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18 August 2020

Mr Corey Hawke
Case Manager, Investigations 3
Anti-Dumping Commission
Level 35
55 Collins Street
Melbourne Victoria 3000

Public File

Dear Mr Hawke,

Anti-Dumping/Subsidisation Investigation No. 550 – Precision Pipe & Tube Steel exported from China, Korea, Taiwan, and Vietnam

I. Introduction

Orrcon Manufacturing Pty Ltd ("Orrcon") is the manufacturer of the subject goods Precision pipe & tube steel in Australia. Orrcon was the applicant company that requested the Anti-Dumping and Subsidisation investigation applicable to Precision pipe and tube exported from the People's Republic of China ("China"), the Republic of Korea, Taiwan, and the Socialist Republic of Vietnam ("Vietnam") – refer ADN No. 2020/030.

Orrcon makes the below additional representations in relation to its previously submitted response to Section A (Market Situation) of the Australian Industry Questionnaire. In addition to providing further support for the China Particular Market Situation ("PMS"), Orrcon also specifically addresses the following issues raised by the Anti-Dumping Commission ("the Commission") in the questionnaire:

> *In the event that the Minister is satisfied a market situation is found to exist during the investigation period, please comment and provide any relevant evidence on:*
> - *the effect of the market situation on exporters' domestic prices in China/Vietnam (as relevant);*
> - *the effect of the market situation on exporters' export prices;*
> - *whether the effect of the market situation is such that exporters' domestic prices and export prices cannot be properly compared.*

II. Further Support for a China Particular Market Situation

Orrcon highlights the existence of a substantial body of research which consistently points to ongoing high levels of State control and subsidisation in China, including in the steel sector.[1] Shuang Jin and Zilong Zhang, for example, found in a 2017 survey that between 2009 and 2017, 95% of listed Chinese firms received subsidies; and that, on average, government subsidies constitute as much as 60% of the absolute net income of a firm.[2]

[1] Confidential Attachment 1 / Confidential Attachment 2.
[2] Confidential Attachment 3.

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A comprehensive study was conducted by Haley and Haley on China's subsidisation of key industries. The study analysed a vast amount of data and described in detail the various ways in which subsidisation occurred, such as the use of policy loans, provision of land-use rights, electricity, and various material inputs.[3] Haley and Haley emphasise the hidden nature of Chinese subsidisation, stating that *"…for institutional and strategic reasons, the information on manufacturing subsidies that the Chinese government provides has rampant missing and misreported data"*.[4] They note further that *"…generally, despite stated policies, outsiders cannot ascertain the true policies that underlie subsidies. A secretive and authoritarian organisation with unclear aims, closed to scrutiny and debate, controls the Chinese state."*[5]

Whilst the Haley study dates prior to the investigation period, currently available information confirms the enduring reliability and relevance of their work. In particular, recent sources highlight that State involvement in the economy has only increased in China since 2013. Medeiros wrote in 2019 that *"*[President] *Xi has made a variety of decisions that reveal a preference for state control over the economy and a corresponding skepticism about market forces. As captured in his speech at the Fall 2017 19th Party Congress, Xi has embraced a greater role for the state in the economy, especially SOEs and state led development projects, and a greater role for the Communist Party in economic governance… It is reasonable to conclude that, going forward, China's relative prioritization of market forces in the reformation of the economy will remain limited"*.[6]

President Xi has spoken about furthering reform of state-owned enterprises and turning Chinese enterprises into world-class, globally competitive firms. These reforms should be viewed by the Commission as part of President Xi's goal of supporting state capital to become stronger, do better, and grow bigger.[7]

III. The Effect of the Market Situation on Exporters Domestic Prices

China

Orrcon submits that there is a PMS in the Chinese domestic market for Precision pipe & tube that renders sales in that market unsuitable for determining normal values under subsection 269TAC(1), due to the influence of the Government of China ("GOC") in the Chinese iron and steel industry. Prices for the subject goods (and the hot-rolled coil ("HRC")/cold-rolled coil substrate feed thereof) are substantially different (i.e. lower) to those that would prevail in normal competitive market conditions.

These lower prices would support the Minister's affirmative finding that a PMS exists in the current inquiry. An evaluation of market conditions, and an assessment of prices outside of China, evidences this distortive effect on domestic prices.

[3] Confidential Attachment 4.
[4] Ibid, p.18.
[5] Ibid, p.61.
[6] Confidential Attachment 5.
[7] See Xi Jinping's address delivered at the 19th National Congress of the Communist Party of China http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf in which he stated (at p.29) that "*We will work to see that state assets maintain and increase their value; we will support state capital in becoming stronger, doing better, and growing bigger, and take effective measures to prevent the loss of state assets.*"

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Home Market Price Analysis

A recent price comparison of Chinese HRC, Cold-Rolled Coil ("CRC") (as key and substantially cost-proportional inputs into the manufacture of the subject goods), and Hot Dipped Zinc Coated (galvanised) steel ("HDG") with prices in other comparable domestic markets[8] has yielded material differences demonstrating Chinese prices are artificially low.

On an $AU/tonne basis, Chinese domestic prices are consistently (and materially, in the case of HRC by up to [*XX*]%) lower than the comparable markets of South Korea, Taiwan, and Japan:

Tables 1-3: Home Market Price Analysis; HRC / CRC / HDG

[redacted]

Source: [redacted]

A similar comparison involving domestic Chinese prices with other benchmarks from [*commercial-in-confidence data sources*] published Chinese prices yields a similar result to the above. The price types quoted are as follows, and are represented in Tables 4-6 below (the yellow line depicting the Chinese price in all instances)[9]:

1. [*Commercial-in-confidence data source*];
2. [*Commercial-in-confidence data source*]; and
3. [*Commercial-in-confidence data source*].

[8] Confidential Attachment 6: MEPS Pricing Data and Tables.
[9] Confidential Attachment 7: SBB China Price Comparisons.

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Table 4

Source: [redacted]

Table 5

Source: [redacted]

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Table 6

Source: [redacted]

For each of the Chinese index prices, there prevails a systematic and material difference between in-China, and the higher rest of the world prices. This difference (i.e. prices being lower) is the direct result of the PMS.

A third point of independent reference, via [*commercial-in-confidence data source*] further validates the impact on prices per the existence of the Chinese PMS.[10]

10 [redacted]

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Table 7

Table 8

The above graphs highlight a consistent theme of price undercutting by China reflected by the reduced world export price for HRC and CRC since the mid-to-late 2000's. China's prices are consistently the lowest, forcing steelmakers such as Orrcon to compete with an industry that the U.S., EU, Canada and Australia (in previous inquiries) have determined as being significantly supported by the GOC. This support has come in many forms, and has enabled China to increase its exports of steel by [*XXX*]% between 2009 and 2016.

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Vietnam

Orrcon submits that the Government of Vietnam ("GOV") is heavily involved in the steel industry, including the Precision pipe & tube steel sector. Prices for the subject goods produced in Vietnam are substantially determined by the GOV, and are lower than they otherwise would be in a competitive market.

Domestic Price Analysis

As noted in its application, Orrcon was unable to source domestic selling price information for Precision pipe & tube sold in Vietnam. At this stage in the inquiry, Orrcon would expect the Commission to encounter similar difficulties.

The Canada Border Services Agency's ("CBSA") recent Statement of Reasons on its preliminary determination on the dumping and subsidisation of corrosion-resistant steel sheet from Turkey, the United Arab Emirates, and Vietnam noted that:

> "*…the CBSA received substantially complete submissions to the Dumping RFI for three exporters in Vietnam. The CBSA used the information submitted to analyse the hot-rolled coil purchases and cold-rolled coil purchases in Vietnam. The prices were then compared to world average prices of hot-rolled coil and cold-rolled coil.*"[11]

The CBSA then concluded that:

> "*The results of the comparison described above indicate that the prices of domestically produced hot-rolled coil was 18.7% lower than the world average price; imported hot-rolled coil was 17.5% lower than the world average price; and domestically produced cold-rolled coil was 18.4% lower than the world average price.*
>
> *In this regard, for the preliminary determination, the domestic price analysis of hot-rolled coil and cold-rolled coil suggest that there is sufficient reason to believe that the prices in the flat-rolled steel sector in Vietnam are not substantially the same as they would be if they were determined in a competitive market.*"[12]

Cold-rolled steel substrate (i.e. HRC that is further cold reduced) is one of the most significant cost inputs for Precision pipe & tube. Orrcon submits that the logical extension of an 18.4% lower-than-competitive world average price for cold-rolled steel in the Vietnamese market translates into a lower-than-competitive market price for subject goods selling prices in Vietnam.

[11] Non-Confidential Attachment 8: CBSA Statement of Reasons concerning the preliminary determinations with respect to the dumping and subsidising of Certain Corrosion Resistant Steel Sheet originating in or exported from Turkey, The United Arab Emirates, and Vietnam; April 3, 2020, p.30.
[12] Ibid.

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Whilst unable to source domestic sell price information for the subject goods in Vietnam, Orrcon has [*confidential Vietnam pricing sources*] in seeking to validate pricing differentials (either for the subject goods, or the HRC/cold-rolled substrate feed thereof). To that end, Orrcon has quantified quarterly in-country pricing [*confidential pricing sources*][13] from [*confidential pricing sources*].[14]

Table 9 below depicts and compares these prices to domestic HRC prices in China, South Korea, Japan, and Taiwan over the 2019/20 period.[15] In doing so, [*confidential price trends*].[16]

Table 9: Vietnamese HRC Price Comparison over the Investigation Period

[redacted]

Source: [redacted].

Where the Minister is satisfied that a market situation is found to exist during the investigation period, it is clearly evident that such a situation has the effect of facilitating lower input substrate HRC feed costs for the manufacture of the subject goods. In the absence of a market situation, this feed cost would otherwise be higher. Orrcon submits that this extends to the selling prices of Precision pipe & tube in the Vietnamese market being lower also.

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[13] [redacted].

[14] Confidential Attachment 9.

[15] [redacted].

[16] South Korea and Taiwan are considered most appropriate for this price comparison as both countries are often cited by the Commission for benchmarking and surrogacy purposes. A recent commentary by the Commission on Korean and Taiwanese HRC benchmark suitability was the Pallet Racking (REP 441) SEF of 5 November 2018. In relevant part *"The Commission has, therefore, preliminary determined that an appropriate benchmark for HRC costs in China is the weighted average domestic HRC prices paid by cooperating exporters from Korea and Taiwan in Reviews 456 and 457, at comparable delivery terms to those observed in China. As explained in Reviews 456 and 457, these markets are characterised by a number of producers, buyers and sellers of HRC in an environment which appears to be free from distortions caused by government or other interference."* Refer pages 102-103. [redacted]

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IV. The Effect of the Market Situation on Exporters Export Prices

Commodity prices on export markets, including that of steel, are generally considered to be traded within a competitive market structure; namely, free market entry and exit, and the existence of many buyers and sellers, none of which by their own influence can impact the export/world price for a particular product.

Recent steel-specific trade distortive practices, such as the United States Section 232 tariffs and the consequent decision by the European Union to impose safeguard measures on steel products, will impact the globally traded prices (and destinations) for steel, including that of the subject goods.

The price achieved on the export market by Chinese and Vietnamese producers of Precision pipe & tube would be similar to that achieved by other exporters from other countries. There would hence be an obvious disconnect between such prices, and the price at which the subject goods are sold on the Chinese and Vietnamese domestic markets where a PMS has been found to exist per the extensive steel industry involvement by the GOC and GOV.

Certainly however, as relating primarily to China, the market distortions evident due to the GOC's influence may have an impact on both domestic and export prices, but the impact will be different. For example, the provision of HRC at less than adequate remuneration will result in lower subject goods prices on the domestic market, although potentially higher margins on the export market. Further, the recent (March 2020) change to the VAT export rebate will direct domestic sales to the export market, creating significant export competition and suppressed selling prices (including for the subject goods). While both markets are affected in these instances, the impact would manifest differently.

V. Whether Domestic and Export Prices are Comparable

A4 Copy Paper

In December 2019, the World Trade Organisation ("WTO") Panel in *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529/R) released its report.[17] The decision follows a complaint against Australia by Indonesia and is the only WTO panel or Appellate Body decision that considers the PMS provision found at article 2.2 of the Anti-Dumping Agreement ("ADA").

The decision provides some guidance on investigating authorities' use of the ADA's market situation provisions. The panel refused to put limits on what may qualify as a PMS, and further, it accepted that low-priced inputs (including those that are used for goods for both domestic and export markets) can contribute to a PMS. The panel also left the door open to subsidies contributing to a market situation (the Commission did not investigate subsidies, but found that government interventions in the form of subsidies contributed to a market situation).[18]

While the panel did not find fault with Australia's approach to determining the existence of a PMS, it did take issue with Australia's determination that the PMS was such that domestic and export "*sales do not permit a proper comparison*". The panel held that "*…we consider that the "proper comparison" language calls for an assessment in respect of the comparison of domestic and export prices.*"[19]

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[17] Non-Confidential Attachment 10: *Australia – Anti-Dumping Measures on A4 Copy Paper* (WT/DS529/R).
[18] In Orrcon's view, this is critical. Subsidies in certain parts of the steel industry are all-pervasive. These will continue to endure as a foundation for PMS findings.
[19] Non-Confidential Attachment 10: *Australia – Anti-Dumping Measures on A4 Copy Paper* (WT / DS529 / R), para 7.73.

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It went on to find that:

> *"While the proper comparison in Article 2.2 refers to the comparison between the domestic and export prices, a purely numerical comparison between the two prices may not reveal anything about whether the domestic price can be properly compared with the export price. Rather, it is necessary to conduct a qualitative comparison of the domestic and export prices. The phrase "because of the particular market situation" makes clear that the qualitative assessment of whether the domestic and export prices can be properly compared should focus on how the particular market situation affects that comparison. We therefore consider that the "proper comparison" language calls for an assessment of the relative effect of the particular market situation on domestic and export prices. We understand that, in certain circumstances, as a result of this assessment, the investigating authority may conclude that the particular market situation has no effect on the export prices"*[20]

The WTO's reasons provide a theoretical, but not a practical, guide as to how an investigating authority is to determine whether a PMS makes it inappropriate to compare domestic and export prices.

Australia argued that all that was necessary was a determination that domestic sales are not suitable for establishing normal values that will provide a reliable foundation. The WTO rejected this approach because it focused on domestic prices and sales, without paying attention to export prices. It noted that the PMS was based on decreased input costs, and that the same low-priced input was used to produce goods for both the domestic and export market. As such, it was incumbent on Australia to explain why the market situation caused by low-priced inputs made domestic and export prices unsuitable for comparison (i.e. the qualitative analysis).

China – Subject Goods Price Comparability

The Chinese PMS has rendered the subject goods domestic price and export price unsuitable for comparison. This is evident via an assessment of officially traded Asian-regional index prices in which China has significant influence and weighting compared to China's own in-country pricing.

Regional Market Price Analysis

[*Commercial-in-confidence data source*] publish the following Asian-regional HRC and CRC price indices, the trends of which can be extended vis-à-vis Precision pipe & tube (for the substrate-specific reasons discussed above):

- [*Commercial-in-confidence data source*];
- [*Commercial-in-confidence data source*]; and
- [*Commercial-in-confidence data source*].

The current weighting of China in the above indices is detailed at Table 10:

[20] Ibid, para 7.75.

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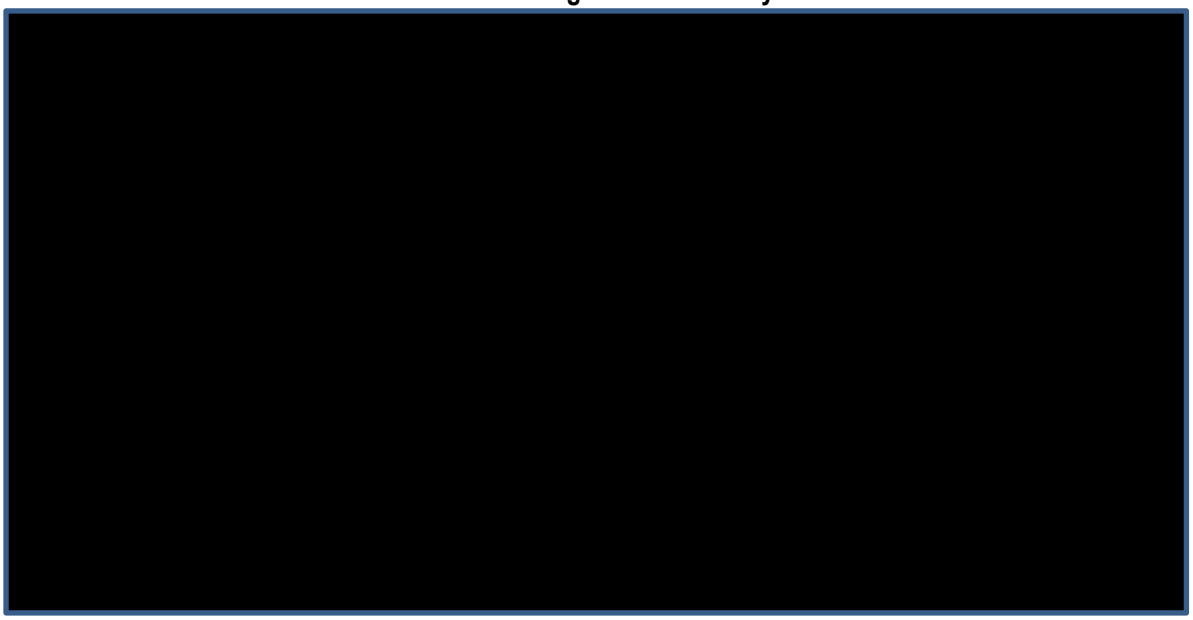
Table 10

China has a cargo-origin representation of nearly [*XX*] per cent. Comparing these prices against [*commercial-in-confidence data source*] in-country prices for Chinese HRC and CRC yields the following results:[21]

Table 11: Regional Price Analysis



Source:

[21] Confidential Attachment 11.

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Table 12: Regional Price Analysis

[redacted]

Source: [redacted].

On an Australian Dollar basis, the in-country HRC Chinese price over the tabled period is $[*XX*]/tonne lower ([*XX*]%-[*XX*]%) than the regionally traded equivalent; and the CRC in-country price is $[*XX*]/tonne lower ([*XX*]%) than its regional counterpart. And whilst the traded Asian-regional prices are quoted [*price terms*], Orrcon is of the view that this would account for only a small part of the overall price disparities.

It is widely considered that prices are materially lower on the export market for steel products, on the premise that steel manufacturers seek to service profitable domestic markets first, and export surplus production (usually covering only variable costs). In the case of China, a clear role-reversal is depicted above, and is driven by the PMS.[22]

Aluminium Extrusions – China Continuation Inquiry No. 543

The Commission concluded in the July 2020 Statement of Essential Facts into the continuation of anti-dumping and countervailing measures on aluminium extrusions exported to Australia from China[23] that a PMS existed in respect of the domestic Chinese market for the subject goods during the 2019 calendar year inquiry period.[24]

In assessing the suitability of sales under section 269TAC(1) where a PMS is found to exist, and as aligned to its obligations under the WTO's *Anti-Dumping Agreement*[25] and the WTO Panel's interpretation of the obligations set out in this Agreement in *Australia – Anti-Dumping Measures on A4 Copy Paper,*[26] the Commission has considered the relative effect of the market situation on both domestic and export sales of aluminium extrusions.

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[22] [redacted]

[23] Refer *Statement of Essential Facts No.543 – Inquiry into the Continuation of Anti-Dumping and Countervailing Measures Applying to Aluminium Extrusions Exported to Australia from the People's Republic of China.*

[24] Ibid, p.40.

[25] *Agreement for the Implementation of Article VI of GATT* 1994 1868 U.N.T.S 186.

[26] Non-Confidential Attachment 10: *Australia – Anti-Dumping Measures on A4 Copy Paper* (WT/DS529/R).

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In undertaking its assessment, the Commission considered the prevailing conditions of competition in the domestic and export market for the subject goods, and the existing relationship between price and cost, to determine whether domestic and export sales can be properly compared.[27]

Assessment Factor	Conclusions
1. Conditions of competition in China and Australia	Market Structure There are three major market segments for aluminium extrusions in Australia; the Chinese market is similarly segmented,[28] however *"…the Australian market does not have the same diversity of market segments."*[29] Market Conditions – Primary Aluminium *"The Australian industry purchases aluminium billet from a combination of Australian and international suppliers…based on a combination of variables including the Monthly London Metal Exchange (LME) Aluminium Official Cash Price, the major Japanese Ports regional ingot premium (MJP), as well as alloy and billet premiums."*[30] *"…Chinese manufacturers have access to cheaper aluminium inputs than the Australian industry due to the distortions in the Chinese primary aluminium market."*[31] Import Penetration *"…the Australian market is composed of a small number of Australian industry participants competing against a significantly higher number of exporters, and substantial import volumes, and that the Australian aluminium extrusions market can therefore be characterised as having a high degree of import penetration."*[32] *"…import penetration in the Chinese aluminium extrusion market was low in the inquiry period, relative to the Australian aluminium extrusion market."*[33]
2. Relationship between price and cost	Chinese Prices & Costs *"…there is consistency and stability in the domestic pricing by Chinese manufacturers which evidences a competitive market where no competitive advantage is derived by any individual manufacturer as the reduced production*

[27] *Statement of Essential Facts No.543 – Inquiry into the Continuation of Anti-Dumping and Countervailing Measures Applying to Aluminium Extrusions Exported to Australia from the People's Republic of China,* p.40.
[28] Ibid, p.41.
[29] Ibid, p.42.
[30] Ibid, p.42.
[31] Ibid, p.43.
[32] Ibid, p.43.
[33] Ibid, p.44.

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	costs from the situation in the market appears to equally benefit the majority or producers."[34] Australian Prices & Costs *"…the Australian market is a competitive market. However, variability of pricing by Chinese manufacturers in the Australian domestic market evidences a competitive advantage enjoyed by Chinese exporters due to the market situation, which allows them to engage in pricing strategies in the Australian market that allow them to achieve either:* – *higher margins than the margins attainable on the sale of the same goods on the domestic market; or* – *increased sales volumes by significantly undercutting other participants in the Australian market; or* – *a combination of higher margins and increased sales volumes resulting from undercutting."*[35]

The consolidated assessment of both crude steel (iron smelting and steel manufacturing, iron and steel casting, and steel pipe and tube manufacture) and primary aluminium in the Commission's *Analysis of Steel and Aluminium Markets Report to the Commissioner of the Anti-Dumping Commission*[36] highlights the close relationship between the two product groups. The Commission's analysis found evidence of market interventions and trade restrictions that influenced market behaviors and decision making by Chinese steel and aluminium producers in ways that diverged from competitive market behaviors and normal commercial decisions.[37]

Applied here (on a market-condition comparison basis), Orrcon submits that Chinese producers of Precision pipe & tube have access to cheaper hot-rolled coil inputs due to distortions in the Chinese steel market. In Review inquiry No. 456,[38] the Commission found that Chinese domestic HRC purchase prices were, on average, 14 per cent lower than HRC domestic purchase prices in Korea and Taiwan,[39] and consequently that

> *"…the GOC materially influenced conditions within the Chinese HRC markets during the review period and because of that influence, the domestic price for Chinese aluminium zinc coated steel and galvanised steel was substantially different to those in competitive market conditions."*[40]

Precision pipe & tube is a further value-add steel product not unlike the subject goods of Review inquiry No. 456. The impact of the GOC's material influence on market conditions can also be similarly assessed.

On a price-comparison basis, when Chinese Precision pipe & tube export prices are contrasted with selling prices in a competitive market (such as Australia, where pricing is determined on an import parity basis), they are clearly lower (due to GOC influence) and undercut all other participants.[41]

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[34] Ibid, p.46.
[35] Ibid.
[36] https://www.industry.gov.au/data-and-publications/analysis-of-steel-and-aluminium-markets
[37] Ibid.
[38] *Review of the Anti-Dumping Measures Applying to Aluminium Zinc Coated Steel Exported to Australia from the People's Republic of China and the Republic of Korea*.
[39] Ibid. Report No. 456, p.73.
[40] Ibid, p.74.
[41] Refer also Confidential Appendix A2.

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Vietnam – Subject Goods Price Comparability

In the current case, the Vietnamese PMS has also rendered the domestic price and export price unsuitable for comparison. The PMS factors identified by Orrcon in its application and other representations, assumed here as assessed by the Commission in an affirmative manner and thus concluded that such a situation exists, affect the input costs and selling prices for the subject goods for export and domestic markets differently.

For example, domestic market distortions affecting the domestic price will have an exclusive impact on domestic sales as export sales will be priced competitively relative to export market pricing (see above at (b)). This includes the impact on the domestic price of the dominance of a small number of large state-owned subject goods steel producers, and government policies targeting domestic supply. Further, where export prices are contrasted with selling prices in Australia, they are clearly lower (due to GOV influence) and undercut all other participants.[42]

Specific to Orrcon's claims, a summary of why a proper price comparison will not be permitted is provided below:

Basis for a PMS Finding	**Impact on Price Comparability; Vietnamese Normal Values v's Export Prices**
1. GOV Industrial Policies	***Steel Master Plans*** Orrcon contends that the objectives, policies and implementation directives of the two consecutive plans consistently indicate the GOV's continuous involvement in the administration and control of the steel industry. The GOV and Vietnamese steel producers have previously indicated that the latest Steel Master Plan had been revoked at the end of 2018. It is submitted, however, that the revocation of the Steel Master Plan in no way hinders or minimizes the effects of the plan on Vietnamese subject goods production and prices over the investigation period. Rather, the effects of the plans, which impacted the structure and capacity of Vietnam's Precision pipe & tube steel industry, continue. Orrcon contends that the GOV is influencing the price of various steel goods in the Vietnamese steel industry, including the price of Precision pipe & tube steel. Orrcon further contends, absent this influence, that the price of the subject goods in the Vietnamese market would be otherwise higher. The CBSA has recently and preliminary concluded similar, stating that: "*Based on the evidence in the document* [the Steel Master Plan 2015-2025]*, the GOV not only intervenes to manage the supply of steel products, which in turn influences* ***domestic*** *prices, but also directly controls prices of various products in the steel sector, which would have a direct impact on the domestic price of COR.*

[42] Refer Confidential Appendix A2.

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	"…the existence of the Steel Master Plan 2015-2025 demonstrates the GOV's intention to remain active in managing the domestic steel sector. Further, the directives contained in these plans demonstrate the GOV's intention and ability to control prices directly or indirectly of various upstream and downstream steel products and therefore, alter the composition and competitiveness of the flat rolled steel sector. Such influence would alter the natural forces of supply and demand and would ***substantially influence the price of goods*** *in this sector, which includes COR."*[43] [emphasis added]. *Industrial Development Strategy* Orrcon noted that the GOV's Development Strategy prioritises, inter-alia, steel production until 2025. The GOV has recently commented that under this plan they would manage disbursement for many projects with public investment, leading to higher demand for steel products.[44] The prevalence of the Steel Master Plans, the ongoing effects post their alleged rescindment, and the GOV's Industrial Development Strategy will impact the in-country price of the subject goods. This impact is not commensurate vis-à-vis the export price.
2. GOV Ownership of Suppliers/Producers	Orrcon noted Vina One Steel Manufacturing Corporation, and Vietnam Steel Corporation ("VNSteel"), as large state owned/government affiliated subject goods producers. State ownership in the Vietnamese steel sector is almost 20%.[45] This considerable holding distorts both raw material input costs to Precision pipe & tube producers (as recently confirmed by the CBSA[46]), and subject goods selling prices. Specific to VNSteel, as a large-scale state-owned steel producer in Vietnam, the Ho Chi Minh City Securities Corporation had earlier advised that: *"…VNSteel does not enjoy much pricing power because prices for many of VNSteel's finished products are regulated by the State. This is part of the burden of being an SOE and industry champion."*[47] The notion of a lack of pricing power, in an economic sense, translates logically to an inability of VNSteel to achieve market-based selling prices (i.e. lower than they otherwise would be).

[43] Non-Confidential Attachment 8: CBSA Statement of Reasons concerning the preliminary determinations with respect to the dumping and subsidising of Certain Corrosion Resistant Steel Sheet originating in or exported from Turkey, The United Arab Emirates, and Vietnam; April 3, 2020, p.22.
[44] Non-Confidential Attachment 12: Vietnam News – Vietnam to produce hot rolled steel this year. February 8, 2018.
[45] Non-Confidential Attachment 8: CBSA Statement of Reasons concerning the preliminary determinations with respect to the dumping and subsidising of Certain Corrosion Resistant Steel Sheet originating in or exported from Turkey, The United Arab Emirates, and Vietnam; April 3, 2020, p.24.
[46] Ibid.
[47] Confidential Attachment 13.

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	As a feed supply to subject goods manufacturing in Vietnam, VNSteel has a 30% share of the cold rolled steel market.[48] It is also understood that several other SOE cold-rolled steel producers provide feed for subject goods manufacture. Orrcon submits that the raw material feed cost and subject goods selling price impact of the GOV's ownership of suppliers to/producers of the subject goods would be confined primarily to the Vietnamese domestic market. Further, the mere existence of only a few major subject goods producers in Vietnam, as opposed to the multitude of steel producers who participate in the world export market for Precision pipe & tube (i.e. the 'Concentration Ratio'[49]) is indicative of price incomparability. The prices charged by a limited number of subject goods producers in Vietnam under a PMS (i.e. exhibiting a 'high' concentration ratio) cannot reasonably be compared to those prices for the same/similar goods on the export market with many more competitors at a far lower concentration measure.[50]
3. GOV Price Stabilisation	The GOV's steel price stabilisation initiatives have been noted to comprise the following: – Directives to SOE steel producers to keep their prices unchanged; – The inclusion of steel on a list of products in need of price stabilisation; – Acting against steel producers who raise prices excessively; and – Implementing controls, specific to steel, on price management and price regulation (Circular 122 and the Price Law refers). By their very nature, the initiatives look to manage the in-country price of Vietnamese steel products. This extends to the subject goods. These stabilisation initiatives, however, would have little to no bearing on the determination of an export price.
4. GOV Subsidisation	Orrcon submits that the GOV maintains extensive ownership and control over certain large Vietnamese steel producers, its subsidiaries, as well as other critical sectors which are major input segments involved in the production of Precision pipe & tube.

[48] Non-Confidential Attachment 8: CBSA Statement of Reasons concerning the preliminary determinations with respect to the dumping and subsidising of Certain Corrosion Resistant Steel Sheet originating in or exported from Turkey, The United Arab Emirates, and Vietnam; April 3, 2020, p.25.
[49] The Concentration Ratio indicates whether an industry is comprised of a few large firms, or many smaller ones. The four-firm concentration ratio, consisting of the four largest firms in an industry, expressed as a percentage, is a commonly used measure. The ratio is calculated as the sum of the market share percentage held by the largest specified number of firms in an industry. A low concentration ratio indicates greater competition in an industry, compared to one with a ratio nearing 100%, which would be a monopoly. An oligopoly is evident when the top five firms in a market account for more than 60% of total market sales, according to the concentration ratio.
[50] The applicability of competition concentration also extends to China; it has a high concentration of ratio of subject-goods produces when contrasted with the highly competitive overall world market for the goods. This was recently recognised by the Commission in the July 2020 Statement of Essential Facts into the continuation of anti-dumping and countervailing measures on aluminium extrusions exported to Australia from China. The Commission concluded that the presence of only a few Chinese SOE's, accounting for a large percentage of output and market share, indicates a higher likelihood that GOC plans and directives will be adhered to; and that such status permits preferential treatment by Chinese financial institutions (in terms of access to, and the cost of, financing). See p.98.

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	At Section C of its application, Orrcon evidenced recent affirmative countervailing subsidy findings by the CBSA involving steel exports from Vietnam; namely *Oil Country Tubular Goods* (positive subsidy margin of 19%), *Certain Copper Pipe Fittings* (positive subsidy margin of 30.6%), and *Cold Rolled Steel* (positive subsidy margin of 6.5%). And as noted above, the CBSA is currently assessing whether Vietnamese producers of corrosion resistant steel sheet are in receipt of countervailable subsidies. Subsidies reduce the price of steel (inputs and final selling prices) in the domestic Vietnamese Precision pipe & tube industry. Orrcon contends that the export price would not be impacted, but that the exporter producers' margin may be (i.e. on the basis of lower subsidised input costs, the margin on an export sale may be higher given the setting of a sell price with reference to a word-traded, not a Vietnamese in-country, dynamic).[51]

If you have any questions concerning this submission, please do not hesitate to contact me on [redacted].

Yours faithfully,

[redacted]
Manager – Trade Measures

[51] Again, this was recognised in the above aluminium extrusions China continuation Statement of Essential Facts where the Commission noted that the existence of a PMS permits exporters *"…a cost advantage that either manifests as an increased margin at the prevailing level of competitive pricing in the Australian market, a low export price that undercuts the prevailing level of competitive pricing, or a combination whereby the manufacturer can enjoy a higher margin while still undercutting other market participants."* See p.47.

Canada Border Services Agency | Agence des services frontaliers du Canada

COR2 2019 IN

OTTAWA, April 3, 2020

STATEMENT OF REASONS

Concerning the preliminary determinations with respect to the dumping and subsidizing of

**CERTAIN CORROSION-RESISTANT STEEL SHEET
ORIGINATING IN OR EXPORTED FROM
TURKEY, THE UNITED ARAB EMIRATES, AND VIETNAM**

DECISION

Pursuant to subsection 38(1) of the *Special Import Measures Act* (SIMA), the Canada Border Services Agency (CBSA) made preliminary determinations on March 20, 2020 respecting the dumping and subsidizing of certain corrosion-resistant steel sheet originating in or exported from Turkey, the United Arab Emirates, and Vietnam.

Cet *Énoncé des motifs* est également disponible en français.
This *Statement of Reasons* is also available in French.

Canada

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SUMMARY OF EVENTS

[1] On September 20, 2019, the Canada Border Services Agency (CBSA) received a written complaint from ArcelorMittal Dofasco G.P. of Hamilton, Ontario (hereafter, "the complainant" or "AMD"), alleging that imports of certain corrosion-resistant steel sheet (COR) originating in or exported from Turkey, the United Arab Emirates (UAE), and Vietnam (hereafter "the named countries") are being injuriously dumped and subsidized. The complainant alleged that the dumping and subsidizing have caused injury and are threatening to cause injury to the Canadian industry producing like goods.

[2] On October 11, 2019, pursuant to paragraph 32(1)(a) of the *Special Import Measures Act* (SIMA), the CBSA informed the complainant that the complaint was properly documented. The CBSA also notified the embassies of Turkey, the UAE, and Vietnam that a properly documented complaint had been received. The governments of Turkey, the UAE, and Vietnam were also provided with the non-confidential version of the subsidy complaint and were invited for consultations pursuant to Article 13.1 of the *Agreement on Subsidies and Countervailing Measures*, prior to the initiation of the subsidy investigation.

[3] On November 1, 2019, consultations were held between the Government of Canada and the Government of Turkey (GOT) via telephone conference. During the consultations, the GOT made representations with respect to its views on the evidence presented in the non-confidential version of the subsidy complaint. A written copy of the GOT's remarks regarding the complaint was submitted on the same day. The CBSA considered the written representations made by the GOT in its analysis.

[4] On November 5, 2019, consultations were held between the Government of Canada and the Government of Vietnam (GOV). During the consultations, the GOV made representations with respect to its views on the evidence presented in the non-confidential version of the subsidy complaint. A written copy of the GOV's remarks regarding the complaint was submitted on the same day. The CBSA considered the written representations made by the GOV in its analysis.

[5] The complainant provided evidence to support the allegations that COR from the named countries have been dumped and subsidized. The evidence also discloses a reasonable indication that the dumping and subsidizing have caused injury and are threatening to cause injury to the Canadian industry producing like goods.

[6] On November 8, 2019, pursuant to subsection 31(1) of SIMA, the CBSA initiated investigations respecting the dumping and subsidizing of COR from the named countries.

[7] Upon receiving notice of the initiation of the investigations, the Canadian International Trade Tribunal (CITT) commenced a preliminary injury inquiry, pursuant to subsection 34(2) of SIMA, into whether the evidence discloses a reasonable indication that the alleged dumping and subsidizing of the above-mentioned goods have caused injury or retardation or are threatening to cause injury to the Canadian industry producing the like goods.

[8] On January 7, 2020, pursuant to subsection 37.1(1) of SIMA, the CITT made a preliminary determination that there is evidence that discloses a reasonable indication that the alleged dumping and subsidizing of COR from the named countries have caused injury to the domestic industry.

[9] On January 30, 2020 the CBSA notified interested parties that the preliminary stage of the investigation will be extended pursuant to subsection 39(1) of SIMA.

[10] On March 20, 2020, as a result of the CBSA's preliminary investigations and pursuant to subsection 38(1) of SIMA, the CBSA made preliminary determinations of dumping and subsidizing of COR from Turkey, the UAE, and Vietnam.

[11] On March 20, 2020, pursuant to subsection 8(1) of SIMA, provisional duty was imposed on imports of dumped and subsidized goods that are of the same description as any goods to which the preliminary determinations apply, and that are released during the period commencing on the day the preliminary determinations were made and ending on the earlier of the day on which the CBSA causes the investigation in respect of any goods to be terminated pursuant to subsection 41(1) of SIMA or the day the CITT makes an order or finding pursuant to subsection 43(1) of SIMA. Where an exporter's estimated margin of dumping and/or estimated amount of subsidy is insignificant, provisional anti-dumping and/or countervailing duties will not be applied.

PERIOD OF INVESTIGATION

[12] The Period of Investigation (POI) for these investigations is July 1, 2018, to June 30, 2019.

PROFITABILITY ANALYSIS PERIOD

[13] The Profitability Analysis Period (PAP) for the dumping investigation is July 1, 2018, to June 30, 2019.

INTERESTED PARTIES

Complainant

[14] The complainant is AMD, which was founded as the Dominion Steel Casting Company in 1912 in Hamilton, Ontario. In 2006 Dofasco was acquired by Arcelor S.A. Later that year, Arcelor S.A merged with Mittal Steel.

[15] AMD is a manufacturer of COR which it produces at its facility in Hamilton, Ontario. The company is the largest of the three known producers of COR in Canada and accounts for a major proportion of the total domestic production of like goods.

[16] The contact information of the complainant is as follows:

ArcelorMittal Dofasco G.P.
1330 Burlington St E,
Hamilton, Ontario L8N 3J5

[17] The other manufacturers of like goods in Canada are:

Stelco Inc. (Stelco)
386 Wilcox Street
Hamilton, Ontario L8L 8K5

Continuous Colour Coated Limited (CCCL)[1]
1430 Martin Grove Road
Rexdale, Ontario M9W 4Y1

Trade Union

[18] The complaint identified the following trade union as representing persons employed in the production of COR in Canada[2]:

United Steel Workers
234 Eglinton Avenue East, 8th floor
Toronto, Ontario M4P 1K7

[1] Formerly known as Material Sciences Corp
[2] EXH 30 (NC) – COR2 Complaint; paragraph 47

Importers

[19] At the initiation of the investigations, the CBSA identified 64 potential importers of the subject goods based on both information provided by the complainant and CBSA import documentation. The CBSA sent an Importer Request for Information (RFI) to all potential importers of the goods. The CBSA received 12 responses to the Importer RFI.

Exporters

[20] At the initiation of the investigations, the CBSA identified 55 potential exporters/producers from the named countries of the subject goods from information provided by the complainant and CBSA import documentation. All of the potential exporters were asked to respond to the CBSA's Dumping and Subsidy RFIs. Exporters located in Vietnam were also asked to respond to the Section 20 RFI.

[21] Fourteen exporter/producers provided a response to the Dumping RFI: seven from Turkey (Atakaş Çelik Sanayi ve Ticaret A.Ş[3]; Bekap Metal Inş.San.ve Tic.A.Ş[4]; Borçelik Çelik Sanayi Ticaret A.Ş[5]; Tatmetal Celik Sanayi Ve Ticaret A.Ş.[6]; Tosyali Toyo Celik A.S.[7]; Toscelik Profil ve Sac Endustrisi A.Ş.[8]; and Yildiz Demir Celik Sanayi A.S[9]); two from UAE (Al Ghurair Iron and Steel[10]; and United Iron and Steel[11]); and five from Vietnam (China Steel and Nippon Steel Vietnam Joint Stock Company; Hoa Sen Group Joint Stock Company; Nam Kim Steel Joint Stock Company; Southern Steel Sheet Co., Ltd; and Ton Dong A Corporation). See "Dumping Investigation" for detailed information regarding these companies.

[22] Five exporters/producers from Vietnam responded to the Section 20 RFI: China Steel and Nippon Steel Vietnam Joint Stock Company[12]; Hoa Sen Group Joint Stock Company[13]; Nam Kim Steel Joint Stock Company[14]; Southern Steel Sheet Co., Ltd[15], and Ton Dong A Corporation[16].

[3] EXH 127 (PRO) & 128 (NC) – Response to RFI – Subsidy and Dumping
[4] EXH 179 (PRO) & 180 (NC) – Response to RFI – Subsidy and Dumping
[5] EXH 125 (PRO) & 126 (NC) – Response to RFI – Subsidy and Dumping
[6] EXH 213 (PRO) & 214 (NC) – Response to RFI – Dumping
[7] EXH 159 (PRO) & 160 (NC) – Response to RFI – Dumping
[8] EXH 183 (PRO) & 184 (NC) – Response to RFI – Dumping
[9] EXH 195 (PRO) & 196 (NC) – Response to RFI – Dumping
[10] EXH 111 (PRO) & 112 (NC) – Response to RFI – Dumping
[11] EXH 111 (PRO) & 112 (NC) – Response to RFI – Dumping
[12] EXH 153 (PRO) & 154 (NC) – Response to RFI – Section 20
[13] EXH 119 (PRO) & 120 (NC) – Response to RFI – Section 20
[14] EXH 171 (PRO) & 172 (NC) – Response to RFI – Section 20
[15] EXH 223 (PRO) & 224 (NC) – Response to RFI – Section 20
[16] EXH 115 (PRO) & 116 (NC) – Response to RFI – Section 20

[23] Thirteen exporters/ producers provided a response to the Subsidy RFI: six from Turkey (Atakaş Çelik Sanayi ve Ticaret A.Ş; Bekap Metal Inş.San.ve Tic.A.Ş; Borçelik Çelik Sanayi Ticaret A.Ş; Tatmetal Celik Sanayi Ve Ticaret A.Ş.; Tosyali Toyo Celik A.S.; and Toscelik Profil ve Sac Endustrisi A.Ş.); two from UAE (Al Ghurair Iron and Steel; and United Iron and Steel); and five from Vietnam (China Steel and Nippon Steel Vietnam Joint Stock Company; Hoa Sen Group Joint Stock Company, Nam Kim Steel Joint Stock Company; Southern Steel Sheet Co., Ltd; and Ton Dong A Corporation). See the "Subsidy Investigation" section for detailed information regarding these companies.

Governments

[24] For the purposes of these investigations, "Government of Turkey (GOT)", "Government of United Arab Emirates (GOU)", and "Government of Vietnam (GOV)" refer to all levels of government, i.e., federal, central, provincial/state, regional, municipal, city, township, village, local, legislative, administrative or judicial, singular, collective, elected or appointed. It also includes any person, agency, enterprise, or institution acting for, on behalf of, or under the authority of, or under the authority of any law passed by, the government of that country or that provincial, state or municipal or other local or regional government.

[25] At the initiation of the investigation, the CBSA sent a Government Subsidy RFI to the GOT, GOU and GOV. In addition, the GOT was sent a Particular Market Situation (PMS) RFI and the GOV was sent the CBSA's Government Section 20 RFI.

[26] All of the governments of the named countries provided a response to the government Subsidy RFI. In addition, the GOT responded to the PMS RFI[17] and the GOV responded to the Government Section 20 RFI[18].

[17] EXH 165 (PRO) & 166 (NC) – Response to RFI – PMS – GOT
[18] EXH 147 (PRO) & 148 (NC) – Response to RFI – Section 20

PRODUCT INFORMATION

Definition

[27] For the purpose of this investigation, subject goods are defined as:[19]

Corrosion-resistant flat-rolled steel sheet products of carbon steel including products alloyed with the following elements:

- *Boron (B) not more than 0.01%,*
- *Niobium (Nb) not more than 0.100%,*
- *Titanium (Ti) not more than 0.08%, or*
- *Vanadium (V) not more than 0.300%*

in coils or cut lengths, in thicknesses up to 0.168 in. (4.267 mm) and widths up to 72 inch (1,828.8 mm) with all dimensions being plus or minus allowable tolerances contained in the applicable standards, with or without passivation and/or anti-fingerprint treatments, originating in or exported from the Republic of Turkey, the United Arab Emirates, and Socialist Republic of Vietnam, and excluding:

- *corrosion-resistant steel sheet products for use in the manufacture of passenger automobiles, buses, trucks, ambulances or hearses or chassis therefor, or parts thereof, or accessories or parts thereof;*
- *steel products for use in the manufacture of aeronautic products;*
- *steel sheet that is coated or plated with tin, lead, nickel, copper, chromium, chromium oxides, both tin and lead ("terne plate"), or both chromium and chromium oxides ("tin free steel");*
- *stainless flat-rolled steel products;*
- *corrosion-resistant steel sheet products that have been pre-painted, including with lacquers or varnishes, or permanently coated in plastic;*
- *galvanized armouring tape, which is narrow flat steel tape of 3 in. or less, that has been coated by a final operation with zinc by either the hot-dip galvanizing or the electrogalvanizing process so that all surfaces, including the edges, are coated;*
- *perforated steel,*
- *and tool steel.*

[19] EXH 30 (NC) – COR2 Complaint; paragraph 10

Additional Product Information[20]

[28] The product definition includes corrosion-resistant steel sheet where the substrate is coated with a corrosion-resistant material such as zinc, aluminum, and other alloys. The coating may be applied by a variety of processes including hot-dip galvanizing or electro-galvanizing.

[29] The product definition includes galvannealed steel. Galvannealed steel is produced by passing the steel through an annealing furnace after it completes the hot-dip galvanizing process and while the zinc is still liquid. This causes the iron and zinc layers to diffuse into each other, creating a zinc-alloy layer at the surface.

[30] Passivation refers to a material becoming "passive", that is, less affected or corroded by the environment of future use. Passivation involves creation of an outer layer of shield material that is applied as a micro-coating, created by chemical reaction with the base material, or allowed to build from spontaneous oxidation in the air. As a technique, passivation is the use of a light coat of a protective material, to create a shell against corrosion.

[31] Corrosion-resistant steel with anti-fingerprint coatings (whether as part of a passivation treatment or separate) are also included within the product definition.

[32] Corrosion-resistant steel sheet is usually produced from cold-rolled carbon steel sheet (CRS) and sometimes from hot-rolled carbon steel sheet (HRS). However, additions of certain elements such as titanium, vanadium, niobium or boron, during the steel-making process enable the steel to be classified as alloy steel. Therefore, corrosion-resistant steel produced from either carbon steel or alloy steel is included in the definition of the subject goods.

[33] The subject goods (and like goods produced by the domestic industry) are manufactured to meet certain American Society for Testing and Materials (ASTM),
Society of Automotive Engineering (SAE) or equivalent specifications, including, but not limited to:

ASTM A653/653M
ASTM A792/A792M
SAE J403
SAE J1392
SAE J2329
SAE J1562

[20] EXH 30 (NC) – COR2 Complaint; pages 16-19

[34] The product definition includes “seconds”. Seconds are goods that do not meet some aspect of the original specification. This could include dimensions, grade, or coating. It could also include a coil that has been damaged. Seconds are sold at a discount. Seconds may meet ASTM, SAE or other specifications or may be re-certified to meet a standard. For example, a coil that is damaged along the edge may be a “second”. However, if the damaged edge is slit and the damage is removed the coil could be classified as a primary coil produced to the new width. Seconds are graded and sold on a scale of five.[21]

For greater clarity, the product definition does not cover[22]:

- Corrosion-resistant steel for use in automobiles and automobile parts, hereafter referred to as “Automotive”. Automotive end users include Original Equipment Manufacturers (“OEMs”) and auto part producers. Such excluded goods may fall under Customs Tariff item 9959.00.00.

- Pre-painted steel and steel permanently coated in plastic. Pre-painted steel is steel on which paint has been applied by coil coating at the manufacturing facility. The paint may be applied to one or both sides. The paint may be applied as a liquid, paste, powder, varnish or lacquer. Paints may include, but are not limited to, primers, finishing coats, polyesters polymers, plastisol paints, polyurethanes, polyvinylidene fluorides, and epoxy. Steel permanently coated in plastic is steel to which plastics, including films or laminates, are permanently attached.

Production Process[23]

[35] The subject goods are usually produced from CRS and sometimes from HRS sheet. The steel sheet to be coated is commonly referred to as steel substrate. Hot-dip galvanizing and electro-galvanizing are the two processes that can be used to coat the substrate steel sheet with zinc, aluminum, or other alloys. AMD uses hot-dip galvanizing.

[36] In the hot-dip galvanizing process, the first step is to clean the surfaces to improve the adhesion of the coating. After cleaning, the substrate enters a continuous annealing furnace. The furnace heats the substrate to the temperature necessary to develop the desired metallurgical properties of the final product. The substrate is then placed in a molten coating bath and, as it emerges from the bath, an air, nitrogen or steam wipe is used to control the thickness of the coating. The galvanized steel sheet is then cooled in a cooling tower.

[21] EXH 30 (NC) – COR2 Complaint; paragraph 19
[22] EXH 30 (NC) – COR2 Complaint; paragraphs 17-18
[23] EXH 30 (NC) – COR2 Complaint; paragraphs 21-24

[37] In the electro-galvanizing process charged steel passes through a plating bath and opposite electrical charges cause the zinc solution to coat the steel. Cold-rolled steel coils are batch annealed in multi-stack furnaces or in off-line continuous annealing process, often skin passing on a temper mill, before being electro-galvanized with a thin coating of zinc on a continuous processing line.

Product Use[24]

[38] Common applications for COR falling within the product definition include, but are not limited to, production of farm buildings, grain bins, culverts, garden sheds, roofing material, siding, floor decks, roof decks, wall studs, drywall corner beads, doors, door frames, ducting (and other heating and cooling applications), flashing, hardware products and appliance components.

Classification of Imports

[39] The allegedly dumped and subsidized goods are normally classified under the following tariff classification numbers[25]:

7210.30.00.00	7210.69.00.10	7225.91.00.00
7210.49.00.10	7210.69.00.20	7225.92.00.00
7210.49.00.20	7212.20.00.00	7226.99.00.10
7210.49.00.30	7212.30.00.00	
7210.61.00.00	7212.50.00.00	

[40] The listing of tariff classification numbers is for convenience of reference only. The tariff numbers include non-subject goods. Also, subject goods may fall under tariff numbers that are not listed. Refer to the product definition for authoritative details regarding the subject goods.

LIKE GOODS AND CLASS OF GOODS

[41] Subsection 2(1) of SIMA defines "like goods" in relation to any other goods as goods that are identical in all respects to the other goods, or in the absence of any identical goods, goods the uses and other characteristics of which closely resemble those of the other goods.

[42] In considering the issue of like goods, the CITT typically looks at a number of factors, including the physical characteristics of the goods, their market characteristics and whether the domestic goods fulfill the same customer needs as the subject goods.

[24] EXH 30 (NC) – COR2 Complaint; paragraph 26
[25] Tariff Classification number: 7212.50.00.14 was also used for statistical purposes for the year 2016.

[43] After considering questions of use, physical characteristics and all other relevant factors, the CBSA is of the opinion that domestically produced COR are like goods to the subject goods and constitute only one class of goods, as previously determined by the CITT in a previous COR finding.[26]

[44] In its preliminary injury inquiry for this investigation, the CITT further reviewed the matter of like goods and classes of goods. On January 22, 2020, the CITT issued its preliminary injury inquiry determination and reasons indicating that "*the Tribunal is not persuaded that there are adequate grounds to distinguish the Tribunal's previous decision in COR1 concerning the definition and characterization of like goods. Nor is there good reason to depart from the principle articulated in previous decisions that like goods must be co-extensive with the scope of the subject goods as defined by the CBSA in the product definition. Accordingly, the Tribunal will conduct its analysis on the basis that domestically produced COR in Canada that are of the same description as the subject goods are "like goods" in relation to the subject goods, and that there is a single class of goods."*.[27]

THE CANADIAN INDUSTRY

[45] In addition to the complainant, there are two other producers of COR in Canada, CCCL and Stelco.

[46] The complainant and the supporting producer, Stelco, account for nearly all of the domestic production of like goods.

IMPORTS INTO CANADA

[47] During the preliminary phase of the investigations, the CBSA refined the estimated volume and value of imports based on information from CBSA import entry documentation and other information received from exporters and importers.

[48] The following table presents the CBSA's analysis of imports of COR for the purposes of the preliminary determinations:

[26] Corrosion-Resistant Steel Sheet, 8 March 2019, NQ-2018-004, Statement of Reasons (CITT); paragraphs 24-25
[27] Canadian International Trade Tribunal; Corrosion-Resistant Steel Sheet Dumping and Subsidizing Determination and Reasons (January 22, 2020), PI-2019-002; paragraphs 19-20

Imports of COR
(% of Volume)

Country	POI (July 1, 2018 to June 30, 2019)
Turkey	23.4%
United Arab Emirates	4.2%
Vietnam	18.2%
All Other Countries	54.2%
Total Imports	**100.0%**

REPRESENTATIONS

[49] During the preliminary phase of the investigation, counsel for the complainant and for the supporting Canadian producer Stelco, made representations concerning the complainant's allegations of a particular market situation in Turkey, Section 20 in Vietnam, and subsidy in the named countries.[28] Representations were also made with respect to various exhibits on the administrative record, including certain RFI responses. These representations concerned the completeness of information provided, government involvement with certain companies and sectors, the relationships between certain parties, the alleged particular market situation in Turkey, the Section 20 inquiry with respect to Vietnam, and the subsidy programs in the named countries. Counsel for the complainant also addressed the accuracy and completeness of the reported cost of production information and other missing or unclear information provided in the RFI responses.

[50] The CBSA has noted the arguments and evidence submitted in the representations and will take them into consideration in the course of verifying and analyzing information for the purposes of a final decision.

INVESTIGATIONS PROCESS

[51] Regarding the dumping investigation, information was requested from all known and potential exporters, producers, vendors and importers, concerning shipments of COR released into Canada during the POI.

[28] EXH 418 (PRO) & 419 (NC) - Preliminary Determination Comments on Behalf of Stelco Inc and EXH 420 (PRO) & 421 (NC) - Preliminary Determination Letter on behalf of ArcelorMittal Dofasco G.P.

[52] Regarding the Section 20 inquiry, information was requested from all known and potential exporters and producers of COR in Vietnam and from the GOV. The CBSA also sent surrogate RFIs to all known producers of COR in South Korea and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) to gather information to determine normal values under paragraph 20(1)(c) of SIMA. Furthermore, importers were requested to provide information respecting re-sales in Canada of like goods imported from a third country in order to gather information to determine normal values under paragraph 20(1)(d) of SIMA.

[53] Regarding the subsidy investigation, information related to potential actionable subsidies was requested from all known and potential exporters and producers in the named countries. The exporters/producers were requested to forward a portion of the RFI to their input suppliers, who were asked to respond to questions pertaining to their legal characterization as state-owned enterprises (SOEs). Information was also requested in order to establish whether there had been financial contributions made by any level of government, including SOEs possessing, exercising or vested with government authority and, if so, to establish if a benefit has been conferred on persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of COR; and whether any resulting subsidy was specific in nature. In addition, information was requested from the governments of those countries, concerning financial contributions made to exporters or producers of COR released into Canada during the subsidy POI. The respective governments were also requested to forward the RFIs to all subordinate levels of government that had jurisdiction over the exporters.

[54] The governments and the exporters/producers were notified that failure to submit all required information and documentation, including non-confidential versions, failure to comply with all instructions contained in the RFI, failure to permit verification of any information or failure to provide documentation requested during verification may result in the margins of dumping, the amounts of subsidy and the assessment of anti-dumping and/or countervailing duties on subject goods being based on facts available to the CBSA. Further, they were notified that a determination on the basis of facts available could be less favorable to their firm than if complete, verifiable information was made available.

[55] Several parties requested an extension to respond to their respective RFIs. The CBSA reviewed all requests and all exporters and governments that requested an extension were granted an extension that still provided CBSA adequate time to review their responses for purposes of the preliminary determination of the investigations.

[56] After reviewing the RFI responses, supplemental RFIs (SRFIs) and deficiency letters were sent to several responding parties to clarify information provided in the responses and request additional information, where necessary.

[57] Preliminary determinations are based on the information available to the CBSA at the time of the preliminary determinations. During the final phase of the investigation, additional information may be obtained and selected responding parties may be verified on-site, the results of which will be incorporated into the CBSA's final decision, which must be made by June 18, 2020.

DUMPING INVESTIGATION

[58] The following presents the preliminary results of the investigation into the dumping of COR originating in or exported from the named countries.

Normal Value

[59] Normal values are generally estimated based on the domestic selling prices of like goods in the country of export, in accordance with the methodology of section 15 of SIMA, or on the aggregate of the cost of production of the goods, a reasonable amount for administrative, selling and all other costs, plus a reasonable amount for profits, in accordance with the methodology of paragraph 19(b) of SIMA.

[60] In the case of prescribed countries such as Vietnam, if, in the opinion of the CBSA, the government of that country substantially determines domestic prices and there is sufficient reason to believe that the domestic prices are not substantially the same as they would be in a competitive market, the normal values are generally estimated on the basis of section 20 of SIMA using either the selling prices or costs of like goods in a "surrogate" country.

Export Price

[61] The export price of goods sold to importers in Canada is generally estimated in accordance with the methodology of section 24 of SIMA based on the lesser of the adjusted exporter's sale price for the goods or the adjusted importer's purchase price. These prices are adjusted where necessary by deducting the costs, charges, expenses, duties and taxes resulting from the exportation of the goods as provided for in subparagraphs 24(a)(i) to 24(a)(iii) of SIMA.

[62] Where there are sales between associated persons and/or a compensatory arrangement exists, the export price is estimated based on the importer's resale price of the imported goods in Canada to unrelated purchasers, less deductions for all costs incurred in preparing, shipping and exporting the goods to Canada that are additional to those incurred on the sales of like goods for use in the country of export, all costs included in the resale price that are incurred in reselling the goods (including duties and taxes) or associated with the assembly of the goods in Canada and an amount representative of the average industry profit in Canada as provided for in paragraphs 25(1)(c) and 25(1)(d) of SIMA.

Margin of Dumping

[63] The estimated margin of dumping by exporter is equal to the amount by which the total estimated normal value exceeds the total estimated export price of the goods, expressed as a percentage of the total estimated export price. All subject goods imported into Canada during the POI are included in the estimation of the margins of dumping of the goods. Where the total estimated normal value of the goods does not exceed the total estimated export price of the goods, the margin of dumping is zero.

[64] Further information regarding each exporter is detailed below.

Particular Market Situation

[65] Paragraph 16(2)(c) is a provision of SIMA that may be applied when the President is of the opinion that domestic sales of like goods in the country of export do not permit a proper comparison with the sales of the goods to the importer in Canada because a PMS prevails.

[66] Pursuant to subsection 16(2.1), the President may form the opinion that PMS can exist in respect of any goods of a particular exporter or of a particular country.

[67] In such cases, the CBSA would not estimate normal values using the methodology of section 15 of SIMA, which relies on domestic prices. Accordingly, and where such information is available, the CBSA would look to using the constructed normal value methodology of paragraph 19(b).

[68] Where the President is of the opinion that a PMS also distorts the cost of inputs that are significant in the production of the goods, the President will use information in accordance with subsection 11.2(2) of SIMR, that best represents the actual cost of the input to permit a proper comparison.

[69] The CBSA is investigating allegations that a PMS exists with respect to Turkey's corrosion resistant steel sheet market. A PMS may be found to exist where factors such as government regulations, significant macroeconomic volatility, or distorted input costs have a significant impact on the domestic sales of like goods in the country of export.

[70] Subsequent to the initiation of the investigation, the complainant made additional representations concerning the existence of a "particular market situation" in the corrosion resistant steel sheet market in Turkey. These representations reiterated some of the points included in the complaint and provided additional supporting documentation.[29]

[29] EXH 418 (PRO) & 419 (NC) - Preliminary Determination Comments on Behalf of Stelco Inc and EXH 420 (PRO) & 421 (NC) - Preliminary Determination Letter on behalf of ArcelorMittal Dofasco G.P.

[71] The CBSA has considered the representations provided by the complainant. In the final phase of the investigation, the CBSA will continue to review and analyze the information available and will seek to gather additional information necessary in order to form an opinion as to whether a PMS, pursuant to paragraph 16(2)(c) of SIMA, exists in Turkey.

PRELIMINARY RESULTS OF THE DUMPING INVESTIGATION

[72] The following presents the preliminary results of the investigation into the dumping of COR originating in or exported from the named countries.

[73] The governments and the exporters/producers were also notified that failure to submit all required information and documentation, including non-confidential versions, failure to comply with all instructions contained in the RFI, failure to permit verification of any information or failure to provide documentation requested during verification may result in the margin of dumping and the assessment of anti-dumping duties on subject goods being based on facts available to the CBSA. Further, they were notified that a determination on the basis of facts available could be less favorable to their firm than if complete, verifiable information was made available.

Turkey

[74] Although the CBSA received Dumping RFI responses from seven Turkish exporters, all responses were insufficient for the purposes of the preliminary determination. Requests to provide required information have been sent out to all parties. The letters noted deficiencies and advised the exporters to provide a revised RFI response to ensure that the CBSA has sufficient time to review, analyze and verify the information provided. For the purposes of the preliminary determination, sufficient information has not been furnished by the seven respondents to enable the CBSA to estimate normal values and export prices as provided in sections 15 to 28 of SIMA. As such, the information provided by the respondents has not been used for the purposes of the preliminary determination.

[75] In establishing the methodology for estimating normal values and export prices for all exporters from Turkey, the CBSA considered all the information on the administrative record, including the complaint filed by the domestic industry, the CBSA's estimates at the initiation of the investigation and customs import documentation.

[76] The CBSA decided that the information submitted on the CBSA customs entry documentation was the best information on which to estimate the export price of the goods as it reflects actual import data.

[77] The CBSA decided that the normal value it estimated at initiation, using a constructed cost approach to reflect the methodology under paragraph 19(b) of SIMA, would be used to establish the methodology for estimating margins of dumping for goods from Turkey as it reflects the best information available to the CBSA since these estimates reflect the general market costs and prices of COR in that country.

[78] The CBSA examined the difference between the normal value it estimated at initiation and the estimated export prices for each individual transaction. The transactions were examined to ensure that no anomalies were considered, such as very low volume and value, effects of seasonality or other business factors. No such anomalies were identified.

[79] The CBSA considered that the highest amount by which the normal value estimated at initiation exceeded the estimated export price on an individual transaction of an exporter of goods from Turkey (expressed as a percentage of the export price), was an appropriate basis for estimating the margin of dumping. This methodology limits the advantage that an exporter may gain from not providing necessary information requested in a dumping investigation.

[80] Based on the above methodology, the estimated margins of dumping for all exporters of subject goods from Turkey is 39.7%, expressed as a percentage of the export price.

United Arab Emirates

[81] Although the CBSA received Dumping RFI responses from two exporters in the UAE, the responses were insufficient for the purposes of the preliminary determination. Requests to provide required information have been sent out to all parties. The letters noted deficiencies and advised the exporters to provide a revised RFI response to ensure that the CBSA has sufficient time to review, analyze and verify the information provided. For the purposes of the preliminary determination, sufficient information has not been furnished by the two respondents to enable the CBSA to estimate normal values and export prices as provided in sections 15 to 28 of SIMA. As such, the information provided by the respondents has not been used for the purposes of the preliminary determination.

[82] In establishing the methodology for estimating normal values and export prices for all exporters from the UAE, the CBSA considered all the information on the administrative record, including the complaint filed by the domestic industry, the CBSA's estimates at the initiation of the investigation and customs import documentation.

[83] The CBSA decided that the information submitted on the CBSA customs entry documentation was the best information on which to estimate the export price of the goods as it reflects actual import data.

[84] The CBSA decided that the normal value it estimated at initiation, using a constructed cost approach to reflect the methodology under paragraph 19(b) of SIMA, would be used to establish the methodology for estimating margins of dumping for goods from the UAE as it reflects the best information available to the CBSA since these estimates would reflect the general market costs and prices of COR in that country.

[85] The CBSA examined the difference between the normal value it estimated at initiation and the estimated export prices for each individual transaction. The transactions were examined to ensure that no anomalies were considered, such as very low volume and value, effects of seasonality or other business factors. No such anomalies were identified.

[86] The CBSA considered that the highest amount by which the normal value estimated at initiation exceeded the estimated export price on an individual transaction of an exporter of goods from the UAE (expressed as a percentage of the export price), was an appropriate basis for estimating the margin of dumping. This methodology limits the advantage that an exporter may gain from not providing necessary information requested in a dumping investigation.

[87] Based on the above methodology, the estimated margins of dumping for all exporters of subject goods from the UAE is 49.0%, expressed as a percentage of the export price.

Vietnam

Section 20 Inquiry

[88] Section 20 is a provision of SIMA that may be applied to determine the normal value of goods in a dumping investigation where certain conditions prevail in the domestic market of the exporting country. In the case of a prescribed country under paragraph 20(1)(a) of SIMA, it is applied where, in the opinion of the CBSA, the government of that country substantially determines domestic prices and there is sufficient reason to believe that the domestic prices are not substantially the same as they would be in a competitive market.[30]

[89] The provisions of section 20 are applied on a sector basis rather than on the country as a whole. The CBSA proceeds on the presumption that section 20 of SIMA is not applicable to the sector under investigation absent sufficient information to the contrary. The CBSA may form an opinion where there is sufficient information that the conditions set forth in paragraph 20(1)(a) of SIMA exist in the sector under investigation.

[90] The CBSA is required to examine whether the government of that country substantially determines domestic prices. The CBSA is also required to examine the price effect resulting from substantial government determination of domestic prices and whether there is sufficient information on the record for the CBSA to have reason to believe that the resulting domestic prices are not substantially the same as they would be in a competitive market.

[30] Vietnam is a prescribed country under section 17.1 of the *Special Import Measures Regulations*.

[91] The complainant alleged that the conditions described in section 20 prevail in the flat-rolled steel sector in Vietnam, which includes COR. That is, the complainant alleges that this industry sector in Vietnam does not operate under competitive market conditions and consequently, prices of COR established in the Vietnamese domestic markets are not reliable for determining normal values.[31]

[92] The complainant provided information to support these allegations concerning the flat-rolled steel sector. The complainant cited specific GOV policies such as the *Steel Master Plan 2007-2015*, the *Steel Master Plan 2015-2025* and *Industrial Development Strategy through* 2025. The complaint included evidence of price stabilization and state-ownership in the steel industry and the flat-rolled steel sector. The complainant also provided information on subsidization in Vietnam's steel industry.

[93] At the initiation of the investigation, the CBSA had sufficient evidence, supplied by the complainant and from its own research, to support the initiation of a section 20 inquiry to examine the extent of the GOV's involvement in pricing in the flat-rolled steel sector, which includes COR. The information indicated that Vietnamese prices in this sector have been influenced by various government industrial policies. Consequently, the CBSA sent section 20 RFIs to the GOV and all known producers and exporters of COR in Vietnam to obtain information on the matter.

[94] Subsequent to the initiation of the investigation, the complainant made additional representations concerning the existence of section 20 conditions in Vietnam. These representations reiterated some of the points included in the complaint and provided additional supporting documentation.[32]

[95] The CBSA has noted the arguments and evidence submitted in the representations and will take them into consideration in the course of verifying and analyzing information for the purposes of a final decision.

Responses To The Section 20 Inquiry

[96] The CBSA received five complete responses from exporters/ producers to the section 20 RFI. In addition, the CBSA received a complete response to the government section 20 RFI from the GOV.

[97] As part of the section 20 inquiry, surrogate RFIs were sent to all known producers of COR in South Korea and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei). These countries were selected as they are major exporters of COR to Canada. No vendors located in surrogate countries responded to the RFI.

[31] EXH 30 (NC) – COR2 Complaint; pages 26-30
[32] EXH 418 (PRO) & 419 (NC) - Preliminary Determination Comments on Behalf of Stelco Inc and EXH 420 (PRO) & 421 (NC) - Preliminary Determination Letter on behalf of ArcelorMittal Dofasco G.P.

[98] Also, as part of the section 20 inquiry, the RFIs sent to importers requested information on re-sales in Canada of COR imported from countries other than Vietnam. The CBSA received a response from two importers. Only one importer provided information on re-sales in Canada of like goods from non-subject countries; however, the information provided by this importer represented a very small volume of imports. As such, the CBS determined that this information could not be used for the purposes of estimating normal values pursuant to section 20 of SIMA.

Preliminary Results Of The Section 20 Inquiry

[99] The following is the CBSA's analysis of the relevant factors that are present in the flat-rolled steel sector, which include COR, in Vietnam.

GOVERNMENT INDUSTRIAL POLICIES

[100] As part of its section 20 analysis, the CBSA examined:

- The Master Plan on the Development of Vietnam's Steel Industry (2007-2015);
- The Master Plan for the Development of Steel Manufacturing and Distribution System (2015-2025); and
- Industrial Development Strategy.

The Steel Master Plan 2007-2015

[101] The *Master Plan on the Development of Vietnam's Steel Industry* (Steel Master Plan 2007-2015) (Decree No. 145/2007/QD-TTg)[33] served as the guiding document for the development of the Vietnamese steel industry for the 2007-2015 period and was replaced by the *Steel Master Plan 2015-2025*. Although the *Steel Master Plan 2007-2015* has expired, the objectives, policies, and implementation directives detailed in the two consecutive plans consistently indicate the GOV's continuous involvement in the administration and control of the steel industry.

[102] The principal objectives of the Steel Master Plan, as set out in Article 1 of the plan, are as follows:

i. To develop Vietnam's steel industry in compliance with the national master plan on socio-economic and industrial development, local socio-economic development planning and Vietnam's integration roadmap.
ii. To build and develop Vietnam's steel industry into an important industry, ensuring stable and sustainable development, minimizing imbalance between the manufacture of pig iron and ingot steel and the manufacture of finished steel products, between long steel products and flat steel products.

[33] EXH 452 (NC) – Section 20 Report – Attachment 4

iii. To build Vietnam's steel industry with advanced and rational technologies, using domestic resources in a thrifty and efficient manner, ensuring harmony with eco-environmental protection in localities where the industry is developed.
iv. To attach importance to, and encourage domestic economic sectors and branches to cooperate with foreign parties to invest in the construction of a number of mining-metallurgy complexes, combine mills and large factories which manufacture flat steel products.

[103] The Steel Master Plan provides direction concerning how to increase the production of pig iron, spongy iron, steel billet and finished steel products to reach the targets specified in the plan. This includes, among other things, direct investments to manufacturing facilities, as well as direction to diversify domestic steel manufacturing in order to produce hot-rolled steel, cold-rolled steel and metallic coated steel. By promoting investments to produce high quality steel and alloy steel, the GOV aims to reduce their dependency on imported goods.[34]

[104] The CBSA finds that the presence of the GOV policies discussed above demonstrate that the GOV had an active role in managing the development of the steel industry in Vietnam. As pig iron, spongy iron, steel billet products are the main raw material inputs in the production of hot-rolled steel sheet and cold-rolled steel coil, increasing the production of those inputs provides an advantage to hot-rolled steel and cold-rolled steel producers which may lead to distorted prices of COR in the flat-rolled steel sector. The CBSA also finds that these actions influence the domestic steel market and disrupt competitive market conditions in the flat-rolled steel sector.

The Steel Master Plan 2015-2025

[105] The *Master Plan for the Development of Steel Manufacturing and Distribution System 2015-2025* (Steel Master Plan 2015-2025) (Decision No. 694/QD-BCT dated 2013-01-31) provides a development direction and national framework for the Vietnamese steel industry during the period from 2015 through 2020, with a vision to 2025.[35]

[106] The *Steel Master Plan 2015-2025* presents substantial revisions to the previous *Steel Master Plan 2007-2015* that set out the direction for the steel industry until 2015. The principal objective of the *Steel Master Plan 2015-2025*, as set out in Article 1 of the plan, is as follows:

> *Developing Vietnamese steel industry to meet demand of steel products for national economy and ensure stability for domestic consumption market and export. Developing the steel industry which is sustainable and environmentally-friendly.*

[34] EXH 452 (NC) – Section 20 Report – Attachment 4
[35] EXH 452 (NC) – Section 20 Report – Attachment 5

[107] In addition to the broader goals outlined above, the *Steel Master Plan 2015-2025* also sets out specific development objectives with respect to the manufacture of pig iron, sponge steel (raw steel), finished steel products, and the export of steel products. With respect to the manufacture of finished steel products, the *Steel Master Plan 2015-2025* provides targeted production levels for specified time periods. This macro-economic policy aims to increase production volume and export growth rate of the steel industry and decrease dependence on imported steel products.

[108] Target capacities for various steel products are clearly specified in the *Steel Master Plan 2015-2025*. The production of hot-rolled steel, a major material to produce COR, is scheduled to jump to 23,850 MT annually in 2025, which is 5.3 times as high as the capacity level in 2015.[36]

[109] To achieve the target production growth specified in the *Steel Master Plan 2015-2025*, the plan includes, among other things, implementation policies to direct investments to manufacturing facilities, as well as direction to diversify domestic steel manufacturing in order to produce hot-rolled steel, cold-rolled steel, and galvanized steel. One of the investment implementation policies for various steel products directly specifies the GOV's intention to encourage investing in projects of manufacturing hot-rolled steel sheet and cold-rolled steel coil, the main input materials of COR:

> *"Raising capacity of pig iron and steel plants (at least 70% of design capacity). Focusing on investment in development of a number of projects with large scale and capacity in the areas of iron ore raw materials and convenient transportation etc. .. to manufacture a number of key products such as pig iron and sponge iron, steel billets, hot rolled steel sheet, cold rolled steel coil and building steel."*[37]

[110] As discussed above, the *Steel Master Plan 2015-2025* established control of construction and investment projects in the steel industry. Although the GOV's management of the steel industry and its planning of steel projects may not be systematic or in sync with real economic demands, by managing and controlling the production levels of steel, the GOV is influencing the prices of various steel goods in the industry.[38]

[36] EXH 452 (NC) – Section 20 Report – Attachment 5
[37] EXH 452 (NC) – Section 20 Report – Attachment 5
[38] EXH 452 (NC) – Section 20 Report – Attachment 6

[111] It is also worth noting that the *Steel Master Plan 2015-2025* clearly states that various levels of Vietnamese governments or government bodies have direct influence and control over the prices of steel products, which likely include hot-rolled steel, cold-rolled steel and COR:

> *"People's Committee of centrally-affiliated cities and provinces shall: Direct the market management force in the area to coordinate with the authorities to strengthen the inspection and control prices of steel products; prevent speculation, fake and ensure price stability steel in the area."*[39]

[112] Based on the evidence in the document, the GOV not only intervenes to manage the supply of steel products, which in turn influences domestic prices, but also directly controls prices of various products in the steel sector, which would have a direct impact on the domestic price of COR.

[113] The CBSA finds that the existence of the *Steel Master Plan 2015-2025* demonstrates the GOV's intention to remain active in managing the domestic steel sector. Further, the directives contained in these plans demonstrate the GOV's intention and ability to control prices directly or indirectly of various upstream and downstream steel products and therefore, alter the composition and competitiveness of the flat-rolled steel sector. Such influence would alter the natural forces of supply and demand and would substantially influence the price of goods in this sector, which includes COR.

Industrial Development Strategy

[114] The *Industrial Development Strategy through 2025, vision toward 2035* (Industrial Development Strategy) (Decision No. 879/QD-TTg) approved by the Prime Minister on June 9, 2014, aims to raise the average annual growth rate of industrial added value from 6.5% in 2015 to 7.0% by 2020, raise the rate of industrial exports to the total exports from 85% to 88% by 2025 and over 90% after 2025, and raise the industrial sector's ICOR (Incremental Capital Output Ratio) from 3.5% to 4.0% by 2025.[40]

[115] Based on the direction of the *Industrial Development Strategy*, Vietnam will prioritize the development of its various industrial sectors including the steel processing and manufacturing sector and invest in the development of steel manufacturing for mechanical engineering such as steel sheets, shaped steel, and alloy steel.[41]

[39] EXH 452 (NC) – Section 20 Report – Attachment 5
[40] EXH 30 (NC) – COR2 Complaint – Attachment 118
[41] EXH 30 (NC) – COR2 Complaint– Attachment 118

[116] In addition to the ability to promote and direct investment in certain steel sectors, the GOV has the authority to approve or cancel steel projects. Based on news reports of Viet Nam News, the Ministry of Industry and Trade (MIT) was planning to abandon 12 ineffective projects from its latest steel master plan.[42] These 12 projects have been removed as they have been deemed inefficient and lack investors. Prior to the issuance of this plan, during the 14th National Assembly, in May 2016, the minister of MIT noted that the "Government had directed relevant ministries to inspect these projects and suggest solutions, including revoking the state's capital and reclaiming assets […]".[43]

[117] With regards to existing practices, a steel project cannot be ratified absent inclusion in the *Steel Master Plan*.[44] The Vietnamese Steel Association (VSA) has recently declared to the MIT "that the State would no longer manage the steel industry with any master plan if the Planning Law was voted through and put into force in 2018".[45] This assertion from the VSA shows that the GOV currently manages the steel industry, and that the master plan is the mechanism employed to do so. Moreover, in a recent article, they indicate that the GOV will enhance disbursement for many projects with public investment to finish the projects, leading to higher demand for steel products.[46]

[118] Such information related to the GOV exerting control over construction and investment projects in the steel industry leads to the belief that the GOV has substantial leverage on steel production.

GOVERNMENT OWNERSHIP OF SUPPLIERS/PRODUCERS

[119] The public document *Vietnam 2035- Toward Prosperity, Creativity, Equity, and Democracy*[47], jointly written by the World Bank Group and the Ministry of Planning and Investment of Vietnam, provides extensive research and economic data which gives evidence that Vietnam has maintained a virtual monopoly in several major segments of the economy.

[120] It is stated in this document that the "[…] public sector's presence in production and its control over factor markets remain pervasive. The state still retains a majority stake in more than 3,000 SOEs, which account for about a third of GDP and close to 40 percent of total investment. The state sector also remains a virtual monopoly (or oligopoly) in critical sectors […]"[48]

[42] EXH 30 (NC) – COR2 Complaint – Attachment 114
[43] EXH 30 (NC) – COR2 Complaint – Attachment 114
[44] EXH 452 (NC) – Section 20 Report – Attachment 7
[45] EXH 452 (NC) – Section 20 Report – Attachment 7
[46] EXH 452 (NC) – Section 20 Report – Attachment 8
[47] EXH 452 (NC) – Section 20 Report – Attachment 9
[48] EXH 452 (NC) – Section 20 Report – Attachment 9

[121] State-ownership in the steel sector almost reaches 20%. This is a considerable portion of the steel industry and its related sectors and, therefore, the GOV maintains significant control of investment in the steel industry.[49]

[122] By holding such control in key sectors, for instance, gas, electricity, coal, water, and mining and quarrying, the GOV has a control over costs of major inputs involved in the production of COR. In other words, the GOV can indirectly distort domestic prices through a variety of mechanisms which involve the supply and price of inputs (goods and services) used in the production of the subject goods.

[123] As such, state-owned or controlled upstream and downstream steel producers are driven by GOV mandates and do not necessarily operate under market forces. Vietnamese steel producers can potentially supply raw material inputs to COR producers at distorted market price. There is a likelihood that COR is sold also at prices different than they would be in a competitive market as a result of distorted raw material input prices.

[124] More recently, the GOV adopted an SOE restructuring scheme aligned with the equitization (i.e. partial privatization) of SOEs. Even though the number of SOEs has decreased from 12,000 in 1990 to 3,048 in 2014, this number is substantial and SOEs accounted for large shares in the fixed assets and profits in the national economy.[50] That demonstrates that the SOEs continue to play key roles in capital-intensive industries and the GOV still has a considerable influence on the investment activities and the control of companies in their country.

[125] In a discussion paper[51] prepared by the Research Institute of Economy, Trade & Industry, it is noted that there are worrying signs about the quality of equitization in Vietnam:

> *The state continues to hold very high proportions of capital in equitized enterprises, which casts doubts on the effectiveness of equitization in transforming SOEs. While the state held 46.1% of the total shares of equitized enterprises as of the end of 2004, this share is reported to have increased to 92% by 2017. This has happened as the state continues to hold large stakes, particularly in large SOEs in strategic sectors, even after equitization.*[52]

[49] EXH 452 (NC) – Section 20 Report – Attachment 9; page 120
[50] EXH 452 (NC) – Section 20 Report – Attachment 10; pages 7-8
[51] EXH 452 (NC) – Section 20 Report – Attachment 10; pages 7-8
[52] EXH 452 (NC) – Section 20 Report – Attachment 10; page 8

[126] Based on the news report by the Saigon Times on September 20, 2018, the Steering Committee for Enterprise Reform and Development reported to the government that the equitization process of SOEs is much slower than the plan approved by the Prime Minister as many new regulations on equitization and capital divestment are stricter and aimed to maximize the benefits of the State.[53]

[127] Viet Nam Steel Corporation (VNSteel) is a large-scale state-owned steel producer in Vietnam with a rolled steel production capacity over 2.5 million tons per year and a workforce of over 17,000 people.[54] VNSteel is described as having a dominant 50% market share and a nationwide distribution network, and being associated with most of the largest steel players in the Vietnamese market. VNSteel owns a fully integrated and complex production chain using both iron ores and scrap for the production of billet and then finished steel products[55]. As reported in 2017, the state-ownership of the GOV accounts for 93.9% of the total ownership at VNSteel[56] and all board members of management are appointed, dismissed, rewarded and punished by the Prime Minister.[57]

[128] Evidence of the GOV's potential influence on steel prices through VNSteel was reported by a Vietnamese securities brokerage firm.[58]

[129] VNSteel has a 30% share of Vietnam's cold-rolled steel market.[59] As cold-rolled steel is a substrate for COR, VN Steel may be able to influence the price of the raw material substrate, and therefore, the price of COR.

[130] Information on the record also indicates that there are several cold-rolled steel producers that are SOEs which provided cold-rolled steel to COR producers in Vietnam during the POI. In addition, a COR producer in Vietnam participating in the dumping investigation is a SOE.

[131] In addition, the GOV may indirectly control many of the economy's most productive assets, creating market imbalances from state interference. According to an Organisation for Economic Co-operation and Development (OECD) Steel Committee report[60] from 2012, there is possible government intervention and control over either upstream steel materials or downstream steel finished products through SOEs or government bodies. As some information regarding the GOV's direct involvement in the flat-rolled steel sector may be dated, the CBSA will endeavour to obtain more current information during the final phase of the investigation.

[53] EXH 452 (NC) – Section 20 Report – Attachment 11
[54] EXH 452 (NC) – Section 20 Report – Attachment 12
[55] EXH 452 (NC) – Section 20 Report – Attachment 13; pages 1 & 4
[56] EXH 452 (NC) – Section 20 Report – Attachment 14; page 9
[57] EXH 452 (NC) – Section 20 Report – Attachment 12
[58] EXH 452 (NC) – Section 20 Report – Attachment 13; pages 3-5
[59] EXH 30 (NC) – COR2 Complaint – Attachment 123
[60] EXH 452 (NC) – Section 20 Report – Attachment 15; pages 1, 3 & 7

PRICE STABILIZATION

[132] In the response to the section 20 RFI, the GOV states that there are certain goods/services, whose prices may be controlled by the State by means of four pricing control methods: (1) price stabilization, (2) price determination, (3) price negotiation, and (4) price analysis.[61]

[133] The Ministry of Finance adopted Law No. 11/2012/QH13 Law on Prices on June 20, 2012.[62] In general, the Law on Prices prescribes rights and obligations of organizations and individuals in the price domain, and the price management and regulation by the GOV.

[134] The Law on Prices contains several vague terms used to describe the applicability when price stabilization measures could be applied. Under the chapter III *Operation on Regulating Prices of the State*, the law prescribes that raw materials, fuel, materials and main service for production and circulation are subject to price stabilization. Although the terms of raw materials and other materials are not clearly defined in the document, it could be reasonably assumed that raw materials used for steel production could be subject to price control if the GOV exerts complete discretionary authority.

[135] The GOV also issued a decree No. 177/2013/ND-CP[63] on November 14, 2013 guiding the implementation of the Law on Prices. The document indicates that construction steel is subject to price declaration although it is unclear which steel products fall into the category and what kind of mechanism the GOV uses to manage the price declaration.

[136] The complainant also alleged that the GOV may apply price controls when prices fluctuate on specific goods including steel.[64]

[137] Although this information is somewhat dated, the information above points to possible government intervention and its ability to control price on various steel products, which may include COR or raw materials for the production of the subject goods. The CBSA acknowledges that there is limited information concerning actual instances of GOV's direct price control in the flat-rolled steel sector and will endeavour to obtain information concerning the GOV's role in price setting and control during the final phase of the investigation.

[61] EXH 148 (NC) – Response to RFI – Section 20; question B5
[62] EXH 452 (NC) – Section 20 Report – Attachment 16
[63] EXH 452 (NC) – Section 20 Report – Attachment 17
[64] EXH 452 (NC) – Section 20 Report – Attachment 18

Import Controls

[138] In a presentation to the OECD Steel Committee in July 2013, the Vietnamese government openly shared strategies to foster the growth of its steel industry and expand steel trade. Among these strategies, the GOV outlined its plan to reduce the importation of different steel products, and provided specific targets for future reductions.[65]

[139] Similarly, the GOV approved in December 2011, Strategy on Exports and Imports for 2011-2020, with visions to 2030 (Decision 2471/QD-TTg). The decision states the GOV's target to "gradually reduce the trade deficit by keeping the excess of import over export below 10% of the export turnover in 2015 so as to guarantee the trade balance by 2020".[66] The directive demonstrates the GOV's intention and ability to alter the natural forces of supply and demand and would substantially influence the price of goods in this sector - reducing import volumes will lead to impacts in domestic supply and pricing.

[140] A research paper published by Tohoku University in May 2016 shows that the volume of imported surface-treated steel sheet and cold-rolled steel sheet remained at a low level while the domestic consumption and exports of those products rose significantly through the last few years.

[141] On March 14, 2016, the MIT made a temporary decision to impose a tariff of 23.3% and 14.2% on imported steel billet and coated steel to protect Vietnamese steel companies from the harm caused by low priced imports.[67] In July 2016, the MIT formally confirmed the measures to support the steel industry by maintaining 23.3% tariff duty on steel billet while increase the tariff to 15.4% on long steel products from a number of countries including China, the United States, Canada, Germany, France, Japan and South Korea. The decision took effect from August 2, 2016, and would last for four years.[68]

[142] In the response to the section 20 RFI, the GOV confirms that the Circular 12/2015/TT-BCT[69] issued by MIT on June 12, 2015 regulated the issuance of licenses for automatic import of steel products, including COR. The circular was annulled on September 1, 2017. It was reported that the import certification and licensing rules "*set strict technical standards and procedures for both producing and importing several types of steel ranging from flat and long carbon steel products to alloy and stainless steel goods*".[70]

[65] EXH 452 (NC) – Section 20 Report – Attachment 4
[66] EXH 452 (NC) – Section 20 Report – Attachment 19
[67] EXH 452 (NC) – Section 20 Report – Attachment 21
[68] EXH 452 (NC) – Section 20 Report – Attachment 22
[69] EXH 452 (NC) – Section 20 Report – Attachment 23
[70] EXH 452 (NC) – Section 20 Report – Attachment 24

[143] As a result of the GOV's steel import controls which imposed higher tariffs on steel billet and required import licenses for steel products, the GOV limited the availability and attractiveness of imported steel products. The CBSA finds that it is reasonable to conclude that these measures directly impact the domestic prices of these steel products including COR.

Subsidization of the Steel Industry

[144] The complaint alleges that subsidies granted by the GOV distort domestic selling prices of COR in Vietnam.

[145] According to the complaint, the GOV maintains extensive ownership and controls on one of the largest Vietnamese steel producers, its subsidiaries as well as other critical sectors (gas, electricity, coal, water, etc.) which are major inputs segments involved in the production of COR.

[146] The complainant claims that this allows the GOV to set prices of raw materials and inputs to COR producers at non-market prices. Moreover, companies can potentially produce and market steel according to GOV objectives and policies instead of market conditions. Similarly with the presence of SOEs that produce material inputs for COR, the complainant states that there is a strong likelihood that prices of COR are also distorted in the flat-rolled steel sector as a result of distorted raw material input prices.

[147] The complaint provided information on the subsidization of the Vietnamese steel industry and argued that this subsidization influences the price of steel products, including COR.[71] In making this allegation, the complainant relied on information published in previous CBSA subsidy investigations[72] and Vietnamese legislative documents (Laws, Decrees and Articles).[73]

[148] The CBSA acknowledges that subsidies may reduce the price of steel inputs in the domestic COR industry. Further, subsidies may be passed on to customers by offering reduced prices.

[149] In summary, the CBSA does find that the subsidies may allow Vietnamese steel enterprises, including COR producers, to market steel and COR products at prices determined by factors other than the market conditions, resulting in prices lower than they would be without government subsidization. During the final phase of the investigation, the CBSA will endeavour to collect additional subsidy information from producers and the GOV with respect to the flat-rolled steel and steel sector.

[71] EXH 30 (NC) – COR2 Complaint; page 164
[72] EXH 30 (NC) – COR2 Complaint; pages 168-170
[73] EXH 30 (NC) – COR2 Complaint; pages 170-18

Summary of Government Control Analysis

[150] Based on the information on the record to date, including the scope of the GOV's macro-economic policies and measures detailed above, there is a factual basis that the GOV is influencing the Vietnamese steel industry, which encompasses the flat-rolled steel sector, including COR, the goods under investigation. The use of such policies and measures can change the demand and supply balance in the domestic market and could materially alter the domestic prices of steel products such as steel slab, plate, hot-rolled steel, cold-rolled steel as well as COR.

[151] The major macro-economic policies and measures of the GOV include the *Steel Master Plan 2015-2025,* the *Steel Master Plan 2007-2015* and the *Industrial Development Strategy*. These have resulted in an environment where steel enterprises could face conflicts between the GOV objectives and commercial objectives of steel enterprises, including COR producers. More specifically, the policies are affecting the type of products to be produced, production volumes and ultimately prices.

[152] In addition to the objectives and plans set by the Master plans, the GOV also influences the flat-rolled steel sector through state-ownership in steel production. The GOV may also influence this sector through state-control of upstream enterprises involved in the supply of COR inputs. Further, evidence of price stabilization and imports controls imposed by the GOV, combined with the alleged subsidization of the steel industry and the flat-rolled steel sector, further demonstrate the GOV's intent and ability to exert control over the flat-rolled steel sector.

[153] The CBSA has previously issued opinions respecting the issue of whether domestic prices in a segment of the steel sector are substantially determined by the GOV. The CBSA has also previously formed the opinion that Section 20 conditions exist within the flat-rolled steel sector in Vietnam as part of the final determination respecting the dumping of cold-rolled steel from Vietnam.

[154] In conclusion, the cumulative impact of these GOV actions, measures and control clearly indicate that prices of COR in Vietnam are being influenced by the GOV. In this regard, there is sufficient evidence on the record for the preliminary determination indicating that the domestic prices in the flat-rolled steel sector, including COR, are substantially affected by the GOV.

Domestic Price Analysis

[155] In order to determine normal values pursuant to section 20 of SIMA, in addition to the requirement in paragraph 20(1)(a) of SIMA that the CBSA must be of the opinion that the government of a prescribed country substantially determines domestic prices, the CBSA must be of the opinion that there is sufficient reason to believe that the domestic prices are not substantially the same as they would be in a competitive market.

[156] The complainant was unable to source domestic selling price information for COR in Vietnam. The CBSA conducted its own research and experienced the same difficulties obtaining information in the public domain regarding COR pricing in Vietnam.

[157] As previously mentioned, the CBSA received substantially complete submissions to the Dumping RFI for three exporters in Vietnam. The CBSA used the information submitted to analyze the hot-rolled coil and cold-rolled coil purchase prices in Vietnam. These prices were then compared to world average prices of hot-rolled coil and cold-rolled coil.

[158] The results of the comparison described above indicate that the prices of domestically produced hot-rolled coil was 18.7% lower than the world average price; imported hot-rolled coil was 17.5% lower than the world average price; and domestically produced cold-rolled coil was 18.4% lower than the world average price.

[159] In this regard, for the preliminary determination, the domestic price analysis of hot-rolled coil and cold-rolled coil suggests that there is sufficient reason to believe that the prices in the flat-rolled steel sector in Vietnam are not substantially the same as they would be if they were determined in a competitive market.

Summary of the Preliminary Results of the Section 20 Inquiry

[160] The CBSA considered the information submitted and the arguments made by the exporters/producers and the GOV in their submissions. Although limited information is available to indicate that the GOV directly controls prices of COR in its domestic market, the CBSA finds that there is evidence to support the fact that the GOV is significantly invested in the steel sector. Furthermore, the involvement and measures adopted by the GOV in respect of various steel products provides cost advantages to exporters/producers of COR in both the Vietnamese and international markets.

[161] The wide range and material nature of the GOV measures in the steel industry have resulted in significant influence on the flat-rolled steel sector in Vietnam, which includes COR. Based on the preceding, the CBSA is of the opinion that:

- domestic prices are substantially determined by the GOV; and
- there is sufficient reason to believe that the domestic prices are not substantially the same as they would be in a competitive market.

[162] During the final stage of the dumping investigation, the CBSA will continue the section 20 inquiry and further verify and analyze relevant information. The CBSA may reaffirm its opinion that the conditions of section 20 of SIMA exist in the flat-rolled steel sector, which includes COR, as part of the final phase of the investigation, or conclude that the determination of normal values may be made using domestic selling prices and costs in Vietnam.

Vietnam Producers/ Exporters

[163] Five producers/exporters of subject goods from Vietnam provided their responses to the CBSA's Dumping RFI and Section 20 RFI.

[164] As discussed above, for the purposes of the preliminary determination, the CBSA has formed the opinion that the conditions described in section 20 of SIMA exist in the flat-rolled steel sector in Vietnam, which includes COR.

[165] Normal values pursuant to paragraph 20(1)(c) or 20(1)(d) of SIMA are normally based on the domestic selling price or cost of production of the goods plus a reasonable amount for administrative, selling and all other costs, plus a reasonable amount for profits of the like goods sold by producers in any country designated by the President and adjusted for price comparability; or on the basis of the selling price in Canada of like goods imported from any country designated by the President and adjusted for price comparability. However, at this time no such information is available to the CBSA.

[166] As there is no surrogate information available, the normal values for subject goods from Vietnam were estimated on the basis of facts available.

[167] In establishing the methodology for estimating normal values, the CBSA analyzed all the information on the administrative record, including the complaint filed by the domestic industry and the CBSA's estimates at the initiation of the investigation.

[168] The CBSA decided that the normal values it estimated at initiation, based on the methodology of subparagraph 20(1)(c)(ii) of SIMA, using surrogate information from South Korea, would be used to establish the methodology for estimating normal values for goods from Vietnam as it reflects the best information available to the CBSA.

[169] The export price of goods sold to importers in Canada is generally estimated in accordance with the methodology of section 24 of SIMA based on the lesser of the adjusted exporter's sale price for the goods or the adjusted importer's purchase price. These prices are adjusted where necessary by deducting the costs, charges, expenses, duties and taxes resulting from the exportation of the goods as provided for in subparagraphs 24(a)(i) to 24(a)(iii) of SIMA.

[170] Where there are sales between associated persons and/or a compensatory arrangement exists, the export price is estimated based on the importer's resale price of the imported goods in Canada to unrelated purchasers, less deductions for all costs incurred in preparing, shipping and exporting the goods to Canada that are additional to those incurred on the sales of like goods for use in the country of export, all costs included in the resale price that are incurred in reselling the goods (including duties and taxes) or associated with the assembly of the goods in Canada and an amount representative of the average industry profit in Canada as provided for in paragraphs 25(1)(c) and 25(1)(d) of SIMA.

China Steel and Nippon Steel Vietnam Joint Stock Company

[171] China Steel and Nippon Steel Vietnam Joint Stock Company (CSVC) is an exporter/producer of subject goods located in Ho Chi Minh, Vietnam.

[172] CSVC provided a substantially complete response to the Dumping RFI.[74] During the POI, CSVC sold subject goods to Canada directly and through one trader. The subject goods were exported directly from Vietnam to Canada.

[173] As explained above, normal values for exporters in Vietnam were estimated using the methodology of subparagraph 20(1)(c)(ii) of SIMA. Therefore, normal values for CSVC were estimated on the basis of the aggregate of a) the cost of production of the goods, b) a reasonable amount for administrative, selling and all other costs, and c) a reasonable amount for profits, as estimated for South Korea at the Initiation stage of the investigation.

[174] For subject goods exported by CSVC to Canada during the POI, export prices were estimated using the methodology of section 24 of SIMA, based on the lesser of the exporter's selling price and the importer's purchase price, adjusted by deducting the costs, charges and expenses incurred in preparing the goods for shipment to Canada and resulting from the exportation and shipment of the goods.

[175] Further analysis and refinement of data will be conducted during the final phase of the investigation.

[176] For the preliminary determination, the total estimated normal value compared to the total estimated export price resulted in an estimated margin of dumping of 36.3% for CSVC, expressed as a percentage of the export price.

Hoa Sen Group Joint Stock Company

[177] Hoa Sen Group Joint Stock Company (HSG) is a producer and exporter of subject goods located in Di An District, Binh Duong Province, Vietnam.

[74] EXH 206 (PRO) & 207 (NC) – Response to RFI – Dumping

[178] HSG[75] and five of their associated companies[76,77,78,79 and 80] provided responses to the exporter Dumping RFI. A review of their responses revealed that the information submitted for HSG was deficient. Consequently, a deficiency letter was issued to HSG. The letter noted deficiencies and advised HSG to provide the missing information as soon as possible to ensure that the CBSA has sufficient time to review, analyze and verify the information provided. For the purposes of the preliminary determination, sufficient information was not furnished by the respondent.

[179] As such, the margin of dumping for HSG was estimated following the same method used for the all other exporters rate from Vietnam. For the preliminary determination, the estimated margin of dumping for HSG is 91.8%, expressed as a percentage of export price.

Nam Kim Steel Joint Stock Company

[180] Nam Kim Steel Joint Stock Company (Nam Kim) is an exporter/producer of subject goods located in Thu Dau Mot, Binh Duong Province, Vietnam.

[181] Nam Kim provided a substantially complete response to the Dumping RFI. [81] They were sent an SRFI on January 13, 2020[82] to gather additional information and seek clarification regarding their original response.

[182] As explained above, normal values for exporters in Vietnam were estimated using the methodology of subparagraph 20(1)(c)(ii) if SIMA. Therefore, normal values for Nam Kim were estimated based on the methodology detailed above, using South Korea as the surrogate country as determined at the Initiation stage of the investigation.

[183] For subject goods exported by Nam Kim to Canada during the POI, export prices were estimated using the methodology of section 24 of SIMA, based on the lesser of the exporter's selling price and the importer's purchase price, adjusted by deducting the costs, charges and expenses incurred in preparing the goods for shipment to Canada and resulting from the exportation and shipment of the goods.

[184] For the preliminary determination, the total estimated normal value compared to the total estimated export price resulted in an estimated margin of dumping of 46.0% for Nam Kim, expressed as a percentage of the export price.

[75] EXH 163 (PRO) & 164 (NC) – Response to RFI – Dumping
[76] EXH 145 (PRO) & 146 (NC) – Response to RFI – Dumping
[77] EXH 325 (PRO) & 326 (NC) – Response to RFI – Dumping
[78] EXH 185 (PRO) & 186 (NC) – Response to RFI – Dumping
[79] EXH 191 (PRO) & 192 (NC) – Response to RFI – Dumping
[80] EXH 204 (PRO) & 205 (NC) – Response to RFI – Dumping
[81] EXH 129 (PRO) & 130 (NC) – Response to RFI – Dumping
[82] EXH 201 (PRO) – SRFI #1

Ton Dong A Corporation

[185] Tong Dong A Corporation (TDA) is an exporter/producer of subject goods located in Di An Town, Binh Duong Province, Vietnam. During the POI, TDA sold subject goods to one related and six unrelated importers in Canada.

[186] TDA provided a substantially complete response to the Dumping RFI[83] They were sent an SRFI on January 22, 2020[84] to gather additional information and seek clarification regarding their original response.

[187] As explained above, normal values for exporters in Vietnam were estimated using the methodology of subparagraph 20(1)(c)(ii) if SIMA. Therefore, normal values for TDA were estimated based on the methodology detailed above, using South Korea as the surrogate country as determined at the Initiation stage of the investigation.

[188] For subject goods exported to unrelated importers, export prices were estimated using the methodology of section 24 of SIMA, based on the lesser of the exporter's selling price and the importer's purchase price, adjusted by deducting the costs, charges and expenses incurred in preparing the goods for shipment to Canada and resulting from the exportation and shipment of the goods. For subject goods exported to the related importer, it was necessary to determine whether the section 24 export prices were reliable by performing a reliability test by comparing the export prices determined under section 24 of SIMA with the export prices determined under section 25 of SIMA. However, the CBSA was unable to perform the reliability test as sufficient information was not available from the related importer. For the purposes of the preliminary determination, export prices for subject goods exported to the related importer were also estimated using the methodology of section 24 of SIMA.

[189] For the preliminary determination, the total estimated normal value compared to the total estimated export price resulted in an estimated margin of dumping of 50.0% for TDA, expressed as a percentage of the export price.

Southern Steel Sheet Co., Ltd

[190] Southern Steel Sheet Co., Ltd (SSSC) is a producer and exporter of subject goods located in Bien Hoa City, Dong Nai Province, Vietnam. SSSC is a SOE in Vietnam and produces various steel products.

[83] EXH 129 (PRO) & 130 (NC) – Response to RFI – Dumping
[84] EXH 213 (PRO) – SRFI #1

[191] SSSC provided a response to the exporter Dumping RFI.[85] A review of their response revealed that the information submitted for SSSC is incomplete. Consequently, a deficiency letter was issued to SSSC. The letter noted deficiencies and advised SSSC to provide missing information as soon as possible to ensure that the CBSA has sufficient time to review, analyze and verify the information provided. For the purposes of the preliminary determination, sufficient information was not furnished by the respondent.

[192] As such, the margin of dumping for SSSC was estimated following the same method used for the all other exporters rate from Vietnam. For the preliminary determination, the estimated margin of dumping for SSSC is 91.8%, expressed as a percentage of the export price.

All Other Exporters - Vietnam

[193] For exporters of subject goods originating in or exported from Vietnam that did not provide a response to the Dumping RFI or where sufficient information was not available or was not provided, the normal values and export prices were estimated on the basis of facts available.

[194] The CBSA decided that the information submitted on the CBSA customs entry documentation was the best information on which to estimate the export price of the goods as it reflects actual import data.

[195] The CBSA decided that the normal values estimated for the exporters whose submissions were substantially complete for purposes of the preliminary determination, would be used to establish the methodology for estimating margins of dumping.

[196] The submissions for CSVC, Nam Kim and TDA were substantially complete for purposes of the preliminary determination. The CBSA examined the difference between the estimated normal value and the estimated export price for each individual transaction of these exporters, and considered that the highest amount (expressed as a percentage of the export price), was an appropriate basis for estimating margins of dumping. This methodology relies on information related to goods that originated in Vietnam and limits the advantage that an exporter may gain from not providing necessary information requested in a dumping investigation as compared to an exporter that did provide the necessary information.

[197] As a result, based on the facts available, for exporters that did not provide a response to the Dumping RFI or did not furnish sufficient information, margins of dumping of subject goods originating in or exported from Vietnam were estimated based on the highest amount by which an estimated normal value exceeded the estimated export price (i.e., 91.8% of the export price), on an individual transaction for an exporter, during the POI. The transactions were examined to ensure that no anomalies were considered, such as very low volume and value, effects of seasonality or other business factors. No such anomalies were identified.

[85] EXH 229 (PRO) & 230 (NC) – Response to RFI – Dumping

[198] Based on the above methodologies, for the preliminary determination, the estimated margin of dumping for all other exporters of the subject goods from Vietnam is 91.8%, expressed as a percentage of the export price.

[199] A summary of the preliminary results of the dumping investigation respecting all subject goods released into Canada during the POI are as follows:

Estimated Margins of Dumping

Country of origin or export	**Estimated Margin of Dumping** (as % of Export Price)	**Estimated Imports of Subject Goods** (as % of Volume)
All Exporters Turkey	39.7%	23.4%
All Exporters United Arab Emirates	49.0%	4.2%
Vietnam		18.2%
Steel and Nippon Steel Vietnam Joint Stock Company	36.3%	
Nam Kim Steel Joint Stock Company	46.0%	
Ton Dong A Corporation	50.0%	
All Other Exporters	91.8%	
All Other Countries		54.2%

[200] Under section 35 of SIMA, if at any time before making a preliminary determination the CBSA is satisfied that the actual and potential volume of goods of a country is negligible, the CBSA is required to terminate the investigation with respect to goods of that country.

[201] Pursuant to subsection 2(1) of SIMA, the volume of goods of a country is considered negligible if it accounts for less than 3% of the total volume of goods that are released into Canada from all countries that are of the same description as the goods.

[202] The volumes of subject goods from Turkey, the UAE and Vietnam are each above 3% of the total volume of goods released into Canada from all countries. Based on the definition above, the volumes of subject goods from these countries are therefore not negligible.

[203] If, in making a preliminary determination, the CBSA determines that the margin of dumping of the goods of a particular exporter is insignificant pursuant to section 38 of SIMA, the investigation will continue in respect of those goods but provisional duties will not be imposed on goods of the same description imported during the provisional period.

[204] Pursuant to subsection 2(1) of SIMA, a margin of dumping of less than 2% of the export price of the goods is defined as insignificant. The margins of dumping, estimated for exporters in Turkey, the UAE and Vietnam, are greater than the threshold of 2% and are therefore not considered insignificant.

[205] A summary of the estimated margins of dumping and provisional duties by exporter are presented in **Appendix 1**.

SUBSIDY INVESTIGATION

[206] In accordance with section 2 of SIMA, a subsidy exists if there is a financial contribution by a government of a country other than Canada that confers a benefit on persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods. A subsidy also exists in respect of any form of income or price support within the meaning of Article XVI of the *General Agreement on Tariffs and Trade*, 1994, being part of Annex 1A to the World Trade Organization (WTO) Agreement that confers a benefit.

[207] Pursuant to subsection 2(1.6) of SIMA, there is a financial contribution by a government of a country other than Canada where:

(a) practices of the government involve the direct transfer of funds or liabilities or the contingent transfer of funds or liabilities;
(b) amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due to the government are forgiven or not collected;
(c) the government provides goods or services, other than general governmental infrastructure, or purchases goods; or
(d) the government permits or directs a non-governmental body to do anything referred to in any of paragraphs (a) to (c) where the right or obligation to do the thing is normally vested in the government and the manner in which the non-governmental body does the thing does not differ in a meaningful way from the manner in which the government would do it.

[208] Where subsidies exist they may be subject to countervailing measures if they are specific in nature. According to subsection 2(7.2) of SIMA a subsidy is considered to be specific when it is limited, in a legislative, regulatory or administrative instrument, or other public document, to a particular enterprise within the jurisdiction of the authority that is granting the subsidy; or is a prohibited subsidy.

[209] A "prohibited subsidy" is either an export subsidy or a subsidy or portion of a subsidy that is contingent, in whole or in part, on the use of goods that are produced or that originate in the country of export. An export subsidy is a subsidy or portion of a subsidy contingent, in whole or in part, on export performance. An "enterprise" is defined as including a group of enterprises, an industry and a group of industries. These terms are all defined in section 2 of SIMA.

[210] Notwithstanding that a subsidy is not specific in law, under subsection 2(7.3) of SIMA a subsidy may also be considered specific having regard as to whether:

(a) there is exclusive use of the subsidy by a limited number of enterprises;
(b) there is predominant use of the subsidy by a particular enterprise;
(c) disproportionately large amounts of the subsidy are granted to a limited number of enterprises; and
(d) the manner in which discretion is exercised by the granting authority indicates that the subsidy is not generally available.

[211] For purposes of a subsidy investigation, the CBSA refers to a subsidy that has been found to be specific as an "actionable subsidy," meaning that it is subject to countervailing measures if the persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods under investigation have benefited from the subsidy.

[212] Financial contributions provided by state-owned enterprises (SOEs) may also be considered to be provided by the government for purposes of this investigation. A SOE may be considered to constitute "government" for the purposes of subsection 2(1.6) of SIMA if it possesses, exercises, or is vested with governmental authority. Without limiting the generality of the foregoing, the CBSA may consider the following factors as indicative of whether the SOE meets this standard: 1) the SOE is granted or vested with authority by statute; 2) the SOE is performing a government function; 3) the SOE is meaningfully controlled by the government; or some combination thereof.

Preliminary Results of the Subsidy Investigation

[213] The following presents the preliminary results of the investigation into the subsidizing of certain COR steel sheets originating in or exported from the named countries

[214] For the purposes of the preliminary determination, the CBSA has received sufficient information from nine exporters/producers to estimate amounts of subsidy. The programs used by the responding exporters are listed in **Appendix 2**. Additionally, the GOT[86], GOU[87] and GOV[88] provided a substantially complete response to the CBSA's government Subsidy RFI.

[86] EXH 199 (PRO) & 200 (NC) – Response to RFI – Subsidy – GOT
[87] EXH 177 (PRO) & 178 (NC) – Response to RFI – Subsidy – GOU
[88] EXH 149 (PRO) & 150 (NC) – Response to RFI – Subsidy – GOV

[215] The CBSA will continue to analyze the submitted information during the final phase of the investigation. The CBSA may also consider any other potential subsidy programs that have not yet been identified.

[216] Estimated amounts of subsidy relating to each of the exporters that provided a response to the RFI are presented in a summary table in **Appendix 1** while the estimated amount of subsidy for each country can be found in a summary table at the end of this section.

Preliminary Results of the Subsidy Investigation by Country

Turkey

[217] The GOT provided substantially complete responses to the CBSA's government Subsidy RFI.

[218] For the purposes of the preliminary determination, the CBSA has received sufficient information from three exporters/producers in Turkey to estimate amounts of subsidy, specifically Atakas Çelik Sanayi ve Ticaret A.Ş, Borçelik Çelik Sanayi Ticaret A.Ş, and Tatmetal Celik Sanayi Ve Ticaret A.Ş.

Atakaş Çelik Sanayi ve Ticaret A.Ş

[219] Atakas Çelik Sanayi ve Ticaret A.Ş (Atakas) is a producer and exporter of subject goods to Canada. In conjunction with the information provided by Atakas [89] and the GOT, sufficient information was received to estimate an amount of subsidy for the purposes of the preliminary determination.

[220] For purposes of the preliminary determination, it is estimated that Atakas benefitted from the following six subsidy programs during the POI:

Program 1:	Turk Eximbank – Rediscount Credits Program
Program 4:	Turk Eximbank – Pre export Credits Program
Program 24:	Deduction from Taxable Income for Export Revenue
Program 27:	Investment Incentive Program
Program 32:	Provision of Input (e.g. Hot-rolled Steel or Cold-rolled Steel, Coal) at Less than Adequate Remuneration
Program 35:	Social Security Premium Incentive

[221] For purposes of the preliminary determination, the above subsidy programs were considered to be specific and therefore actionable. This decision was based on an analysis of the information provided by Atakas and the GOT.

[89] EXH 360 (PRO) & 361 (NC) – Response to RFI – Subsidy

[222] The estimated amount of subsidy for Atakas is 1.70%, expressed as a percentage of the export price.

[223] Based on the information available, Atakaş also used three additional subsidy programs during the POI, although it is estimated that the company did not receive countervailable benefits on the basis of these programs, either because no benefit was provided under the program, because the program is generally available, or because the benefit is not applicable to subject goods. These programs are:

Program 10: Credit Guarantee Fund (KGF) Scheme for Turk Eximbank Programs
Program 23: Inward Processing Regime
Program 25. Exemption from Banking and Insurance Transactions Tax (BITT) on Foreign Exchange Transactions

[224] The CBSA will continue to collect and verify information from Atakaş.

Borçelik Çelik Sanayi Ticaret A.Ş

[225] Borçelik Çelik Sanayi Ticaret A.Ş (Borçelik) is a producer and exporter of subject goods to Canada. In conjunction with the information provided by Borçelik [90] and the GOT, sufficient information was received to estimate an amount of subsidy for the purposes of the preliminary determination.

[226] For purposes of the preliminary determination, it is estimated that Borçelik benefitted from the following subsidy programs during the POI:

Program 1: Turk Eximbank – Rediscount Credits Program
Program 24: Deduction from Taxable Income for Export Revenue
Program 32: Provision of Input (e.g. Hot-rolled Steel or Cold-rolled Steel, Coal) at Less than Adequate Remuneration
Program 34: TUBITAK Industrial R&D Projects Grant

[227] For purposes of the preliminary determination, the above subsidy programs were considered to be specific and therefore actionable. This decision was based on an analysis of the information provided by Borçelik and the GOT.

[228] The estimated amount of subsidy for Borçelik is 0.87%, expressed as a percentage of the export price.

[90] EXH 125 (PRO) & 126 (NC) – Response to RFI – Subsidy

[229] Based on the information available, Borçelik also used 12 additional subsidy programs during the POI, although it is estimated that the company did not receive countervailable benefits on the basis of these programs, either because no benefit was provided under the program, because the program is generally available, or because the benefit is not applicable to subject goods. These programs are:

Program 3: Turk Eximbank – Post-shipment Rediscount Credits
Program 10: Credit Guarantee Fund (KGF) Scheme for Turk Eximbank Programs
Program 23: Inward Processing Regime
Program 25. Exemption from Banking and Insurance Transactions Tax (BITT) on Foreign Exchange Transactions
Program 33: Incentives for R&D Operations and Investments
Program 35: Social Security Premium Incentive (Employer's Share)
Additional program reported: Minimum Wage Support
Additional program reported: Social Security Premium Support for Hiring New Employees Who Previously Unemployed
Additional program reported: Income Tax Withholding Support Under Law 7103
Additional program reported: Social Security Premium Support Under Law 4857
Additional program reported: Intern Salary Support
Additional program reported: Eximbank and Turkish Central Bank Factoring

[230] The CBSA will continue to collect and verify information from Borçelik.

Tatmetal Celik Sanayi Ve Ticaret A.Ş

[231] Tatmetal Celik Sanayi Ve Ticaret A.Ş (Tatmetal) is a producer and exporter of subject goods to Canada. In conjunction with the information provided by Tatmetal [91] and the GOT, sufficient information was received to estimate an amount of subsidy for the purposes of the preliminary determination.

[232] For purposes of the preliminary determination, it is estimated that Tatmetal benefitted from the following subsidy programs during the POI:

Program 1: Turk Eximbank – Rediscount Credits Program
Program 6: Turk Eximbank –Investment Credit for Export
Program 32: Provision of Input (e.g. Hot-rolled Steel or Cold-rolled Steel, Coal) at Less than Adequate Remuneration

[233] For purposes of the preliminary determination, the above subsidy programs were considered to be specific and therefore actionable. This decision was based on an analysis of the information provided by Tatmetal and the GOT.

[91] EXH 215 (PRO) & 216 (NC) – Response to RFI – Subsidy

[234] The estimated amount of subsidy for Tatmetal is 1.15%, expressed as a percentage of the export price.

[235] Based on the information available, Tatmetal also used four additional subsidy programs during the POI, although it is estimated that the company did not receive countervailable benefits on the basis of these programs, either because no benefit was provided under the program or because the program is generally available. These programs are:

Program 8.	Turk Eximbank – Export Credit Insurance
Program 10:	Credit Guarantee Fund (KGF) Scheme for Turk Eximbank Programs
Program 23:	Inward Processing Regime
Program 25.	Exemption from Banking and Insurance Transactions Tax (BITT) on Foreign Exchange Transactions

[236] The CBSA will continue to collect and verify information from Tatmetal.

Bekap Metal Inş.San.ve Tic.A.Ş

[237] Bekap Metal Inş.San.ve Tic.A.Ş (Bekap) provided a response to the exporter Subsidy RFI.[92] A review of their response revealed that the information submitted for Bekap is incomplete. Consequently, a deficiency letter was issued to Bekap. The letter noted deficiencies and advised Bekap to provide missing information as soon as possible to ensure that the CBSA has sufficient time to review, analyze and verify the information provided. For the purposes of the preliminary determination, sufficient information was not furnished by the respondent.

[238] As such, for purposes of the preliminary determination, the amount of subsidy for Bekap was estimated according to the all other exporters rate for Turkey. Therefore, the estimated amount of subsidy for Bekap was is 7.72 %, expressed as a percentage of the export price.

Tosyali Toyo Celik A.S

[239] Tosyali Toyo Celik A.S. (Tosyali Toyo) provided a response to the exporter Subsidy RFI[93]. A review of their response revealed that the information submitted for Tosyali Toyo is incomplete. For the purposes of the preliminary determination, sufficient information was not furnished by the respondent.

[240] As such, for purposes of the preliminary determination, the amount of subsidy for Tosyali Toyo was estimated according to the all other exporters rate for Turkey. Therefore, the estimated amount of subsidy for Tosyali Toyo is 7.72%, expressed as a percentage of the export price.

[92] EXH 179 (PRO) & 180 (NC) – Response to RFI – Subsidy and Dumping
[93] EXH 169 (PRO) & 170 (NC) – Response to RFI – Subsidy

Toscelik Profil ve Sac Endustrisi A.S.

[241] Toscelik Profil ve Sac Endustrisi A.S. (Toscelik) provided a response to the exporter Subsidy RFI[94]. A review of their response revealed that the information submitted for Toscelik is incomplete. For the purposes of the preliminary determination, sufficient information was not furnished by the respondent.

[242] As such, for purposes of the preliminary determination, the amount of subsidy for Toscelik was estimated according to the all other exporters rate for Turkey. Therefore, the estimated amount of subsidy for Toscelik is 7.72%, expressed as a percentage of the export price.

All Other Exporters - Turkey

[243] For all other exporters of subject goods from Turkey, the CBSA estimated an amount of subsidy on the basis of the following methodology:

1) the highest amount of subsidy for each of the eight programs, as found at the preliminary determination, for the producers/exporters located in Turkey for whom the CBSA has sufficient information to estimate an amount of subsidy, plus;

2) the average amount of subsidy for the seven programs listed in (1) (i.e 0.32%), applied to each of the remaining 16 potentially actionable subsidy programs for which sufficient information is not available or has not been provided at the preliminary determination.

[244] Using the above methodology, for the preliminary determination, the estimated amount of subsidy for all other exporters in Turkey is 7.72%, expressed as a percentage of the export price.

United Arab Emirates

[245] The GOU provided substantially complete responses to the CBSA's Government Subsidy RFI.

[246] Al Ghurair Iron & Steel LLC and United Iron and Steel both provided substantially complete responses to the Subsidy RFI. As such, the information provided by the exporters and the GOU was used to estimate an amount of subsidy.

[94] EXH 181 (PRO) & 182 (NC) – Response to RFI – Subsidy

Al Ghurair Iron & Steel LLC

[247] Al Ghurair Iron & Steel LLC (AGIS) is a producer and exporter of subject goods to Canada. AGIS provided a substantially complete response to the Subsidy RFI.[95]

[248] For purposes of the preliminary determination, AGIS was found to have not benefitted from any subsidy programs during the POI.

[249] The estimated amount of subsidy for AGIS is 0.00%, expressed as a percentage of the export price.

United Iron and Steel Company LLC

[250] United Iron and Steel Company LLC (USIC) is a producer and exporter of subject goods to Canada. USIC provided a substantially complete response to the Subsidy RFI.[96]

[251] For purposes of the preliminary determination, UISC was found not to have benefitted from any subsidy program during the POI.

[252] The estimated amount of subsidy for UISC is 0.00%, expressed as a percentage of the export price.

Vietnam

[253] The GOV provided substantially complete responses to the CBSA's Government Subsidy RFI.

[254] For purposes of the preliminary determination, an individual amount of subsidy has been estimated for four exporters who provided substantially complete responses to the Subsidy RFI specifically CSVC, HSG, Nam Kim and TDA.

China Steel and Nippon Steel Vietnam Joint Stock Company

[255] CSVC provided a substantially complete response to the Subsidy RFI.[97]

[256] For purposes of the preliminary determination, CSVC was found to have benefitted from the following subsidy program during the POI:

Program 8 – Investment Support

[95] EXH 113 (PRO) & 114 (NC) – Response to RFI – Subsidy
[96] EXH 222 (PRO) & 223 (NC) – Response to RFI – Subsidy
[97] EXH 161 (PRO) & 162 (NC) – Response to RFI – Subsidy

[257] For purposes of the preliminary determination, the above subsidy program was considered to be specific and therefore actionable. This decision was made from the analysis of the information provided by CSVC.

[258] The estimated amount of subsidy for CSVC is 0.00%, expressed as a percentage of the export price. The CBSA will continue to collect and verify information from CSVC.

Hoa Sen Group Joint Stock Company

[259] HSG [98] and five of their associated companies [99,100,101,102 and 103]provided substantially complete responses to the Subsidy RFI.

[260] For purposes of the preliminary determination, HSG was found to have benefitted from the following four subsidy programs during the POI:

Program 1: Exemptions of Import Duty
Program 3: Incentives on non-agricultural Land Use Tax
Program 4: Exemption/Reductions of Land Rent, Tax and Levy
Program 6: Enterprise Income Tax Preferences, Exemptions and Reductions

[261] For purposes of the preliminary determination, the above subsidy programs are considered to be specific and therefore actionable. This decision was made from the analysis of the information provided by HSG, five of their associated companies and the GOV.

[262] The estimated amount of subsidy for HSG is 0.002%, expressed as a percentage of the export price. The CBSA will continue to collect and verify information from HSG and their associated companies.

Nam Kim Steel Joint Stock Company

[263] Nam Kim provided a substantially complete response to the Subsidy RFI.[104]

[264] For purposes of the preliminary determination, Nam Kim was found to have benefitted from the following subsidy program during the POI:

Program 6 - Enterprise Income Tax Preferences, Exemptions and Reductions

[98] EXH 123 (PRO) & 124 (NC) – Response to RFI – Subsidy
[99] EXH 121 (PRO) & 122 (NC) – Response to RFI – Subsidy
[100] EXH 187 (PRO) & 188 (NC) – Response to RFI – Subsidy
[101] EXH 189 (PRO) & 190 (NC) – Response to RFI – Subsidy
[102] EXH 193 (PRO) & 194 (NC) – Response to RFI – Subsidy
[103] EXH 202 (PRO) & 203 (NC) – Response to RFI – Subsidy
[104] EXH 101 (PRO) & 102 (NC) – Response to RFI – Subsidy

[265] For purposes of the preliminary determination, the above subsidy program was considered to be specific and therefore actionable. This decision was made from the analysis of the information provided by Nam Kim.

[266] The estimated amount of subsidy for Nam Kim is 0.12%, expressed as a percentage of the export price.

[267] The CBSA will continue to collect and verify information from Nam Kim.

Ton Dong A Corporation

[268] TDA provided a substantially complete response to the Subsidy RFI.[105]

[269] For purposes of the preliminary determination, TDA was found to have not benefitted from any subsidy programs during the POI.

[270] The estimated amount of subsidy for TDA is 0.00%, expressed as a percentage of the export price.

[271] The CBSA will continue to collect and verify information from TDA.

Southern Steel Sheet Co., Ltd

[272] SSSC provided a response to the exporter Subsidy RFI.[106] A review of their response revealed that the information submitted for SSSC is incomplete. Consequently, a deficiency letter was issued to SSSC. The letter noted deficiencies and advised SSSC to provide missing information as soon as possible to ensure that the CBSA has sufficient time to review, analyze and verify the information provided. For the purposes of the preliminary determination, sufficient information was not furnished by the respondent.

[273] As such, for purposes of the preliminary determination, the amount of subsidy was estimated for SSSC was determined according to the all other exporters rate for Vietnam. Therefore, the estimated amount of subsidy for SSSC was is 0.2%, expressed as a percentage of the export price.

[105] EXH 175 (PRO) & 176 (NC) – Response to RFI – Subsidy
[106] EXH 232 (PRO) & 231 (NC) – Response to RFI – Subsidy

All Others Exporters - Vietnam

[274] For all other exporters of subject goods from Vietnam, the CBSA estimated an amount of subsidy on the basis of the following methodology:

1) the highest amount of subsidy for each of the five programs, as found at the preliminary determination, for the producers/exporters located in Vietnam that provided a substantially complete response to the Subsidy RFI, plus;

2) the average amount of subsidy for the five programs listed in (1), applied to each of the remaining five potentially actionable subsidy programs for which sufficient information is not available or has not been provided at the preliminary determination.

[275] Using the above methodology, for the preliminary determination, the estimated amount of subsidy for all other exporters in Vietnam is 0.20%, expressed as a percentage of the export price.

Estimated Amounts of Subsidy

[276] A summary of the preliminary results of the subsidy investigation respecting all subject goods released into Canada during the POI follows:

Country of origin or export	Estimated Amounts of Subsidy (as % of Export Price)	Estimated Imports of Subject Goods (as % of Volume)
Turkey		**23.4%**
Atakaş Çelik Sanayi ve Ticaret A.Ş	1.70%	
Borçelik Çelik Sanayi Ticaret A.Ş	0.87%	
Tatmetal Celik Sanayi Ve Ticaret A.Ş.	1.15%	
All Other Exporters - Turkey	7.72%	
United Arab Emirates		**4.2%**
Al Ghurair Iron and Steel	0.00%	
United Iron and Steel	0.00%	
All Other Exporters - UAE	0.00%	
Vietnam		**18.2%**
China Steel and Nippon Steel Vietnam Joint Stock Company	0.00%	
Hoa Sen Group	0.002%	
Nam Kim Steel Joint Stock Company	0.12%	
Ton Dong A Corporation	0.00%	
All Other Exporters - Vietnam	0.20%	
All Other Countries		54.2%

[277] Under section 35 of SIMA, if, at any time before making a preliminary determination, the CBSA is satisfied that the actual and potential volume of goods of a country is negligible, the CBSA is required to terminate the investigation with respect to goods of that country.

[278] Pursuant to subsection 2(1) of SIMA, the volume of goods of a country is considered negligible if it accounts for less than 3% of the total volume of goods that are released into Canada from all countries that are of the same description as the goods.

[279] The volume of subject goods from each country is above 3% of the total volume of goods released into Canada from all countries. Based on the definition above, the volume of subject goods from each country is therefore not negligible.

[280] If, in making a preliminary determination, the CBSA determines that the amount of subsidy on the goods of an exporter is insignificant, less than 1%, pursuant to section 38 of SIMA, the investigation will continue in respect of those goods but provisional duties will not be imposed on goods of the same description imported during the provisional period. The amount of subsidy estimated for Borçelik, the exporters/producers from the UAE, and the exporters/producers from Vietnam did not exceed 1% of the export price and were, therefore, determined to be insignificant.

[281] The goods under investigation that have been subsidized, by an estimated amount of subsidy that exceeds 1% are therefore not insignificant, will have provisional countervailing duties imposed on the goods imported during the provisional period.

DECISIONS

[282] On March 20, 2020, pursuant to subsection 38(1) of SIMA, the CBSA made preliminary determinations of dumping and subsidizing respecting COR originating in or exported from Turkey, the UAE, and Vietnam.

PROVISIONAL DUTY

[283] Subsection 8(1) of SIMA provides that where a preliminary determination has been made and where the CBSA considers that the imposition of provisional duty is necessary to prevent injury, retardation or threat of injury, the importer in Canada of dumped and/or subsidized goods shall pay, or post security for, provisional duty. If, in making the preliminary determination, a determination is made that the estimated margin of dumping and/or the estimated amount of subsidy on the goods of an exporter is insignificant, subsection 8(1.3) provides that provisional anti-dumping and/or countervailing duties will not be imposed on importations of the goods from that particular exporter.

[284] Pursuant to subsection 8(1) of SIMA, provisional duty payable by the importer in Canada will be applied to dumped and subsidized imports of COR that are released from the CBSA during the period commencing on the day the preliminary determinations are made and ending on the earlier of the day on which the CBSA causes the investigation in respect of any goods to be terminated, in accordance with subsection 41(1), or the day on which the CITT makes an order or finding. The CBSA considers that the imposition of provisional duty is needed to prevent injury. As noted in the CITT's preliminary determination, there is evidence that discloses a reasonable indication that the dumping and subsidizing of COR have caused injury or are threatening to cause injury to the domestic industry.

[285] Imports of COR from Turkey, the UAE and Vietnam released by the CBSA on or after March 20, 2020, will be subject to provisional duties equal to the estimated margin of dumping and estimated amount of subsidy, where applicable, expressed as a percentage of the export price of the goods per exporter. **Appendix 1** contains the estimated margins of dumping, estimated amounts of subsidy and the rates of provisional duty.

[286] Importers are required to pay provisional duty in cash or by certified cheque. Alternatively, they may post security equal to the amount payable. Importers should contact their CBSA regional office if they require further information on the payment of provisional duty or the posting of security. If the importers of such goods do not indicate the required SIMA code or do not correctly describe the goods in the import documents, an administrative monetary penalty could be imposed. The imported goods are also subject to the *Customs Act*. As a result, failure to pay duties within the specified time will result in the application of the provisions of the *Customs Act* regarding interest.

FUTURE ACTION

The Canada Border Services Agency

[287] The CBSA will continue its investigations of the dumping and subsidizing and will make final decisions by June 18, 2020.

[288] If the margins of dumping or amounts of subsidy are found to be insignificant, the CBSA will terminate the investigations in respect of those goods and any provisional duty paid or security posted will be refunded to importers, as appropriate. If the CBSA is satisfied that the goods were dumped and/or subsidized, final determinations will be made.

The Canadian International Trade Tribunal

[289] The CITT has begun its inquiry into the question of injury to the Canadian industry. The CITT is expected to issue its finding by July 17, 2020.

[290] If the CITT finds that the dumping has not caused injury, retardation or is not threatening to cause injury, the proceedings will be terminated and all provisional anti-dumping duty collected or security posted will be refunded.

[291] If the CITT makes a finding that the dumping has caused injury, retardation or is threatening to cause injury, anti-dumping duty in an amount equal to the margin of dumping will be levied, collected and paid on imports of COR that are of the same description as goods described in the CITT's finding.

[292] If the CITT finds that the subsidizing has not caused injury, retardation or is not threatening to cause injury, the proceedings will be terminated and all provisional countervailing duty collected or security posted will be refunded.

[293] If the CITT makes a finding that the subsidizing has caused injury, retardation or is threatening to cause injury, countervailing duties in the amount equal to the amount of subsidy on the imported goods will be levied, collected and paid on imports of COR that are of the same description as goods described in the CITT's finding.

[294] For purposes of the preliminary determination of dumping or subsidizing, the CBSA has responsibility for determining whether the actual and potential volume of goods is negligible. After a preliminary determination of dumping or subsidizing, the CITT assumes this responsibility. In accordance with subsection 42(4.1) of SIMA, the CITT is required to terminate its inquiry in respect of any goods if the CITT determines that the volume of dumped or subsidized goods from a country is negligible.

RETROACTIVE DUTY ON MASSIVE IMPORTATIONS

[295] Under certain circumstances, anti-dumping and/or countervailing duty can be imposed retroactively on subject goods imported into Canada. When the CITT conducts its inquiry on material injury to the Canadian industry, it may consider if dumped and/or subsidized goods that were imported close to or after the initiation of the investigation constitute massive importations over a relatively short period of time and have caused injury to the Canadian industry. Should the CITT issue a finding that there were recent massive importations of dumped and/or subsidized goods that caused injury, imports of subject goods released by the CBSA in the 90 days preceding the day of the preliminary determination could be subject to anti-dumping and/or countervailing duty.

[296] In respect of importations of subsidized goods that have caused injury, this provision is only applicable where the CBSA has determined that the whole or any part of the subsidy on the goods is a prohibited subsidy. In such a case, the amount of countervailing duty applied on a retroactive basis will equal the amount of subsidy on the goods that is a prohibited subsidy. An export subsidy is a prohibited subsidy according to subsection 2(1) of SIMA.

UNDERTAKINGS

[297] After a preliminary determination of dumping by the CBSA, other than a preliminary determination in which a determination was made that the margin of dumping of the goods is insignificant, an exporter may submit a written undertaking to revise selling prices to Canada so that the margin of dumping or the injury caused by the dumping is eliminated. An acceptable undertaking must account for all or substantially all of the exports to Canada of the dumped goods.

[298] Similarly, after a preliminary determination of subsidizing by the CBSA, other than a preliminary determination in which a determination was made that the amount of subsidy on the goods is insignificant, a foreign government may submit a written undertaking to eliminate the subsidy on the goods exported or to eliminate the injurious effect of the subsidy, by limiting the amount of the subsidy or the quantity of goods exported to Canada. Alternatively, exporters with the written consent of their government may undertake to revise their selling prices so that the amount of the subsidy or the injurious effect of the subsidy is eliminated.

[299] In view of the time needed for consideration of undertakings, written undertaking proposals should be made as early as possible, and no later than 60 days after the preliminary determinations of dumping and subsidizing. Further details regarding undertakings can be found in the CBSA's Memorandum D14-1-9, available online at: www.cbsa-asfc.gc.ca/publications/dm-md/d14/d14-1-9-eng.html.

[300] Interested parties may provide comments regarding the acceptability of undertakings within nine days of the receipt of an undertaking by the CBSA. The CBSA will maintain a list of parties who wish to be notified should an undertaking proposal be received. Those who are interested in being notified should provide their name, telephone and fax numbers, mailing address and e-mail address to one of the officers identified in the "Information" section of this document.

[301] If undertakings were to be accepted, the investigations and the collection of provisional duties would be suspended. Notwithstanding the acceptance of an undertaking, an exporter may request that the CBSA's investigations be completed and that the CITT complete its injury inquiry.

PUBLICATION

[302] A notice of these preliminary determinations of dumping and subsidizing will be published in the *Canada Gazette* pursuant to paragraph 38(3)(a) of SIMA.

INFORMATION

[303] This *Statement of Reasons* is posted on the CBSA's website at the address below. For further information, please contact the officers identified as follows:

Mail: SIMA Registry and Disclosure Unit
Trade and Anti-dumping Programs Directorate
Canada Border Services Agency
100 Metcalfe Street, 11th floor
Ottawa, Ontario K1A 0L8
Canada

Telephone: Denis Chénier 613-954-0032
Lindsay Kyne 613-960-3099

E-mail: simaregistry@cbsa-asfc.gc.ca

Web site: www.cbsa-asfc.gc.ca/sima-lmsi

Doug Band
Director General
Trade and Anti-dumping Programs Directorate

ATTACHMENTS

Appendix 1: Summary of Estimated Margins of Dumping, Estimated Amounts of Subsidy and Provisional Duties Payable
Appendix 2: Description of Identified Programs and Incentives

APPENDIX 1 – SUMMARY OF ESTIMATED MARGINS OF DUMPING, ESTIMATED AMOUNTS OF SUBSIDY AND PROVISIONAL DUTIES PAYABLE

The following table lists the estimated margins of dumping, the estimated amounts of subsidy, and the provisional duty by exporter as a result of the decisions mentioned above. Imports of subject goods released from the Canada Border Services Agency on or after March 20, 2020, will be subject to provisional duties at the rates specified below.

Country of Origin or Export	Estimated Margin of Dumping*	Estimated Amount of Subsidy*	Total Provisional Duty Payable*
Turkey			
Atakaş Çelik Sanayi ve Ticaret A.Ş	39.7%	1.70%	41.4%
Borçelik Çelik Sanayi Ticaret A.Ş	39.7%	0.87%	39.7%
Tatmetal Celik Sanayi Ve Ticaret A.Ş.	39.7%	1.15%	40.85%
All Other Exporters - Turkey	39.7%	7.72%	47.42%
United Arab Emirates			
Al Ghurair Iron & Steel LLC	49.0%	0.00%	49.0%
United Iron and Steel Company LLC	49.0%	0.00%	49.0%
All Other Exporters - United Arab Emirates	49.0%	0.00%	49.0%
Vietnam			
China Steel and Nippon Steel Vietnam Joint Stock Company	36.3%	0.00%	36.3%
Hoa Sen Group Joint Stock Company	91.8%	0.002%	91.8%
Nam Kim Steel Joint Stock Company	46.0%	0.12%	46.0%
Ton Dong A Corporation	50.0%	0.00%	50%
All Other Exporters- Vietnam	91.8%	0.20%	91.8%

***** As a percentage of export price.

APPENDIX 2 – DESCRIPTION OF IDENTIFIED PROGRAMS AND INCENTIVES

The following subsidy programs are included in the current investigation. Questions concerning these programs were included in the Subsidy RFIs sent to the governments of the named countries and to all known producers/exporters of subject goods.

Evidence provided by the complainant and obtained by the CBSA suggests that the GOT, GOU and GOV have provided support to exporters/producers of subject goods in the following manner.

TURKEY

This Appendix consists of descriptions of the subsidy programs which the responding exporters (i.e. the three respondents for which sufficient information was available to estimate an amount of subsidy) benefited from during the course of the subsidy POI and other potentially actionable subsidy programs identified by the CBSA.

The CBSA has used the best information available to describe the potentially actionable subsidy programs that may not have been used by the responding exporters in the current investigation. This includes using information provided by the GOT, exporters and related suppliers, information included in the complaint, as well as information obtained from CBSA research on potential subsidy programs in Turkey.

Subsidy Programs Used by the Responding Exporters

Program 1. Turk Eximbank – Rediscount Credit Program

The legal basis for this program are the Turk Eximbank Law, Principles and Articles of Association, and the "*Implementation Principles for Rediscount Program".*[107] The Central Bank of Republic of Turkey (CBRT)'s Export Credit Rediscount Operation Instructions also includes terms and conditions regarding the credit process in addition to the Implementation Principles.

The program, which requires an export commitment, provides rediscount loans to exporters, with a maturity of 360 days or less.

[107] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 38 and exhibits 20 & 21

Under SIMA, as a general rule, an entity will constitute "government" when it possesses, exercises, or is vested with governmental authority. The following are factors that could indicate that this is the case in a particular entity:

- Express delegation or vesting of authority to an entity by statute or other legal instrument;
- Evidence that an entity is, in fact, exercising governmental functions; and
- Evidence that a government exercises meaningful control over an entity.

The CBSA determined that the Turk Eximbank satisfies the above criteria of a public body. As such, financial contributions provided by the Turk Eximbank (or on its behalf) with respect to the Eximbank programs are considered as financial contributions provided by the GOT. The CBSA's position is based on the following factors:

- The bank is wholly-owned by the GOT and is under the responsibility of the Prime Ministry. The bank was created by the government decree (No.87/11914) in 1987 following the order of Law No. 3332[108];
- the bank acts as the government's major export incentive instrument in Turkey's export strategy and maintains close co-operation with the related entities of the government. Its objectives are legislated[109];
- the Bank's policies and operations have been formulated to work within the framework of the export-led growth strategies pursued by the Turkish government[110];
- the Responsibilities and Powers of the Supreme Advisory and Credit Guidance Committee, which is comprised of GOT officials[111];
- the Turkish Treasury makes capital contributions to Turk Eximbank as the sole shareholder of the Bank. Its main sources of funds are direct funding from the Treasury through capital injections as well as through borrowing from commercial banks and international financial markets[112]; and
- losses incurred by Turk Eximbank as a result of political risks are covered by the Turkish Treasury[113].

A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA.

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[108] EXH 362 (NC) – CBSA Research Exhibits 1; G/SCM/N/315/TUR/Suppl.1 • G/SCM/N/343/TUR - New And Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures- Turkey, September 16, 2019; and EXH 200 (NC), Response to RFI – Subsidy – GOT; exhibit 20

[109] Ibid.

[110] Ibid.

[111] Ibid.

[112] Ibid.

[113] EXH 200 (NC) – Response to RFI – Subsidy – GOT; EXH 20 & EXH 362 (NC) CBSA Research Exhibits 1-; G/SCM/N/315/TUR; New And Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures- Turkey, August 31, 2017; page7

Pursuant to section 28 of the *Special Import Measures Regulations (SIMR)*, the benefit to the recipient should be based on a commercial benchmark that reflects the recipient's ability to obtain comparable financial services in the commercial market. Benefit exists if the bank requires the recipient to repay a lesser amount than would otherwise be payable under a comparable commercial loan. Specifically, the benefit is equal to the difference between (a) the amount of interest that would be payable, by the recipient of the preferential loan, on a non-guaranteed commercial loan in the same currency in which the payments for the preferential loan are expressed and on the same credit terms, other than the interest rate, as are applicable to the preferential loan, plus any additional costs, other than the interests, that would have been incurred by the recipient with respect to a non-guaranteed commercial loan the recipient could have obtained, and (b) the amount of interest payable on the preferential loan.

In order to determine appropriate benchmarks for the loans by the respondents, the CBSA used interest rates from privately owned banks and government banks operating on commercial basis for short term loans (within 360 days), weighted by the value of each loans, obtained by the responding exporters during the POI (or where interest accrued during the POI).

According to subsection 2(7.2) of SIMA, a subsidy is considered to be specific when it is limited, in a legislative, regulatory or administrative instrument, or other public document, to a particular enterprise within the jurisdiction of the authority that is granting the subsidy; or is a prohibited subsidy. A "prohibited subsidy" is either an export subsidy or a subsidy or portion of subsidy that is contingent, in whole or in part, on the use of goods that are produced or that originate in the country of export. An "export subsidy" is a subsidy or portion of a subsidy contingent, in whole or in part, on export performance.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific pursuant to paragraph 2(7.2)(b) of SIMA.

Program 3. Turk Eximbank – Post-shipment Rediscount Credits (PSRC)

The legal basis for this program are the Turk Eximbank Law, Principles and Articles of Association, and the "Implementation Principles for Post-Shipment Rediscount Credit Program".[114] The CBRT's Export Credit Rediscount Operation Instructions also includes terms and conditions regarding the credit process in addition to the Implementation Principles.

PSRC is a post-shipment finance facility, aiming at increasing the competitiveness of Turkish exporters in international markets.

[114] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 57 and exhibits 20 & 27

A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA. Pursuant to section 28 of the *SIMR*, the benefit to the recipient in the same manner as described for Program 1 above. This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

While one of the respondents used this program during the POI, the CBSA estimated that the amount of benefit was not applicable to subject goods because the program was only used for goods shipped to other destinations.

Program 4. Turk Eximbank – Pre-export Credits (PEC)

The legal basis for this program are the Turk Eximbank Law, Principles and Articles of Association, and the "Implementation Principles for Pre-Export Credit Program*".*[115]

Pre-export Credits are export credit facilities to exporters which are provided in foreign currency or in Turkish lira (TL). The purpose of PEC Program is to provide financial support to exporters, manufacturer-exporters and export-oriented manufacturers in return of the export commitment of Turkish origin goods. The credited company is obliged to fulfill its export commitment within the credit period.[116]

A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA. Pursuant to section 28 of the *SIMR*, the benefit to the recipient in the same manner as described for Program 1 above. This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

Program 6. Turk Eximbank –Investment Credit for Export

The legal basis for this program are the Turk Eximbank Law, Principles and Articles of Association, and the "Implementation Principles for Investment Credit for Export Program*".*[117]

Investment Credit for Export (ICE) Program aims at financing machine, equipment and accessory expenditures which need a middle or long term financing because of their sustainability or long-term usage properties on the basis of the amount excluding VAT. The maturity for this program is up to 10 years.[118] Manufacturers and manufacturer-exporter firms which are established in Turkey and which produce export-oriented Turkish products are eligible to apply for this credit program.[119]

[115] EXH 200 (NC) – Response to RFI – Subsidy – GOT; pages 67 and exhibits 20 & 26
[116] EXH 200 (NC) – Response to RFI – Subsidy – GOT; pages 66-67
[117] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 84 and exhibits 20 & 28
[118] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 84
[119] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 85

A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA. Pursuant to section 28 of the *SIMR,)*, the benefit to the recipient is based on a commercial benchmark that reflects the recipient's ability to obtain comparable financial services in the commercial market. Benefit exists if the bank requires the recipient to repay a lesser amount than would otherwise be payable under a comparable commercial loan.

For benchmark, the CBSA attempted to use interest rates from privately owned banks and government banks operating on commercial basis for long term loans of similar maturity, in the same currency, weighted by the value of each loans, obtained by the cooperating exporters during the POI (or where interest accrued during the POI). The best information available for a benchmark rate in the same currency was the weighted average interest rates for state owned banks' USD commercial loans, as provided by the GOT[120]. In the final phase of the investigation, the CBSA will attempt to identify a more suitable benchmark rate, from long term commercial provided by Turkish commercial banks for USD denominated loans.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

Program 8. Turk Eximbank – Export Credit Insurance including: Short-term Export Credit Insurance

The legal basis for this program are the Turk Eximbank Law, Principles and Articles of Association and "Implementation Principles for Short-Term Export Credit Insurance".[121]

The Short Term Export Credit Insurance Program (STECI) provides Turkish exporters with one-year blanket insurance cover for exports purchased on short term credits. The percentage of cover is up to 90 % for losses due to the political and commercial risks for the shipments to be paid up to 360 days.[122]

Within the framework of this program, the rates of premium differ for all shipments according to the risk classification of buyer's country, payment terms and credit periods and the type of the buyer (private/public).[123]

[120] EXH 200 (NC) – Response to RFI – Subsidy – GOT; pages 19-20
[121] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 102
[122] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 101
[123] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 107

The provision of export credit insurance is considered as the provision of goods or services, other than general governmental infrastructure and therefore considered a financial contribution pursuant to paragraph 2(1.6)(c) of SIMA. Section 36 of the SIMR deals with the calculation of the amount of subsidy which arises from the provision of goods or services by government. In the absence of a comparable insurance service being provided on a commercial basis and in agreement with paragraph (j) of Annex I of the SCM Agreement, the CBSA will generally consider that an export insurance program provides benefit if the premiums charged for access to the program are inadequate to cover the long term operating costs and losses of the program.[124]

This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

The CBSA reviewed Turk Eximbank's 2014 to 2018 Annual Reports and other information available on the administrative record.[125] The CBSA's preliminary analysis indicates that the revenue from premiums covers the long term operating costs of the program and that this program is not a subsidy in respect of the subject goods. As such, for the purposes of the preliminary phase of the investigation, the CBSA is of the opinion that no countervailable benefit was provided under this program. For the purposes of the preliminary determination, the CBSA also excluded this program from the "all other rate".

In the final phase of the investigation, the CBSA will continue to assess the financial viability of the insurance program in relation to the premiums being charged to the insured parties.

Program 10. Credit Guarantee Fund (KGF) Scheme for Turk Eximbank Programs

This program is referred to as the "Credit Guarantee Fund (KGF) Equity Backed Guarantees and Treasury Backed Guarantees" per the GOT.

Turk Eximbank credit programs require the beneficiary to submit a letter of guarantee. The program provide collateral for different credit programs extended by Turk Eximbank. With respect to Treasury-backed guarantees, KGF can provide guarantees up to 100% for the loan requests from Eximbank or TL/foreign currency denominated loans from banks for businesses engaged in exports or foreign currency-earning activities.[126] It is the CBSA's understanding that KGF generally guarantees up to 80% of the credit, with the exception of Eximbank credit which are guaranteed by 100%.[127]

[124] 6.5.12 of SIMA Handbook

[125] EXH 200 (NC) – Response to RFI – Subsidy – GOT; Exhibit 33; TE Annual Report 2018; Exhibit 345 GOT's response to Subsidy SRFI 1, Exhibit 9 and Exhibit 362 (NC) CBSA Research Exhibits 1- Australia SEF 495; p. 106

[126] EXH 362 (NC) – CBSA Research; Exhibits 1- KGF website Information Center

[127] EXH 362 (NC) – CBSA Research; Exhibits 1- International Journal of Business and Social Science; Vol. 3 No. 10 [Special Issue – May 2012] - Evaluatıng the Credıt Guarantee Fund (Kgf) of Turkey as a Partıal Guarantee Program in the Lıght of Internatıonal Practıces; H. Tunahan and A.S. Dizkirici

Under SIMA, as a general rule, an entity will constitute "government" when it possesses, exercises, or is vested with governmental authority.[128] The following are factors that could indicate that this is the case in a particular entity:

- Express delegation or vesting of authority to an entity by statute or other legal instrument;
- Evidence that an entity is, in fact, exercising governmental functions; and
- Evidence that a government exercises meaningful control over an entity.

The KGF is a joint-stock company incorporated under the Turkish Commercial Code. Its website lists KGF's government entity shareholders and shareholders that have public institution status. It also states that KGF is the only institution in Turkey that provides guarantees to "ease SME and non-SME access to finance." [129]

The KGF website also states that guarantee institutions are supported by states since the services they provide are for the public good. Hence, KGF is exempt from stamp duty, corporate tax, and certain other fees and charges. Furthermore, information on the record also suggests that significant funds are being provided by the GOT for the KGF. [130]

The CBSA noted that the GOT's economic policy documents specifically refer to the KGF as a policy tool. For example, the Medium Term Programme (2018-2020) states that "The Credit Guarantee Fund (CGF) will be restructured to prioritize the financing investments, exports, new ventures and R&D projects.[131]" Similarly the 11th Development Plan says that "The efficiency of the existing credit guarantee system will be increased and the use of the Credit Guarantee Fund in projects that will increase competitiveness and efficiency in prioritized sectors will be concentrated. Fifty percent of the Credit Guarantee Fund will be allocated to investment and to the export loans in the manufacturing industry sectors." […]. "The support of the Development and Investment Bank to industrial investments, particularly the prioritized sectors, will be strengthened."[132]

Having regards to the above, the CBSA determined that the KGC satisfies the above criteria of a public body. The KGC is an entity that was established by the GOT (i.e. under Cabinet Decree No. 93/4496 dated 14 July 1993) and has a controlling number of government entity shareholders (as high as 70% according to a research paper[133]). Some of the KGF's capital is provided by the GOT. The KGF appears to be exercising government functions and is used as policy tools in government economic policy and plans.

[128] SIMA Handbook, Section 6.3.3.3
[129] EXH 362 (NC) – CBSA Research; Exhibits 1- KGF website Information Center / FAQs
[130] EXH 362 (NC) – CBSA Research; Exhibits 1- KGF website Information Center / FAQs
[131] EXH 166 (NC) – Response to RFI – PMS – GOT; Exhibit 10 – Medium Term Programme 2018-2020
[132] EXH 166 (NC) – Response to RFI – PMS – GOT; Exhibit 6 – 11th Development Plan, Paras. 299-300
[133] EXH 30 (NC) – COR2 Complaint; Attachment 47; page 88

As such, financial contributions provided by the KGF are considered as financial contributions provided by the GOT.

A loan guarantee is considered a financial contribution pursuant to paragraph 2(1.6)(a) as a practice of the government that involves a contingent transfer of funds.

Pursuant to section 31.1 of the SIMR, the amount of subsidy on loan guarantees is calculated by taking the present value of the difference between (a) the amount of interest and any administrative fees the person on whose behalf the guarantee is provided would have paid in respect of the loan if not for the guarantee, and (b) the amount of interest and any administrative fee the person on whose behalf the guarantee is provided will actually pay in respect of the loan secured by the guarantee. This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

The CBSA estimated that this program does not result in any benefit that is not already fully determined in the calculation of the amount of benefit under any of the Eximbank loan programs already under investigation. The CBSA would be unable to segregate the proportion of the preferential terms of a given loan that is due specifically to the KGF guarantee. As such, the CBSA did not determine any amount of subsidy for this program, although potential benefit due to this program would already be reflected in the amounts of benefits estimated for the other Eximbank loan programs.

On the other hand, a financial contribution could be provided resulting in countervailable benefit under loans other than Eximbank loans, if such loans guaranteed by the KGF were provided. As such, the name of the program will be changed to "Credit Guarantee Fund (KGF) Equity Backed Guarantees and Treasury Backed Guarantees" and the program will be looked at as a program distinct from Eximbank programs. As such, in the final phase of the investigation, the CBSA will assess whether the KGC provided guarantees on any other loans provided to the producers or exporters of subject goods.

Program 23. Inward Processing Regime – Excessive tax exemptions and drawback (Import Duty Rebates/Drawback Under Inward Processing Regime; Tariff and VAT Exemptions Under Inward Processing Certificate Program)

The legal basis for the program is the Resolution Concerning Inward Processing Regime ("The Resolution No. 2005/8391").[134]

[134] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 197 and Exhibit 47 (article 9 provides the general provisions)

The Inward Processing Regime (IPR) is a system allowing Turkish manufacturers and exporters to obtain raw materials, intermediate unfinished goods that are used in the production of the exported goods without paying customs duty including Value Added Tax (VAT). The GOT claims that Turkey has a system in place to confirm which inputs, and in what amounts are consumed in production of the exported products under the program.[135]

Under the IPR, two types of certificates are granted, the D1 and D3 certificates. The D1 certificates allow manufacturer-exporters /exporters to obtain inputs that are used in the production of exported goods without paying any import duty and VAT. The D3 certificates can be used in some business activities realized in Turkey. In the implementation of D3 certificates, there is no need for export commitments. All of these business activities are defined as "domestic sales and deliveries deemed as exports". Holder of the D3 certificates can import goods without paying import duty but in this case, as it is mentioned above, holder makes domestic sales instead of export.[136]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

Under paragraph 2(1)(a) of SIMA, a subsidy does not include the amount of any duty or internal tax imposed on any goods which is exempted or relieved because the goods are exported (including duties on inputs consumed in the production of the exported goods). It is only the excessive relief that consist of a subsidy. An excess amount may occur where, on the condition of export, relief is provided on goods that are not exported, or in instances where the goods are exported but the amount of the relief is greater than the amount that would normally be payable if the goods had been consumed domestically rather than being exported. A normal allowance for waste should be made when considering the excess. The amount of benefit from excessive relief of duties and taxes is determined pursuant to section 35 or 35.01 (for inputs) of the SIMR.

The CBSA may also determine that the entire exemption amount constitute a benefit if the foreign government has not examined the inputs in order to confirm that such inputs are consumed in the production of the exported goods, in what amounts, and the taxes that are imposed on the inputs. If it is found that there is a system in place that confirms this information, the CBSA will examine the system to see if it is reasonable.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

[135] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 197
[136] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 198

In past subsidy investigations, the CBSA[137] and Australia[138] have concluded that the the GOT had adequate controls in place to ensure all export commitments are met and for monitoring compliance with the IPR. It is believed that these conclusions regarded the D1 certificates.

Any relief under D3 certificates would appear to be countervailable. According to responses from the GOT and from the respondents, only D1 certificates were issued to producers or exporters of subject goods during the POI.

Considering that only D1 certificates were used by the producers or exporters of subject goods during the POI, for the purposes of the preliminary determination, the CBSA considered that no countervailable benefits were granted under this program, in light of evidence that the GOT has adequate controls in place to ensure all export commitments are met and for monitoring compliance with the IPR. For the purposes of the preliminary determination, the CBSA excluded this program from the "all other rate".

In the final phase of the investigation, the CBSA will continue to review and verify information with respect to this program.

Program 24. Deduction from Taxable Income for Export Revenue

According to Article 40, Clause 1 of Income Tax Law No. 193 dated January 6, 1961, which was amended by the Law No. 4108 dated June 2, 1995, all taxpayers may have an additional deduction of a lump sum amount from their gross income resulting from exports, construction, maintenance, assembly and transportation activities abroad. This amount may not exceed 0.5 % of the proceeds they earned in foreign exchange from such activities. The program is administered by Ministry of Treasury and Finance.[139]

The only criterion is receipt of foreign currency revenue. The deduction is claimed as part of the exporter's tax filings and is shown in their annual tax return. No application or approval process required.

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

[137] CBSA; Dry What Pasta from Turkey, *Statement of Reasons*, Final Determination, July 11, 2018; CBSA; Certain Concrete Reinforcing Bar from Turkey, *Statement of Reasons*, Final Determination, December 23, 2014;
[138] EXH 362 (NC) – CBSA Research; Exhibits 1; Australia Anti-Dumping Commission, Statement of Essential Facts No. 495 – Rebar from Turkey, April 18, 2019
[139] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 208

Section 32 of the SIMR deals with income tax credits, refunds and exemptions contingent on the export of goods. The subsidy in such cases is to be determined as the amount of the income tax which is credited, refunded or exempted, according to the taxation laws in the territory of the government (i.e. local, state or national) providing the tax relief. The amount of the subsidy on a per unit basis is determined by dividing the tax saving by the total number of units exported during the taxation period under review. The tax rate in Turkey is 22%.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

Program 25. Exemption from Banking and Insurance Transactions Tax (BITT) on Foreign Exchange Transactions

Between May 2008 and May 15, 2019, the BITT rate set for all foreign exchange sales was 0%. To restrict speculative and high frequency foreign exchange movements, with Presidential Decree no 1106, BITT rate for foreign exchange sales was increased to 0,1% with certain exceptions.[140]

The BITT rate is specified by the Article 1 of the Annexed Decision of the Cabinet Decree No. 98/11591 dated August 28, 1998. The change in BITT rate is put into force with the Presidential Decree no 1106 published in the Official Gazette numbered 30377 dated May 15, 2019 and amended with the Presidential Decree no 1149 published in the Official Gazette numbered 30804 dated June 17, 2019.[141] This regulation is administered by Ministry of Treasury and Finance.[142]

With the May 15, 2019 amendment, the below stated transactions remained to be subject to 0% BITT:[143]

- Foreign exchange sales between banks and authorized institutions or among each other;
- Foreign currency sales that are made to the Ministry of Treasury and Finance; and
- Foreign currency sales made to corporate borrowers having foreign currency loan payables, by the lender banks or the banks that act as intermediary to the utilization of the foreign currency loan.

[140] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 214
[141] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 213 & exhibit 51; and EXH 345 (NC) – Response to SRFI 1; exhibit 1
[142] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 216
[143] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 214

Afterwards, with the Presidential Decree no 1149, the below stated transactions have been added to the foreign exchange transactions which are subject to 0% BITT rate, from the date of June 18, 2019:[144]

- Foreign exchange sales to enterprises having industrial registry certificate,
- Foreign Exchange sales to exporters

As such, the GOT claimed that foreign exchange sales that are made to any enterprise having an industrial registry certificate are subject to 0% BITT rate without any exceptions. Industrial registry certificate can be obtained by any industrial establishment.[145]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

Subsection 27.1(2) of the SIMR stipulates that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program. Pursuant to paragraph 27(a) of the SIMR, given that the grant (grant equivalent) is to be used for operating expenses in the production, purchase, distribution, transportation, sale, export or import of subsidized goods, the benefit should be allocated over the total quantity of subsidized goods to which the grant is attributable.

Regarding specificity, the GOT claims that the foreign exchange transactions of all enterprises having industrial registry certificate are excluded from BITT and that the applicable exemption is not contingent on export. Thus, under the GOT's argument, the BITT exception on foreign exchange transactions is generally available and not export contingent.

On the one hand, exemption from a foreign exchange transaction tax could be treated as a de facto specific subsidy in accordance with paragraph 2(7.3)(c) due to the fact that a certain subset of those who are eligible for the program would receive a larger amount of the benefit (i.e. exporters). This could be the case if the tax relief program provides a distortive benefit in comparison to sales made in the domestic market, as those sales would not require an exchange of currency.

On the other hand, the exemption appears to be restorative in nature, such that it removes a tax on export sales that would not be present for domestic sales as they would not require currency conversion. As such, the subsidy does not appear to be causing distortions to normal patterns of investment, production and pricing that result in harmful trade effects and it is not believed to be targeted to a specific group of enterprises through administrative discretion.

[144] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 214
[145] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 215

Having regards to the above, for the purposes of the preliminary determination, the CBSA has considered that any benefit resulting from the BITT on Foreign Exchange Transactions is not specific and therefore not countervailable. For the purposes of the preliminary determination, the CBSA excluded this program from the "all other rate".

Program 27. Investment Incentive Program

The GOT refers to the Program as the "Investment Encouragement Program" (IEP). IEP is designed and implemented by the Ministry of Industry and Technology (MIT) and is currently based on the provisions of the Council of Ministers' Decree No. 2012/3305, which has been in force since June 15, 2012.[146]

Pursuant to the current Decree No. 2012/3005, IEP consists of four separate incentive schemes: Regional Investment Incentive Scheme (RIIS), Large Scale Investment Incentive Scheme (LSIIS), Strategic Investment Incentive Scheme (SIIS) and General Investment Incentive Scheme (GIIS). A company should have an investment incentive certificate issued by MIT to have a support under IEP.[147]

There are nine aspects of support measures under either one of the schemes:[148]

1) Customs Duty Exemption: Investment machinery and equipment imported within the scope of the incentive certificate are exempted from customs duty set in the Import Regime Decree. The customs duties are exempted for the companies, which have an incentive certificate, during import operations under the control of the Ministry of Trade.

2) VAT Exemption: Investment machinery and equipment imported and/or locally provided within the scope of the incentive certificate are exempted from VAT. The companies, which have an incentive certificate, do not pay VAT for the machinery and equipment under the control of Ministry of Treasury and Finance.

3) Interest Rate Support: This support is available for investment loans, borrowed to finance the investment, with a maturity of at least one year for Regional Investments (Region 3, 4, 5 and 6), Strategic Investments, R&D and Environment Investments. The GOT covers a portion of the interest/profit share of the loans that do not exceed 70% of the fixed investment amount registered on the certificate for a specific period which would not exceed five years. The amount of interest rate support and the support rate is limited for each region differently.

[146] EXH 200 (NC) – Response to RFI – Subsidy GOT; page 228
[147] EXH 200 (NC) – Response to RFI – Subsidy GOT; pages 228-229
[148] EXH 200 (NC) – Response to RFI – Subsidy GOT; pages 229-231

4) Social Security Premium Support (Employer's Share): For any additional employment created by an investment with an incentive certificate under Regional, Large Scale and Strategic Investment Incentive Schemes, the amount corresponding to the employer's share of the social security premium on legal minimum wage, paid by the investor, is covered by the Social Security Institution. In order for an investor to benefit from this support, the project should be concluded and a completion visa should be granted.

5) Tax Reduction: Reduced income or corporate tax rates are applied for the companies until the total deduction reaches the "contribution amount". There are two different rates for the implementation of this support; "contribution rate" and "discount rate". The discount rate is used to find the reduced income/corporate tax rate of the company. The contribution rate is used to find the total deduction. Multiplication of contribution rate with total investment amount gives the contribution amount. The Ministry of Treasury and Finance applies reduced income/corporate tax rate for the company until total deduction reaches the contribution amount.

6) Land Allocation: State-owned lands are allocated for investments with incentive certificate under large scale, strategic and regional incentive schemes in accordance with the rules and principles defined by the Ministry of Treasury and Finance, depending on the availability of such land in the provinces where investments are made.

7) VAT Refund: VAT collected on the building & construction expenses made for Strategic Investments is rebated provided that the fixed investment amount is over 500 million TL.

8) Social Security Premium Support for Employee's Share (Only for Region 6): This scheme allows for the Ministry to cover the employee's share of the social security premium paid by the investor to the Social Security Institution in the amount corresponding to the legal minimum wage, for additional personnel recruited for new investments in Region 6. This support is available for Regional, Large Scale and Strategic investments in Region 6 only and for 10 years.

9) Income Tax Withholding Support (Only for Region 6): For additional employment created by the investments to be realized within the scope of the incentive certificates issued for Region 6, the income tax that is calculated on the basis of the portion of the employees' wages that corresponds to the minimum wage is not levied. This support is available for the investments in Region 6 only for 10 years.

According to the Article 18 of the Decree No. 2012/3305, investments with incentive certificates within the scope of large scale investments or regional incentive implementations may benefit from tax discount and social security premium employer share support over the rates and periods valid in one region below the region they exist, if the investment is realized in an OIZ (Program 16).[149]

[149] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 231

According to the GOT, unless they are operating in region 6, the producers of subject merchandise could only benefit from General Investment Incentive Scheme.[150] The CBSA notes that producers operating in region 5 are also eligible if they are in an OIZ.[151] Steel is a sector supported under the Regional scheme.

For Regional Investment Scheme, the sectors that may benefit from regional support and the minimum investments are identified in Annex 2/A of the Decree No. 2012/3305. Steel is identified as such a sector. Furthermore, investments should meet the minimum investment amount criteria for respective regions. Under Strategic Investment Incentive (SII) Scheme of IEP, the investments fulfilling the criteria stipulated in Article 8 of the Decree No. 2012/3305 could benefit from the program. The scopes of investments which could benefit from Large – Scale Investment Incentive Scheme are defined in Annex 3 of the Decree No. 2012/3305. (Annex 3 of the Decree No. 2012/3305).[152] Annex – 4 to the Decree No. 2012/3305 describes the investments which are not supported as well as the investments which are supported under certain conditions.[153]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

Subsection 27.1(2) of the SIMR stipulates that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program. Pursuant to paragraph 27(a) of the SIMR, given that the grant (grant equivalent) is to be used for operating expenses in the production, purchase, distribution, transportation, sale, export or import of subsidized goods, the benefit should be allocated over the total quantity of subsidized goods to which the grant is attributable. Pursuant to paragraph 27(b), where the grant was, or is, to be used for the purchase or construction of a fixed asset, the grant is allocated over the estimated total quantity of subsidized goods for the production, purchase, distribution, transportation, sale, export or import of which the fixed asset was, or will be, used for the anticipated useful life of the fixed asset.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because they are restricted to specified sectors, and in some instances, it favors enterprises operating in an OIZ or other special zone.

[150] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 232
[151] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 53
[152] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 232 and exhibit 53
[153] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 236 and exhibit 53

Program 32: Provision of Input (e.g. Hot-rolled Steel, Cold-rolled Steel, coking coal) at Less than Adequate Remuneration

Hot-rolled Steel (HRS), Cold-rolled Steel (CRS)

The complainant alleges that the GOT may be providing substrate (HRS or CRS) to Turkish COR producers through Ereğli Demir ve Çelik Fabrikaları T.A.Ş. (Erdemir) or its subsidiary for less than adequate remuneration.[154]

Information on the record confirmed that HRS was supplied by Erdemir for the production of subject and like goods.[155]

Under SIMA, as a general rule, an entity will constitute "government" when it possesses, exercises, or is vested with governmental authority. The following are factors that could indicate that this is the case in a particular entity:

- Express delegation or vesting of authority to an entity by statute or other legal instrument;
- Evidence that an entity is, in fact, exercising governmental functions;
- Evidence that a government exercises meaningful control over an entity.

Conversely, an entity that is carrying out an entirely commercial function (e.g. a steel producer) can potentially be considered as constituting government, if there is some evidence to show that the entity is in some way possessing, exercising or vested with governmental authority, such as through a statute or through the exercise of governmental function under government control.

Evidence of meaningful control by the GOT over OYAK and/or Erdemir

Erdemir is a joint-stock company whose share are traded on the Istanbul Stock Exchange. Erdemir is the largest iron and steel works corporation in Turkey. According to data provided by the GOT, Erdemir, together with its subsidiary Isdemir, accounted for close to 53% of HRS production in Turkey, and about 30% of the apparent domestic market for HRS (not counting HRS produced for internal consumption).[156] Erdemir denoted the group structure of Erdemir and its subsidiaries as OYAK Mining and Metallurgy Group.

[154] EXH 030 (NC) – COR2 Complaint; page 158
[155] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; Q.3.
[156] EXH 166 (NC) – Response to RFI – PMS – GOT; response to question 1; and Exhibit 200 (NC) – Response to RFI – Subsidy – GOT; response to question D2

Evidence on the record confirms that OYAK (Military Personnel Assistance and Pension Fund) owns the majority of Erdemir's share on the stock market through its wholly-owned subsidiary ATAER Holding A.Ş.. In this regard, ATAER Holding A.Ş. owns 49.29% of Erdemir's share, while Erdemir owns 3.08% of its own shares, which effectively provides OYAK the majority controlling interest of Erdemir (i.e. at 52.37%).[157] Erdemir was privatized in 2006.[158]

According to information on the record, at least five of the current nine members of Erdemir's Board of Directors (BoD) are associated with OYAK. Further, the Turkish Privatization Administration (TPA), a government body, is also a member of the BoD.[159] The TPA has a representative on the BoD as required by Erdemir's Article of Association, and a usufruct right over the "A Group Share".[160] This right of the TPA was a precondition of privatization.[161] The rights assigned to the "A Group Share" include "Resolutions regarding closedown, sales of or an encumbrance upon the integrated steel production facilities and mining facilities owned by the Company and/or its subsidiaries or a resolution on reduction in capacities of such facilities", as well as "Resolutions regarding closedown, sales, demerger or merger or liquidation of the Company and/ or its subsidiaries owning the integrated steel production facilities and mining facilities. Such resolutions can only pass through affirmative votes of the usufructory in representation of Group A shares.[162] In other words, the TPA has veto power over these decisions.

On the basis of the above, it appears that the GOT does have a degree of control or authority over Erdemir, with respect to some potential corporate decisions. The GOT does have veto power over important strategic decisions such as reduction in capacity, closedown, mergers, etc. While the GOT noted that the TPA has never exercised its veto power[163], the mere existence of such power could be sufficient to influence of strategic decisions of the company. With respect to the TPA's involvement in other decisions, it may not be very influential considering the weight of OYAK representatives on the Board. On the other hand, the GOT may also exercise meaningful control over Erdemir indirectly though OYAK.

[157] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; Q.2
[158] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; response to question 12
[159] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; response to question 15
[160] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; Annex 5
[161] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; response to question 17
[162] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; Annex 5, Articles of Association – article 22
[163] EXH 166 (NC) – Response to RFI – PMS – GOT; response to question 5

OYAK is a Military Personnel Assistance and Pension Fund (Fund) which was founded as an institution of the Ministry of National Defense, pursuant to Law No. 205 of January 3, 1961.[164] OYAK utilizes the contribution collected from its members in its investments. While realizing its investments, OYAK aims to contribute to the development of Turkish economy and prioritizes the areas where this contribution shall be at the highest level".[165]

Pursuant to Article 20 of the Law No. 205, OYAK is to provide benefits to its members (i.e. military personnel), specifically, retirement benefits, disability benefits, death benefits and housing acquisition benefits.[166] OYAK is to be funded mainly by deductions from the wage of its members and the revenues generated from the management of the assets of the Fund.[167] Under the Law, OYAK shall be a corporate body with financial and administrative autonomy.[168] The Law describes the Organs of OYAK (i.e. Representative Assembly, General Assembly, Board of Directors, Board of Audit and General Directorate), the selection of its members, their constitutions and duties.[169]

A review by the CBSA of the articles describing the governing bodies of OYAK suggests that the GOT has some direct representations in these governing bodies or has influence in the selection of the representatives. For example, the Minister of National Defense and the Minister of Finance are members of the General Assembly. The General Assembly is indeed presided by the Minister of National Defense, or in his absence, by the Minister of Finance.[170] Some of the members of the Board of Audit are elected among candidates nominated by the Minister of National Defense and by the Prime Ministry of the Republic of Turkey. Members of the Board of Directors are nominated by the Minister of National Defense, or by an election committee composed of the Minister of National Defense, the Minister of Finance and other government officials.[171]

[164] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 64, Law No. 205
[165] Exhibit 362 (NC) CBSA Research Exhibits 1 - Website at https://www.oyak.com.tr/member-services/, accessed January 16, 2020.
[166] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 64, Law No. 205
[167] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 64, Law No. 205, article 18
[168] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 64, Law No. 205, article 1
[169] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 64, Law No. 205, articles 2-17
[170] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 64, Law No. 205, article 4
[171] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 64, Law No. 205, articles 7 & 8

In *US – Carbon Steel (India),* the WTO Appellate Body observed that "a government's power to appoint directors to the board of an entity and the issue of whether those directors are independent, would seem to be distinct factors" in assessing the governmental character of an entity.[172] In this context, in *United States – Countervailing Measures On Certain Pipe And Tube Products From Turkey*[173], the WTO Panel determined that the US DOC failed to provide evidence that suggest that military and government personnel within OYAK have made decisions under the direction of the GOT in pursuit of governmental economic policies.[174] The CBSA reviewed the duties of the members of the governing bodies of OYAK, as stipulated by the Law, which did not provide evidence that military and government personnel within OYAK are making decisions under the direction of the GOT in pursuit of governmental policies.

The CBSA's review of OYAK's corporate website, several of its Press Releases and its Annual Report, suggested evidence of an aim to contribute to the economic policies of the GOT as well as to the national economy, namely to reduce the country's trade deficit and import dependency.[175] These aims are in line with the government policies and actions cited in the numerous policy documents reviewed by CBSA.[176]

For example, in a Press Release regarding OYAK's 58th Ordinary General Assembly Meeting, its Chairman of the Board of Directors was quoted as saying "We are endeavoring for supporting our country's combat against current deficit, as well as the employment mobilization, and give our best to ensure OYAK's presence in the production fields that will reduce the foreign dependency."[177] The 2018 annual report of OYAK Mining Metallurgy Group, the group structure that includes Erdemir and its subsidiaries, also discusses how the Group "…has added impetus to the development of the national economy by supplying raw materials to all industries, meeting the growing domestic demand by constantly improving its technology and capacity, enabling the establishment of new industries and supporting exports."[178] On that basis, it could be argued that OYAK has, to some degree, a corporate strategy that is aligned with the GOT's official economic policy. Its specific aim at reducing the country's trade deficit and import dependency do appear to be aligned with the policies and actions cited in the GOT's 10th and 11th Development Plans, GITES, the 2023 Turkey Export Strategy and Action Plan, the Strategy Document And Action Plan on Turkey Iron-Steel And Nonferrous Metals Sector and the Mid Term Programme 2018-2020.[179]

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[172] EXH 362 (NC) – CBSA Research; Exhibits 1 - WT/DS436/AB/R; *US – Carbon Steel (India) – Report of the Appellate Body;* Paragraph 4.45
[173] EXH 362 (NC) – CBSA Research; Exhibits 1 - DS523 - United States – Countervailing Measures On Certain Pipe And Tube Products From Turkey, Report of the Panel, December 18, 2018;
[174] EXH 362 (NC) – CBSA Research; Exhibits 1 -DS523 - United States – Countervailing Measures On Certain Pipe And Tube Products From Turkey, Report of the Panel, December 18, 2018; paragraph 7.39
[175] EXH 362 (NC) – CBSA Research Exhibits 1. Website at https://www.oyak.com.tr/home-page/, accessed January 16, 2020.
[176] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibits 15-19
[177] EXH 362 (NC) – CBSA Research Exhibits 1 – OYAK Press Release 3
[178] EXH 030 (NC) – COR2 Complaint – Attachment 105
[179] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibits 15-19

Having regards to the above, for the purposes of the preliminary determination, the CBSA is of the opinion that Erdemir is possessing, exercising or vested with governmental authority, such as through the exercise of governmental function under some amount of government control. As such, the CBSA is of the opinion that Erdemir is a public body. In the final phase of the investigation, the CBSA will continue to assess whether there is evidence that OYAK and/or Erdemir are in fact, exercising government functions.

Pursuant to paragraph 2(1.6)(c) of SIMA, there is a financial contribution where the government provides goods or services, other than general governmental infrastructures. The potential benefit, pursuant to section 36 of the SIMR, is equal to the difference between the fair market value of the goods or services in the territory of the government providing the subsidy (i.e. the benchmark price), and the price at which the goods or services were provided by the government.

Benchmark Price:

The determination of "fair market value" should, to the extent possible, parallel the provisions of Article 14(d) of the ASCM regarding the determination of "adequacy of remuneration", particularly in terms of establishing the fair market value on the basis of prevailing market condition.

Thus, ideally, the benchmark prices should be based on the prices of the same, or similar goods, in relation to prevailing market conditions for HRS in Turkey (including price, quality, availability, marketability, transportation and other conditions of sale). As such, the ideal benchmark would consist of the prices paid by the producers for the same or similar goods purchased from private Turkish suppliers, under similar terms of sale.

However, where the government is the dominant supplier, its influence may be such as to distort the selling price of such goods provided by the private suppliers.

As mentioned earlier, Erdemir (including its subsidiaries) accounts for more than half of domestic production and over 30% of the total market.[180] Further, imports from Russia and Ukraine also have a strong presence in the Turkish market, representing about half of imports and over 20% of the apparent domestic consumption.[181] Low-priced imports of HRS or CRS from Russia and Ukraine are the subject of several anti-dumping measures, in Brazil, Canada, the European Union, Mexico and the United States of America.[182] Imports of HRS from Russia and Ukraine are priced about 10% lower than other imports and domestic goods and are likely to be having a depressing impact on all domestic prices.[183] Together, Erdemir and CIS imports represent the majority of HRS available in Russia, and would be the price setters. Similarly, the import prices from the other sources may be influenced by the dominant parties (i.e. Erdemir and CIS imports). Further, based on data from respondents from Turkey regarding their purchases of HRS, it is estimated that a significant proportion of the remaining imports (outside CIS) are from related parties.

For the reasons described above, for the purposes of the preliminary determination, the CBSA has used the published monthly HRS prices for Southern Europe, as reported by Metal Bulletin.[184] According to Erdemir, Southern Europe, along with CIS, were the most influential markets to monitor, in terms of setting prices for the domestic market.[185] Geographically, Southern Europe includes parts of Turkey, which makes it even more relevant as a benchmark.

In the final phase of the investigation, the CBSA will continue to assess the appropriateness of using prices in Turkey as benchmark for the comparison with Erdemir's selling prices.

Program 33: Incentives for R&D Operations and Investments

The legal basis for Incentives for Research & Development ("R&D") Activities are based on the "Law on supporting Research and Development Activities" (Law No. 5746).[186]

[180] EXH 166 (NC) – Response to RFI – PMS – GOT; response to question 1 and Exhibit 200 (NC) – Response to RFI – Subsidy – GOT; response to question D2
[181] EXH 166 (NC) – Response to RFI – PMS – GOT; response to question 1 and Exhibit 200 (NC) – Response to RFI – Subsidy – GOT; response to question D2
[182] EXH 362 (NC) – CBSA Research; Exhibits 1 - (WTO) Semi-Annual Reports Under Article 16.4 of the Agreement
[183] EXH 166 (NC) – Response to RFI – PMS – GOT; response to question 1 and Exhibit 200 (NC), Response to RFI – Subsidy – GOT; response to question D2
[184] EXH 030 (NC) – COR2 Complaint; exhibit 12
[185] EXH 371 (NC) – Erdemir Response to Appendix II and related questions of Subsidy Request for Information; response to question 6
[186] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 291 and exhibit 68

Technology centres, R&D centres, and some pre-competition cooperation projects are able to benefit from the support measures under the Law No. 5746 by applying the Ministry of Industry and Technology (MoIT).[187] The support measures provided under the Law No. 5746 are

- R&D Allowance;
- Income Tax Withholding Support;
- Insurance Premium Support; and
- Stamp Tax Exemption.[188]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected. The benefit to the service provider would be equivalent to the amount of tax exempted.

With respect to specificity, the complainant believes that the program is specific due to its discretionary nature. The CBSA acknowledge that despite some objective eligibility criteria, an application for benefits under this program is subject to assessment by a panel set up by the GOT. Therefore, the CBSA examined whether there was evidence that the discretion was applied in a manner that favors or was limited to a particular enterprise (i.e. an enterprise or industry or group of enterprises or industries). The CBSA examined the statistical data provided by the GOT which suggested that the number of R&D centers were spread across all sectors.[189] The Iron and Non-ferrous Metal accounted for 2.3% of the total number of R&D centers. For the purposes of the preliminary determination, the CBSA considered that the evidence suggested that the subsidy was generally available and therefore not specific. In the final phase of the investigation, however, the CBSA will request evidence that the expenditures are also distributed across all sectors.

Program 34: TUBITAK Industrial R&D Projects Grant

The legal basis for the program is The Scientific and Technological Research Council of Turkey (TUBITAK)'s Implementation Principles.[190] The program is provided as grants. The granting authority is TUBITAK.

According to the GOT, the projects are evaluated based on three criteria: i) the project's R&D content and technological-innovative aspects; ii) the project plan and the company infrastructure; iii) economic and social benefits expected from the outcomes.[191]

[187] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 291
[188] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 291
[189] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 89
[190] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 299 and exhibit 70 (not translated)
[191] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 301

Under SIMA, as a general rule, an entity will constitute "government" when it possesses, exercises, or is vested with governmental authority. The following are factors that could indicate that this is the case in a particular entity:

- express delegation or vesting of authority to an entity by statute or other legal instrument;
- evidence that an entity is, in fact, exercising governmental functions; and
- evidence that a government exercises meaningful control over an entity.

According to TUBITAK's website, the "President of TUBITAK is nominated by the Science Board from distinguished scientists, recognized in the fields of natural sciences and engineering, and is appointed by the President of Turkey upon the recommendation of the Prime Minister. The President of TUBITAK chairs the Science Board and manages the Council pursuant to the decisions reached by the Science Board." [192] It also states that TUBITAK is responsible for promoting, developing, organizing, conducting and coordinating research and development in line with national targets and priorities. TUBITAK acts as an advisory agency to the Turkish Government on science and research issues, and is the secretariat of the Supreme Council for Science and Technology (SCST), the highest Science and Technology policy making body in Turkey. On the basis of the above, the CBSA is of the opinion that TUBITAK is a government body.

Pursuant to paragraph 2(1.6)(a) of SIMA, there is a financial contribution where practices of the government involve the direct transfer of funds or liabilities or the contingent transfer of funds or liabilities. The benefit is determined under paragraph 27(a) of the SIMR, where the amount of the grant shall be distributed over the total quantity of subsidized goods to which the grant is attributable.

[192] EXH 362 (NC) – CBSA Research; Exhibits 1- Extracts from TUBITAK's website

Pursuant to section 2(7.1) of SIMA, the subsidy may be specific because the criteria and conditions governing eligibility for, and the amount of subsidy do not appear to be objective, and may be applied in a manner that favors a limited number of enterprises. As mentioned above, TUBITAK is responsible for promoting, developing, organizing, conducting and coordinating research and development in line with national targets and priorities. In fact, there are several references to TUBITAK in key the government policy documents which were reviewed by the CBSA, such as the GOT's Development Plans, GITES, the 2023 Turkey Export Strategy and Action Plan, the Strategy Document And Action Plan on Turkey Iron-Steel And Nonferrous Metals Sector and the Mid-Term Programme 2018-2020.[193] On this basis, the CBSA preliminary finds that the evidence on the record suggests that the GOT exercises the discretionary nature of the program to favor certain sectors. It is noted that about 40% of requests for funding under the programs are rejected, which emphasizes the discretionary nature of the approval process.[194] Further the majority of the grants were distributed to manufacturing companies. As such, for the purposes of the preliminary determination, the CBSA has determined that the program is specific, pursuant to section 2(7.1) of SIMA.

In the final phase of the investigation, the CBSA will continue to gather and analyze information regarding this program.

Program 35: Social Security Premium Incentive (Employer's Share)

The GOT refers to this program as the "Social Security Premium Incentive Under Law 6486". This program aims to increase productions and employment level in some provinces of Turkey by reducing costs of insurance premiums to the employers and intends to reduce the unregistered employment. The program is established by the Law No. 6486, which added a provision to the Law 5510 on May 21, 2013. [195] The Social Security Institution (Institution) is responsible for administering the program.[196]

According to the paragraph (ı) of Article 81 of the Law 5510; 5% of the employer's social security premium share (11% in total) is financed by the Treasury if employers submit service documents and pay the residual part of the premiums which are employee's share (9%) and the rest of the employer's share (6%) within the statutory periods. This incentive is an across the board application regardless of sector or region. With the additional paragraph (appended provision) of the Article 81, the remaining 6% of employers' social security premiums are also covered by the Treasury if these employers are operating in the provinces that are determined by the Council of Ministers. Therefore, employers operating in these provinces do not pay employers' share of the long term social security insurance premiums (11% in total) for specified periods depending on regions.[197]

[193] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibits 15-19
[194] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 76
[195] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 306
[196] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 309
[197] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 307

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected. According to subsection 27.1(2) of the SIMR, any amount otherwise owing and due to a government that is exempted or deducted and any amount owing to a government that is forgiven or not collected by the government shall be treated as a grant under section 27.

With respect to specificity, the CSBA determined that the benefit relating to "the remaining 6% of employers' social security premiums that are also covered by the Treasury if these employers are operating in the provinces that are determined by the Council of Ministers" is specific pursuant to section 2(7.2)(a) of SIMA because it is limited to enterprises located in certain areas.

Other Program Not Previously Addressed

This additional program was reported by the GOT in its subsidy response: **TUBITAK International Industrial R&D Projects Grant Program**

According to the GOT, the legal basis for this program is the Scientific and Technological Research Council of Turkey (TUBITAK)'s Implementation Principles.[198] The granting authority is TUBITAK.

The objective of the program is to create market focused R&D Projects between European countries and to increase cooperation between Europe wide firms, universities and research institutions, by using cooperation networks such as EUREKA.[199] The program is provided as grants.

According to the GOT, the projects are evaluated based on three criteria: i) the project's R&D content and technological-innovative aspects; ii) the project plan and the company infrastructure; and iii) economic and social benefits expected from the outcomes.[200]

Pursuant to paragraph 2(1.6)(a) of SIMA, there is a financial contribution where practices of the government involve the direct transfer of funds or liabilities or the contingent transfer of funds or liabilities. The benefit is determined under paragraph 27(a) of the SIMR, where the amount of the grant shall be distributed over the total quantity of subsidized goods to which the grant is attributable.

[198] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 314 and exhibit 82
[199] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 314
[200] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page .315

Pursuant to section 2(7.1) of SIMA, the subsidy may be specific because the criteria and conditions governing eligibility for, and the amount of subsidy do not appear to be objective, and may be applied in a manner that favors a limited number of enterprises. As mentioned above, TUBITAK is responsible for promoting, developing, organizing, conducting and coordinating research and development in line with national targets and priorities. In fact, there are several references to TUBITAK in key the government policy documents which were reviewed by the CBSA, such as the GOT's Development Plans, GITES, the 2023 Turkey Export Strategy and Action Plan, the Strategy Document And Action Plan on Turkey Iron-Steel And Nonferrous Metals Sector and the Mid-Term Programme 2018-2020. On this basis, the evidence on the record suggests that the GOT exercises the discretionary nature of the program to favor certain sectors. Further, key documents regarding this program, provided in response to the Government RFI, such as the implementation principle in additional to the approval and contractual documents, were not translated. As such, for the purposes of the preliminary determination, the CBSA has determined that the program is specific, pursuant to section 2(7.1) of SIMA.

In the final phase of the investigation, the CBSA will continue to gather and analyze information regarding this program, regarding the approval criteria, in general, and with respect to the projects that were relevant to the subject goods, and with respect to the distribution of the overall expenditures under the program.

Further, the following programs were reported by respondents:

- Additional program reported by Respondents: Minimum Wage Support
- Additional program reported by Respondents: Social Security Premium Support for Hiring New Employees Who Previously Unemployed
- Additional program reported by Respondents: Income Tax Withholding Support Under Law 7103
- Additional program reported by Respondents: Social Security Premium Support Under Law 4857
- Additional program reported by Respondents: Intern Salary Support
- Additional program reported by Respondents: Eximbank and Turkish Central Bank Factoring

While the first five of these programs appear to be generally available, the CBSA will review these additional programs in the final phase of the investigation. With respect to the Eximbank and Turkish Central Bank Factoring, the benefit to the responding exporter did not appear to be applicable to subject goods.

Other Potentially Actionable Subsidy Programs Identified By The CBSA That Were Not Used By The Responding Exporters

Based on the information available, for purposes of the preliminary determination, the CBSA has found that these programs were not used by the responding exporters in Turkey. Based on the information available these programs may constitute financial contributions provided by the GOT, confer benefit to companies and appear to be specific. Therefore, these programs appear to be countervailable.

The CBSA will continue to further investigate these programs in the final phase of the investigation.

Program 2. Turk Eximbank – Pre-shipment Export Credits (PSEC) including:
Pre-shipment Turkish Lira Export Credits (PSEC –TL)
Pre-shipment Foreign-Currency Export Credits (PSEC-FX)

The legal basis for this program is the Turk Eximbank Law, Principles and Articles of Association, and the "Implementation Principles for Pre-Shipment Export Credits Program" (with 2013.05.20 revision).[201]

Pre-shipment Export Credits (PSEC) are short-term export credit facilities to exporters which are provided in foreign currency or Turkish lira (TL). The facilities aim at increasing the competitiveness of Turkish exporters in foreign markets. [202]

According to the GOT, none of the subject product exporters received benefit from PSEC Program during POI. None of the responding exporters reported use of this program during the POI. Thus, information on the record in the preliminary phase of the investigation suggests that this program has not been used by producers/exporters of subject goods.

A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA. Pursuant to section 28 of the *SIMR*, the benefit to the recipient in the same manner as described for Program 1 above. This program appears to be contingent upon an export commitment. Therefore, this program may be specific, pursuant to paragraph 2(7.2)(b) of SIMA.

[201] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 48
[202] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 47

Program 5. Turk Eximbank – Export-Oriented Working Capital Credit

The legal basis for this program is the Turk Eximbank Law, Principles and Articles of Association, and the "Implementation Principles for Export-Oriented Working Capital Credit Program*"*.[203]

Export-Oriented Working Capital Credit was established with the aim of financing raw materials, intermediate goods, machinery and equipment purchases and other financial needs of companies. Purchasing of raw materials and intermediate goods are financed based on completed procurement within the framework of invoices. The maturity for this program is currently three years.[204] It is believed that at least one of the exporters of subject goods used this program during the POI.[205]

A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA.

Pursuant to section 28 of the *SIMR*, the benefit to the recipient should be based on a commercial benchmark that reflects the recipient's ability to obtain comparable financial services in the commercial market. Benefit exists if the bank requires the recipient to repay a lesser amount than would otherwise be payable under a comparable commercial loan.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific pursuant to paragraph 2(7.2)(b) of SIMA.

Program 7. Turk Eximbank – Specific Export Credit

The legal basis for this program is the Turk Eximbank Law, Principles and Articles of Association. Disbursements under this program are made in accordance with the implementation principles of Export Oriented Working Capital Program and Investment for Credit Program. *"*.[206]

Specific Export Credit is a medium-term pre-shipment financing facility provided to contractors that have overseas activities, exporters, exporter-manufacturers' foreign currency generating projects which cannot be financed via existing Turk Eximbank credits. It is believed that at least one of the exporters of subject goods used this program during the POI.[207]

A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA.

[203] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 76
[204] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 76
[205] EXH 200 (NC) – Response to RFI – Subsidy – GOT, exhibit 27
[206] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 93
[207] EXH 200 (NC) – Response to RFI – Subsidy – GOT, exhibit 29

Pursuant to section 28 of the *SIMR*, the benefit to the recipient should be based on a commercial benchmark that reflects the recipient's ability to obtain comparable financial services in the commercial market. Benefit exists if the bank requires the recipient to repay a lesser amount than would otherwise be payable under a comparable commercial loan.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific pursuant to paragraph 2(7.2)(b) of SIMA.

Program 9. Turk Eximbank – Ad-hoc Foreign Exchange Scheme for Rediscount Export Credit by the Central Bank of Turkey

The legal basis for this program is the Circular regarding the Turkish lira repayment option, dated 2018-05-25.[208] The program is administered by CBRT.

According to the GOT, this program is referred to as the "Turkish Lira Repayment Option". The "Turkish Lira Repayment Option", which was valid from May 25, 2018 to July 31, 2018, was introduced by CBRT as a temporary measure. Under the program, Turkish lira repayment option has been provided to ease borrowers' repayment obligations with respect to the extraordinary volatility in the foreign exchange market during that period. [209]

In order to make use of Turkish lira repayment option, the borrower (companies which used Rediscount Program – Program 1) must have obtained the rediscount credit before May 25, 2018 and the credit must have a maturity date no later than July 31, 2018. This program potentially adds to the benefit received under Program 1 - Rediscount Program.

Turkish lira repayment option provides borrowers with a choice to make their repayments at specified exchange rates. In case the exchange rate on the date of credit extension is higher than these rates, the exchange rate on the date of credit extension will be applicable in credit repayment.[210] Information on the record suggest that at least one of the exporters of subject goods used this program during the POI.[211]

The financial contribution with respect to this program is tied to the loan received under Program 1 - Rediscount Program. A loan is considered a direct transfer of funds and therefore considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA. Further, the purchase or the sale of foreign currencies by the GOT is a financial contribution pursuant to paragraph 2(1.6)(c) of SIMA.

[208] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 120
[209] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 119
[210] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 120 and Exhibit 31 - Circular Regarding TL Repayment Option.pdf
[211] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page, exhibit 31

While the benefit related to the preferential terms of the loan itself, as determined under Section 28 of the SIMR, is discussed under Program 1 - Rediscount Program, above, the potential benefit under the Turkish Lira Repayment Option is equal to the difference in the cost of the credit that is attributable to the difference in the exchange rate that would have applied absent this program (i.e. the fair market value of the foreign currency), and the preferential terms applied by the GOT. The benefit is determined under Section 36 of the SIMR, which relates to the provisions of goods or services by a Government, as the difference between the fair market value of the currency sold to the exporter (what the exporter would have paid for the currency if not for the Turkish Lira Repayment Option, and the actual amount paid.

According to subsection 2(7.2) of SIMA, a subsidy is considered to be specific when it is limited, in a legislative, regulatory or administrative instrument, or other public document, to a particular enterprise within the jurisdiction of the authority that is granting the subsidy; or is a prohibited subsidy. A "prohibited subsidy" is either an export subsidy or a subsidy or portion of subsidy that is contingent, in whole or in part, on the use of goods that are produced or that originate in the country of export. An "export subsidy" is a subsidy or portion of a subsidy contingent, in whole or in part, on export performance.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific pursuant to paragraph 2(7.2)(b) of SIMA.

Program 11: OIZ: Provision of energy (e.g. natural gas, electricity) or utilities (e.g. water) at less than fair market value/ preferential rates

Pursuant to paragraph 2(1.6)(c) of SIMA, there is a financial contribution by a government where the government provides goods or services, other than general governmental infrastructure.

Under section 36 of the SIMR, such provision of goods or services may result in a benefit if the goods or services were provided at a price that is less than the fair market value of the goods or services, which relates to the adequacy of the remuneration.

Natural Gas:

The complainant alleged that companies located in OIZs save 0.5% on the cost of natural gas for uses other than electricity.[212] The allegations are based on the published prices of Boru Hatları ile Petrol Taşıma Anonim Şirketini [in English - Petroleum Pipeline Corporation] (BOTAS), the government entity [213] that is the primary supplier of natural gas in Turkey, which indicates that prices to OIZs are 0.5% lower than for companies located outside an OIZ.[214] The complainant also provided evidence that BOTAS was a public body. The complaint alleged that BOTAS is a "state economic enterprise", established in accordance with the provisions of Decree Law No. 233 on State Economic Enterprises, and is 100% owned by the Turkish government. Its investment and financial decisions are subject to approval by the government, which also appoints the CEO and Board of Directors.[215]

The natural gas market in Turkey has been regulated according to the provisions of Natural Gas Market Law No. 4646.[216] The Law covers the import, transmission, distribution, storage, marketing, trade and export of natural gas and the rights and obligations of all real and legal persons relating to these activities. The GOT explained that per the law, prices in the natural gas market in Turkey are to be based on free market principles and all wholesale companies and importers undertake natural gas transactions as market players.[217]

The GOT also indicated that the retail price also includes distribution charge over the wholesale price, and that this charge is regulated by the Energy Market Regulatory Authority (EMRA). Distribution charges are set for a 5-year period for each distribution region separately according to regional operating expenditures and capital expenditures components. [218] At this time, there is no evidence on the record suggesting any preferential distribution charges.

The GOT provided BOTAS' wholesale prices for each month of the POI, which confirmed that prices for process consumption (i.e. not for energy generation) are consistently 0.5% lower for OIZs.[219] Information on the record suggest that at least one of the exporters of subject goods purchased natural gaz from BOTAS during the POI.[220]

[212] EXH 30 (NC) – COR2 Complaint; paragraph 453
[213] EXH 200 (NC) – Response to RFI – Subsidy – GOT; The State ownership of BOTAS was confirmed by the GOT in exhibit 6 of its Subsidy RFI Response
[214] EXH 30 (NC) – COR2 Complaint – Attachment 47, page 42 & 66
[215] EXH 30 (NC) – COR2 Complaint – Attachment 47, page 42
[216] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 137 and exhibit 35
[217] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 25
[218] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 26
[219] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 10
[220] EXH 200 (NC) – Response to RFI – Subsidy – GOT, exhibit 31

Pursuant to paragraph 2(1.6)(c) of SIMA, there is a financial contribution where the government provides goods or services, other than general governmental infrastructures. The potential benefit, pursuant to section 36 of the SIMR, is equal to the difference between the fair market value of the goods or services in the territory of the government providing the subsidy (i.e. the benchmark price), and the price at which the goods or services were provided by the government.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

Electricity:

The complainant alleged that producers in IOZ may receive a 10%-20% discount on electricity. The legal basis for the alleged preferential rates is the Article 13 of Electricity Market Law No. 6446.[221]

Pursuant to paragraph 2(1.6)(c) of SIMA, there is a financial contribution where the government provides goods or services, other than general governmental infrastructures. The potential benefit, pursuant to section 36 of the SIMR, is equal to the difference between the fair market value of the goods or services in the territory of the government providing the subsidy (i.e. the benchmark price), and the price at which the goods or services were provided by the government.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

For the purposes of the preliminary determination, there is no evidence that exporters/ producers are benefiting from electricity on preferential terms. In the final phase of the investigation, the CBSA will investigate further.

Water:

The complainant alleged that the GOT listed low water cost as an advantage of operating in a OIZ.

Pursuant to Article 97 of Law No. 2464 on Municipality Revenues and Article 18-f of Municipality Law No. 5393, the water tariffs are determined by the related Municipal Council of the related municipality of the related province or country.[222]

[221] Exhibit 30 (NC) – COR2 Complaint; paragraph 453
[222] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 27

Pursuant to paragraph 2(1.6)(c) of SIMA, there is a financial contribution where the government provides goods or services, other than general governmental infrastructures. The potential benefit, pursuant to section 36 of the SIMR, is equal to the difference between the fair market value of the goods or services in the territory of the government providing the subsidy (i.e. the benchmark price), and the price at which the goods or services were provided by the government.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

In the final phase of the investigation, the CBSA will further analyze whether any of the respondents received a benefit under this program during the POI.

Program 12: OIZ: VAT exemption or reduction on land acquisition

According to the complainant, a GOT's investment guide published on the internet lists the exemption of VAT on land acquisition as an advantage of operating in an OIZ.[223] According to article 17/4(k) of Value Added Tax Law No:3065, land and workplace deliveries of enterprises which are established for the purpose of founding OIZ or Small Industrial Area, are exempt from VAT.[224] The exemption is for enterprises which are established for the purpose of founding OIZ. The Ministry of Treasury and Finance is responsible for administering of the program.[225]

According to the GOT, for the purpose of establishing OIZs, commercial enterprises, such as enterprising committee, cooperative or under other names, are being established. These organizations are established to carry out the all or some of the services such as procure the land that OIZ to be established on, completion of infrastructure, construction of the workplaces. In the establishment of OIZ, land and workplace deliveries are within the scope of the VAT exemption.[226]

Pursuant to paragraph 2(1.6)(c) of SIMA, there is a financial contribution where the government provides goods or services, other than general governmental infrastructures. The potential benefit, pursuant to section 36 of the SIMR, is equal to the difference between the fair market value of the goods or services in the territory of the government providing the subsidy (i.e. the benchmark price), and the price at which the goods or services were provided by the government.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

[223] EXH 30 (NC) – COR2 Complaint – Attachment 139
[224] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 145 and exhibit 40
[225] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 146
[226] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 144

None of the respondents reported benefits under this program. The CBSA will gather more information on this program in the final phase of the investigation.

Program 13: OIZ: Real Estate Duty Exemption or Reduction

According to the complainant, a GOT's investment guide published on the internet lists the exemption of real estate duty for five years starting from the date of completion of the plant construction, as an advantage of operating in an OIZ.[227]

In its response to the Subsidy RFI, the GOT indicated that its answer was provided under Program 26 – Exemption from Property Tax. However, it is unclear whether these two programs are the same.

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected. According to subsection 27.1(2) of the SIMR, any amount otherwise owing and due to a government that is exempted or deducted and any amount owing to a government that is forgiven or not collected by the government shall be treated as a grant under section 27.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

None of the respondents reported benefits under this program. The CBSA will gather more information on this program in the final phase of the investigation.

Program 14: OIZ: Municipal Tax Exemption or Reduction (e.g. for construction and usage of the plant, on solid waste, etc)

The GOT refers to program as "OIZ – Exemption from Building and Construction Charges".[228]

"Building constructions in municipal borders and urban areas (including extensions and amendments) are subject to building and construction charges at the time construction or amendment license is granted by related municipality. The purpose of the program is encouraging companies to operate in OIZs. The buildings and facilities constructed in OIZs are exempted from building permit fee and occupancy permit fee charged by the municipalities."[229]

[227] EXH 30 (NC) – COR2 Complaint – Attachment 139
[228] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 150
[229] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 150-151

The program is regulated under Article 80 of the Law No. 2464 on Municipal Revenues, which states that *"Organized Industrial Zones and the constructions and facilities built in small-scaled business sites are exempt from building construction duties and occupancy permit charges*".[230] The Ministry of Industry and Technology, Directorate General for Industrial Zones, as well as the Ministry of Treasury and Finance are reportedly responsible for the administration of the program.[231]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

Subsection 27.1(2) of the SIMR stipulate that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program. Pursuant to section 27, where a grant was related to the purchase or construction of a fixed asset, the amount of benefit should be distributed over the estimated total quantity of goods produced / to be produced over the estimated useful life of the asset.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

None of the respondents reported benefits under this program. In the final phase of the investigation, the CBSA will continue to gather and analyse information with respect to potential benefits under this program.

Program 15: OIZ – Exemption from amalgamation and allotment transaction charges

According to the GOT, this program, which aims at encouraging companies to operate in OIZs, is regulated under Article 59 (n) of the Law No. 492 on the Law on Fees, which stated that "*amalgamation and allotment operations of the real estates located in organized industrial zones, free zones, industrial zones, technological development zones and industrial sites, transactions that requires annotation due to the allocation of the land and transfer and allotment transactions of the buildings built on this land and type change transactions in the mentioned zones".* [232]

[230] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 151. and exhibit 41
[231] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 152
[232] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 157 and exhibit 42

According to the GOT, land registry and cadastre transactions are subject to land registry and cadastre charges. The charges regarding amalgamation and allotment transactions are collected at the time of amalgamation or allotment transaction by the local office of land registry where the transaction takes place. Allotment, partition or amalgamation transactions pertaining to the immovable properties located in OIZs are exempted from amalgamation and allotment transactions charges. The Ministry of Industry and Technology, Directorate General for Industrial Zones is responsible for the administration of the program. [233]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

Subsection 27.1(2) of the SIMR stipulates that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program. Pursuant to section 27, where a grant was related to the purchase or construction of a fixed asset, the amount of benefit should be distributed over the estimated total quantity of goods produced / to be produced over the estimated useful life of the asset.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

None of the respondents reported benefits under this program. In the final phase of the investigation, the CBSA will continue to gather and analyse information with respect to potential benefits under this program.

Program 16 : OIZ – Additional Support Granted Under the Investment Incentives Program

In its response to the Subsidy RFI, the GOT addressed this program under Program 27 - Investment Incentive Program.

In the final phase of the investigation, the CBSA will determine whether program 16 and program 27 should be merged as a single program.

[233] EXH 200 (NC) – Response to RFI – Subsidy – GOT; pages 158-159

Program 17: Free Zones Law – Corporate income tax exemption or reductions
Program 18: Free Zones Law – Stamp duties and fees exemptions or reductions
Program 19: Free Zones Law – Customs duties exemptions or reductions
Program 20: Free Zones Law – VAT and special consumption tax exemptions or reductions
Program 21: Free Zones Law – Real Estate Tax Exemptions or reductions
Program 22: Free Zones Law – Income Tax on Employee's Salary Exemptions or reductions

According to the GOT, all producers/ exporters of subject goods operate in an OIZ.[234] The GOT also reported that none of the producers/ exporters of subject goods operate in a Free Zone.[235]

For the purposes of the preliminary determination, the CBSA considered that the six programs related to Free Zones have not been used and were not available to any of the producers or exporters of subject goods. For the purposes of the preliminary determination, the CBSA excluded these six programs from the "all others rate".

In the final phase of the investigation, the CBSA will remove these programs from the investigation if it remains satisfied that the programs related to Free Zones have not been used and were not available to any of the producers and/or exporters of subject goods.

Program 26. Exemption from Property Tax

The GOT refers to this program as "Property tax exemption under the Law No. 1319".
The program provides property tax exemption for the buildings which are in the organized industrial zones, free zones, industrial zones, technology development zones and industrial sites.[236]

The relevant legal basis for the tax exemption is paragraph (m) of Article 4 of Property Tax Law No. 1319.[237] The subparagraph (m) of Article 4 (permanent exemptions) of Law No. 1319 has been amended by the Article 10 of Law No. 7033 from the date of 1 July 2017 and it is still in force. Municipalities and the Ministry of Finance are responsible for administering the program.[238]

Local municipalities administer this program. Companies wishing to benefit from this program must notify the related municipality when they first build or acquire a building in an OIZ. The municipality then refrains from assessing the relevant building for property tax.

[234] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 29 and exhibit 14
[235] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 29 and exhibit 14
[236] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page. 220
[237] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 221 and exhibit 52
[238] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 223

The property tax rate is 0.2% for these buildings. Owners of buildings located in the types of areas covered by this law (e.g. OIZs) are eligible for the exemption under this program. Owners, not renters, who are responsible for paying property taxes can benefit from the building tax exemption under this program. [239]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

Subsection 27.1(2) of the SIMR stipulate that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program. Pursuant to paragraph 27(a) of the SIMR, given that the grant (grant equivalent) is to be used for operating expenses in the production, purchase, distribution, transportation, sale, export or import of subsidized goods, the benefit should be allocated over the total quantity of subsidized goods to which the grant is attributable.

This program may be specific, pursuant to paragraph 2(7.2)(a) of SIMA because it is specific to enterprises operating in an OIZ or other special zone.

None of the respondents reported benefits under this program. In the final phase of the investigation, the CBSA will continue to gather and analyse information with respect to potential benefits under this program.

Program 28. Project-based Government Support for Investment Program (Super Investment Incentive Scheme)

The GOT refer to this program as "Project Based Investment Incentive System". The legal basis of the program is Article 80 of the Law No. 6745 and Decree No. 2016/9495[240].
The Ministry of Industry and Technology (MIT) is responsible for administering the program.[241]

Incentives under this program may include:[242]

Tax incentives:

- Customs duty exemption
- VAT exemption
- VAT refunds
- Corporate tax deductions or exemptions

Employment incentives:

- Social security premium support (employer's share)

[239] EXH 200 (NC) – Response to RFI – Subsidy – GOT; pages 221-222
[240] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 239 and exhibit 57
[241] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 241
[242] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 239

- Income tax withholding support
- Qualified personnel employment support

Financial incentives:

- Interest support
- grant support
- Capital contribution support
- Energy support

Incentives related to land allocation:

- Substructure support
- Land allocation

Other incentives:

- Facilitation of legal and administrative procedures
- Purchasing guarantee

Companies which would like to obtain a project-based investment encouragement certificate, apply to the MIT with the details of the investment. MIT evaluates the applications and determines the projects that will be supported. MIT evaluates the applications with regard to current and future needs of the country and potential technological transformation will be provided with the investment.[243]

The CBSA reviewed the application documentation that must be provided by applicants.[244] The application requests that the applicant submits an impact analysis. The document lists 14 criteria to address in the impact analysis, which will form the key decision criteria for the MIT in its evaluation of the applications. Key criteria taken into consideration by the granting authority include the contribution of the product produced via the project to reduce import dependency and the contribution of the project to the competitiveness and export potential of the country. The CBSA noted that these criteria are consistent with the common policies and actions cited in the GOT's 10th and 11th Development Plans, GITES, the 2023 Turkey Export Strategy and Action Plan, the Strategy Document And Action Plan on Turkey Iron-Steel And Nonferrous Metals Sector and the Mid Term Programme 2018-2020. The policies have a common thread in regards to meeting the input supply needs of the manufacturing industry more effectively in export-oriented production, especially for product groups where import dependency is intense. Encouraging exports of higher-added-value steel products is specifically targeted, while encouraging the increase use of domestic intermediate materials in their production.[245]

Evidence on the record suggest that none of the exporters of subject goods used this program during the POI.

[243] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 242
[244] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 57; 2016 9495 EK-1_EN.DOCX
[245] EXH 166 (NC) – Response to RFI – PMS – GOT; exhibits 6-10 for the policy documents.

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected.

Subsection 27.1(2) of the SIMR stipulate that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program. Pursuant to paragraph 27(a) of the SIMR, given that the grant (grant equivalent) is to be used for operating expenses in the production, purchase, distribution, transportation, sale, export or import of subsidized goods, the benefit should be allocated over the total quantity of subsidized goods to which the grant is attributable. Pursuant to paragraph 27(b), where the grant was, or is, to be used for the purchase or construction of a fixed asset, the grant is allocated over the estimated total quantity of subsidized goods for the production, purchase, distribution, transportation, sale, export or import of which the fixed asset was, or will be, used for the anticipated useful life of the fixed asset.

Pursuant to section 2(7.1) of SIMA, the subsidy may be specific because the criteria and conditions governing eligibility for, and the amount of subsidy do not appear to be objective, and may be applied in a manner that favors a limited number of enterprises.

Program 29: TURQUALITY Brand Promotion Incentive Program

The GOT refers to this program as the "Overseas Branding of Turkish Products, Promotion of Turkish Product Image and Supporting ®Turquality".[246] The "Turquality" program is regulated by Communiqué No. 2006/4 of the Money-Credit and Coordination Council.[247] The Ministry of Trade is the national authority responsible for the administration of the program.[248]

The expenses that may be supported under this program are international trademark registration, certification and quality marks, salaries of fashion/industrial designers and product development engineers, consultancy, promotional activities and rent, decoration and construction of branches and franchises of the supported firms. Companies, who are found eligible to be supported by this program, can apply for the support of certain expenses, as listed above. Companies who are accepted under the "Turquality" program are supported for five years.[249]

No producers reported benefits under this program during the POI.

Pursuant to paragraph 2(1.6)(a), a financial contribution is provided where practices of the government involve the direct transfer of funds or liabilities or the contingent transfer of funds or liabilities.

[246] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 246
[247] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 247 and exhibit 58
[248] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 248
[249] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 247

Subsection 27.1(2) of the SIMR stipulate that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program. Pursuant to paragraph 27(a) of the SIMR, given that the grant is to be used for operating expenses in the production, purchase, distribution, transportation, sale, export or import of subsidized goods, the benefit should be allocated over the total quantity of subsidized goods to which the grant is attributable.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific pursuant to paragraph 2(7.2)(b) of SIMA.

Program 30: Support to Offset Costs Related to Trade-Remedy Investigations

According to the GOT, it is the Turkish Steel Exporters' Association (TSEA), which is a non-profit business and trade association, that provides assistance to its members through its own budget.[250] According to TSEA, exporters' associations are non-profit business and trade associations and uses its budget, which basically consists of membership fees to solve the problems of its members face at home and abroad, provides contact between members and foreign importers in order to ease the export processes, to serve up to date domestic and global market news, reports and analysis. Thus, once a trade policy investigation is initiated against Turkish exports, TSEA may contribute to such expenditures. However, the TSEA claims that this is not a support program since TSEA transfers the money to the exporters that it has already collected as membership fees.[251]

According to TSEA it evaluates each request based on the provisions of "Procedures and Principles Regarding the Supports Provided to Companies for Advocacy and Legal Counselling Services Purchased in Trade Remedy Investigations and Generalized System of Preferences Practices", which have been in force snice 2015 (Procedures and Principles).[252]

Under the program, 50% of consultancy fees, not exceeding 100,000 USD may be contributed by the Exporters' Association. According to TSEA, the applicant company is required to be a member of the exporters' association and to realize at least 500,000 USD export within two calendar years prior to the initiation of the investigation.

According to TSEA, none of the exporters having subject merchandise exports to Canada during the POI applied for, accrued, or received benefits under this program during the POI.[253]

[250] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 253
[251] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 254
[252] EXH 200 (NC) – Response to RFI – Subsidy – GOT; pages 254-255 and exhibit 61
[253] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 256

The CBSA notes that pursuant to paragraph 2(1)(b) of SIMA, the definition of "government" includes "any person, agency or institution acting for, on behalf of, or under the authority of, or under the authority of any law passed by, the government of that country or that provincial, state, municipal or other local or regional government". As a general rule, an entity will constitute "government" when it possesses, exercises, or is vested with governmental authority.[254]

The CBSA reviewed Law 5910[255], and made the following observations:

- The TSEA is a sub-organization of the Turkish Exporters Assembly
- Article 1 - The objective of this Law is to regulate the procedures and principles related with the foundation, operation, duties, bodies, expenses and auditing of the exporters associations and the Turkish Exporters Assembly and the rights and obligations of its members in order to contribute to the economy by increasing export through organizing the exporters and improving cooperation.
- Article 3(3) sets the duties of the exporters' associations
- According to Article 1 of the Procedures and Principles[256], the Support to Offset Costs Related to Trade-Remedy Investigations is provided within the context of clause (a) of third paragraph of Article 3 of Law No. 5910 on Foundation and Duties of the Turkish Exporters Assembly and the Exporters' Associations.
- Article 4 (1) - Exporters are obliged to be a member of the related association and affect the payments specified in the law.
- Article 4 (2) - Members are obliged to comply with the decisions of the association, act in conformity with the objectives of the association, to submit any information and document required by the authorized bodies on time and in full and entitled to resign from membership at will.
- Article 11(3) regards the duties of the Turkish Exporters Assembly. Generally speaking, the Turkish Exporters Assembly is under the authority of the Undersecretariat of Foreign Trade. For example, sub-clause (i) the Turkish Exporters Assembly is to perform the other foreign trade related duties to be assigned by the Undersecretariat.
- Article 18 sets the mandatory contribution to the exporters' association and to the Turkish Exporters Assembly

In regards to the above, the CBSA's position is that the TSEA is vested with government authority and carrying out government function. As such, the TSEA is considered as a government body.

[254] SIMA Handbook, Section 6.3.3.3
[255] EXH 30 (NC) – COR2 Complaint; exhibit 47. pp. 602-624
[256] EXH 200 (NC) – Response to RFI – Subsidy – GOT; exhibit 61 - Implementation Procedures And Principles On Financial Support for the Attorney/ Legal Consultancy Fees Paid by Companies as Part of Investigations of Trade Policy Measures and Practices of Generalized System of Preferences

Pursuant to paragraph 2(1.6)(a), a financial contribution is provided where practices of the government involve the direct transfer of funds or liabilities or the contingent transfer of funds or liabilities.

The benefit under this program is equal to the amount of legal fees reimbursed or covered by the TSEA. Pursuant to paragraph 27(a) of the SIMR, the subsidy is to be distributed over the estimated total quantity of subsidized goods to which the grant is attributable. In the case of this program, the grant would be distributed over the quantity of goods subject to the trade remedy investigation in question.

This program appears to be contingent upon an export commitment. Therefore, this program may be specific pursuant to paragraph 2(7.2)(b) of SIMA.

Program 31: Export Freight Supports

The GOT referred to this program as the "VAT and Special Consumption Tax (SCT) exemption on the delivery of diesel fuel to the vehicles carrying exporting goods".[257] Under this program, trucks, haulers and semi-trailers with cooling unit, carrying goods that will be exported within the export regime are exempt from VAT and SCT for their fuel purchases when exiting from the customs border gates determined by the President of the Republic. Purchased diesel fuel amount shall not exceed the standard fuel tank volumes of trucks and cooler units.[258]

The legal basis for the tax exemption Article 14.3 of the Value Added Tax Law No. 3065 for the VAT exemption; and Article 7/A of the Special Consumption Tax Law No. 4760 for the SCT exemption.[259] The Ministry of Treasury and Finance is administering this exemption.[260]

Pursuant to paragraph 2(1.6)(b), a financial contribution is provided where amounts that would otherwise be owing and due to the government are exempted or deducted or amounts that are owing and due are forgiven or not collected. Subsection 27.1(2) of the SIMR stipulates that such amount shall be treated as a grant under Section 27. The benefit is equal to the amount that would otherwise be owing and due that was exempted under this program.. This program appears to be contingent upon an export commitment. Therefore, this program may be specific pursuant to paragraph 2(7.2)(b) of SIMA.

[257] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 261
[258] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 263
[259] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 262
[260] EXH 200 (NC) – Response to RFI – Subsidy – GOT; page 264 and exhibits 62 & 63

No evidence suggests that the service providers have passed through any benefits from this program. For the purposes of the preliminary determination, the CBSA determined that none of the producers / exporters of subject goods benefited from this program during the POI. The CBSA also excluded this program from the "all other rate". Pending some clarification in the final phase of the investigation, the CBSA may eliminate this program for the purposes of the final determination.

United Arab Emirates

This Appendix consists of descriptions of the subsidy programs which the responding exporters (i.e. the two exporters for which sufficient information was available to estimate an amount of subsidy) benefited from during the course of the subsidy POI and other potentially actionable subsidy programs identified by the CBSA.

The CBSA has used the best information available to describe the potentially actionable subsidy programs that may not have been used by the responding exporters in the current investigation. This includes using information provided by the GOU, information provided by exporters and related suppliers, information included in the complaint, as well as information obtained from CBSA research on potential subsidy programs in the UAE.

Summary Of The United Arab Emirates Subsidies

Program 1: Import Duty and VAT Exemption in Free Trade Zone

The GOU provided that the "Import Duty and VAT Exemption in Free Trade Zone" falls within the VAT legal regulations of the UAE, the 'Federal Decree-Law No. (8) of 2017 on Value Added Tax.' The program seeks the appropriate and simplification of the proceeding to the implementation of the VAT, and does not in and of itself provide any exemptions to the 5% VAT or customs duties payable upon importation of input materials of machinery and equipment. The government also provided that "There is no exemption from the 5% VAT on imports of materials or machines or equipment or any other capital for producers located in free Trade Zones."[261]

Both exporters provided that they are exempted from paying customs duties on importations of input material, equipment and machinery. Since they hold an Industrial License in the UAE, they are exempted from such duties by the Industrial Development Bureau of the GOU. This constitutes a benefit in the form of revenue forgone. However, it appears to be generally available, and not only within a Free Trade Zone. Therefore it is not specific.

[261] EXH 178 (NC) –Response to RFI – Subsidy – GOU; page 32

Program 2: Preferential Export Financing or Export Credit Insurance

The GOU provided that the Etihad Export Credit Insurance PJSC (ECI) was established by the UAE Cabinet Resolution No. 303/11W7 of 2015, and is

> *"…mandated to protect and help UAE companies to reduce the uncertainty of exporting to other countries. It provides production to exporters and re-exporters against non-payments due to commercial and political risks associated with the export and re-export of UAE goods and services. It provides protection for foreign investments and projects (outside UAE) due to associated political risks."*[262]

Both exporters provided they did not apply for, nor receive any export credit insurance through ECI during the POI. Therefore no benefit was conferred to either exporter during the POI. The GOU also responded that neither exporter applied for nor received any export credit insurance through ECI during the POI.

Program 3: Export Assistance Program

The GOU acknowledged the existence of the programme, however it also provided that

> *"…the program has been put on hold since 2015, and as per the official statement of the UAE during the last WTO Trade Policy review undertaken in 2006, Dubai Exporters do not envisage to re-initiate this programs."*[263]

The exporters provided that they did not apply for nor receive any export assistance under this program during the POI. Therefore no benefit was conferred to either exporter during the POI. The GOU also responded that neither exporter applied for nor received any export assistance under this program during the POI.

VIETNAM

This Appendix consists of descriptions of the subsidy programs which the responding exporters (i.e. the four respondents for which sufficient information was available to estimate an amount of subsidy) benefited from during the course of the subsidy POI and other potentially actionable subsidy programs identified by the CBSA.

The CBSA has used the best information available to describe the potentially actionable subsidy programs that may not have been used by the responding exporters in the current investigation. This includes using information provided by the GOV, information provided by exporters and related suppliers, information included in the complaint, as well as information obtained from CBSA research on potential subsidy programs in Vietnam.

[262] EXH 178 (NC) –Response to RFI – Subsidy – GOU; page 39
[263] EXH 178 (NC) –Response to RFI – Subsidy – GOU; page 45

Subsidy Programs Used By The Responding Exporters

Program 1: Exemptions of import duty

The programs of import duty exemptions are made available pursuant to the Law No. 107/2016/QH13 dated April 6, 2016, on export and import duties (Law No. 107) and Decree No. 134/2016/ND CP dated September 1, 2016, on guidelines for the law on export and import duties (Decree No. 134). Law No. 107 replaced the Law on Export and Import Tax No. 45/2005/QH11 dated June 14, 2005, on detailing a number of articles of the law on export and import duties (Law No. 45). Decree 134 replaced Decree No. 87/2010/ND CP dated August 13, 2010, guiding the implementation of a number of articles of the Law on Export Tax and Import Tax (Decree No. 87). Duty exemption is stipulated in Article 16 of Law No. 45 and Law No. 107 and specified in Article 12 of Decree No. 87 and Article 5 to 29 of Decree No. 134. These programs were provided by the GOV.

This program is considered to be a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the Government are reduced and/or exempted, and confer a benefit to the recipient equal to the amounts of the reductions and exemptions.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to either enterprises in certain geographic areas or investment projects specified in Appendix 1 and Appendix 2 of Decree No. 118/2015/ND-CP[264] dated November 12, 2015, guiding the implementation of a number of articles of the law on investment.

Program 3: Incentives on Non-agricultural land use tax

Based on CBSA research, non-agricultural land use tax is regulated by Law No. 48/2010/QH12 dated June 17, 2010, on non-agricultural land use tax (Law No. 48); Decree 53/2011/ND-CP dated July 1, 2011, guiding the implementation of this Law No. 48; and Circular No. 153/2011/TT-BTC dated November 11, 2011, guiding on non-agricultural land use tax (Circular No. 153). Articles 9 and 10 of Law No. 48 provide for tax exemption and reduction for non-agricultural land use. This program was provided by the GOV.

Appendix 1 of Decree No. 118/2015/ND-CP dated November 12, 2015, guiding the implementation of the Law on Investment (Decree No. 118), defines domains eligible for investment promotion and domains eligible for special investment preferences. Appendix 2 of Decree No. 118 defines areas with extreme socio-economic difficulties, areas with socio-economic difficulties eligible for investment preferences.

[264] EXH 426 (NC) – Decree No. 118.

This program is a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the Government are reduced and/or exempted, and confers a benefit to the recipient equal to the amount of the reduction/exemption.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to industries located in the regions prescribed.

Program 4: Exemption/Reductions of Land Rent, Tax and Levy

Land used for production and business purposes is governed by Law No. 45/2013/QH13[265] dated June 21, 2013, on Land (Law No. 45); Decree No. 46/2014/ND-CP[266] dated May 15, 2014, on regulating the collection of land rents and water surface rents (Decree No. 46); Circular No. 77/2014/TT-BTC[267] dated June 16, 2014, guiding Decree No. 46/2014/ND-CP; and Circular No. 333/2016/TT-BTC dated December 26, 2016, amending and supplementing a number of articles of Circular No. 77/2014/TT-BTC. Land rent exemption and reduction in land rent are provided in Articles 19 and 20 of Decree No. 46. These programs were provided by the GOV.

The program land-use levy exemption/reduction was terminated on July 1, 2014, as the effective date of the Law No. 45/2013/QH13 dated June 21, 2013, on Land (Law No. 45), replaced Law No. 13. Although, this program was terminated on July 1, 2014, companies that were eligible for the program could have benefited from the subsidy while it was in effect. Depending on the size of the benefits, the benefits could potentially be amortized over the following subsequent years.

This program is considered to be a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the Government are reduced and/or exempted, and confer a benefit to the recipient equal to the amounts of the reductions and exemptions.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to the List of domains entitled to investment incentives and the List of regions entitled to investment incentives as specified in Article 110 of the Law on Land 2013; Section II, Chapter II of Decree No. 46; and Appendix II of Decree 118/2015/ND-CP.

[265] EXH 426 (NC) – New Law No. 45.
[266] EXH 426 (NC) – Decree No. 46.
[267] EXH 426 (NC) - Circular No. 77.

Program 6: Enterprise income tax preferences, exemptions and reductions

Corporate income tax and tax benefits are governed by Law No. 14/2008/QH12[268] dated June 3, 2008, on Enterprise Income Tax 2008 (Law No. 14); Law No. 32/2013/QH13[269] dated June 19, 2013, on amending and supplementing a number of articles of Law on Enterprise Income Tax 2008 (Income Tax 2008 Amending); Law No. 71/2014/QH13[270] dated December 8, 2014, on amending and supplementing a number of articles of the laws on taxes (Law No. 71); Decree No. 218/2013/ND-CP dated December 26, 2013, on detailing and guiding the implementation of law on corporate income tax (Decree No. 218) and Decree No. 12/2015/ND-CP dated February 12, 2015, on elaboration of the law on amendments to tax laws (Decree No. 12). Income tax rate preference is provided in Article 15 of Decree No. 218 and tax exemptions and reductions is provided in Article 16 of Decree No. 218. This program was provided by the GOV.

Article 20.2 of Decree 218 allows the continuation of the application of corporate income tax preferences granted before the Decree's effective date as of February 15, 2014, if those preferences are more advantaged than those granted under Decree 218.

According to Article 15 of Law No. 67/2014/QH13 dated November 26, 2014, on the Law on Investment (Law No. 67), corporate income tax preferences apply to: (1) Economic zone, high-tech zone established by Decision of the Prime Minister in area with difficult socio-economic conditions; (2) Industrial, processing zone established by Decision of the Prime Minister in areas with special difficult socio-economic conditions specified in Attachment II to Decree No. 118/2015/ND-CP dated November 12, 2015, on guidelines for some articles of the law on Investment (Decree No. 118).

This program is a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the Government are reduced and/or exempted, and confer a benefit to the recipient equal to the amount of the reduction/exemption.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to investment projects within certain eligible geographic areas as specified in Article 15 of Law No. 67.

[268] EXH 426 (NC) – Law No. 14.
[269] EXH 426 (NC) – Law No. 32.
[270] EXH 426 (NC) – Law No. 71.

Program 8: Investment support

The complaint listed the two programs and referred to the US DOC's final determination in *Certain Steel Nails.*[271]

The programs are made available pursuant to *Decree 108/2006/ND-CP of the Government,* dated, September 22, 2006.[272] Decree 108 details in which areas the government will support new investments.

This program is a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts confer a benefit to the recipient equal to the amount of the extra support received from the Government.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to a list of sectors entitled to investment incentives and a list of geographical areas entitled to investment incentives as specified in Appendix I and II and of the Law.

Other Potentially Actionable Subsidy Programs Identified By The CBSA That Were Not Used By The Responding Exporter

Based on the information available, for purposes of the preliminary determination, the CBSA has preliminarily found that these programs were not used by the responding exporters in Vietnam. Based on the information available these programs may constitute financial contributions provided by the GOV, confer benefit to companies and appear to be specific. Therefore, for purposes of the preliminary determination, these programs appear to be countervailable. The CBSA will continue to further investigate these programs in the final phase of the investigation.

Program 2: Refunds of import duty

The import duty refund programs are made available pursuant to the Law No. 107/2016/QH13 dated April 6, 2016, on export and import duties (Law No. 107) and Decree No. 134/2016/ND CP dated September 1, 2016, on guidelines for the law on export and import duties (Decree No. 134). Law No. 107 replaced the Law on Export and Import Tax No. 45/2005/QH11 dated June 14, 2005, on detailing a number of articles of the law on export and import duties (Law No. 45). Decree 134 replaced Decree No. 87/2010/ND-CP dated August 13, 2010, guiding the implementation of a number of articles of the Law on Export Tax and Import Tax (Decree No. 87). Duty refund is stipulated in Article 19 of Law No. 45 and Law No. 107 and specified in Article 15 of Decree No. 87 and Article 33 to 37 of Decree No. 134. These programs were provided by the GOV.

[271] EXH 30 (NC) – COR2 Complaint; page 173
[272] EXH 426 (NC) – Decree No. 108.

This program is considered to be a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the Government are reduced and/or exempted, and confer a benefit to the recipient equal to the amounts of the refund.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to enterprises located in certain geographic areas or contingent upon export performance and, therefore, constitute a prohibited subsidy as defined in subsection 2(1) of SIMA.

Program 5: Export and import support in forms of preferential loan, guarantee and factoring

Investment credit and export credit are made available pursuant to Decree No. 75/2011/ND-CP[273] dated August 30, 2011, on state investment credit and export credit (Decree No. 75) and Decree No. 151/2006/ND-CP[274] dated December 20, 2006, on state investment credit and export credit (Decree No. 151). These programs were provided by the GOV.

Investment credit is stipulated in Chapter II and Appendix I of Decree No. 75 and in Chapter II and List of Eligible Projects for Investment Credit of Decree No. 151. Export credit is stipulated in Chapter III and Appendix II of Decree No. 75 and in Chapter III and List of Eligible projects for export credit of Decree No. 151. The regulation of guarantee operation was detailed in the Circular 28/2012/TT-NHNN[275] issued by the State Bank of Vietnam.

This program is considered to be a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the government are reduced and/or exempted, and confer a benefit to the recipient equal to the amounts of the reductions or exemptions.

The program may be considered specific pursuant to paragraph 2(7.2)(b) of SIMA as it is contingent upon export performance and, therefore, constitute a prohibited subsidy as defined in subsection 2(1) of SIMA.

[273] EXH 426 (NC) – Decree No. 75.
[274] EXH 426 (NC) – Decree No. 151.
[275] EXH 426 (NC) – Circular No. 28.

Program 7: Accelerated Depreciation of Fixed Assets

Accelerated depreciation of fixed assets is specified in Circular 45/2013/TT-BTC[276] dated April 25, 2013, on guiding the regime of management, use and depreciation of fixed assets (Circular 45). According to Article 1, Circular No. 45 applies to enterprises established and operating in Vietnam under regulations of law. Enterprises are permitted to choose their preferred method of depreciation, period of depreciation of fixed assets according to Circular No. 45 and must notify the tax authority before implementation. This program was provided by the GOV.

Article 35 of Law No. 59/2005/QH11 dated November 29, 2005, on the Law on Investment (Law No. 59) provides for investment projects in investment incentive sectors and geographical areas and business projects with high economic efficiency to adopt accelerated depreciation of fixed assets.

This program is a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the Government are reduced and/or exempted, and confers a benefit to the recipient equal to the amount of the reduction/exemption.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to particular enterprises with fixed assets and specialized technological capabilities.

Program 9: Export Promotion Program

The National Trade program was established by Decision No. 279/2005/QD-TTg of November 3, 2005. The Decision constituted the framework for state-funded trade promotion activities from 2006 to 2010. The state funding of these activities was derived from the Export Promotion Fund, established pursuant to Prime Minister's Decision No. 195/1999/QD-TTg. The Decision 279 was amended and supplemented by Prime Minister's Decision No. 80/2009/QD-TTg of May 21, 2009.[277]

This program where a direct transfer of funds from the Government is considered to be a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because Article 9 of Decision 279 specifies the types of trade promotion schemes that are eligible for support and Article 10 specifies the level of support that is available for each of the eligible schemes.

[276] EXH 426 (NC) – Circular No. 45.
[277] EXH 426 (NC) – Decision No. 80.

Program 10: Assistance to Enterprises Facing Difficulties due to Objective Reasons

The GOV reported this subsidy program in its New and Full Notifications pursuant to Article 25 of the WTO Agreement on Subsidies and Countervailing Measures, dated, March 13, 2013. This program was provided by the GOV.

According to the GOV response, this program targets companies facing difficulties that arise as the result of unforeseen reasons, such as: policy changes in terms of taxation and other dues to the state budget; relocation of enterprises upon request of competent authorities; loss due to natural disaster, etc.

Depending on the form of benefit, this program may be considered a financial contribution pursuant to paragraph 2(1.6)(a) of SIMA as a direct transfer of funds from the Government and confers a benefit to the recipient equal to the amount of the grant. This program may also be considered a financial contribution pursuant to paragraph 2(1.6)(b) of SIMA, in that amounts that would otherwise be owing and due to the government are reduced and/or exempted, and confer a benefit to the recipient equal to the amount of the reduction/exemption.

The program may be considered specific pursuant to subsection 2(7.2) of SIMA because it is limited to particular enterprises targeted by the GOV.

WORLD TRADE ORGANIZATION

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Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, p. 213
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Broiler Products (Article 21.5 – US)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS427/RW and Add.1, adopted 28 February 2018
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EEC – Cotton Yarn	GATT Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995, BISD 42S/17
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, DSR 2016:VI, p. 3077
EU – Fatty Alcohols (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R and Add.1, adopted 29 September 2017, as modified by Appellate Body Report WT/DS442/AB/R, DSR 2017:VI, p. 2765
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
India – Solar Cells	Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
Ukraine – Ammonium Nitrate	Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/AB/R and Add.1, adopted 30 September 2019
Ukraine – Ammonium Nitrate	Panel Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/R, Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727

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

EXHIBITS REFERRED TO IN THIS REPORT

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

ABBREVIATIONS USED IN THIS REPORT

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

1 INTRODUCTION

1.1 Complaint by Indonesia

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

1.2. Consultations were held on 31 October 2017.

1.2 Panel establishment and composition

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

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

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

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

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

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

1.3 Panel proceedings

1.3.1 General

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

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

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

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

1.3.2 Requests for enhanced third-party rights

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

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

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

1.3.3 *Amicus curiae* submission

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

2 FACTUAL ASPECTS

2.1 The measures at issue

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

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

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

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

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

2.2 Other factual aspects

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

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

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

6 INTERIM REVIEW

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

7 FINDINGS

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

7.1.1 Treaty interpretation

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

7.1.2 Standard of review

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

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

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

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

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

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

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

7.1.3 Burden of proof

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

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

7.2.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2.3.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2.3.3 Situations that distort input costs

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

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

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

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

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

[60] Indonesia's first written submission, paras. 73-78.
[61] Indonesia's first written submission, paras. 58-71.
[62] Indonesia's first written submission, para. 77.
[63] Indonesia's opening statement at the second meeting of the panel, paras. 3 and 24.
[64] Indonesia's responses to Panel question No. 2(b) following the first meeting of the Panel, p. 8.
[65] Indonesia's responses to Panel question No. 2(a) following the first meeting of the Panel, p. 7. (emphasis original)
[66] Indonesia's responses to Panel question No. 2(a) following the first meeting of the Panel, p. 7; second written submission, paras. 18-19.
[67] Indonesia's second written submission, paras. 15-16.
[68] Indonesia's second written submission, para. 18.
[69] Australia's second written submission, para. 51.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[92] Emphasis added; fn omitted.

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

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

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

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

7.2.3.5 Situations arising from government action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2.3.6 Conclusion in respect of "particular market situation"

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

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

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

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

7.2.4.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2.4.5 Conclusion in respect of "permit a proper comparison"

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

7.2.5 Conclusion

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

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

7.3.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) If:

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

(b) the records:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[228] See also Indonesia's response to Panel question No. 32 following the second meeting of the Panel, para. 96.
[229] Australia's first written submission, paras. 189 and 192; second written submission, para. 202.
[230] Panel Report, *Ukraine – Ammonium Nitrate*, paras. 7.72-7.75 and 7.79-7.80.
[231] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.80.
[232] Final Report, (Exhibit IDN-4), section 6.9, pp. 50-65.
[233] Australia's second written submission, para. 211. (underlining omitted)
[234] Indonesia's first written submission, para. 153 (referring to Indah Kiat's Verification Report, (Exhibit IDN-9), section 4.3).
[235] Indonesia's first written submission, para. 153; Pindo Deli's Verification Report, (Exhibit IDN-10), section 4.1.

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

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

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

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

7.3.4 Conclusion

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

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

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

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

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

7.4.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[254] Fn omitted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[277] Indonesia's first written submission, para. 168.
[278] Final Report, (Exhibit IDN-4), section 6.9.8.1.4, p. 62; Australia's first written submission, paras. 236-237 and 240.
[279] Final Report, (Exhibit IDN-4), sections 6.9.8.1.3, A4.4 and A4.5.1, pp. 61, and 231-232; Australia's first written submission, para. 238; and Indonesia's first written submission, para. 168.
[280] Final Report, (Exhibit IDN-4), section 6.9.8.1.3, p. 62; Australia's first written submission, paras. 238 and 240; and Indonesia's first written submission, para. 168. Although Australia argues that the ADC subtracted the amount for selling, general and administrative expenses from Pindo Deli's benchmark, we have not been able to identify that deduction in the text of the Final Report.
[281] Indonesia's opening statement at the second meeting of the Panel, para. 71; responses to Panel question No. 9 following the second meeting of the Panel, para. 26 and question No. 30, paras. 91-93; Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 158-177.
[282] Indonesia's response to Panel question No. 30(a) following the second meeting of the Panel, para. 91.
[283] Indonesia's response to Panel question No. 30(a) following the second meeting of the Panel, para. 91; comments on Australia's response to Panel question No. 33 following the second meeting of the Panel, para. 55.
[284] Although Indonesia pointed to Indah Kiat's Verification Report in the context of discussing the accuracy of the exporters' recorded costs, we consider it to be also relevant for the purposes of our examination of this specific issue. (See Indonesia's first written submission, para. 153 (referring to Indah Kiat's Verification Report, (Exhibit IDN-9), section 4.3)).
[285] Australia's response to Panel question No. 33 following the second meeting of the Panel, paras. 168-175.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.4.5 Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.5.1 Conclusion

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

8 CONCLUSIONS AND RECOMMENDATION

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

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

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

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

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

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

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

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

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

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

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

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

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

Viet Nam News
THE NATIONAL ENGLISH LANGUAGE DAILY

Việt Nam to produce hot rolled steel this year

Update: February, 08/2018 - 09:00

Deputy chairman of the Việt Nam Steel Association Nguyễn Văn Sưa
Viet Nam News

Việt Nam's steel industry will be able to produce enough hot-rolled steel in 2018 to meet local demand. Before, the nation had to import millions of tonnes of hot-rolled steel products every year.

Deputy chairman of the Việt Nam Steel Association Nguyễn Văn Sưa tells *Thời báo Kinh doanh* (Business Times) newspaper about steel production this year and origins of Vietnamese steel.

How did the domestic steel industry develop in 2017? And what do you predict for its growth in 2018?

The domestic steel market has grown in production and consumption over the past few years, especially the period 2016-17. Most steel enterprises have achieved high profits from steel production and business in 2017.

In 2017, the steel industry reached a year-on-year increase of 23 per cent in production and 20 per cent in consumption while exports of steel reached 4.7 million tonnes, a surge of 28 per cent against 2016.

The strong growth was due to high demand for steel as the domestic economy developed, including construction of infrastructure, bridges, harbors, airports, urban areas and housing.

The steel industry will continue the development because many projects have to be completed and put into operation this year.

Meanwhile, the Government will enhance disbursement for many projects with public investment to finish the projects, leading to higher demand for steel products.

However, to obtain those advantages, the local steel producers must improve competitiveness of their products by investing in reform of production technology, a skilled workforce and use of modern management methods.

Việt Nam has joined many free trade agreements (FTAs) so there are opportunities and challenges for the local steel industry. What does the industry do to maximise opportunities?

The FTAs aim to liberalise trade and will create opportunities and challenges for the local steel industry.

Therefore, we have to understand international trade very well to take suitable actions.

I think that Việt Nam’s steel industry in the future should build large steel enterprises to produce steel products with the ability to compete with foreign ones.

Those enterprises must have large production scale, high technology and good management ability to produce 7-10 million tonnes of steel per year.

Now, the local steel producers have had difficulties in capital, technology and equipment.

Over past years, China has cut its output of steel. How has this action affected Việt Nam's steel industry, especially given that the US Department of Commerce has suspected 90 per cent of the steel exports from Việt Nam to the US are produced in China?

China's steel production capacity is too high and the steel industry has overheated development over the domestic demand. The reduction will ensure the effectiveness of the steel industry in China and that will partly affect Việt Nam.

The media has recently reported that 90 per cent of Việt Nam's steel shipped to the US is produced in China.

I believe it is inaccurate because a very small amount of Việt Nam's steel exports were produced in China.

The reality will be proven soon this year when Việt Nam begins producing hot rolled steel, ensuring the origin of steel products produced in Việt Nam.

Taxes for steel imports from China have fallen to zero per cent under the ASEAN-China FTA effective in July 2005. Has that increased China's steel exports to Việt Nam ?

Việt Nam's steel industry needs to improve the competitiveness of its products for competing with Chinese steel and Việt Nam needs to use trade remedies for protecting its domestic production, which the US and Europe are using quite effectively.

In 2017, Việt Nam also used trade remedies effectively. Pig iron imported from China to Việt Nam in 2015 was two million tonnes. Since 2016, Việt Nam has had a trade remedy for the pig iron from

China so the imports are reduced to 1.2 million tonnes in 2016 and a few hundred thousands of tonnes in 2017.

Meanwhile, in 2016, Việt Nam imported 1.8 million tonnes of galvanised steel sheet. After the imposition of the trade remedy tax, the import of galvanised steel sheets decreased to 1.2 million tonnes last year.

China has closed the induction furnace for fear of environmental pollution, while the steel industry of Việt Nam has still used this a lot. To avoid a situation like China, what should Việt Nam do?

Currently, Việt Nam has not planned to close the induction furnace because the capacity of the electric furnace has not met the local demand so the induction furnace has still had a positive contribution.

However, investors should pay attention to the long-term vision to not put large investment in developing induction furnaces because it may be limited in the future due to its negative effects on the environment, then the investor will suffer great damage. - VNS

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