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AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER

REPORT OF THE PANEL

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CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
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.