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28 December 2016

Mr Dale Seymour
Commissioner of the Anti-Dumping Commission
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Dear Mr Commissioner,

Non-Confidential Submission regarding SEF341 and PAD341A

Genuine Steps to resolve disagreement about errors of law in PAD 341A and SEF341

WITHOUT PREJUDICE

I act for PT Indah Kiat Pulp and Paper Tbk, PT Pindo Deli Pulp And Paper Mills Tbk, and PT Pabrik Kertas Tjiwi Kimia Tbk, companies in the Sinar Mas group.

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My clients are:

- aggrieved by your decision published in Anti-Dumping Notice No 2016/120 in respect of which you gave some reasons in Preliminary Affirmative Determination Report No 341A. I note that I wrote to you on 2 December 2016 requesting that you furnish a statement in writing setting out your reasons for two decisions on questions of law contained in PAD341A, that is under section 269TAC(2)(a)ii) of the *Customs Act 1901*; and under Regulation 43(2)(b)(ii) of the Customs (International Obligations) Regulations 2015 and, on 23 December 2016, you replied to decline to provide any explanation of your reasons for your decisions on these two questions of law; and
- concerned that SEF341 indicates that you are proceeding with the investigation on the basis of the same two errors of law, so that it is possible that you will issue a recommendation to the Minister under section 269TEA which is based on the same two errors of law and possible that the Minister may issue a notice under section 269TG based upon the same two errors of law.

Roger D Simpson & Associates Pty Ltd will lodge a submission responding to several aspects of SEF341.

This letter is limited to setting out an explanation of the basis on which it is argued that the Commissioner has made errors of law. I am confident that upon receiving this submission, you will realize that you have been proceeding on the basis of erroneous interpretations of the law and that you will decide (1) to cease requiring securities to be taken pursuant to PAD341A, and (2) to conduct the remainder of the investigation according to a correct interpretation of section 269TAC(2)(a)(ii) and Regulation 43(2)(b)(ii).

If you are not convinced of the correctness of my arguments that you are making two errors of law, I would be pleased to have further discussions so that I can assist you to analyse the matter, and for that purpose, I would be grateful if you would in the first instance contact me to arrange a telephone meeting to discuss the two legal points. In that way, we may be able to agree on the correct interpretation that you should apply.

In the event that we are not able to resolve our disagreement and that my client decides to seek judicial review, it would be necessary for me to certify to the Court, that my client has made genuine steps to resolve the disagreement with you before proceedings are instituted. Therefore, in any subsequent judicial proceedings, this letter would become evidence of genuine steps within the meaning of Rule 8.02 of the Federal Court rules and Part 2 of the *Civil Dispute Resolution Act 2011* (Cth).

1. Your error of law under section 269TAC(2)(a)(ii) – the market situation issue

1.1 Your findings on the market situation issue

In both PAD 341A and SEF341, you have indicated that for Indonesian exporters, you have:

- determined the normal values under section 269TAC(2)(c) which is the constructed cost method (PAD341A at 6.9.1 on p35; SEF341 at 6.9.1 on p40);
- decided that you cannot determine normal values under section 269TAC(1) because the circumstance described in Section 269TAC(2)(a)(ii) exists because "there is a 'market situation' within the Indonesian A4 copy paper market such that sale in that market are not suitable for use in determining a price under section 269TAC(1)" (quoting from PAD341a at 6.6 on p30; and SEF at 6.5 on p33).

Your decision that you cannot determine normal values under section 269TAC(1) and that you can determine normal values under section 269TAC(2)(c) is based on your finding that the circumstances in section 269TAC(2)(a)(ii) exist.

Section 269TAC(2)(a)(ii) provides:

> Subject to this section, where the Minister:
> (a) is satisfied that:
> (i) …; or
> (ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);
> the normal value of goods exported to Australia cannot be ascertained under subsection (1); or

The reference to determining a price under subsection (1) is a reference to the ordinary method of basing the determination of normal value on sales in the domestic market of the country of export.

Section 269TAC(1) provides:

> (1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.'

In both PAD341A and SEF341, you have explained your legal interpretation of section 269TAC(2)(a)(ii) in the following way (at A2.3):

> The Act does not provide a definition of particular circumstances or factors which would satisfy the Minister that a 'market situation' exists.

Your next sentence acknowledges that the WTO *Anti-dumping Agreement* is relevant to the interpretation of section 269TAC(2)(a)(ii):

> The WTO Anti-Dumping Agreement is similarly silent in relation to the definition of the concept of a 'market situation' referred to within article 2.2.

Your report does not quote Article 2.2 or analyse the words of Article 2.2.

Your next sentence is followed by a quotation from the Commission's Dumping and Subsidy Manual (a document which is not a source of law) although your text does not include quotation marks to indicate which part of your text is a quotation from the Dumping and Subsidy Manual.

> In relation to determining whether a 'market situation' exists, the Commission's Dumping and Subsidy Manual states: [followed by this quote from page 35 of the Manual]
>
> In considering whether sales are not suitable for use in determining a normal value under subsection 269TAC(1) 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 which render sales in that market not suitable for use in determining prices under subsection 269TAC(1).

Government influence on prices or costs could be one cause of "artificially low pricing". Government influence means influences from any level of government.

In investigating whether a market situation exists due to governmental influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.

The remainder of explanation of your legal interpretation of section 269TAC(2)(a)(ii) is (PAD341A, A2.2, p87-88; SEF341, A2.3, p104-105):

The Commission considers that the analysis of a 'market situation' can involve the consideration of all relevant market variables in relation to the subject good in totality and that the term 'a situation' for the purposes of this assessment defies precise definition.

The Commission considers 'a situation' to refer to the presence of a factor or composite factors which collectively operate to cause a degree of distortion in the market that renders arm's-length transactions in the ordinary course of trade in that market unsuitable for use in determining normal values.

More specifically, the Commission considers that a 'market situation' assessment involves an examination of factors which may affect the interaction of supply and demand in a sector, industry or market, to the extent that prices and costs in that market can no longer be viewed as being established under normal market principles.

In assessing a 'market situation', the Commission considers that governments can directly or indirectly influence domestic prices through the imposition of restrictions on how prices are charged for a product. This influences can be through:
1. direct price regulation (floor or ceiling pricing mechanisms); or
2. indirect influence through policies [sic] that impact on the supply of the subject goods or the supply or price of major inputs used in the production of the subject goods.

The influence of a government does not, in itself, establish the existence of a 'market situation'. In assessing whether a 'market situation' exists, the Commission needs to examine both:
1. the effect such influence has on the market; and
2. the extent to which domestic prices are distorted and unsuitable for proper comparison with corresponding export prices.

The Commission considers that, in the context of this analysis, evidence of government policies and programs that specifically or indirectly flow to the relevant market under consideration may have an effect on domestic commerce with respect to the goods. The Commission holds that this information is relevant to the analysis of whether factors exist which can be characterised as a 'market situation' for the purposes of subsection 269TAC(2)(a)(ii) of the Act.

Consideration of whether a situation exists in the relevant market is concerned with the operation of policies and regulations (whether overt or implied) and their potential impact on the suitability of domestic selling prices for normal value purposes. Accordingly, the question to be answered is whether the relevant policies operate in a manner which:

> a) leads to a distortion of competitive market conditions in relation to the subject goods such that domestic sales are unsuitable for the purposes of determining normal value; and
> b) affects the conditions of commerce related to the production or manufacture of like goods such that the records of exporters cannot be relied upon to reasonably reflect competitive market costs associated with production in accordance with the provisions of subsection 43(2) of the Regulation.

That is the end of your explanation of your legal interpretation of section 269TAC(2)(a)(ii). The last point about the records of exporters relates to a different issue and is not relevant to the determination of whether there is a market situation within the meaning of section 269TAC(2)(a)(ii).

Then the report contains a section, A2.10, which contains analysis of the situation in the Indonesian market for A4 paper. Your conclusions are set out in section A2.10.3 (in PAD341A at p108-109 and in SEF341 p129-130). Your conclusion is that the domestic price of A4 copy paper is lower than it would have been in the absence of certain interventions of the government of Indonesia. You conclude that this is a 'market situation' and that the "domestic price for Indonesian A4 copy paper is not suitable for the determination of normal values under subsection 269TAC(1) of the Act.

The Reports also contain a section headed "Submissions received from interested parties" followed by a section headed "Commission's consideration of submissions received from interested parties". (PAD, 6.9.1 at p37-38 and SEF341, 6.9.1 at p42-43.). One of the responses gives further information about your legal interpretation of section 269TAC(2)(a)(ii). The submission was:

> "The alleged artificially lowering of the prices of inputs to manufacture does not in some unspecified way preclude a proper comparison of domestic selling with export prices, particularly when the same inputs to manufacture are used to produce the same products sold in the domestic market as sold for export. [In SEF341A, there are the additional words in brackets ("i.e., they equally impact both export and domestic prices.")

In the reports, your response is: (at PAD341A p38, SEF341 p43)

> "Whilst the findings of a market situation may be indicative of lower input costs for goods produced for domestic and export markets, where a market situation finding has been made that renders sales in that market as not suitable for use in determining a price under subsection 269TAC(1), normal values cannot be established on the basis of domestic selling prices."

In SEF341, section A2.10.4 deals with submissions by the Sinar Mas Group and the Indonesian Government in response to PAD341A. There the SEF report says:

> In regard to the concerns raised by the Sinar Mas Group concerning the consistency of the Commission's approach to its market situation assessments with Article 2.2 of the Anti-Dumping Agreement, it is the Commission's approach to follow its legislative requirements and the guidance provided by the Commission's Dumping and Subsidy Manual.

In making this response, the SEF report does not say anything about the significance of Australia's obligations under Article 2.2 to the interpretation of section 269TAC(2)(a)(ii) to add to its earlier acknowledgement of the relevance of Article 2.2 when it considered whether article 2.2 had a definition of the concept of market situation (in section A2.3 on p104, also in PAD341A in A2.3 at p86). Nor does

the SEF (or the PAD) say anything about how the context of Part XVB should be taken into account in interpreting section 269TAC(2)(a)(ii).

Your conclusion on whether the legal standard required under section 269TAC(2)(a)(ii) is met is founded entirely upon your findings of fact that the government of Indonesia is intervening in upstream markets with the alleged result that the domestic price of A4 copy paper is lower than it would have been in the absence of those government interventions. There is nothing whatsoever in Section A2.10 of the report, or any other part of the Report, which considers whether and how the alleged market situation impacts upon the comparison between domestic prices of A4 copy paper and export prices of A4 copy paper.

It is curious that, in your reports, that there is one sentence in your explanation of your legal interpretation of section 269TAC(2)(a)(ii) which refers to a comparison between domestic prices and corresponding export prices. This is in A2.3 on p88 of PAD341A and p105 of SEF341 quoted above, and quoted again here:

> "In assessing whether a 'market situation' exists, the Commission needs to examine both:
> 1. the effect such influence [of a government] has on the market; and
> 2. the extent to which domestic prices are distorted and unsuitable for *proper comparison with corresponding export prices*." (emphasis added)

It is curious because all other parts of the explanation of your legal interpretation of section 269TAC(2)(a)(ii) refer to whether the market situation renders domestic prices unsuitable for determining normal value not to whether the market situation renders the domestic prices unsuitable for proper comparison with corresponding export prices. Of course, the purpose of comparing domestic prices with corresponding export prices is to determine whether the product is being dumped.

If you consider that the correct test under section 269TAC(2)(a)(ii) requires a determination of whether there is a market situation which renders the domestic prices unsuitable for comparison with corresponding export prices, then you have not applied that test because there is no examination whatsoever of:

- Whether the alleged market situation has any impact upon the corresponding export prices;
- Whether the alleged market situation has any impact upon the comparison between domestic prices and corresponding export prices;
- Whether the alleged market situation has any impact on the outcome of a comparison between domestic prices and corresponding export prices; or
- Whether the alleged market situation has any impact on whether a comparison between the domestic prices and the corresponding export prices indicates whether the product is being dumped and there is a margin of dumping.

You have not examined factors the examination of which is essential to being able to reach a finding that there is a market situation which renders the domestic prices unsuitable for comparison with corresponding export prices.

If you have applied that legal interpretation of section 269TAC(2)(a)(ii), then the matters that you have considered in the Report are not capable of being the foundation for a conclusion under section

269TAC(2)(a)(ii) that there is a market situation "such that sales in [the Indonesian] market are not suitable for use in determining a price under subsection (1)"..

If, on the other hand, you have applied a test under section 269TAC(2)(a)(ii) requiring merely that there is a market situation which renders the domestic prices unsuitable for determining normal vale without regard to whether the market situation renders the domestic prices unsuitable for comparison with corresponding export prices for the purposes of determining whether the products are being dumped, then you have applied a wrong legal interpretation of section 269TAC(2)(a)(ii).

1.2 The appropriate legal interpretation of Section 269TAC(2)(a)(ii)

The approach to statutory interpretation

Section 269TAC(2)(a)(ii) must be interpreted in accordance with applicable Australian law on statutory interpretation. This derives primarily from the *Acts Interpretation Act 1901* (Cth) as amended.

The *Acts Interpretation Act* indicates that provision of an Act must be interpreted on the basis of the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act. (Section 15AB)

Section 15AA requires that provisions be interpreted in a way that best achieves the purpose or object of the Act. The High Court of Australia has stressed that an individual provision of a statute must be interpreted in a way that is consistent with the language of the whole of the statute and is consistent with the purpose of the statue. (See *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 per Hayne, Kiefel and Bell JJ at [67], p638; and *Monis v The Queen* (2013) 87 ALJR 340 at [309] p401; both endorsing the approach in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, per McHugh, Gummow, Kirby and Hayne JJ at [78] onp344 and [69] on p381.)

Therefore, section 269TAC(2)(a)(ii) of the *Customs Act* must be interpreted in the context of all of the relevant language of the Act. It cannot be interpreted in isolation from the rest of the Act, most relevantly, it cannot be interpreted in isolation from the rest of Part XVB of the *Customs Act*. The reference in section 269TAC(2)(a)(ii) to the term "situation in the market of the country of export … such that sales in that market are not suitable for use in determining a price under subsection (1)" must be interpreted in the context of all of the other provisions in Part XVB of the *Customs Act*. As stated by Mason J. in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 35

> The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

Second, section 269TAC(2)(a)(ii) must be interpreted in a way that takes into account the object and purpose of all of the other provisions of Part XVB of the *Customs Act*.

The *Acts Interpretation Act 1901* provides in section 15AB(1) that material (other than the provisions of the statute) "which is capable of assisting in the ascertainment of the meaning of the provision can be considered" either "to confirm that the meaning is the ordinary meaning conveyed by the text of the

provision taking into account its context in the Act and the purpose or object underlying the Act" or if the provision is ambiguous or obscure or if interpretation without reference to the extrinsic material leads to a result that is manifestly absurd or unreasonable. Section 15AB(2) contains a non-exhaustive list of extrinsic material that may be considered, two of which are particularly relevant:

- paragraph (d) "any treaty or other international agreement that is referred to in the Act"; and
- paragraph (e) "any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted".

In *Pilkington v Minister of State for Justice and Customs* [2002] FCAFC 423, the Full Court of the Federal Court quoted from the Explanatory Memorandum which accompanied the Customs Legislation (World Trade Organization Amendments) Bill which became the *Customs Legislation (World Trade Organization Amendments) Act 1994* (Cth) (at [22]):

> This Bill will amend the Customs Act 1901 and the Anti-Dumping Authority Act 1988 to bring Australia's anti-dumping and countervailing regimes into conformity with the standards and principles arising from the Uruguay Round agreements.

The reference to the Uruguay Round Agreements is a reference to the *Agreement Establishing the World Trade Organization,* signed at the conclusion of the Uruguay Round of multilateral trade negotiations in April 1994 and in force from 1 January 1995. Under that Agreement, Australia is bound by the instruments listed in Annex 1A of that Agreement. The list of instruments in Annex 1A includes the *General Agreement on Tariffs and Trade 1994* which includes the text of Article VI of the *GATT 1947*. Annex 1A also includes the *Agreement on the Implementation of Article VI of the GATT 1994* (hereinafter referred to as the *Anti-Dumping Agreement*). Part XVB of the *Customs Act*, in section 269T, does refer to the *Agreement Establishing the World Trade Organization*, and to the *General Agreement on Tariffs and Trade 1994* being listed in Annex 1 to the *Agreement Establishing the WTO*.

On several occasions, the Federal Court of Australia has confirmed that Australia's obligations under the *Agreement Establishing the WTO* are relevant to the interpretation of provisions in Part XVB of the *Customs Act*. In *Pilkington v Minister of State for Justice and Customs*, the Full Court of the Federal Court referred to the *Agreement on Implementation of Article VI of the GATT 1994* as

> "The international agreement to which Australia is a party that Part XVB of the Act introduces in significant part into domestic Australian law". [9]

The approach in Pilkington was endorsed in subsequent cases including *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86) where the full court said:

> The present provisions [on anti-dumping measures] are found within part XVB of the Customs Act. Part XVB reflects in substance amendments to the Act made in 1994 by the *Customs Legislation (World Trade Organization Amendments) Act 1994* (Cth) and in 1998 by the *Customs Legislation (Anti-Dumping Amendments) Act 1998* (Cth) The amendments were intended to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement on Tariffs and Trade: *Pilkington (Australia) Limited v Minister for Justice and Customs* [2002] FCAFC 423 at [22], 127 FCR 92 at 98-99 per Mansfield, Conti and Allsop JJ.

The High Court has on several occasions decided that legislation should be interpreted, as far as possible, in conformity with international obligations. In *Al-Kateb v Godwin* (2004) 219 CLR 562 1t 589-91 {63-65], the Court said that "so far as the language of a statute permits, it should be interpreted and applied in conformity with the established rules of international law" and that "the implication must give way where the words of the statute are inconsistent with the implication." The Court cited *Polites v Commonwealth* (1945) 70 CLR 60, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287, and *Kartinyeri v Commonwealth* (1998) 195 CLR 337 per Gummow & Hayne JJ at p384 [97].

That principle has been applied by the Federal Court in approaching the interpretation of Part XVB of the *Customs Act*. For example, the full Court of the Federal Court said in *Pilkington* in 2002:

> To the extent that the Parliament has passed (as it has) legislation dealing with the subject matter of the [WTO Anti-dumping Agreement] , that legislation will be interpreted and applied, as far as its language permits, so that it is in conformity, and not in conflict, with Australia's international obligations. Where a statute is ambiguous (the concept of ambiguity not being viewed narrowly) the court should favour a construction consistent with the international instrument and the obligations which it imposes over another construction: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 384 at [97].

And in *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86, the full court said:

> "These statutory provisions [in Part XVB] "*are to be interpreted and applied, as far as the language permits, in accordance with Australia's international obligations*" and *"[a] broad approach to construction is to be adopted": Schaefer Waste Technology Sdn Bhd v Chief Executive Officer, Australian Customs Services* [2006] FCA 1644 at [48] to [49], 156 FCR 94 at 103 per Jacobson J." (emphasis in the original)

1.3 The context provided by all of the provisions of Part XVB, interpreted in conformity with the WTO Anti-dumping Agreement

Therefore, the interpretation of the meaning of section 269TAC(2)(a)(ii) must be done by considering the context provided by all of the provisions of Part XVB which must in turn be interpreted, as far as the language permits in conformity with Australia's obligations under the *WTO Antidumping Agreement* and *GATT* Article VI.

Read in isolation, section 269TAC(2)(a)(ii) is concerned with the determination of normal value. However, the determination of normal value on its own has no consequences. The determination of normal value is just one step in the entire scheme of provisions in part XVB under which it is decided whether it is permissible for the Minster to impose an interim or a final antidumping duty. Each of the elements of that scheme of provisions reflect an international obligation of Australian under the WTO *Anti-dumping Agreement* which itself contains a set of rules delimiting when it is permissible for a WTO Member county to impose antidumping measures. The WTO *Anti-dumping Agreement* does not prohibit dumping by firms nor does it require WTO Members to impose any disciplines on dumping. The main function of the WTO *Anti-dumping Agreement* is to prohibit antidumping measures that go beyond the constraints set out in the *Anti-dumping Agreement*. The *Customs Act* reflects the design of the *Anti-dumping Agreement*. It provides for the implementation of anti-dumping measures but constrains the use of anti-dumping

measures so that they are adopted only in conformity with the requirements of the *Anti-Dumping Agreement*.

The scheme of Part XVB has been described in a number of Federal Court judgements to varying degrees of detail (see for example *Panasia v AG* [2013] FCA 870; *Siam Polyethylene v Minister* [2009] FCA 837).

Part XVB provides for the determination of whether imports are dumped imports and the determination of the relevant dumping margin. Then it provides for a determination of whether dumped imports cause or threaten material injury.

Interim dumping duties are only levied when the Minister issues a notice under section 269TG that section 8 of the *Customs Tariff (Anti-dumping) Act 1975*)" (the *Dumping Duty Act*") applies.

The dumping notice under section 8 of the *Dumping Duty Act* specifies an interim duty to be an amount equal to the difference between the amount "that the Minister ascertains to be the export price and the normal value of [the] particular goods" (unless a lesser duty rule applies). This accords with Australia's obligation under Article 9.3 of the *Anti-dumping Agreement* which provides that the anti-dumping duty must "not exceed the margin of dumping established under Article 2", and it accords with Australia's obligation under Article VI:2 of GATT which provides that the permissible anti-dumping duty may not be "greater in amount than the margin of dumping in respect of [the] product. "

To facilitate the calculation of the difference between the export price and the normal value under s8 of the *Dumping Duty Act*, section 269TG(3) requires that a notice under subsections (1) or (2) of section 269TG must specify the normal value of the goods and the export price of those goods.

The Minster may not issue a notice under subsections (1) or (2) of section 269TG unless the Minister is satisfied that the amount of the export price of the goods is less than the amount of the normal value of those goods. The prior stages in the investigation by the Commissioner and the recommendations by the Commissioner to the Minister are all required to be done by the Commissioner on the basis that the Commissioner must be satisfied of the same matters as to which the Minister has to be satisfied in order to issue a section 269TG notice.

Section 269TAB provides for the determination of the export price of goods exported to Australia; and

Section 269TAC provides for the determination of the normal value of goods exported to Australia.

Section 269 TACB requires the Minister to determine whether dumping has occurred by comparing the export prices determined under section 269TAB with the normal values determined under section 269TAC. Section 269TAB provides for permissible methods of comparing export prices with normal values. Section 269TAB requires methods of comparing export prices with normal values that are consistent with Australia's obligations under Article 2.4 of the *Anti-dumping Agreement*. In addition section 269TAF provides for the situation in which comparison between export prices and corresponding normal values requires a conversion of currencies. The methods of conversion of currencies permitted under section 269TAF accord with the requirements of article 2.4.1 of the *Anti-dumping Agreement*.

The requirement under section 269TACB that the Minister must ascertain whether dumping has occurred by comparing the export prices with the normal values, the requirement that the Minister may not issue a section 269TG notice unless satisfied that the export price is less than the normal value, and the requirement of section 8 of the *Dumping Duty Act* that the interim duty may be less than but cannot be more than the amount by which the export price is less than the normal value all reflect constraints of GATT Article VI and Article 2 of the *Anti-dumping Agreement* and serve the purpose of ensuring that antidumping duties applied under Part XVB do not go beyond what is permissible under the GATT and the *Anti-Dumping Agreement*.

As mentioned above, GATT Article VI:2 provides that the permissible antidumping duty may not be "greater in amount than the margin of dumping in respect of such product." GATT Article VI:2 continues"

> "For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

Paragraph 1 refers to dumping as the

> "situation by which products of one country are introduced into the commerce of another country at less than the normal value of the products" and provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value if the price of the product exported from one country to another
> (a) is less than the comparable price, in the ordinary course of trade for the like product when destined for consumption in the exporting country, or,
> (b) in the absence of such domestic price, is less than either
>
> (i) the highest comparable price for the like product for export to any third country ini the ordinary course of trade, or
>
> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Article 2.1 provides that:

> "a product is to be 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.

Article 2.2 provides for the same two alternative methods of determining the margin of dumping as are set out in GATT Article VI:1 but it narrows down the situations in which the authorities are permitted to determine the dumping margin other than by following the rule in Article 2.1.

Article 2.2 allows a Member country to depart from calculating the dumping margin by the method set out in Article 2.1 in three situations:

- First "where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country"; or
- Second, "when, because of … the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison", that being a reference to the comparison referred to in article 2.1 between the export price and "the price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country"; or

- Third, "when, because of the particular market situation …, such sales do not permit a proper comparison" that being a reference to the comparison referred to in article 2.1 between the export price and "the price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

All of these elements of the scheme of provisions in the GATT and the *Anti-Dumping Agreement* for determining if there is dumping and the size of the margin of dumping are to be found in the scheme of the provisions in Part XVB of the Customs Act and its related legislation the *Dumping Duty Act*. This scheme of provisions in Part XVB of the *Customs Act* and its related legislation the *Dumping Duty Act* is an essential part of the context within which section 269TAC(2)(a)(ii) must be interpreted. In particular, the concept of normal value is not used for any purpose other than to enable normal value to be compared with the export price in the manner required by section 269TACB. That comparison of the normal value with the export price under section 269TACB is required to be undertaken before the Minister may determine that the export price is less than the normal value. The difference between the normal value and the export price arising from the comparison under section 269TACB forms the maximum boundary on the interim duty that can be imposed under section 8 of the *Dumping Duty Act*.

Further, additional parts of the context are the requirements of Part XVB that in the ordinary situation the determination of export price, the determination of normal value and the comparison between export price and normal value are done for individual exporters. Section 269TACAA provides that the Commission's investigation should cover any exporter that has submitted information unless extending the investigation to that individual exporter would prevent timely completion of the investigation. Therefore, in the ordinary course, the determination of the export price under section 269TAB is a determination of the export price for an individual exporter, the determination of the normal value under section 269TAC is a determination of the normal value for an individual exporter and the determination under section 269TACB of whether dumping has occurred by comparing the export price with the normal value is a determination of whether that individual exporter has engaged in dumping and if so what is the applicable margin of dumping for that individual exporter. These provisions of section 269TACAA implement the obligation under Article 6.10 of the *Anti-dumping Agreement* which obliges WTO Member countries to "as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Article 6.10 allows authorities to limit their examination to a reasonable number of interested parties but Article 6.10.2 obliges the authorities to determine an individual margin of dumping for any exporter who submits the necessary information in time for it to be considered in the investigation.

The scheme of the Act indicates that the object and purpose of Part XVB of the *Customs Act* is to identify situations in which individual business firms are engaging in dumping by selling exports to Australia at lower prices than the prices at which they sell to the domestic market in their own country, and if dumped imports are causing injury to a domestic industry producing the like product, to permit an antidumping duty no larger than the amount that offsets the margin of dumping by the individual exporter. Similarly, the scheme of the Act indicates that the object and purpose of Part XVB of the *Customs Act* is to ensure that any antidumping measures imposed do not go beyond what is permitted under the WTO *Anti-dumping Agreement*.

Section 269TAC(2)(a)(ii) must be interpreted in the context of the overall scheme of the Act and its object and purpose. Section 269TAC(2)(a)(ii) is a provision that allows an exception from the usual rule under

section 269TAC(1). When section 269TAC(1) applies, then the comparison required under section 269TACB is one between the export prices of an individual exporter and the price for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by that same individual exporter. In other words, section 269TAC(1) provides for use of prices of domestic sales that will enable the Minister to compare those domestic prices with export prices so as to determine whether that individual exporter is engaging in dumping, and if so what is the margin of dumping for that individual exporter. This understanding of the function of section 269TAC(1) is critical to understanding the exceptions to section 269TAC(1) that are provided for in section 269TAC(2)(a).

The first exception in section 269TAC(2)(a) is that under paragraph (i) under which normal values do not have to be determined under section 269TAC(1)

> Where the Minister (a) is satisfied that:
> (i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1);
> …
> The normal value of goods exported to Australia cannot be ascertained under subsection (1)"

Subsection 269TAC(2)(a)(i) reflects the obligation in Article 2.2 of the *Anti-dumping Agreement*. Both section 269TAC(2)(a)(i) and Article 2.2 of the *Anti-dumping Agreement* reflect the fact that it will not be possible to use a comparison of the prices of an exporter's domestic sales with the prices of that exporter's export sales to determine if that exporter is price discriminating between the domestic market and the export market if there are not enough transactions in which the exporter sells to the domestic market to provide a good indication of a price in the ordinary course of trade. Therefore, in that situation, both section 269TAC(2)(i) and Article 2.2 allow for the use of a basis for estimating what the exporter's sale price to the domestic market would have been had the exporter made sufficient sales to the domestic market and using that as a proxy for the price of domestic sales. Both section 269TAC(2)(a)(i) and Article 2.2 allow the use of either a constructed price or a price of exports to a third country market to be used. The object and purpose of allowing alternative methods of determining normal value is that given the absence of sufficient actual sales by the individual exporter in the domestic market, the proxy methods provide a better way of determining whether the individual Exporter is engaging in price discrimination, or, is dumping.

The second limb of subsection 269TAC(2) shares the same object and purpose as the first limb. Paragraph (ii) of subsection 269TAC(2)(a) also describes a situation in which it will not be possible to use a comparison of the prices of an individual exporter's domestic sales with the prices of that individual exporter's export sales to determine if that exporter is discriminating between the domestic market and the export market, or, is dumping. The second exception under paragraph (ii) of section 269TAC(2)(a) provides that normal values do not have to be determined under section 269TAC(1):

> Where the Minister (a) is satisfied that:
> (ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);
> …
> the normal value of goods exported to Australia cannot be ascertained under subsection (1)"

Subsection 269TAC(2)(a)(ii) reflects the obligation in Article 2.2 of the *Anti-dumping Agreement*. Both section 269TAC(2)(a)(ii) and Article 2.2 of the *Antidumping Agreement* reflect the fact that there may be situations in a market which have the effect that it will not be possible to use a comparison of the prices of an individual exporter's domestic sales with the prices of that individual exporter's export sales to determine if that exporter is discriminating between the domestic market and the export market, or, is dumping. This would occur if there were some situation in the market which results in lower prices of the exporter's domestic sales without having an equivalent effect on the prices of the exporter's export sales. In that situation, a comparison between the exporter's domestic sales and the exporter's export sales would lead to a determination of a smaller excess of domestic prices over export prices than would exist in the absence of the market situation. Therefore, in that situation, both section 269TAC(2)(a)(ii) and Article 2.2 allow for the use of a basis for estimating what the exporter's sale price to the domestic market would have been had the particular market situation not existed , and for the use of that as a proxy for the price of domestic sales. Both section 269TAC(2)(a)(ii) and Article 2.2 allow the use of either a constructed price or a price of exports to a third country market. The object and purpose of allowing alternative methods of determining normal value is that given the particular market situation having an asymmetric impact on the price of domestic sales and the price of export sales, the proxy methods provide a better way of determining whether the individual exporter is engaging in price discrimination, or, is dumping.

Taking into account the text of section 269TAC(2)(a)(ii), the relevant context of other provisions of Part XVB of the *Customs Act* and the related provisions of the *Dumping Duty Act*, and the object and purpose of Part XVB, it is submitted that the interpretation of section 269TAC(2)(a)(ii) which would best achieve the object and purpose of the *Customs Act* is an interpretation that limits the meaning of "situation in the market" to situations which have an asymmetrical effect on the price of domestic sales and the price of export sales so that a comparison of the prices of domestic sales and the prices of export sales cannot provide a reliable indication of whether the individual export is engaging in price discrimination, or is dumping.

Consideration of Article 2.2 of the *Anti-dumping Agreement*, interpreted in its context and in the light of the object and purpose of the *Anti-dumping Agreement* confirms that the meaning of section 269TAC(2)(a)(ii) is the meaning described above being the ordinary meaning of the text of section 269TAC(2)(a)(ii) taking into account its context in the *Customs Act* and the purpose or object underlying the *Customs Act*.

It follows that you, in both PAD341A and SEF 341, in adopting an interpretation of section 269TAC(2)(a)(ii) which does not require a finding that there is a market situation which has an asymmetric impact on the prices of the individual exporter's domestic prices and export prices such as to make the comparison between those prices an unreliable indicator of whether the exporter is price discriminating between export sales and domestic sales are committing an error of law.

To reiterate the point, I refer to your response in PAD341A and SEF341 described above:

> "Whilst the findings of a market situation may be indicative of lower input costs for goods produced for domestic and export markets, where a market situation finding has been made that renders sales in that market as not suitable for use in determining a price under subsection 269TAC(1), normal values cannot be established on the basis of domestic selling prices."

Any finding that there is a market situation that renders sales in that market as not suitable for use in determining a price under subsection 269TAC(1) which is made without a finding that the alleged market situation has an asymmetric impact on the exporter's export prices and domestic prices is a finding in error. Under the correct interpretation of section 269(2)(a)(ii), if the market situation does cause lower input costs for goods produced for domestic and export markets in a way that has the same effect on the prices for the final products sold in domestic and export sales, then section 269TAC(2)(a)(ii) does not permit the Commissioner to find that is a market situation such that the prices in the domestic market are unsuitable for use in determining a price under subsection (1).

2. Your error of law under Regulation 43(2)(b)(ii) – the issue of records reflecting competitive market costs issue

2.1 Your findings on the issue of records reflecting competitive market costs

In both PAD 341A and SEF 341, you have indicated that, for Indonesian exporters, normal values were worked out under section 269TAC(2)(c) and that you have applied the provisions of subsections 269TAC(5A) and 269TAC(5B), in accordance with sections 43, 44 and 45 of the *Customs (International Obligations) Regulation 2015*.

In both reports, you have made findings that the exporter's records do not reasonably reflect competitive market costs associated with the production or manufacture of A4 copy paper because the cost of pulp recorded in the exporter's records does not reasonably reflect a competitive market cost of pulp.

In PAD341A, you decided that:

> The actual cost of pulp recorded by exporters in their records do not reasonably reflect competitive market costs associated with the production of manufacture. Pulp proportionally, is the largest cost component for the production of like goods and on this basis the Commissioner considers that the exporter's records do not reasonably reflect competitive market costs. Consequently, the Commission considers that this renders these domestic pulp costs unsuitable for determining the cost to make A4 copy paper for the purposes of constructing normal values.

In SEF341, you decided 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 each of the Indonesian producers' and exporters' record unsuitable for determining the cost to make A4 copy paper for the purposes of constructing normal values.

On the basis of these findings, in both reports, you decide that you are not obliged to use the information set out in the records of the exporters to work out the cost of production or manufacture of A4 paper in Indonesia. (PAD 6.9.1, p36; SEF 6.9.1, p41).

You have based that that decision under Regulation 43(2) which provides:

"(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."

The term "the amount" refers to the cost of production or manufacture of like goods in a country of export as is set out in regulation 43(1) which provides:

"(1) For subsection 269TAAD(5) of the Act, this section sets out:
(a) the manner in which the Minister must, for paragraph 269TAAD(4)(a) of the Act, work out an amount ('the amount) to be the cost of production or manufacture of like goods in a country of export;; and
(b) factors that the Minister must take account of for that purpose.

You apply Regulation 43 because when determining normal values under section 269TAC(2)(c), section 269(2)(c)(i) requires the Minister to add a component for

(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export

and section 269TAC(5A) requires that the amount determined to be the cost of production or manufacture of goods under subparagraph (2)(c)(i)

> must be worked out in such manner, and taking into account of such factors, as the regulations provide for the [purpose of paragraph s269TAAD(4)(a)].

In both PAD341A and SEF341, you have explained your legal interpretation of Regulation 43(2) in the following way:

> Subsection 43(2) of the Regulations requires that, if an exporter keeps records relating to the like goods which are in accordance with generally accepted accounting principles, and those records reasonably reflect competitive market costs associated with the production or manufacture of like goods, then the cost of production must be worked out using 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.

The next sentence in PAD341A is"

> Generally, when undertaking this assessment, the Commission may examine whether the Government influenced the price of any major cost inputs.

In SEF341, the next sentence is:

> When undertaking this assessment, the Commission may examine a number of factors, including whether the Government influenced the price of any major cost inputs.

The Reports also contain a section headed "Submissions received from interested parties" followed by a section headed "Commission's consideration of submissions received from interested parties". One of the responses gives further information about your legal interpretation of Regulation 43(2). The submission was:

> The WTO panel report in European Union – Anti-Dumping Measures on Biodiesel from Argentina (WT/DS473/R) (the 'Bio Diesel case'), specifies '… that the use of surrogate input material costs in normal value constructions because of government influence on those recorded in the accounts of domestic manufacturers is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement;"

In the reports, the response is: (at PAD341A, p38 & SEF341, p42):

> The Commission has noted the recent WTO appellate body decision in EU – Biodiesel, as raised by various interested parties. The Commission has considered Australian domestic legislation in its approach in this SEF in relation to cost construction.

Neither PAD341A nor SEF341 quote, or refer in any other way to, Article 2.2.1.1 of the *Anti-Dumping Agreement*. Neither PAD341A nor SEF341 say anything about whether Australia's obligations under the *Anti-Dumping Agreement* should be taken into account in interpreting Regulation 43(2).

In addition, in the Appendix 2 to SEF 341, there is a section which responds to submissions by the Sinar Mas Group and the Indonesian government in response to PAD341A. This mostly deals with submissions relating to the particular market situation issue but one part relates to the competitive market costs issue under Regulation 43. The report says in the first paragraph of section A2.10.5:

> Similarly, with regard to Sinar Mas Group's views about how the Commission interprets the term 'competitive market costs', it is the Commission's practise to give the term 'competitive' its usual meaning and this can be considered according to the case circumstances.

The reports do not offer any explanation of what the Commission means by the usual meaning of the term 'competitive'.

That is the end of your explanation in the report of your legal interpretation of Regulation 43(2).

Then the report moves on to make the assessment of whether the exporters' records reasonably reflect competitive market costs. Despite SEF341 saying that the Commission in making this assessment "may examine a number of factors, including whether the government influenced the price of any major cost inputs", in fact, the analysis that the Commission undertakes in both PAD341A and in SEF341 is limited to the analysis of just one issue, that is, whether the Government influenced the price of the major cost input, pulp.

In making the assessment under regulation 43(2), the Commission wrote in the two reports [first part of any bracketed text is from PAD341A/ second part of any bracketed text comes from SEF341]:

> As discussed in Appendix 2, the Commission considers that the significant influence of the Government of Indonesia (GOI) has distorted prices in the paper industry and the paper market in Indonesia.
>
> In particular, the Commission considers that various plans and policies have distorted the prices of domestic logs used to make pulp. [As the Commission notes the / The] domestic price of Indonesian A4 copy paper, once adjusted to a comparable basis, is significantly below comparable regional benchmarks. It is the Commission's view that the distortion of the domestic price for A4 copy paper is the direct result of the GOI's involvement within the forestry and pulp industries through its support for the development of timber plantations and its prohibition on the export of timber logs, which have increased the availability of timber relative to demand and hence resulted in artificially low prices for Indonesian logs and pulp. Without these interventions, the price for timber and pulp would be above levels experienced in the investigation period and [that these / these] higher input cost, would also be reflected in a higher domestic prices for A4 copy paper.
>
> The Commission finds that logs, as a raw material, are a significant input into the cost to manufacture of paper pulp, accounting for in the vicinity of 40 per cent of the cost to manufacture pulp. [additional words in SEF341 only: As explained below, the Commission has quantified the effects of GOI influence by comparing each exporter's actual cost of production with a benchmark. In each instance it was identified that the cost of producing pulp was substantially less than the benchmark.] Consequently, the actual cost of pulp recorded by exporters in their records [do / does] not reasonably reflect [competitive market costs associated with the production or manufacture of like goods / a competitive market cost]. [Pulp, proportionally, is / As pulp is proportionally] the largest cost component for the production [of like goods and on this basis / of the goods and like goods],the Commission considers that the exporter's records do not reasonably reflect [competitive market costs / competitive market costs associated with the production or manufacture of like goods]. Consequently, the Commission considers that this renders [these domestic pulp costs / this component of each of the Indonesian producers' and exporters' records] unsuitable for determining the cost to make A4 copy paper for the purposes of constructing normal values.

Your conclusion is that the price of pulp recorded in the exporters' records is less than what it would have been in the absence of certain interventions of the government of Indonesia and that, for this reason, the exporters' records do not reflect the competitive market costs associated with the production or manufacture of A4 paper. On the basis of that conclusion, you go on to substitute other amounts for the cost of pulp indicating that you have concluded that you are not obliged under Regulation 43(2) to use the amounts for pulp in the exporters' records to work out the constructed cost of A4 paper.

Your conclusion on whether the legal standard in regulation 43(2)(b)(ii) is met so as to allow you to depart from using the information in the exporters' records in working out the constructed cost of A4 paper is founded entirely upon your finding of fact that the government of Indonesia is intervening in the market for timber with the alleged result that the domestic price of pulp is lower than it would have been in the absence of those government interventions. The reasoning in the report is that a finding that a price is distorted by government intervention is a sufficient basis for a conclusion that the price is not a competitive market price.

Your reports do not contain any finding that the amounts recorded in the exporters' records as the amounts paid to purchase pulp differ from the value actually transferred by the exporter to the seller in exchange for the pulp. Nor do the reports contain any finding that the information in the exporters' records does not reasonably reflect the costs that were actually incurred by the exporters in purchasing the pulp. Nor is there anything in section 6.9.1 of the report or any other part of the report, which indicates that the Commissioner has considered:

- whether the amounts recorded in the exporter's records as the amounts paid to purchase pulp reflect the value given by the exporter to the seller in exchange for the pulp; or
- whether the amounts recorded in the exporter's records do reasonably reflect the costs that were actually incurred by the exporters in purchasing pulp.

In fact, in verification reports, the Commission accepted the accuracy of the exporters' records (See *Verification Report – Exporter for PT Indah Kiat Pulp and Paper Tbk* posted to the public record on 19 August 2016 as document number 58, *Verification Report – Exporter for PT Pindo Deli Pulp and Paper Tbk* posted to the public record on 19 August as document number 59, and *Verification Report – Exporters for PT Pabrik Kertas Tjiwi Kimia Tbk* posted to the public record on 19 August as document number 60).

2.2 The appropriate legal interpretation of Regulation 43(2)(b)(ii)

As noted above, Regulation 43(2) of the *Customs (International Obligations) Regulations 2015* provides for the circumstances in which the Commissioner may depart from using the records of the exporter to work out 'the amount' and Regulation 43(1) defines the term 'the amount' as the "costs of production or manufacture of like goods in a country of export".

Regulation 43(1) indicates that it is made for the purposes of section 269TAAD(5) and that it is specifying a rule with respect to the determination of cost of production or manufacture for the purposes of section 269TAAD(4)(a).

Section 269TAAD provides for the Minister to determine that the price of certain sales in the country of export are not sales at a price in the ordinary course of trade if the Minister determines that the price for those sales is less than the cost of such goods. The consequence of determining that transactions are not sales at prices in the ordinary course of trade is that those transactions may be disregarded when the Minister is determining the normal value of goods under section 269TAC(1) on the basis of the sales in the country of export. In practice, this means that the calculation of a weighted average price would be higher than if the lower price sales were not disregarded.

Section 269TAAD(4)(a) provides that

> (4) The cost of goods is worked out by adding:
> (a) the amount determined by the Minister to be the cost of production or manufacture of those goods in the country of export; and
> (b) …

and section 269TAAD(5A) provides that the Minister must determine the cost of production under section 269TAAD(4)(a) in the manner provided in regulations for that purpose.

The *Customs (International Obligations) Regulations 2015* are regulations made under section 270 of the *Customs Act,* which permits the Governor-General to make regulations not inconsistent with the *Customs Act*. These regulations are a "legislative instrument" under section 8 of the *Legislation Act 2003* (Cth).

Regulation 43 must be interpreted in accordance with applicable Australian law on interpretation of legislative instruments. This derives from the *Legislation Act 2003* (Cth) and the *Acts Interpretation Act 1901* (Cth). Under section 13 of the *Legislation Act*, the *Acts Interpretation Act 1901* applies to the

Customs (International Obligations) Regulations 2015 as if that instrument were an Act and as if each provision of the *Customs (International Obligations) Regulations 2015* were a section of an Act. Section 13 requires also that the Regulations must be read and construed subject to the *Customs Act,* and so as not to exceed the power of the relevant person (in this case, Governor-General under section 270 of the *Customs Act*) to make the Regulations.

Therefore, the same principles of statutory interpretation that are discussed above in relation to the interpretation of section 269TAC(2)(a)(ii) also apply to the interpretation of Regulation 43.

Regulation 43 must be interpreted upon the basis of:

- The ordinary meaning conveyed by the text of regulation 43;
- Taking into account its context in the Regulations and the *Customs Act*;
- The purpose or object of the Regulations and the *Customs Act*;
- Any extrinsic material capable of assisting in the ascertainment of the meaning of the provision including the Explanatory Statement accompanying the Regulations and the relevant parts of the *Agreement Establishing the World Trade Organization*.

Just as a section of an Act cannot be interpreted in isolation but must be interpreted in a way that is consistent with the language of the whole of the statute and consistent with the purpose of the statute, Regulation 43 cannot be interpreted in isolation but must be interpreted in a way that is consistent with the language of the whole of the Regulations read and construed subject to the whole of the language of the *Customs Act,* in particular Part XVB of the *Customs Act,* and consistent with the purpose of the Regulations, read and construed subject to the purpose of the *Customs Act*.

Therefore, the reference in Regulation 43(2)(b)(ii) to whether the exporters' records "reasonably reflect competitive market costs associated with the production or manufacture of like goods" must be interpreted in the context of all of the provisions of the Regulations and all of the provisions of Part XVB of the *Customs Act*.

Under section 15AA, in interpreting Regulation 43, the interpretation that would best achieve the purpose or object of the Regulations, read and construed subject to the *Customs Act*, is to be preferred to each other interpretation. Therefore, the reference in Regulation 43(2)(b)(ii) to whether the exporters' records "reasonably reflect competitive market costs associated with the production of manufacture of like goods" must be interpreted in a way that would best achieve the purpose or object of the Regulations, read and construed in accordance with the provisions of Part XVB of the *Customs Act* which themselves must be interpreted in a way that best achieves the object and purpose of Part XVB.

Under section 15AB(1) material other than the Regulations "which is capable of assisting in the ascertainment of the meaning of the provision can be considered" in the interpretation of Regulation 43 either to "confirm that the meaning is the ordinary meaning conveyed by the text of [Regulation 43] taking into account its context in the [Regulations] and the purpose or object underlying the [Regulations]" or if Regulation 43 is ambiguous or obscure or if interpretation without reference to the extrinsic material leads to a result that is manifestly absurd or unreasonable.

In relation to the interpretation of Regulation 43, two instruments which are capable of assisting in the ascertainment of the meaning of Regulation 43 are:

- The Explanatory Statement to Select Legislative Instrument No. 32, 2015 Issued by the authority of the Minister for Immigration and Border Protection on the *Customs (International Obligations) Regulations 2015* under the *Customs Act 1901*; and
- The *Agreement establishing the World Trade Organization* including in particular two of the agreements listed in Annex 1A, the *General Agreement on Tariffs and Trade 1994* and the *Anti-Dumping Agreement*.

The Explanatory Statement explains that the *Customs (International Obligations) Regulation 2015* was made to "remake the provisions within the 1926 Regulations that give effect to Australia's international obligations". It explains that the 1926 regulation would be automatically repealed on 1 April 2015 under the sunset rule in section 50 of the *Legislative Instruments Act 2003* (as the *Legislation Act 2003* was then named). It explains that since provisions relating to international obligations are exempt from any future sunsetting requirements, the provisions in the 1926 Regulations which relate to international obligations were placed in a separate instrument, the *Customs (International Obligations) Regulations 2015* leaving the provisions in the 1926 Regulations which would be subject to future sunsetting requirements to be remade in the *Customs Regulations 2015*.

Therefore, the Explanatory Statement indicates that the purpose and object of the *Customs (international Obligations) Regulation 2015* was to help the Australian government to act in a manner consistent with Australia's obligations under international law. Neither the Regulations nor the Explanatory Statement refer explicitly to the *Anti-Dumping Agreement* but the Regulations are to be read and construed in accordance with the *Customs Act* which does refer to the *Agreement Establishing the World Trade Organization* of which the *Anti-Dumping Agreement* is a part. Nevertheless, a comparison of Regulations 43, 44 and 45 of the Regulations indicates that they have been drafted in order to implement Australia's obligations under specific paragraphs of Article 2.2 of the *Anti-Dumping Agreement*. Regulation 44 implements Australia's obligation under Article 2.2.2 of the *Anti-Dumping Agreement* with respect to determining amounts for administrative, selling and general costs. Regulation 45 implements Australia's obligation under Article 2.2.2 of the *Anti-Dumping Agreement* with respect to determining an amount for profit. The three paragraphs of Regulation 44 (3) and 45(3) correspond to the 3 paragraphs of Article 2.2.2. Regulation 43 implements Australia's obligation under Article 2.2.1.1 of the *Anti-Dumping Agreement* with respect to determining amounts for the cost of production.

Regulation 43 is a legislative instrument which implements international obligations. The High Court has indicated that where legislation implements international obligations, the legislation should be interpreted, as far as the language permits in conformity with international obligations. It is possible that the legislation or legislative instrument can mandate conduct that would be inconsistent with Australia's international obligations but as far as possible a Court should interpret the legislative instrument in conformity with Australia's international obligations. So it is important to analyse the meaning of Article 2.2.1.1 of the *Anti-Dumping Agreement* and then to assess whether Regulation 43(2)(b)(ii) can be interpreted in conformity with Australia's obligation under Article 2.2.1.1 of the *Anti-Dumping Agreement*.

2.3 Interpreting regulation 43(2)(b)(ii) in the context of Article 2.2.1.1 of the Anti-Dumping Agreement

In the earlier part of the letter, I set out the relevant provisions of Article VI:1 and VI:2 of *GATT* and Article 2.1 and 2.2 of the *Anti-Dumping Agreement* which determine which method is used to determine

whether there is dumping and the size of the dumping margin, and explained that those rules are implemented in sections 269TAC(1) and s269TAC(2) of the *Customs Act*.

The provision in the *Anti-Dumping Agreement* which sets out how costs should be calculated is Article 2.2.1.1.

Article 2.2.1.1 provides

> 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. Authorities shall consider all available evidence in the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter of producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

The rules of Article 2.2.1.1 are an integral part of the scheme of rules in the GATT and the *Antidumping Agreement* constraining how WTO Member countries may determine whether an exporter is dumping and the size of the margin of dumping. The rules in Article 2.2.1.1 are implemented in Regulation 43 of the *Customs (International Obligations) Regulations 2015* which form an integral part of the scheme of rules in Part XVB of the *Customs Act 1901* constraining how the Minister (and the Commissioner) may determine whether an exporter is dumping and the size of the margin of dumping.

Of particular importance to the interpretation of regulation 43(2)(b)(ii) is the first sentence of article 2.2.1.1:

> 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.

Article 2.2.1.1 serves multiple purposes:

- It determines how costs should be calculated to determine if sales are below cost and therefore can be treated as not in the ordinary course of trade so that those sales can be disregarded in determining normal values on the basis of the ordinary method using prices of sales in the country of export under Article 2.1;
- It determines how costs should be calculated to determine if sales are below cost and therefore can be treated as not in the ordinary course of trade for the purpose of deciding under Article 2.2 if there are no sales in the ordinary course of business so as to justify using one of the other two methods for determining normal value;
- It determines how costs should be calculated when the constructed cost method of determining normal value is used under Article 2.2.

Since the single provision, that is, Article 2.2.1.1 applies to the different purposes under the Agreement requiring ascertainment of cost, then Article 2.2.1.1 must have the same meaning regardless of the provision for which Article 2.2.1.1 is being applied to ascertain the cost of production.

One function of Article 2.2.1.1 relates to the determination of normal value using the method described in Article 2.1 under which normal value is the price in the ordinary course of trade in the country of export. Under 2.2.1, it is permissible to disregard sales at a loss in certain circumstances from the determination of the normal value. Article 2.2.1 permits sales at a loss to be excluded from the determination:

> only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

Determining whether prices provide for the recovery of all costs necessarily involves determination of what those costs are. The reference to costs and whether an exporter sets prices that provide for the recovery of costs must be a reference to costs actually incurred by the exporter which is selling at the particular price. Therefore, the phrase in Article 2.2.1.1 must have the same meaning. Certainly, the ordinary rule under the first sentence of Article 2.2.1.1 requiring use of the information in the records of the exporter indicates that it is concerned with determining what the exporter actually spent. The exception under the last clause of the first sentence of Article 2.2.1.1 applies where the exporter's records do not "reasonably reflect the costs associated with the production and sale of the product under consideration" must also relate to the determination of whether the prices provide for the recovery of the costs actually incurred by the exporter. Therefore, it allows for the departure from using information in the exporter's records to determine costs where that information does not reflect the costs that the exporter actually incurred in the production and sale of the product under consideration.

Another function of Article 2.2.1.1 relates to the situation in which margin of dumping is determined by comparison of the export price "with the cost of production in the country or origin plus a reasonable amount for administrative, selling and general costs and for profits". The use of this method is allowed in the circumstances, described in Article 2.2, where a comparison between export prices and the prices described in Article 2.1 would not provide for a reliable indication of whether there is dumping and of the size of the margin of dumping. As discussed in the first part of the letter, the constructed cost method is used because it would provide a better indication of whether there is dumping. Comparing export prices with a constructed cost will only provide a reliable indication of whether there is dumping if the constructed cost represents a reasonably accurate proxy for the price at which the exporter would sell if none of the circumstances in Article 2.2 existed, that is, there were sales in the domestic market, there was a sufficient volume of them and they were not affected by any market situation which skews the domestic price so as to make it not suitable for comparison with the export price. The price setting behaviour of an exporter can only be realistically estimated upon the basis of the actual costs incurred by that exporter and a reasonable basis for estimating that exporter's profit margin. Therefore, the exception in the second condition of the first sentence of Article 2.2.1.1 applying where the exporter's records do not "reasonably reflect the costs associated with the production and sale of the product under consideration" allows for the departure from using information in the exporter's records to determine costs *only* where that information does not reflect the costs that the exporter *actually incurred* in the production and sale of the product under consideration.

Therefore, consideration of the meaning of the words "provided that the records … reasonably reflect the costs associated with the production and sale of the product under consideration" in the context of their function under article 2.2.1 (disregarding sales at a loss) and consideration of the meaning of those same words in the context of their function under article 2.2 (working out a constructed cost) leads to the same interpretation of their meaning: that it is concerned with whether the records reflect the actual costs incurred by the exporter.

The WTO Appellate Body has interpreted Article 2.2.1.1 in the same way so that the exception to the general rule in Article 2.2.1.1 is concerned with whether the exporter's records reasonably reflect the actual costs incurred by the exporter. The relevant decision of the WTO Appellate Body was the case of *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (report of the Panel WT/DS473/R and report of the Appellate Body WT/DS473/AB/R WT DS473/AB/R both adopted on 26 October 2016). There the European Union had departed from using the information in the records of the exporters about the cost of an input, soybeans, in the production of biodiesel fuel, because the EU considered that the price of soybeans in Argentina was not a reasonable price due to policies of the government of Argentina. The Panel found that the words "records … reasonably reflect the costs associated with the production and sale of the products under consideration" are concerned with the reasonableness of the way that the records of the exporter record the costs that the exporter actually incurred not with the reasonableness of the costs themselves. (Para 7.232) To support this view, the Panel draws on the context of Article 2.2 and says that since the purpose of determining the cost of production is to determine a proxy for the price in the domestic market, then the costs associated with production and sale of the product under consideration must be those costs that a producer actually incurs (para 7.233). The panel rejects the notion that the accuracy of the records is dealt with by the requirement regarding compliance with generally accepted accounting principles so the second condition must be interpreted as imposing a requirement additional to requiring the records to reflect the costs actually incurred. The panel says that even when recorded costs are consistent with the generally accepted accounting principles, they still might not reflect the costs actually incurred by the producer or exporter for the particular goods. (7.232)

The panel concludes at para 7.242:

> "On the basis of the foregoing considerations, we understand the ordinary meaning of the phrase "provided such records … reasonably reflect the costs associated with the production and sale of the product under consideration", in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in –within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer. We emphasize, however, that the object of the comparison is to establish whether the records reasonably reflect the costs *actually* incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred."

The Appellate Body rejected the appeal by the European Union. The AB also took the view that the condition in article 2.2.1.1 was concerned with whether the costs actually incurred by the exporter or producer under investigation were reasonably reflected in the exporter's records not with whether those costs were reasonable. The Appellate Body said that since the purpose of calculating a constructed cost Article 2.2 is to generate a proxy for the price in the domestic market, then the costs used under Article

2.2.1.1 must be capable of generating such a proxy. So they must be costs which "have a genuine relationship with the production and sale of the product under consideration" (para 6.24). The Appellate Body agreed with the panel that records which are consistent with generally accepted accounting principles might still not reasonably reflect the costs associated with the production and sale of the product under consideration because the way that the costs are recorded in the accounting records may not reflect the costs associated with the particular product under investigation. (6.33) The Appellate Body says that the words "records … reasonably reflect the costs associated with the production and sale of the products under consideration" is concerned with "the costs incurred by the producer under investigation that are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation' (para 6.30) The Appellate Body find that the condition does not contain any additional standard requiring that the costs be reasonable. It only requires that the records reasonably reflect the costs of the exporter (para 6.35).

The conclusion of the Appellate Body (at para 6.56) is:

> "we consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement – that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration – relates to whether the records kept by the exporter or producer under investigation 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. … In our view, the Panel did not err in rejecting the European' Union's argument that the second condition in the first sentence of article 2.2.1.1 includes a general standard of "reasonableness". With respect to the application of Article 2.2.1.1 to the anti-dumping measure on biodiesel, we agree with the Panel that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system 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 and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel."

This Appellate Body decision explains the way in which article 2.2.1.1 should be taken into account as context for interpreting Regulation 43(2)(b)(ii).

2.4 The relevant context for considering the meaning of Regulation 43(2)(b)(ii)

The interpretation of the meaning of Regulation 43(2) must be done by considering all relevant context.

As mentioned, Regulation 43 is one of three regulations in the *Customs (International Obligations) Regulations 2015* which deal with the determination of cost of production, one dealing with cost of manufacture or production, one dealing with cost of administrative, selling and general costs and another dealing with allowing an amount for a profit margin.

Regulation 43 itself describes its function as working out amounts for the purposes of section 269TAAD, which is the provision which permits exclusion of some below cost sales from the determination of normal value on the basis of sales in the country of export. However, since section 269TAC(5A) requires the manner of determining amounts under section 269TAAD to be used also for determining components of costs when normal value is determined on the basis of the constructed cost method under section 269TAC(2)(c), then both section 269TAAD and section 269TAC are closely related context for Regulation

43. Both section 269TAC and section 269TAAD are part of the overall scheme of rules in Part XVB. In the earlier part of this letter, I have already described the overall scheme of rules in Part XVB and explained that the overall scheme of rules in Part XVB has the purpose of identifying situations in which individual business firms are engaging in dumping by selling exports to Australia at lower prices than the prices at which they sell to the domestic market in their own country, and subject to satisfaction of an injury requirement, to permit an antidumping duty no larger than the amount that offsets the margin of dumping by the individual exporter. I also described in the earlier part of this letter that the scheme of Part XVB indicates that the object and purpose of part XVB is to ensure that any antidumping measures imposed do not go beyond what is permitted under the WTO *Anti-dumping Agreement*.

2.4.1 Section 269TAAD as context for the interpretation of Regulation 43(2)(b)(ii)

The particular role of section 269TAAD is to help ensure that the ordinary method of determining normal value under section 269TAC(1) does provide a normal value that can be compared with export sales so as to provide a reliable indication of whether an exporter is dumping. Section 269TAC(1) provides that normal value is to be ascertained from domestic sales in the ordinary course of trade. Some sales might not be in the ordinary course of trade. For example, if some domestic sales are made at a loss to create new markets or win market share, then taking those sales into account in determining the domestic price would result in a lower average price than if only the ordinary profit making sales were taken into account. On the other hand, some variation in selling price including some sales at marginal cost might be well within the bounds of ordinary trade. Section 269TAAD(1) functions to apply some constraints to the decision to exclude sales at a loss so as to avoid having the inclusion of extended sales at a loss leading to an artificially low or negative dumping margin and also to avoid having too many sales at a loss excluded from the calculation so as to lead to an artificially high dumping margin. For that reason, section 269 TAAD does not allow the exclusion of sales at a loss unless they are at a price that will not result in recovery of cost within a reasonable period, are in substantial quantities, and for an extended period of time. This is consistent with the object and purpose of Part XVB to allow dumping duties in response to dumping but to ensure that dumping duties are not applied where there is no dumping. This rule in section 269TAAD(1) implements the provisions of Article 2.2.1 of the *Antidumping Agreement.* Section 269TAAD(1) contains exactly the same criteria as are contained in Article 2.2.1. This manifests an intention in section 269TAAD(1) to avoid the determination of dumping margins in excess of those determined in accordance with the constraints of Article 2.2.1.

Critical to the determination of whether the exporter would recover costs within a reasonable period of time is a determination of the costs that need to be recovered. Regulation 43(2) provides that the usual approach to determining the exporter's costs is to rely on the exporter's own records. This general rule in Regulation 43(2) manifests an intention that determination of whether prices would enable the exporter to recover their costs within a reasonable period of time should be based on the costs that the exporter actually expended. If the costs are calculated at an amount lower than what the exporter actually spent then fewer sales would be excluded and the dumping margin would be too low. If the costs are calculated at an amount higher than what the exporter actually spent then more sales would be excluded and the dumping margin would be too high. Therefore, the general rule in Regulation 43 reflects a purpose of making as reliable a determination as possible of whether the exporter is dumping and of the size of the margin of dumping.

Regulation 43(2) allows the Commissioner to depart from using the information in the exporter's records in two situations. The first situation, under regulation 43(2)(b)(i), is where the exporters' "records … [are not] in accordance with generally accepted accounting principles in the country of export". Regulation 43(2)(b)(i) implements the provisions of the first sentence of Article 2.2.1.1 and contains the same criteria as are in the first sentence of Article 2.2.1.1. This exception under regulation 43(2)(b)(i) should be considered in the context of the purpose of the determination under section 269TAAD(1), which in turn should be considered in the context of the purpose of the corresponding determination under Article 2.2.1. This is the purpose of making the determination as accurately as possible whether any of the domestic sales are at a price that will not result in recovery of costs within a reasonable time. The accounting principles followed by the exporter will affect the way that records are kept of expenditures that need to be allocated across time periods and across units of production. It is possible that a departure from generally accepted accounting principles might lead to a smaller portion of expenditure being allocated to particular goods in the investigation period than if the records did accord with generally accepted accounting principles. That would result in less sales being found to be sales at a loss, less sales being excluded from the determination of normal value and the comparison between normal value and export prices would result in a smaller dumping margin. On the other hand, Regulation 43(2)(b)(i) does not authorise the Commissioner to depart from using the information in the exporter's records to work out the amounts for the cost of production just because the Commissioner has a preference for a different accounting method. It is only a deviation from generally accepted accounting principles in the particular country that can justify not using the information in the exporter's records. Limiting the scope to discard what is likely to be the best evidence of what the exporter actually spent is likely to make the determination of what the exporter actually spent more accurate. That leads to a more accurate determination of whether the costs can be recovered within a reasonable period time. This leads to a better selection of transactions in the ordinary course of trade. All of this reflects a purpose of making as reliable a determination as possible of whether the exporter is dumping and what is the dumping margin.

The second exception allowing the Commissioner to depart from using the information in the exporter's records in working out the cost of production is that in regulation 43(2)(b)(ii). This relates to the situation where the information in the exporter's "records …[does not] … reasonably reflect competitive market costs associated with the production or manufacture of like goods". Regulation 43(2)(b)(ii) implements the provisions of the first sentence of Article 2.2.1.1 and contains the same criteria as the first sentence of Article 2.2.1.1. This exception under regulation 43(2)(b)(ii) must also be considered in the context of the purpose of making the determination under section 269TAAD(1), which in turn must be considered in the context of the purpose of the corresponding determination under Article 2.2.1. The purpose is to determine as accurately as possible whether any of the domestic sales are at a price that will not result in recovery of cost within a reasonable period of time. As stated above, the general rule in Regulation 43(2) manifests an intention that determination of whether prices would enable the exporter to recover their costs within a reasonable period of time should be based on the costs that the exporter actually expended. It is possible that the exporter's records do not reflect the cost incurred by the exporter in purchasing the cost item in the sense that an amount recorded as the purchase price for an input product may not reflect the resources that the exporter transferred to the seller in exchange for the purchase of the input item. This could occur if the transaction to purchase the input item were just one component of a composite transaction aggregating more than one transaction involving an exchange of value. It may be that the amount recorded in the exporter's records does not completely disentangle the transaction for the purchase of the input item from other transactions so that the amount in the exporter's records

does not represent what the exporter would have paid for the input item in a stand-alone transaction. Regulation 43(2) and the exception in regulation 43(2)(b)(ii) deal with this problem by requiring the Commissioner to use the information in the exporter's records except where that information does not reasonably reflect what the exporter would have had to pay for the input item in a stand-alone transaction completely divorced from any other exchange of value, or more simply does not reasonably reflect the competitive market cost of the input associated with the production or manufacture of like goods. This rule maintains the focus on what the exporter actually spent but allows flexibility where the amount of expenditure recorded does not reflect the actual value given by the exporter to acquire the input.

In summary, interpreting Regulation 43(2)(b)(ii) in the context of section 269TAAD(1) indicates that the words "records … reasonably reflect competitive market costs associated with the production or manufacture of like goods" is a reference to whether the records of the export reasonably reflect the value that the exporter actually had to give to acquire the particular input. This is consistent with the meaning of Article 2.2.1.1 as interpreted by the WTO Appellate Body in *European Union – Antidumping Measures on Biodiesel from Argentina* (WT/DS473/AB/R) that the records reasonably reflect the costs actually incurred by the exporter which have a genuine relationship with the production and sale of the product under consideration in the particular investigation. Therefore, the consideration of Article 2.2.1.1 confirms the above described meaning of regulation 43(2)(b)(ii).

2.4.2 Sub-Sections 269TAC(2)(c) and 269TAC(5A) as context for the interpretation of Regulation 43(2)(b)(ii)

Since as stated above, Regulation 43 has a function under section 269TAAD and under section 269TAC(5A), then in addition to section 269TAAD, section 269TAC(5A) must also be considered as closely related context for interpreting Regulation 43(2). Therefore, we must interpret Regulation 43(2)(b) in the context of section 269TAC(5A). In the scheme of rules under Part XVB, the particular role of section 269TAC(5A) is to help ensure that the constructed cost method of determining normal value under section 269TAC(2)(c) does provide a normal value that can be compared with export prices so as to provide a reliable indication of whether an exporter is selling the units exported at a lower price than the units sold locally. The objective in determining a constructed cost under section 269TAC(2)(c) is to estimate the price at which the exporter would have sold the goods if it did sell in the domestic market, in sufficient quantities and unaffected by any market situation which skews the domestic price so as to make it not suitable for comparison with the export price.

Section 269TAC(2)(c) provides for that estimation to be based on an aggregation of cost of production, administrative, selling and general costs and an allowance for a profit margin. Section 269TAC(5A) provides that the amounts allowed for those items should be determined according to the method provided for in Regulation 43, 44 and 45 (under the same provisions that establish the method for determining these components of cost for the purposes of section 269TAAD(1)). As stated above, Regulation 43(2) provides that in determining the amount for cost of production, the Commissioner should ordinarily use the information set out in the exporter's records. Regulation 44(2) provides for the same general rule requiring use of information in the records of the exporter in the determination of the administrative, selling and general costs. Regulation 43(2) provides that the preferred way to determine the allowance for profit is to use data based on actual sales by the same exporter or producer in the ordinary course of trade. These preferred ways of working out the allowance for cost of production,

other costs and profit margin indicate that the purpose of the inquiry is to estimate how the individual exporter would behave in making pricing decisions. In order for this aggregation of costs and profit margin under section 269TAC(2)(c) to provide a reasonable estimation of the price at which the exporter would sell on the domestic market, it is necessary that the costs used should be the same or as close as possible to the actual costs incurred by the exporter upon which the exporter's pricing decisions are made, and that there is a reasonable basis for estimating how the exporter sets a profit margin. In particular, it indicates that the purpose of the general rule in Regulation 43(2) in relation to determining the cost of production is to determine the cost that the exporter *actually incurs* in purchasing the particular input item. Regulation 43(2) also reflects an acknowledgement that ordinarily the information recorded in the records of the exporter will be the best evidence of the costs *actually incurred* by the exporter. More generally, the application of the ordinary rule under Regulation 43(2) reflects the general purpose of Part XVB of making as reliable a determination as possible of whether the exporter is dumping and of the size of the margin of dumping, and this in turn reflects the general purpose of Article 2 of the *Anti-Dumping Agreement*.

As discussed above, Regulation 43(2) provides a general rule and two exceptions in Regulations 43(2)(b)(i) and (ii). It is the same general rule and exceptions that apply when the amounts are determined under regulation 43(2) for the purposes of determining costs for the purposes of section 269TAAD(1) or for determining costs for the purposes of section 269TAC(5A). As stated above, the first of the two exceptions under which the Commission may depart from using the information in the exporter's records to work out costs is the exception in Regulation 43(2)(b)(i) which deals with the situation in which the exporter's records do not follow generally accepted accounting principles in the country of export. As noted above, Regulation 43(2)(b)(i) implements the provisions of the first condition in the first sentence of Article 2.2.1.1 and contains the same criteria. This exception in Regulation 43(2)(b)(i) should be interpreted in the context of the purpose of the determination under section 269TAC(5A), which is a part of the determination under section 269TAC(2)(c). Section 269 TAC(2)(c) implements the rules in Article 2.2, so Regulation 43(2)(b)(i) should be interpreted in the context of the purpose of the determination under section 269TAC(2)(c), which in turn must be interpreted in the context of the purpose of Article 2.2 . The method of keeping accounting records may mean that the recorded amounts for the costs of the particular products in the particular period do not reflect the costs incurred by the exporter which the exporter takes into account when making pricing decisions. The method of keeping accounting records could mean that the recorded cost of production is less than the actual costs incurred and taken into account by the exporter so that basing a constructed normal value on those recorded costs would tend to underestimate the normal value, or an overestimation of normal value would flow from using recorded costs of production which are larger than the actual costs incurred and taken into account by the exporter. The purpose of this exception is to allow the Commissioner to depart from using the information in the exporter's records in situations in which the choice of accounting method has the effect that the amounts in the exporter's records are not a good indication of the costs actually incurred by the exporter and influencing the exporter's pricing decisions. However, the rule does not authorise the Commission to depart from the information in the exporter's records merely because the Commissioner would prefer a different accounting method. It is only a departure from the generally accepted accounting principles in the country of export which can justify departing from using the information in the exporter's records.

As stated above, the second of the two exceptions is the exception in Regulation 43(2)(b)(ii) under which the Commissioner may depart from using the information in the exporter's records if that information

does not reasonably reflect competitive market costs. As noted above, Regulation 43(2)(b))(ii) implements the provisions of the second condition in the first sentence of Article 2.2.1.1 and contains the same criteria. This exception under Regulation 43(2)(b)(ii) must also be assessed in the light of the purpose of making the determination under section 269TAC(2)(c), which in turn must be interpreted in the context of Article 2.2, which is to estimate what the exporter's domestic selling price would be if the exporter did sell in the domestic market, in sufficient quantities and unaffected by any market situation which skews the domestic price so as to make it not suitable for comparison with the export price. As described above, this means estimating the costs that the exporter actually incurs and takes into account in making pricing decisions. While the information in the exporter's records would ordinarily be the best evidence of the cost actually incurred by the exporter and taken into account in the exporter's pricing decisions, it is possible that the exporter's records do not reflect the cost incurred by the exporter in purchasing the cost item in the sense that an amount recorded as the purchase price for an input product may not reflect the resources that the exporter transferred to the seller in exchange for the purchase of the input item. For example, this could occur if the transaction to purchase the input item were just one component of a composite transaction aggregating more than one transaction involving an exchange of value. It may be that the amount recorded in the exporter's records does not completely disentangle the transaction for the purchase of the input item from other transactions so that the amount in the exporter's records does not represent the resources that the exporter transferred to the seller in exchange for the purchase of the input item which is what the exporter would have paid for the input item in a stand-alone transaction. Regulation 43(2) and the exception in regulation 43(2)(b)(ii) deal with this problem by requiring the Commissioner to use the information in the exporter's records except where that information does not reasonably reflect what the exporter would have had to pay for the input item in a stand-alone transaction completely divorced from any other exchange of value, or more simply does not reasonably reflect the competitive market cost of the input that is associated with the production or manufacture of the goods which are the subject of the particular investigation. This rule maintains the focus on what the exporter actually spent but allows flexibility where the amount of expenditure recorded does not reflect the actual value given by the exporter to acquire the input associated with the production of the particular goods which are the subject of the investigation.

In summary, interpreting Regulation 43(2)(b)(ii) in the context of section 269TAC(2)(c) and (5A) indicates that the words "records … reasonably reflect competitive market costs associated with the production or manufacture of like goods" is a reference to whether the records of the export reasonably reflect the value that the exporter actually had to give to acquire the particular input. This is consistent with the meaning of Article 2.2.1.1 as interpreted by the WTO Appellate Body in *European Union – Antidumping Measures on Biodiesel from Argentina* (WT/DS473/AB/R) that the records reasonably reflect the costs actually incurred by the exporter which have a genuine relationship with the production and sale of the product under consideration in the particular investigation. Therefore, the consideration of Article 2.2.1.1 confirms the above described meaning of regulation 43(2)(b)(ii).

2.5 Conclusion on the interpretation of regulation 43(2)(b)(ii) in the context of related regulations 44 and 45, section 269TAAD, section 269TAC(2)(c) and (5A) and the overall scheme of regulation in Part XVB of the Customs Act and the object and purpose of all of these provisions

Therefore, when we interpret regulation 43(2) in the context of section 269TAC(5A), it indicates the same meaning as when we interpret regulation 43(2) in the context of section s269TAAD(1). It is to be

expected that Regulation 43(2)(b)(ii) would have to have the same meaning in all of the situations to which it applies. The above analysis of the purpose of the determination under section 269TAAD and the above analysis of the purpose of the determination under section 269TAC(2)(c) and (5A) do indicate the same meaning of regulation 43(2)(b)(ii).

They indicate that the words in paragraph (ii) of Regulation 43(2)(b) :

> "records … reasonably reflect competitive market costs associated with the production or manufacture of like goods"

are concerned with whether the information in the records kept by the exporter or producer does reasonably reflect the costs that the exporter or producer actually incurred in purchasing the input item, in the sense that the information in the records reasonably reflects the value that the exporter or producer transferred to the seller of the input item associated with the production of the particular goods the subject of the investigation.

Therefore, regulation 43(2)(b)(ii) excuses the Commissioner from using the information in the records of the exporter to work out the cost of an input in production if the information in the records of the exporter do not reasonably reflect the amount that the exporter actually incurred in acquiring the input item. Regulation 43(2)(b)(ii) could excuse the Commissioner from using the information in the records of the exporter to work out the cost of an input in production if the information in the records of the exporter does accurately record the invoice price that the exporter incurred in acquiring the input item but the invoice price does not reasonably reflect the value that the exporter actually transferred in the transaction in exchange for the purchase of the input item that is associated with the production of the particular goods subject to the investigation. Regulation 43(2)(b)(ii) does not excuse the Commissioner from using the information in the records of the exporter to work out the cost of an input in production in *any other* circumstances.

This is consistent with the meaning of Article 2.2.1.1 as interpreted by the WTO Appellate Body in *EU – Antidumping Measures on Biodiesel from Argentina* WT/DS473/AB/R. The AB in *EU Biodiesel* interpreted the words in the first sentence of Article 2.2.1.1

> "records … reasonably reflect the costs associated with the production and sale of the product under consideration"

as being concerned with whether the records reflect what the exporter actually spent. The permission in the text of Article 2.2.1.1, as indicated by the Appellate Body in *EU- Biodiesel* to depart from the information in the exporter's records when they do not reasonably reflect the actual costs expended by the exporter would extend to permitting departure from the information in the records when the information in the records does not adequately separate out the amount of value actually given by the exporter in the market in acquiring a particular input that is associated with the production of the particular goods under investigation. This interpretation of Article 2.2.1.1 is consistent with the text, in its context and in the light of its object and purpose.

It is possible to interpret the words in Regulation 43(2)(ii)

> "records … reasonably reflect competitive market costs associated with the production or manufacture of like goods"

Consistent with the above interpretation of the words in Article 2.2.1.1

> "records ... reasonably reflect the costs associated with the production and sale of the product under consideration".

That is the reference to records reasonably reflecting costs in Article 2.2.1.1 already covers the situation in which the records do reflect the invoice price that an exporter incurred in acquiring the input item but the invoice price does not reasonably reflect the value that the exporter paid in the market in exchange for the purchase of the input item associated with the particular goods subject to the investigation.

The fact that Regulation 43(2)(b)(ii) modifies the wording of article 2.2.1.1 by replacing the words "the costs" with the words "competitive market costs" can be interpreted as making it clear that regulation 43(2)(b)(ii) does allow the Commissioner to depart from relying on the information in the records of the exporter where the information does accurately record the actual cost paid by the exporter in a purchase transaction but where the information in the records on their own do not indicate the amount of resources actually given in exchange for input items included in the invoice, which are associated with the production of the particular goods the subject of the investigation. It is submitted that Article 2.2.1.1 does authorise departure from using the information in the exporter's records in such circumstances and that the additional words in Regulation 43(2)(b)(ii) do no more than make it clear that the Commission can depart from relying on the information in the exporter's records in such circumstances.

It would have been possible that Regulation 43(2) mandated the consideration of a matter that is additional to what is required by Article 2.2.1.1 to be considered and it would have been possible that Regulation 43 allowed or mandated that the Commissioner depart from working out the cost of production using the information set out in the exporter's records in circumstances in which Article 2.2.1.1 mandates that the Commissioner must work out the cost of production using the information set out in the exporter's records. In that case, an Australian Court would have to give effect to Regulation 43 even if were regarded as not being in conformity with Article 2.2.1.1, with the effect that conduct of the Commissioner or Minister could be consistent with Regulation 43 under Australian law even if that conduct were inconsistent with Australia's obligations under Article 2.2.1.1 under international law. However, under the laws of statutory interpretation applying under Australian domestic law, Regulation 43 should be interpreted, as far as the words of Regulation 43 permit, in conformity with Australia's obligations under Article 2.2.1.1. The analysis above has demonstrated that it is possible to interpret regulation 43(2)(b)(ii) in conformity with Australia's obligations. This means that Regulation 43(2)(b)(ii) should be interpreted as explaining the requirements of Article 2.2.1.1 but not adding to them.

Therefore, regulation 43(2)(b)(ii) does not authorise the Commissioner to justify a departure from using the information in the records of the exporter on the basis that the information in the exporter's records diverges from what the price of the input would be in the absence of a distortion arising from a government intervention, even though the information in the records of the exporter does reasonably reflect the value that the exporter gave in the market to purchase the input.

The Commissioner has interpreted regulation 43(2)(b)(ii) as permitting the Commissioner to depart from using the information in the exporter's records where the information in the records does not reasonably reflect a competitive market price that is not distorted from what it would be in the absence of a government intervention even without any inquiry as to whether the information in the exporter's records reasonably reflect the value actually exchanged in the market by the exporter for the input purchased which is associated with the production of the particular goods under investigation.

That represents an error in the legal interpretation of regulation 43(2)(b)(ii). This means that the basis upon which the Commissioner has in PAD341A and SEF341 departed from using the information in the exporter's records about the cost of paper pulp is not consistent with Regulation 43(2)(b)(ii). Therefore, the use of surrogate prices for the acquisition cost of pulp is also not consistent with Regulation 43(2)(b)(ii).

Apart from being a breach of Regulation 43(2)(b)(ii), the departure from using the records of the exporter in PAD341A is a violation of Australia's obligation under Article 2.2.1.1. Should the Commissioner continue to work on an erroneous interpretation of the law and should the Minister make a decision based on a departure from using the information in the exporter's records without meeting the criteria of Article 2.2.1.1, then that will constitute a violation of Australia's obligation under Article 2.2.1.1. That would expose Australia to the possibility of a WTO dispute settlement ruling that Australia is in breach of Article 2.2.1.1 and ultimately to the possibility of a complainant WTO Member imposing sanctions on Australian exports.

3 Further Discussions

I look forward to hearing from you so that we discuss the two legal issues discussed in this letter and may reach agreement on the way that the two legal issues should affect the determination under the Investigation into alleged dumping by my clients of A4 paper.

Yours Faithfully,

Brett Williams

Dr Brett G Williams