "because" and the phrase "do not permit a proper comparison" inutile. To paraphrase, Australia's definition of "proper comparison", which is not vastly different from Indonesia's, is to allow a suitable and accurate comparison to ascertain whether the product is considered dumped". Where Indonesia differs from Australia is Australia's conclusory and unsupported interpretation of a "particular market situation" renders home market sales unsuitable for comparison. Australia's interpretation is incorrect because it effectively reads out of existence the word "because" and the phrase "such sales do not permit a proper comparison". Australia seems to think Article 2.2 should be read as saying if there is a "particular market situation" then a proper comparison is not possible. But what Article 2.2 says is when "because" of the "particular market situation" "such sales do not permit a proper comparison", then the investigating authority can resort to constructed normal value. In other words, the "particular market situation" must be the cause of why a suitable and accurate comparison to ascertain whether the product is dumped cannot be performed. And the purpose of the comparison is to determine whether the export price is below the home market price.

59. Australia's view is in direct conflict with the GATT panel decision in *EC − Cotton Yarn*, What the GATT panel was plainly saying was the "particular market situation" had to cause the sales to be unsuitable to permit a proper comparison − it was not the mere existence of a "particular market situation". Australia argues that the Appellate Body decision in *US − Hot-Rolled Steel* permits the conclusion that prices fixed in a manner incompatible with normal commercial practice or not according to criteria of the marketplace may be considered as not permitting a proper comparison. But as Australia acknowledges, the Appellate Body was discussing circumstances when sales were not made in the ordinary course of trade. Article 2.2 of the Anti-Dumping Agreement already covers the situation when there are no sales in the ordinary course of trade.

60. The United States and the European Union argue in their third-party submissions that the Anti-Dumping Agreement does not require the investigating authority to consider whether a situation with an effect in the domestic market has a similar effect on prices to the export market. But this

reading is fundamentally flawed because it gives no meaning to the word "because" and the phrase "such sales do not permit a proper comparison". The fact that Article 2.2 contains those words means the investigating authority must consider whether because of the particular market situation a proper comparison is no longer possible. The United States and the European Union argue that the Anti-Dumping Agreement permits comparisons that are not symmetrical. But this argument fails for the same reason.

61. The European Union reads into the term "normal value" a meaning that simply is not supported by ordinary meaning, context, object and purpose, or negotiating history. The European Union characterize the term "normal value" as undefined but that is not correct. Article 2.1 defines "normal value" as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the export country." Article 2.2 provides two alternative bases for normal value: 1) the "comparable price of the like product when exported to an appropriate third country, provided this price is representative" and 2) "the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits". Normal value, thus, is a shorthand reference to one of three defined possibilities for the price to be compared to the export price, but it does not have an independent meaning as the European Union argues.

62. Australia cites to facts it alleges support distortions to the home market price but cites no evidence that it considered whether those same factors flowed through to the export price. Australia's sole rebuttal as to whether it considered whether the low-priced inputs equally affected the domestic and export price was a purported lack of proof. Indonesia established, and it is unrefuted, that the same inputs were used to manufacture the A4 copy paper sold to the Indonesian domestic market and exported to Australia. Indonesia also established that its export prices were lower than those of other countries demonstrating, to the extent the Indonesian producers received low-priced inputs, it affected export prices.

III. AUSTRALIA'S FAILURE TO USE THE INDONESIAN PRODUCERS' RECORDS TO CALCULATE THE COST OF PRODUCTION IS INCONSISTENT WITH ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

63. Australia claims Indonesia's interpretation renders use of the word "normally" in Article 2.2.1.1 inutile, arguing that qualification of the verb "shall" by the adverb "normally" means an investigating authority may use records, other than the producer's own, to determine costs even if the two conditions in Article 2.2.1.1 are met. Australia's interpretation is incorrect.

64. As the panel indicated in *EU – Biodiesel (Argentina)*, and the Appellate Body did not question, the way in which the term "normally" is used is to indicate that the rule may be derogated from the two conditions specified in the first sentence of Article 2.2.1.1. The use of "normally" in Article 2.2.1.1 means the cost of production must, as a rule, be based on the exporter's or producer's cost records and derogation from that rule is limited to the two specified exceptions in the first sentence of Article 2.2.1.1.

65. The Appellate Body in *US – Clove Cigarettes* noted the ordinary meaning of "normally" is "'under normal or ordinary conditions; as a rule'". The "Appellate Body has found that the 'qualification of an obligation with the adverb ''normally'' does not, necessarily, alter the characterization of that obligation as constituting a ''rule'' ... [r]ather, the use of the term ''normally'' ... indicates that the rule ... admits of derogation under certain circumstances.'"

66. In *China – Broiler Products*, the panel in the compliance proceeding reasoned "'use of the term 'normally' in a legal obligation indicates a rule from which derogations are permitted subject to the conditions set out in the legal provision'".

IV. AUSTRALIA DID NOT CALCULATE THE PRODUCER'S COST OF PRODUCTION IN INDONESIA WHICH IS INCONSISTENT WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

67. Australia does not appear to disagree with Indonesia's argument that Article 2.2 requires calculating the cost of production in Indonesia. Australia claims it calculated a cost of production in Indonesia because it made certain adjustments. But none of the adjustments related to deriving the cost of production in Indonesia. Instead, the adjustments were needed to convert certain elements so that they were stated on an equivalent basis. Converting dry pulp to wet pulp was necessary not

to derive the cost of production in Indonesia but to state the pulp in the same unit of measure. In other words, it was no different than converting from short tons to metric tons. Removing SG&A, ocean freight, and inland transport charges was done for the exact same reason. SG&A, ocean freight, and inland transport charges were included in the benchmark the Commission used and Australia had to remove them because they are not part of the cost production as specified by Australia's own Anti-Dumping Manual.

V. AUSTRALIA CALCULATED AND IMPOSED ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN DUMPING PERMITTED BY ARTICLE 2 WHICH IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

68. Indonesia established in its First Written Submission that Australia violated Article 9.3 by calculating a constructed normal value and, in that calculation, replaced the Indonesian producers' actual hardwood pulp costs. Both of Australia's actions were inconsistent with Article 2. Those inconsistencies resulted in Australia imposing a higher anti-dumping duty than Australia would have imposed had Australia calculated the margin consistent with Article 2. In so doing, Australia violated its obligations under Article 9.3 and Australia has not argued to the contrary. Indonesia respectfully asks the Panel to so find and to recommend Australia bring its measures into conformity with its obligations.

EXECUTIVE SUMMARY OF INDONESIA'S CLOSING STATEMENT AT THE FIRST SUBSTANTIVE MEETING

69. With respect to Indonesia's first claim, Indonesia believes that there are a number of key points Indonesia has established which Australia has not effectively rebutted. The three exceptions to using domestic prices are set forth in Article 2.2 of the Anti-Dumping Agreement and all concern situations that require the existence of an effect on domestic but not export price. Article 2.2 provides an exception when there are no sales in the ordinary course of trade, which means the "particular market situation" must relate to a different circumstance. Australia however confirmed it was equating these two exceptions which Indonesia believes is incorrect. While we all are aware that "particular market situation" is not defined, Indonesia notes that there is no negotiating history supporting Australia's interpretation. Indonesia has clarified that it does not agree with Australia's view that "particular market situation" covers the Government of Indonesia's policies. This is based on the fact that Australia's conclusive finding in its parallel anti-subsidy investigation disclosed that the alleged subsidies were at a de-minimis level and not countervailable. This is more than sufficient to prove that no "particular market situation" is present in Indonesia.

70. For its second claim, Indonesia has established that Article 2.2 requires an investigating authority to determine whether "because" of a "particular market situation" a proper comparison of domestic and export prices is not possible. Australia's interpretation in this regard is incorrect because it reads out the word "because" and the phrase "such sales do not permit a proper comparison" in Article 2.2. Indonesia has taken note from the meeting, however, that Australia acknowledged that a proper price comparison is an element to be fulfilled to apply Article 2.2 of Anti-Dumping Agreement, but it stated that such comparison is not related to export price. In Indonesia's view the position taken by Australia showed nothing other than to emphasize its incorrect interpretation of Article 2.2 of the Anti-Dumping Agreement. With this position, not only has Australia wrongly interpreted Article 2.2 of the Anti-Dumping Agreement but also failed to properly establish and evaluate the facts.

71. Indonesia's third claim is based on nearly identical facts in the case law of *EU − Biodiesel (Argentina)*, *EU − Biodiesel (Indonesia)*, and *Ukraine − Ammonium Nitrate (Russia)* where the respective panels and Appellate Body uniformly decided that Article 2.2.1.1 requires an investigating authority to use the producer's actual costs, even when it determines that an input cost is distorted. In this dispute, Australia decided not to use the producer's actual costs for no other reason than because of an alleged distortion in the cost of pulp. Australia has not pointed to anything to dispute that the records of certain Indonesian A4 copy paper producers is consistent with GAPP applied in Indonesia, and reasonably reflect the production and sale of the product under investigation. As such, Indonesia believes that the substitution of the actual cost of an input with an out-of-country benchmark is not justified.

72. With respect to Indonesia's fourth claim, Australia does not dispute that it is required to calculate the cost of production in Indonesia. But the adjustments Australia made did not result in the calculation of a cost of production in Indonesia. Finally, because Australia did not calculate the anti-dumping margin in line with Article 2, Australia calculated a dumping margin in excess of what is permitted, and this violates the chapeau of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Indonesia's claims in this dispute are built on an inaccurate interpretation of the Anti-Dumping Agreement and a misrepresentation of the facts of the investigation before this Panel. In particular, Indonesia's case appears built on an assumption that the GATT 1994 and the Anti-Dumping Agreement must be read in a manner which narrows the legitimate scope for investigating authorities to remedy injurious dumping well beyond what is actually required by the texts. As such, its claims must fail.

2. Australia's submissions demonstrate that the Anti-Dumping Commission properly determined there was a "market situation" in the Indonesian A4 copy paper market such that sales in that market were "not suitable for use in determining" the "normal value" (i.e. because of the "particular market situation" such sales did not "permit a proper comparison" under Article 2.2 of the Anti-Dumping Agreement). The Anti-Dumping Commission then correctly proceeded to determine the "normal value" on the basis of a "constructed normal value" methodology (i.e. the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" under Article 2.2 of the Anti-Dumping Agreement and its subparagraphs).

3. Importantly, Indonesia does not challenge all of the Anti-Dumping Commission's findings in relation to imports of A4 copy paper from Indonesia. The varied findings by the Anti-Dumping Commission with respect to Indonesia[1] is a clear illustration of the Anti-Dumping Commission's proper establishment of the facts and its unbiased and objective evaluation of those facts, as required by Article 17.6(i) of the Anti-Dumping Agreement. The Panel cannot overturn such an evaluation by the Anti-Dumping Commission, even though it might have reached a different conclusion.

4. The Anti-Dumping Commission has undertaken a rigorous, unbiased and objective assessment of the facts and evidence in its investigation and has, through the proper application of the GATT 1994 and the Anti-Dumping Agreement, as implemented domestically through Australian legislation, done so in a manner fully consistent with Australia's WTO obligations.

II. INTERPRETATION OF TREATIES, BURDEN OF PROOF, STANDARD OF REVIEW

5. Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) directs a panel or the Appellate Body to clarify the provisions of the covered agreements of the Marrakesh Agreement Establishing the World Trade Organization "in accordance with customary rules of interpretation of public international law". The Appellate Body has confirmed customary international law includes Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).[2]

6. The general rule regarding the burden of proof is that a complaining party in a WTO dispute must present sufficient evidence and argument to establish a *prima facie* case of a violation of a

[1] The Anti-Dumping Commission found a negative dumping margin for one Indonesian exporter (Tjiwi Kimia); and imposed anti-dumping duties on another Indonesian exporter (RAK) that Indonesia has not challenged. To the extent that Indah Kiat and Pindo Deli had different results to the other exporters, it was due to their individual circumstances, as properly determined by the Anti-Dumping Commission. The Anti-Dumping Commission also terminated the countervailing duties investigation in respect of Indonesia, and rejected the applicant's "particular market situation" claim made in respect of China. See Final Report, Exhibit IDN-04, section 1.3, pp. 8-9; section 13, p 136; and Appendix 2.2, p. 146.

[2] Appellate Body Reports, *US — Gasoline*, p. 17, DSR 1996:I, 3, at p. 16; and *Japan — Alcoholic Beverages II*, p. 10, DSR 1996:1, 97 at p. 104.

covered agreement.[3] The Appellate Body has stated that, "under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."[4] Thus, the burden of proof in this dispute falls squarely on Indonesia. Australia's submissions demonstrate that the evidence and arguments set out by Indonesia in its first written submission are insufficient to prove any inconsistency with the GATT 1994 or the Anti-Dumping Agreement in regard to the measures at issue in this dispute.

7. The Anti-Dumping Agreement is a covered agreement listed in Appendix 1 of the DSU; the rules and procedures of the DSU apply to disputes brought under it. Article 11 of the DSU sets out the function of panels. A panel must make an objective assessment of the matter before it, including the facts of the case, and the applicability of and conformity with the covered agreement at issue.

8. Articles 17.5 and 17.6 of the Anti-Dumping Agreement are listed as special or additional rules and procedures in Appendix 2 of the DSU. Article 17.5(ii) of the Anti-Dumping Agreement provides that the panel is to examine the matter based upon the facts that were before the investigating authority of the importing Member when it made its determination. Article 17.6(i) provides that a panel shall determine whether the national authorities' establishment of the facts was proper and whether the authorities' evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, a panel shall not overturn that evaluation, even though the panel might have reached a different conclusion.

III. FACTUAL BACKGROUND

A. Overview of Australia's Anti-Dumping System

9. The "anti-dumping system" in Australia refers to the system which gives effect to Australia's rights and obligations under Article VI of the GATT 1994, the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Australia's anti-dumping system is based on four core principles: independence, transparency, evidence-based decision-making, and access to review (both merits review and judicial review).

10. Australia's investigating authority is the Anti-Dumping Commission, which is headed by an independent Commissioner and is responsible for administering Australia's anti-dumping system. The organisational structure in Australia is not bifurcated, meaning the Anti-Dumping Commission investigates allegations of dumped and/or subsidised goods that have been imported into Australia, and claims of material injury (or threat of material injury) to the Australian industry producing like goods.

11. The *Customs Act 1901 (Cth)* and the *Customs Tariff (Anti-Dumping) Act 1975 (Cth)* provide the statutory authority for the anti-dumping system. They contain the legal authority for the responsible Minister and Commissioner to make decisions with respect to anti-dumping and countervailing duties. The *Customs (International Obligations) Regulation 2015 (Cth)* (*Customs Regulation*) sets out technical details, including matters to which the responsible Minister must have regard when constructing the "normal value" in an anti-dumping investigation.

12. The Dumping and Subsidy Manual (Manual) provides a comprehensive guide to the policy and practice for all operational activities conducted by the Anti-Dumping Commission. The purpose of the Manual is to promote a consistent approach to investigation findings and decisions, but it does not contain a mandatory set of instructions or constrain the decisions of the Commissioner.

13. The anti-dumping system in Australia is unique in that interested parties have access to comprehensive merits review of decisions made by the Commissioner and the responsible Minister, in addition to judicial review. Merits review is undertaken by the independent Anti-Dumping Review Panel. After receiving a report containing recommendations from the Anti-Dumping Review Panel, the responsible Minister is required to affirm or revoke the reviewable decision.

[3] See, for example, Appellate Body Reports, *US − Wool Shirts and Blouses*, p. 14, DSR:1997:I, 323, at p. 335; *EC − Hormones*, para. 104; and Panel Report, *Korea − Dairy*, para. 7.24.

[4] Appellate Body Report, *Canada − Dairy (Article 21.5 − New Zealand and US II)*, para. 66. (emphasis original)

B. The Investigation Before This Panel

14. On 24 February 2016, a written application was received from Paper Australia Pty Ltd (Australian Paper) seeking the publication of a dumping duty notice in respect of A4 copy paper imported into Australia from Brazil, China, Indonesia and Thailand, and a countervailing duty notice in respect of A4 copy paper imported into Australia from China and Indonesia. Australian Paper's application claimed, *inter alia*, that a "particular market situation" existed in relation to both China and Indonesia and that, as a result, domestic prices of A4 copy paper were not suitable for determining normal values.[5]

15. A dumping and subsidy investigation, Investigation 341, was initiated on 12 April 2016. Interested parties, including the Government of Indonesia and Indonesian exporters, were individually notified in writing of the investigation and invited to complete a questionnaire, which included requests for additional information relating to the claim of a "particular market situation". Almost 150 submissions were received and considered by the Anti-Dumping Commission in the course of its investigation, including 14 from the Government of Indonesia and 39 from Indonesian exporters.[6]

16. The Anti-Dumping Commission's analysis of import data identified that imports of Indonesian A4 copy paper were primarily through two groups of companies: the APRIL Group and the Sinar Mas Group of companies (SMG). The Anti-Dumping Commission's investigation identified that:

- the APRIL Group exports were exported by PT Riau Andalan Kertas (RAK) through a related trading company April Fine Paper Trading Pte Ltd (AFPT);[7] and
- the SMG exports were predominantly exported through unrelated intermediaries by three related companies: PT Indah Kiat Pulp & Paper Tbk (Indah Kiat); PT Pabrik Kertas Tjiwi Kimia Tbk (Tjiwi Kimia); and PT Pindo Deli Pulp and Paper Mills (Pindo Deli)[8] (the SMG exporters).

17. On 17 March 2017, the Commissioner terminated the countervailing duty investigation relating to Indonesia, finding countervailable subsidies had been received in respect of A4 copy paper exported to Australia from Indonesia during the investigation period, but that these were negligible in value and/or volume.[9] The Commissioner also terminated the dumping investigation in relation to Tjiwi Kimia, one of the SMG exporters, on the basis that the goods exported by Tjiwi Kimia were not dumped.[10]

18. On 17 March 2017, the Commissioner completed Final Report No. 341 in relation to Investigation 341, finding, *inter alia*, dumped exports of A4 copy paper from Indonesia (with the exception of exports from Tjiwi Kimia), and making, *inter alia*, the following recommendations to the responsible Minister relevant to Indonesia:[11]

- that a particular market situation existed in Indonesia, such that domestic selling prices were not suitable for determining normal values;
- that the normal values for Indah Kiat, Pindo Deli and RAK were to be determined as the sum of the cost of production or manufacture of A4 copy paper in Indonesia; and the administrative, selling and general costs associated with that sale and the profit on that sale;[12]
- that anti-dumping duties be imposed in respect of certain A4 copy paper exports from Indonesia.

19. On 18 April 2017, the responsible Minister signed a notice declaring that the goods under investigation were subject to anti-dumping duties, and signed a public notice outlining the findings in relation to the dumping investigation.

[5] Final Report, Exhibit IDN-04, section 6.5, p. 36.
[6] Australia's opening statement at the first substantive meeting with the Parties, para. 17.
[7] Final Report, Exhibit IDN-04, section 6.9.7.1, p. 56.
[8] Final Report, Exhibit IDN-04, section 6.9.4.1, p. 52; section 6.9.6.1, p. 55; and section 6.9.5.1, p. 54.
[9] Final Report, Exhibit IDN-04, section 1.3, p. 9 and section 7.1.4, p. 76.
[10] Final Report, Exhibit IDN-04, section 1.3, p. 8 and section 6.9.8.1.6, p. 63.
[11] Final Report, Exhibit IDN-04, section 13, pp. 131-139.
[12] This total was adjusted so as to ensure that the normal value was properly comparable with the export price (Final Report, Exhibit IDN-04, section 13, p. 136).

20. Applications for independent merits review were received from, amongst others, the Government of Indonesia, SMG, RAK and a successor company to AFPT. The Anti-Dumping Review Panel subsequently recommended that the responsible Minister revoke the decisions in relation to Indah Kiat and Pindo Deli, respectively, to not apply a downward adjustment to their respective normal values for their domestic sales intermediary's sales margin; however it rejected the other grounds for appeal made by the Indonesian parties.[13] This recommendation was adopted by the responsible Minister. The effect was to reduce the interim anti-dumping duty rate on Indah Kiat from 35.4% to 30% and to reduce the interim anti-dumping duty rate on Pindo Deli from 38.6% to 33%.

21. The Indonesian exporters and the Government of Indonesia have not made applications to the Federal Court of Australia for judicial review of the decisions made by the Commissioner or the responsible Minister.

IV. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE 2.2 IN DISREGARDING INDONESIAN DOMESTIC PRICES IN DETERMINING THE "NORMAL VALUE"

A. Anti-Dumping Duties are a Valid and Permissible Response to Injurious Dumping

22. Under Article VI of the GATT 1994 and the Anti-Dumping Agreement, anti-dumping duties are a valid and permissible response to something that is to be condemned, being injurious dumping.

23. Indonesia appears to suggest that validly determined and levied anti-dumping duties constitute some sort of "exception" to Article I and Article II of the GATT 1994,[14] rather than a legitimate response to injurious dumping. This incorrect characterisation underpins a number of the fundamental legal errors contained in Indonesia's submissions, particularly those relating to the correct legal interpretation of core terms in the Anti-Dumping Agreement. By invoking these characterisations, Indonesia seeks to promote a more restrictive interpretation of those core terms than is warranted by a good faith examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose.

B. Because of the "Particular Market Situation", Indonesian Domestic Sales of A4 Copy Paper Did Not "Permit a Proper Comparison" with Export Prices

1. Australia properly established there was a "particular market situation" within Article 2.2 of the Anti-Dumping Agreement

24. The proper interpretation of "particular market situation" – clear from its ordinary meaning, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement – is any condition, state or combination of circumstances in respect of the buying and selling of the like product (i.e. A4 copy paper) in the market of the exporting country (i.e. Indonesia) that is distinguishable and not general.[15]

25. This interpretation is fully consistent with the findings of *EC – Cotton Yarn*, in which the GATT Panel found that a "particular market situation" was "relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison …. There must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison".[16]

26. In accordance with this meaning, Australia properly established there was a "particular market situation" within Article 2.2 of the Anti-Dumping Agreement. In summary, the Anti-Dumping Commission found that:[17]

- programs and policies of the Government of Indonesia including the export ban on logs increased the supply of logs in Indonesia, lowering the cost and price of logs and hardwood pulp in Indonesia;

[13] Anti-Dumping Review Panel Report No. 55 (ADRP Report), Exhibit AUS-10, paras. 585 and 588-589.
[14] Indonesia's first written submission, paras. 42, 48, 55 and 103.
[15] Australia's first written submission, paras. 97-106.
[16] GATT Panel Report, *EC — Cotton Yarn*, paras. 478.
[17] Australia's first written submission, para. 115.

- the lowered cost and price of logs and hardwood pulp in Indonesia induced and allowed the main Indonesian A4 copy paper producers (SMG and APRIL Group), which are integrated A4 copy paper producers with their own upstream pulp facilities,[18] to supply more A4 copy paper at each possible price point than they otherwise would have; and
- the resultant price of A4 copy paper in Indonesia was the end result of the interactions between those selling, and those buying, A4 copy paper in Indonesia. The resultant price of A4 copy paper in Indonesia was artificially low, significantly below regional benchmarks, and reflected the lowered cost and price of logs and hardwood pulp in Indonesia that resulted from the programs and policies of the Government of Indonesia.[19]

27. Taken together, these factors clearly demonstrate a "particular market situation" within Article 2.2 of the Anti-Dumping Agreement, being a condition, state or combination of circumstances in respect of the buying and selling of A4 copy paper in Indonesia that was distinguishable and not general. In addition, these factors were intrinsic to the nature of the sales of A4 copy paper themselves.

2. Australia properly established that, because of the "particular market situation", Indonesian domestic sales did not "permit a proper comparison" with export prices

28. The Appellate Body has stated that the effect of Article 2.2 is that an alternative basis for deriving the "normal value" must be relied upon by an investigating authority where sales in the exporting country's market do not "permit a proper comparison" with the export price because of the "particular market situation".[20]

29. The proper interpretation of "permit a proper comparison" – clear from its ordinary meaning, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement – is to allow a suitable and accurate comparison to ascertain whether the product is to be considered as being dumped; and determine the margin of dumping.[21] As such, the focus is the proper determination of the "normal value", and not, as Indonesia asserts,[22] whether the export price was also affected by the same factors that affected the domestic price.

30. The Anti-Dumping Agreement does not explicitly identify the factors that will determine whether or not using the domestic price as the basis for the "normal value" would allow an investigating authority to conduct a suitable and accurate comparison to ascertain whether the like product is to be considered as being dumped, and/or determine the margin of dumping. However, the characteristics of such factors can be identified from the context provided by Article VI of the GATT 1994, the second *Ad* Note to Article VI:1 of the GATT 1994, and Article 2 of the Anti-Dumping Agreement.

(a) Government intervention (both in respect of the like product and in respect of inputs to the like product) can result in the domestic price not being suitable to use as the basis for the normal value

31. Indonesia asserts that "dumping is an exporter-specific inquiry without relation to government involvement".[23] That is incorrect. Government intervention is a factor that can result in the domestic price not being suitable to use as the basis for the "normal value" because the affected domestic sales do not permit a proper comparison with the export price.

32. For example, Article 2.7 of the Anti-Dumping Agreement and the second *Ad* Note to Article VI:1 of the GATT 1994 recognise that one instance where the domestic price may not be suitable for use as the basis for the "normal value" is where imports are "from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State."[24] The Appellate Body findings in *EC — Fasteners (China)*[25] and *EC – Fasteners (China)*

[18] Final Report, Exhibit IDN-04, section A2.9.3, p. 173.
[19] Final Report, Exhibit IDN-04, section A2.9.2.2, p. 167; and section A2.9.4, pp. 173-174.
[20] Appellate Body Report, *EC — Tube or Pipe Fittings*, para. 94.
[21] Australia's first written submission, paras. 122-132.
[22] Indonesia's first written submission, paras. 72 and 88.
[23] Indonesia's first written submission, para. 93.
[24] See the second *Ad* Note to Article VI:1 of the GATT 1994.
[25] Appellate Body Report, *EC – Fasteners (China),* para. 285.

(Article 21.5 – China)[26] clearly recognised that government intervention that distorts costs and prices of inputs and the price of the like product in the domestic market of the exporting country can preclude a "proper comparison" between domestic sales and the export price. Whether or not it does so in a particular case will depend on the facts and circumstances and must be determined on a case-by-case basis.

33. Australia is in no way alleging that Indonesia is a non-market economy - clearly, the nature and degree of government intervention is different in the case of a non-market economy. Nevertheless, as demonstrated by the Anti-Dumping Commission's findings, in the A4 copy paper sector in Indonesia, the domestic price was not suitable to use as the basis for "normal value".

(b) Prices fixed in a manner incompatible with normal commercial practice or according to criteria which are not those of the marketplace are not suitable to use as the basis for the normal value

34. In *US – Hot Rolled Steel*, the Appellate Body recognised that a domestic price will not be suitable to use as the basis for the "normal value" where it is the result of sales transactions concluded on terms and conditions that are incompatible with normal commercial practice; or are fixed according to criteria which are not those of the marketplace.[27]

35. While *US – Hot-Rolled Steel* considered a situation where the domestic sales were not in the "ordinary course of trade" rather than a "particular market situation", both situations relate to determining whether the domestic price is suitable to use as the basis for the "normal value". *US – Hot-Rolled Steel* therefore suggests that, where there is a "particular market situation" (including one arising from government intervention), a relevant factor for an investigating authority to consider in determining whether the domestic sales "permit a proper comparison" is whether the "particular market situation" has resulted in the domestic price being fixed in a manner incompatible with normal commercial practice; and/or fixed according to criteria which are not those of the marketplace.

(c) The findings of the Anti-Dumping Commission

36. Therefore, in deciding whether the price of A4 copy paper in Indonesia would allow a suitable and accurate comparison to ascertain whether the A4 copy paper was to be considered as being dumped and to determine the margin of dumping (i.e. whether the domestic price was suitable to use as the basis for the "normal value") it was relevant for the Anti-Dumping Commission to consider whether:

- the domestic price of A4 copy paper was affected by government intervention that distorted costs and prices; and/or
- the "particular market situation" meant that the domestic price of A4 copy paper was fixed in a manner incompatible with normal commercial practice; and/or
- the "particular market situation" meant that the domestic price of A4 copy paper was fixed according to criteria which were not those of the marketplace.

37. This is exactly what the Anti-Dumping Commission did. It concluded that:[28]

- "the policies and programs [of the Government of Indonesia] … have affected the structure and development of Indonesia's forestry sector and increased the supply of timber";
- "an export ban imposed by the [Government of Indonesia] on logs distorts the domestic supply of timber" and "the net impact of the export ban on Indonesian logs … [is] reduced prices";
- "the cost of producing pulp was substantially less than a competitive benchmark… the actual cost of pulp recorded by exporters in their records does not reasonably reflect a competitive market cost";
- "pulp is proportionally the largest cost component for the production of the goods and like goods";

[26] Appellate Body Report, EC – Fasteners (China) (Article 21.5 – China), para. 5.207.
[27] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 140-141.
[28] Final Report, Exhibit IDN-04, section 6.5, p. 36; section 6.9.1, p 51; and Appendix 2 at section A2.2, p 146; section A2.5.1, p 150; section A2.9, p 165; and section A2.9.2 at pp 166-172. (emphasis added) See also Australia's first written submission, para. 144.

- "the primary beneficiary of identified timber-related [Government of Indonesia] policies and programs was the Indonesian pulp industry", "this finding is significant in assessing a market situation in the Indonesian A4 copy paper market", and "Indonesian A4 copy paper producers have benefited through access to cheaper pulp including from related parties for integrated paper producers such as [SMG]";
- "the significant influence of the Government of Indonesia … within the forestry and pulp industries has distorted prices in the paper industry and the paper market in Indonesia";
- "Indonesian domestic prices [of A4 copy paper] are artificially low";
- "[t]he domestic price of Indonesian A4 copy paper is significantly below comparable regional benchmarks";
- "[t]he [Government of Indonesia] exerts significant influence over the Indonesian timber and pulp industries through various programs and policies … [T]hese programs and policies have rendered Indonesian domestic A4 copy paper prices unsuitable for determining normal values";
- "[t]he [Government of Indonesia's] involvement in forestry and pulp industries through its support for the development of timber plantations and its prohibition on the export of timber logs has directly resulted in the distortion of the domestic price for A4 copy paper"; and
- "there is a market situation in the Indonesian A4 copy paper market such that sales in that market are not suitable for use in determining [normal value]".

38. The Anti-Dumping Commission also took steps to assess the extent to which the low cost and price of logs in Indonesia might be the result of lower timber growing costs in Indonesia as opposed to government intervention. This examination showed, contrary to the claims of the Government of Indonesia, that, "for Indonesia's primary pulpwood (acacia), it is more costly to produce timber in Indonesia than in other Asian countries" and "growing costs for acacia pulpwood in Indonesia were the highest in Asia".[29]

39. The Anti-Dumping Commission undertook a comprehensive assessment of the facts related to whether the "particular market situation" resulted in domestic sales that were "not suitable"[30] to use as the basis for the "normal value" (i.e. such sales would not permit a proper comparison with the export price). It found that there was government intervention. It found that this government intervention materially reduced the cost and price of logs and hardwood pulp in Indonesia and distorted the price of A4 copy paper in Indonesia such that the domestic sales were not suitable to use as the basis for the "normal value". It found that the domestic price was distorted, artificially low, below regional benchmarks, and reflected the lowered cost and price of logs and hardwood pulp in Indonesia that resulted from the programs and policies of the Government of Indonesia.

40. The Anti-Dumping Commission therefore validly found that the domestic sales of A4 copy paper did not permit a proper comparison with export prices.

3. Indonesia misrepresents the practice and findings of the Anti-Dumping Commission in relation to "particular market situation" and "permit a proper comparison"

41. Indonesia's claims and arguments are predicated on incorrect descriptions of the practice and findings of the Anti-Dumping Commission in respect of "particular market situation" and "permit a proper comparison". In particular, Indonesia seeks to convince the Panel that:

- Australia finds a "particular market situation" exists every time an input price is distorted;
- having done so, Australia then doesn't examine whether the domestic sales would "permit a proper comparison" with the export price; and
- rather, having found a "particular market situation", Australia simply proceeds directly to determining a constructed normal value.

42. Australia's legislation, the Manual, the Statement of Essential Facts and the Final Report all clearly show that the Anti-Dumping Commission engages in a two-step analysis in respect of "particular market situation" and "permit a proper comparison".[31] Contrary to Indonesia's first

[29] Final Report, Exhibit IDN-04, section A2.5.1, p. 150; and section A2.9.2.2, p. 166. (emphasis added)
[30] Final Report, Exhibit IDN-04, section 6.5, p. 36.
[31] The factors considered to determine a "particular market situation" and "permit a proper comparison" are not necessarily mutual exclusive, and often overlap. This does not meant that there is not a separate analysis of the two requirements (Australia's closing statement at the first substantive meeting with the Parties, para. 15).

written submission, Australia does not simply proceed directly to determining a constructed normal value. In particular, Australia demonstrably does not find that a "particular market situation" exists every time that an input price is distorted – and, in the investigation that is before this Panel, the Anti-Dumping Commission undertook a detailed and exhaustive consideration of whether a "particular market situation" existed, which extended far beyond considering whether an input price was distorted.

43. The Anti-Dumping Commission, in the same investigation that is before this Panel, rejected the applicant's "particular market situation" claim in respect of China, even though it found the Government of China exerted significant influence over the size and structure of the hardwood pulp industry, that this intervention had likely distorted the domestic price of hardwood pulp in China, and that Government of China subsidies had likely distorted the A4 copy paper market.[32] This is because the Anti-Dumping Commission found that the influence and involvement of the Government of China were "unlikely to have rendered Chinese domestic A4 copy paper prices unsuitable for determining normal values".[33]

4. Indonesia's arguments with respect to "particular market situation" and "permit a proper comparison" have no merit

44. Indonesia has not conducted a proper Vienna Convention interpretation of the term "particular market situation". Building on its incorrect assertion that anti-dumping duties are an "exception" to Articles I and II of the GATT 1994, Indonesia misinterprets a "particular market situation" as an "exceptional set of circumstances affecting comparability of domestic market prices in such a way as to affect them unilaterally",[34] despite the terms "exceptional" and "unilateral" being entirely absent from the phrase "particular market situation" or the dictionary definition of "particular". Indonesia provides no references or support for its assertion that "silence in the negotiating history"[35] supports its narrow interpretation of "particular market situation". The "Draft Recommendation Concerning Treatment of the Practice Known as Input Dumping", cited by Indonesia as evidence that WTO Members did not intend to include a provision in the Anti-Dumping Agreement governing input dumping, was never adopted by the Committee on Anti-Dumping Practices[36] and, in any event, concerned a practice that is not before the Panel in this dispute. Finally, it is simply incorrect that "government involvement" is exclusively covered by the SCM Agreement;[37] Indonesia's refusal to say whether or not a government imposed price-ceiling or floor would constitute a "particular market situation" is instructive in this regard.[38]

45. Similarly, Indonesia's arguments in respect of "permit a proper comparison" have no merit, and are based on the incorrect assertion that the domestic price can only be discarded as the basis for the "normal value" if the "particular market situation" affects the domestic price but not the export price.[39] These arguments are based on the incorrect assertion, made throughout Indonesia's submissions, that "dumping" and the Anti-Dumping Agreement are solely concerned with "international price discrimination."[40] However this term does not appear in the GATT 1994 or Anti-Dumping Agreement; and the Appellate Body has referred to the term only in the context of when "normal value" is based on "domestic price", not when it is based on constructed normal value under Article 2.2.

46. Indonesia's argument that in the other situations covered by Article 2.2 ("when there are no sales in the ordinary course of trade and … when there is a low volume of sales"), "the effect is one-

[32] Final Report, Exhibit IDN-04, section A2.2, p 146; section A2.8.1, p 153; and section A2.8.4, p 160.
[33] Final Report, Exhibit IDN-04, section A2.2, p 146. The domestic price of A4 copy paper in China was consistent with regional benchmarks.
[34] Indonesia's first written submission, para. 72.
[35] Indonesia's first written submission, para. 68.
[36] The Draft Recommendation on Input Dumping was considered at five Meetings of the Committee on Anti-Dumping Practices between 1985 and 1987: 21 & 24 October 1985, 23 April 1986, 30 October 1986, 5 June 1987, and 26 & 28 October 1987. The Minutes of these Meetings record that the Draft Recommendation was never adopted by the Committee on Anti-Dumping Practices.
[37] Indonesia's first written submission, para. 93.
[38] Indonesia's written response to Panel Question 11 following the first substantive meeting with the Parties; Australia's closing statement at the first substantive meeting with the Parties, para. 18.
[39] Indonesia's first written submission, paras. 72 and 88.
[40] Indonesia's first written submission, paras. 101 and 107.

sided and on the domestic market"[41] is incorrect. And it has provided no proof to support its argument that the "low price inputs" equally affected the domestic and export price of A4 copy paper.[42] Even if Indonesia were to provide such proof, there is nothing in the language of the GATT 1994 or the Anti-Dumping Agreement that suggests that there must be some sort of "asymmetrical" impact on the domestic prices vis-à-vis export prices in order to find that a "proper comparison" was not permitted. Furthermore, *US − Anti Dumping and Countervailing Duties (China)* − the only dispute that Indonesia refers to in relation to this issue − is not relevant to the application of Article 2 of the Anti-Dumping Agreement.

C. Conclusion

47. The Anti-Dumping Commission provided a reasoned and adequate explanation as to how the evidence supported its factual findings and how those findings supported its determination that "there is a market situation in the Indonesian A4 copy paper market such that sales in that market are not suitable for use in determining [normal value]".[43] Indonesia has submitted no evidence that the Anti-Dumping Commission's establishment of the facts was not proper or that the Anti-Dumping Commission's evaluation was biased or not objective. Indonesia has also failed to show that an "objective and impartial investigating authority could not properly have"[44] made the determinations above. Indonesia's legal interpretation of "particular market situation" and "permit a proper comparison" are incorrect.

V. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT IN ITS DETERMINATION OF THE CONSTRUCTED NORMAL VALUE OF A4 COPY PAPER

A. The Anti-Dumping Commission was Not Required to Calculate the Hardwood Pulp Component of the Constructed Normal Value on the Basis of the Records of Indah Kiat and Pindo Deli

48. Article 2.2.1.1 establishes that, in determining the constructed normal value, "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation" whenever the two conditions of Article 2.2.1.1 are satisfied.[45]

49. Indonesia submits that Australia acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because the Anti-Dumping Commission did not calculate the hardwood pulp component of the constructed normal value for those exporters on the basis of the records of those exporters even though the two conditions in Article 2.2.1.1 were satisfied. These arguments ignore the presence of the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement − the inclusion of this word provides a legal ground, separate and distinct from the legal ground of a failure to satisfy the two conditions in Article 2.2.1.1, for not calculating costs on the basis of records kept by the exporter or producer under investigation.[46]

1. The qualification of the verb "shall" by the adverb "normally" in Article 2.2.1.1 must be given meaning and effect

50. The meaning of the first sentence of Article 2.2.1.1 is clear from its ordinary meaning, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement. Interpreting the first sentence of Article 2.2.1.1 in a way that requires that the "costs … be calculated on the basis of records kept by the exporter or producer under investigation" whenever the two

[41] Indonesia's first written submission, para. 40.
[42] Indonesia's first written submission, paras. 118 and 121.
[43] Final Report, Exhibit IDN-04, section 6.5, p. 36. See also section 6.9.1, p. 50; section A2.9.1, p. 165; and section A2.9.6.8, p. 185.
[44] Panel Report, *US − DRAMS*, para. 6.69.
[45] Emphasis added.
[46] Australia has not conceded that the records of Indah Kiat and Pindo Deli did satisfy the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, and does not consider it necessary for the Panel to consider this question (Australia's opening statement at the first substantive meeting with the Parties, para. 69).

conditions in Article 2.2.1.1 are satisfied − as Indonesia does[47] − renders the word "normally" inutile and redundant.

51. As stated by the Appellate Body in *US − Clove Cigarettes*: "[T]he ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule".[48]

52. Accordingly, the proper interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement, and in a way that does not render the word "normally" inutile or redundant, is that, where the circumstances are not normal and ordinary, the investigating authority is not required to calculate costs on the basis of records kept by the exporter or producer under investigation, even if the two conditions in Article 2.2.1.1 are satisfied.[49]

53. This interpretation is fully consistent with the findings of panels and the Appellate Body in relation to the meaning of "normally" in Article 2.2.1.1.[50] Notably, the panel and Appellate Body in *EU − Biodiesel (Argentina)* left open the possibility of there being circumstances beyond a failure to satisfy the two expressly stated conditions in Article 2.2.1.1 in which an investigation authority would not be required to calculate costs on the basis of records kept by the exporter or producer under investigation.[51]

2. The records of Indah Kiat and Pindo Deli in respect of hardwood pulp would not have established an appropriate proxy for the domestic sales price and would have rendered the resort to constructed normal value inutile, so the circumstances were not normal and ordinary

54. The Appellate Body has stated that the purpose of determining a constructed normal value is to "… establish[] … the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy".[52]

55. Not every "particular market situation" that results in domestic sales not permitting a "proper comparison" would create circumstances that were not normal and ordinary, and thus permit an investigating authority to not calculate costs on the basis of the records of the exporter or producer under investigation even though the two conditions in Article 2.2.1.1 were satisfied. The key question in each case is whether those records were suitable to determine a constructed normal value that was an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales".[53] The answer to this question is necessarily dependent on the specific facts of each case.

56. In the facts of the investigation before this Panel, the Anti-Dumping Commission was faced with circumstances that were not normal and ordinary in respect of Indah Kiat and Pindo Deli. A constructed normal value calculated on the basis of Indah Kiat's and Pindo Deli's records in respect of hardwood pulp would not have been an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales",[54] because, like the domestic sales price that

[47] Indonesia's first written submission, paras. 124 and 136.
[48] Appellate Body Report, *US − Clove Cigarettes*, para. 273. (emphasis added, footnote omitted)
[49] Australia's first written submission, para. 194.
[50] Panel Report, *China − Broiler Products*, para. 7.161; Panel Report, *EU − Biodiesel (Argentina)*, para. 7.227.
[51] Panel Report, *EU − Biodiesel (Argentina)*, footnote 380; Appellate Body Report, *EU − Biodiesel (Argentina)*, footnote 120. See also Panel Report, *Ukraine − Ammonium Nitrate*, para. 7.68.
[52] Appellate Body Report, *EU − Biodiesel (Argentina),* para. 6.24 (footnote omitted). See also Panel Reports, *EU − Biodiesel (Argentina)*, para. 7.233; *Thailand − H-Beams*, para. 7.112; *US − Softwood Lumber V*, para. 7.278.
[53] Ibid.
[54] Ibid.

had been found unsuitable to use as the basis of the "normal value", they would have reflected the "particular market situation". This is clearly set out in the Final Report.[55]

57. Notably, for one of the other Indonesian exporters (RAK), the Anti-Dumping Commission found that its transfer prices for purchases of hardwood pulp in Indonesia from a related company were consistent with the benchmark prices used to derive the "pulp benchmark". The Anti-Dumping Commission thus calculated the constructed normal value of A4 copy paper for RAK on the basis of its records,[56] because a constructed normal value calculated on the basis of those transfer prices (and RAK's other costs) would have been an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales".[57]

B. The Anti-Dumping Commission Correctly Determined the Hardwood Pulp Component of the Constructed Normal Value

1. The Anti-Dumping Commission correctly determined an appropriate benchmark

58. In Appendix 4 to the Final Report, the Anti-Dumping Commission identified that its "preferences for choosing a replacement competitive market cost are, in descending order: private domestic prices; import prices; and external benchmarks."[58] The Anti-Dumping Commission was unable to identify any acceptable private domestic prices that could be used, and found there was a lack of imports of hardwood pulp into Indonesia and that it was likely that the price of any such imports would be similarly affected by the programs and policies of the Government of Indonesia.[59]

59. In the absence of its preferred private domestic prices and import prices, the Anti-Dumping Commission developed a "pulp benchmark" based on external sources which it used for the hardwood pulp component of the constructed normal value of A4 copy paper produced by Indah Kiat and Pindo Deli. The Anti-Dumping Commission explained that:[60]

- it had "derived a pulp benchmark" "consisting of quarterly import pulp prices into China and Korea based on an average CIF price for [hardwood pulp] originating from Brazil and South America";[61, 62]
- these pulp prices were obtained from data provided by RISI Inc. and Hawkins Wright Ltd;
- information from RISI Inc. "indicated that growing costs for acacia pulpwood in Indonesia is not significantly less than growing costs for eucalyptus pulpwood from South America, notably Brazil";
- "there is broad alignment of South American eucalyptus pulp and traded Indonesian acacia pulp prices";
- "neither the [Government of Indonesia] nor any Indonesian pulp producer provided the Commission with information or evidence to support claims that the cost of producing acacia pulpwood in Indonesia is significantly less than in other Asian or South American countries"; and
- the pulp benchmark was "based on verified actual transaction prices collected through broad systematic surveys of small, medium and large size participants, including both buyers and sellers".

[55] The Anti-Dumping Commission found that, reflecting the "particular market situation", the "actual cost of pulp recorded by exporters in their records does not reasonably reflect a competitive market costs … this renders this component of Indonesian producers' and exporters' records unsuitable for determining the costs to make A4 copy paper for the purposes of constructing normal values" (Final Report, Exhibit IDN-04, section 6.9.1, p. 51).

[56] Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.

[57] Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.24 (footnote omitted). See also Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; *US – Softwood Lumber V*, para. 7.278.

[58] Final Report, Exhibit IDN-04, section A4.3, p. 230. (emphasis added)

[59] Final Report, Exhibit IDN-04, section A4.3.2, p. 230-1.

[60] Final Report, Exhibit IDN-04, section A4.1, p 230; section A4.2, p 230; section A4.3.3, p 231; and section A4.5, pp. 232-233. See also Australia's first written submission, para. 228.

[61] Final Report, Exhibit IDN-04, sections A4.1-A4.2, p. 230; see also section A4.3.3, p. 231. Note that monthly import pulp prices were also used to derive the pulp benchmark.

[62] China and Korea were Indonesia's two main destinations for exports of hardwood pulp (Final Report, Exhibit IDN-04, section A2.9.2.3, p. 167).

60. The Anti-Dumping Commission also found that the benchmark prices used to derive the "pulp benchmark" were consistent with the transfer prices in the records kept by one of the other Indonesian exporters (RAK) for its purchases of hardwood pulp in Indonesia from a related company.[63]

2. The Appellate Body has made it clear that an "out-of-country" benchmark can be used for the purpose of determining the constructed normal value

61. The Appellate Body has made it clear that such an "out-of-country" benchmark can be used for the purpose of determining the constructed normal value, but has cautioned that "whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects."[64]

62. The Anti-Dumping Commission did not, as Indonesia alleges, "merely substitute[] the Indonesian producers' actual cost for hardwood pulp with a benchmark price for hardwood pulp manufactured in Brazil and South America".[65] Rather, it considered a number of options for a benchmark and provided a reasoned and adequate explanation as to why it chose the benchmark that it ultimately used. It checked whether there were suitable domestic prices or import prices that could be used and concluded that there were not. It found that the benchmark prices used to derive the "pulp benchmark" were consistent with the transfer prices in the records kept by one of the other Indonesian exporters (RAK) for its purchases of hardwood pulp in Indonesia from a related company.[66] It checked the alignment of South American eucalyptus pulp and traded Indonesian acacia pulp prices, determined that growing costs for acacia pulpwood in Indonesia were not significantly less than growing costs for eucalyptus pulpwood in South America, and noted that the Government of Indonesia and the Indonesian hardwood pulp producers had provided no evidence to support their claims that it was cheaper to produce acacia pulpwood in Indonesia than in other Asian or South American countries.[67]

63. Significantly, the Anti-Dumping Commission also found no significant difference between the price of hardwood pulp sourced by Asian importers from South America and the price of hardwood pulp sourced by Asian importers from Indonesia.[68] That is, the Anti-Dumping Commission found that the export price of Indonesian pulp was not significantly different to the export price of South American pulp. Australia notes Indonesia has indicated that it would have been consistent with Article 2.2 of the Anti-Dumping Agreement if Australia had derived the hardwood pulp component of the constructed normal value by reference to the "export price of Indonesian pulp" − this is effectively what Australia did do.[69]

3. The Anti-Dumping Commission properly adapted the pulp benchmark

64. Furthermore, the Anti-Dumping Commission then adapted the "pulp benchmark" specific to the circumstances of Indah Kiat and Pindo Deli. With respect to Indah Kiat, the Anti-Dumping Commission adapted the pulp benchmark so that it was the cost of slush hardwood pulp or dry hardwood pulp as appropriate and using amounts incurred specifically by Indah Kiat. Indah Kiat made its own hardwood pulp,[70] so the Anti-Dumping Commission separately multiplied the quantity of slush hardwood pulp and dry hardwood pulp consumed by Indah Kiat each month during the investigation period with the corresponding adapted pulp benchmark for that month. The Anti-Dumping Commission also made deductions to the pulp benchmark based on Indah Kiat's own

[63] Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52. The Anti-Dumping Commission was prevented from using these prices as the basis for the hardwood pulp component of the constructed normal value of A4 copy paper because they were confidential and could not be disclosed (Final Report, Exhibit IDN-04, section A4.5.1, p 232).

[64] Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.73. (footnote omitted)

[65] Indonesia's first written submission, para. 155.

[66] Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.

[67] Final Report, Exhibit IDN-04, section A4.5.2, p. 233.

[68] Final Report, Exhibit IDN-04, section A4.4, p. 231 and section A4.5.2 at p 233.

[69] Indonesia's opening statement at the first substantive meeting with the Parties, para 49; Australia's closing statement at the first substantive meeting with the Parties, para. 27.

[70] Indonesia first written submission, para. 10.

records, including amounts for the cost of ocean freight and inland transport, for selling, general and administrative expenses and for the cost to convert wet hardwood pulp to dry hardwood pulp.[71]

65. Pindo Deli did not manufacture hardwood pulp. Rather, it obtained the vast majority of its hardwood pulp from other companies within SMG, including Indah Kiat.[72] Therefore, in respect of Pindo Deli, the Anti-Dumping Commission made the same adaptations to the pulp benchmark that it applied in respect of Indah Kiat. However, it did not deduct an amount for converting slush hardwood pulp to dry hardwood pulp because the pulp benchmark already represented an amount for dry hardwood pulp.

4. Indonesia's arguments in relation to the hardwood pulp component of the constructed normal value have no merit

66. Indonesia claims that Australia should have used the amounts in the records of Indah Kiat and Pindo Deli for the hardwood pulp component of the constructed normal value rather than the "competitive market cost" that it used pursuant to subsection 43(2) of the *Customs Regulation*.[73] But it simply cannot be the case that amounts that were validly rejected under Article 2.2.1.1 of the Anti-Dumping Agreement must then be used to determine the constructed normal value under Article 2.2.

67. Indonesia's arguments also fail to take into account the vertical integration and related-party transactions that characterise Indah Kiat and Pindo Deli (which facilitated SMG and the APRIL Group to "capture" the advantages of the cheap timber which resulted from the interventions of the Government of Indonesia), and the analysis that the Anti-Dumping Commission undertook to ensure the pulp benchmark was suitable to use to arrive at the cost of production of A4 copy paper in Indonesia.[74]

C. Indonesia's Reliance on EU – Biodiesel (Argentina), EU – Biodiesel (Indonesia) and Ukraine – Ammonium Nitrate is Misplaced

68. Indonesia asserts that the facts of this dispute are "almost identical" to the facts in *EU – Biodiesel (Argentina)* and *EU – Biodiesel (Indonesia)*, that "there is no factual or legal basis for this Panel to interpret Article 2.2.1.1 in a manner at odds with" the decisions in *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate*; that there are no "meaningful differences" between the dispute before this Panel and those disputes; and that "the fact pattern [in the dispute before this Panel] is almost identical" to those disputes.[75]

69. All of these assertions are incorrect. There are obvious factual differences between the investigations at issue in those disputes and the investigation before this Panel – including, with respect to the investigation before this Panel, the existence of: a "particular market situation"; the vertical integration of exporters within SMG and the non-arm's length transactions for the input in question; and the fact that a prevailing international export price was available for the input in question.[76] Further, the reasoning of the panels and Appellate Body in these cases was expressly limited to the interpretation and application of the second condition of Article 2.2.1.1, with no detailed consideration of the meaning of the word "normally".

D. The Phrase "Competitive Market Costs" in Australia's Regulations Operated So as to Ensure That the Anti-Dumping Commission Properly Calculated the Constructed Normal Value and Complied with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement

70. Indonesia also focuses on the fact that subsection 43(2) of the *Customs Regulation* uses the phrase "the records … reasonably reflect competitive market costs associated with the production or manufacture of like goods" whereas Article 2.2.1.1 of the Anti-Dumping Agreement uses the phrase

[71] Final Report, Exhibit IDN-04, section 6.9.8.1.3, p. 62.
[72] Indonesia's first written submission, paras. 10, 117 and 167; see also footnote 70.
[73] Indonesia's first written submission, paras. 2, 153 and 170
[74] To paraphrase the Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.
[75] Indonesia's first written submission, paras. 142, 145, 155 and 162.
[76] Australia's first written submission, para. 249.

"such records … reasonably reflect the costs associated with the production and sale of the product under consideration".[77]

71. Australia notes, at the outset, that Indonesia is making an "as applied", rather than an "as such", challenge,[78] so Australia's regulations are relevant only insofar as how they were applied in this dispute. Australia operates a dualist legal system under which treaty obligations are given effect via domestic laws and regulations, which may or may not mirror the language of the underlying treaty but which are consistent with the relevant treaty obligations. Subsection 43(2) of the *Customs Regulations* gives effect to both the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, and to the word "normally" in Article 2.2.1.1.

72. As applied in the investigation before this Panel, the phrase "competitive market costs" facilitated the discarding of the distorted hardwood pulp component of the records of Indah Kiat and Pindo Deli in circumstances that were outside the normal and ordinary circumstances envisaged by the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The phrase "competitive market costs" then facilitated recourse to an appropriate alternative amount to ensure the proper determination of the constructed normal value for those two exporters under Article 2.2 of the Anti-Dumping Agreement.

73. In addition, the terms "actual cost" and "actual costs" − which Indonesia uses at least 11 times to describe the "test" under the second condition of Article 2.2.1.1 − are nowhere to be found in Article 2.2.1.1 of the Anti-Dumping Agreement. It is clear from the treaty that when the drafters wanted "actual costs" to always be used, they incorporated the word "actual" into the text of the Anti-Dumping Agreement − see Articles 2.2.2(i) and 2.2.2(ii). It is simply not the case that Article 2.2.1.1 of the Anti-Dumping Agreement requires the use of the records of an exporter whenever those records reflect the "actual costs" of that exporter. There are a large number of qualifications and exceptions to the use of "actual costs".[79]

E. Conclusion

74. Australia has established that the Anti-Dumping Commission acted consistently with Article 2.2 and Article 2.2.1.1 of the Anti-Dumping Agreement in its determination of the constructed normal value of A4 copy paper for Indah Kiat and Pindo Deli.[80] The Anti-Dumping Commission provided a reasoned and adequate explanation as to how the evidence supported its factual findings and how those factual findings supported its determination that it was not required to calculate the hardwood pulp component of the constructed normal value on the basis of the records of Indah Kiat and Pindo Deli, and determination of the constructed normal value of their A4 copy paper by reference to the "pulp benchmark".

75. Indonesia has submitted no evidence that the Anti-Dumping Commission's establishment of the facts was not proper or that the Anti-Dumping Commission's evaluation was biased or not objective. Indonesia has also failed to show that an "objective and impartial investigating authority could not properly have"[81] made the determination above. Indonesia's interpretations of Article 2.2.1.1 of the Anti-Dumping Agreement and the phrase "costs of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement are incorrect.

[77] Emphasis added. See Indonesia's first written submission, para. 125.

[78] Indonesia's first written submission, para. 27.

[79] For example, the "actual costs" in the records may not be the costs that had a genuine relationship with the production of the like product (see Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.26); may reflect costs incurred in transactions involving inputs purchased in non-arm's-length transactions (Panel Reports, *Ukraine − Ammonium Nitrate*, para. 7.70; *EU − Biodiesel (Argentina)*, footnote 400; *US − OCTG (Korea)*, para. 7.197; and Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.41); or might understate the actual costs incurred (Panel Report, *EU − Biodiesel (Argentina)*, footnote 400).

[80] Australia also acted consistently with Article VI:1(b)(ii) of the GATT 1994 in this regard.

[81] Panel Report, *US − DRAMS*, para. 6.69.

VI. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE VI:2 OF THE GATT 1994 AND WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT BY IMPOSING ANTI-DUMPING DUTIES IN AN AMOUNT THAT DID NOT EXCEED THE MARGIN OF DUMPING

76. Indonesia's claims under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement are entirely dependent on this Panel finding that Australia acted inconsistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement in its determination of the "normal value" for Indah Kiat and Pindo Deli. Australia has demonstrated above that its determination of the "normal value" for Indah Kiat and Pindo Deli was fully consistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. Indonesia's claims under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement must therefore fail.

VII. AUSTRALIA HAS NOT NULLIFIED OR IMPAIRED BENEFITS ACCRUING DIRECTLY OR INDIRECTLY TO INDONESIA

77. No benefits accruing directly or indirectly to Indonesia under the GATT 1994 or the Anti-Dumping Agreement have been nullified or impaired by Australia.

VIII. CONCLUSION

78. For the foregoing reasons, Australia respectfully requests that the Panel reject Indonesia's claims in their entirety.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

EXECUTIVE SUMMARY OF INDONESIA'S SECOND WRITTEN SUBMISSION

I. Australia's Interpretation Of "Particular Market Situation" Is Incorrect

1. Australia's interpretation of "particular market situation" would wrongly expand the concept and implementation of Article 2.2 of Anti-Dumping Agreement for Members to disregard domestic prices in market economies in almost any situation and would be a far broader grant than given in cases of State set prices or nonmarket economies. Indeed, Australia's definition is overly broad such that a large number of subsidy or government policy/intervention situations could potentially be subject to a "particular market situation" finding.

2. Australia argues the meaning of "particular" is "'pertaining or relating to a single definite thing or person, or set of things or persons, as distinguished from others; of or belonging to some one thing (etc.) and not to any other, or to some and not to all ... special; not general'". However, the Oxford English Dictionary notes that the definition of "particular" Australia relies upon is "{o}ften preceded by a possessive adjective". Thus, the fact that "particular" is not preceded by a possessive adjective suggests the definition of "particular" Australia relies upon is not appropriate in the context of interpreting the meaning of "particular market situation".

3. Australia also argues Indonesia has no basis for relying on the silence in the negotiating history. But Australia cannot otherwise cite to any negotiating history to support its interpretation of an undefined treaty term. If "particular market situation" was as broad as Australia interprets it, i.e. any situation that is not general, it is inconceivable that the term would not be defined or that there would not have been some negotiating history supporting Australia's interpretation.

4. Australia further concedes that its "particular market situation" finding was based exclusively on the price of an input but claims Indonesia offered no proof that the low price inputs equally affected domestic and export prices.

5. First, Indonesia noted Australia never reached a determination on whether domestic and export prices were equally affected because the Commission did not address that question. Australia now concedes that point. Second, Indonesia recalled the nature of the A4 copy paper production process which involves using timber to produce pulp, and pulp as a direct input to produce paper. Indonesia further argued the same inputs were used to make A4 copy paper sold to the Indonesian domestic market and exported to Australia. Indeed, Australia, itself, verified this fact during its onsite visit. Third, Indonesia cited to evidence on the Commission's record establishing imports of A4 copy paper from Indonesia into Australia had the lowest prices, suggesting any "particular market situation" involving inputs affected both domestic and export prices.

6. It is important to recall that Article 2.2 specifies that it is "because of" the "particular market situation" that the sales do not permit a proper comparison. Based on the facts in this dispute, the "particular market situation" did not cause or prevent domestic prices from being compared to export prices to determine whether there was price discrimination. Australia failed to do so based on its incorrect interpretation and application of its obligations under Article 2.2.

7. Whether the input price affected domestic and export prices is relevant under Indonesia's first and second claims. Under Indonesia's first claim, a situation involving an input that affects prices of domestic and export sales is not a "particular market situation" because, properly interpreted, a "particular market situation" only affects sales in the domestic market. Under Indonesia's second claim, even if a "particular market situation" exists, Article 2.2 still requires an examination of whether the situation prevents the investigating authority from determining whether the domestic price and the export price are comparable, and it is only when they are not that the investigating authority may disregard domestic prices.

II. Dumping Is Price Discrimination And Australia's Attempt To Broaden The Meaning Of The Term Impermissibly Rewrites The Anti-Dumping Agreement

8. Dumping is a defined term. As Indonesia established in its First Written Submission, "dumped", "dumping", "margin of dumping", or "dumping margin" all refer to the same definition of dumping defined by Article 2.1. Article 2.1 defines a product that is dumped as one that is "introduced into the commerce of another country at less than its normal value". Dumping, therefore, is the act of an individual producer or exporter selling exports at prices below normal value.

9. Pursuant to Articles 2.1 and 2.2, "normal value" is one of three possibilities: 1) domestic prices, 2) constructed normal value, or 3) third country sales. By Australia's own definition, "proper" means "'suitable and accurate'" and "comparison" means "'the action, or an act, of comparing, or noting the similarities and differences of two or more things'". As explained in detail below, Australia's justification for its interpretation fails because whether a product has been sold for less than normal value in the export market (i.e. has been dumped) can suitably and accurately ascertained when domestic and export prices are similarly affected.

10. Whether a price comparison is "proper" pursuant to Article 2.2 must be determined in view of the purpose of the comparison. Australia does not dispute this and recognizes the purpose of the comparison is to ascertain whether the product is being dumped and to determine the margin of dumping. As the Russian Federation notes, "the word 'proper' in Article 2.2 of the Anti-Dumping Agreement relates to the correct determination of the pricing behavior of {an} individual exporter or foreign producer". China, likewise notes the purpose of the proper comparison in Article 2.2 is to reveal price discrimination of an individual producer.

11. Indonesia recalls the definition of dumping is selling at export prices that are below normal value. The definition of dumping remains exactly the same no matter which basis is used for normal value. When domestic sales are the basis for normal value, the product is dumped if the domestic price is above the export price. When constructed normal value is used, the product is dumped if the constructed normal value is above the export price. When third country sales are used, the product is dumped if the third country sales price is above the export price. In every instance, whether dumping exists is defined based on whether the price in the domestic market, whether actual or surrogate, is above the price in the export market. In other words, the purpose of every comparison remains the same − to determine whether there is price discrimination.

12. Australia and a number of third parties argued that the Anti-Dumping Agreement never uses the term "price discrimination" and seem to imply that dumping is something other than price discrimination. Members considered dumping to be price discrimination when they were drafting the "particular market situation" provision in what is now Article 2.2 of the Anti-Dumping Agreement.

13. The idea that dumping is price discrimination was a central premise during the Kennedy Round, which eventually produced an Anti-Dumping Code which included the "particular market situation" provision. As part of the negotiations, the Group on Anti-Dumping Policies circulated an "Anti-Dumping Checklist" for comment. The first item on the agenda is "Concept of dumping" and subheading A is titled "Price discrimination criteria". Several governments submitted comments and notably, not one voiced an objection about use of the term "price discrimination" in connection with "concept of dumping". Indeed, several governments expressed views that are practically synonymous with those advanced by Indonesia in this dispute.

14. The European Economic Community explained:

> Pursuant to Article VI of the General Agreement, dumping is deemed to be the sale of merchandise of one country in the market of another country at less than normal value of such merchandise, such value being not the price in the market of the importing country, but the price of a like product when destined for consumption in the exporting country or, in the absence of such domestic price, the price for export to any third country or the cost of production in the country of origin. Consequently, dumping is a practice of price discrimination in external trade.

Indonesia has advanced the exact interpretation above, noting irrespective of the basis for normal value, the definition of dumping remains unchanged throughout the Anti-Dumping Agreement and seeks to determine whether price discrimination is occurring.

15. Japan expressed views nearly identical to the European Economic Community in its comments on the Anti-Dumping Checklist:

> The price discrimination should be taken to mean the difference between the export price and the price of the like product in the domestic market of the supplier ... When there are no comparable domestic prices, e.g., when there are no open sales in the domestic market, price discrimination should be determined by comparison with either of the alternatives provided for in Article VI:1(b)(i) and (ii) of the GATT.

Again, Indonesia has advanced the exact points made by Japan in this dispute, i.e., dumping is price discrimination no matter what basis is used for normal value.

16. In response to the same Anti-Dumping Checklist, Canada stated "{t}his concept of price discrimination between export and domestic market is the basic definition of dumping in Article VI of the GATT". The United States noted "{p}rice comparisons for the purpose of determining the existence of price discrimination or of assessing an anti-dumping duty should be based on a comparison of different sales of an specific seller − the firm accused of dumping − and never by averaging sales of several sellers in the home market or in export". The points made by the United States are consistent with two points Indonesia advances in this dispute: 1) dumping is price discrimination and 2) dumping is specific to a firm.

17. Two points concerning the well-accepted idea of dumping as price discrimination during the Kennedy Round are of particular importance. The first is there is no mention by any of the parties of government involvement in the dumping inquiry, the entire discussion of dumping concerns the pricing behavior of individual producers and exporters. Second, dumping as price discrimination by individual producers and exports was the view held when the "particular market situation" provision was negotiated and included in the 1967 Anti-Dumping Code which eventually became Article 2.2 of the Anti-Dumping Agreement. The Panel should give more weight to the statements about the meaning of dumping made by the governments at the time the "particular market situation" provision was negotiated than on the new found and self-serving interpretation advanced by Australia and certain third parties in the context of a particular dispute.

18. Indonesia established in its First Written Submission that an investigating authority must examine whether the comparability of domestic to export prices was affected, even if there was a "particular market situation" and established Australia had not examined whether there was any effect on domestic and export prices. As both China and Korea have indicated, a situation that equally affects export prices is not a "particular market situation". The reason Australia did not do so is based on its interpretation and application of Article 2.2 as not requiring an examination of whether export prices are equally affected by a "particular market situation", such that whether there is dumping, nevertheless, can be determined. As Australia explained, the Commission found domestic sales were not suitable to use because of government intervention that allegedly led to distorted domestic prices for A4 copy paper. Australia concedes that it did not examine export sales.

19. Indonesia established in its First Written Submission that the three situations described in Article 2.2 all concern situations that unilaterally affect prices in the domestic market meaning that a situation, such as one involving an input that affects domestic and export prices, cannot be a "particular market situation". Australia attempted to rebut Indonesia's argument claiming when an exporter sells at below cost prices or low volumes to both domestic and export markets, the Anti-Dumping Agreement permits discarding the domestic price but keeping the export price. Indonesia rebutted the relevance of Australia's point because it did not refute the point Indonesia was making about the two other exceptions described in Article 2.2 as situations that only affect the home market. However, at no point has Indonesia claimed Article 2.2 does not require export sales to be considered. To the contrary, Indonesia has argued the only correct interpretation of Article 2.2 is that the investigating authority must undertake an evidentiary analysis of whether a proper comparison of domestic to export prices can be performed.

20. Australia and certain third parties note that the "proper comparison" is focused only on establishing normal value and the "proper comparison" is not related to the export price. However,

as China notes, what needs to be "proper" is not the domestic price, *per se*, but its comparison with the export price. Korea, similarly states the determination of normal value must be made in light of the export price, otherwise the requirement to ensure a proper comparison would be meaningless. China and Korea both support this argument with reference to the "low volume of sales" provision in Article 2.2.

21. In summary, when there is a low volume of sales in the domestic market, Article 2.2 requires the investigating authority to compare the volume of sales in the domestic market to the volume of sales in the export market to determine whether they constitute five percent or more of sales. The "proper comparison", therefore, is between the domestic sales and the export sales. Consequently, the same is true of the "proper comparison" when there is a "particular market situation". The "proper comparison" when a "particular market situation" exists is between the domestic sales price and the export sales price.

22. Australia argues Indonesia has not offered any proof that domestic and export prices were equally affected by the allegedly distorted price of timber. This simply is not correct. Indonesia has argued from the outset that the nature of the A4 copy paper production process involves using timber to produce pulp, and pulp to produce paper. Indonesia further argued the same inputs were used to make A4 copy paper sold to the Indonesian domestic market and exported to Australia. Indeed, Australia, itself, verified this fact during its onsite visit.

23. Indeed, additional evidence corroborated the conclusion that domestic and export prices were equally affected even if a "particular market situation" existed. As Indonesia noted in its First Written Submission, the Australian Anti-Dumping Commission gathered evidence in the injury investigation showing the price of imports into Australia from Indonesia were below the Australian domestic price and all other imports.

24. Ultimately, Australia concedes it did not even consider whether domestic and export prices were equally affected. This means that if the Panel finds Article 2.2 requires an investigating authority to examine whether a proper comparison of the domestic price to the export price is required even if there is a "particular market situation", Australia's interpretation and application of Article 2.2 in this dispute was inconsistent.

25. Australia argues that a "particular market situation" is analogous to situations involving state controlled economies and nonmarket economies. Australia ignores a number of critical differences. First, the discretion to disregard domestic prices in both the state controlled economy and nonmarket economy context was *not* granted on an ad hoc basis. Second, the grants of authority giving discretion to disregard domestic prices were made in express provisions. Third, the second Ad note to Article VI:1 of the GATT 1994 only applies when the State sets prices.

26. Australia also argues a "particular market situation" is analogous to situations involving nonmarket economies, referring to China's Accession Protocol. But again, Australia's interpretation of the "particular market situation" provision would render it far broader than application of the provisions in China's Accession Protocol.

27. As the Russian Federation and China noted, the need for the second Ad Note to Article VI:1 of the GATT 1994 and for Article 15 of China's Accession Protocol demonstrate Australia's interpretation of the "particular market situation" provision is incorrect. If the "particular market situation" covered government influence or interference on market prices, there was no need to have a separate provision for State controlled economies or as China described, the "painful negotiations to introduce provisions for this purpose". Because Australia's interpretation of the "particular market situation" is so broad, it actually reaches more government behavior than applies in either the context of a State controlled economy or a nonmarket economy.

28. In this dispute, Australia determined a proper comparison was not possible by comparing Indonesian domestic A4 copy paper prices to a benchmark. As Indonesia has established, the proper comparison is between the individual producer's domestic prices and export prices as set forth in Article 2.1. Even if Australia's comparison was not inconsistent with Article 2.2, Australia's interpretation and application of Article 2.2 is still incorrect because Australia based its "particular market situation" finding on the same basis it used to determine a proper comparison could not be made.

29. If Australia had found Indonesian domestic A4 copy paper prices were above or consistent with the benchmark, Australia would not have found a "particular market situation" existed. This is why Australia found there was not a "particular market situation in China.

30. Australia's and certain third parties' interpretation and application renders the following phrases in Article 2.2 without meaning: "because of" and "such sales do not permit a proper comparison" because it renders "particular market situation" and "proper comparison" the same thing. Interpreting Article 2.2 to mean that a "particular market situation" automatically means constructed normal value or third country sales will be used makes the phrases "because of" and "such sales do not permit a proper comparison" unnecessary. In this dispute, Australia's interpretation equated the "particular market situation" with the inability to perform a proper comparison which renders several treaty terms superfluous. As the Russian Federation notes, "the words actually used ... must give meaning and effect to all its terms". The Russian Federation further quotes from the Appellate Body which noted the "*duty* of any treaty interpreter is to 'read' all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'". Australia's interpretation, which fails to give meaning to all of the terms in Article 2.2, is incorrect.

III. Australia's Interpretation Of Article 2.2.1.1 As Permitting An Investigating Authority To Reject A Producer's Costs Any Time A Situation Exists That Is Not "Normal" Is Incorrect

31. Australia's interpretation of Article 2.2.1.1 is that an investigating authority may disregard a producer's records when circumstances are "'outside the normal and ordinary'" such as when a "particular market situation" exists. Australia claims the Appellate Body in *EU – Biodiesel (Argentina)* "explicitly left open the possibility" that other circumstances might exist that would allow the investigating authority to disregard a producer's records. Indonesia first addresses the flaws in Australia's textual analysis and then responds to Australia's claim that disregarding a producer's costs for reasons other than the two express exceptions in Article 2.2.1.1, i.e. if a "particular market situation" exists is an open question.

32. Australia's sole textual argument is that "normally" must be given meaning. While Australia emphasized the "normal" and "ordinary conditions" portion of the definition, the Appellate Body concluded in *US – Clove Cigarettes* that "qualification of an obligation with the adverb 'normally' does not, necessarily, alter the conclusion of that obligation as constituting a 'rule'".

33. Not only does Australia ignore that "normally" can be defined "as a rule", Australia also ignores Article 2.2.1.1's use of the conjunction "provided" in the first sentence. "Provided" means "with the provision or condition (that)"; "it being provided, stipulated, or arranged (that); "on the condition, supposition, or understanding (that)". By including the word "provided" the drafters intentionally were conditioning application of the rule in Article 2.2.1.1, i.e., costs shall, as a rule, i.e., "normally", be calculated using the producer's records, to the two conditions that followed, i.e., the records are kept in accordance with GAAP and suitably and sufficiently reproduce the costs incurred to produce the merchandise under consideration.

34. Australia also argues the Appellate Body in *EU – Biodiesel (Argentina*) left open the possibility there might be reasons for disregarding a producer's records other than those found in Article 2.2.1.1. This is not an accurate characterization of what the Appellate Body said or did. The Appellate Body merely recalled that the EU was relying on the second condition in the first sentence of Article 2.2.1.1.

35. Australia argues that to require the records kept by Indah Kiat and Pindo Deli, which according to Australia, reflected the "particular market situation" would render resorting to constructed normal value inutile. But this issue already has been settled by the Appellate Body in *EU – Biodiesel (Argentina)*, and the fact that *Biodiesel* was based on sales outside of the ordinary course of trade is a distinction without a difference. The crucial similarity, however, is even if an input is distorted by government influence and normal value is based on constructed normal value, the investigating authority must still use the input price recorded in the producer's records if the two conditions specified in Article 2.2.1.1 are satisfied.

36. It is important to recall, rejecting a producer's records based on the reasonableness of the costs, themselves, is not an open question. The Appellate Body in *EU – Biodiesel (Argentina)* was clear in ruling the costs must reflect the costs incurred that have a genuine relationship with the

production and sale of the product under consideration. As China notes, interpreting "normally" as incorporating a standard of the reasonableness of the costs makes including the two conditions specified after the word "provided" in the first sentence of Article 2.2.1.1 unnecessary.

37. In this dispute, Australia rejected Indah Kiat's and Pindo Deli's costs because they were not reasonable. It does not matter whether Australia now characterizes this as a situation that was not normal because of a "particular market situation", the basis given in the determination for Australia disregarding the cost of pulp recorded in Indah Kiat's and Pindo Deli's records was because it was less than a benchmark price of pulp which meant, in Australia's view, it did not reflect a competitive market cost. That is a reasonableness test, the same as the one the EU applied and the Appellate Body rejected in *EU – Biodiesel (Argentina)*.

IV. Australia Did Not Calculate The Cost Of A4 Copy Paper Production In Indonesia

38. Australia does not appear to disagree with Indonesia's argument that Article 2.2 requires calculating the cost of production in Indonesia. Australia claims it calculated a cost of production in Indonesia because it made certain adjustments. But none of the adjustments related to deriving the cost of production in Indonesia. Instead, the adjustments were needed to convert certain elements so that they were stated on an equivalent basis. Australia's removal of those elements had nothing to do with calculating the cost of production of pulp in Indonesia. The adjusted cost Australia used was the FOB cost of producing pulp in South America and Brazil not Indah Kiat's or Pindo Deli's cost of producing pulp in Indonesia.

V. Australia Has Not Rebutted Indonesia's Claim That A Violation Of Article 2 In The Calculation Of The Dumping Margin Violates The Chapeau Of Article 9.3 Of The Anti-Dumping Agreement And Article VI:2 Of The GATT 1994

39. Indonesia established in its First Written Submission as inconsistent with the chapeau of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because Australia calculated and imposed anti-dumping duties in excess of those permitted by Article 2. Australia's sole rebuttal was the claim is dependent on establishing an inconsistency with Article 2. Consequently, if the Panel finds Australia acted inconsistently with Article 2, it should also find Australia acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

EXECUTIVE SUMMARY OF INDONESIA'S OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING

I. Indonesia Has Demonstrated Australia's Actions Violate Article 2.2 Because They Are Based On An Incorrect Interpretation Of "Particular Market Situation"

40. Indonesia's first claim is that Australia has based its application of the anti-dumping duties upon an incorrect interpretation of "particular market situation" in Article 2.2 of the Anti-Dumping Agreement, one that does not conform to any correct interpretation of "particular market situation". In applying anti-dumping duties on imports of A4 paper from Indonesian exporters, Australia wrongly found that there was a "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement, even though there was no situation in the domestic market which could impact the dumping margin calculated by deducting the prices in export sales from the prices in domestic sales. To succeed on its first claim, it is only necessary for Indonesia to establish that no correct interpretation of "particular market situation" could include any situation in the market which is incapable of making any difference to the dumping margin arrived at by comparing prices in export sales with prices in domestic sales.

41. Australia takes issue with Indonesia's use of the word "exceptional", which Indonesia used to summarize the various dictionary definitions of "particular". Australia is making a distinction without a difference because the Panel could substitute any of the following definitions of "particular" from Indonesia's First Written Submission and still reach the same result: "distinguished in some way among others of the same kind"; "not ordinary"; "worthy of notice, remarkable"; or "special".

42. Australia also takes issue with Indonesia's use of the word "unilateral" but confuses the issue by categorizing it as one of Indonesia's ordinary meaning arguments. Indonesia, however, argued that a "particular market situation" must be interpreted as being "unilateral", i.e., only affecting

domestic sales, based on the context including the context given by the other two exceptions in Article 2.2 that permit departing from domestic prices. Indonesia has never argued the "unilateral" nature of a "particular market situation" was based on an ordinary meaning analysis, and Australia's claim in that regard is incorrect and misleading.

43. Finally, Australia argues against Indonesia's references to the silence in the negotiating history on the meaning of "particular market situation" and how that stands in stark contrast to the extensive discussion generated by input dumping. Indonesia did not offer a definition of "particular market situation" based on the silence in the negotiating history, the existence of which, notably, Australia has not refuted. Whether or not the alleged government intervention in this dispute could be characterized as a form of input dumping, Indonesia's point was that the attempt to regulate such behavior generated a significant amount of discussion.

44. Indonesia notes that while Australia claims it relied on the regional benchmark price of A4 copy paper and not just the low input price of timber to support its "particular market situation" finding, yet Australia acknowledged in response to the Panel's questions following the First Substantive Meeting that the finding was not based on any government program or policy that affected the A4 copy paper market other than those that lowered the cost and price of logs and hardwood pulp.

45. Australia further incorrectly claims in its Second Written Submission that Indonesia has changed the arguments relating to its first and second claims. To the contrary, Indonesia has argued from the outset in claim 1 that Australia's interpretation of the treaty term "particular market situation" is incorrect, and even if a "particular market situation" existed, in its claim 2 Indonesia argues that Australia misinterpreted Article 2.2 because a proper comparison of domestic price to export price was possible.

46. In arguing against Indonesia's interpretation, Australia reaffirms its mistaken view that if a "particular market situation" exists, domestic sales, per se, do not permit a proper comparison. As Indonesia has argued, the Panel must reject Australia's proposed interpretation because it reads the word "because" and the phrase "such sales do not permit a proper comparison" out of Article 2.2.

47. Australia also argues Indonesia has conflated the phrases "particular market situation" with "not permit a proper comparison". Again, Australia confuses Indonesia's argument which was that the meaning of "particular market situation" can be understood in the context of the remainder of Article 2.2, including the phrase "not permit a proper comparison". Indonesia has established based on an analysis that is fully consistent with the VCLT that a "particular market situation" is "an exceptional combination of circumstances taking place in a geographic region". Such a situation affects the market for the exporter's domestic sales and, thus may prevent a proper comparison by rendering domestic sales unfit to permit a proper comparison but it does not, per se, mean a proper comparison cannot be performed.

II. Indonesia Has Demonstrated That Australia's Actions Violate Article 2.2 Because They Are Based On An Incorrect Interpretation Of That Provision

48. Indonesia has established in its second claim that Australia's overall interpretation of Article 2.2 of the Anti-Dumping Agreement as it relates to rejecting domestic prices because of a "particular market situation" is incorrect. Australia attempts numerous justifications in its Second Written Submission, none of which are availing.

49. The GATT Group on Anti-Dumping Policies during the Kennedy Round negotiation, which created the Anti-Dumping Code which first contained the 'particular market situation' exception, was clear that dumping was price discrimination. This included views of the European Economic Community, Canada, the United States and, Japan.

50. In particular, the delegation of Japan to the Group on Anti-Dumping Policies neatly explained that all of the three methods of determining normal value set out in GATT Article VI are related to determining the existence of price discrimination, whether the existence of price discrimination is determined by assessing the difference between the export price and the domestic price, or by assessing the difference between the export price and one of the two alternatives to domestic price "provided for in Article VI:1(b)(i) and (ii) of the GATT". Indonesia's combined analysis of the negotiating history and the context provided in various other provisions of the Anti-Dumping

Agreement and of the object and purpose of the Agreement show the whole agreement is directed to ensuring a reliable and accurate determination of whether exporters are price discriminating between domestic sales and export sales.

51. When one understands the essential point that dumping is price discrimination, then it also becomes clear that the purpose of making the comparison between an exporter's domestic prices and export prices is to determine whether that exporter is price discriminating between the domestic and export markets and if so by what margin, and that a "proper comparison" is one that can serve that purpose. When the price received by the exporter from domestic sales arises from transactions that are in the ordinary course of trade, being compatible with normal commercial practice and fixed according to criteria of the market place but are nevertheless complicated by some situation affecting how the exporter makes sales into the domestic market, which has the effect that the formal contract price of those domestic sales does not properly represent the value received by the exporter from the sale, then comparing the formal contract price of the domestic sales with the export prices will not serve the purpose of determining whether the exporter is price discriminating and, if so, by what margin so it makes sense to use an alternative price which is likely to be a better estimation of what the domestic price would be in the absence of that "particular market situation".

52. One can reduce this concept to its simplest form, by recognizing that the proper determination of whether an exporter is dumping and of the margin of dumping involves a simple subtraction equation which is the domestic price minus the export price equals the margin of price discrimination or margin of dumping. If a situation affects the number on both sides of the minus sign in the equation, then there is no change in the Difference arrived at by the Subtraction of the second number from the first number. If a situation affects only the starting number (Minuend) and not the number being taken away (Subtrahend) then the presence of the situation does change the Difference arrived at by the Subtraction of the second number from the first number.

53. Australia claims it does consider whether the domestic price would permit a proper comparison with the export price. This is misleading because Australia does not actually consider the "particular market situation" effects on the domestic price relative to the effects on the export price. In other words, Australia is not considering whether or how the "particular market situation" affects the equation − Australia is making a per se determination that the domestic price is not suitable for comparison because of the alleged "particular market situation".

54. Australia insists Indonesia has not proven low priced inputs equally affected domestic and export sales prices. However, the evidence shows that import prices of A4 copy from one or more Indonesian producers into Australia were lower than import prices from every other import source, save a single exporter, and even then, imports from one or more Indonesian producers still were cheaper than from this single Thai exporter in 7 out of 12 months of the investigation period.

55. Basis economics support Indonesia's position on the equal effects. This proposition of economic theory, that a domestic subsidy or the availability of low prices inputs would have the same effect on the costs of exporters in relation to their domestic sales as it has on their costs in relation to their export sales was accepted by the panel and the Appellate Body in *United States − Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*. In that case, the Appellate Body had to decide whether the concurrent application of a countervailing duty offsetting a domestic subsidy and an anti-dumping duty offsetting a dumping margin based on a normal value using surrogate country cost method, without making any adjustment for double counting was a violation of the obligation in Article 19.3 of the SCM Agreement to levy countervailing duties "in the appropriate amounts". The question necessitated an analysis of the effects of domestic subsidies. The panel noted a domestic subsidy would lower the production cost for all units of production and would allow the producer to lower prices in both the domestic and export market. The Appellate Body agreed.

56. The only difference is, in this dispute, rather than a domestic subsidy, there is a low priced input, which has the same effect on the exporter's costs for all merchandise, regardless of whether A4 copy paper is sold in export sales or domestic sales. Since the reduction in costs is received by a producer for all units of production regardless of whether they are ultimately sold to the domestic market or to the export market, then the reduction in cost lowers the costs and the minimum price at which the producer is willing to supply. Consequently, the existence of low-priced pulp will have the same impact on the A4 copy paper producer's behavior with respect to domestic sales as it has with respect to export sales: it reduces the amount that the supplier is willing to take in exchange

for supplying an additional unit. In the presence of a domestic subsidy affecting both sides of the dumping margin equation, a comparison of domestic to export prices to determine whether price discrimination was occurring, thus, can properly be performed.

57. Australia argues Indonesia reads the word "proper" out of the phrase "permit a proper comparison". However, Australia's claim is based on a premise, which Indonesia already has established is flawed, which is that a "particular market situation", per se, means domestic prices cannot be compared to export prices. As Indonesia also has demonstrated, and Australia agrees, the word "proper" refers to the comparison specified in Article 2.1. As discussed earlier, where the parties diverge is on whether the Anti-Dumping Agreement defines "dumping" as something other than price discrimination. Indonesia has established that the definition and concept of "dumping" in the Anti-Dumping Agreement is limited to price discrimination.

58. Australia argues that the phrase "proper comparison" relates to the suitability of using domestic sales and prices alone, and this interpretation is confirmed by the other two situations in Article 2.2 that permit domestic sales to be disregarded. Australia is incorrect. The first situation described in Article 2.2 is when there are no sales in the ordinary course of trade. There are no sales to compare because they all have been found outside of the ordinary course of trade by operation of Article 2.1. Article 2.2 simply takes as a given that there are no sales in the ordinary course of trade, which is why the phrase "no sales in the ordinary course" is not connected grammatically to the phrase "such sales do not permit a proper comparison". There is no possibility of a comparison to export sales because there are no domestic sales to compare. However, if Australia's interpretation were correct, i.e. that "proper comparison" means the domestic sales are "unsuitable", the phrase "no sales in the ordinary course" would be linked to the phrase "such sales do not permit a proper comparison". Article 2.2 would then say sales outside of the ordinary course do not permit a proper comparison. But that is not what Article 2.2 says. Indeed, the use of "proper comparison" in Article 2.2 does not mean sales outside the ordinary course are unsuitable and, likewise, it cannot be correctly interpreted as saying sales made when there is a particular market situation, or sales made in low volumes are, necessarily, unsuitable. Instead, "proper comparison" refers to the ability of the investigating authority to determine whether dumping is occurring, as Indonesia has established.

59. By claiming the only consideration in a situation involving a low volume of sales is the volume of domestic sales, Australia wrongly ignores footnote 2 to Article 2.2, which specifies whether domestic sales are at a sufficient volume to permit a proper comparison is an evidentiary question. The only plausible evidentiary question is whether the domestic sales volume is of a sufficient volume to be comparable to export sales. In other words, the evidentiary consideration requires a comparison of domestic sales to export sales.

60. Australia mistakenly interprets and applies Article 2.2 in a manner that when a "particular market situation" exists, those sales, per se, are not to be used as the basis for normal value. This is evident from Australia's statement that the phrase "such sales do not permit a proper comparison" defines when domestic sales should or should not be used.

61. Australia incorrectly claims Indonesia argued the possibility of making comparisons makes them proper. Australia is incorrect. Indonesia has argued under its first claim that the government policies in this dispute that allegedly result in a low priced input do not constitute a "particular market situation". Indonesia has argued under its second claim that price discrimination can be determined in this dispute because the same input is used to produce A4 copy paper for sale in Indonesia and Australia and, thus, a "proper comparison" is possible. Indonesia has never taken the position that a proper comparison is not possible if a "particular market situation" (as defined by Indonesia in its first claim) exists. Likewise, Indonesia has not claimed the possibility of making price comparisons automatically makes them proper. Indeed, Indonesia's position, which is consistent with Article 2.2., is that whether a proper price comparison is possible requires considering the effects of a "particular market situation" on domestic and export costs.

62. Australia acknowledges the term "proper comparison" in Article 2.2 refers to Article 2.1, but Australia argues in its Second Written Submission that the term "proper comparison" should be understood to mean "unsuitable", despite the fact this term does not appear in the text of any of the provisions Australia cites as context , and is in direct contradiction with Australia's own dictionary definitions of "proper comparison". Article 2.2's drafters did not use the word "unsuitable", which they easily could have done but, instead, they used the term "proper comparison" − an explicit

reference to the comparison between normal value and export price specified in Article 2.1. Australia claims two circumstances render domestic prices unsuitable and, thus, incapable of providing a "proper comparison".

63. The first circumstance, according to Australia, is government intervention that distorts costs and prices, which Australia argues is evident from the context provided by the second Ad note to Article VI:1 of the GATT 1994. But that note is exceptional and should be treated as such, and should not be interpreted in a manner that would fundamentally change the meaning of the Anti-Dumping Agreement, as Australia invites the Panel to do.

64. The second circumstance Australia offers is Article 2.2's purpose, which according to Australia is to "set out when the domestic price is to be considered as not a 'comparable price, in the ordinary course of trade'". Article 2.2 does not contain any provision specifying when domestic prices are not in the ordinary course of trade, that is done solely by operation of Article 2.2.1. Article 2.2 sets out two situations that may or may not permit authorities to use third country sales or constructed normal value, depending on whether a proper comparison between domestic sales and export sales is possible. Again, Article 2.2 does not specify when the domestic price is not considered comparable.

65. Australia is not correct in its interpretation of Articles 2.1 and 2.2 of the Anti-Dumping Agreement as having a purpose of identifying when there is an absence of "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Rather, Articles 2.1 and 2.2 of the Anti-Dumping Agreement are a more precise specification of when it is or is not permissible to depart from using domestic sales prices as the basis for normal value. After the addition of the Anti-Dumping Agreement to the rules, the rule in GATT Article VI must be interpreted and implemented within the limits specified by the codification in Article 2.2.

66. Australia relies on the Appellate Body's reasoning in *US − Hot Rolled Steel* concerning the characteristics of sales that are outside the ordinary course of trade and, thus, unsuitable for normal value. In other words, Australia's interpretation relies on the exact same factors to determine whether to exclude sales made outside the ordinary course and sales made in a "particular market situation".

III. Indonesia Has Demonstrated That Australia's Actions Violate Article 2.2.1.1 Because They Are Based On An Incorrect Interpretation Of That Provision

67. Indonesia's third claim challenges Australia's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement as incorrect because it allowed Australia to substitute a benchmark pulp price for the actual price of pulp recorded in the producer's books and records despite the fact that the records were in accordance with Indonesian GAAP and reasonably reflected the cost to produce A4 copy paper. Australia responds that the word "normally" in the first sentence of Article 2.2.1.1 gives it such authority.

68. In response, Indonesia has established that "normally", as used in combination with "provided" in the first sentence of Article 2.2.1.1 means the drafters intended to emphasize that the rule that costs shall be based on the producer's records can only be deviated from in two circumstances − they were not kept in accordance with GAAP or they did not sufficiently reproduce the costs incurred to produce the merchandise under consideration. It simply is not correct that Indonesia has read "normally" out of Article 2.2.1.1 or ignored that "normally" is an adverb qualifying the verb "shall". Indonesia's interpretation gives full meaning to the words and grammatical structure of the first sentence of Article 2.2.1.1.

69. Australia argues the drafters could have omitted "normally" and achieved the same result. This reading is incorrect because the drafters included "normally" along with "provided" to emphasize Article 2.2 was setting forth a rule. Indeed, other provisions of the Anti-Dumping Agreement use the same structure and, like Article 2.2.1.1, the use of "normally" highlights the rule cannot be deviated from other than as specified. Footnote 2 to Article 2.2 is drafted in a similar manner to Article 2.2.1.1. Footnote 2 uses the phrase "shall normally" to introduce the five percent or more rule for an investigating authority to use domestic sales. However, Article 2.2 qualifies this rule by stating it is subject to an exception, which is introduced by the word "provided". Likewise, the structure of Article 5.8 of the Anti-Dumping Agreement, which governs negligibility, is similar to both Article 2.2.1.1 and footnote 2 to Article 2.2, by stating the three percent rule for negligibility

(introduced by the term "shall normally") followed by the exception for investigations involving multiple countries that would be negligible individually (introduced by the word "unless").

70. Other than to say it was not based on the meaning of "normally", which is not in dispute, Australia cannot explain why the Appellate Body's reasoning in *EU − Biodiesel (Argentina)* is not analogous in interpreting Article 2.2.1.1 as requiring an investigating authority to use the input cost recorded in a producer's records even though the input price was distorted and all of the domestic sales were outside the ordinary course of trade. Likewise, the panel's reasoning in *EU − Biodiesel (Indonesia)* and *Ukraine − Ammonium Nitrate* is equally relevant because in both disputes, the panel found Article 2.2.1.1 requires an investigating authority to use the producer's records despite a distorted input cost. Australia also fails to detract from the relevance of the reasoning in *US − Clove Cigarettes* and *China − Broiler Products*.

71. In *US − Clove Cigarettes*, the issue was whether a period of less than six months was sufficient because, as the United States argued as Australia does in this dispute, presence of the word "normally" meant the six month period was not a rule. The Appellate Body rejected that view and determined the six month rule could only be deviated from based on the exception specified in the same provision. In other words, the presence of "normally" did not create a separate, open-ended exception to the rule as Australia argues it does in the first sentence of Article 2.2.1.1.

72. Australia claims Indonesia's reliance on *China − Broiler Products* is misplaced because the panel was considering the second sentence of Article 2.2.1.1 and the panel did not say the failure to consider one or both conditions in the second sentence is the only instance in which an investigating authority can disregard the producer's records. But it is impossible to reconcile Australia's reading with what the panel actually said. The panel considered the use of "normally" in the first sentence of Article 2.2.1.1 and then concluded it meant the only two exceptions permitted by Article 2.2.1.1 are those set out under the provision.

IV. Indonesia Has Demonstrated Australia's Actions Violate Article 2.2 Of The Anti-Dumping Agreement Because Australia Did Not Calculate A Cost Of Production In The Country Of Origin, That Is, In Indonesia.

73. Indonesia's fourth claim established Australia's use of the price for hardwood pulp produced in Brazil and South America, stated on a free on board (or F.O.B.) basis Brazil/South America, is inconsistent with Article 2.2, which requires the cost of production to be calculated in the country of origin, i.e., Indonesia. As an initial matter, Indonesia has argued for the Panel to reject Australia's belated attempt to put new evidence on the record of this dispute with its Second Written Submission. Indonesia also has challenged the evidence, on its face, as unreliable.

74. In addition, Indonesia has challenged the consistency with Article 2.2 of Australia using the price "hardwood pulp originating in South America and Brazil" as a substitute for the cost of production in Indonesia. Indonesia has also challenged the consistency with Article 2.2 of Australia ignoring the fact that the Indonesian producers are integrated or affiliated with pulp producers by failing to remove profit from the pulp benchmark.

V. Indonesia Has Demonstrated Australia Violated Article 9.3 Of The Anti-Dumping Agreement And GATT Article VI:2 By Imposing Anti-Dumping Duties In Excess Of Legally And Justifiable Rates

75. Indonesia has established multiple violations of Article 2 which means Australia has violated Article 9.3 and VI:2 and that benefits accruing to Indonesia under the Anti-Dumping Agreement and under GATT 1994 including Australia's relevant tariff bindings thereunder are being nullified and impaired as a result of the failure of Australia to carry out its obligations under the Anti-Dumping Agreement and Article VI of the GATT 1994.

EXECUTIVE SUMMARY OF INDONESIA'S CLOSING STATEMENT AT THE SECOND SUBSTANTIVE MEETING

76. Australia acknowledged a number of points during the Second Substantive Meeting that confirm its action is inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. First, Australia agrees that its interpretation of "particular market situation" applies to any situation in a market that is not acceptable. The range of situations covered by such a definition has no limit and

is inconsistent with Article 2.2 of the Anti-Dumping Agreement. Second, Australia agrees that it does not have to compare or even consider whether the export price is affected by the "particular market situation". If Australia's over expanded interpretation is accepted, it is only a matter of time before the exception of using a surrogate, in the form of constructed normal value, instead of the actual domestic price becomes the rule.

77. Australia argues the Panel must rule in its favor to respond to instances of government intervention that affect the domestic price of a good that may not come within the SCM Agreement or the provisions in the Anti-Dumping Agreement that refer to government actions. But if Members did not agree to regulate government intervention in either the SCM Agreement or the Anti-Dumping Agreement, then it is incorrect to argue it should, nevertheless, be covered.

78. Australia's interpretation of "normally" in Article 2.2.1.1 is similarly disturbing. No one, including Australia, can argue with the fact that Article 2.2.1.1 contains two conditions for not using a producer's costs. The first is if they are not kept in accordance with generally accepted accounting principles. The second is if they do not reasonably reflect the cost of producing the merchandise being investigated. Australia argues that the word "normally" means there is a third exception for not using a producer's costs, yet one that is broader and far less defined than the other two reasons and it applies any time something in the market is not "normal".

79. The interpretations Australia advances of Article 2.2. and 2.2.1.1 in this dispute are nothing short of an attempt to rewrite the Anti-Dumping Agreement to permit an investigating authority to disregard a producer's domestic sales and then the domestic producer's costs at will.

80. Australia's defense of how it calculated the hardwood pulp replacement cost, which relies on information Australia only placed on the record in its Second Written Submission, fails to show Australia calculated the cost of production in Indonesia for the producers under investigation which violates Article 2.2. Australia claims it only did so in response to a statement in Indonesia's Opening Statement at the First Panel Meeting. But this is incorrect. Australia relied on this information in its First Written Submission in paragraph 228 and in the investigating authority's decision, yet failed to place it on the record until much later. Finally, Australia's violations of Article 2 result in a violation of Article 9.3 because Australia imposed anti-dumping duties in excess of what the Anti-Dumping Agreement allows.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE 2.2 IN DISREGARDING INDONESIAN DOMESTIC PRICES IN DETERMINING THE "NORMAL VALUE"

A. Australia Properly Established There Was a "Particular Market Situation"

1. The proper Vienna Convention interpretation of "particular market situation" is any condition, state or combination of circumstances in respect of the buying and selling of the like product (i.e. A4 copy paper) in the market of the exporting country (i.e. Indonesia) that is distinguishable and not general.[1]

2. Indonesia is incorrect to argue that the Anti-Dumping Commission's finding in respect of the "particular market situation" was "limited to hardwood timber and pulp"[2] and was "based exclusively on the price of an input.[3] Rather: (a) the lowered cost and price of logs and hardwood pulp, alone, were not the "particular market situation";[4] (b) an integral part of the "particular market situation" finding was that the price of A4 copy paper in Indonesia was artificially low,[5] was significantly below regional benchmarks,[6] and reflected the lowered cost and price of logs and hardwood pulp in Indonesia that resulted from the programs and policies of the Government of Indonesia;[7] (c) the Final Report expressly stated that "low input costs, of themselves, are not determinative of a market situation",[8] that "a market situation assessment primarily concerns the domestic market for like goods",[9] and that "conditions in a significant input market that do not distort the market for like goods will not found a market situation finding".[10, 11] It is thus also not the case that the Anti-Dumping Commission found that the fact that "a low-priced input [was] used equally to produce A4 copy paper for the domestic and export markets constitute[d] [the] "particular market situation"".[12]

B. Australia Properly Found That, Because of the "Particular Market Situation", Domestic Sales Did Not "Permit a Proper Comparison"

3. The phrase "such sales do not permit a proper comparison" in Article 2.2 is not defined in the Anti-Dumping Agreement, and no particular methodology is prescribed for determining whether domestic sales do, or do not, permit a proper comparison with the export price. An investigating authority therefore has discretion with respect to the methodology it employs, provided that the methodology rests upon a proper interpretation of Article 2.2.[13] Interpreting the phrase "such sales do not permit a proper comparison" is a contextual exercise. The immediate context establishes that "such sales do not permit a proper comparison" – that is, they are "not suitable" to use as the basis for the normal value – where the resultant prices would not allow an investigating authority to

[1] Australia's first written submission, paras. 97-106.
[2] Indonesia's second written submission, para. 3.
[3] Indonesia's second written submission, para. 13.
[4] Australia's written response to question 6 following the first substantive meeting with the Parties, footnote 29.
[5] Final Report, Exhibit IDN-04, section A2.7.4, p. 153 and section A2.9.2.2, p. 167.
[6] Final Report, Exhibit IDN-04, section A2.9.4, p. 173.
[7] Final Report, Exhibit IDN-04, section A2.9.4, p. 174; see also Australia's first written submission, paras. 114-115.
[8] Final Report, Exhibit IDN-04, section A2.8.6.3, p. 165.
[9] Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.
[10] Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162. See also Australia's opening statement at the first substantive meeting with the Parties, para. 31 and Australia's written response to question 13 following the first substantive meeting with the Parties, para. 84.
[11] Australia's second written submission, para. 37.
[12] Indonesia's written response to question 5 following the first substantive meeting with the Parties, p. 11.
[13] Australia's written response to question 5 following the second substantive meeting with the Parties, para. 36.

conduct a suitable and accurate comparison to: (a) ascertain whether the like product is to be considered as being dumped; and (b) determine the margin of dumping.[14]

4. The broader context identifies the relevant characteristics of unsuitability in this investigation, including where domestic prices are affected by government intervention that distorts costs and prices, where they are fixed in a manner incompatible with normal commercial practice, and where they are fixed according to criteria which are not those of the marketplace.[15] Those characteristics were present and were evident in the price of A4 copy paper in Indonesia. The domestic sales did "not permit a proper comparison" to the export price. The lowered domestic price was quite properly relevant to the "particular market situation" analysis and to the "permit a proper comparison" analysis.[16]

C. Indonesia Continues to Misrepresent the Practices and Findings of the Anti-Dumping Commission in Relation to "Particular Market Situation" and "Permit a Proper Comparison"

5. Indonesia's claims and arguments are predicated on incorrect descriptions of the practice and findings of the Anti-Dumping Commission in respect of "particular market situation" and "permit a proper comparison". Contrary to Indonesia's submissions: (a) Australia does not find that a "particular market situation" exists every time that an input is distorted – and, in this case, the Anti-Dumping Commission undertook a detailed and exhaustive assessment of whether a "particular market situation" existed, which extended beyond considering whether an input price was distorted; (b) the Anti-Dumping Commission's finding in respect of "particular market situation" was not "based exclusively on the price of an input";[17] (c) Australia does consider whether the domestic price would "permit a proper comparison" with the export price – and, in this case, the Anti-Dumping Commission established and concluded that the domestic price was not suitable to use as the basis for the "normal value" i.e. that the domestic sales did not "permit a proper comparison" with the export price; (d) Australia demonstrably did not simply proceed directly to determining a constructed normal value;[18] (e) Australia does not interpret the term "particular market situation" to mean "any situation that is not normal";[19] and (f) Australia's interpretation does not provide for a "broad grant of authority to Members for disregarding domestic prices any time the investigating authority determines something about prices is not "normal"".[20]

6. Indonesia is incorrect in arguing that Australia's interpretation of the phrase "particular market situation" would "turn the provision into a grant of authority for Members to disregard domestic prices in market economies in almost any situation".[21] Contrary to Indonesia's argument, Australia's definition of "particular market situation" is in no way akin to "any situation".[22] Furthermore, in order to discard domestic sales in determining the "normal value", an investigating authority must also find that, because of that "particular market situation", domestic sales "did not permit a proper comparison". And, before an investigating authority can impose anti-dumping duties based on a finding of a "particular market situation", it must also find that: (a) the export price is below the third country export price or below the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits; and (b) the resultant "dumping" has caused injury to the domestic industry.[23]

[14] Australia first written submission, paras. 118-132; Australia's written response to question 15 following the first substantive meeting with the Parties, paras. 95-103; Australia's second written submission, paras. 168, 170 and 172; Australia's opening statement at the second substantive meeting with the Parties, para. 12; and Australia's written response to question 5 following the second substantive meeting with the Parties, para. 36.

[15] Australia's second written submission, paras. 172-181 and Australia's opening statement at the second substantive meeting with the Parties, para. 13.

[16] Australia's opening statement at the second substantive meeting with the Parties, paras. 14-15.

[17] Indonesia's second written submission, para. 13.

[18] Australia's first written submission, para. 155.

[19] Indonesia's written response to question 2(b) following the first substantive meeting with the Parties, p. 8.

[20] Indonesia's written response to question 10(b) following the first substantive meeting with the Parties, p. 14.

[21] Indonesia's second written submission, para. 9.

[22] Indonesia's second written submission, para. 9.

[23] Australia's opening statement at the second substantive meeting with the Parties, paras. 60-64.

D. Indonesia's Arguments with Respect to "Particular Market Situation" and "Permit a Proper Comparison" Have No Merit

7. In order to satisfy the requirements of Article 2.1, and hence be suitable to use as the basis for the "normal value", the "domestic price" must be of the correct nature and quality. The Appellate Body in *US − Hot-Rolled Steel* made this clear when it said: "The text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be "in the ordinary course of trade"; second, it must be of the "like product"; third, the product must be "destined for consumption in the exporting country"; and, fourth, the price must be "comparable"".[24] The aim of the exercise is to derive a valid foundation on which to base the "normal value", which is then compared to the export price. The entire focus of Article 2.2 is on the domestic sales and their suitability to use as a basis for the "normal value".[25]

8. In all situations where an investigating authority can discard domestic prices − sales outside of the ordinary course of trade, low volume of sales, command economy, non-market economy conditions, incompatibility with normal commercial practice, and non-marketplace criteria − the analysis as to whether the domestic price is a "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" concentrates on the conditions in the domestic market for the like product. Contrary to Indonesia's arguments, the analysis is not concerned at all with the export price or the comparison between the domestic price and the export price.[26]

9. Indonesia is conflating the steps of the dumping investigation. As Indonesia itself has recognised: (a) "Article 2 first describes what sales should be in the dataset for normal value and export price and then defines how those datasets are to be evaluated";[27] (b) "determining whether a proper comparison is possible [is not] equivalent to calculating a dumping margin";[28] (c) the evaluation of whether the domestic sales "permit a proper comparison" "is performed in the stage that is still determining what sales [, if any,] are in the [normal value] dataset";[29] (d) at the stage of evaluating whether the domestic sales "permit a proper comparison" "the dumping margin analysis is not yet being performed";[30] and (e) if the result of that "evaluation" is that there are no "remaining above cost domestic sales", then the "normal value" is determined on the basis of "third country sales … or constructed normal value".[31, 32]

10. Despite this recognition, Indonesia continues to advocate that "as long as it is possible to examine whether price discrimination is occurring by comparing domestic [sales] to export sales, then such sales permit a proper comparison"[33] and that "a proper comparison is possible when the investigating authority can determine whether price discrimination is occurring [by comparing the actual domestic prices to the actual export prices]".[34] However, the stage of the dumping investigation when an investigating authority determines whether, because of the "particular market situation", domestic sales "permit a proper comparison" is different from the stage of the dumping investigation when an investigating authority determines the appropriate "dataset" to use for the "export price". Indonesia recognises this when it states that "Article 2 also contains a provision

[24] Appellate Body Report, *US − Hot-Rolled Steel*, para. 165.
[25] Australia's opening statement at the second substantive meeting with the Parties, paras. 75-76.
[26] Australia's written response to questions 22 and 23 following the second substantive meeting with the Parties, para. 120.
[27] Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 58.
[28] Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 64.
[29] Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 64.
[30] Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 64.
[31] Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 65.
[32] Australia's comments on Indonesia's response to question 24 following the second substantive meeting with the Parties, para. 113.
[33] Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 80. (emphasis added)
[34] Indonesia's written response to questions 22 and 23 following the second substantive meeting with the Parties, para. 52.

(Article 2.3) specifying how the export price dataset is to be established"[35] and that "the export price dataset can be based on one of three possibilities".[36] It is illogical for Indonesia to argue that, at the stage of the dumping investigation that determines the "dataset" for the "normal value", an investigating authority should be considering whether comparing the actual domestic prices and the actual export prices would show the extent of "price discrimination". This is because at that stage of the dumping investigation the "dataset" for the "export price" has not yet been established.[37, 38]

11. There are three separate and distinct tests set out in the Anti-Dumping Agreement: (a) the "normal value" dataset is determined under Article 2.1 and Article 2.2; (b) the "export price" dataset is determined under Article 2.1 and Article 2.3; and (c) the resulting dataset for the "export price" is compared with the resulting dataset for the "normal value" under Article 2.4. Indonesia's argument ignores this by advocating that, under Article 2.2, the actual domestic prices should form the basis of the "normal value" whenever comparing those actual domestic prices to the actual export prices would show whether "price discrimination" (and, hence, dumping) is occurring. But an investigating authority has not yet established whether the actual export prices should form the basis of the "export price" that it will subsequently use to determine the margin of dumping under Article 2.4. The actual export prices cannot be relevant to determining whether the domestic sales "permit a proper comparison" to the "export price" under Article 2.2 because, under Article 2.3, that "export price" may not even be based on the actual export prices.[39] Thus, contrary to Indonesia's arguments, the fact that the Anti-Dumping Commission "did not take the export price into consideration"[40] in deciding whether or not to discard the domestic sales under Article 2.2 does not mean that "its interpretation and application of Article 2.2 [is] inconsistent with its WTO obligations".[41]

12. Indonesia is also incorrect when it argues that "[i]f a producer sells at the same low price in the domestic market and export market, that is not dumping and it is not regulated by the Anti-Dumping Agreement"[42] and is also incorrect when it argues that "if a producer sells at the same low price in sales in the ordinary course of trade in the domestic market and in sales in the export market, that is not dumping".[43] The GATT 1994 and the Anti-Dumping Agreement define dumping as being when the export price is below the "normal value". Thus, the fact that the export price and the price of domestic sales (or the price of domestic sales in the ordinary course of trade) are the same does not necessarily mean that there is no dumping. If the domestic price is not a "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country", then an investigating authority must not use it as the "normal value". Indonesia ignores that there will not be a "comparable price" if, "because of the particular market situation", domestic sales "do not permit a proper comparison".[44]

13. Furthermore, "dumping" extends beyond the situation where an exporter is "selling for less in the export market than in the domestic market".[45] This argument of Indonesia ignores the alternative bases for "normal value (being third country export prices and constructed normal value) that are available: (a) if there are "no sales of the like product in the ordinary course of trade"; and (b) if, "because of the particular market situation or the low volume of the sales in the domestic

[35] Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 74.
[36] Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 74.
[37] See also Indonesia's written response to question 26 following the second substantive meeting with the Parties, paras. 71-75.
[38] Australia's comments on Indonesia's written response to question 24 following the second substantive meeting with the Parties, paras. 114-116.
[39] Australia's comments on Indonesia's written response to question 24 following the second substantive meeting of the Parties, paras. 117-119.
[40] Indonesia's second written submission, para. 38.
[41] Indonesia's second written submission, para. 38.
[42] Indonesia's first written submission, para. 102.
[43] Indonesia's written response to question 3 following the second substantive meeting with the Parties, para. 5. (emphasis added)
[44] Australia's comments on Indonesia's written response to question 3 following the second substantive meeting with the Parties, paras. 7-12.
[45] Indonesia's written response to question 15 following the first substantive meeting with the Parties, p. 17.

market of the exporting country, such sales do not permit a proper comparison to the export prices".[46]

14. As clearly set out in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, "dumping" occurs when the export price is below the "normal value", not merely when "the pricing practice of an exporting firm [is] to charge a lower price for exported goods than it does for the same goods sold domestically".[47] And, as clearly set out in Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b) of the GATT 1994, there are certain circumstances where an investigating authority is required to not use the domestic prices of the like product as the basis for the "normal value". One of those circumstances is where, "because of the particular market situation … such sales do not permit a proper comparison" with the export price. This is the circumstance before the Panel in this dispute.[48]

E. Government Intervention Can Result in the Domestic Price Not Being Suitable to Use as the Basis for the Normal Value

15. There is nothing in the text of the GATT 1994 or the Anti-Dumping Agreement to support Indonesia's argument that "government involvement … falls exclusively within the province of the SCM Agreement"[49] or that "the Anti-Dumping Agreement is concerned solely with the behaviour of individual producers or exporters absent express language indicating otherwise".[50] Furthermore, the basis of Australia's "particular market situation" finding was not that the Government of Indonesia provided goods for less than adequate remuneration.[51]

F. Footnote 2 of Article 2.2 of the Anti-Dumping Agreement Provides No Support for Indonesia's Arguments

16. Indonesia argues that "the "proper comparison" when a "particular market situation" exists is between the domestic sales price and the export sales price".[52] But the comparative examination discussed in footnote 2 only addresses the relative magnitudes of the domestic sales and the export sales − it certainly does not consider the price of the domestic sales in comparison to the price of the export sales. Furthermore, the overarching question under footnote 2 is whether the domestic sales were of a sufficient magnitude "to provide for a proper comparison" − the focus remains on the attributes of the domestic sales.[53] Indonesia recognised this when it suggested that domestic sales might "not permit a proper comparison" in the context of a "low volume of … sales" if: (a) they are "not … representative of how the exporter would behave over a larger volume of sales";[54] (b) there are "unusual transactions";[55] or (c) "the evidence establishes" that "the sales are … unsuitable".[56]

17. Thus, Indonesia appears to have recognised that in order to be suitable to use as the basis for the "normal value", the "domestic price" must be of the correct nature and quality, even if the sale is in the ordinary course of trade.[57] This is a key shift in Indonesia's argument because Indonesia acknowledges that there may be something inherent in the "domestic sales" that make them "unreliable" − or, as Australia has explained, "unsuitable" − for use as the basis for the "normal value", even if they are in the ordinary course of trade. And, crucially, whether or not the domestic

[46] Australia's second written submission, para. 161.
[47] Indonesia's first written submission, para. 91. (footnote omitted)
[48] Australia's second written submission, para. 163.
[49] Indonesia's first written submission, para. 93.
[50] Indonesia's written response to question 10(b) following the first substantive meeting with the Parties, pp. 13-14.
[51] Australia's second written submission, paras. 111-122.
[52] Indonesia's second written submission, para. 37. (emphasis added)
[53] Australia's written response to question 5 following the second substantive meeting with the Parties, para. 32.
[54] Indonesia's written response to question 21 following the second substantive meeting with the Parties, para. 46. (emphasis added)
[55] Indonesia's written response to question 21 following the second substantive meeting with the Parties, para. 46. (emphasis added)
[56] Indonesia's written response to question 21 following the second substantive meeting with the Parties, para. 49. (emphasis added)
[57] See Australia's opening statement at the second substantive meeting with the Parties, para. 74.

sales are "[un]representative", "unusual" or "unsuitable" has nothing to do with the "comparison" between the actual domestic price and the actual export price.[58]

G. Indonesia has Admitted That Domestic Prices and Export Prices Were Not "Equally Affected" by the Low-Cost Inputs

18. Indonesia argued that domestic prices and export prices were "equally affected" because "the same inputs were used to make A4 copy paper sold to the Indonesian domestic market and exported to Australia".[59] It argued that this meant there was no "particular market situation"[60] and that this meant that the domestic sales permitted a "proper comparison".[61] It argued that "[w]hether the input price affected domestic and export prices is relevant under Indonesia's first and second claims".[62]

19. Indonesia states that, in respect of its first and second claims, it is presenting the Panel "with narrow questions that do not require [the Panel] to offer a definitive interpretation of "particular market situation" or "proper comparison"".[63] In the words of Indonesia, these "narrow questions" are "whether a low-price input used identically to produce merchandise for the domestic and export market constitutes a "particular market situation" within the narrow meaning of Article 2.2 of the Anti-Dumping Agreement (claim 1) or prevents a proper comparison (claim 2)".[64] Indonesia's assertion that the "low-price input" equally affected the domestic price and the export price is integral to Indonesia's argument as to why such a "low-price input" could not result in a "particular market situation" and would not prevent a "proper comparison". However, Indonesia admitted at the second substantive meeting with the Parties that the domestic price and the export price were not "equally affected" by the lowered cost and price of logs and hardwood pulp. Thus, the "narrow questions" that Indonesia poses must both be answered in the positive − that is, even on Indonesia's arguments, the "low-price input" can lead to a "particular market situation" and the "low-price input" does prevent a "proper comparison".[65]

20. On Indonesia's argument, the crucial question is "whether [the] alleged situations involving government policies in the domestic market actually made any difference to the determination of the margin of dumping that would arise from a comparison between each individual Indonesian exporter's domestic prices and its export prices".[66] Indonesia has admitted that the domestic price and the export price were not "equally affected" by the lowered cost and price of logs and hardwood pulp. Thus, Indonesia has admitted that the government intervention would have changed the margin between the domestic price and the export price of A4 copy paper, so that margin would not show the exporter's "international price discrimination". Thus, even on Indonesia's argument, this would mean that the domestic sales did "not permit a proper comparison" and the Anti-Dumping Commission was required to discard the domestic prices as the basis for the "normal value".[67]

21. Australia questions whether Indonesia has made out a *prima facie* case in respect of its first and second claims. Even if the Panel accepted all of Indonesia's arguments on Indonesia's first and second claims, the Panel could not as a matter of law rule in favour of Indonesia on those claims.[68] This is because Indonesia has admitted that an integral part of its argument in respect of those claims − the alleged fact that the domestic price and the export price were "equally affected" by the

[58] Australia's comments on Indonesia's written response to questions 5 and 21 following the second substantive meeting with the Parties, paras. 35-36.

[59] Indonesia's second written submission, para. 15.

[60] Indonesia's second written submission, paras. 3, 13-14, and 32.

[61] Indonesia's first written submission, paras. 115-122; Indonesia's second written submission, paras. 15-16 and 39-42; Indonesia's opening statement at the second substantive meeting with the Parties, para. 32; and Indonesia's closing statement at the second substantive meeting with the Parties, para. 6.

[62] Indonesia's second written submission, para. 19.

[63] Indonesia's written response to question 20(a) following the second substantive meeting with the Parties, para. 38.

[64] Indonesia's written response to question 2(b) following the first substantive meeting with the Parties, p. 8.

[65] Australia's comments on Indonesia's written response to question 20 following the second substantive meeting with the Parties, paras. 99-100.

[66] Indonesia's first written submission, para. 116.

[67] Australia's response to question 4 following the second substantive meeting with the Parties, para. 20.

[68] Appellate Body Report, *EC − Hormones*, para. 104.

reduction in the cost and price of the logs and hardwood pulp − is not true.[69] Australia recalls, in this regard, that the Panel "cannot make the case for a complainant".[70, 71]

II. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT IN ITS DETERMINATION OF THE CONSTRUCTED NORMAL VALUE OF A4 COPY PAPER

A. Australia was Not Required to Calculate the Hardwood Pulp Component of the Constructed Normal Value on the Basis of the Records of Indah Kiat and Pindo Deli

1. Indonesia's interpretation of the first sentence of Article 2.2.1.1 reads out the word "normally"

22. Indonesia argues that the word "normally" appears in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in order to specify that the exporter's records must be used unless one (or both) of the conditions in the first sentence of Article 2.2.1.1 are not satisfied.[72] But, if that had been the intention of the provision, the word "normally" would not have been included. Indonesia's interpretation strips the word "normally" of any effect at all. Indonesia's interpretation is that the first sentence of Article 2.2.1.1 means the same thing with the word "normally" included as it would mean without the word "normally" included. But the qualification of the verb "shall" by the adverb "normally" must be given meaning and effect. Interpreting the first sentence of Article 2.2.1.1 in a way that requires that the "costs … be calculated on the basis of records kept by the exporter or producer under investigation" whenever the two conditions in Article 2.2.1.1 are satisfied − as Indonesia does[73] − renders the word "normally" inutile and redundant.[74]

23. The proper Vienna Convention interpretation of the first sentence of Article 2.2.1.1 is that where the circumstances in respect of the records are not normal and ordinary, the investigating authority is not required to calculate costs on the basis of records kept by the exporter or producer under investigation, even if the two conditions in Article 2.2.1.1 are satisfied.[75] Australia's interpretation is fully consistent with the findings of panels and the Appellate Body in relation to the

[69] Australia also notes that in the Request for the Establishment of a Panel by Indonesia, Indonesia stated that the legal basis of its first claim was that Australia's finding of a "particular market situation" was "incorrect and inconsistent with Article 2.2". In developing this claim in its submissions, Indonesia argued that the use of the same hardwood pulp in A4 copy paper sold domestically and A4 copy paper exported to Australia meant that the domestic price and the export price were "similarly affected" (Indonesia's second written submission, para. 2), that "domestic and export prices were equally affected by [the] situation" (Indonesia's second written submission, para. 3), that the Anti-Dumping Commission should have "examine[d] whether the situation affects domestic and export prices", and that Indonesia had provided "proof the low price inputs equally affected domestic and export prices" (Indonesia's second written submission, paras. 13-14; see also para. 15). In its response to question 4 following the second substantive meeting with the Parties, Indonesia conceded that, in fact, the domestic price and the export price were not "equally affected".

Australia also notes that in the Request for the Establishment of a Panel by Indonesia, Indonesia stated that the legal basis of its second claim was that "Australia did not properly consider that such domestic sales price permitted a proper comparison with the Indonesian producers' export price of A4 copy paper to Australia since Indonesian A4 copy paper producers used the same raw material of the same cost to produce A4 copy paper for domestic, Australian and other export markets". In developing this claim in its submissions, Indonesia argued that the use of the "same raw material" meant that the domestic price and the export price were "equally affected", which is why a "proper comparison" was permitted (see, for example, Indonesia's first written submission, paras. 115-122; Indonesia's second written submission, paras. 39-42; Indonesia's opening statement at the second substantive meeting with the Parties, para. 32; and Indonesia's closing statement at the second substantive meeting with the Parties, para. 6). In its response to question 4 following the second substantive meeting with the Parties, Indonesia conceded that, in fact, the domestic price and the export price were not "equally affected".

[70] Appellate Body Report, *Canada − Renewable Energy*, para. 5.215.

[71] Australia's comments on Indonesia's written response to question 4 following the second substantive meeting with the Parties, paras. 26-29.

[72] Indonesia's first written submission, para. 131; Indonesia's opening statement at the first substantive meeting with the Parties, para. 44; Indonesia's written response to question 20(a) following the first substantive meeting with the Parties, p. 20; and Indonesia's second written submission, paras. 56-59.

[73] Indonesia's first written submission, paras. 124 and 136.

[74] See, for example, Australia's second written submission, paras. 197-203 and 226.

[75] Australia's first written submission, para. 194.

meaning of "normally" in Article 2.2.1.1.[76] Notably, the panel and Appellate Body in *EU − Biodiesel (Argentina)* left open the possibility of there being circumstances beyond a failure to satisfy the two expressly stated conditions in Article 2.2.1.1 in which an investigation authority would not be required to calculate costs on the basis of records kept by the exporter or producer under investigation.[77, 78]

24. The Anti-Dumping Commission was faced with circumstances that were not "normal and ordinary" with respect to the hardwood pulp component of the records of Indah Kiat and Pindo Deli. Even if the two conditions in Article 2.2.1.1 were satisfied, a constructed normal value calculated on the basis of the records kept by Indah Kiat and Pindo Deli in respect of hardwood pulp would not have been an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales",[79] because, like the domestic sales price that had been found unsuitable to use as the basis of the "normal value", it would have reflected the "particular market situation".[80] If the Anti-Dumping Commission had used the amounts for hardwood pulp in the records kept by Indah Kiat and Pindo Deli then the resultant "normal value" for A4 copy paper would simply have reflected the unsuitability of the domestic sales. Such a result would have been inconsistent with a harmonious interpretation of the applicable provisions.[81]

2. The Anti-Dumping Commission did not base its decision to discard the hardwood pulp component of the record of Indah Kiat and Pindo Deli on the second condition of Article 2.2.1.1

25. Indonesia argues that the Anti-Dumping Commission's finding that "the actual cost of pulp recorded by exporters in their records does not reasonably reflect a competitive market cost" was "unmistakably made pursuant to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement".[82] But subsection 43(2) of the *Customs Regulation* − which requires consideration of whether the records "reasonably reflect competitive market costs associated with the production or manufacture of like goods" − gives effect to both the second condition of the first sentence of Article 2.2.1.1, and to the word "normally" in Article 2.2.1.1.[83] The Anti-Dumping Commission's reasoning in support of its decision to discard the hardwood pulp component of the records of Indah Kiat and Pindo Deli was consistent with a reliance on the word "normally" in Article 2.2.1.1, rather than a reliance on the second condition of Article 2.2.1.1 not being satisfied.[84]

3. Australia's interpretation does not make the second *Ad* Note and the NME provisions in Accession Protocols redundant

26. Indonesia argues that Australia's interpretation of the "particular market situation" provision of Article 2.2 permits the discarding of domestic prices in situations beyond those covered by the second *Ad* Note to Article VI:1 of the GATT 1994 and the NME provisions in certain Accession

[76] Panel Report, *China − Broiler Products*, para. 7.161; Panel Report, *EU − Biodiesel (Argentina)*, para. 7.227. See also Australia's first written submission, paras. 195-199.

[77] Panel Report, *EU − Biodiesel (Argentina)*, footnote 380; Appellate Body Report, *EU − Biodiesel (Argentina)*, footnote 120. See also Panel Report, *Ukraine − Ammonium Nitrate*, para. 7.68.

[78] Australia's second written submission, para. 231.

[79] That is, they were not suitable to fulfil the basic purpose of determining a constructed normal value under Article 2.2 − see Appellate Body Report, *EU − Biodiesel (Argentina),* para. 6.24 (footnote omitted) and Panel Report, *EU − Biodiesel (Argentina)*, para. 7.233. See also Panel Report, *Thailand − H-Beams*, para. 7.112; and Panel Report, *US − Softwood Lumber V*, para. 7.278.

[80] See Australia's first written submission, para. 215; Australia's written response to question 20(c) following the first substantive meeting with the Parties, para. 141; and Australia's second written submission, para. 219.

[81] Australia's opening statement at the second substantive meeting with the Parties, para. 21.

[82] Indonesia's written response to question 21 following the first substantive meeting with the Parties, p. 21.

[83] See Australia's written response to Panel questions 20(c) and 23 following the first substantive meeting with the Parties, paras. 132-142 and 169-171; and Australia's second written submission, para. 209.

[84] Australia's written response to question 20(c) following the first substantive meeting with the Parties, paras. 130 and 138-142.

Protocols.[85] Indonesia goes so far as to suggest that adopting Australia's interpretation would make the second *Ad* Note and those NME provisions "unnecessary"[86] and that such a result is "absurd".[87]

27. However, in making this argument, Indonesia (and China[88]) ignore the fact that the investigating authority's discretion in determining the "normal value" is materially different under Article 2.2 than it is under the second *Ad* Note and the NME provisions in the Accession Protocols. If the domestic price is discarded as the basis for the normal value under Article 2.2, the methodology that an investigating authority must use to determine the "normal value" must be either: (a) the "comparable price of the like product when exported to an appropriate third country, provided that this price is representative"; or (b) "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits". The requirement that a "representative" export price or the "cost of production in the country of origin"[89] be used as the basis for the alternative "normal value" is not present in the second *Ad* Note or the NME provisions in the Accession Protocols. Rather, they have been interpreted to permit the "normal value" to be based on prices and costs in a market economy third country. Article 2.2 does not allow for the use of such a "surrogate" or "analogue" country methodology. Thus, the effect on the margin of dumping (and hence the anti-dumping duties) of a finding under Article 2.2 is materially different from a finding under the second *Ad* Note or the NME provisions in the Accession Protocols.[90]

4. Indonesia's arguments with respect to the Anti-Dumping Commission's decision to discard the hardwood pulp component of the records of Indah Kiat and Pindo Deli are incorrect

28. Indonesia argues that if Australia had not "improperly linked a "particular market situation" to a producer's input cost" then "there would not be a problem using the producer's costs to construct the normal value".[91] Bur, as stated in the Final Report, "low input costs, of themselves, are not determinative of a market situation",[92] that "a market situation assessment primarily concerns the domestic market for like goods",[93] and that "conditions in a significant input market that do not distort the market for like goods will not found a market situation finding".[94]

29. Indonesia argues that the "problem" is that the Anti-Dumping Commission found that the amounts for hardwood pulp in the records of Indah Kiat and Pindo Deli were unsuitable to use as the hardwood pulp component of the cost of production of A4 copy paper in Indonesia. But Indonesia has effectively conceded that the "pulp benchmark" that the Anti-Dumping Commission instead used − which was different to the amounts for hardwood pulp in the records of Indah Kiat and Pindo Deli − was the proper amount to use for the hardwood pulp component of the cost of production of A4 copy paper in Indonesia.[95]

30. This is because Indonesia has acknowledged that the prevailing export price of hardwood pulp was the proper amount to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in Indonesia".[96] And Australia has demonstrated that the "pulp benchmark" was virtually identical to that prevailing export price.[97] Using the amounts for hardwood pulp that were in the records of Indah Kiat and Pindo Deli would have been the real "problem" because: (a) contrary to the findings of the Appellate Body in *EU − Biodiesel (Argentina)*, those records would not have

[85] Indonesia's second written submission, paras. 5, 9, 12 and 43-52.
[86] Indonesia's second written submission, para. 5. See also Indonesia's second written submission, para. 52.
[87] Indonesia's second written submission, para. 5.
[88] See China's written response to question 4 to the third parties following the first substantive meeting with the Parties, paras. 37-42.
[89] "[P]lus a reasonable amount for administrative, selling and general costs and for profits" as per Article 2.2.
[90] Australia's opening statement at the second substantive meeting with the Parties, paras. 105-108.
[91] Indonesia's second written submission, para. 68.
[92] Final Report, Exhibit IDN-04, section A2.8.6.3, p. 165.
[93] Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.
[94] Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.
[95] Australia's second written submission, paras. 241-249.
[96] See, for example, Indonesia's opening statement at the first substantive meeting with the Parties, para. 49, Australia's closing statement at the first substantive meeting with the Parties, paras. 26-29, and Australia's second written submission, paras. 241-249.
[97] Australia's second written submission, paras. 241-249.

resulted in the constructed normal value being an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales",[98] and (b) contrary to Article 2.2 of the Anti-Dumping Agreement, they would not have resulted in the derivation of the proper "cost of production of [A4 copy paper] in [Indonesia]".[99]

B. The Anti-Dumping Commission was Correct to Use the "Pulp Benchmark" for the Hardwood Pulp Component of the Constructed Normal Value

1. The use of the "pulp benchmark" resulted in a proper determination of the "cost of production in the country of origin" under Article 2.2

31. The Anti-Dumping Commission's use of the "pulp benchmark" yielded a "cost of production in the country of origin" under Article 2.2 which properly included the full costs of production of the like product in the country of origin, including those costs that were not incurred, in whole or in part, as a cash cost to specific entities producing the like product. Those full costs of production continued to exist notwithstanding the "particular market situation" – but they were not all incurred as a cash cost by Indah Kiat and Pindo Deli, and hence were not reflected in their records.[100]

32. Indonesia improperly equates the cash costs incurred by Indah Kiat and Pindo Deli to produce and acquire the hardwood pulp, respectively, with the hardwood pulp component of the "cost of production [of A4 copy paper] in [Indonesia]" under Article 2.2.[101]

33. But the cost of producing hardwood pulp and the cost of acquiring hardwood pulp are not necessarily the same as the cost of consuming hardwood pulp in the production of A4 copy paper.[102] As Australia has established, and as Indonesia itself has acknowledged, the prevailing export price of hardwood pulp was a proper amount to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in [Indonesia]" in this case.[103] Australia has demonstrated that: (a) the "pulp benchmark" used by the Anti-Dumping Commission was virtually identical to that prevailing export price;[104] and (b) Indah Kiat's cost to produce hardwood pulp and Pindo Deli's cost to acquire hardwood pulp were both different to the "pulp benchmark".[105] Clearly, and as found by the Anti-Dumping Commission, the amounts in the records of Indah Kiat and Pindo Deli for hardwood pulp were not suitable to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in [Indonesia]". Rather, the proper amount to use was the "pulp benchmark", which was determined in an entirely appropriate manner and based on suitable benchmark prices.[106]

34. By contrast, for one of the other Indonesian exporters (RAK), the Anti-Dumping Commission found that its transfer prices for purchases of hardwood pulp in Indonesia from a related company were consistent with the benchmark prices used to derive the "pulp benchmark". The Anti-Dumping Commission thus calculated the constructed normal value of A4 copy paper for RAK on the basis of its records,[107] because a constructed normal value calculated on the basis of those transfer prices (and RAK's other costs) would have been an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales".[108]

[98] Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.24. (footnote omitted) See also Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; and *US – Softwood Lumber V*, para. 7.278.

[99] Australia's opening statement at the second substantive meeting with the Parties, para. 102.

[100] See Australia's second written submission, paras. 259-260.

[101] Australia's opening statement at the second substantive meeting with the Parties, para. 25.

[102] Australia's opening statement at the second substantive meeting with the Parties, para. 26.

[103] See, for example, Indonesia's opening statement at the first substantive meeting with the Parties, para. 49, Australia's closing statement at the first substantive meeting with the Parties, paras. 26-29, and Australia's second written submission, paras. 241-249.

[104] Australia's second written submission, paras. 241-249.

[105] Australia's opening statement at the second substantive meeting with the Parties, paras. 23-24.

[106] Australia's opening statement at the second substantive meeting with the Parties, para. 29.

[107] Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.

[108] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24 (footnote omitted). See also Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; *US – Softwood Lumber V*, para. 7.278.

35. Indonesia does not argue that there were export taxes or other export restrictions on hardwood pulp. It does not deny that, unlike the situations in *EU − Biodiesel (Argentina)* and *Ukraine − Ammonium Nitrate*, the input in this case − hardwood pulp − could be exported at its prevailing competitive export price, which was virtually identical to the "pulp benchmark" used by the Anti-Dumping Commission. Thus, the "pulp benchmark" reflects the amount foregone when the hardwood pulp was consumed in the production of A4 copy paper in Indonesia rather than being exported.[109] Furthermore, the benchmark prices used to derive the "pulp benchmark" were consistent with the confidential transfer prices in RAK's records for its purchases of hardwood pulp in Indonesia from a related company.[110]

36. The use of the "pulp benchmark" is also consistent with the Appellate Body's observation that "the scope of the obligation to calculate the costs on the basis of the records in the first sentence of Article 2.2.1.1 is narrower than the scope of the obligation to determine the cost of production in the country of origin in Article 2.2".[111, 112]

2. Contrary to Indonesia's arguments, the "pulp benchmark" was not the cost of producing hardwood pulp in South America or Brazil or the sales price of hardwood pulp in South America or Brazil

37. Indonesia argues that the "benchmark pulp price Australia substituted for the costs recorded in the Indonesian producers' records represents the cost of producing pulp in South America and Brazil";[113] that it represents the "pulp price in Brazil and South America";[114] and that it was "the free on board South America and Brazil price".[115] All of these statements are incorrect.

38. Rather, the "pulp benchmark": (a) consisted of monthly and quarterly import pulp prices into China and Korea based on an average c.i.f. price for hardwood pulp originating from Brazil and South America;[116] (b) was "based on verified actual transaction prices collected through broad systematic surveys of small, medium and large size participants, including both buyers and sellers";[117] (c) was the price at which hardwood pulp originating in South America and Brazil was sold in Indonesia's primary export markets, namely China and Korea; (d) was virtually identical to the average of the four price series that Indonesia says the Anti-Dumping Commission could have used to "derive[] the cost of pulp and, ultimately, paper production in Indonesia", consistent with Article 2.2;[118] and (e) was virtually identical to the prevailing competitive export price of hardwood pulp from Indonesia, as represented by those four price series.[119]

3. No further adaptation of the pulp benchmark was required

39. Indonesia argues that Australia did not "make any adjustments to [the "pulp benchmark"] to derive the cost of production in Indonesia".[120] It dismisses the adjustments for dry to wet pulp conversion, and the removal of SG&A, ocean freight and inland transportation charges, arguing that they were not relevant to deriving the cost of production of A4 copy paper in Indonesia.[121]

[109] Australia's second written submission, para. 256.
[110] Australia's opening statement at the second substantive meeting with the Parties, para. 28.
[111] Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.73. (emphasis added)
[112] Australia's opening statement at the second substantive meeting with the Parties, para. 30.
[113] Indonesia's opening statement at the first substantive meeting with the parties, p. 24. See also Indonesia's first written submission, para. 168.
[114] Indonesia's written response to question 28(a) following the first substantive meeting with the Parties, p. 22.
[115] Indonesia's written response to question 35 following the second substantive meeting with the Parties, para. 97.
[116] Australia's first written submission, para. 228 and footnote 241.
[117] Australia's first written submission, para. 228 and footnote 247.
[118] Indonesia's opening statement at the first substantive meeting with the Parties, para. 49.
[119] Australia's second written submission, para. 249.
[120] Indonesia's opening statement at the first substantive meeting with the Parties, para. 46. (footnote omitted)
[121] Indonesia's opening statement at the first substantive meeting with the Parties, para. 48 and Indonesia's written response to Panel question 29 following the first substantive meeting with the Parties, p. 24.

40. The Anti-Dumping Commission adapted the "pulp benchmark" specific to the circumstances of Indah Kiat and Pindo Deli. The Anti-Dumping Commission carefully considered submissions of the Government of Indonesia and the exporters in respect of the "pulp benchmark" and the required adaptations.[122] Contrary to Indonesia's arguments, the adjustments made by the Anti-Dumping Commission were necessary to adapt the "pulp benchmark" so as to ensure the proper derivation of the cost of production in Indonesia specific to the circumstances of Indah Kiat and Pindo Deli.[123]

41. Indonesia argues that additional adaptation of the pulp benchmark was required.[124] This is incorrect. Australia notes the following: (a) "50 to 60 per cent of total [pulp] production" in Indonesia is consumed in Indonesia[125] – the rest is exported; (b) there was no significant difference between the price of hardwood pulp sourced by Asian importers from South America and the price of hardwood pulp sourced by Asian importers from Indonesia;[126] (c) the prevailing competitive export price (i.e. the "pulp benchmark") would have been obtained for the Indonesian hardwood pulp if it had been exported from Indonesia rather than being consumed in the production of A4 copy paper, because there were no export tariffs or export quotas on hardwood pulp in Indonesia;[127] (d) the prevailing competitive export price (i.e. the "pulp benchmark") was therefore a cost of production of A4 copy paper in Indonesia, because it was given up when the hardwood pulp was consumed in the production of A4 copy paper in Indonesia rather than being exported; (e) the benchmark prices used to derive the pulp benchmark were consistent with the confidential transfer prices in the records kept by one of the other Indonesian exporters (RAK) for its purchases of hardwood pulp in Indonesia from a related company;[128] (f) the growing costs for acacia pulpwood in Indonesia were not significantly less than growing costs for eucalyptus pulpwood in South America;[129] and (g) the Government of Indonesia and the Indonesian hardwood pulp producers provided no evidence to support their claims that it was cheaper to produce acacia pulpwood in Indonesia than in other Asian or South American countries.[130, 131]

42. These circumstances and facts clearly establish that the "pulp benchmark" reflected the hardwood pulp component of the cost of production of A4 copy paper in Indonesia. Therefore, it was not necessary for the Anti-Dumping Commission to take additional steps beyond those taken to adapt the "pulp benchmark" when determining the hardwood pulp component of the constructed normal values for Indah Kiat and Pindo Deli.[132]

43. Indonesia is therefore simply incorrect when it argues that "the hardwood pulp price the Commission used had no connection whatsoever to Indonesia";[133] that "Australia did not attempt to calculate a pulp price in Indonesia"[134] and that, by using the "pulp benchmark", "Australia failed to calculate the cost of production in the country of origin, i.e. Indonesia".[135, 136]

44. The "cost of production in the country of origin" must include the full costs of production of the like product in the country of origin, including those costs that are not incurred, in whole or in part, as a cash cost to specific entities producing the like product, as is the case in this dispute.[137]

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[122] Final Report, Exhibit IDN-04, section A4.4, p. 231 and section A4.5, pp. 232-233.
[123] Australia's second written submission, para. 254.
[124] Indonesia's first written submission, para. 168; Indonesia's opening statement at the first substantive meeting with the Parties, para. 48; and Indonesia's written response to question 29 following the first substantive meeting with the Parties, p. 24.
[125] Final Report, Exhibit IDN-04, section A2.9.2.3, p. 167. (footnote omitted)
[126] Final Report, Exhibit IDN-04, section A4.4, p. 231.
[127] See Australia's first written submission, para. 114 and Final Report, Exhibit IDN-04, section A.2.9.2.6, p. 170.
[128] Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52 and section A4.5.1, p. 232.
[129] Final Report, Exhibit IDN-04, section A4.5.2, p. 233.
[130] Final Report, Exhibit IDN-04, section A4.5.2, p. 233.
[131] Australia's second written submission, para. 256.
[132] Australia's second written submission, para. 257.
[133] Indonesia's first written submission, para. 166.
[134] Indonesia's written response to question 28(a) following the first substantive meeting with the Parties, p. 22.
[135] Indonesia's first written submission, para. 2. See also Indonesia's first written submission, paras. 164-169.
[136] Australia's second written submission, para. 258.
[137] Australia's second written submission, para. 259.

45. It has been accepted by panels and the Appellate Body that a non-arm's-length cost (i.e. a non-competitive market cost) in the records of a producer can be discarded and replaced by the arm's-length cost (i.e. the competitive market cost), even though nobody in the transaction incurs that arm's-length cost (i.e. the competitive market cost) as a cash cost. This is clear recognition of the rejection of recorded cash costs and their replacement with higher non-cash costs in the determination of the "cost of production in the country of origin" pursuant to Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. Those higher non-cash costs equal the amount that the input supplier would have received for the input if that input supplier had sold the input at an arm's-length price (i.e. a competitive market price) rather than the non-arm's-length price (i.e. the non-competitive market price) reflected in the records of the producer. It is also the amount that the producer would have received for the input if that producer had sold the input at an arm's-length price (i.e. the competitive market price) rather than consuming it in the production of the product.[138]

46. Australia's use of the "pulp benchmark" − as adapted to the specific circumstances of Indah Kiat and Pindo Deli − ensured that the full amount of the hardwood pulp component of the "cost of production [of A4 copy paper] in [Indonesia]" was used to determine the constructed normal value, not just the amounts included in the records of Indah Kiat and Pindo Deli (which were merely the (lower) cash costs they respectively incurred to produce and acquire hardwood pulp).[139]

4. Indonesia has no basis to resile from its admission that the prevailing export price was a proper amount to use as the hardwood pulp component of the constructed normal value

47. Indonesia has no legal or logical basis for its attempt to completely reverse its position that the prevailing export price of hardwood pulp was the proper amount to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in [Indonesia]". Australia's submission of the evidence and information regarding the RISI and Hawkins Wright data was not "untimely"[140] – rather, it was "necessary for purposes of rebuttal" within paragraph 5(1) of the Working Procedures and it was submitted by Australia at the first opportunity that Australia had to do so following the submission of the Parties' written responses to the Panel's questions following the first substantive meeting with the Parties. The data itself was "reliable"[141] and the Government of Indonesia had full knowledge during the investigation of the methodologies utilised by RISI to collect data. There was no need for the Anti-Dumping Commission to "remove profit"[142] or to adjust for any "mark up".[143] Contrary to Indonesia's arguments, the evidence on the record indicates that integrated paper producers in Indonesia do, in fact, "export pulp", and that they do so in significant quantities. Furthermore, hardwood pulp is a tradeable commodity, not "merely an intermediate stage in the paper production process" − Indonesia itself concedes that Indah Kiat provides hardwood pulp to Pindo Deli.[144] Furthermore, the prevailing export price of hardwood pulp is a key factor[145] that determines how much hardwood pulp is devoted to paper production as opposed to being sold on the open market and is a key factor[146] that determines whether a producer will expand, contract, or abandon paper production.[147]

[138] Australia's written response to questions 14 and 15 following the second substantive meeting with the Parties, paras. 97-98.
[139] Australia's second written submission, para. 260.
[140] Indonesia's written response to question 9 following the second substantive meeting with the Parties, para. 24.
[141] Indonesia's written response to question 9 following the second substantive meeting with the Parties, para. 24.
[142] Indonesia's written response to question 9 following the second substantive meeting with the Parties, para. 26.
[143] Indonesia's written response to question 30(b) following the second substantive meeting with the Parties, para. 92.
[144] Indonesia's first written submission, footnote 70.
[145] With all other things held equal.
[146] With all other things held equal.
[147] See, for example, Australia's written response to question 33 following the second substantive meeting with the Parties, paras. 158-177 and Australia's comments on Indonesia's written responses to questions 9, 10, 29 and 30 following the second substantive meeting with the Parties, paras. 44-59 and 130-139.

48. Indonesia's arguments appear to be driven solely by the fact that Indonesia has realised that its acknowledgement that the prevailing export price of hardwood pulp was the proper amount to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in [Indonesia]" is fatal to its third, fourth and fifth claims.[148]

5. Indonesia's reliance on *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate* is misplaced

49. Indonesia asserts that the facts of this dispute are "almost identical" to the facts in *EU – Biodiesel (Argentina)* and *EU – Biodiesel (Indonesia)*,[149] that "there is no factual or legal basis for this Panel to interpret Article 2.2.1.1 in a manner at odds with" the decisions in *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate*,[150, 151] that there are no "meaningful differences" between this dispute and those disputes,[152] that "the fact pattern [in this dispute] is almost identical" to those disputes,[153] and that "the facts [in this dispute] are indistinguishable in any meaningful way from" the facts in those disputes.[154]

50. All of these assertions are incorrect. Firstly, none of those disputes considered the determination of a constructed normal value in circumstances where, because of a "particular market situation", domestic sales did not permit a proper comparison. Rather, they were all concerned with a situation where the domestic sales were found not to be in the ordinary course of trade. Secondly, all of those disputes concerned the interpretation and application of the second condition of Article 2.2.1.1, which is not before the Panel in this dispute. Thirdly, those disputes focussed on whether or not the second condition of Article 2.2.1.1 permitted an examination of the "reasonableness" of the costs recorded by the exporters in their records. But the "reasonableness" of the recorded costs was simply not part of the Anti-Dumping Commission's consideration. Fourthly, in relation to the main input to production, and in comparison to the hardwood pulp in the dispute that is before this Panel, neither the soybeans in *EU – Biodiesel (Argentina)*, the crude palm oil in *EU – Biodiesel (Indonesia)* or the gas in *Ukraine – Ammonium Nitrate* could be exported at the prevailing competitive export price by the producers of the like product. Fifthly, the "pulp benchmark" was not a hypothetical figure that might have been incurred under different circumstances[155] or an amount that would have been incurred under "normal circumstances".[156] Unlike the soybean benchmark used by the European Union investigating authority in *EU – Biodiesel (Argentina)*, the "pulp benchmark" was not chosen precisely because it did not represent the relevant cost of hardwood pulp in Indonesia.[157, 158]

III. INDONESIA HAS FAILED TO DEMONSTRATE THAT AUSTRALIA ACTED INCONSISTENTLY WITH ARTICLE VI:2 OF THE GATT 1994 AND WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

51. Indonesia's has acknowledged that its claims under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement are entirely dependent on this Panel finding that Australia acted inconsistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement in its determination of the "normal value" for Indah Kiat and Pindo Deli.[159] Australia has demonstrated

[148] Australia's comments on Indonesia's responses to questions 9, 10 and 29 following the second substantive meeting with the Parties, para. 62.

[149] Indonesia's first written submission, para. 142.

[150] Indonesia's first written submission, para. 145.

[151] Australia notes that the panel decision in *Ukraine – Ammonium Nitrate* has been appealed and the panel's report has thus not been adopted by the DSB.

[152] Indonesia's first written submission, para. 155.

[153] Indonesia's first written submission, para. 162. Also, in Indonesia's closing statement at the first substantive meeting with the Parties, it stated that "Indonesia's third claim is based on nearly identical facts in the case law of *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate (Russia)*" (para. 5).

[154] Indonesia's opening statement at the first substantive meeting with the Parties, para. 41.

[155] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 (see also Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.8 and 6.41) and Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.22-7.26.

[156] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.89.

[157] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.

[158] Australia's second written submission, paras. 262-269.

[159] Indonesia's written response to questions 31(a) and 31(b) following the first substantive meeting with the Parties, p. 24.

that its determination of the "normal value" for Indah Kiat and Pindo Deli was fully consistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. Indonesia's claims under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement must therefore fail.[160]

IV. AUSTRALIA HAS NOT NULLIFIED OR IMPAIRED BENEFITS ACCRUING DIRECTLY OR INDIRECTLY TO Indonesia

52. No benefits accruing directly or indirectly to Indonesia under the GATT 1994 or the Anti-Dumping Agreement have been nullified or impaired by Australia.[161]

V. CONCLUSION

53. Australia has conclusively rebutted the arguments that Indonesia has made in the course of this dispute − including those it has made in its responses to the questions from the Panel following the second substantive meeting with the Parties. Furthermore, Australia has conclusively shown that the measures challenged by Indonesia are consistent with those provisions of the GATT 1994 and the Anti-Dumping Agreement that Indonesia alleges Australia has violated. Indonesia has failed to establish that Australia's action violated the GATT 1994 or the Anti-Dumping Agreement and, in fact, Australia has demonstrated that its actions were entirely WTO-consistent. In addition, the submissions and evidence before the Panel establish that the Anti-Dumping Commission: (a) properly established the facts; (b) evaluated them in an unbiased and objective manner; and (c) provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination.

54. Given the above − and recalling the level of deference accorded to an investigating authority under Article 17.6 of the Anti-Dumping Agreement − Australia respectfully requests that the Panel dismiss all of Indonesia's claims.

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[160] Australia's second written submission, paras. 274-276.
[161] Australia's second written submission, para. 277.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. This executive summary integrates the Third Party Written Submission, Oral Statement and Responses to the Panel's Questions by China.

The meaning of "because of the particular market situation, such sales do not permit a proper comparison" in Article 2.2 of the Anti-Dumping Agreement

2. The general rule for the calculation of normal value is to use the domestic price of like product. The "particular market situation", together with the other two circumstances provided for in Article 2.2 of Anti-Dumping Agreement and the circumstance in second Ad Note to Article VI:1 in GATT 1994, are circumstances because of which alternative "exceptional methods" for the calculation of normal value shall be used. Exceptions to the general rule should be interpreted narrowly.

3. The markets other than that of the domestic market of the like product in the exporting Member are not directly implicated in the phrase "particular market situation".

4. Article 2.2 provides that only when the domestic sales impacted by the particular market situation "do not permit a proper comparison", would the domestic sales prices be disregarded for the determination of normal value. The purpose of such comparison is for the determination of dumping and dumping margins. Thus, the features of the market that do not have impact on the domestic price of like product in a way that affects its comparison with the export price could not reasonably be interpreted as "particular" under Article 2.2, even they might be special or distinguishable in one way or another.

5. The word "proper" modifies the word "comparison", not the individual variables per se of "comparison", i.e., the domestic price or the export price. It follows that the investigating authority is required to examine, not whether the "particular market situation" resulted in the domestic price being proper or accurate, but its comparison with export price being proper or accurate.

6. Whether a "comparison" is "proper" would need to be assessed as to whether it is apt to reveal "dumping", i.e., different pricing strategy by an individual exporter or producer in its domestic market and export market, in order to determine if there is "international price discrimination" that warrant the application of antidumping measure. Any government behavior that does not affect the different pricing strategy by individual exporter or producer in the domestic market and export market would not affect the "proper comparison" for the purpose of revealing "dumping".

7. The purchase price of the inputs are generally destination-neutral and the same input prices constitute the bases of costs for both domestic sale and export sales, and the rise or fall of the input price, whether it is due to market force or government involvement, would have the same effect on the domestic price and export price. Such situation in the market equally affects both domestic market and export market, and do not affect the proper comparison between the domestic price and export price for the purpose of the determination of dumping and dumping margin. Therefore, regardless of the alleged government intervention in the input market, the symmetric comparison of domestic price and export price would still be capable of revealing the pricing strategy of the export or producer in different markets for the purpose of determination of dumping.

8. Further, the impact of the "particular market situation" needs to amount to a degree that makes the proper comparison of the domestic price to the export price not "allowed" to disregard the domestic price for the determination of normal value. Even if the "particular market situation" might have some different impact on the domestic price and the export price so that they are not directly comparable in all aspects, if it does not lead to such proper comparison impermissible, it would not qualify for method alternative to using the domestic price for the calculation of the normal value.

9. The normal value established under Article 2.2 would need to provide a foundation for "fair comparison" with export price under Article 2.4. Even though Article 2.2 provides for the determination of normal value, this does not mean normal value under Article 2.2 could be properly established without regard to its comparability with export price. Support could be found in the parallel circumstance in Article 2.2 that due to the low volume of domestic sales, "such sales do not permit a proper comparison". Footnote 2 clearly demonstrated that the impact on proper comparison between domestic sales and export sales is considered when whether the volume of domestic sales is "low" is analyzed, since it is not the absolute volume of domestic sales that is considered, but its relationship with the export volume.

10. It is also noticeable that, "outside the ordinary course of trade" and domestic sales that "do not permit a proper comparison" are two distinct bases for the possible disregard of domestic market sales for the determination of normal value under Article 2.2. These two terms should not be interpreted by incorporating the same legal criteria because this would make one of them redundant. Therefore, it is not correct to introduce the criteria of "normal commercial practice" for "ordinary course of trade" into "particular market situation" that "do not permit a proper comparison".

11. The "particular market situation" in Article 2.2 could not be interpreted as already incorporating a condition of general market economy principle of supply and demand or normal commercial principles, and warrant the use of third country surrogate values for normal values. Otherwise, Members would not have considered it necessary to adopt special rules for use of third country normal value in the Accession Protocols for some Members or to adopt Ad Note 2 to GATT 1994.

12. The Anti-Dumping Agreement addresses issues of pricing behavior of individual foreign exporters or producers, and, in contrast, the SCM Agreement addresses financial contribution by government which confers benefit. There are legally distinct disciplines applicable to a Member's use of anti-dumping duties and its use of countervailing duties. A Member does not have discretion to interpret a provision in one of the Agreements to address the subject issue of the other.

DISREGARDING THE RECORDS OF THE EXPORTER IN THE CALCULATION OF COSTS

13. First sentence of Article 2.2.1.1 imposes a positive obligation on an investigating authority to normally use the books and records of the respondents if two conditions are met: (i) the books and records are consistent with the generally accepted accounting principles (GAAP) of the exporting country, and (ii) they reasonably reflect the costs associated with the production and sale of the product under consideration.

14. Article 2.2.1.1 of Anti-Dumping Agreement provided for specific situations for the derogation of the positive obligation of the investigating authority to calculate the costs based on the records kept by the exporter or producer, when one of the two conditions in the first sentence is not satisfied. It is reasonable to interpret that the word "normally" in the first sentence of Article 2.2.1.1 refers to the absence of the exceptions already specified. "Normally" does not provide a legal ground separate and distinct from the legal ground of a failure to satisfy the two conditions in the first sentence of Article 2.2.1.1 to disregard the costs in the producers' records.

15. If the costs in the records of the respondent satisfy both conditions in the first sentence of Article 2.2.1.1, such costs would be "costs that have a genuine relationship with the production and sale of the product under consideration", and would be capable of generating an appropriate proxy to the domestic prices.

16. Since the facts in *EU-Biodiesel (Argentina)* and those in the current dispute are both concerning domestic input price influenced by government policies, the finding of the panel and Appellate Body in *EU-Biodiesel (Argentina)* directly informs the current dispute.

17. The Appellate Body has found that the domestic input prices influenced by government policies is not a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of inputs associated with the production and sale of subject merchandise, or for disregarding those costs when constructing the normal value.

18. The panel in *EU-Biodiesel (Argentina)* explained that an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the

producers/exporters". The purpose of the examination of the "reliability and accuracy" of the costs referenced by the panel is to determine whether the "reflection" of the costs in the records is "reasonable", not the whether costs themselves are "reasonable".

19. The issue of the costs based on an affiliated party transfer price is not whether the costs *per se* are "reasonable" or reflect so-called market-based conditions, but whether the "reflection" of the costs in the records of the producer/exporter under investigation is "reasonable". In contrast, even if the inputs prices are affected by government policies, as long as the producer/exporter reflects the actual input prices of its purchase in its records, the "reflection" of the costs would be "reasonable".

20. When the domestic input price influenced by government policies forms the basis for the construction of normal value as appropriate proxy to the domestic price, it would be incoherent to allege that the same input prices would constitute "particular market situation" that "do not permit a proper comparison", and warrant the rejection of the domestic price for the determination of normal value in the first place.

CONSTRUCTING NORMAL VALUE WITH THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN

21. The Appellate Body in the *EU – Biodiesel (Argentina)* observed that the phrase "cost of production […] in the country of origin" in Article 2.2 "do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin", but cautioned that this "does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the cost of production in the country of origin".

22. The Appellate Body did not recognize an "out-of-country" benchmark can be used for the purpose of determining the constructed normal value, but merely observed that "sources of information or evidence" not within the country of origin, in limited circumstances, after necessary adaption, might be used to arrive at the "cost of production in the country of origin".

23. It follows that the adaptations by the investigating authority of the information it collects outside of the country of origin would need to ensure that such information, after the adaptions, represent the cost of production in the country of origin. If, although some kind of adaptions were made, the using of information outside of the country of origin still aims at removing the "perceived distortion" in the costs in the country of origin, such adaption won't help to adapt the information to satisfy the requirement that "such information must be apt to or capable of yielding a cost of production in the country of origin".

24. It should be noticed that the Appellate Body stated that its interpretation of Article 2.2 of the Anti-Dumping Agreement "is without prejudice to our interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement". Therefore, if the conditions in first sentence of Article 2.2.1.1 are satisfied, the cost of production shall be calculated based on the records of the respondent, and the use of sources of information other than the records of the export or producer, including those not inside of the country of origin, would not arise.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE EXISTENCE OF A "PARTICULAR MARKET SITUATION" AND ITS IMPLICATIONS

1. A "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement is a set of circumstances, additional to the other two sets of circumstances envisaged in that provision, that affects the use of the price of sales of the like product in the domestic market of the exporting country for the purpose of determining the normal value of the product under investigation. It is not to be excluded that there may be some overlap between all of these types of situations: for example, the same set of facts might be capable of supporting either a determination of the absence of the ordinary course of trade; or a determination of a "particular market situation"; or both.

2. Where a "particular market situation" exists, the domestic sales price does not reflect the normal value of the like product that would result from the normal operation of the forces of supply and demand in the domestic market of the country of origin, but rather a value that is "abnormal" due to distortions in the formation of the domestic sales price.

3. By contrast, the export price of a product is simply the price at which the product is introduced into the commerce of another country, which must be compared with its normal value in order to determine if a product is being dumped for the purpose of the Anti-Dumping Agreement.

4. Government intervention may create a "particular market situation" where the price of domestic sales of the like product does not reflect its normal value and therefore does not permit a proper comparison with the export price. Public policies and programmes aimed at encouraging or supporting a particular domestic industry can lead to price distortions in markets both upstream and downstream of the encouraged industry, depending on the intensity of the government intervention and the extent to which room is left for market forces to operate normally and in an undistorted manner, within the framework established by the government.

5. The fact that certain types of government intervention may be disciplined under the SCM Agreement does not preclude Members who apply anti-dumping measures in accordance with the provisions of the Anti-Dumping Agreement from finding that the same intervention by the government gives rise to a "particular market situation" within the meaning of Article 2.2. This is also true when the government intervention does not meet the conditions of an actionable subsidy.

6. The finding that a "particular market situation" exists in the country of origin does not imply that the product is being dumped or that anti-dumping duties must be imposed. That remains to be ascertained during the course of the investigation and the determinations may vary in respect of different exporters.

7. In case a "particular market situation" is found to exist in the country of origin, so that a proper comparison with the export price is not possible, the consequence is that the normal value of the products under investigation will be determined either on the basis of "the price of the like product when exported to an appropriate third country" or "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

8. Since Article 2.2 does not impose a hierarchy for using either a third country export price or a constructed normal value to proceed with the comparison with the export price, an investigation authority is free to choose and may resort to a constructed normal value.

II. A "PROPER COMPARISON" WITH THE EXPORT PRICE

9. There is no basis in the Anti-Dumping Agreement for asserting that, in order to exclude a "proper comparison" of the normal value with the export price, the "particular market situation" identified by an investigating authority must affect exclusively the price or cost of a product when

sold in the domestic market of the exporting country. That distinction is not made in Article 2.2 of the Anti-Dumping Agreement and it cannot be inferred either from Article 2.1, which requires the export price of a product to be compared with its normal value.

10. In fact, even if a "particular market situation" affects symmetrically both the domestic price and the export price by a similar amount, such a comparison would be incapable of providing a meaningful answer to the question: is there dumping as that term has been defined by Article VI:1 of the GATT (including the Ad Notes) and the relevant provisions of the Anti-Dumping Agreement?

11. A "proper comparison" is not simply an arithmetical comparison of the domestic sales price with the export price, but rather a comparison of the export price of a product with its normal value or, in other words, a value that is normal.

12. It is possible to draw up a long list of abnormal situations in which the prices or costs of the exporters are, in whole or in part, incapable of forming the basis for the calculation of a normal value, or a value that is normal, in a way that ensures comparability.

13. In each of these abnormal situations, it is permissible and may be required that an investigating authority concludes that the data is unreliable and unsuitable for use as the basis for the calculation of a normal value with which the export price can be meaningfully compared. In other words, an investigating authority may be required to reject such data, in whole or in part, and/or to replace the rejected data with information from some other source, and/or to adjust the data in a manner that ensures comparability or a "proper comparison" between the export price of a product and its normal value.

14. A lack of comparability can result from a distortion that affects only one side of the comparison, asymmetrically, that is, which affects the domestic price or cost but not the export price or the costs underlying the export price, or *vice versa*. However, a lack of comparability can also result from a distortion that affects both sides of the comparison, symmetrically, that is, a distortion that has as a consequence that the data no longer permit a meaningful comparison between the putative normal value on the one hand and the export price on the other hand.

III. DISREGARDING COSTS UNDER ARTICLE 2.2.1.1

15. An investigating authority may disregard the records of costs kept by the exporter or producer under investigation even if the two conditions in Article 2.2.1.1 of the Anti-Dumping Agreement are satisfied. Consequently, an investigating authority is permitted, and may even be required, to reject, replace or adjust the costs of production in the records of the investigated firm if those costs are unsuitable to serve as the basis for calculating a constructed normal value due to a "particular market situation".

IV. CALCULATING COSTS IN THE COUNTRY OF ORIGIN

16. The Appellate Body in *EU – Biodiesel (Argentina)* agreed as a general matter that, under Article 2.2 of the Anti-Dumping Agreement, in certain circumstances, an investigating authority may have recourse to data or evidence from a third country, as a proxy, duly adjusted when necessary.

17. The Appellate Body also made clear that such "out-of-country" data serves as proxy for costs of production in the country of origin. However, the case-law of the Appellate Body makes it equally clear that the data from outside the country of origin does not need to be adjusted back to an amount that is the same as the amount that would result from use of the very data rejected as unreliable or distorted.

18. This guiding principle in respect of the scope of adjustments must also apply to cases where, because of a "particular market situation" identified by the investigating authority, domestic data in the country of origin was first rejected as a basis for determining the normal value of the products concerned and then also rejected as a basis for establishing the cost of production when determining a constructed normal value under Article 2.2.1.1. The obligation to arrive at "the cost of production in the country of origin" does not require the investigating authority to revert to the distorted domestic data that masked that cost of production and resulted in artificially low domestic sales prices.

V. THE NOTION OF "PARTICULAR MARKET SITUATION"

19. A "particular market situation" does not need to affect all market participants, but can be limited to just some of them. Whilst Article VI of the GATT 1994 and the Anti-Dumping Agreement do envisage circumstances in which the dumping calculation, and specifically the determination of normal value, may reflect the situation in the relevant "market" as a whole, they equally envisage a calculation grounded in the circumstances of individual producers

20. An investigating authority is entitled to take into account a situation in which the normal operation of the market forces of supply and demand has been distorted, such that the resulting price and cost data is unreliable as a basis for determining normal value, or a value that is normal. This is so irrespective of the source of the distortion, that is, whether it is private or public: what matters is whether market power is inappropriately used to smother or distort the normal operation of the market forces of supply and demand. Whether or not this has occurred is something that can only be assessed on a case-by-case basis, having regard to all the facts.

21. The term "situation" refers to the situation in the domestic market. It does not refer to a situation external to the domestic market, which is affecting that domestic market. The term "particular market situation" is not circumscribed by a rule according to which there must be an asymmetrical impact on normal value and export price in order for a "particular market situation" to arise.

22. In this respect, there is a fundamental difference between export price and normal value. Export price is the object of the investigation. The investigating authority is not generally concerned with *why* the export price is what it is: it is just concerned with accurately determining *what* the export price is, and with making a fair and proper comparison between the normal value and the export price. By contrast, the normal value is the benchmark against which the export price is to be compared. It must be established in accordance with Article 2. In particular, it must be based on price or cost data that permits the establishment of a normal value, or a value that is normal, as opposed to price or cost data that is distorted and unreliable.

23. Distinguishing between the "particular market situation" and the individual circumstances that may be combining in order to create a "particular market situation" is something that would need to be done on a case-by-case basis.

24. Article 17.6(ii) of the Anti-Dumping Agreement concerns interpretation, not application. There are very many situations in which the same set of facts in a given Member could be assessed differently by two different investigating authorities in two different Members. Each authority would generally be applying their own municipal legislation, which in turn would generally be aligned and consistent with the Anti-Dumping Agreement. This process is governed by Article 17.6(i), which expressly envisages the possibility of different conclusions. According to the terms of Article 17.6(i), if the Panel would conclude that the facts were properly established and the investigating authority's assessment of those facts, in reaching the determination that there was a "particular market situation", was unbiased and objective, then the Panel must reject Indonesia's claims and arguments on that point, even if the Panel might have reached a different interpretation.

25. At the interpretative level, there is no requirement that the municipal laws and investigating authorities of all WTO Members interpret the Anti-Dumping Agreement in exactly the same way. Rather, the question is always simply whether or not the municipal law, or instances of its application, are consistent with the balance of rights and obligations set out in the Anti-Dumping Agreement.

VI. PROPER COMPARISON AND FAIR COMPARISON

26. The term "proper comparison" in Article 2.2 is a specific expression of the concept of "comparability", which flows from Article VI of the GATT 1994. It is a fundamental concept that lies at the heart of Article VI and the Anti-Dumping Agreement. Comparability is achieved when normal value and export price have been established and if necessary adjusted in such a manner that comparing them can give a meaningful answer to the question: is there dumping as that term is defined in Article VI and the Anti-Dumping Agreement?

27. The idea behind the reference to a "low volume of the sales in the domestic market" in Article 2.2, as further detailed in footnote 2, is that the relationship between the volume of domestic sales and the volume of export sales should permit a proper comparison. This may not be the case, in particular, where the volume of domestic sales falls below 5% of the volume of export sales.

28. If one has a weighted-average export price based on a very large number of data points then one knows that it should be relatively representative. On the other hand, if one has only very few data points for the establishment of a weighted-average normal value, then one might be legitimately concerned about the risk that it would not be representative, or that it might be susceptible to manipulation. In such circumstances, an investigating authority might reach the conclusion that such a relatively low volume of sales would not permit a proper comparison.

29. There is no necessary bright line distinction between the concept of a "particular market situation" on the one hand and other concepts, such as, for example, "ordinary course of trade", or the circumstances referred to in the Second Ad Note to Article VI:1, or the concept of "non-market economy" referred to in some accession protocols. These concepts may overlap and in some cases may even be co-extensive. In some circumstances, these concepts may operate together to support a particular conclusion.

30. In Article 2.4, the focus is on the manner in which both normal value and export price have been established and adjusted, and the manner in which they may need to be further adjusted, in order to ensure a fair comparison. In particular, Article 2.4 is focussed on differences affecting the comparison between normal value and export price. The terms "proper comparison" in Article 2.2 and footnote 2 and "fair comparison" in Article 2.4 are both specific expressions of the fundamental principle of comparability, which finds expression throughout Article 2.

VII. RECOURSE TO OUT-OF-COUNTRY DATA

31. The Appellate Body's findings in *EC − Fasteners (China) (Article 21.5 − China)* support the basic observation that if a domestic price has been found unsuitable as a basis for establishing normal value because of a "particular market situation", which has also distorted the underlying cost data, then an investigating authority is also permitted to reject such distorted cost data when making its determination of a constructed normal value.

32. Furthermore, if a particular item of data has been lawfully rejected as distorted and unreliable, and if it has been replaced by other data to be used as a proxy, such other data must surely be adapted as necessary to the case at hand, but does not need to be adjusted back to the very data that has already been lawfully rejected. This basic proposition is also well-supported by the Appellate Body Report in *China − HP-SSST*.

33. The term "normally" supports the proposition that the two conditions in Article 2.2.1.1 do not exhaust the circumstances in which the recorded costs may be rejected as distorted and unreliable. However, it is not the only treaty term that supports that conclusion. Article 2.2.1.1 states expressly that it controls for the "purpose" of paragraph 2. The purpose of paragraph 2 is to establish a normal value (which is not a defined term), that is, a value that is normal. A value is normal when it results from the normal operation of the market forces of supply and demand. Therefore, in any situation in which a particular item of data has been lawfully rejected as distorted and unreliable because it does not result from the normal operation of the market forces of supply and demand, such item of data does not need to be brought back into the calculation pursuant to Article 2.2.1.1.

34. Out-of-country data to which an investigating authority lawfully has recourse should be adjusted to reflect the circumstances in the country of origin, but not back to the data initially and lawfully rejected as distorted and unreliable.

35. In other words, the adjustments to be made do not cover differences between the country of origin and the third country which result from the distortions in the market of the country of origin that have been duly identified by the investigating authority. Any other significant difference affecting comparability, duly demonstrated, should be adjusted for.

36. The statements referred to in Question 9 of the Panel are not, in themselves, "interpretations" of any provision of WTO law. They do not involve the use of the customary rules of interpretation of public international law as tools to resolve apparent tensions in the terms of the treaty.

37. There is no bar to this Panel taking guidance from the prior Appellate Body Report (referring with approval to the prior panel report) on this point. Although there is no formal system of precedent in WTO law, there is a reasonable expectation of consistency, and particularly a reasonable expectation that a panel will follow prior Appellate Body reports on the same point.

38. However, these statements are not particularly important for this Panel's analysis. Further, the exhibited documents referred to by the panel in DS379 are not currently on the record of these panel proceedings and if that remains the case could not be relied upon by this Panel. In any event, Indonesia's representations are incomplete and therefore technically incorrect. Indonesia omits the qualification that the reasoning holds when normal value is based on domestic prices.

VIII. RELATIONSHIP WITH THE SCM AGREEMENT

39. According to Indonesia, if something attributable to the State would give rise to an adjustment under the Anti-Dumping Agreement, this would somehow represent a circumvention of the definition of a subsidy under the SCM Agreement, and an unlawful extension of the reach of the anti-subsidy disciplines. Indonesia's argument is not merely that a subsidy cannot give rise to an adjustment under the Anti-Dumping Agreement, but that anything attributable to the State cannot give rise to an adjustment under the Anti-Dumping Agreement.

40. In fact, Article VI:5 of GATT 1994 expressly and precisely confirms that there may be situations in which the Anti-Dumping Agreement and the SCM Agreement apply concurrently. Moreover, other provisions of the GATT 1994 and the Anti-Dumping Agreement expressly confirm that Indonesia is wrong. For example, the second paragraph of the Ad Note to Article VI refers to "a country" having "a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State". The Ad Note on multiple currency practices refers expressly to "practices by governments or sanctioned by governments". Article 2.4 of the Anti-Dumping Agreement refers to "taxation". And so forth.

41. Therefore, Indonesia's assertion that it somehow results from the existence of the SCM Agreement that a "particular market situation" can never be attributable to the State is entirely without merit. The Anti-Dumping Agreement is agnostic as to the identity of the causal agent giving rise to the "particular market situation", and other provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement confirm that the causal agent may be the State.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. The Government of Japan has joined as a Third Party in this dispute to address some key issues of systemic importance that are before the Panel in relation to the interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA") and Article VI:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), including its *Ad* Note.

II. GATT ARTICLE VI:1 AND ARTICLES 2.2 AND 2.2.1.1 OF THE ADA

2. The first sentence of GATT Article VI:1 defines "dumping" as imports of products "at less than the normal value", but does not explicitly define "normal value" nor require the use of any specific methodology to determine "dumping" of subject imports.

3. On the other hand, the second sentence of Article VI:1 provides a price comparison methodology to determine what constitutes "dumping" (i.e. whether the subject imports are introduced into the commerce of another country "at less than the normal value"). The second sentence provides that imports at prices below the three types of "comparable" prices and costs listed therein are "to be considered" to constitute "dumping". The second sentence does not, however, state that these three prices and costs are the only permissible bases for "normal value", and it expressly presumes that these prices and costs are, in fact, "comparable" (i.e. capable of being compared) to the export price.

4. In fact, "normal value" under both sentences is a concept that is distinct from the enumerated "prices" or "costs" in the second sentence. "Normal value" therefore may encompass something more than or different from the "comparable" prices or costs enumerated in the second sentence of Article VI:1. If the domestic prices or costs specified in the second sentence had been intended to limit the interpretation of "normal value", the second sentence would have stated that the "prices" or "costs" listed therein were "normal value", and that comparisons between these actual "comparable" prices and costs and export prices were the sole means of determining "dumping". Instead, the second sentence illustrates only the relationship of "normal value" (and therefore dumping) to three alternative domestic transaction prices and costs. In short, the phrasing of the second sentence shows that the two provisions therein are examples of ways to determine what is less than normal value, but does not exclusively limit the acceptable ways.

5. Articles 2.1 and 2.2 of the ADA do not contradict this interpretation. The provisions dictate how dumping may be determined by further elaborating on GATT Article VI:1. They do not (i) change the relationship between the first and second sentences of Article VI:1; (ii) strictly define "normal value"; or (iii) alter the definition of "dumping". In fact, Article 2.1 restates the definition of "dumping" as products being "introduced into the commerce of another country at less than its normal value". It further provides that a product is "to be considered" as being dumped if imports are introduced at less than the home market sales price, which corresponds to the price provided for in the second sentence of GATT Article VI:1. Similarly, Article 2.2 provides certain circumstances in which two other options (third country export prices and constructed values) may be compared to export prices − the same options that appear in the second sentence of GATT Article VI:1.

6. Finally, the use of price comparison methodologies specified in the second sentence of GATT Article VI:1 and in Articles 2.1 and 2.2 of the ADA are not required where the domestic economy of the exporting Member does not operate under market economy conditions. In such a case, the use of the Member's domestic prices and costs for price comparison purposes is not required to identify dumping. Accordingly, pursuant to the first sentence of GATT Article VI:1, investigating authorities may use a third country price as a reasonable estimate of the "normal value" in order to determine "dumping", and they are not required to use adjusted prices or costs in the domestic market of the exporting Member. Moreover, jurisprudence relating to "non-market economy" producers is not

relevant to the issues before the Panel, insofar as the exporting Member at issue here is not a "non-market economy".

III. PARTICULAR MARKET SITUATION

7. With respect to "particular market situation" in Article 2.2 of the ADA, which has never before been interpreted by a WTO panel or the Appellate Body, Japan offers several pieces of interpretive guidance.

8. First, the "particular market situation" refers to a "situation" of the market of the exporting country that is "particular" (i.e. "special; not general"[1]), and that is therefore not the "normal" or "common" market situation but rather a "special" one. This is confirmed also by the Spanish language version of this provision, which refers to "una situacion *especial* del mercado".

9. Second, the application of a "particular market situation" under Article 2.2 is limited to "market" situations, as is the rest of Article 2.2, and these provisions do not necessarily apply to imports from "non-market economy" Members. Based on the above understanding of "normal value", the use of price comparison methodologies specified in the second sentence of GATT Article VI:1 and Articles 2.1 and 2.2 of the ADA are required under the assumption that the domestic economy of the exporting Member operates under market economy conditions. Where the domestic economy of the exporting Member does *not* operate under market economy conditions, such Member's domestic prices and costs cannot be used for price comparison purposes to identify dumping.

10. Third, for "market economy" Members, what constitutes a "particular" situation will differ from Member to Member. Thus, rather than seeking to develop a general definition of a "particular market situation", the determination should be made on a case-by-case basis according to the specific facts and circumstances at issue. Applying this principle to the current case, the Panel may wish to examine carefully the facts on which Australia relied in support of its determination, with a view to determining in this specific case whether the facts support a finding of a "particular market situation".

11. Along similar lines, even if Members interpret the phrase "particular market situation" in the same way, one Member's finding of "particular market situation" may be different from another Member's finding, depending on the factors and evidence that are taken into consideration. Thus, in the case of two Members' investigating authorities assessing the same subject imports of the same exporter, one authority could find that a "particular market situation" exists, while the other finds no such "particular market situation" under the same circumstances, and both findings could be consistent with Article 17.6(i) of the ADA because an investigating authority's exercise involves fact-finding, the consequences of which may differ from one Member to another.

12. Fourth, there is no textual basis in Article 2.2 of the ADA for excluding government influence from being a cause of a "particular market situation". Even in a market economy Member, there may be a special circumstance in a market that affects price comparability, regardless of whether that circumstance is due to government influence.

13. Fifth, there is no textual support in the GATT 1994 or the ADA for the view that Article 2.2 requires a "symmetrical comparison", i.e. that an investigating authority must exclude factors affecting both the domestic price and export price from the scope of a "particular" situation. Instead, such a factor might still distort the market, and thus prevent a "proper comparison" under Article 2.2. Furthermore, requiring an authority to demonstrate that the relevant factor affects domestic prices and export prices "differently" also lacks textual support and would be an inappropriately heavy burden for an importing Member.

14. Finally, Japan sees nothing in the text of Article 2.2 that precludes the possibility that the "particular market situation" affects some, but not all, market participants.

IV. "PROPER COMPARISON"

15. Japan also offers the following interpretive guidance with respect to a "proper comparison" under Article 2.2 of the ADA.

[1] Shorter Oxford Dictionary, p. 2110.

16. First, the word "proper" modifies, and is therefore directly related to, the subsequent noun "comparison". Article 2.2 sets forth the methodology to follow for the determination of "dumping". Thus, the definition of "dumping" in the first sentence of GATT Article VI:1 (i.e. "products of one country are introduced into the commerce of another country at less than the normal value of the products") ultimately dictates the "proper" comparison.

17. Second, "normal value" requires "a proper comparison" or "comparability", and prices or costs that are not market-determined cannot be considered as "comparable" because comparability is only ensured when the comparison between the normal value and the export price is capable of producing a meaningful answer to the question of whether there is dumping, as defined by GATT Article VI and the ADA. Accordingly, where there is only a low volume of like product in the domestic market, and thus insufficient interaction of supply and demand in the market of the like product, such prices and costs may be incapable of permitting a "proper comparison" because they may not substantially reflect market-determined prices and costs.

18. Third, all bases for discarding domestic market sales (i.e. "proper comparison", "no sales … in the ordinary course of trade", "centrally planned", and "non-market economy") are based upon the concept of price comparability under GATT Article VI. However, the "centrally planned" and "non-market economy" provisions relate to non-market economies where the comparison methodologies under the second sentence of GATT Article VI:1 do not apply. In that situation, pursuant to the first sentence of GATT Article VI:1, investigating authorities may use a third country price as a reasonable estimate of the "normal value" to determine "dumping".

19. On the other hand, the provisions "do not permit a proper comparison" and "no sales … in the ordinary course of trade" under Article 2.2 of the ADA reflect sub-paragraph (b) of the second sentence of GATT Article VI:1, and are therefore predicated on the premise that the exporting Member is a "market economy" where the second sentence applies. In such a case, the use of a third country price is allowed only as "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country", which may require certain adjustments depending on the specific circumstances of each case.

20. Fourth, while both "proper comparison" in Article 2.2 and "fair comparison" in Article 2.4 of the ADA relate to comparison methodologies, the terms "proper" and "fair" deal with different phases of, and conduct of the different investigating authority in, the determination of dumping. The text of Article 2.4 indicates that is concerned with the investigating authority's adjusting the differences between the export price and the normal value when comparing them. On the other hand, Article 2.2, together with Article 2.1, is concerned with the definition of dumping (i.e. what is the normal value used to determine dumping).

V. ASSERTION THAT "DUMPING" IS LIMITED TO INTERNATIONAL PRICE DISCRIMINATION HAS NO VALID BASES

21. Japan disagrees with the view that dumping is limited to the concept of "international price discrimination", and that any distortions that equally affect domestic and export prices must be exclusively governed by the SCM Agreement. First, there is a telling lack of textual basis for recognizing the concept of "dumping" as a form of private behaviour in the form of "international price discrimination", which neither GATT Article VI nor the ADA mentions. The first sentence of GATT Article VI:1 defines "dumping" as imports of a product at less than its "normal value"; it does not refer to the concept of price discrimination and certainly does not require that normal value always be determined based on the prices in the exporting country.

22. Nor is there any provision providing that anti-dumping remedies cannot counteract "dumping" made possible by subsidies or other government actions. Indeed, GATT Article VI:5 confirms that anti-dumping duties can remedy dumping caused by government actions, as it explicitly provides that anti-dumping duties and countervailing duties should not "compensate for the same situation of dumping or export subsidization". As such, anti-dumping duties can be imposed on dumping caused by government actions, but, where both anti-dumping and anti-subsidy remedies are imposed simultaneously on the same imports, adjustments are required to avoid double remedies for the same situation (e.g. subsidies). Appellate Body decisions in *US − Offset Act (Byrd Amendment)* are not relevant in any way to the current dispute, which relates to an entirely different factual situation and a separate legal question under the ADA.

23. Second, Appellate Body references to "international price discrimination" or "the pricing behavior of exporters or foreign producers" also are not particularly relevant here. In *US – Stainless Steel (Mexico)*, the Appellate Body mentioned "international price discrimination" when concluding that GATT Article VI:1 and Article 2.1 of the ADA address the pricing practice of an exporter, not that of an importer.[2] The Appellate Body did not suggest, however, that dumping should be reduced to the notion of "international price discrimination" by an exporter, even when the prices and costs in the relevant market of the exporting country are not market-determined due to a "particular market situation". The Appellate Body was never asked to examine this matter when it made its statement about dumping as a form of "international price discrimination".

VI. ALTERNATIVE METHODOLOGIES UNDER ARTICLES 2.2 AND 2.2.1.1

24. With respect to the alternative dumping methodologies set forth in Article 2.2, the Appellate Body has confirmed that this provision is intended to generate an "appropriate proxy" for the price of the like product in the ordinary course of trade in the home market. The Appellate Body added that the costs calculated pursuant to Article 2.2.1.1 must also be "capable of generating such a proxy".[3] Accordingly, the proper interpretation of Articles 2.2 and 2.2.1.1 should take into account the role of Article 2.2 to provide "an appropriate proxy" for "the price of the like product in the ordinary course of trade in the domestic market".[4]

25. An investigating authority is required, when constructing normal value under Article 2.2, to use the cost of production *in the country of origin* and not the cost in *some other place*. The source of the cost information may in certain circumstances be obtained from outside the country of origin, but the Appellate Body has explained that "an investigation authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'" including by adjusting the information collected, where required by the specific circumstances of each case.[5]

26. What adjustments are required will depend on the type of information that is used to calculate the cost of production in the country of origin. The investigating authority has some discretion to undertake adjustments, provided that it (i) ensures that the calculated cost represents the cost in the country of origin; and (ii) adequately explains its adjustments. For example, the investigating authority may use out-of-country evidence to calculate the cost of production in the country of origin if the actual costs in the country of origin are found to be unreliable. However, in such a case, the investigating authority should (i) take into consideration the differences in the market conditions between the country of origin and the third country that affect the prices of the cost items; and (ii) provide a proper explanation of why an adjustment was adequate under the circumstances.

27. Moreover, Article 2.2.1.1 of the ADA requires the use of recorded costs that "reasonably reflect the costs associated with the production and sale of the product under consideration". According to the Appellate Body, this means that the records must be used "if they suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".[6] The Appellate Body also clarified that this condition does not allow an authority to consider which costs would pertain to the production and sale of the product under consideration "in normal circumstances, i.e. in the absence of the alleged distortion", as this would "add words to the condition at issue that are not present in Article 2.2.1.1, namely, the costs that 'would pertain' and 'in normal circumstances'".[7]

28. In other words, there is no separate reasonableness test that applies to those costs that accurately reflect the actual costs that relate specifically to the production and sale of the product under consideration and not some other product.[8] The Appellate Body in *EU – Biodiesel (Argentina)*, for example, found that the fact that domestic prices of inputs are lower than international prices due to a government regulation "was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production

[2] Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-95, fn. 208.
[3] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.
[4] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.
[5] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.
[6] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26.
[7] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.30.
[8] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37.

and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel".[9]

29. This is not to say, however, that any costs as recorded in the records of the producer/exporter must always be used: for example, an investigating authority may examine the reliability and accuracy of the record costs to determine "whether all costs incurred are captured; whether the costs incurred have been over- or understated; and whether non-arms-length transactions or other practices affect the reliability of the reported costs".[10]

30. Finally, the term "normally" in Article 2.2.1.1 has been interpreted to mean "under normal or ordinary conditions; as a rule".[11] Thus, the use of the term "normally" suggests that even where the two conditions contemplated in the "provided" clause of the first sentence of Article 2.2.1.1 ("in accordance with the generally accepted accounting principles" and "reasonably reflect the costs associated with the production and sale of the product under consideration") are met, the use of an exporter/producer's records is not necessarily mandatory in every case, and an investigating authority may consider other available evidence in certain circumstances. Indeed, if the drafters of the first sentence of Article 2.2.1.1 had intended otherwise, they would have had no need to insert the word "normally". The meaning of "normally" in Article 2.2.1.1 should instead be explored in the overall context of determining normal value and price comparability under Articles 2.2.1.1 and 2.2, as well as other relevant provisions.

VII. CONCLUSION

31. Japan respectfully requests the Panel to consider Japan's positions on the interpretive issues set out above.

[9] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.
[10] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41.
[11] Appellate Body Report, *US – Clove Cigarettes*, para. 273 (citing *Shorter Oxford English Dictionary*, 6th ed., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1945); see also Panel Report, *China – Broiler Products*, para. 7.161.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA

I. Proper Interpretation of Article 2.2 of the Anti-Dumping Agreement within the Context of a Finding of a "Particular Market Situation"

1. Article 2.1 of the Anti-Dumping Agreement defines dumping as the introduction of a product into the commerce of another country at less than its normal value and establishes that the domestic sales price of the product under investigation (the "like product") is the primary basis for determining the "normal value." Article 2.2 then identifies certain circumstances in which an investigating authority may calculate the normal value on a basis other than the domestic sales price, i.e., third country sales or constructed value. One of these circumstances is the existence of a "particular market situation" that prevents a proper comparison. Article 2.2 requires three conditions to be present for an investigating authority to disregard domestic sales prices on this basis: (1) there must be a "particular market situation" in the domestic market of the exporting country; (2) this situation must have an effect on the sales of the like product in the domestic market of the exporting country; and (3) the effect must be such that a "proper comparison" with the export price cannot be made.

2. With respect to the first condition, Korea agrees with Indonesia's description of the ordinary meaning of a "particular market situation" as requiring an exceptional set of circumstances that takes place in a single market, which is the exporting country.[1] In Korea's view, the term "market" within the meaning of Article 2.2 of the Anti-Dumping Agreement depicts a geographical area. Korea also considers a "market" to be characterized by commercial activity that is controlled by supply and demand. In this respect, Korea considers that a "particular market situation" would not include circumstances that arise normally in an economy that is operating on the basis of the market forces of supply and demand.

3. Korea also agrees that the "situation" can be interpreted to mean a "combination of circumstances".[2] However, in order to avoid the possibility of abuse, Korea considers that an investigating authority must clearly articulate how the situation, whether singular or in combination, is "particular" to the market such that a "proper comparison" is prevented. Thus a finding of a "particular market situation" must be based on an examination of the exceptional circumstances that take place in the market as a whole. Korea considers that such examination could consider relevant market characteristics and that it should focus on the market as a whole, rather than the effect of the situation on specific market participants.

4. In Korea's view, the rules of treaty interpretation do not permit multiple interpretations of the term "particular market situation". Thus, the interpretation of the term is covered under the first sentence of Article 17.6(ii) and recourse to the second sentence is unnecessary. However, Korea notes that one investigating authority might find a "particular market situation" whereas another authority might reach a different conclusion based on the same facts, a situation that appears to be covered under Article 17.6(i). So long as the authority's establishment of the facts was proper and its evaluation of those facts was unbiased and objective, a panel should defer to the evaluation of the authority in determining whether the authority's *application* of Article 2.2 (as properly interpreted under the customary rules of interpretation) was appropriate.

5. With respect to the second condition, Korea considers that the structure of Articles 2.1 and 2.2 confirm that the focus of the "particular market situation" is to identify circumstances that affect the domestic sales price of the like product to such an extent that it is rendered unusable for the purpose of comparing it with the export price. Moreover, Article 2.2 provides for two other situations in which an investigating authority is authorized to disregard the domestic sales as the basis for determining the normal value, both of which concern sales in the "exporting country" – i.e., sales in the domestic market. This further confirms that Article 2.2 only permits deviation from the domestic sales price when there is a circumstance that affects sales in the domestic market of the like product

[1] Korea's third party submission, para. 8.
[2] Korea's third party submission, para. 8.

such that the price of these sales cannot be used as the normal value.

6. With respect to the third condition, given that the very definition of dumping rests on a comparison between the normal value and the export price, Korea considers it critical that the investigating authority engage in an examination of whether, as a result of the "particular market situation", a "proper comparison" between the normal value and export price is not permitted.

7. As to the meaning of the term "proper comparison", Korea agrees with Indonesia that an examination of whether a comparison is "proper"[3]—and thus, "suitable" or "appropriate"—requires consideration of the purpose for which the comparison is being made. In Korea's view, the purpose of the "comparison" is to determine whether the subject merchandise is sold in the export market at a price that is lower than the normal value such that factors that affect the normal value and export price differently should be excluded. In this regard, Article 2.2 should be read together with Article 2.1 and the phrase "proper comparison" should be understood to mean that a price comparison conducted in an anti-dumping investigation should be for the purpose of determining whether the subject merchandise is sold in the export market at a price lower than normal value. Korea considers that the phrase "permit a proper comparison" should be interpreted and applied uniformly both in the context of "particular market situation" and "low volume of sales" given that the phrase appears in connection with both situations. Indeed, footnote 2, which clarifies that a volume that would normally be considered insufficient would nonetheless be appropriate if such sales can nonetheless provide for a proper comparison confirms that the purpose of examining the volume of sales is to determine whether such volume would permit a proper comparison.

8. A comparison cannot be "proper"—that is "suitable" or "appropriate"—if it is tainted by factors that affect the normal value and export price differently. For example, if there is a situation that distorts the domestic market of a product but not the export market, an appropriate comparison between prices in the two different markets would not be possible. On the other hand, if there is a situation that affects both the domestic price and export price equally, it cannot be said to prevent a proper comparison. This is because a situation that uniformly affects the price of an input that is incorporated equally into products for domestic sales and products for export would be reflected on both sides of the dumping margin calculation. Such a situation would not impact the gap between the domestic sales price and the export price, which comprises the margin of dumping.

9. It is Korea's view that circumstances affecting the cost of production will not usually prevent a "proper comparison," to the extent that the circumstances do not distinguish between products destined for the domestic market and those destined for export. In this respect, Korea agrees with Indonesia that the Anti-Dumping Agreement does not authorize the imposition of anti-dumping duties in response to exporters simply selling at *low* prices in the export market.[4] Korea notes that Australia's investigating authority, by examining only the effect of the alleged government intervention on the domestic sales price, appears to have ended up comparing two values that were based on different costs of production. The normal value was calculated on a constructed value basis using an out-of-country benchmark, while the export price was based on the actual cost of production incurred in Indonesia. Korea questions whether a comparison of the normal value and export price that is based on different costs of production can be considered to constitute a "proper comparison" for the purpose of determining whether the export price was below the normal value.

10. Korea further notes that there is nothing in the text of Article 2.2 that prohibits consideration of government influence in the domestic market in determining whether a particular market situation exists. Therefore, Korea does not consider that government influence is *a priori* excluded from the scope of a particular market situation. However, Korea considers that the key issue would be whether the "particular market situation" prevents a "proper comparison," and not whether the government created those circumstances. For example, in Korea's view, a dual pricing system, in which the price of raw material or energy is regulated by the government, is one example that might fit the description of a "particular market situation". Price floors or ceilings may also meet the definition of a "particular market situation" depending on the circumstances of the government intervention. A dual pricing system draws a distinction between the domestic sales price and export price by its design, seeks to benefit the domestic market by suppressing the price of the product sold there, and would affect the domestic sales price and export price differently. It therefore might qualify as a "particular market situation". In the case of a government-imposed price floor or ceiling, a "particular

[3] Indonesia's first written submission, para. 88.
[4] Indonesia's first written submission, para. 101.

market situation" could be found if the price ceiling is limited to the domestic market, allowing exporters to sell the product at any price in foreign markets.

11. Finally, Korea notes that the general principle of ensuring a proper comparison is also present in Article 2.4 of the Anti-Dumping Agreement, which requires that an investigating authority ensure a "fair comparison" between the normal value and the export price by making adjustments for "differences which affect price comparability". Korea thus considers that, while there are differences in the application of Articles 2.2 and 2.4, Article 2.4 confirms that the Anti-Dumping Agreement seeks to exclude from the comparison factors that affect the normal value and export price differently.

II. Government Intervention Under the Anti-Dumping and SCM Agreements

12. Korea considers that there is a fundamental dichotomy between anti-dumping measures and measures against government subsidization. As Indonesia notes, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") is concerned with regulating government influence on market prices, while the Anti-Dumping Agreement is concerned with international price discrimination by individual exporters or producers.[5]

13. Moreover, the text of the SCM Agreement makes clear that the sole remedies for government subsidies are those that are provided for under the provisions of the SCM Agreement, and not any other agreement, including the Anti-Dumping Agreement. In particular, Article 32.1 of the SCM Agreement provides that "no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". Korea considers this provision to mean that a government subsidy must be remedied through permitted measures under the SCM Agreement (such as countervailing duties) and not through the imposition of anti-dumping duties. Therefore, if an investigating authority is examining possible government subsidization within the context of the "particular market situation" provision of Article 2.2 of the Anti-Dumping Agreement, it must first find that the situation is not properly governed by Article 32.1 of the SCM Agreement; in other words, that the situation is neither "specific" to nor "against" subsidization. If an investigating authority does take "specific action against" a subsidy, it will be in violation of Article 32.1 if the measure taken does not fall into one of the enumerated remedies (countervailing duties, provisional measures or price undertakings, or multilateral sanctions).

14. Korea notes that the footnote to Article 32.1 provides that the article "is not intended to preclude action under other relevant provisions of the GATT 1994, where appropriate". Korea does not consider that the footnote provides a basis for an investigating authority to take anti-dumping action against a subsidy that falls within the scope of the SCM Agreement. It would not be "appropriate" to permit remedies to government subsidization under the Anti-Dumping Agreement because the disciplines that apply to a Member's use of anti-dumping duties and its use of countervailing duties are legally distinct.[6] Korea considers that the footnote simply allows for measures outside of those specified in the SCM Agreement that relate to subsidization, but are not inextricably linked, or strongly correlated, to the constituent elements of subsidization. Where the investigating authority's actions are "specific" to the subsidy, the footnote would not apply and any actions by the investigating authority must fall within one of the enumerated remedies provided under the SCM Agreement.

15. Korea recognizes that in the present case, the Australian investigating authority did not impose countervailing duties for the same programs that formed the basis of its "particular market situation" finding in the anti-dumping investigation. Korea understands, however, that the investigating authority's decision not to impose duties was, at least in part, based on the negligible margin of subsidization, and not because the government action failed to meet the constituent elements of a subsidy under Article 1.1.[7] The fact that the Australian investigating authority conducted a countervailing duty investigation of these government programs implies that the authority did consider the government intervention at issue to constitute a subsidy that met the constituent elements under Article 1.1. Therefore, Korea considers that it might be necessary to examine whether the investigating authority's actions in the anti-dumping investigation might nonetheless constitute "specific actions" relating to a subsidy. It might also be necessary to assess

[5] Indonesia's first written submission, para. 46.
[6] See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 570.
[7] Indonesia's first written submission, para. 17.

whether the design and structure of these measures are such that they create an incentive to terminate the subsidization. If so, the Australian investigating authority's actions might fall under the scope of Article 32.1 of the SCM Agreement.

III. Proper Interpretation of Article 2.2.1.1 within the Context of Conditions to Disregard Records Maintained By The Exporter Or Producer

16. When calculating the normal value on the basis of constructed value, Article 2.2.1.1 of the Anti-Dumping Agreement establishes rules for the calculation of the cost of production that is to be used. Specifically, for the purpose of Article 2.2, "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation …". Article 2.2.1.1 then provides for two specific situations in which the investigating authority may deviate from those records: (1) when the records are not in accordance with the generally accepted accounting principles ("GAAP") of the exporting country; and (2) when the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.

17. Korea does not agree with Australia's argument that the word "normally" provides a separate legal ground under Article 2.2.1.1. Korea understands the use of the term "normally" to establish the presumption that, absent the specific conditions proscribed in the first sentence of Article 2.2.1.1, [8] the source for calculating cost of production must "as a rule" be the records maintained by the exporter or producer under investigation.[9] Derogation from that rule is permitted only under specified circumstances; as explained by the panel in *China − Broiler Products*, those circumstances are limited to those proscribed in the first sentence of Article 2.2.1.1.[10] In Korea's view, even if the term "normally" could be interpreted to permit deviation from cost records for reasons other than the two conditions provided in Article 2.2.1.1, such situations should be construed narrowly. For example, Korea considers that an investigating authority should demonstrate that it cannot use available cost records to properly calculate the normal value before it is permitted to use an alternative methodology.[11]

18. Finally, even when using an alternative methodology, Korea notes that the investigating authority remains constrained by Article 2.2, which mandates that the cost of production must reflect the country of origin. Korea submits that benchmark adjustments are fact- and case-specific, and the calculation of cost in any given investigation must be determined based on the merits, in light of the particular facts of that investigation.[12] An investigating authority must properly adapt the chosen benchmark based on a consideration of all of the facts on the record before it. To the extent that an investigating authority must use an out-of-country benchmark, such a benchmark must reflect the situation *as it exists* in the country of origin, and not as the investigating authority *considers that it should be*, either based on a perceived distortion in the domestic market, or based on international reference prices.[13]

IV. Treatment of Non-Market Economies Under Article 2.2 of the Anti-Dumping Agreement

19. Korea considers that *Ad* Article VI and Article 15 of China's Accession Protocol to constitute limited exceptions to the general rule provided in Articles 2.1 and 2.2 of the Anti-Dumping Agreement. This general rule is that the margin of dumping must be determined through a comparison of the export price with the domestic sales price, or alternatively, with a third country sales price or constructed value if one of three circumstances described in Article 2.2 exists. The "particular market situation" provision constitutes one of the circumstances in which the investigating authority may disregard domestic market sales and determine normal value either through third country sales or constructed value. China's Accession Protocol specifically provides for deviation from the methods described in Articles 2.1 and 2.2, permitting a WTO Member to use a different methodology that is not based on a strict comparison with domestic prices or costs in China under specified circumstances.[14]

[8] Korea's third party submission, paras. 40-49.
[9] Appellate Body Report, *US − Clove Cigarettes*, para. 273.
[10] Panel Report, China − Broiler Products, para. 7.164; Panel Report, *China − Broiler Products (Article 21.5 − US)*, para. 7.29.
[11] See e.g. Panel Report, *China − Broiler Products*, para. 7.161.
[12] Panel Report, *Egypt − Steel Rebar*, para. 7.393.
[13] See Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.81.
[14] Protocol on the Accession of the People's Republic of China, WT/L/432.

20. As exceptions to this general rule, Korea considers that the circumstances described in *Ad* Article VI and Article 15 of China's Accession Protocol must be viewed as distinct from the circumstances described in Article 2.2. The rules applicable to NMEs are based on the particular influence and intervention of the government that exists in such NMEs rather than individual factors that may affect the comparability between the export price and domestic sales price. On the other hand, a "particular market situation" deals with specific circumstances that affect the domestic market that render domestic sales prices incomparable to export prices, which might *include* government influence or intervention. In order to find a particular market situation for government influence or intervention, however, the investigating authority must find that such government involvement disturbs the proper comparison between normal value and export value.

21. Korea considers the jurisprudence relating to costs of NME producers under Article 2.4 of the Anti-Dumping Agreement provides limited guidance in this Panel's consideration of Indonesia's cost of production under Article 2.2.1.1. The Panel should be cautious in applying findings relating to non-market economy producers in cases involving market economy producers.

V. Interpretive Value of US – Anti-Dumping and Countervailing Duties (China)

22. Lastly, Korea notes that Indonesia cites statements of the panel and Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* which in turn refer to evidence not on the record in this proceeding. Korea does not necessarily consider those statements to constitute "legal interpretations". Nonetheless, Korea considers these statements to hold authoritative value in that they represent statements and observations adopted by the Dispute Settlement Body in interpreting the provisions at issue. Accordingly, Korea considers that the Panel should give weight to these observations in conducting its interpretive analysis.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. Introduction

1. In this executive summary, the Russian Federation summarizes its views presented to the Panel in its oral statement at the third party session of the first substantive meeting with the Panel and answers to the Panel's questions following this meeting.

2. The Russian Federation provides comments on certain issues on the interpretation of Articles 2.2 and 2.2.1.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter − "Anti-Dumping Agreement") which are determinative for the maintenance of the balance of rights and obligations of the WTO Members with regard to anti-dumping disciplines.

II. Neither Article 2, nor any other provisions of the Anti-Dumping Agreement mention the term "input" or "input prices"

3. The Russian Federation would like to stress that neither Article 2, nor any other provisions of the Anti-Dumping Agreement mention the term "input" or "input prices". According to Article 2.1 *a product* is being dumped when it is "introduced into the commerce of another country" at an export price that is "less than its normal value". As the Appellate Body explained, "dumping" and "margin of dumping" can only be established for the product under consideration as a whole.[1] The term "normal value" of the product refers to "the comparable price, in the ordinary course of trade, for the *like product* when destined for consumption in the exporting country".[2]

4. Article 2.2 of the Anti-Dumping Agreement provides for alternative methods for determination of the normal value of *the like product*. This provision allows, in particular, construction of normal value, but only with respect of the like product as a whole and *not* for the input involved. Also, the other alternative method provides for comparison with a comparable price of *the like product* when exported to an appropriate third country and *not* for the input involved. In case of injurious dumping an anti-dumping duty is imposed on *the product* that is considered and found to be dumped, i.e. *not on the input* of that product.

5. Thus, the focus of the analysis is on the investigated exporter or producer of the product under consideration, i.e. *not* on the producer of the input used for manufacturing the product under consideration.

III. It is exporter, not the government that engages in practices that result in situations of dumping

6. Dumping arises from the pricing behavior of an exporter of the product under consideration.[3] An individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* the investigated exporter shall not exceed its margin of dumping.[4]

7. In *US − Anti-Dumping and Countervailing Duties (China)* the Appellate Body confirmed that the existence of dumping is determined by comparing the prices set by the individual exporter and examining the choice of the behavior of that exporter in setting these prices.[5] It follows that the investigated exporter or producer can be responsible only for its pricing policies, but not for government regulation.

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[1] Appellate Body Report, *US − Softwood Lumber V*, para. 99.
[2] Anti-Dumping Agreement, Article 2.1. (emphasis added)
[3] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 94. (See also Appellate Body Report, *US − Zeroing (Japan)*, para. 156 (referring to Appellate Body Report, *US − Zeroing (EC)*, para. 129)).
[4] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 94.
[5] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 568.

IV. The interpretation of the term "proper comparison" in Article 2.2 of the Anti-Dumping Agreement

8. Drafters of Articles 2.2 of the Anti-Dumping Agreement did not provide a specific definition for the term "proper comparison". This fact suggests that drafters did not intend to assign to this term a special meaning that would be different from the one established through the application of customary rules of interpretation of public international law.

9. The Russian Federation recalls that the meaning of the term "proper" is elaborated, in particular, in the context of Article 17.6(i) of the Anti-Dumping Agreement. According to the Appellate Body the ordinary meaning of "proper" suggests "accurate" or "correct".[6] The interpretation of the word "proper" in the context of Article 2.2.1.1 of the Anti-Dumping Agreement (the second sentence) confirms this understanding.[7]

10. Based on this ordinary meaning, "a proper comparison" is an accurate, correct comparison. The phrase "proper comparison" is part of the expression "such sales do not permit a proper comparison" in Article 2.2 of the Anti-Dumping Agreement. In its turn the phrase "such sales" refers to sales of the like product in the domestic market of the exporting country. Article 2.2 of the Anti-Dumping Agreement concerns the determination of the normal value. The phrase "the margin of dumping shall be determined by comparison with "either" a comparable price of the like product …" or constructed normal value (i.e. "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits") indicates that an investigating authority needs to compare the export price with the normal value in order to evaluate the pricing behavior of the exporter or producer under the investigation.

11. It follows that the word "proper" in Article 2.2 of the Anti-Dumping Agreement relates to correct determination of the pricing behavior of individual exporter or producer.

12. The use by the drafters of different wordings in different obligations ("proper comparison" in Article 2.2 and "fair comparison" in Article 2.4 of the Anti-Dumping Agreement) with different requirements should be respected. The structure of Article 2 of the Anti-Dumping Agreement and interconnection of its provisions support the understanding that the obligation to ensure fair comparison arises after the normal value and the export price are established. According to the WTO jurisprudence, "the subject-matter of Article 2.4, i.e. differences affecting the comparability of the normal value and the export price, can be contrasted with that of Articles 2.1, 2.2 − including its subparagraphs − and 2.3 which pertain to the methodology for determining the normal value and the export price".[8]

V. The SCM Agreement is not applicable for the determination of dumping

13. The Russian Federation strongly disagrees with the proposition to blur the line between obligations under the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (hereinafter − "SCM Agreement") by including the terms "government regulation"[9] into the scope of application of the Anti-Dumping Agreement.

14. Anti-Dumping Agreement addresses issues of pricing behavior of foreign exporters or producers. In contrast, the SCM Agreement addresses conferring benefit to the subsidy recipient by government.[10] Therefore, Anti-Dumping Agreement and SCM Agreement regulate different issues. Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement clearly support this understanding.

15. It is inappropriate to include in the scope of one agreement the scope and definitions used in the other agreement. This understanding has been confirmed by the Appellate Body. The Russian Federation recalls that in *US − Anti-Dumping and Countervailing Duties (China)* the Appellate Body clarified that the SCM Agreement is not applicable for the determination of

[6] Appellate Body Report, *Thailand − H-Beams*, para. 116. (footnote omitted)

[7] Panel Report, *China − Broiler Products (Recourse to Article 21.5 of the DSU by the United States*), paras. 7.34-7.37.

[8] Panel Report, *EU − Biodiesel (Argentina)*, para. 7.296.

[9] Australia's First Written Submission, paras. 135-139.

[10] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 568.

dumping.[11] The Appellate Body underlined the major difference between dumping and a subsidy as two different phenomena which shall be determined under distinct rules: dumping − under the Anti-Dumping Agreement and subsidy − under the SCM Agreement.

16. In case the difference between the subject issues of the Anti-Dumping Agreement and SCM Agreement is blurred, the line between distinct obligations under the distinct agreements will also be blurred. If that happens, the scope of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement will be changed. Therefore, the object and purpose of the Anti-Dumping Agreement focused on the pricing behavior of the foreign exporters or producers would be inadmissibly expanded. Such an approach is contrary to the intention of drafters to treat different problems differently with different instruments.

VI. Article 2.2 of the Anti-Dumping Agreement provides mandatory rule for constructing normal value on the basis of the cost of production of the like product in the country of origin

17. The Russian Federation wishes to draw the Panel's attention to the terms used in Article 2.2 of the Anti-Dumping Agreement and in Article VI:1(b)(ii) of the General Agreement on Tariffs and Trade 1994 (hereinafter − "GATT 1994") and then to what the Appellate Body said in *EU − Biodiesel (Argentina)* with respect to the use of information or evidence from outside the country of origin.

18. The phrases "the cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "the cost of production of the product in the country of origin" in Article VI:1(b)(ii) of the GATT 1994 concern "the" cost of production of "the" product in "the" country of origin, informing investigating authorities what specific cost shall be used in the construction of the normal value of the product under consideration. These phrases clearly provide that the basis for the construction of the normal value must be the cost of production of the product under consideration *in the country of origin*.

19. The Appellate Body has clarified that if an investigating authority relies on information other than the records of investigated exporters and producers, it "has *to ensure* that such information is used to arrive at the 'cost of production [of the like product] in the country of origin'".[12] According to the Appellate Body, this may require the investigating authority to adapt that information "in order to ensure that it represent[s] the cost of production" of the like product in the country of origin. The purpose of adaptation is to obtain the amount reflecting the cost of production of the like product in the country of origin, i.e. the cost of production available to domestic producers during the period of investigation. This is the key consideration to determine whether an investigating authority has properly adapted the out-of-country information to arrive at the cost of production in the country of origin.

20. The costs of production in no circumstances can be adjusted, established or refuted with a reference to information that does not have a genuine relation with the product under consideration produced in the country of origin.

21. Thus, Article 2.2 of the Anti-Dumping Agreement does not provide for any possibility to construct an input price. Just the opposite − there is mandatory obligation to construct normal value on the basis of the cost of production in the country of origin as it is.

VII. Only explicit derogations in the Anti-Dumping Agreement or an Accession Protocols of certain Members can provide the legal basis for an investigating authority to use prices or costs other than those in the country of origin of the product under consideration

22. Recalling the Appellate Body's guidance that "provisions of the Anti-Dumping Agreement are explicit regarding the permissibility of disregarding certain matters",[13] the Russian Federation stresses that there is a limited number of the explicit provisions that would allow investigating authorities when determining the normal value to disregard costs reflected in investigated producers' and exporters' records (in case both conditions of the first sentence of Article 2.2.1.1 of the Anti-

[11] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 568.
[12] Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.73. (emphasis added)
[13] Appellate Body Report, *US − Continued Zeroing*, para. 286 (referring to the Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 103).

Dumping Agreement are satisfied). Only the second Ad Note to Article VI:1 of the GATT 1994 (which is incorporated by reference into the Anti-Dumping Agreement through Article 2.7 thereof), and the protocols of accession of certain Members can provide the legal basis for an investigating authority to use prices or costs other than those in the country of origin of the product under consideration. These provisions suggest "that their drafters considered explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin".[14] Only with respect to these provisions an investigating authority may rely on the expression "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement.

23. There is no other legal basis in the Anti-Dumping Agreement for an investigating authority to reject records kept by investigated producers and exporters when the two conditions in Article 2.2.1.1 of the Anti-Dumping Agreement are satisfied, and substitute them with prices outside the country of origin in determination of dumping. As the Appellate Body in *US – Carbon Steel*[15] explained, the fact that a particular treaty is silent on a specific issue must have some meaning. Words that are not in the text of Article 2.2.1.1 of the Anti-Dumping Agreement must not be incorporated there.

24. The same applies to the construction of the normal value on the basis of Article 2.2 of the Anti-Dumping Agreement. Any attempts to reject domestic prices and costs and substitute them in constructed normal value with prices outside the country of origin through the application of provisions other than Article 2.7 of the Anti-Dumping Agreement or provisions on dumping enshrined in the protocols of accession of certain Members are illegal.

VIII. The term "the particular market situation" does not allow a broad interpretation

25. A number of the WTO Members involved in this proceeding promote a broad interpretation of the term "particular market situation". They use indefinite article "a" to show that there may be indefinite number of such situations.[16]

26. To sustain such a broad interpretation of the term "particular market situation", specific treaty language is required.[17] However there is no such treaty language in the Anti-Dumping Agreement. Thus, a broad interpretation of the term "the particular market situation" should fail.

27. The Russian Federation considers that what constitutes "the particular market situation" should be defined in accordance with Article 31 of the Vienna Convention on the Law of Treaties by considering the ordinary meaning of this term in its context, i.e. the operation of the specific rules of the Anti-Dumping Agreement governing the determination of normal value. The proper interpretation is a textual interpretation. As the Appellate Body explained, "the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms".[18]

28. With the term "particular market situation" in Article 2.2 of the Anti-Dumping Agreement the definite article "the" is used. Significantly, the terms "like product", "ordinary course of trade", "domestic market", "exporting country", "margin of dumping", "cost of production in the country of origin" are also used with the definite article "the". Thus, according to the text of the Anti-Dumping Agreement there is only one like product, only one ordinary course of trade, only one domestic market, only one exporting country, only one margin of dumping, only one cost of production in the country of origin.

29. Further, both words "market" and "situation" in the term "the particular market situation" are used in Article 2.2 of the Anti-Dumping Agreement in the singular form. The word "particular" takes the position of an adjective in Article 2.2 of the Anti-Dumping Agreement and refers to the noun "situation". Moreover, the text of Article 2.2 of the Anti-Dumping Agreement clearly indicates that the term "the particular market situation" refers to domestic market of the exporting country. The text does not refer to a sector of the domestic market or some market participants.

[14] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.241.
[15] Appellate Body Report, *US – Carbon Steel*, para. 65.
[16] Japan's Third Party Submission, paras.11-12.
[17] Appellate Body Report, *EC – Hormones*, para. 165.
[18] Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 37.

30. Article 2.2 of the Anti-Dumping Agreement does not include any textual indication of an ability of the investigating authority to take into account government influence on the domestic market for the product under consideration, in particular such as imposing price floors or ceilings. Neither the term the "particular market situation" can be interpreted to mean a combination of circumstances.

31. The existence of "the particular market situation" does not give carte blanche to investigating authorities. Even in cases when sales of the like product in the ordinary course of trade do not permit a proper comparison because of the particular market situation and an investigating authority resorts to the second alternative method to construct the normal value, the latter shall be based on the cost of production in the country of origin. There is no way to reject costs in the country of origin and substitute them with prices outside the country of origin in constructing the normal value.

32. Far-reaching interpretation of the term "the particular market situation" as unlimited list of circumstances is contrary to the intention of the drafters as expressed in the text in the Anti-Dumping Agreement. Entitling an investigating authority to disregard domestic sales of the like product in a broad set of circumstances would lead to a change in the scope of the rights and obligations of the WTO Members. Such change is contrary both to Article 2.2 of the Anti-Dumping Agreement and to the requirements of Article 3.3 of the DSU prescribing the maintenance of a proper balance between the rights and obligations of the Members.

33. This interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties is the only legitimate interpretation of the term "the particular market situation". There are no other permissible interpretations of this term within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement. If an investigating authority finds that a situation constitutes "the particular market situation", but this finding is not based on legitimate interpretation of this term, such finding would be inconsistent with Article 2.2 of the Anti-Dumping Agreement.

IX. Conclusion

34. In sum, the text of the Anti-Dumping Agreement does not allow an investigating authority to examine the effect of a governmental measure of the exporting country on input, and, as a result, whether such effect influences the prices of the product under investigation.

35. Such terms as "government regulation", "effect of government regulation", "input" are not in the legal text of the Anti-Dumping Agreement. Any interpretations of the anti-dumping disciplines based on these words would effectively undermine WTO Members' rights under the Anti-Dumping Agreement.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

I. INTRODUCTION

1. This executive summary contains comments made by Thailand in response to the Panel's questions at the third party session on 19 December 2018 pertaining to the interpretation of the *Agreement on the Implementation of Article VI of GATT 1994* ("Anti-Dumping Agreement"). Thailand's views focus on legal questions without taking a position on the facts presented by the parties to the dispute.

II. THE USE OF THE PARTICULAR MARKET SITUATION PROVISION

2. Thailand expresses its systemic concerns on the increasing frequency of using the particular market situation provision by investigating authorities. In this regard, Thailand notes the following.

3. First, resorting to the particular market situation provision should be confined to specific circumstances envisaged in Article 2.2 of the Anti-Dumping Agreement. An investigating authority may depart from the usual method in calculating normal value as a result of the particular market situation only if it necessarily finds that the situation in question prevents a proper comparison of domestic sales price to export sales price. In Thailand's view, Article 2.2 of the Anti-Dumping Agreement does not address *any* market situation, but only the particular situation that does not permit a proper comparison in revealing dumping.

4. Second, the particular market situation does not and should not cover government influence in the form of subsidies within the context of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Thailand urges the panel to exercise caution in interpreting the provisions of the Anti-Dumping Agreement so as not to allow circumvention of the rules under the SCM Agreement, or to condemn government subsidies which are not meant to be condemned under the SCM Agreement.

III. A PARTICULAR MARKET SITUATION REQUIRES A CASE-SPECIFIC ANALYSIS

5. A factual analysis on a case-by-case basis is required in order to determine whether the particular market situation in the sense of Article 2.2 of the Anti-Dumping Agreement exists. To constitute a "particular market situation" under Article 2.2 of the Anti-Dumping Agreement, the key issue is not how many market participants are being affected by the situation in question; rather, it is whether the existence of the situation has an impact on domestic sales price in such a way that it renders the proper comparison with export sales price impermissible for the purpose of dumping determination.

6. In considering whether domestic sales of the product under consideration warrant a proper comparison to export prices, an investigating authority may take into account government influence on the market of the exporting country. However, given the fact that a government in a regulatory capacity may always have certain influence on the market, *e.g.* by imposing minimum wages or environmental standards, the particular market situation provision should not be interpreted to capture *any* government actions that may have an effect on the formation of domestic sales price. A particular market situation may exist only if the investigating authority finds that, based upon the facts and evidence before it, domestic sales price of the product under consideration has been distorted by government interference. Thailand considers that the determination as to whether government influence would amount to interference in the sense that gives rise to a "particular market situation" requires a case-specific analysis.

IV. THE PROPER COMPARISON IS DISSIMILAR FROM THE FAIR COMPARISON

7. Thailand notes that the "fair comparison" under Article 2.4 of the Anti-Dumping Agreement seeks to ensure that a comparison between the normal value and the export price is fair by adjusting differences which may affect price comparability. The proper comparison under Article 2.2 of the Anti-dumping Agreement, on the other hand, relates to the step *before* the adjustment occurs when considering if the domestic sales price may be used as a basis for deriving normal value in order to ensure that the comparison to the export price is proper for the purpose of the determination of dumping.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. CLAIMS REGARDING "PARTICULAR MARKET SITUATION" IN ARTICLE 2.2

1. Article 2.2 of the Anti-Dumping Agreement establishes certain alternatives for determining normal value when, "because of the particular market situation … such sales do not permit a proper comparison". Article 2.2, which includes the phrase "proper comparison," links back to the dumping definition in Article 2.1. If a particular market situation affects price comparability, *i.e.*, if a particular market situation indicates that sale prices of the like product do not reflect market-based conditions, such sale prices need not be used as a basis for normal value because they would not "permit a proper comparison".

2. The phrase "particular market situation" as it appears in Article 2.2 addresses a specific condition or set of circumstances taking place in the domestic market. It is the position of the United States that an investigating authority may find that a "particular market situation" exists when the evidence of record demonstrates that a specific condition or set of circumstances renders the comparable price, in the ordinary course of trade, for the like product, unfit as a proper comparison. The United States therefore agrees with Australia that "the ordinary meaning of the term 'particular market situation' … is broad" and that "there is no support for Indonesia's argument that a 'particular market situation' is an 'exceptional' situation." The United States also agrees with Australia that a "particular market situation" may include "any condition, state or combination of circumstances in respect of the buying and selling of the like product … in the market of the exporting country … that is distinguishable and not general".

3. The findings of an investigating authority in a countervailing duty investigation do not otherwise prohibit the investigating authority from finding in an antidumping duty investigation that certain actions by a government give rise to a "particular market situation". Article 2.2 contains no textual language which prohibits an analysis of State interference in assessing whether a particular market situation exists that precludes a proper comparison. As a result, an investigating authority may find it appropriate to further analyze whether a particular market situation exists based on State interference. If State interference causes domestic market conditions, including in respect of the domestic market for inputs, to be materially different than market-based conditions (such as those reflecting normal commercial principles), this could result in artificial sales prices of the like product that are not fit for a proper comparison. The United States thus agrees with Australia's statement that State interference "is a factor that can result in the domestic price not being suitable to use as the basis for the 'normal value' because the affected domestic sales do not permit a proper comparison with the export price".

4. Further, since the determination of normal value, by definition, must exclude all transactions not made in the ordinary course of trade, the comparison between normal value and export value is, similarly by definition, an asymmetrical comparison because the determination of export price does not exclude all transactions not made in the ordinary course of trade. As the Appellate Body has explained, "the duties of the investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, … irrespective of the reason why the transaction is not 'in the ordinary course of trade'. Investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation … would distort what is defined as '*normal* value'". Accordingly, the United States disagrees with Indonesia that an investigating authority may not disregard domestic sales prices pursuant to a "particular market situation" whenever the identified situation affects both domestic and export sales.

5. It is also nonsensical to assert that the pre-Uruguay Round discussions of an *Ad Hoc Group* about "input dumping" have a bearing on the meaning of "particular market situation". The *Ad Hoc Group* did not discuss input dumping in the context of a particular market situation, nor did it mention

particular market situation in its report. Besides, the issue in this dispute does not involve the question of whether State interference results in input dumping. The issue here involves the question of whether State interference in the marketplace has resulted in a domestic price or cost that does not reflect marked-based conditions. An input does not need to be dumped before an investigating authority concludes that domestic price does not reflect market-based conditions. Indeed, a particular market situation may exist where State interference results in a domestic price or cost that is higher than it would have been absent such interference. Therefore, the United States disagrees with Indonesia that statements made by an *Ad Hoc Group* in 1984 should be viewed by the Panel as demonstrating that a "particular market situation" cannot address State interference in the market for an input used to produce the like product.

6. Finally, nothing in the text of GATT 1994 Article VI, the Anti-Dumping Agreement, or other relevant texts, indicates that dumping reflects only discriminatory pricing strategies of individual producers or exporters. The WTO agreements reflect that "dumping" is a price difference. Article 2.1 of the Anti-Dumping Agreement states that "a product is considered as being *dumped*, *i.e*. introduced into the commerce of another country *at less than* its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". GATT 1994 Article VI:1 uses almost identical language. On the other hand, the phrase "international price discrimination" does not appear in the text of the GATT 1994 or the text of the Anti-Dumping Agreement. Instead, dumping relates to a price difference − where export price is lower than normal value − irrespective of any motivation of the producer or exporter.

II. Claims Regarding the Second Condition of Articles 2.2.1.1 and Article 2.2

7. The introductory phrase "[f]or the purpose of paragraph 2" indicates that Article 2.2.1.1 should be read together with Article 2.2. The costs calculated pursuant to Article 2.2 must be capable of generating "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales". Given that the use of costs under Article 2.2.1.1 must be capable of generating an appropriate proxy for the prices of sales in the ordinary course of trade, the term "cost" must be understood as referring to costs that reflect market-based conditions associated with producing the like product in the exporting country.

8. The United States disagrees with Indonesia that the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement obligated Australia to accept without question the costs recorded in the respondents' records. Article 2.2.1.1, properly interpreted, does not mean that the costs reported in the records kept by the exporter or producer under investigation must always be used absent any consideration. To the contrary, an investigating authority may examine such records. That examination may include, among other considerations, a substantive inquiry into whether the costs kept by the exporter or producer under investigation do not "reasonably reflect" objectively real, economically meaningful data associated with the production and sale of the product under consideration. The United States agrees then with Australia that in such a situation, an unbiased and objective investigating authority would have a basis under the Anti-Dumping Agreement to reject or adjust a cost that does not reflect market-based conditions, so long as its determination was based on a reasoned and adequate explanation.

9. The United States further disagrees with Indonesia's assertion that "the Appellate Body and panels have rejected the argument that [Article 2.2.1.1] relates to whether the costs, themselves, are reasonable". The Appellate Body in *EU − Biodiesel (Argentina)* specifically *rejected* the argument that "'no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do'". As the Appellate Body explained, "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured; whether the costs incurred have been over- or under-stated; and whether non-arm's-length transactions or other practices affect the reliability of the reported costs".

10. For example, both the panel and Appellate Body in *EU − Biodiesel (Argentina)* confirmed that a cost based on an affiliated party transfer price should not be used under Article 2.2.1.1, even if that transfer price is reflected in the investigated firm's records. Such a non-arms-length sale is exactly the type of transaction for which an investigating authority may look beyond the four corners

of an investigated firm's records and determine whether the transaction does not reasonably reflect real economic costs involved in producing the product in the exporting country, especially because the reported transfer price may fail to accurately and reliably reflect the interaction between independent buyers and sellers. The authority under Article 2.2.1.1 to reject a non-arms-length transaction makes clear that "costs" that are "associated with" the production and sale of a product must be understood as costs that "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration".

11. The concept that underlies the well-established concern regarding related, affiliated, associated, or non-independent party transactions is that such transactions may not reflect market-based conditions where "buyers and sellers come together voluntarily to decide on what products to produce and sell and buy, and how resources such as labour and capital should be used". The same concept also underlies concerns that may arise for other types of transactions. The question of whether the records of the exporters or producers reasonably reflect the costs associated with production and sale of the product under consideration is a question which needs to be assessed on a case-by-case basis, taking into account the evidence before the investigating authority, and the determination that it makes.

12. The focus of the Panel's inquiry in this matter should be on whether Australia's findings for rejecting input costs, based on the facts and circumstances of its investigation, is one that could have been reached by an objective and unbiased investigating authority. An investigating authority may examine whether a respondent's recorded costs "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration". Australia had a sufficient basis to examine whether input prices distorted by State interference resulted in a particular market situation that rendered domestic market paper prices unfit for a proper comparison under Article 2.2. It would be incongruous to consider that Australia was prohibited from examining whether those *same* recorded pulp costs reasonably reflect the costs associated with the production and sale of the product under consideration for purposes of constructing normal value under Article 2.2.1.1. As explained, those costs, to be used, must be capable of generating an "appropriate proxy" for the price of the like product "in the ordinary course of trade".

13. Finally, Article 2.2 does not prohibit the use of out-of-country information to evaluate recorded costs, or to adjust or replace recorded costs, when formulating the appropriate cost for an individual producer. Article 2.2 also does not require an investigating authority to adapt an out-of-country source for an input price back to the cost that it just rejected as incapable of generating an appropriate proxy for the price of the like product, in the ordinary course of trade, in the domestic market of the exporting country. The United States agrees with Australia that "it simply cannot be the case that amounts that were validly rejected under Article 2.2.1.1 of the Anti-Dumping Agreement must then be used to determine the constructed normal value under Article 2.2 of the Anti-Dumping Agreement". Therefore, contrary to Indonesia's position, an investigating authority does not need to adapt an out-of-country source for an input price under Article 2.2 to match the rejected cost for that input.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

14. Just as one could "envis[ion] many reasons for which transactions might *not* be 'in the ordinary course of trade'," it is possible to envision many reasons for which transactions might not permit a proper comparison because of a "particular market situation". An investigating authority would therefore need to determine on a case-by-case basis, based on the facts and circumstances before it, whether domestic market conditions constitute a "particular market situation". If those facts and circumstances indicate that a "particular market situation" exists because of government interference in the marketplace, nothing in the WTO agreements requires an investigating authority to ignore this situation and find that the sales of the like product subject to the "particular market situation" permit a proper comparison. If government interference causes domestic market conditions to be materially different than market-based conditions (such as those reflecting normal commercial principles), this could result in artificial sales prices of the like product that are not fit for a proper comparison.

15. Likewise, if the facts and circumstances indicate that a "particular market situation" affects both sales of the like product and sales of the product under consideration, nothing in the WTO agreements requires an investigating authority to ignore the "particular market situation" and

find that sales of the like product subject to such a situation permit a proper comparison. As the European Union noted, under Article 2.3 of the Anti-Dumping Agreement, the export price of the product under consideration is the price of the product as exported to the importing country. An investigating authority generally is not concerned with why the export price is what it is. Indeed, unlike normal value, the export price may include sales that are *not* in the ordinary course of trade because the prices are below the product's costs of production. Unlike normal value, the export price may include sales that do *not* reflect normal commercial principles. Unlike normal value, the export price may include sales in which the domestic cost of an input used in the manufacture of product as exported does *not* reflect a non-arm's length transaction.

16. Article 2.2 describes two specific conditions or sets of circumstances for when these "such sales" do not permit a "proper comparison" for the calculation of "normal value". A low volume of these sales is one set of circumstances. Here, a problem does not exist with respect to the sales themselves, just with how many there are and whether, from a illustrative standpoint, sufficient data points exist to determine whether "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value".

17. A "particular market situation" is another set of circumstances for when "such sales" do not permit a "proper comparison". Here, a problem does exist with respect to the sales themselves, such that they cannot be used to determine whether "a product is … introduced into the commerce of another country at less than its normal value". As the Appellate Body explained in *US − Hot-Rolled Steel*, investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation … would distort what is defined as '*normal* value'".

18. The duties of an investigating authority are the same under Article 2.1 of the Anti-Dumping Agreement with respect to transactions of the like product subject to a "particular market situation". An investigating authority must exclude *all* such sales from the calculation of normal value if they do not permit a proper comparison, because to include such sales in this calculation would distort what is defined as "normal value". The phrase "proper comparison" as set out in Article 2.2 therefore reinforces the requirement that, before an investigating authority can determine if the "product is to be considered as being dumped," it must first exclude from the calculation of normal value all transactions of the like product in the domestic market that are subject to the "particular market situation".

19. Finally, the adverb "normally" moderates the obligation established in the first sentence of Article 2.2.1.1, because while "normally" confirms that "under normal or ordinary conditions" costs should be calculated on the basis of the records kept by the exporter or producer under investigation," it also directs that where conditions are demonstrated to be *not* normal or *not* ordinary, costs should *not* be calculated on the basis of these records. The adverb "normally" thus anticipates the two conditions to the first sentence of Article 2.2.1.1 introduced by the conjunction "provided that," as well as reflects that certain costs may be deemed unsuitable through the introductory phrase "[f]or the purpose of paragraph 2". It provides for a degree of flexibility and expressly contemplates that there will be instances when the evidence demonstrates that an investigating authority should *not* calculate costs on the basis of the records kept by the exporter or producer, even when these records satisfy the two conditions that follow the conjunction "provided that".

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

20. A "particular market situation" could affect all market participants, or its impact could be limited to some market participants. The definition of a market "situation" would be the "condition or state of" the market − which may relate to one, some, or all participants. This suggests that what constitutes a particular market "situation" should be evaluated on a case-by-case basis, based on the facts and circumstances before the investigating authority. An investigating authority is permitted to take into account government influence in the domestic market under the particular market situation provision. Also, a situation that equally affects both domestic and export markets can constitute a particular market situation.

21. The phrase "proper comparison" in Article 2.2 of the Anti-Dumping Agreements relates to the comparison that reveals whether a "product is to be considered as dumped", which starts with ascertaining the "normal value" of a product (Article 2.1). The normal value necessary for a dumping

comparison requires a *comparable* price, in the ordinary course of trade, preferably based on the like product in the domestic market of the exporting country (again, Article 2.1). Article 2.2 then reinforces that a suitable normal value is necessary for a "proper comparison". If there are no sales in the ordinary course of trade, resort may be made to a suitable proxy for the comparable price, in the ordinary course of trade, in the domestic market. Alternatively, if the particular market situation or the low volume of sales in the domestic market do not result in a suitable normal value (for example, because the sales do not generate a comparable, market-determined price), Article 2.2 also provides for resort to a proxy for the comparable price, in the ordinary course of trade. Thus, a "proper comparison" is one that starts with a normal value reflecting a *comparable* price, in the ordinary course of trade, that can start to answer the question whether a product is to be considered as dumped.

22. The phrase "proper comparison" in Article 2.2 and the phrase "fair comparison" in Article 2.4 are aimed at different lines of inquiry. Article 2.2 establishes certain alternatives for establishing normal value, when there are no domestic sales in the ordinary course of trade or when, because of a "particular market situation" or a "low volume of ... sales in the domestic market of the exporting country", "such sales do not permit a proper comparison". In contrast, the text of Article 2.4 presupposes that an investigating authority has established a normal value pursuant to Articles 2.1 and 2.2 and an export price pursuant to Article 2.3 and obligates an investigating authority to make a "fair comparison" *between* normal value and export price when determining the existence of dumping and when calculating a margin of dumping.

23. The Panel otherwise should not rely on the statements of the panel and Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, discussed by Indonesia at paragraphs 119-121 of its first written submission, as legal interpretations because Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, which are the basis of the Panel's terms of reference in this dispute, were not the object of a legal interpretation by the panel in *US – Anti-Dumping and Countervailing Duties (China)* and were not raised on appeal. The statements of the panel and Appellate Body are therefore in the nature of *obiter dicta* – statements not necessary to resolve the legal issues before the panel or raised on appeal.

24. Finally, Article VI:5 of the GATT 1994 is the only provision of the covered agreements that pertains to the interrelationship between the Anti-Dumping Agreement and the SCM Agreement. As the only provision linking the remedy in an anti-dumping proceeding with the remedy in a countervailing proceeding, Article VI:5 demonstrates that Members agreed only to constrain concurrent application of anti-dumping and countervailing duties where imposing anti-dumping duties would compensate for "the same situation of dumping or *export* subsidization". If the Members intended to constrain concurrent application in other situations, they would have provided so explicitly.

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