In the World Trade Organization
Panel Proceedings

Australia – Anti-Dumping Measures on A4 Copy Paper

(DS529)

First Written Submission by Australia

Geneva, 7 November 2018
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I. INTRODUCTION

1. In this dispute, Indonesia is challenging the anti-dumping duties imposed on two of the four Indonesian exporters of A4 copy paper that were investigated by the Australian Anti-Dumping Commission – Indah Kiat and Pindo Deli, which are both subsidiaries of the SMG conglomerate.

2. Specifically, Indonesia is challenging the Anti-Dumping Commission's use of a constructed normal value for those exporters and the manner in which the Anti-Dumping Commission derived the hardwood pulp component of that constructed normal value. Indonesia does not challenge any other aspect of the Anti-Dumping Commission's findings or any other aspect of the Anti-Dumping Commission's determination of the constructed normal value.

3. While the burden of proof in this dispute falls squarely on Indonesia, in this submission Australia will demonstrate why Indonesia's claims must fail.

4. The Anti-Dumping Commission properly determined that there was a "market situation" in the Indonesian A4 copy paper market (i.e. a "particular market situation" under Article 2.2 of the Anti-Dumping Agreement) such that sales in that market were "not suitable for use in determining" the "normal value" (i.e. they did not "permit a proper comparison" with export prices under Article 2.2 of the Anti-Dumping Agreement).

5. The Anti-Dumping Commission found that policies and programs of the Government of Indonesia and its export ban on logs lowered the cost and price of logs and hardwood pulp in Indonesia. This induced and allowed the vertically-integrated Indonesian A4 copy paper producers to supply more A4 copy paper at each possible price point than they otherwise would have. This resulted in domestic sales of A4 copy paper being made at a price that was distorted, artificially low and significantly below regional benchmarks. These domestic sales, which reflected the lowered input costs that resulted from the interventions of the Government of Indonesia, did not permit a proper comparison with the export price.

6. The Anti-Dumping Commission then correctly proceeded to determine the "normal value" on the basis of a "constructed normal value" methodology (i.e. the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" under Article 2.2 of the Anti-Dumping Agreement).
7. The records kept by Indah Kiat and Pindo Deli in respect of hardwood pulp reflected the "particular market situation", so using them to determine the constructed normal value would have rendered the determination of a constructed normal value inutile. Since the circumstances were not normal and ordinary, the Anti-Dumping Commission therefore legitimately discarded the hardwood pulp component of those records under Article 2.2.1.1 of the Anti-Dumping Agreement.

8. In the absence of suitable private domestic prices or import prices that could be used in place of the amounts that had been discarded, and in an environment of vertical integration and related-party transactions, the Anti-Dumping Commission properly developed a "pulp benchmark" which it used as the basis of the hardwood pulp component of the constructed normal value of A4 copy paper made by Indah Kiat and Pindo Deli. The Anti-Dumping Commission determined that the (confidential) transfer prices for purchases of hardwood pulp in Indonesia that were used by RAK – another Indonesian exporter of A4 copy paper – were consistent with the prices used to derive the “pulp benchmark”.

9. Indonesia's case appears to be built on an assumption that the GATT 1994 and the Anti-Dumping Agreement must be read in a manner which narrows the legitimate scope for investigating authorities to remedy injurious dumping well beyond what is actually required by the texts. Indonesia seeks to establish that anti-dumping duties are some sort of "exception" to Article I and Article II of the GATT 1994. This is a surprising assertion given that injurious dumping is a practice which the GATT 1994 rightly says should be "condemned". Anti-dumping duties imposed consistently with WTO-rules are a valid and permissible response to injurious dumping and can in no way be characterised as an "exception".

10. Similarly, there is no support for Indonesia's argument that a "particular market situation" is an "exceptional" situation. Its assertion that the term "particular market situation" must be interpreted narrowly has no legal foundation in the WTO Agreement and its interpretation of that term does not follow a proper analysis undertaken consistently with the rules of treaty interpretation contained in the Vienna Convention.
11. In addition, there is no textual support in the Anti-Dumping Agreement for Indonesia's argument that, in order to discard domestic prices as the basis for the "normal value", the "particular market situation" must affect the domestic price but not the export price. That simply reads the treaty as containing language which is not there.

12. There is no support for Indonesia's argument that Article 2.2.1.1 requires the use of an exporter's "actual costs" whenever they appear in its records. That simply reads out the word "normally" from the treaty and ignores the requirement of the Appellate Body that the records must lead to an "appropriate proxy" for the domestic sales price.

13. Indonesia's assertion that "government involvement … falls exclusively" within the SCM Agreement has no support in either the SCM Agreement or the Anti-Dumping Agreement and contradicts the well accepted operation of the covered agreements in relation to each other.

14. Indonesia's presentation of the facts of the investigation before this Panel is also in error.

15. Contrary to Indonesia's assertion, the Anti-Dumping Commission does not find that a "particular market situation" exists every time that an input price is distorted. In the investigation before this Panel, the Anti-Dumping Commission undertook a detailed and exhaustive consideration of whether a "particular market situation" existed. In addition, it established and concluded that the domestic sales price was not suitable to use as the basis for the "normal value" (i.e. that the domestic sales did not "permit a proper comparison" with the export price under Article 2.2 of the Anti-Dumping Agreement).

16. There is no support for Indonesia's argument that the low-priced hardwood pulp equally affected the domestic and export price of A4 copy paper. Even if that were true, it would not establish that domestic sales permitted a "proper comparison" with the export price.

17. There is no support for Indonesia's assertion that Australia "merely substituted the Indonesian producers' actual cost for hardwood pulp with a benchmark price for hardwood pulp manufactured in Brazil and South America".
18. Rather, the Anti-Dumping Commission considered a number of options for the pulp benchmark and provided a reasoned and adequate explanation as to why it used a benchmark based on international hardwood pulp prices. The Anti-Dumping Commission performed all of the adaptations to that pulp benchmark that were necessary given the analysis that it had undertaken to ensure that the pulp benchmark was suitable to use to arrive at the cost of production of A4 copy paper in Indonesia, as required by Article 2.2 of the Anti-Dumping Agreement.

19. Indonesia's submission does not deny that government intervention reduced the cost and price of timber and pulp in Indonesia, or that this artificially lowered the price of A4 copy paper in Indonesia. Indonesia does not challenge the independent evidence before the Anti-Dumping Commission showing that Indonesia's growing costs for acacia pulpwood were the highest in Asia. Indonesia does not contest the findings of the Anti-Dumping Commission in respect of export prices or the injury caused to Australia's paper industry by the dumping.

20. Australia recalls that the task of the Panel, consistent with Article 11 of the DSU, is to "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". Further, in accordance with Article 17.6(i) of the Anti-Dumping Agreement, the Panel must "determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective"; and, if the "establishment of the facts was proper and the evaluation was unbiased and objective, even though the [P]anel might have reached a different conclusion, the evaluation shall not be overturned".

21. Australia is confident that the Anti-Dumping Commission has undertaken a rigorous, unbiased and objective assessment of the facts and evidence in its investigation and has, through the proper application of the GATT 1994 and the Anti-Dumping Agreement, as implemented domestically through Australian legislation, done so in a manner fully consistent with Australia's WTO obligations.
II. INTERPRETATION OF TREATIES, BURDEN OF PROOF, AND STANDARD OF REVIEW

A. ARTICLES 31 AND 32 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

1. The Anti-Dumping Agreement must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose

22. The general rule of treaty interpretation, as set out in Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. This is the starting point for the proper interpretation for all treaty provisions, including the provisions of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on the Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement).

23. Indonesia is not party to the Vienna Convention. Nonetheless, the Appellate Body has confirmed that the general rule of treaty interpretation, provided for in Article 31 of the Vienna Convention, has attained the status of "customary or general international law".1

2. Recourse to supplementary means of interpretation is permitted to determine or confirm the meaning of the GATT 1994 and the Anti-Dumping Agreement

24. Article 32 of the Vienna Convention deals with the role of supplementary means of interpretation. Supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, can be used to confirm the meaning resulting from the application of the interpretative framework set out in Article 31 of the Vienna Convention, or to determine the meaning where the meaning derived from the application of Article 31 is ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

25. The Appellate Body has confirmed that Article 32 of the Vienna Convention has also attained the status of "customary or general international law".2

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B. **ARTICLE 3.2 OF THE DISPUTE SETTLEMENT UNDERSTANDING**

1. **The provisions of the Anti-Dumping Agreement are to be read in accordance with the customary rules of interpretation of public international law**

26. Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) directs a panel or the Appellate Body to clarify the provisions of the covered agreements of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) "in accordance with customary rules of interpretation of public international law". The Appellate Body in *US – Gasoline* stated that this direction found in Article 3.2 of the DSU on the interpretative method for the covered agreements "reflects a measure of recognition that the [covered agreements are] not to be read in clinical isolation from public international law".3

27. The Appellate Body has confirmed that customary international law includes Articles 31 and 32 of the Vienna Convention. The Appellate Body has further confirmed that, pursuant to Article 31(3)(c) of the Vienna Convention, the World Trade Organization (WTO) agreements must also be interpreted in accordance with general principles of law.4

C. **BURDEN OF PROOF**

28. The general rule regarding the burden of proof is that a complaining party in a WTO dispute must present sufficient evidence and argument to establish a *prima facie* case of a violation of a covered agreement.5

29. The Appellate Body has stated that, "under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."6

30. Thus, the burden of proof in this dispute falls squarely on Indonesia.

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31. This submission demonstrates that the evidence and arguments set out by Indonesia in its first written submission are insufficient to prove any inconsistency with the GATT 1994 or the Anti-Dumping Agreement in regard to the measures at issue in this dispute.

D. STANDARD OF REVIEW

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

33. Articles 17.5 and 17.6 of the Anti-Dumping Agreement are listed as special or additional rules and procedures in Appendix 2 of the DSU. The Appellate Body has described "the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the WTO Agreement."\(^7\)

34. Article 17.5(ii) of the Anti-Dumping Agreement provides that the panel is to examine the matter based upon the facts that were before the investigating authority of the importing Member when it made its determination.

35. Article 17.6(i) of the Anti-Dumping Agreement provides that a panel shall determine whether the national authorities’ establishment of the facts was proper and whether the authorities’ evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, a panel shall not overturn that evaluation, even though the panel might have reached a different conclusion.

\(^7\) Appellate Body Report, *Guatemala – Cement I*, para. 66.
36. In *Egypt – Steel Rebar*, the panel said that determining whether the national authority’s establishment of the facts was proper involves an assessment by the panel of the means by which the data before the investigating authority were gathered and compiled.\(^8\) Similarly, in *US – Hot Rolled Steel*, the panel noted that "[w]hether the facts were properly established involves determining whether the investigating authorities collected relevant and reliable information concerning the issue to be decided – it essentially goes to the investigative process".\(^9\)

37. The Appellate Body has stated that the "objective assessment" to be made by a panel pursuant to Article 11 of the DSU when reviewing an investigating authority's determination is to be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination.\(^10\)

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\(^8\) Panel Report, *Egypt – Steel Rebar*, para. 7.45.  
III. FACTUAL BACKGROUND

A. INTRODUCTION

38. This section provides an overview of Australia’s anti-dumping system and the role of the Anti-Dumping Commission in that system. It then describes the relevant facts of the anti-dumping investigation that is before this Panel.

B. OVERVIEW OF AUSTRALIA'S ANTI-DUMPING SYSTEM

1. Introduction

39. The "anti-dumping system" in Australia refers to the system which gives effect to Australia's rights and obligations under Article VI of the GATT 1994, the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Australia's anti-dumping system is based on four core principles: independence, transparency, evidence-based decision-making, and access to review (both merits review and judicial review). This ensures that Australia's anti-dumping system provides an efficient and effective system to remedy material injury to Australian industry caused by dumped and/or subsidised goods in a manner fully consistent with Australia's international legal obligations.

2. The role of the Anti-Dumping Commission

40. Australia's investigating authority is the Anti-Dumping Commission. Established in its current form in 2013, and headed by an independent Commissioner, the Anti-Dumping Commission is responsible for administering Australia's anti-dumping system.

41. The Anti-Dumping Commission investigates allegations of dumped and/or subsidised goods that have been imported into Australia, and claims of material injury (or threat of material injury) to the Australian industry producing like goods that have been caused by the allegedly dumped and/or subsidised goods. The organisational structure in Australia is not bifurcated.

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11 See Information about the Commissioner of the Anti-Dumping Commission, Exhibit AUS-01.
3. The Australian Domestic Legal and Policy Framework

(a) The relevant Acts and regulations

42. The *Customs Act 1901* (Cth) (*Customs Act*)\(^{12}\) and the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (*Customs Tariff Act*)\(^{13}\) provide the statutory authority for the anti-dumping system. They contain the legal authority for the responsible Minister and Commissioner to make decisions with respect to anti-dumping and countervailing duties.

43. The *Customs Act* provides authority to make delegated legislation. In the Australian legal system, delegated legislation is not made directly by an Act of Parliament, but rather by the Executive Government (for example, a Minister) under the authority of an Act of Parliament. Delegated legislation must be made within the principles of the law, and cannot exceed it. Relevant to the anti-dumping system is the *Customs (International Obligations) Regulation 2015* (Cth) (*Customs Regulation*).\(^{14}\) The *Customs Regulation* sets out technical details, including matters to which the responsible Minister must have regard when constructing the "normal value" in an anti-dumping investigation.

44. The authority to impose anti-dumping and countervailing duties is contained in the *Customs Tariff Act*. Duties are imposed by way of publication of a "dumping duty notice" or a "countervailing duty notice".

(b) The Dumping and Subsidy Manual

45. The Dumping and Subsidy Manual (Manual)\(^{15}\) provides a comprehensive guide to the Anti-Dumping Commission's policy and practice for all operational activities conducted by the Anti-Dumping Commission.

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\(^{12}\) Relevant extracts are in Exhibit AUS-02.

\(^{13}\) Relevant extracts are in Exhibit AUS-03.

\(^{14}\) Relevant extracts are in Exhibit AUS-04.

\(^{15}\) Dumping and Subsidy Manual (with explanatory statements), November 2015 (Manual), Exhibit AUS-05. (Exhibit AUS-05 is the version of the Dumping and Subsidy Manual that was in use during the investigation that is before this Panel. The version exhibited by Indonesia is a later version dated April 2017 – see Exhibit IDN-17).
46. The purpose of the Manual is to promote a consistent approach to investigation findings and decisions. The Manual sets out the principles and practices followed by the Anti-Dumping Commission as they normally apply to investigations and other inquiries. The Manual does not contain a mandatory set of instructions or constrain the decisions of the Commissioner.

4. Access to review

47. The anti-dumping system in Australia is unique in that interested parties have access to comprehensive merits review of decisions made by the Commissioner and the responsible Minister, in addition to judicial review.¹⁶

48. Merits review is undertaken by the Anti-Dumping Review Panel. Members of the Anti-Dumping Review Panel are independent and cannot be directed in their duties. They enjoy the same protections and immunities as a Justice of the High Court of Australia (which is the highest court in the Australian judicial system). There is no fee for applying for merits review. Applicants are not required to be represented by a lawyer.

49. The Anti-Dumping Review Panel may require the Commissioner to reinvestigate a specific finding that formed the basis of the reviewable decision and report the result of the reinvestigation to the Anti-Dumping Review Panel. After receiving a report containing recommendations from the Anti-Dumping Review Panel, the responsible Minister is required to affirm or revoke the reviewable decision. This can include varying a dumping duty notice or countervailing duty notice by amending the dumping duty or countervailing duty payable, revoking the notice, or publishing a new notice.

¹⁶ Access to judicial, arbitral or administrative review is mandated under Article 13 of the Anti-Dumping Agreement and Article 23 of the SCM Agreement.
50. After conducting a review of a decision of the Commissioner, the Anti-Dumping Review Panel may revoke a termination decision (or other negative prima facie decision). In this instance, the Anti-Dumping Commission would resume the investigation or other inquiry type.

51. The availability of both merits and judicial review ensures that interested parties have different avenues through which they can seek the best outcome on the facts of the case, in accordance with the law. This is particularly important in relation to anti-dumping where interested parties often have significant commercial interests at stake.

5. Further details on Australia’s anti-dumping system

52. Further details on Australia’s anti-dumping system are available in Exhibit AUS-06.

C. The Investigation Before This Panel – Alleged Dumping of A4 Copy Paper Exported from Brazil, China, Indonesia and Thailand, and Alleged Subsidisation of A4 Copy Paper Exported from China and Indonesia

1. Application from the Australian industry

53. On 24 February 2016, a written application\(^\text{17}\) was received from Paper Australia Pty Ltd (Australian Paper) seeking the publication of a dumping duty notice in respect of A4 copy paper that had been imported into Australia from Brazil, China, Indonesia and Thailand, and a countervailing duty notice in respect of A4 copy paper that had been imported into Australia from China and Indonesia.

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54. Australian Paper is an Australian proprietary company and is a wholly owned subsidiary of Nippon Paper Industries Co. Ltd, which is registered in Japan. The Anti-Dumping Commission found that Australian Paper solely constituted the Australian industry producing "like goods" as defined under Article 4 of the Anti-Dumping Agreement.

55. Australian Paper's application:

- sought the publication of a dumping notice in relation to Brazil, China, Indonesia and Thailand;
- sought the publication of a countervailing duty notice in respect of China and Indonesia;
- alleged that the Australian industry for A4 copy paper had suffered material injury caused by A4 copy paper exported to Australia from Brazil, China, Indonesia and Thailand at dumped and/or subsidised prices; and
- claimed in relation to both China and Indonesia that a "particular market situation" existed and that, as a result, domestic prices of A4 copy paper were not suitable for determining normal values.

56. In relation to its claim of a particular market situation in Indonesia, Australian Paper referenced various Government of Indonesia policies and referred to the findings in the United States Department of Commerce's affirmative final determinations in the anti-dumping and countervailing duty investigations involving Indonesia.

57. On 25 February 2016 and 8 March 2016, Australian Paper provided further evidence in support of its application.

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18 Final Report, Exhibit IDN-04, section 4.3, p. 27.
19 The Anti-Dumping Commission considered that Australian Paper constituted all domestic producers consistent with the requirements of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of SCM Agreement. See also Final Report, Exhibit IDN-04, section 1.5.2, p. 12 and section 4.3.5, p. 29.
20 Final Report, Exhibit IDN-04, section 1.1, p. 8 and section 2.1, p. 16.
21 Final Report, Exhibit IDN-04, section 1.1, p. 8 and section 2.1, p. 16.
22 Final Report, Exhibit IDN-04, section 1.1, p. 8 and section 2.1, p. 16.
23 Final Report, Exhibit IDN-04, section 6.5, p. 36.
25 Final Report, Exhibit IDN-04, section 2.1, p. 16.
58. On 21 March 2016, the Anti-Dumping Commission notified the Government of Indonesia that it had received a properly-documented application requesting the publication of a dumping and countervailing duty notice in relation to Indonesia.

2. The Anti-Dumping Commission's investigation

(a) Introduction

59. On 29 March 2016, the Commissioner, in light of the Anti-Dumping Commission's Consideration Report of the same date, decided to not reject the application.

60. A dumping and subsidy investigation, Investigation 341, was initiated on 12 April 2016. Interested parties, including the Government of Indonesia and Indonesian exporters, were individually notified in writing of the investigation and invited to complete a questionnaire.

61. The questionnaires sent to the Government of Indonesia and Indonesian exporters contained requests for additional information relating to the claim that, because of the particular market situation, domestic prices of A4 copy paper were not suitable for determining normal values.

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

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63. The Anti-Dumping Commission's investigation identified that:

- the APRIL Group exports were exported by PT Riau Andalan Kertas (RAK) through a related trading company April Fine Paper Trading Pte Ltd (AFPT),\(^{27}\) and

- the SMG exports were predominantly exported through unrelated intermediaries (variously described as financiers, distributors and traders) by three related companies:
  - PT Indah Kiat Pulp & Paper Tbk (Indah Kiat);\(^ {28}\)
  - PT Pabrik Kertas Tjiwi Kimia Tbk (Tjiwi Kimia);\(^ {29}\) and
  - PT Pindo Deli Pulp and Paper Mills (Pindo Deli)\(^ {30}\) (collectively the SMG exporters).

64. The Government of Indonesia provided its questionnaire response on 2 June 2016. The Government of Indonesia also provided a response to a supplementary questionnaire on 20 February 2017.\(^ {31}\)

65. The SMG exporters and AFPT both provided their questionnaire responses on 26 May 2016.\(^ {32}\)

(b) Fifty-three submissions received from the Government of Indonesia and Indonesian exporters were considered by the Anti-Dumping Commission in the investigation

66. Interested parties were invited at the time of initiation to lodge submissions concerning the dumping and countervailing duty notices sought by the applicant.\(^ {33}\)

67. Interested parties were also invited to make submissions in response to the Statement of Essential Facts.\(^ {34}\)

\(^{27}\) Final Report, Exhibit IDN-04, section 6.9.7.1, p. 56.
\(^{28}\) Final Report, Exhibit IDN-04, section 6.9.4.1, p. 52.
\(^{29}\) Final Report, Exhibit IDN-04, section 6.9.6.1, p. 55.
\(^{30}\) Final Report, Exhibit IDN-04, section 6.9.5.1, p. 54.
\(^{33}\) Final Report, Exhibit IDN-04, section 6.3, p. 34. See also Anti-Dumping Notice 2016/33 - Public Notice under subsection 269TC(4) of the Customs Act 1901 - Initiation of an Investigation into Alleged Dumping and Subsidisation, 12 April 2016, Exhibit AUS-07.
\(^{34}\) 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
68. A total of 151 submissions were received by the Anti-Dumping Commission in the investigation, and 147 submissions were considered.\textsuperscript{35}

69. In relation to Indonesia, 55 submissions were received as follows.\textsuperscript{36}

<table>
<thead>
<tr>
<th>Party</th>
<th>Number of Submissions</th>
<th>Submission Numbers (EPR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>SMG</td>
<td>34</td>
<td>5, 6, 22, 39, 42, 52, 62, 64, 69, 78, 91, 92, 105, 113, 129, 131, 143, 146, 147, 148, 158, 159, 171, 173, 180, 181, 182, 183, 189, 190, 200, 203, 206 and 211.</td>
</tr>
<tr>
<td>APRIL Group</td>
<td>6</td>
<td>63, 114, 125, 128, 157 and 165.</td>
</tr>
</tbody>
</table>

70. The Anti-Dumping Commission visited the SMG exporters and RAK in Indonesia to verify information they provided in their exporter questionnaire responses and to obtain further information in relation to the investigation.\textsuperscript{37} As part of its verification of the APRIL Group, the Anti-Dumping Commission also visited AFPT (in Singapore).

71. The SMG exporters were visited in June 2016 and RAK and AFPT were visited in July 2016.

72. The SMG exporters, RAK and AFPT were presented with information regarding the outcome of visits by way of a Verification Report and a preliminary dumping margin calculation. They were provided with an opportunity to review the Verification Report and the dumping margin calculations prior to the publication of a non-confidential version of the Verification Report.

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\textsuperscript{35} Four submissions were not considered because they were late – one of these was from the Government of Indonesia and one was from SMG (Final Report, Exhibit IDN-04, section 1.4.5, p. 12).

\textsuperscript{36} See Electronic Public Record for Investigation 341, Exhibit AUS-08.

\textsuperscript{37} Final Report, Exhibit IDN-04, section 6.9.3, p. 52.
The Anti-Dumping Commission met twice with representatives of the Government of Indonesia during the investigation.


A representative of the Government of Indonesia was present during part of the SMG exporters' verification.

Termination of the countervailing duty investigation in relation to goods exported from Indonesia and termination of the dumping investigation in relation to goods exported from Indonesia by Tjiwi Kimia

On 17 March 2017, the Commissioner terminated the countervailing duty investigation relating to Indonesia.\(^{38,39}\)

The Commissioner found that countervailable subsidies had been received in respect of A4 copy paper exported to Australia from Indonesia during the investigation period. However, as the countervailable subsidies were found to be negligible in value for certain exporters and negligible in volume for the exports from Indonesia to Australia, the Indonesian countervailing duty investigation was terminated.\(^{40}\)

On 17 March 2017, the Commissioner terminated the dumping investigation in relation to Tjiwi Kimia,\(^{41}\) one of the SMG exporters. The Commissioner found that the goods exported by Tjiwi Kimia were not dumped, and therefore terminated the investigation with respect to that exporter.\(^{42}\)

\(^{38}\) Final Report, Exhibit IDN-04, section 1.3, p. 9 and section 7.1.4, p. 76.


\(^{40}\) Final Report, Exhibit IDN-04, section 1.3, p. 9 and section 7.1.4, p. 76.

\(^{41}\) Final Report, Exhibit IDN-04, section 1.3, p. 8 and section 6.9.8.1.6, p. 63.

\(^{42}\) Termination Report, Exhibit IDN-07, section 1.2, p. 7 and section 4.7, p. 25.
(e) The Final Report

78. On 17 March 2017, the Commissioner completed Final Report No. 341 in relation to Investigation 341.\textsuperscript{43}

79. The Commissioner found that, \textit{inter alia},:

- there was an Australian industry producing goods that closely resembled the goods under consideration, which were therefore like goods;\textsuperscript{44}

- the volume of dumped goods from Indonesia was greater than 3\% of total import volumes and was therefore not negligible;\textsuperscript{45}

- the Australian industry experienced injury as follows: loss of sales volume, price suppression, price depression, reduced profits and profitability, and reduced revenue from A4 copy paper;\textsuperscript{46}

- dumped exports of A4 copy paper from Brazil, Indonesia (with the exception of exports from Tjiwi Kimia which were not at dumped prices) and Thailand, and dumped and subsidised exports of A4 copy paper from China, caused material injury to the Australian industry producing like goods;\textsuperscript{47}

- it would be appropriate to consider the cumulative effect of the dumped imports from Brazil, China, Indonesia and Thailand given the conditions of competition in the Australian market;\textsuperscript{48} and

- in the future, exports of A4 copy paper from Brazil, Indonesia and Thailand may be at dumped prices, and, in the future, exports of A4 copy paper from China may be at dumped and subsidised prices, and that continued dumping and subsidisation may continue to cause material injury to the Australian industry.\textsuperscript{49}

\textsuperscript{43} Final Report, Exhibit IDN-04.
\textsuperscript{44} Final Report, Exhibit IDN-04, section 3.1, p. 22.
\textsuperscript{45} Final Report, Exhibit IDN-04, section 6.12, p. 74.
\textsuperscript{46} Final Report, Exhibit IDN-04, section 8.1, p. 82.
\textsuperscript{47} Final Report, Exhibit IDN-04, section 9.1, p. 91.
\textsuperscript{48} Final Report, Exhibit IDN-04, section 9.4.5, p. 100.
\textsuperscript{49} Final Report, Exhibit IDN-04, section 10.1, p. 118.
80. The Commissioner made the following recommendations to the responsible Minister relevant to Indonesia, *inter alia*:

- that a particular market situation existed in Indonesia, such that domestic selling prices were not suitable for determining normal values;\(^{50}\)

- that the normal values for Indah Kiat, Pindo Deli and RAK were to be determined as the sum of:
  - the cost of production or manufacture of A4 copy paper in Indonesia; and
  - on the assumption that A4 copy paper, instead of being exported, had been sold for home consumption in the ordinary course of trade in Indonesia, the administrative, selling and general costs associated with that sale and the profit on that sale;\(^{51}\)

- that the dumping margin be calculated as the difference between the weighted average of export prices over the investigation period and the weighted average of corresponding normal values over that period;\(^{52}\) and

- that anti-dumping duties be imposed in respect of certain A4 copy paper exports from Indonesia.\(^{53}\)

3. Decision of the responsible Minister

81. The Final Report containing the Commissioner's findings was provided to the responsible Minister on 17 March 2017.

82. On 18 April 2017, the responsible Minister signed a notice declaring that the goods under investigation were subject to anti-dumping duties.\(^{54}\)

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\(^{50}\) Final Report, Exhibit IDN-04, section 13, p. 133.

\(^{51}\) This total was adjusted so as to ensure that the normal value was properly comparable with the export price (Final Report, Exhibit IDN-04, section 13, p. 136).

\(^{52}\) Final Report, Exhibit IDN-04, section 13, p. 133.

\(^{53}\) Final Report, Exhibit IDN-04, section 13, p. 131.

\(^{54}\) Notice pursuant to subsection 8(5) of the *Customs Tariff (Anti-Dumping) Act 1975* - 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, 18 April 2017, Exhibit AUS-09.
83. On 18 April 2017, the responsible Minister also signed a public notice outlining the findings in relation to the dumping investigation. The responsible Minister found dumping margins for Indonesian exporters (except Tjiwi Kimia) and found that the Australian industry had been injured by dumping.  

4. Independent merits review

84. Applications for independent merits review were received from, amongst others, the Government of Indonesia, SMG, and RAK and a successor company to AFPT.  

85. Relevantly, the Indonesian parties sought review of:  

- the finding that a particular market situation existed (Government of Indonesia and SMG),  
- the findings in respect of Indah Kiat's and Pindo Deli’s recorded costs (SMG);  
- the findings to not apply a downward adjustment to Indah Kiat's and Pindo Deli’s normal values for their domestic sales intermediary's sales margin (SMG), and  
- the calculation of RAK's "normal value" (RAK and the successor company to AFPT).

86. The Anti-Dumping Review Panel found that the Government of Indonesia, and RAK and the successor company to AFPT, had failed to demonstrate that the decisions they appealed were not the correct or preferable decisions and their grounds for appeal were rejected.
The Anti-Dumping Review Panel recommended that the responsible Minister revoke the decisions in relation to Indah Kiat and Pindo Deli, respectively, to not apply a downward adjustment to their respective normal values for their domestic sales intermediary's sales margin.\textsuperscript{63}

This recommendation was adopted by the responsible Minister.\textsuperscript{64} The effect was to reduce the interim anti-dumping duty rate on Indah Kiat from 35.4\% to 30\% and to reduce the interim anti-dumping duty rate on Pindo Deli from 38.6\% to 33\%. This reduction in the interim anti-dumping duty payable by Indah Kiat and Pindo Deli is not reflected in Indonesia's first written submission.\textsuperscript{65}

5. Judicial review

Two non-Indonesian interested parties made applications to the Federal Court of Australia seeking review of certain aspects of the responsible Minister's decision. However, the Indonesian exporters and the Government of Indonesia have not sought judicial review of the decisions made by the Commissioner or the responsible Minister.

\textsuperscript{63} ADRP Report, Exhibit AUS-10, paras. 588-589.
\textsuperscript{64} The decision was signed by the responsible Minister on 9 March 2018 and published on the website of the Anti-Dumping Review Panel on the same day. See Public Notice under Section 269ZZM(4) of the \textit{Customs Act 1901} - 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, 9 March 2018, Exhibit AUS-11.
\textsuperscript{65} Indonesia's first written submission, paras. 15, 23 and 176.
IV. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE 2.2 IN DISREGARDING INDONESIAN DOMESTIC PRICES IN DETERMINING THE "NORMAL VALUE"

A. ANTI-DUMPING DUTIES ARE A VALID AND PERMISSIBLE RESPONSE TO INJURIOUS DUMPING

90. Article VI of the GATT 1994 concerns "Anti-dumping and Countervailing Duties". Article VI:1 of the GATT 1994 confirms that WTO Members recognise that dumping is to be condemned if it causes or threatens material injury to an established industry in the territory of a WTO Member, or materially retards the establishment of a domestic industry.

91. Article VI:2 of the GATT 1994 provides that a WTO Member may levy on a dumped product an anti-dumping duty not greater in amount than the margin of dumping in order to offset or prevent dumping.

92. The Anti-Dumping Agreement governs the application of Article VI of the GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.66

93. Anti-dumping duties are thus a valid and permissible response to something that is to be condemned, being injurious dumping.

94. Indonesia, however, throughout its first written submission, appears to suggest that validly determined and levied anti-dumping duties constitute some sort of "exception" to Article I and Article II of the GATT 1994.67 Moreover, it seeks to invoke language from actual exceptions contained within the WTO Agreements, such as Article XX of the GATT 1994, to argue that provisions in the Anti-Dumping Agreement should be interpreted in a limited and narrow way.68

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66 See Article 1 of the Anti-Dumping Agreement.
67 Indonesia's first written submission, paras. 42, 48, 55 and 103.
68 Indonesia's first written submission, paras. 29, 30, 32, 42, and 55-57.
This clearly incorrect characterisation underpins a number of the fundamental legal errors contained in Indonesia’s first written submission, particularly those relating to the correct legal interpretation of the core terms in the Anti-Dumping Agreement that are at issue in this dispute. By invoking these characterisations, Indonesia seeks to promote a more restrictive interpretation of those core terms than is warranted by an examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the rules of treaty interpretation contained in Articles 31 and 32 of the Vienna Convention. Indonesia goes beyond what would be warranted even if any of the core terms it has addressed were exceptions.

B. BECAUSE OF THE "PARTICULAR MARKET SITUATION", INDONESIAN DOMESTIC SALES OF A4 COPY PAPER DID NOT "PERMIT A PROPER COMPARISON" WITH EXPORT PRICES

1. Introduction

Indonesia claims that Australia acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because:

- it "disregarded domestic market sales and calculated normal value using constructed normal value based on a "particular market situation" finding … [that] was based on an incorrect interpretation of that treaty term"; 69 and

- it "resort[ed] to constructed normal value based solely on the finding of a "particular market situation" without assessing whether the existence of the "particular market situation" prevented a proper comparison of domestic market prices and, thus, the ability to determine whether price discrimination was occurring". 70

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69 Indonesia's first written submission, para. 2.
70 Indonesia's first written submission, para. 2.
2. A "particular market situation" is a condition, state or combination of circumstances in respect of the buying and selling of the like product that is distinguishable and not general.

97. The meaning of "particular market situation" is clear from its ordinary meaning, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement.

98. The ordinary meaning of the word "particular" is "pertaining or relating to a single definite thing or person, or set of things or persons, as distinguished from others; of or belonging to some one thing (etc.) and not to any other, or to some and not to all; ... special; not general". The ordinary meaning of the word "market", in the context of Article 2, is "the action or business of buying and selling" and "sale as controlled by supply and demand". The ordinary meaning of the word "situation", in the context of Article 2, is "condition or state (of anything)" and "position of affairs; combination of circumstances".

99. The term "particular market situation" appears in Article 2 of the Anti-Dumping Agreement, which is titled and is concerned with the "Determination of Dumping". It is located in Article 2.2 of the Anti-Dumping Agreement, which describes certain circumstances under which the "normal value" of a product must be determined by reference to something other than "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

100. As stated by the Appellate Body in EC — Tube or Pipe Fittings:

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.

72 The Compact Oxford English Dictionary, p. 1038. (emphasis added)
73 The Compact Oxford English Dictionary, p. 1038.
74 The Compact Oxford English Dictionary, p. 1778. (emphasis added)
75 Article 2.1 of the Anti-Dumping Agreement.
76 Appellate Body Report, EC — Tube or Pipe Fittings, para. 94.
101. The term "particular market situation" thus forms part of one of the three conditions under which an investigating authority must derive the "normal value" by reference to either "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".\(^\text{77}\)

102. The other two conditions address circumstances in respect of sales of the like product in the market of the exporting country (that is, where there are "no sales in the exporting country of the like product in the ordinary course of trade" and where "sales in the exporting country's market do not "permit a proper comparison" because of their low volume").\(^\text{78}\)

103. In terms of context, the term "particular market situation" is thus located: (a) in the Article of the Anti-Dumping Agreement that is concerned with the "Determination of Dumping"; (b) within a paragraph of that Article that is concerned with describing certain conditions under which an alternative basis for determining "normal value" must be used; and (c) is co-located with the description of two such conditions that comprise specific circumstances in respect of sales of the like product in the market of the exporting country.

104. In this context, to give the term "particular market situation" meaning and effect, it must cover circumstances other than where there are "no sales in the exporting country of the like product in the ordinary course of trade", where "sales in the exporting country's market do not "permit a proper comparison" because of their low volume",\(^\text{79}\) and where there are "special difficulties … in determining price comparability"\(^\text{80}\) in circumstances where "imports [are] from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State".\(^\text{81}\)

\(^{77}\) Article 2.2 of the Anti-Dumping Agreement.

\(^{78}\) Appellate Body Report, \textit{EC — Tube or Pipe Fittings}, para. 94. (emphasis added)

\(^{79}\) Appellate Body Report, \textit{EC — Tube or Pipe Fittings}, para. 94.

\(^{80}\) See second \textit{Ad Note} to Article VI:1 of the GATT 1994.

\(^{81}\) See second \textit{Ad Note} to Article VI:1 of the GATT 1994.
105. In relation to the object and purpose of the Anti-Dumping Agreement, it does not contain a preamble or provisions which explicitly specify its object and purpose.\textsuperscript{82} However, as stated by the Appellate Body in \textit{EU – Biodiesel (Argentina)}:

\begin{quote}
Taken as a whole, the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures.\textsuperscript{83} (footnote omitted)
\end{quote}

106. Accordingly, the ordinary meaning of the term "particular market situation", interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement, is broad. It covers any condition, state or combination of circumstances\textsuperscript{84} in respect of the buying and selling\textsuperscript{85} of the like product (i.e. A4 copy paper) in the market of the exporting country (i.e. the market in Indonesia) that is distinguishable\textsuperscript{86} and not general.\textsuperscript{87}

107. This interpretation is fully consistent with the findings of the GATT panel in \textit{EC – Cotton Yarn}. At the time of that dispute, Article 2:4 of the Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Tokyo Round Anti-Dumping Code) read:

\begin{quote}
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…or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profit ….
\end{quote}

\textsuperscript{82} Panel Report, \textit{US – Corrosion-Resistant Steel Sunset Review}, para. 7.44; and Appellate Body Reports, \textit{US – Softwood Lumber V (Article 21.5 – Canada)}, para. 118; and \textit{EU – Biodiesel (Argentina)}, para. 6.25.
\textsuperscript{83} Appellate Body, \textit{EU – Biodiesel (Argentina)}, para. 6.25.
\textsuperscript{84} See above para. 98.
\textsuperscript{85} See above para. 98.
\textsuperscript{86} See above para. 98.
\textsuperscript{87} See above para. 98.
108. Brazil argued, *inter alia*, that the EC had violated Article 2:4 of the Tokyo Round Anti-Dumping Code because it failed to take into consideration the "particular market situation" that prevailed in Brazil during the investigation period, and therefore calculated its dumping margin on the basis of a "normal value" (i.e. domestic prices) that did not provide for a proper comparison.\(^\text{88}\)

109. Brazil argued that it had frozen its exchange rate in order to control high inflation. But domestic prices continued to rise, while export earnings (converted into the Brazilian currency) remained stable. This led to a gross distortion in the comparison between domestic prices (when used as the basis for the "normal value") and export prices.\(^\text{89}\) It argued that this "particular market situation" meant that a "proper comparison" was not possible between domestic sales and export prices and that the EC should have used sales to third country markets as the basis for "normal value".\(^\text{90}\)

110. The GATT panel stated:

> [R]ecourse to use of constructed value or third country sales … was governed by whether or not the sales concerned would permit a proper comparison, due to the particular market situation. In the Panel's view, the wording of Article 2:4 made it clear that the test for having any such recourse 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. In the Panel's view, therefore, Article 2:4 specified that there must be something intrinsic to the nature of the sales themselves that dictates they cannot 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 … Brazil had not specified its claim in the form of any argument showing that the prices used as a basis of normal value were themselves so affected by the combination of high domestic inflation and a fixed exchange rate such that those sales did not permit a proper comparison. Accordingly, the Panel concluded on the basis of Brazil's submission, that this did not demonstrate that the EC had acted inconsistently with the requirements of Article 2:4.\(^\text{91}\) (emphasis original)

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111. Although a decision of a GATT panel on a predecessor to the Anti-Dumping Agreement is not binding on the parties to this dispute or on this Panel, Australia notes that a condition, state or combination of circumstances in respect of the buying and selling of A4 copy paper in Indonesia (i.e. in respect of "the sales" of such paper in Indonesia) that is distinguishable and not general is "something intrinsic to the nature of the sales themselves".  

112. Thus, the proper interpretation of the term "particular market situation", interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement, is any condition, state or combination of circumstances in respect of the buying and selling of the like product (i.e. A4 copy paper) in the market of the exporting country (i.e. the market in Indonesia) that is distinguishable and not general.

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

113. We now turn to whether Australia properly established that there was a "particular market situation".

114. In Appendix 2 to the Final Report (titled "Particular market situation findings"), the Anti-Dumping Commission found, inter alia, that:

- "[t]he [two] main Indonesian producers of A4 copy paper … are integrated paper producers with their own upstream raw materials and input facilities" and that they "account for around 90 per cent of Indonesian [pulp] capacity";

- "50 to 60 per cent of total [pulp] production" in Indonesia is consumed in Indonesia.

The rest is exported;

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93 See above para. 98.
94 See above para. 98.
95 See above para. 98.
96 See above para. 98.
97 Final Report, Exhibit IDN-04, section A2.9.3, p. 173. (footnote omitted)
98 Final Report, Exhibit IDN-04, section A2.9.2.3, p. 167.
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- "no [export] tariff applied to … pulp and … there [were] no export quotas for pulp"\textsuperscript{100} and "Latin American or Brazilian based benchmarks and Indonesian export based benchmarks are broadly aligned [and] reflect competitive market prices"\textsuperscript{101}
- policies and programs of the Government of Indonesia "have affected the structure and development of Indonesia's forestry sector and increased the supply of timber"\textsuperscript{102}
- "an export ban imposed by the [Government of Indonesia] on logs distorts the domestic supply of timber"\textsuperscript{103} and "the net impact of the export ban on Indonesian logs [is] … reduced prices"\textsuperscript{104}
- "around 50 per cent of logs used by the Indonesian forestry sector are consumed in pulp production"\textsuperscript{105}
- "pulp is a key raw material input to paper"\textsuperscript{106} and "typically comprises between 60 to 65 per cent of the total cost of A4 copy paper"\textsuperscript{107}
- "the Indonesian pulp industry has [thus] been the largest beneficiary of the resulting increased access to timber"\textsuperscript{108} and "the primary beneficiary of identified timber-related [Government of Indonesia] policies and programs was the Indonesian pulp industry"\textsuperscript{109}
- "[Government of Indonesia] programs have increased the availability of timber relative to demand and hence artificially lower[ed] prices for Indonesian logs and pulp … [W]ithout these interventions, the price for timber and pulp [in Indonesia] would be above prices that prevailed during the investigation period"\textsuperscript{110}

\textsuperscript{100} Final Report, Exhibit IDN-04, section A.2.9.2.6, p. 170.
\textsuperscript{101} Final Report, Exhibit IDN-04, section 2.8.6.3, p. 165.
\textsuperscript{102} Final Report, Exhibit IDN-04, section A2.9.2.4, p. 168
\textsuperscript{103} Final Report, Exhibit IDN-04, section A2.9.2.6, p. 170.
\textsuperscript{104} Final Report, Exhibit IDN-04, section A2.9.2.6, p. 172.
\textsuperscript{105} Final Report, Exhibit IDN-04, section A2.9.2.1, p. 166.
\textsuperscript{106} Final Report, Exhibit IDN-04, section A2.7.1, p. 151.
\textsuperscript{107} Final Report, Exhibit IDN-04, section A2.7.1, footnote 211, p. 151.
\textsuperscript{108} Final Report, Exhibit IDN-04, section A2.9.2.4, p. 168.
\textsuperscript{109} Final Report, Exhibit IDN-04, section A2.9.3.1, p. 173.
\textsuperscript{110} Final Report, Exhibit IDN-04, section A2.9.4, p.174.
"the [Government of Indonesia's] support for the forestry and pulp industry … is effected through programs that support the expansion of timber plantations and restrict timber exports. These programs have resulted in distortions in the Indonesian forestry and pulp industries and ultimately the domestic price for A4 copy paper";¹¹¹

"Indonesian A4 copy paper producers have benefited through access to cheaper pulp including from related parties for integrated paper producers … [A]ccess to cheap pulp has improved the international competitiveness of Indonesian paper producers …";¹¹²

"without the[] interventions … higher input costs would be reflected in higher domestic prices for A4 copy paper";¹¹³ and

"the domestic price of Indonesian A4 copy paper is significantly below comparable regional benchmarks … [T]he distortion of the domestic price for A4 copy paper directly results from Government of Indonesia involvement in the forestry and pulp industries through its support for development of timber plantations and prohibition on exporting of timber logs".¹¹⁴

In summary, the Anti-Dumping Commission found that:

- programs and policies of the Government of Indonesia and the export ban on logs increased the supply of logs in Indonesia and thereby lowered the cost and price of logs and hardwood pulp¹¹⁵ in Indonesia;

- the lowered cost and price of logs and hardwood pulp in Indonesia induced and allowed the main Indonesian A4 copy paper producers (SMG and APRIL Group), which are integrated A4 copy paper producers with their own upstream pulp facilities,¹¹⁶ to supply more A4 copy paper at each possible price point than they otherwise would have; and

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¹¹¹ Final Report, Exhibit IDN-04, section A2.9.6.5, p. 183.
¹¹² Final Report, Exhibit IDN-04, section A2.9.3.1, p.173.
¹¹⁵ The term "hardwood pulp" is used in this submission to refer to pulp that is made from hardwood trees such as acacia and eucalyptus, which is the predominant pulp used in the production of non-recycled A4 copy paper. The production of A4 copy paper also requires a small volume of pulp made from softwood trees such as pine. Such pulp is not produced in Indonesia.
• the resultant price of A4 copy paper in Indonesia was the end result of the interactions between those selling, and those buying, A4 copy paper in Indonesia. The resultant price of A4 copy paper in Indonesia was artificially low,\(^{117}\) was significantly below regional benchmarks,\(^ {118}\) and reflected the lowered cost and price of logs and hardwood pulp in Indonesia that resulted from the programs and policies of the Government of Indonesia.\(^ {119}\)

116. Taken together, the factors outlined at paragraphs 114 to 115 clearly demonstrate a "particular market situation" within Article 2.2 of the Anti-Dumping Agreement, being a condition, state or combination of circumstances in respect of the buying and selling of A4 copy paper in Indonesia that was distinguishable and not general.\(^ {120}\)

117. In addition, these factors were, to paraphrase the GATT panel report in \textit{EC — Cotton Yarn}, intrinsic to the nature of the sales of A4 copy paper themselves.\(^ {121}\)

4. To "permit a proper comparison" is to allow a suitable and accurate comparison to ascertain whether the product is to be considered as being dumped and to determine the margin of dumping.

118. The Appellate Body has stated that the effect of Article 2.2 is that an alternative basis for deriving the "normal value" must be relied upon by an investigating authority where sales in the exporting country's market do not "permit a proper comparison" with the export price because of "the particular market situation".\(^ {122}\)

\(^{117}\) The Final Report states: "The Commission compared Indonesian and Chinese domestic prices with a number of regional benchmark prices to determine whether Indonesian and Chinese domestic prices [of A4 copy paper] were artificially low" (Final Report, Exhibit IDN-04, section A2.7.4, p. 153); and refers to the finding of the Anti-Dumping Commission "that Indonesian domestic prices [of A4 copy paper] are artificially low" (Final Report, Exhibit IDN-04, section A2.9.2.2, p. 167).

\(^{118}\) The Final Report states: "[T]he domestic price of Indonesian A4 copy paper is significantly below comparable regional benchmarks" (Final Report, Exhibit IDN-04, section A2.9.4, p. 173).

\(^{119}\) The Final Report states: "… [Government of Indonesia] programs have increased the availability of timber relative to demand and hence artificially lower[ed] prices for Indonesian logs and pulp … [W]ithout these interventions, the price for timber and pulp would [have] be[en] above prices that prevailed during the investigation period and … these higher input costs would [have] be[en] reflected in higher domestic prices for A4 copy paper" (Final Report, Exhibit IDN-04, section A2.9.4, p. 174).

\(^{120}\) See above para. 112.

\(^{121}\) GATT panel report, \textit{EC — Cotton Yarn}, para. 478.

\(^{122}\) Appellate Body Report, \textit{EC — Tube or Pipe Fittings}, para. 94.
119. The GATT panel in *EC — Cotton Yarn* recognised that a "particular market situation" is only relevant insofar as it has the effect of rendering the sales themselves unfit to permit a proper comparison.\(^{123}\)

120. Articles 2.1 and 2.2 concern the methodology for determining "normal value". This is the starting point of the dumping calculation. At this stage of the dumping calculation, the method of establishing the "normal value" of the like product must provide a foundation that "permit[s] a proper comparison" with the export price.

121. We therefore now turn to a consideration of the term "permit a proper comparison".

122. The meaning of "permit a proper comparison" is clear from its ordinary meaning, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement.

123. The ordinary meaning of the word "permit", in the context of Article 2 of the Anti-Dumping Agreement, is "to allow, suffer, give leave; not to prevent".\(^{124}\)

124. The ordinary meaning of the word "proper", in the context of Article 2, is "adapted to some purpose or requirement expressed or implied; fit, apt, suitable; fitting, befitting; esp. appropriate to the circumstances or conditions; what it should be, or what is required; such as one ought to do, have, use, etc.; right".\(^{125}\)

125. The meaning of the word "proper" has been considered by the Appellate Body in the context of Article 17.6(i) of the Anti-Dumping Agreement (which requires a panel, in its assessment of the facts of a matter, to "determine whether the authorities' establishment of the facts was proper"). The Appellate Body noted that the "ordinary meaning of "proper" suggests "accurate" or "correct"".\(^{126}\)

126. The ordinary meaning of the word "comparison", in the context of Article 2, is "the action, or an act, of comparing, or noting the similarities and differences of two or more things".\(^{127}\)

\(^{124}\) *The Compact Oxford English Dictionary*, p. 1313. (emphasis added)
\(^{125}\) *The Compact Oxford English Dictionary*, p. 1447. (emphasis added)
\(^{127}\) *The Compact Oxford English Dictionary*, p. 299.
127. The term "permit a proper comparison" appears in Article 2 of the Anti-Dumping Agreement, which is titled and is concerned with the "Determination of Dumping". Article 2.1 of the Anti-Dumping Agreement provides that, for the purposes of the Anti-Dumping Agreement, "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product … is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

128. Article 2.2 of the Anti-Dumping Agreement then describes certain conditions under which the "normal value" must be determined by reference to something other than "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".  

129. This recourse to an alternative basis to determine the "normal value" is required where there is not a "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" within Article 2.1 of the Anti-Dumping Agreement because:

- there are no sales of the like product in the ordinary course of trade in the exporting country's market; and/or

- sales in the exporting country's market do not "permit a proper comparison" (i.e. are not "comparable" to the export price) because of the "particular market situation" or because of their "low volume".

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128 Article 2.1 of the Anti-Dumping Agreement.

129 Australia notes that the ordinary meaning of the word "comparable", in the context of Article 2 of the Anti-Dumping Agreement, is "worthy of comparison; proper, or fit to be compared" (The Compact Oxford English Dictionary, p. 299, emphasis added).
130. Thus, in terms of context, the term "permit a proper comparison":

- is located in the Article of the Anti-Dumping Agreement that is concerned with the "Determination of Dumping";
- is located in the Article of the Anti-Dumping Agreement that is concerned with, inter alia, methods to determine the "normal value", methods to determine whether a product is to be considered as being dumped, and methods to determine the "margin of dumping";
- is located in the Article of the Anti-Dumping Agreement that effectively provides that the "normal value" is the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country", where such a price is available;
- is located within a paragraph of that Article that is concerned with describing certain conditions under which an investigating authority must use an alternative basis to determine the "normal value"; and
- forms part of two of the three situations that comprise specific circumstances under which an investigating authority must use an alternative basis to determine the "normal value".

131. Accordingly, the proper interpretation of the term "permit a proper comparison", interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement, is to allow a suitable and accurate comparison to:

- ascertain whether the product is to be considered as being dumped; and
- determine the margin of dumping.

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130 Article 2.1 of the Anti-Dumping Agreement.
131 That is, a basis different to "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" (Article 2.1 of the Anti-Dumping Agreement).
132 That is, a basis different to "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" (Article 2.1 of the Anti-Dumping Agreement).
133 See above para. 105 for a discussion of the object and purpose of the Anti-Dumping Agreement.
134 See above para. 123.
135 See above para. 124.
136 See above para. 125.
132. Restated in the terms of Article 2.2 of the Anti-Dumping Agreement to reflect the circumstances of the dispute before this Panel, sales of A4 copy paper in Indonesia would not "permit a proper comparison" where using the resultant domestic prices as the basis for the "normal value" would not allow the Anti-Dumping Commission to conduct a suitable and accurate comparison to:

- ascertain whether the A4 copy paper is to be considered as being dumped; and
- determine the margin of dumping.

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

(a) **Introduction**

133. The Anti-Dumping Agreement does not explicitly identify the factors that will determine whether or not using the domestic price as the basis for the "normal value" would allow an investigating authority to conduct a suitable and accurate comparison to:

- ascertain whether the like product is to be considered as being dumped; and/or
- determine the margin of dumping.

134. However, the characteristics of such factors can be identified from the context provided by Article VI of the GATT 1994, the second Ad Note to Article VI:1 of the GATT 1994, and Article 2 of the Anti-Dumping Agreement.

(b) **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**

135. Indonesia asserts that "dumping is an exporter-specific inquiry without relation to government involvement".\(^{137}\) That is incorrect. Government intervention is a factor that can result in the domestic price not being suitable to use as the basis for the "normal value" because the affected domestic sales do not permit a proper comparison with the export price.

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\(^{137}\) Indonesia's first written submission, para. 93.
136. For example, Article 2.7 of the Anti-Dumping Agreement and the second *Ad* Note to Article VI:1 of the GATT 1994 recognise that one instance where the domestic price may not be suitable for use as the basis for the "normal value" is where imports are "from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State"138 (i.e. where there is a certain type of government intervention that affects domestic prices).

137. Thus, in *EC — Fasteners (China)*, the Appellate Body stated that:

> The second *Ad* Note to Article VI:1 recognizes that, in the cases of imports from countries where the State has a complete or substantially complete monopoly of trade and where all domestic prices are fixed by the State, importing Members may determine that a comparison with domestic prices in such a country may not be appropriate due to special difficulties in determining price comparability. This provision 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.139 (emphasis added)

138. Subsequently, in *EC — Fasteners (China) (Article 21.5 – China)*, the Appellate Body further reasoned as follows:

> We recall that the rationale for determining normal value on the basis of the domestic prices of Pooja Forge was that the Chinese producers had not clearly shown that market economy conditions prevail in the fasteners industry in China. Costs and prices in the Chinese fasteners industry thus cannot, in this case, serve as reliable benchmarks to determine normal value. In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted. Based on the foregoing, an investigating authority can reject a request for an adjustment if such adjustment would effectively reflect a cost or price that was found to be distorted in the *exporting country* in the normal value component of the comparison that is contemplated under Article 2.4 of the Anti-Dumping Agreement. Accordingly, an investigating authority has to "take steps to achieve clarity as to the adjustment claimed" and determine whether, on its merits, the adjustment is warranted because it reflects a difference affecting price comparability or whether it would lead to adjusting back to costs or prices that were found to be distorted in the *exporting country*.140 (emphasis added, footnotes omitted)

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138 See the second *Ad* Note to Article VI:1 of the GATT 1994.
140 Appellate Body Report, *EC — Fasteners (China) (Article 21.5 – China)*, para. 5.207. (emphasis added)
139. Although made in the context of the second *Ad* Note to Article VI:1 of the GATT 1994, Article 2.4 of the Anti-Dumping Agreement, and section 15(a) of China's Accession Protocol, these passages clearly recognise that government intervention that distorts costs and prices of inputs and the price of the like product in the domestic market of the exporting country can preclude a "proper comparison" between domestic sales and the export price. That is, such government intervention can result in the domestic price not being suitable to use as the basis for the "normal value" (and, in addition, can result in domestic costs not being suitable to determine the constructed normal value). Whether or not it does so in a particular case will depend on the facts and circumstances and must be determined on a case-by-case basis.

(c) 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

140. The Appellate Body in *US – Hot-Rolled Steel* 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. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.

We can envisage many reasons for which transactions might not be "in the ordinary course of trade". For instance, where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically independent, transacted at market prices, the sale effectively involves a transfer of goods within a single economic enterprise. In that situation, there is reason to suppose that the sales price might be fixed according to criteria which are not those of the marketplace. (emphasis original)

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141 Australia also notes that the GATT Panel in *EC – Cotton Yarn* contemplated that, "assuming arguendo" that the freezing of an exchange rate – a form of government intervention – constituted a "particular market situation", then if it affected the cost of raw materials, it could affect domestic sales (and prices) such that they did not "permit a proper comparison" with the export price (GATT Panel Report, *EC — Cotton Yarn*, para. 479).

141. The Appellate Body has thus recognised that a domestic price will not be suitable to use as the basis for the "normal value" where:

- it is the result of sales transactions concluded on terms and conditions that are incompatible with normal commercial practice; and

- it is fixed according to criteria which are not those of the marketplace.

142. Of course, US – Hot-Rolled Steel considered a situation where the domestic sales were not in the "ordinary course of trade" rather than the situation before this Panel of a "particular market situation". However, both situations relate to determining whether the domestic price is suitable to use as the basis for the "normal value". US – Hot-Rolled Steel therefore suggests that, where there is a "particular market situation" (including one arising from government intervention), a relevant factor for an investigating authority to consider in determining whether the domestic sales "permit a proper comparison" is whether the "particular market situation" has resulted in the domestic price being:

- fixed in a manner incompatible with normal commercial practice; and/or

- fixed according to criteria which are not those of the marketplace.

(d) The findings of the Anti-Dumping Commission

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

- the domestic price of A4 copy paper was affected by government intervention that distorted costs and prices; and/or

- the "particular market situation" meant that the domestic price of A4 copy paper was fixed in a manner incompatible with normal commercial practice; and/or

- the "particular market situation" meant that the domestic price of A4 copy paper was fixed according to criteria which were not those of the marketplace.
This is exactly what the Anti-Dumping Commission did. It concluded that:

- "the policies and programs [of the Government of Indonesia] … have affected the structure and development of Indonesia's forestry sector and increased the supply of timber", 143
- "an export ban imposed by the [Government of Indonesia] on logs distorts the domestic supply of timber" 144 and "the net impact of the export ban on Indonesian logs … [is] reduced prices", 145
- "the cost of producing pulp was substantially less than a competitive benchmark… the actual cost of pulp recorded by exporters in their records does not reasonably reflect a competitive market cost", 146
- "pulp is proportionally the largest cost component for the production of the goods and like goods", 147
- "the primary beneficiary of identified timber-related [Government of Indonesia] policies and programs was the Indonesian pulp industry", "this finding is significant in assessing a market situation in the Indonesian A4 copy paper market", and "Indonesian A4 copy paper producers have benefited through access to cheaper pulp including from related parties for integrated paper producers such as [SMG]", 148
- "the significant influence of the Government of Indonesia … within the forestry and pulp industries has distorted prices in the paper industry and the paper market in Indonesia", 149
- "Indonesian domestic prices [of A4 copy paper] are artificially low", 150
- "[t]he domestic price of Indonesian A4 copy paper is significantly below comparable regional benchmarks", 151

143 Final Report, Exhibit IDN-04, section A2.9.2.4, p. 168. (emphasis added)
144 Final Report, Exhibit IDN-04, section A2.9.2.6, p. 170. (emphasis added)
145 Final Report, Exhibit IDN-04, section A2.9.2.6, p. 172. (emphasis added)
146 Final Report, Exhibit IDN-04, section 6.9.1, p. 51. (emphasis added)
147 Final Report, Exhibit IDN-04, section 6.9.1, p. 51. (emphasis added)
148 Final Report, Exhibit IDN-04, section A2.9.3.1, p. 173. (emphasis added)
149 Final Report, Exhibit IDN-04, section A2.9.2.2, p. 167. (emphasis added)
150 Final Report, Exhibit IDN-04, section A2.9.1, p. 165. (emphasis added)
151 Final Report, Exhibit IDN-04, section A2.9.1, p. 165. (emphasis added)
Australia – Anti-Dumping Measures on A4 Copy Paper (DS529)

Australia’s First Written Submission
7 November 2018

- "[t]he [Government of Indonesia] exerts significant influence over the Indonesian timber and pulp industries through various programs and policies … [T]hese programs and policies have rendered Indonesian domestic A4 copy paper prices unsuitable for determining normal values'',\textsuperscript{152}

- "[t]he [Government of Indonesia's] involvement in forestry and pulp industries through its support for the development of timber plantations and its prohibition on the export of timber logs has directly resulted in the distortion of the domestic price for A4 copy paper'',\textsuperscript{153} and

- "there is a market situation in the Indonesian A4 copy paper market such that sales in that market are not suitable for use in determining [normal value]''.\textsuperscript{154}

145. The Anti-Dumping Commission additionally noted that it had purchased a report on global timber costs so as to "address concerns expressed by the [Government of Indonesia] and SMG that the [Anti-Dumping] Commission had not adequately accounted for" the alleged fact that it was cheaper to produce the timber used to produce A4 copy paper in Indonesia than in other countries.\textsuperscript{155}

\textsuperscript{152} Final Report, Exhibit IDN-04, section A2.2, p. 146. (emphasis added)
\textsuperscript{153} Final Report, Exhibit IDN-04, section A2.9.1, p. 165. (emphasis added)
\textsuperscript{154} Final Report, Exhibit IDN-04, section 6.5, p. 36. (emphasis added)
\textsuperscript{155} Final Report, Exhibit IDN-04, section A2.5.1, p. 150.
146. Thus, the Anti-Dumping Commission took steps to assess the extent to which the low cost and price of logs in Indonesia (and hence the lowered domestic price of A4 copy paper in Indonesia) might be the result of lower timber growing costs in Indonesia (i.e. the result of an inherent competitive advantage in log production held by Indonesia) as opposed to the result of government intervention – this examination showed, contrary to the claims of the Government of Indonesia during the investigation,\(^\text{156}\) that, "for Indonesia's primary pulpwood (acacia), it is more costly to produce timber in Indonesia than in other Asian countries"\(^\text{157}\) and "growing costs for acacia pulpwood in Indonesia were the highest in Asia"\(^\text{158, 159}\).

147. The Anti-Dumping Commission undertook a comprehensive assessment of the facts related to whether the "particular market situation" resulted in domestic sales that were “not suitable”\(^\text{160}\) to use as the basis for the "normal value" (i.e. such sales would not permit a proper comparison with the export price). It found that there was government intervention. It found that this government intervention materially reduced the cost and price of logs and hardwood pulp in Indonesia and distorted the price of A4 copy paper in Indonesia such that the domestic sales were not suitable to use as the basis for the "normal value". It found that the domestic price was distorted, artificially low, below regional benchmarks, and reflected the lowered cost and price of logs and hardwood pulp in Indonesia that resulted from the programs and policies of the Government of Indonesia.

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

\(^{156}\) Final Report, Exhibit IDN-04, section A2.5.1, p. 150; see also section 2.9.2.2, p. 166 and section A2.9.6.12, p. 186.

\(^{157}\) Final Report, Exhibit IDN-04, section A2.9.2.2, p. 166. (emphasis added)

\(^{158}\) (footnote original) Growing costs included the following costs: operational costs (land, sit[e] preparation, pest control, maintained [sic], administration); stumpage and harvesting costs. In regard to the Asia region, the RISI Review found that growing costs for acacia pulpwod within: the Philippines ranged between USD 10 to 22 m\(^3\) (mean of USD 15 m\(^3\)); Malaysia ranged between USD 14 to 28 m\(^3\) (mean of USD 18 m\(^3\)); Laos ranged between USD 14 to 39 m\(^3\) (mean of USD 22 m\(^3\)); Vietnam ranged between USD 15 to 47 m\(^3\) (mean of USD 22 m\(^3\)); and Indonesia ranged between USD 17 to 49 m\(^3\) (mean of USD 32 m\(^3\)).

\(^{159}\) Final Report, Exhibit IDN-04, section A2.5.1, p. 150. (emphasis added)

\(^{160}\) Final Report, Exhibit IDN-04, section 6.5, p. 36.
During its assessment, the Anti-Dumping Commission considered and responded to extensive arguments from interested parties. It properly established the relevant facts, evaluated them in an unbiased and objective manner, and came to a conclusion that was consistent with the legal position discussed above.

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

Indonesia's claims and arguments are predicated on incorrect descriptions of the practice and findings of the Anti-Dumping Commission in respect of "particular market situation" and "permit a proper comparison".

The table in Exhibit AUS-12 contains 18 different descriptions that Indonesia makes of the practice and findings of the Anti-Dumping Commission in respect of "particular market situation" and "permit a proper comparison" – they are all incorrect.

Those 18 incorrect descriptions appear designed to convince the Panel that, in general, and in the investigation before this Panel in particular:

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

Australia's legislation, the Manual, the Statement of Essential Facts and the Final Report all clearly show that the Anti-Dumping Commission engages in a two-step analysis in respect of "particular market situation" and "permit a proper comparison". That is what's required by Australian law. It is what's set out in the Manual. And it was clearly done in the investigation before this Panel. This is illustrated in the table in Exhibit AUS-13.

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161 The Anti-Dumping Commission expressly found that: (a) "[T]here is a market situation in the Indonesian A4 copy paper market such that sales in that market are not suitable for use in determining [normal value]" (Final Report, Exhibit IDN-04, section 6.5, p. 36); (b) "[T]here is a particular market situation in Indonesia such that domestic selling prices are not suitable for determining normal value" (Final Report, Exhibit IDN-04, section 6.9.1, p. 50); (c) "[T]here 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" (Final Report, Exhibit IDN-04,
154. Indonesia's claims in respect of "particular market situation" and "permit a proper comparison" thus refer to practice and findings of the Anti-Dumping Commission that simply do not exist.

155. Contrary to Indonesia's first written submission:

- Australia does not find that a "particular market situation" exists every time that an input price is distorted – and, in the investigation that is before this Panel, the Anti-Dumping Commission undertook a detailed and exhaustive consideration of whether a "particular market situation" existed. This extended far beyond considering whether an input price was distorted.¹⁶²

- Australia does consider whether the domestic price would "permit a proper comparison" with the export price – and, in the investigation that is before this Panel, the Anti-Dumping Commission established and concluded that the domestic price was not suitable to use as the basis for the "normal value" i.e. that the domestic sales did not "permit a proper comparison" with the export price;¹⁶³ and

- Australia does not simply proceed directly to determining a constructed normal value.

7. Indonesia's arguments in respect of "particular market situation" have no merit

156. Building on its incorrect assertion that anti-dumping duties are an "exception" to Articles I and II of GATT 1994, Indonesia argues that a "particular market situation" is an "exceptional set of circumstances in the domestic market affecting comparability of domestic market prices in such a way as to affect them unilaterally".¹⁶⁴, ¹⁶⁵

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¹⁶² See above paras. 113-117.
¹⁶³ See above paras. 133-148.
¹⁶⁴ Indonesia's first written submission, para. 72.
¹⁶⁵ In fact, Indonesia provides at least 12 interpretations of "particular market situation" (see Exhibit AUS-14).
157. Indonesia further states that the term "particular market situation" should be given "the narrow meaning it was intended to have",\textsuperscript{166} that the "silence in the negotiating history is another indication that Australia's broad interpretation is incorrect",\textsuperscript{167} that Australia's approach is "in direct contradiction with the parties' intention not to include a provision [in the Anti-Dumping Agreement] governing input dumping",\textsuperscript{168} and that "government involvement … falls exclusively within the province of the SCM Agreement".\textsuperscript{169}

158. Indonesia has not conducted a proper Vienna Convention interpretation of the term "particular market situation". Although it purports to examine the ordinary meaning of that term, the dictionary definition of "particular" that it cites does not define that word as meaning "exceptional".\textsuperscript{170} And none of its dictionary definitions contain the word "unilaterally" or any word like it.

159. Indonesia provides no references or support for its assertion that "silence in the negotiating history"\textsuperscript{171} somehow supports its narrow interpretation of "particular market situation". That is because reaching or confirming an interpretation of a provision in a treaty based on the "silence in the negotiating history"\textsuperscript{172} has no basis whatsoever in the rules of treaty interpretation contained in Articles 31 and 32 of the Vienna Convention.

160. In relation to "input dumping", 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\textsuperscript{173} and, in any event, concerned a practice that is not before the Panel in this dispute.

\textsuperscript{166} Indonesia's first written submission, para. 30.
\textsuperscript{167} Indonesia's first written submission, para. 68.
\textsuperscript{168} Indonesia's first written submission, para. 70.
\textsuperscript{169} Indonesia's first written submission, para. 93.
\textsuperscript{170} Indonesia's first written submission, paras. 36-37.
\textsuperscript{171} Indonesia's first written submission, para. 68.
\textsuperscript{172} Indonesia's first written submission, para. 68.
\textsuperscript{173} The Draft Recommendation on Input Dumping was considered at five Meetings of the Committee on Anti-Dumping Practices between 1985 and 1987: 21 & 24 October 1985, 23 April 1986, 30 October 1986, 5 June 1987, and 26 & 28 October 1987. The Minutes of these Meetings record that the Draft Recommendation was never adopted by the Committee on Anti-Dumping Practices - see Committee on Anti-Dumping Practices, Minutes of the Meeting held on 21 and 24 October 1985, ADP/M/16, Exhibit AUS-15, paras. 77-85; Committee on Anti-Dumping Practices, Minutes of the Meeting held on 23 April 1986, ADP/M/17, Exhibit AUS-16, paras. 56-58; Committee on Anti-Dumping Practices, Minutes of the Meeting held on 30 October 1986, ADP/M/18, Exhibit AUS-17, paras. 95-98; Committee on Anti-Dumping Practices, Minutes of the Meeting held on 5 June 1987, ADP/M/19, Exhibit AUS-18, paras. 92-96; and Committee on Anti-Dumping Practices, Minutes of the Meeting held on 26 and 28 October 1987, ADP/M/20, Exhibit AUS-19, paras. 75-77.
161. Finally, it is simply incorrect that "government involvement" is exclusively covered by the SCM Agreement.174

8. Indonesia's arguments in respect of "permit a proper comparison" have no merit

162. Indonesia's entire argument in respect of "permit a proper comparison" is based on the assertion that the domestic price can only be discarded as the basis for the "normal value" if the "particular market situation" affects the domestic price but not the export price.175

163. It supports this argument by reference to the situations "when there are no sales in the ordinary course of trade and … when there is a low volume of sales" (i.e. the other situations covered by Article 2.2 of the Anti-Dumping Agreement). Indonesia refers to those two situations as not relating "to circumstances that also affect export prices"176 and asserts that, in both of those examples, "the effect is one-sided and on the domestic market".177 This is incorrect.

164. It is, in fact, quite possible for there to be export sales that are, in whole or in part, not in the ordinary course of trade. For example, it may be that export sales, as well as domestic sales, are not in the ordinary course of trade by reason of price if the exporter is selling at a price that is not profitable/recoverable178 in both the domestic market and the export market. In addition, there is no requirement in the GATT 1994 or the Anti-Dumping Agreement to even consider whether export sales are in the ordinary course of trade when deciding what to use for the "export price".

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174 See above paras. 135-143.
175 Indonesia states: "… 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" (Indonesia's first written submission, para. 72); and "sales in the domestic market can only be disregarded when they do not permit a “proper comparison” because of a situation that unilaterally affects domestic market prices but not export prices" (Indonesia's first written submission, para. 88).
176 Indonesia's first written submission, para. 40.
177 Indonesia's first written submission, para. 40.
178 Within the terms of Article 2.2.1 of the Anti-Dumping Agreement.
165. Put another way, where an exporter sells at the same ex-factory below-cost price to both the domestic market and the export market, both the domestic price and the export price are affected. Under Indonesia’s argument, there would be no dumping under these circumstances. Yet, contrary to Indonesia’s argument, in those circumstances the Anti-Dumping Agreement effectively requires that the domestic price be discarded and permits the determination of a constructed normal value, being an amount that covers all costs plus a reasonable amount for profit – dumping may well then be found to have occurred.

166. It is also quite possible for there to be a "low volume" of export sales as well as a low volume of "domestic sales". In addition, there is no requirement in the GATT 1994 or the Anti-Dumping Agreement to even consider whether export sales are of a "low volume" when deciding what to use for the "export price".

167. It is thus simply untrue that those two situations could not "also affect export prices", are "one-sided" and are "[only] on the domestic market". 179

168. Indonesia further argues that the domestic price of A4 copy paper "permit[ted] a proper comparison" with the "export price" because the "low price inputs" 180 "equally affect[ed] [the] domestic and export price [of A4 copy paper]". 181

169. But Indonesia provides no proof that the "low price inputs" 182 "equally affect[ed] [the] domestic and export price [of A4 copy paper]". 183
170. Furthermore, US – Anti-Dumping and Countervailing Duties (China) – the only dispute that Indonesia refers to in relation to this issue – was not about Article 2 of the Anti-Dumping Agreement. It was not a "particular market situation" dispute. It was not about the A4 copy paper market in Indonesia or the A4 copy paper market in Australia. It did not at all consider the extent to which the domestic price of A4 copy paper in Indonesia was affected by the "low-priced [hardwood pulp]" and how the export price of A4 copy paper was affected by the "low price [hardwood pulp]". How it can possibly show that the "low price inputs" in the investigation before this Panel "equally affect[ed] [the] domestic and export price [of A4 copy paper]" is never explained by Indonesia.

C. CONCLUSION

171. Australia has demonstrated that it properly established that there was a "particular market situation" within Article 2.2 of the Anti-Dumping Agreement.

172. Australia has also demonstrated that it properly established that, because of the "particular market situation", Indonesian domestic sales did not "permit a proper comparison" with export prices within Article 2.2 of the Anti-Dumping Agreement.

173. The Anti-Dumping Commission provided a reasoned and adequate explanation as to how the evidence supported its factual findings and how those factual findings supported its determinations186 that:

- "there is a market situation in the Indonesian A4 copy paper market such that sales in that market are not suitable for use in determining [normal value]";187
- "there is a particular market situation in Indonesia such that domestic selling prices are not suitable for determining normal value";188

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184 Indonesia’s first written submission, para. 118.
185 Indonesia’s first written submission, para. 121.
186 See above para. 37.
187 Final Report, Exhibit IDN-04, section 6.5, p. 36.
188 Final Report, Exhibit IDN-04, section 6.9.1, p. 50.
• "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";¹⁸⁹ and

• "domestic sales of A4 copy paper are unsuitable for use in determining normal value".¹⁹⁰

174. Indonesia has submitted no evidence that the Anti-Dumping Commission's establishment of the facts was not proper or that the Anti-Dumping Commission's evaluation was biased or not objective.¹⁹¹

175. Indonesia has failed to show that an "objective and impartial investigating authority could not properly have"¹⁹² made the determinations set out at paragraph 173.

176. The Panel should therefore reject Indonesia's claims that:

• Australia acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because it "disregarded domestic market sales and calculated normal value using constructed normal value based on a "particular market situation" finding … [that] was based on an incorrect interpretation of that treaty term";¹⁹³ and

• Australia acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because it "resort[ed] to constructed normal value based solely on the finding of a "particular market situation" without assessing whether the existence of the "particular market situation" prevented a proper comparison of domestic market prices and, thus, the ability to determine whether price discrimination was occurring".¹⁹⁴

¹⁸⁹ Final Report, Exhibit IDN-04, section A2.9.1, p. 165.
¹⁹⁰ Final Report, Exhibit IDN-04, section A2.9.6.8, p. 185.
¹⁹¹ See above para. 35.
¹⁹³ Indonesia's first written submission, para. 2.
¹⁹⁴ Indonesia's first written submission, para. 2.
V. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT IN ITS DETERMINATION OF THE CONSTRUCTED NORMAL VALUE OF A4 COPY PAPER

A. THE ANTI-DUMPING COMMISSION WAS NOT REQUIRED TO CALCULATE THE HARDWOOD PULP COMPONENT OF THE CONSTRUCTED NORMAL VALUE ON THE BASIS OF THE RECORDS OF INDAH KIAT AND PINDO DELI

1. Introduction

177. We have demonstrated that, "because of the particular market situation", Indonesian domestic sales did not "permit a proper comparison" with export prices within Article 2.2 of the Anti-Dumping Agreement.

178. The Appellate Body in EC — Tube or Pipe Fittings found that:

   Article 2.2 makes clear that an alternative basis for deriving "normal value" must be relied upon by an investigating authority where … sales in the exporting country's market do not "permit a proper comparison" [with the export price] because of "the particular market situation."  

179. The Anti-Dumping Commission was therefore required by Article 2.2 of the Anti-Dumping Agreement to determine the "normal value" of A4 copy paper as either:

   - the "comparable price of the like product when exported to an appropriate third country, provided that this price is representative" (hereafter referred to as "third country export price"); or

   - "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" (hereafter referred to as "constructed normal value").

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195 Appellate Body, EC — Tube or Pipe Fittings, para. 94.
180. Article 2.2 does not impose a hierarchy for using either a third country export price or a constructed normal value. The Anti-Dumping Commission chose to determine the "normal value" as the constructed normal value.

181. It is to this determination of the constructed normal value that we now turn.

182. Article 2.2.1.1 of the Anti-Dumping Agreement provides that:

For the purpose of [Article 2.2], costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations. (footnote omitted)

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

- the "records kept by the exporter or producer under investigation … are in accordance with the generally accepted accounting principles of the exporting country"; and
- the "records kept by the exporter or producer under investigation … reasonably reflect the costs associated with the production and sale of the product under consideration".

184. This submission will refer to these two conditions as the "two conditions in Article 2.2.1.1" and will refer to the second of these two conditions as the "second condition of Article 2.2.1.1".

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196 See Panel Report, US – OCTG (Korea), paras. 7.15-7.16.

197 The Final Report states: "[T]here is a particular market situation in Indonesia such that domestic selling prices are not suitable for determining normal value … and normal values must be constructed or determined on the basis of third country sales. The Commission constructed normal values" (Final Report, Exhibit IDN-04, section 6.9.1, p. 50, footnotes omitted).

198 Emphasis added.
185. Indonesia argues that Australia acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it "disregarded the actual costs recorded by [certain Indonesian] producers, despite the fact that those records were maintained in accordance with generally accepted accounting principles in Indonesia and reasonably reflected the cost [sic] associated with the production and sale of A4 copy paper in Indonesia". Indonesia further submits that "Australia's refusal to use the Indonesian producers' actual costs was unjustified and inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement".

186. That is, Indonesia submits that the reason that Australia acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement is because the Anti-Dumping Commission did not calculate the hardwood pulp component of the constructed normal value for those exporters on the basis of the records of those exporters even though the two conditions in Article 2.2.1.1 were satisfied.

187. Indonesia's arguments have no merit. They ignore the presence of the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement – the inclusion of this word provides a legal ground, separate and distinct from the legal ground of a failure to satisfy the two conditions in Article 2.2.1.1, for not calculating costs on the basis of records kept by the exporter or producer under investigation.

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

188. The meaning of the first sentence of Article 2.2.1.1 is clear from its ordinary meaning, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement.

189. Firstly, interpreting the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in a way that requires that the "costs … be calculated on the basis of records kept by the exporter or producer under investigation" whenever the two conditions in Article 2.2.1.1 are satisfied – which is what Indonesia does – renders the word "normally" inutile and redundant.

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199 Indonesia's first written submission, para. 2.
200 Indonesia's first written submission, para. 2.
201 Indonesia states: "Article 2.2.1.1 … [requires] an investigating authority to use a producer's actual costs unless they fail to meet one of two express conditions" (Indonesia's first written submission, para. 124) ; and "the first sentence of Article 2.2.1.1 requires the investigating authority to use a producer's or exporter's records provided those records satisfy two conditions" (Indonesia's first written submission, para. 136).
190. If the word "normally" was not included in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, then that first sentence would read:

For the purpose of paragraph 2, costs shall 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.

191. Had Article 2.2.1.1 been drafted in this manner, then the unqualified word "shall" would mean that the "costs" had to always "be calculated on the basis of records kept by the exporter or producer under investigation" whenever the two conditions in Article 2.2.1.1 were satisfied. That is how Indonesia reads it.²⁰²

192. But that is not how Article 2.2.1.1 was drafted. Rather, it specifies that the costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation whenever the two conditions in Article 2.2.1.1 are satisfied. The word "normally" appears in the context of qualifying the word "shall". That is, it appears as an adverb qualifying the verb "shall". This qualification of the verb "shall" by the adverb "normally" must be given meaning and effect.

193. Secondly, and as stated by the Appellate Body in *US – Clove Cigarettes*:

[T]he ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule".²⁰³ (emphasis added)

3. Where the circumstances are not normal and ordinary, the investigating authority is not required to calculate costs on the basis of the exporters' records, even if the two conditions in Article 2.2.1.1 are satisfied

194. Accordingly, the proper interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement,²⁰⁴ and in a way that does not render the word "normally" inutile or redundant, is that, where the circumstances are not normal and ordinary, the investigating authority is not required to calculate costs on the basis of records kept by the exporter or producer under investigation, even if the two conditions in Article 2.2.1.1 are satisfied.

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²⁰² Indonesia's first written submission, paras 124 and 136.
²⁰³ Appellate Body Report, *US – Clove Cigarettes*, para. 273.
²⁰⁴ See above para. 105 for a discussion of the object and purpose of the Anti-Dumping Agreement.
195. This interpretation is consistent with the findings of the panel in *China – Broiler Products*:

In our view, the use of the term "normally" in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records. The Appellate Body observed in *US – Clove Cigarettes* that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule". According to the Appellate Body, "the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule" … [r]ather, the use of the term 'normally' … indicates that the rule … admits of a derogation under certain circumstances." As using the respondents' books and records is the rule and declining to do so is the derogation from that rule, it is for the investigating authority to decide to do so and to justify its decision on the record of the investigation and/or in the published determinations.\(^\text{205}\) (emphasis added, footnote omitted)

196. Similarly, the panel in *EU – Biodiesel (Argentina)* observed that:

The term "shall" in this first sentence of Article 2.2.1.1 indicates that it establishes a mandatory rule … whereas the term "normally" suggests that this rule may be derogated from under certain conditions. In that regard, the first sentence of Article 2.2.1.1 expressly provides for two circumstances in which an investigating authority need not follow the general rule to calculate costs on the basis of the records kept by the producer/exporter under investigation.\(^\text{206}\) (footnotes omitted)

197. The panel in *EU – Biodiesel (Argentina)* further noted the possibility of circumstances beyond a failure to satisfy the two conditions in Article 2.2.1.1 in which an investigating authority would not be required to calculate "costs … on the basis of records kept by the exporter or producer under investigation":

\[W\]e consider it unnecessary to the resolution of the present claim to express any views on the arguments presented by the parties and third parties as to whether, in general terms, Article 2.2.1.1 permits derogations on grounds other than those expressly listed in Article 2.2.1.1.\(^\text{207}\)

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\(^{205}\) Panel Report, *China – Broiler Products*, para. 7.161.


198. Similarly, the Appellate Body in EU – Biodiesel (Argentina) left open the possibility of there being circumstances beyond a failure to satisfy the two conditions in Article 2.2.1.1 in which an investigating authority would not be required to calculate costs on the basis of records kept by the exporter or producer under investigation:

[T]he EU authorities relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to discard the records kept by the Argentine producers under investigation insofar as they pertained to the costs of soybeans … Thus, for the purposes of resolving this dispute, it is the meaning of this condition that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply. 208

199. In Ukraine – Ammonium Nitrate, the panel confirmed that it was yet to be settled whether there were circumstances beyond a failure to satisfy the two conditions in Article 2.2.1.1 in which an investigating authority would not be required to calculate costs on the basis of records kept by the exporter or producer under investigation:

[T]he question whether the use of the word "normally" in the opening sentence [of Article 2.2.1.1] permits investigating authorities to reject the record costs even when [the] two conditions are met has been alluded to in previous disputes, [but] neither a panel nor the Appellate Body has made findings on this issue. 209

200. In conclusion, the proper interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement is that where the circumstances are not normal and ordinary, the investigating authority is not required to calculate costs on the basis of records kept by the exporter or producer under investigation, even if the two conditions in Article 2.2.1.1 are satisfied. 210

201. We now turn to the investigation that is before this Panel and, in particular, the question of whether the circumstances faced by the Anti-Dumping Commission were normal and ordinary.

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208 Appellate Body Report, EU – Biodiesel (Argentina), footnote 120.
209 Panel Report, Ukraine – Ammonium Nitrate, para. 7.68. Australia notes that the panel decision in Ukraine – Ammonium Nitrate has been appealed and the panel’s report has thus not been adopted by the DSB.
210 The word "normally" in the first sentence of Article 2.2.1.1 thus provides a legal ground, separate and distinct from the legal ground of a failure to satisfy the two conditions in Article 2.2.1.1, for not calculating costs on the basis of records kept by the exporter or producer under investigation.
4. The records of Indah Kiat and Pindo Deli in respect of hardwood pulp would not have established an appropriate proxy for the domestic sales price and would have rendered the resort to constructed normal value inutile, and so the circumstances were not normal and ordinary

202. The Appellate Body has stated that the purpose of determining a constructed normal value is to:

… establish[] … the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy.\textsuperscript{211} (footnote omitted)

203. The panel in \textit{EU \textendash Biodiesel (Argentina)} stated that:

\textquote{The basic purpose of calculating the cost of production and constructing the normal value on the basis of that cost under Article 2.2 is to identify 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 that price cannot be used.}\textsuperscript{212} (emphasis added, footnote omitted)

204. In this dispute, the "normal value" could not be determined on the basis of domestic sales (and the resultant prices) because the "particular market situation" meant that Indonesian domestic sales (and the resultant prices) of A4 copy paper did not "permit a proper comparison" with export prices within Article 2.2 of the Anti-Dumping Agreement.

205. Programs and policies of the Government of Indonesia and the export ban on logs increased the supply of logs in Indonesia and thereby lowered the cost and price of logs and hardwood pulp in Indonesia. This induced and allowed the main Indonesian A4 copy paper producers, which are integrated A4 copy paper producers with their own upstream pulp facilities,\textsuperscript{213} to supply more A4 copy paper at each possible price point than they otherwise would have.\textsuperscript{214}

\textsuperscript{211} Appellate Body Report, \textit{EU \textendash Biodiesel (Argentina)}, para. 6.24. See also Panel Reports, \textit{EU \textendash Biodiesel (Argentina)}, para. 7.233; \textit{Thailand \textendash H-Beams}, para. 7.112; \textit{US \textendash Softwood Lumber V}, para. 7.278.
\textsuperscript{212} Panel Report, \textit{EU \textendash Biodiesel (Argentina)}, para. 7.233.
\textsuperscript{213} Final Report, Exhibit IDN-04, section A2.9.3, p. 173.
\textsuperscript{214} See above paras. 114-115.
206. The resultant price of A4 copy paper in Indonesia was:

- at a level that would not have allowed the Anti-Dumping Commission to undertake a suitable and accurate comparison to ascertain whether the A4 copy paper was to be considered as being dumped or to determine the margin of dumping; and

- therefore not suitable to use as the basis for the "normal value".  

207. To require the use of the records kept by Indah Kiat and Pindo Deli, which reflected the lowered cost and price of logs and hardwood pulp (i.e. to require the use of records that reflected the "particular market situation"), would render the use of a constructed normal value inutile. This is because it is precisely this "particular market situation" that rendered the domestic prices unsuitable to use as the basis for the "normal value" in the first place.

208. Using records that reflected the "particular market situation" would have resulted in the constructed normal value being a value akin to the domestic sales price of A4 copy paper, which is the value that was not suitable to use as the basis for the "normal value". A "proxy" for the domestic sales price calculated in this way would not be an "appropriate proxy" because, like the domestic sales price that had been found unsuitable to use as the basis for the "normal value", it would reflect the "particular market situation".

209. The situation faced by the Anti-Dumping Commission can be contrasted with other situations where an investigating authority must, or may choose to, derive the "normal value" by reference to the constructed normal value.

215 See above paras. 133-148.


217 Australia notes that it was recognised by the Appellate Body in EC – Fasteners (China) (Article 21.5 – China) that, due to government intervention, "[c]osts and prices in the Chinese fasteners industry … cannot … serve as reliable benchmarks to determine normal value" (Appellate Body Report, EC – Fasteners (China) (Article 21.5 – China), para. 5.207, emphasis added) and an investigating authority was not required (under Article 2.4 of the Anti-Dumping Agreement) to make adjustments to the constructed normal value where this would "lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted" (Appellate Body Report, EC – Fasteners (China) (Article 21.5 – China), para. 5.207, emphasis added).
210. Firstly, where "there are no sales of the like product in … the domestic market of the exporting country",\textsuperscript{218} it is likely that a constructed normal value calculated on the basis of records kept by the exporter or producer under investigation\textsuperscript{219} would be an "appropriate proxy" for the domestic sales price because it would approximate what the domestic sales price of the product would have been if it had been sold in the domestic market of the exporting country.

211. Secondly, where there are "sales of the like product in … the domestic market of the exporting country",\textsuperscript{220} but they are all made at prices that are not profitable/recoverable,\textsuperscript{221} it is likely that a constructed normal value calculated on the basis of records kept by the exporter or producer under investigation\textsuperscript{222} would be an "appropriate proxy" for the domestic sales price because it would approximate the profitable/recoverable price of the product on the domestic market of the exporting country.

212. Thirdly, where domestic sales constitute less than 5% of the volume of export sales,\textsuperscript{223} it is likely that a constructed normal value calculated on the basis of records kept by the exporter or producer under investigation\textsuperscript{224} would be an "appropriate proxy" for the domestic sales price because it would approximate what the domestic sales price of the product would have been if it had been sold on the domestic market of the exporting country in sufficient volumes.

213. Not every "particular market situation" that results in domestic sales not permitting a "proper comparison" would create circumstances that were not normal and ordinary and thus permit an investigating authority to not calculate costs on the basis of the records of the exporter or producer under investigation even though the two conditions in Article 2.2.1.1 were satisfied.

\textsuperscript{218} Article 2.2 of the Anti-Dumping Agreement.
\textsuperscript{219} Where the two conditions in Article 2.2.1.1 are satisfied.
\textsuperscript{220} Article 2.2 of the Anti-Dumping Agreement.
\textsuperscript{221} See Article 2.2.1 of the Anti-Dumping Agreement.
\textsuperscript{222} Where the two conditions in Article 2.2.1.1 are satisfied.
\textsuperscript{223} See Article 2.2 (including footnote 2) of the Anti-Dumping Agreement.
\textsuperscript{224} Where the two conditions in Article 2.2.1.1 are satisfied.
The key question in each such case would be whether those records were suitable to determine a constructed normal value that was an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales". The answer to this key question is necessarily dependent on the specific facts of each case.

In the facts of the investigation that is before this Panel, and unlike the situations discussed above at paragraphs 210 to 212, the Anti-Dumping Commission was faced with circumstances that were not normal and ordinary. A constructed normal value calculated on the basis of the records kept by Indah Kiat and Pindo Deli in respect of hardwood pulp would not have been an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales" because, like the domestic sales price that had been found unsuitable to use as the basis of the "normal value", it would have reflected the "particular market situation".

This is clearly set out in the Final Report. The Anti-Dumping Commission, in its consideration of the "Constructe normal value" stated:

[T]he Commission's findings in respect of a [particular] market situation in Indonesia … 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 unsuitable for determining the cost to make A4 copy paper for the purposes of constructing normal values. (emphasis added)


227 Final Report, Exhibit IDN-04, heading of section 6.9.1, p. 50.

228 Final Report, Exhibit IDN-04, section 6.9.1, p. 51.
Notably, for one of the other Indonesian exporters (RAK), the Anti-Dumping Commission found that its transfer prices for purchases of hardwood pulp in Indonesia from a related company were consistent with the benchmark prices used to derive the "pulp benchmark". The Anti-Dumping Commission thus calculated the constructed normal value of A4 copy paper for RAK on the basis of its records.

A constructed normal value calculated on the basis of those transfer prices (and RAK's other costs) would have been an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales". Put another way, the circumstances in respect of RAK were normal and ordinary, so the constructed normal value for RAK was calculated on the basis of RAK's records.

5. Conclusion

Thus, the Anti-Dumping Commission was faced with circumstances that were not normal and ordinary in respect of Indah Kiat and Pindo Deli. It therefore acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement in not calculating the hardwood pulp component of the constructed normal value on the basis of the records kept by Indah Kiat and Pindo Deli, even if those records satisfied the second condition of Article 2.2.1.1.

Australia therefore acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement in not calculating the hardwood pulp component of the constructed normal value on the basis of the records kept by Indah Kiat and Pindo Deli.

Australia notes that the "competitive benchmark" referred to here comprised a number of regional benchmark prices (see Preliminary Affirmative Determination No. 341A and Amendment to Securities, Investigation into 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 Subsidisation of A4 Copy Paper Exported from the People's Republic of China and the Republic of Indonesia, November 2016 (PAD 341A), Exhibit IDN-12, section A2.8.4, p. 91). The "pulp benchmark" discussed below at paras. 222-233 was developed subsequently to the Anti-Dumping Commission determining that a "particular market situation" existed (see Statement of Essential Facts, Exhibit IDN-01, section 6.9.1, pp. 40-42).

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

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

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

Panel Reports, EU – Biodiesel (Argentina), para. 6.24. (footnote omitted) See also Panel Reports, EU – Biodiesel (Argentina), para. 7.233; Thailand – H-Beams, para. 7.112; and US – Softwood Lumber V, para. 7.278.
And, importantly, where the cost of hardwood pulp was reported in the records of an exporter on the basis of a competitive market cost – as was the case for RAK – the Anti-Dumping Commission did not discard the records of the exporter. Rather, the hardwood pulp component of the constructed normal value was calculated on the basis of the records of the exporter.\(^{233}\)

**B. THE ANTI-DUMPING COMMISSION CORRECTLY DETERMINED THE HARDWOOD PULP COMPONENT OF THE CONSTRUCTED NORMAL VALUE**

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

   In Appendix 4 to the Final Report (titled "Pulp cost benchmark"), the Anti-Dumping Commission identified that its "preferences for choosing a replacement competitive market cost are, in descending order:

   - private domestic prices;
   - import prices; and
   - external benchmarks."\(^{234}\)

   The Anti-Dumping Commission was unable to identify any acceptable private domestic prices that could be used.

   The Anti-Dumping Commission stated that it "prefers to use actual transaction data from the relevant market where possible".\(^{235}\)

   The Anti-Dumping Commission did, in fact, have access to the internal transfer prices in the records kept by RAK for hardwood pulp it purchased in Indonesia from a related company.\(^{236}\) However, it was prevented from using such domestic prices as the basis for the hardwood pulp component of the constructed normal value of A4 copy paper because those domestic prices were confidential\(^{237}\) and so could not be disclosed.

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\(^{233}\) See above paras. 217-218.

\(^{234}\) Final Report, Exhibit IDN-04, section A4.3, p. 230. (emphasis added)

\(^{235}\) Final Report, Exhibit IDN-04, section A4.5.1, p. 232.

\(^{236}\) Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.

\(^{237}\) Final Report, Exhibit IDN-04, section A4.5.1, p. 232.
Furthermore, to require the use of the private domestic prices for hardwood pulp in the records of Indah Kiat and Pindo Deli, which reflected the lowered cost and price of logs and hardwood pulp (i.e. to require the use of a benchmark that reflected the "particular market situation"), would render the use of a constructed normal value inutile. This is because it is precisely this "particular market situation" that rendered the domestic prices unsuitable to use as the basis for the "normal value" in the first place.\textsuperscript{238}

The Anti-Dumping Commission also considered using import prices for the hardwood pulp component of the constructed normal value. However, it found that there was a lack of imports of hardwood pulp into Indonesia\textsuperscript{239} and that it was likely that the price of any such imports would be similarly affected by the programs and policies of the Government of Indonesia.\textsuperscript{240}

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

- it had "derived a pulp benchmark" "consisting of quarterly import pulp prices into China and Korea based on an average CIF price for [hardwood pulp] originating from Brazil and South America",\textsuperscript{241,242}

- these pulp prices were obtained from data provided by RISI Inc. and Hawkins Wright Ltd.;\textsuperscript{243}

\textsuperscript{238} Final Report, Exhibit IDN-04, section A4.3.1, p. 230; see also section A2.9.4, pp. 173-174.
\textsuperscript{239} Final Report, Exhibit IDN-04, section A4.3.2, p. 230.
\textsuperscript{240} Final Report, Exhibit IDN-04, section A4.3.2, p. 230-1.
\textsuperscript{241} Final Report, Exhibit IDN-04, sections A4.1 and A4.2, p. 230; see also section A4.3.3, p. 231. Note that monthly import pulp prices were also used to derive the pulp benchmark.
\textsuperscript{242} China and Korea were Indonesia's two main destinations for exports of hardwood pulp (Final Report, Exhibit IDN-04, A2.9.2.3, p. 167).
\textsuperscript{243} RISI Inc. provides information and analytical services (including comprehensive and current data on supply and demand, pricing and costs) about pulp, paper and wood products. Hawkins Wright provides market intelligence and analytical services to international pulp, paper and biomass industries. Both RISI Inc. and Hawkins Wright were selected to provide information because of their reputation as being industry experts on international paper markets. (Final Report, Exhibit IDN-04, section A4.5.1, p. 232.)
• information from RISI Inc. "indicated that growing costs for acacia pulpwood in Indonesia is not significantly less than growing costs for eucalyptus pulpwood from South America, notably Brazil";\(^{244}\)

• "there is broad alignment of South American eucalyptus pulp and traded Indonesian acacia pulp prices";\(^{245}\)

• "neither the [Government of Indonesia] nor any Indonesian pulp producer provided the Commission with information or evidence to support claims that the cost of producing acacia pulpwood in Indonesia is significantly less than in other Asian or South American countries";\(^{246}\) and

• the pulp benchmark was "based on verified actual transaction prices collected through broad systematic surveys of small, medium and large size participants, including both buyers and sellers".\(^{247}\)

\(^{229}\) The Anti-Dumping Commission also found that the benchmark prices used to derive the "pulp benchmark" were consistent with the transfer prices in the records kept by one of the other Indonesian exporters (RAK) for its purchases of hardwood pulp in Indonesia from a related company.\(^{248}\)
2. The Appellate Body has made it clear that an "out-of-country" benchmark can be used for the purpose of determining the constructed normal value

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

We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country.249

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 … 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.250

231. However, the Appellate Body has also cautioned that:

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 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.251

249 Appellate Body Report, EU – Biodiesel (Argentina), para. 6.70.
250 Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73.
251 Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73.
232. The Anti-Dumping Commission did not "simply substitute"\(^{252}\) the hardwood pulp component of the records of Indah Kiat and Pindo Deli with "costs from outside the country of origin". The Anti-Dumping Commission did not, as Indonesia alleges, "merely substitute[] the Indonesian producers' actual cost for hardwood pulp with a benchmark price for hardwood pulp manufactured in Brazil and South America".\(^{254}\)

233. Rather, it considered a number of options for a benchmark and provided a reasoned and adequate explanation as to why it chose the benchmark that it ultimately used. It checked whether there were suitable domestic prices or import prices that could be used and concluded that there were not.\(^{255}\) It found that the benchmark prices used to derive the "pulp benchmark" were consistent with the transfer prices in the records kept by one of the other Indonesian exporters (RAK) for its purchases of hardwood pulp in Indonesia from a related company.\(^{256}\) It checked the alignment of South American eucalyptus pulp and traded Indonesian acacia pulp prices.\(^{257}\) It determined that growing costs for acacia pulpwood in Indonesia were not significantly less than growing costs for eucalyptus pulpwood in South America.\(^{258}\) It noted that the Government of Indonesia and the Indonesian hardwood pulp producers had provided no evidence to support their claims that it was cheaper to produce acacia pulpwood in Indonesia than in other Asian or South American countries.\(^{259}\)

\(^{252}\) Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73.
\(^{253}\) Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73.
\(^{254}\) Indonesia's first written submission, para. 155.
\(^{255}\) See above paras. 222-227.
\(^{256}\) Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.
\(^{259}\) Final Report, Exhibit IDN-04, section A4.5.2, p. 233.
3. The Anti-Dumping Commission properly adapted the pulp benchmark

234. Furthermore, the Anti-Dumping Commission then adapted the "pulp benchmark" specific to the circumstances of Indah Kiat and Pindo Deli.

235. Indonesia's assertions that Australia did not make any "adjustments … to derive the cost of production in Indonesia" is misleading – the Anti-Dumping Commission performed all of the adjustments that were necessary given the analysis that it had undertaken to ensure that the pulp benchmark was suitable to use to arrive at the cost of production of A4 copy paper in Indonesia, as required by Article 2.2 of the Anti-Dumping Agreement.

(a) Adaptation of the pulp benchmark – Indah Kiat

236. The Anti-Dumping Commission adapted the pulp benchmark so that it was the cost of slush hardwood pulp or dry hardwood pulp as appropriate and using amounts incurred specifically by Indah Kiat.

237. Indah Kiat made its own hardwood pulp. The Anti-Dumping Commission separately multiplied the quantity of slush hardwood pulp and dry hardwood pulp consumed by Indah Kiat each month during the investigation period with the corresponding adapted pulp benchmark for that month.

238. The Anti-Dumping Commission made deductions to the pulp benchmark based on Indah Kiat's own records. These deductions included an amount for the cost of ocean freight and inland transport, an amount for selling, general and administrative expenses and an amount for the cost to convert wet hardwood pulp to dry hardwood pulp (for the slush hardwood pulp quantities).

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260 Indonesia’s first written submission, para. 168.
261 To paraphrase the Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73.
262 See above para. 233.
263 Indonesia first written submission, para. 10.
(b) Adaptation of the pulp benchmark – Pindo Deli

239. Pindo Deli did not manufacture hardwood pulp. Rather, it obtained the vast majority of its hardwood pulp from other companies within SMG, including Indah Kiat.  

240. Therefore, in respect of Pindo Deli, the Anti-Dumping Commission made the same adaptations to the pulp benchmark that it applied in respect of Indah Kiat. However, it did not deduct an amount for converting slush hardwood pulp to dry hardwood pulp because the pulp benchmark already represented an amount for dry hardwood pulp.

4. Indonesia's arguments in relation to the hardwood pulp component of the constructed normal value have no merit

241. Indonesia argues that "Australia substituted the actual cost of hardwood pulp recorded in the Indonesian producers' records with reference prices for hardwood pulp made by Brazilian and South American producers" and, "[i]n so doing, Australia failed to calculate the cost of production in the country or origin, i.e. Indonesia which is inconsistent with Article 2.2 of the Anti-Dumping Agreement".  

242. Indonesia claims that Australia should have used the amounts in the records of Indah Kiat and Pindo Deli for the hardwood pulp component of the constructed normal value rather than the "competitive market cost" that it used pursuant to subsection 43(2) of the Customs Regulation.  

243. But it simply cannot be the case that amounts that were validly rejected under Article 2.2.1.1 of the Anti-Dumping Agreement must then be used to determine the constructed normal value under Article 2.2 of the Anti-Dumping Agreement. It would make no sense to require that the constructed normal value be determined by using amounts that were validly rejected under Article 2.2.1.1.

265 Indonesia's first written submission, paras. 10, 117 and 167; see also footnote 70.  
266 See above para. 238.  
267 Because of Pindo Deli’s low volume of export sales to Australia during the investigation period, the Anti-Dumping Commission did not conduct on-site verification of Pindo-Deli’s cost to make data (see Verification Report – Exporter, PT Pindo Deli Pulp and Paper Mills, Exhibit IDN-10, section 4.1, page 8).  
268 Indonesia's first written submission, para. 2.  
269 Indonesia's first written submission, paras. 2, 153 and 170
244. Amongst other things, Indonesia's arguments also fail to take into account the vertical integration and related-party transactions that characterise Indah Kiat and Pindo Deli, the analysis that the Anti-Dumping Commission undertook to ensure that the pulp benchmark was suitable to use to arrive at the cost of production of A4 copy paper in Indonesia, or the fact that the benchmark prices used to derive the "pulp benchmark" were found to be consistent with the transfer prices for RAK's purchases of hardwood pulp in Indonesia.

5. Conclusion

245. Thus, the Anti-Dumping Commission developed an appropriate pulp benchmark and adapted it so that it was specific to the circumstances of Indah Kiat and Pindo Deli, respectively – it therefore properly determined the cost of production of A4 copy paper in Indonesia, as required by Article 2.2 of the Anti-Dumping Agreement.

246. Australia therefore acted consistently with Articles 2.2 of the Anti-Dumping Agreement in its determination of the constructed normal value of A4 copy paper for Indah Kiat and Pindo Deli.

C. INDONESIA'S RELIANCE ON EU – BIODIESEL (ARGENTINA), EU – BIODIESEL (INDONESIA) AND UKRAINE – AMMONIUM NITRATE IS MISPLACED

247. Indonesia asserts that the facts of this dispute are "almost identical" to the facts in EU – Biodiesel (Argentina) and EU – Biodiesel (Indonesia), that "there is no factual or legal basis for this Panel to interpret Article 2.2.1.1 in a manner at odds with" the decisions in EU – Biodiesel (Argentina), EU – Biodiesel (Indonesia) and Ukraine – Ammonium Nitrate, that there are no "meaningful differences" between the dispute before this Panel and those disputes, and that "the fact pattern [in the dispute before this Panel] is almost identical" to those disputes.

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270 To paraphrase the Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73.
271 See above para. 233.
272 See above paras. 222-233 for details on the pulp benchmark developed by the Anti-Dumping Commission.
274 Australia also acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement (see above paras. 182-221) and Article VI:1(b)(ii) of the GATT 1994 in this regard.
275 Indonesia's first written submission, para. 142.
276 Indonesia's first written submission, para. 145.
277 Indonesia's first written submission, para. 155.
278 Indonesia's first written submission, para. 162.
248. All of these assertions are incorrect. There are obvious factual differences between the investigations at issue in those disputes and the investigation before this Panel.

249. For the convenience of the Panel, we have summarised in the table below the pertinent and crucial differences between those cases and the investigation before the Panel in this dispute:

<table>
<thead>
<tr>
<th>Particular market situation that did not permit a proper comparison?</th>
<th>EU – Biodiesel (Argentina)</th>
<th>EU – Biodiesel (Indonesia)</th>
<th>Ukraine – Ammonium Nitrate</th>
<th>The Investigation Before this Panel</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-arm’s-length transactions like in SMG for the input in question?</th>
<th>No</th>
<th>No</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Vertically-integrated exporters like in SMG?</th>
<th>No</th>
<th>No</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Constructed normal value an appropriate proxy for the domestic sales price?</th>
<th>No</th>
<th>No</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Prevailing international export price available for the input in question?</th>
<th>No</th>
<th>No</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>&quot;Reasonableness&quot; of recorded costs decisive in discarding amount in the records for the input in question?</th>
<th>Yes</th>
<th>Yes</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>&quot;Hypothetical&quot; cost for the input in question used in determining constructed normal value?</th>
<th>Yes</th>
<th>Yes</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>
250. Given these obvious factual differences between the investigation before the Panel and the investigations considered by the panel and the Appellate Body in EU – Biodiesel (Argentina) and the panels in EU – Biodiesel (Indonesia) and Ukraine – Ammonium Nitrate, it is not at all clear why Indonesia has taken dispute settlement action against Australia with such heavy reliance on those disputes.

D. **THE PHRASE "COMPETITIVE MARKET COSTS" IN AUSTRALIA'S REGULATIONS OPERATED SO AS TO ENSURE THAT THE ANTI-DUMPING COMMISSION PROPERLY CALCULATED THE CONSTRUCTED NORMAL VALUE AND COMPLIED WITH ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT**

251. Indonesia also focuses on the fact that subsection 43(2) of the Customs Regulation uses the phrase "the records … reasonably reflect competitive market costs associated with the production or manufacture of like goods"\(^{279}\) whereas Article 2.2.1.1 of the Anti-Dumping Agreement uses the phrase "such records … reasonably reflect the costs associated with the production and sale of the product under consideration".\(^{280}\)

252. Indonesia asserts that the dispute before this Panel "concerns Australia's rejection of the Indonesian producers' records because they did not reflect a "competitive market cost" – a term found exclusively in Australian domestic law and not the Anti-Dumping Agreement".\(^{281}\)

253. Australia notes, at the outset, that Indonesia is making an "as applied", rather than an "as such", challenge,\(^{282}\) so Australia's regulations are relevant only insofar as how they were applied in this dispute.

\(^{279}\) Emphasis added.

\(^{280}\) Emphasis added.

\(^{281}\) Indonesia's first written submission, para. 125.

\(^{282}\) Indonesia's first written submission, para. 27.
In addition, the terms "actual cost" and "actual costs" – which Indonesia uses at least 11 times to describe the "test" under the second condition of Article 2.2.1.1 – are nowhere to be found in Article 2.2.1.1 of the Anti-Dumping Agreement. It is clear from the treaty that when the drafters wanted "actual costs" to always be used, they incorporated the word "actual" into the text of the Anti-Dumping Agreement – see Articles 2.2.2(i) and 2.2.2(ii) ("the actual amounts incurred"). They could have used a similar formulation in Article 2.2.1.1. But they didn't.

It is simply not the case that Article 2.2.1.1 of the Anti-Dumping Agreement requires the use of the records of an exporter whenever those records reflect the "actual costs" of that exporter. There are a large number of qualifications and exceptions to the use of "actual costs". 283

For example: (a) the presence of the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement permits the determination of the constructed normal value on a basis other than the records kept by the exporter, even if those records accurately record the "actual costs" of the exporter (see above paras. 188-219); (b) the "actual costs" in the records may not lead to the cost of production of the like product in the country of origin (see Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73); (c) the "actual costs" in the records may not be the costs that had a genuine relationship with the production of the like product (see Appellate Body Report, EU – Biodiesel (Argentina), para. 6.26); (d) the "actual costs" in the records may not be "capable of generating" "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales" (see Appellate Body Report, EU – Biodiesel (Argentina), para. 6.24 (footnote omitted) and Panel Reports, EU – Biodiesel (Argentina), para. 7.233; Thailand – H-Beams, para. 7.112; US – Softwood Lumber V, para. 7.278); (e) the "actual costs" in the records may not be indicative of the actual costs involved in the production of the like product in the country of origin (see Panel Report, EU – Biodiesel (Argentina), para. 7.232); (f) it is not the situation that, no matter how unreasonable the "actual costs" in the records kept by the investigated firm when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do (Appellate Body Report, EU – Biodiesel (Argentina), paras. 6.40-6.41); (g) the "actual costs" in the records may reflect costs incurred in transactions involving inputs purchased in non-arm's-length transactions (Panel Reports, Ukraine – Ammonium Nitrate, para. 7.70; EU – Biodiesel (Argentina), footnote 400; US – OCTG (Korea), para. 7.197 and Appellate Body Report, EU – Biodiesel (Argentina), para. 6.41); (h) the "actual costs" in the records might underestimate the actual costs incurred (Panel Report, EU – Biodiesel (Argentina), footnote 400); and (i) the exporter under investigation might be part of a vertically-integrated group of companies in which the costs of inputs are spread across different companies' records (Appellate Body Report, EU – Biodiesel (Argentina), para. 6.33; Panel Report, EU – Biodiesel (Argentina), para. 7.232) – as such the "actual costs" in the records of that producer/exporter might not represent all of the costs of production of the like product in the country of origin.
256. If the word "costs" in subsection 43(2) of the Customs Regulation was preceded by the word "actual", as Indonesia seems to think it should be, then it would not be possible for Australia to properly implement Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. On Indonesia's preferred drafting of the subsection, the subsection would not permit Australia to give effect to the matters set out at footnote 283. It could also result in Australia contravening Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and acting in a manner contrary to the panel and Appellate Body decisions in EU – Biodiesel (Argentina) and the panel decision in US – OCTG (Korea).

257. In short, Indonesia's approach would require that Australia act inconsistently, rather than consistently, with its WTO obligations.

258. As applied in the investigation before this Panel, the phrase "competitive market costs" facilitated the discarding of the distorted hardwood pulp component of the records of Indah Kiat and Pindo Deli in circumstances that were outside the normal and ordinary circumstances envisaged by the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The phrase "competitive market costs" then facilitated recourse to an appropriate alternative amount to ensure the proper determination of the constructed normal value for those two exporters under Article 2.2 of the Anti-Dumping Agreement.

E. CONCLUSION

259. Australia has established that the Anti-Dumping Commission was not required to calculate the hardwood pulp component of the constructed normal value on the basis of the records of Indah Kiat and Pindo Deli.

260. Australia has established that the Anti-Dumping Commission acted consistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement in its determination of the constructed normal value of A4 copy paper for Indah Kiat and Pindo Deli.284

284 Australia also acted consistently with Article VI:1(b)(ii) of the GATT 1994 in this regard.
261. The Anti-Dumping Commission provided a reasoned and adequate explanation as to how the evidence supported its factual findings and how those factual findings supported\(^{285}\) its:

- determination that it was not required to calculate the hardwood pulp component of the constructed normal value on the basis of the records of Indah Kiat and Pindo Deli; and

- determination of the constructed normal value of A4 copy paper for Indah Kiat and Pindo Deli by reference to the "pulp benchmark".

262. Indonesia has submitted no evidence that the Anti-Dumping Commission's establishment of the facts was not proper or that the Anti-Dumping Commission's evaluation was biased or not objective.\(^{286}\)

263. Indonesia has failed to show that an "objective and impartial investigating authority could not properly have found".\(^{287}\)

- that it was not required to calculate the hardwood pulp component of the constructed normal value of A4 copy paper on the basis of the records of Indah Kiat and Pindo Deli; and

- that the constructed normal values for A4 copy paper were the amounts found by the Anti-Dumping Commission.

264. The Panel should therefore reject Indonesia's claims that:

- Australia acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it did not calculate the hardwood pulp component of the constructed normal value of A4 copy paper on the basis of the records of Indah Kiat and Pindo Deli; and

- Australia acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because it "substituted the actual cost of hardwood pulp recorded in the Indonesian producers' records with reference prices for hardwood pulp made by Brazilian and South American producers" in determining the constructed normal value of A4 copy paper.

\(^{285}\) See above para. 37.

\(^{286}\) See above para. 35.

VI. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE VI:2 OF THE GATT 1994 AND WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT BY IMPOSING ANTI-DUMPING DUTIES IN AN AMOUNT THAT DID NOT EXCEED THE MARGIN OF DUMPING

265. Indonesia's claims under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement are entirely dependent on this Panel finding that Australia acted inconsistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement in its determination of the "normal value" for Indah Kiat and Pindo Deli.

266. Australia has demonstrated above that its determination of the "normal value" for Indah Kiat and Pindo Deli was fully consistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

267. Indonesia's claims under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement must therefore fail.

VII. AUSTRALIA HAS NOT NULLIFIED OR IMPAIRED BENEFITS ACCRUING DIRECTLY OR INDIRECTLY TO INDONESIA

268. No benefits accruing directly or indirectly to Indonesia under the GATT 1994 or the Anti-Dumping Agreement have been nullified or impaired by Australia.

VIII. CONCLUSION

269. For the foregoing reasons, Australia respectfully requests that the Panel reject Indonesia's claims in their entirety.