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Australia – Anti-Dumping Measures on A4 Copy Paper

(DS529)

Oral Statement of Australia at the Second Substantive Meeting with the Parties

Geneva, 14 May 2019
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Thank you, Chairperson, distinguished members of the Panel. As you may recall, my name is Patricia Holmes and I am the Assistant Secretary of the Trade and Investment Law Branch at the Australian Government Department of Foreign Affairs and Trade.

In this oral statement, Australia will outline for the Panel its views on the key legal questions requiring adjudication to ensure the prompt settlement of this dispute. After briefly recalling the applicable standard of review, I will summarise Australia's position on the correct Vienna Convention interpretation of the applicable WTO provisions and explain why the Anti-Dumping Commission's investigation was consistent with those provisions. Following those remarks, the Head of Australia's Anti-Dumping Commission, Mr Dale Seymour, will address the importance of this case to WTO Members seeking to respond to government intervention that is incompatible with the WTO's dedication to open, fair and undistorted competition. He will also correct Indonesia's misrepresentation about the information that was available to the Anti-Dumping Commission in the A4 copy paper investigation. Finally, I will rebut a number of specific arguments Indonesia has made in its second written submission.

1. Standard of Review

Chairperson, members of the Panel, the standard of review in anti-dumping disputes is unique in the WTO dispute settlement system. Articles 17.5 and 17.6 of the Anti-Dumping Agreement require panels to accord a high level of deference to investigating authorities. Article 17.5(ii) specifies that your function is to examine the matter based solely on the facts that were before the Anti-Dumping Commission. And, having found that the Anti-Dumping Commission's establishment of the facts was proper and its evaluation of them unbiased and objective, Article 17.6(i) specifies that you cannot overturn that evaluation, even if you may have reached a different conclusion.

Your job in this case has been simplified because Indonesia is only concerned with the proper legal interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. Indonesia is not separately concerned with the Anti-Dumping Commission's establishment of the facts or the Anti-Dumping Commission's evaluation of those facts.
5. This means that, under Article 17.6(ii) of the Anti-Dumping Agreement, Indonesia's case hinges on whether or not the Anti-Dumping Commission's determinations rest upon "permissible interpretations" of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

6. As we have already demonstrated in our submissions to you, and as I will now summarise, there is quite clearly no incompatibility whatsoever between Australia's anti-dumping duties on A4 copy paper from Indonesia and those provisions.

2. The proper Vienna Convention interpretation of the applicable WTO provisions and the Anti-Dumping Commission's investigation

7. The text of Article 2.2 provides, amongst other things, that an investigating authority must use an alternative basis for deriving the "normal value", such as a constructed normal value, where sales in the exporting country's market "do not permit a proper comparison" with the export price "because of the particular market situation".

8. A "particular market situation" is any condition, state or combination of circumstances in respect of the buying and selling of the like product (i.e. A4 copy paper) in the market of the exporting country (i.e. the market in Indonesia) that is distinguishable and not general. This interpretation is the clear legal result of applying the Vienna Convention interpretative rules to the phrase "particular market situation".

9. In the investigation that is before this Panel, the "particular market situation" was a combination of factors as detailed in Appendix 2 of the Final Report¹ and in our submissions in this dispute.² These factors include, but are not limited to, the forestry-related programs and policies of the Government of Indonesia; the lowered cost and price of logs and hardwood pulp in Indonesia; and the artificially low price of A4 copy paper in Indonesia.

¹ Final Report, Exhibit IDN-04.
² Australia's first written submission, paras. 114-115, Australia's written response to question 8 from the Panel following the first substantive meeting with the Parties, para. 50, and Australia's second written submission, para. 114.
10. However, the existence of a "particular market situation" does not justify, in and of itself, recourse to an alternative basis for deriving the "normal value". As Indonesia emphasises, and Australia agrees, it must also be the case that, "because of the particular market situation", domestic sales "do not permit a proper comparison" with the export price. In the words contained in Australia's law, and hence used by the Anti-Dumping Commission, the requirement to use an alternative method for determining the "normal value" applies where domestic sales are "not suitable" – or are unsuitable – for determining the normal value.

11. The phrase "such sales do not permit a proper comparison" in Article 2.2 is not defined in the Anti-Dumping Agreement, and no particular methodology is prescribed for determining whether domestic sales do, or do not, permit a proper comparison with the export price. An investigating authority therefore has discretion with respect to the methodology it employs, provided that the methodology rests upon a proper interpretation of Article 2.2.

12. Interpreting the phrase "such sales do not permit a proper comparison" is necessarily a contextual exercise. The immediate context establishes that "such sales do not permit a proper comparison" – that is, they are "not suitable" to use as the basis for the normal value – where the resultant prices would not allow an investigating authority to conduct a suitable and accurate comparison to:

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

13. The broader context identifies the relevant characteristics of unsuitability. These characteristics are discussed in detail in Australia's submissions but, in summary, they include where domestic prices are affected by government intervention that distorts costs and prices, where they are fixed in a manner incompatible with normal commercial practice, and where they are fixed according to criteria which are not those of the marketplace.
14. In the investigation that is before this Panel, those characteristics were present and were evident in the price of A4 copy paper in Indonesia. This domestic price was distorted, was artificially low, was 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. The domestic price clearly did "not permit a proper comparison" to the export price.

15. And this lowered domestic price was, in this investigation, quite properly relevant to the "particular market situation" analysis and to the "permit a proper comparison" analysis.

16. In summary, the Anti-Dumping Commission found that the domestic sales of A4 copy paper in Indonesia were unsuitable for the determination of "normal value" in a WTO-consistent manner. Its determination was based on a proper interpretation of Article 2.2, a proper establishment of the facts, and an unbiased and objective evaluation of those facts. In addition, the explanation provided by the Anti-Dumping Commission in its report was reasoned and adequate. The Panel should dismiss Indonesia's first and second claims in their entirety.

17. Chairperson, I will now turn to the proper Vienna Convention interpretation of the legal provisions governing the Anti-Dumping Commission's determination of the constructed normal value.

18. The relevant provisions are the first sentence of Article 2.2.1.1 and the phrase "cost of production in the country of origin" in Article 2.2. These provisions must be interpreted in a coherent and consistent manner, and the interpretation of them must give meaning to all applicable provisions harmoniously\(^3\) including, in this instance, the phrases "particular market situation" and "such sales do not permit a proper comparison".

19. The proper Vienna Convention interpretation of the first sentence of Article 2.2.1.1 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.\(^4\)

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\(^4\) Australia's first written submission, para. 194.
20. In the investigation before this Panel, the circumstances were clearly not normal and ordinary. A "normal value" calculated using the hardwood pulp component of the records of Indah Kiat and Pindo Deli would have been inconsistent with the Appellate Body's finding in EU – Biodiesel (Argentina), as it would not have resulted in 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". This is because, like the domestic sales price that had been found unsuitable to use as the basis of the "normal value", the constructed normal value would have reflected the "particular market situation".

21. In other words, if the Anti-Dumping Commission had used the amounts for hardwood pulp in the records kept by Indah Kiat and Pindo Deli then the resultant "normal value" for A4 copy paper would simply have reflected the unsuitability of the domestic sales. Such a result would have been inconsistent with a harmonious interpretation of the applicable provisions.

22. Furthermore, the Anti-Dumping Commission's use of the "pulp benchmark" yielded a "cost of production in the country of origin" under Article 2.2 which properly included the full costs of production of the like product in the country of origin, including those costs that were not incurred, in whole or in part, as a cash cost to specific entities producing the like product. Those full costs of production continued to exist notwithstanding the "particular market situation" – but they were not all incurred as a cash cost by Indah Kiat and Pindo Deli, and hence were not reflected in their records. We note the Panel's interest in this issue and we will explore it in more detail in our response to Question 14 and Question 15.

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6 See Australia's first written submission, para. 215 and Australia's written response to question 20(c) from the Panel following the first substantive meeting with the Parties, para. 141.

7 See Australia's second written submission, paras. 259-260.
23. [I would like to note that at this point we will be referring to Business Confidential Information and distributing an exhibit containing Business Confidential Information]. Indah Kiat recorded the hardwood pulp component of the cost of production of A4 copy paper as its cost to make that hardwood pulp, which was [[BCI]] the "pulp benchmark". Pindo Deli recorded the hardwood pulp component of the cost of production of A4 copy paper as the transfer price it paid to acquire the hardwood pulp from related parties – including Indah Kiat – which was [[BCI]] than the cost of Indah Kiat to make hardwood pulp, but was [[BCI]] the "pulp benchmark". [That concludes the references to Business Confidential Information].

24. We have included as Exhibits AUD-29A to AUD-29F distributed with this statement the supporting information from the record of the investigation showing the difference between the amounts in the records of Indah Kiat and Pindo Deli and the "pulp benchmark".

25. Indonesia improperly equates these cash costs incurred by Indah Kiat and Pindo Deli to produce and acquire the hardwood pulp, respectively, with the hardwood pulp component of the "cost of production [of A4 copy paper] in [Indonesia]" under Article 2.2.

26. However, the cost of producing hardwood pulp and the cost of acquiring hardwood pulp are not necessarily the same as the cost of consuming hardwood pulp in the production of A4 copy paper. As Australia has established, and as Indonesia itself has acknowledged, the prevailing export price of hardwood pulp was a proper amount to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in [Indonesia]" in this case.8 And Australia has demonstrated that the "pulp benchmark" used by the Anti-Dumping Commission was virtually identical to that prevailing export price.9

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8 See, for example, Indonesia's opening statement at the first substantive meeting with the Parties, para. 49, Australia's closing statement at the first substantive meeting with the Parties, paras. 26-29, and Australia's second written submission, paras. 241-249.

9 Australia's second written submission, paras. 241-249.
27. Chairperson, Indonesia does not argue that there were export taxes or other export restrictions on hardwood pulp. It does not deny that, unlike the situations in EU – Biodiesel (Argentina) and Ukraine – Ammonium Nitrate, the input in this case – hardwood pulp – could be exported at its prevailing competitive export price, which was virtually identical to the "pulp benchmark" used by the Anti-Dumping Commission. Thus, the "pulp benchmark" reflects the amount foregone when the hardwood pulp was consumed in the production of A4 copy paper in Indonesia rather than being exported.\footnote{Australia's second written submission, para. 256.}

28. Furthermore, the benchmark prices used to derive the "pulp benchmark" were consistent with the confidential transfer prices in RAK's records for its purchases of hardwood pulp in Indonesia from a related company.

29. Clearly, and as found by the Anti-Dumping Commission, the amounts in the records of Indah Kiat and Pindo Deli for hardwood pulp were not suitable to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in [Indonesia]". Rather, the proper amount to use was the "pulp benchmark", which was determined in an entirely appropriate manner and based on suitable benchmark prices.

30. Chairperson, the use of the "pulp benchmark" is also consistent with the Appellate Body's observation that "the scope of the obligation to calculate the costs on the basis of the records in the first sentence of Article 2.2.1.1 is narrower than the scope of the obligation to determine the cost of production in the country of origin in Article 2.2".\footnote{Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73. (emphasis added)}

31. In summary, the Anti-Dumping Commission determined the constructed normal value in a WTO-consistent manner. Its determination was based on a proper interpretation of Articles 2.2 and 2.2.1.1, a proper establishment of the facts, and an unbiased and objective evaluation of those facts. In addition, the explanation provided by the Anti-Dumping Commission in its report was reasoned and adequate. The Panel should therefore dismiss Indonesia's third and fourth claims in their entirety.
3. Indonesia's fifth claim

32. Finally, given that Indonesia's fifth claim – alleging a breach by Australia of Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement – is a consequential one, the Panel should dismiss that claim in its entirety as well.

33. I would now like to pass the floor to Mr Seymour.

4. Systemic importance of this dispute to WTO Members

34. Chairperson and distinguished members of the Panel. My name is Dale Seymour and I am the Commissioner of the Anti-Dumping Commission, Australia's investigating authority.

35. The Panel will be acutely aware that this is the first time that a WTO panel has heard a dispute about a WTO Member's reliance on the "particular market situation" provision of Article 2.2. The scope of this provision is of systemic interest and importance to many WTO Members.

36. Australia and Indonesia do not seek any findings that go beyond the specific facts of this dispute. However, your decision will inevitably help clarify the rules for when WTO Members may be able to respond to instances of government intervention that affects the domestic price of a good. Such intervention may not come within the Agreement on Subsidies and Countervailing Measures or within the provisions in the Anti-Dumping Agreement that refer explicitly to government actions. However, Australia argues that they may be captured by the Anti-Dumping Agreement, which requires that domestic prices be discarded as the basis for the "normal value" where, "because of the particular market situation", domestic sales "do not permit a proper comparison" with the export price.

37. In considering your decision, I would urge you to consider closely the facts of this case and to keep in mind that they are not in dispute.

38. Indonesia is not arguing that the programs and policies found by the Anti-Dumping Commission and the export ban on logs did not exist. It does not deny that these government interventions increased the supply of logs in Indonesia and lowered the cost and price of logs and hardwood pulp in Indonesia.
39. Indonesia does not deny that SMG and the APRIL Group are vertically integrated conglomerates that have their own upstream hardwood pulp facilities. It does not deny that the lowered cost and price of logs and hardwood pulp induced SMG and the APRIL Group to supply more A4 copy paper at each possible price point than they otherwise would have.

40. And Indonesia does not deny that the resultant price of A4 copy paper in Indonesia was artificially low, significantly below regional benchmarks, and reflected the lowered cost and price of logs and hardwood pulp in Indonesia that resulted from the interventions of the Government of Indonesia.

41. These are the key facts that formed the basis of the Anti-Dumping Commission's "particular market situation" determination.

42. Indonesia does not contest the existence of this situation, but argues that the Anti-Dumping Agreement does not empower WTO Members to respond, even where the producers export the like product at a price below its full cost of production in the country of origin\textsuperscript{12} and the domestic industry in the importing country is materially injured.

43. Chairperson, the "particular market situation" provision of Article 2.2 provides a highly contained, limited and measured defence against government intervention that affects the domestic price of a good and that is inconsistent with the WTO's dedication to open, fair and undistorted competition.

44. The issue squarely before this Panel is whether WTO Members should have the ability – appropriately and tightly constrained – to respond to such a situation when this is clearly available on a proper interpretation of the relevant provisions, or whether WTO Members should be rendered completely unable to act based on Indonesia's unduly narrow and legally incorrect interpretation of these provisions.

\textsuperscript{12} "[P]lus a reasonable amount for administrative, selling and general costs and for profits" as per Article 2.2.
45. A finding in favour of Indonesia would be contrary to a proper Vienna Convention interpretation of the Anti-Dumping Agreement and Article VI of the GATT 1994. It would have serious negative ramifications for those WTO Members – like Australia – who are dedicated to open, fair and undistorted competition. And, instead of providing a limited and measured mechanism for WTO Members seeking to respond to injurious unfair trading practices, the Panel would instead be providing a licence to those WTO Members who engage in injurious unfair trading practices.

46. The existence of an anti-dumping system provides an important relief in countries such as Australia that have liberalised and opened their markets. The rules in the Anti-Dumping Agreement reflect the need for this mechanism and reflect the intention of the negotiating parties. I strongly urge the Panel not to adopt an interpretation of the Anti-Dumping Agreement that is not supported by the words of the treaty and that would operate only to protect government intervention that is contrary to the very principles upon which the WTO is based.

47. Chairperson, the Anti-Dumping Commission has well-established and rigorous investigating processes, making it a competent investigating authority. All of our investigations – including the one you are considering here today – are conducted according to four core principles: independence, transparency, evidence based decision-making, and full access to both merits and judicial review.

48. The recommendations I make are consistent with Australian law – which itself fully implements Australia's WTO obligations – and are independent from the policy or political considerations of the government of the day.

49. As a result, I am confident that you will find that the application of Australia's anti-dumping system in this case was fully consistent with Australia's obligations under the WTO agreements. And I am also confident that you will find that the Anti-Dumping Commission's establishment of the facts was proper and its evaluation of those facts was unbiased and objective.
5. Indonesia's assertions regarding Indah Kiat's records on pulpwood

50. I would like to finish by briefly correcting the record on the information that the Anti-Dumping Commission had about the pulpwood consumed by Indah Kiat.

51. In its second written submission, Indonesia asserts that Australia misled the Panel in its response to Question 30 from the Panel issued following the first substantive meeting with the Parties. Indonesia says that its Exhibit IDN-28 shows that, in fact, the Anti-Dumping Commission did "have the volume and value of pulpwood consumed [by Indah Kiat] for all twelve months of the investigation period".\(^{13}\)

52. Indonesia states that the amount shown for "Raw Material" in Exhibit IDN-28 "is the cost of hardwood pulp".\(^{14}\) We presume what Indonesia means is that the amount shown for "Raw Material" is the cost of pulpwood. However, even if that is what Indonesia means, that is still incorrect.

53. The Anti-Dumping Commission verified that the amount shown for "Raw Material" was the cost of the woodchips used in the production of hardwood pulp, not the cost of pulpwood. This amount comprises the pulpwood log cost, plus the cost of the water and electricity consumed in turning the logs into woodchips, plus the cost of direct labour employed to turn the logs into woodchips, plus other manufacturing expenses incurred in turning the logs into woodchips, minus an amount representing the value of steam produced by burning the bark from the logs in the woodchip production process.

54. Thus, the amount shown for "Raw Material" is the cost of manufacturing the woodchips used in the production of hardwood pulp. It is not the value of pulpwood consumed in the production of A4 copy paper, and it is not the volume of pulpwood consumed in the production of A4 copy paper.

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\(^{13}\) Indonesia's second written submission, para. 79.

\(^{14}\) Indonesia's second written submission, para. 80.
55. As stated in our response to Question 30 from the Panel following the first substantive meeting with the Parties, the Anti-Dumping Commission was only able to determine the volume and value of pulpwood consumed in the production of A4 copy paper for the month of November 2015. Exhibit IDN-28 does not show otherwise.

56. I wish you all the best with your deliberations, and will now hand the floor back to Ms Holmes.

6. Indonesia's submissions regarding "particular market situation"

57. Thank you. I will now address a number of arguments Indonesia has raised in its second written submission.

58. Indonesia continues to argue that the Anti-Dumping Commission's finding in respect of the "particular market situation" was "limited to hardwood timber and pulp" and was "based exclusively on the price of an input". We rebutted these arguments in our first written submission, in our opening statement at the first substantive meeting with the Parties, in our written responses to the Panel's questions following the first substantive meeting with the Parties, in our second written submission, and earlier in this statement. We refer the Panel to those statements.

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15 Australia's written response to question 30 from the Panel following the first substantive meeting with the Parties, paras. 202-203.
16 Indonesia's second written submission, para. 3.
17 Indonesia's second written submission, para. 13.
18 Australia's first written submission, paras. 114-117 and 155.
19 Australia's opening statement at the first substantive meeting with the Parties, paras. 21-24, 31-32 and 39-42.
20 See Australia's written response to question 6 from the Panel following the first substantive meeting with the Parties, footnote 29 and Australia's written response to question 13 from the Panel following the first substantive meeting with the Parties, paras. 82-85.
21 Australia's second written submission, paras. 35-38
59. The Anti-Dumping Commission's "particular market situation" finding was clearly not "limited to hardwood timber and pulp". And, contrary to Indonesia's allegation, Australia's response to Question 12 from the Panel following the first substantive meeting with the Parties did not "concede" that Australia's "particular market situation" finding was "based exclusively on the price of an input".

60. Chairperson, I also think it is important to make clear that Indonesia is incorrect in arguing that Australia's interpretation of the phrase "particular market situation" would "turn the provision into a grant of authority for Members to disregard domestic prices in market economies in almost any situation".

61. Rather, "particular market situation" means any condition, state or combination of circumstances in respect of the buying and selling of the like product in the market of the exporting country that is distinguishable and not general.

62. This is in no way akin to "almost any situation".

63. Furthermore – and as I discussed earlier – in order to discard domestic sales in determining the "normal value", the investigating authority must also find that, because of that "particular market situation", domestic sales "do not permit a proper comparison".

64. And, of course, before an investigating authority can impose anti-dumping duties based on the "particular market situation" it must also find:

- that the export price is below the third country export price or below the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits; and

- that the resultant "dumping" has caused material injury to the domestic industry.

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22 Indonesia's second written submission, para. 3.
23 Indonesia's second written submission, para. 13.
24 Indonesia's second written submission, para. 9.
25 Australia's first written submission, paras. 97-112.
26 Indonesia's second written submission, para. 9.
7. Indonesia's submissions regarding "such sales do not permit a proper comparison"

65. I would now like to discuss Indonesia's arguments regarding the correct interpretation of the phrase "such sales do not permit a proper comparison".

66. Chairperson, Indonesia is incorrect when it argues that "the proper comparison is between the individual producer's domestic prices and export prices as set forth in Article 2.1".\(^{27}\) Nowhere does Article 2.1 of the Anti-Dumping Agreement (or Article VI of the GATT 1994) define dumping as being when the export price is below the domestic price. Rather, they say that dumping is when the export price is below the normal value. This is a fundamental point in this case.

67. Indonesia's second written submission continues to improperly rely on the mistaken belief that Article 2.1 and the concept of "dumping" are solely concerned with "whether domestic prices are above or below export prices"\(^{28}\) and "whether an individual producer or exporter is price discriminating".\(^{29}\)

68. As a result, Indonesia continues to argue that a "proper comparison" is permitted whenever an investigating authority is able to determine from the domestic prices and the export prices whether an exporter is "price discriminating" i.e. selling at an export price that is below the domestic price.\(^{30}\)

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\(^{27}\) Indonesia's second written submission, para. 53.

\(^{28}\) Indonesia's second written submission, para. 19.

\(^{29}\) Indonesia's second written submission, para. 50.

\(^{30}\) See, for example, Indonesia's second written submission, paras. 18-19, 37 and 50.
69. However, as detailed in our submissions, WTO rules permit an investigating authority to discard domestic sales as the basis for the "normal value" notwithstanding that it remains possible for the authority to determine from those domestic sales whether an exporter is "price discriminating" i.e. selling at an export price that is below the domestic price. That is what happens when domestic sales are discarded because they are not in the ordinary course of trade. It is what happens under Section 15 of China's Accession Protocol when domestic sales are discarded because of the absence of market economy conditions in the relevant industry. It is what happens under the second Ad Note to Article VI:1 of the GATT 1994 when domestic sales are discarded because of the nature of the exporting country's economy.

70. In all of these cases a comparison of all of the domestic sales with the export sales would permit an investigating authority to determine "whether domestic prices are above or below export prices" and "whether an individual producer or exporter is price discriminating". Nonetheless, the Anti-Dumping Agreement and the GATT 1994 allow an investigating authority to discard some or all of those domestic sales when determining the "normal value".

71. And, in all of these cases, the domestic sales are discarded because they do not result in 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 and Article VI:1(a) of the GATT 1994. That is, the domestic sales are discarded because they are not suitable to use as the basis for the "normal value", not because using them would mean an investigating authority could not determine whether an exporter is "price discriminating".

72. And, in all of these cases, domestic sales are discarded even though the export sales might also be "affected" by the circumstances that led to the domestic sales being discarded.

73. This conclusively demonstrates that the overarching factor in deciding whether to discard domestic sales in determining the "normal value" is whether the domestic sales result in 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.

31 Indonesia's second written submission, para. 19.
32 Indonesia's second written submission, para. 50.
74. In order to satisfy the requirements set out in Article 2.1, and hence be suitable to use as the basis for the "normal value", the "domestic price" must be of the correct nature and quality. The Appellate Body made that clear in *US – Hot-Rolled Steel* when it said that:

    The text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be "in the ordinary course of trade"; second, it must be of the "like product"; third, the product must be "destined for consumption in the exporting country"; and, fourth, the price must be "comparable".  

75. The Panel will note that the Appellate Body did not refer to the like product's export prices or their relationship to domestic prices as the relevant considerations for an investigating authority to consider when it decides whether or not to use the domestic sales as the basis for the "normal value". Rather, the aim of the exercise is to derive a valid foundation on which to base the "normal value", which is then compared to the export price.

76. This is reflected in Article 2.2 – which describes circumstances where the domestic price is not a "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Indeed, the entire focus of Article 2.2 is on the domestic sales and their suitability to use as a basis for the "normal value".

77. In the dispute that is before this Panel, and as stated by the words of the Anti-Dumping Agreement itself, what needs to be looked at is whether, "because of the particular market situation", the relevant domestic sales "do not permit a proper comparison". It is the domestic sales (and prices) per se that need to be analysed at this stage of the dumping investigation.

78. Article 2.2 quite clearly does not address the next step of the dumping investigation, which is comparing the "normal value" (once ascertained) with the export price.

79. Indonesia is conflating the steps of the dumping investigation. Australia is obviously not saying that the export price is irrelevant to the dumping calculation. Rather, the export price is relevant after the investigating authority has ascertained the proper foundation for the "normal value".

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80. Thus, contrary to Indonesia's argument in its second written submission, the fact that the
Anti-Dumping Commission "did not take the export price into consideration"\(^{34}\) in deciding
whether or not to discard the domestic sales under Article 2.2 does not mean that "its
interpretation and application of Article 2.2 [is] inconsistent with its WTO obligations".\(^{35}\)

8. Indonesia's "symmetry" argument

81. Turning now to Indonesia's arguments regarding the supposed relevance of a perceived
"symmetry" in this case, Indonesia continues to argue that it is clear that domestic prices and
export prices were "equally affected" because "the same inputs were used to make A4 copy paper
sold to the Indonesian domestic market and exported to Australia".\(^{36}\) It continues to argue that this
means there was no "particular market situation"\(^{37}\) and that this means that the domestic sales
permitted a "proper comparison".\(^{38}\) It argues that "[w]hether the input price affected domestic and
export prices is relevant under Indonesia's first and second claims".\(^{39}\)

82. Australia also recalls that Indonesia has previously stated that it is "ask[ing] the Panel for a
narrow ruling on the specific issue of whether a low-price input used identically to produce
merchandise for the domestic and export market constitutes a "particular market situation" …
(claim 1) or prevents a proper comparison (claim 2)".\(^{40}\)

83. We have already explained why Indonesia is wrong to equate the "particular market
situation" finding with the lowered cost and price of inputs.

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\(^{34}\) Indonesia's second written submission, para. 38.
\(^{35}\) Indonesia's second written submission, para. 38.
\(^{36}\) Indonesia's second written submission, para. 15.
\(^{37}\) Indonesia's second written submission, paras. 3, 13-14, and 52.
\(^{38}\) Indonesia's second written submission, paras. 15-16, 39-42.
\(^{39}\) Indonesia's second written submission, para. 19.
\(^{40}\) Indonesia's written response to question 2(b) from the Panel following the first substantive meeting with the Parties,
p. 8.
84. We have already explained that, even if the domestic prices and the export prices were "equally affected", it would not automatically mean that there was not a "particular market situation" analysis or that a "proper comparison" was possible.\footnote{See, for example, Australia's written response to question 6 from the Panel following the first substantive meeting with the Parties, paras. 25-40 and Australia's written response to questions 36 and 37 from the Panel following the first substantive meeting with the Parties, paras. 226-228.}

85. And we have already explained how Indonesia is conflating the two limbs of Article 2.2 – being "particular market situation" and "such sales do not permit a proper comparison" – and depriving one of the limbs of any operation at all. This is because, on Indonesia's argument, every situation that comes within the term "particular market situation" would automatically not "permit a proper comparison", because the domestic price and the export price would not have been "equally affected". And, if there is a "situation" that does "permit a proper comparison" because the domestic price and the export price have been "equally affected", then, on Indonesia's argument, it could not be a "particular market situation", because the export price would have been affected.\footnote{See, for example, Australia's second written submission, paras. 71-76 and Indonesia's written response to question 5 from the Panel following the first substantive meeting with the Parties, p. 11.}

86. Indonesia thus fails to interpret the provisions in a coherent and consistent manner, and does not give meaning to all the applicable provisions harmoniously.\footnote{Appellate Body Report, \textit{US – Anti-Dumping and Countervailing Duties (China)}, para. 570 (citing Appellate Body Report, \textit{US – Upland Cotton}, paras. 549-550).}

87. But, putting that aside for the moment, it is basic economics that, when the cost and price of a major input is reduced, the effect on the price of a product in a particular market will depend on the supply and demand situation in that particular market.

88. Simply put, the Indonesian market for Indonesian A4 copy paper is different from the Australian market for Indonesian A4 copy paper. The sellers are different. The buyers are different. There are different price elasticities of supply and different price elasticities of demand. The brands on offer are different. The amount of A4 copy paper demanded is different. The mix between recycled and non-recycled A4 copy paper is different.
89. Australia does not dispute that the Indonesian A4 copy paper sold in Indonesia contains the same hardwood pulp as the Indonesian A4 copy paper exported to Australia. But that in no way means the effect of the lowered cost and price of that hardwood pulp on the price of Indonesian A4 copy paper in Indonesia is automatically the same as its effect on the price of Indonesian A4 copy paper in Australia. 44

90. In fact, given the differences in the two markets, the logical conclusion is that the lowered cost and price of hardwood pulp would not have resulted in the price of Indonesian A4 copy paper in Indonesia changing by exactly the same amount or percentage as the price of Indonesian A4 copy paper in Australia. We note that the Parties will have the opportunity to address this issue further in their responses to Question 4.

91. Indonesia cannot, and has not, established that the domestic price and the export price were "equally affected". Thus, even if the Panel accepted Indonesia's approach, it must nonetheless find in favour of Australia on Indonesia's first and second claims on the basis that Indonesia has failed to show that the domestic price and the export price were "equally affected".

9. Indonesia's arguments regarding the Anti-Dumping Commission's determination of the constructed normal value

92. Chairperson, I will now address Indonesia's third and fourth claims, which challenge Australia's derivation of the constructed normal value under Articles 2.2 and 2.2.1.1.

93. Indonesia continues to read Article 2.2.1.1 as if it does not include the word "normally" and continues to argue that the facts of this case are indistinguishable from those in EU – Biodiesel (Argentina). 45 We have explained in detail how our interpretation and application of Article 2.2.1.1 under Australia's domestic legislation gives "normally" the required meaning and effect and how the factual and legal situations before this Panel are fully distinguishable from those in EU – Biodiesel (Argentina).

44 Indonesia argues that "the only reasonable and unbiased conclusion is that the price of domestic sales and exports would be equally affected, even if there were a "particular market situation"" (Indonesia's second written submission, para. 15) and, moreover, that "Indonesia has established the alleged input situation affected domestic and export prices equally" (Indonesia's second written submission, para. 16).

45 Indonesia's second written submission, paras. 61-66 and 69-71.
94. I will not repeat what we have already said. However, I do wish to address Indonesia's argument in its second written submission that the Anti-Dumping Commission applied the "reasonableness test" that was rejected by the Appellate Body in EU – Biodiesel (Argentina). Indonesia's support for this assertion is paragraph 6.9.1 of the Final Report.

95. The Anti-Dumping Commission did not consider the "reasonableness" of the hardwood pulp component of the exporters' records at all in that paragraph, or in any other part of its determination.

96. Rather, and as required by Australian law, the Anti-Dumping Commission disregarded the hardwood pulp components of the records of Indah Kiat and Pindo Deli because it considered that they did not "reasonably reflect competitive market costs associated with the production or manufacture of [A4 copy paper]", rendering them "unsuitable for determining the cost to make A4 copy paper for the purposes of constructing normal values".

97. This reasoning reflects the assessment that it is necessary to take into account the crucial context provided by the "particular market situation" provision in Article 2.2 when interpreting the word "normally" in Article 2.2.1.1. Moreover, this reasoning is in line with the Appellate Body's statement in EU – Biodiesel (Argentina) that costs calculated pursuant to Article 2.2.1.1 must be capable of generating an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales."

98. Chairperson, I also wish to address Indonesia's argument that if Australia had not "improperly linked a "particular market situation" to a producer's input cost" then "there would not be a problem using the producer's costs to construct the normal value".

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48 See also Australia's second written submission, para. 221.
50 Indonesia's second written submission, para. 68.
99. The Anti-Dumping Commission clearly stated in the Final Report that "low input costs, of themselves, are not determinative of a market situation",\(^{51}\) that "a market situation assessment primarily concerns the domestic market for like goods",\(^{52}\) and that "conditions in a significant input market that do not distort the market for like goods will not found a market situation finding".\(^{53}\)

100. Indonesia argues that the "problem", in its view, is that the Anti-Dumping Commission found that the amounts for hardwood pulp in the records of Indah Kiat and Pindo Deli were unsuitable to use as the hardwood pulp component of the cost of production of A4 copy paper in Indonesia. But Indonesia has effectively conceded that the "pulp benchmark" that the Anti-Dumping Commission instead used – which was different to the amounts for hardwood pulp in the records of Indah Kiat and Pindo Deli – was the proper amount to use for the hardwood pulp component of the cost of production of A4 copy paper in Indonesia.\(^{54}\)

101. This is because Indonesia has acknowledged that the prevailing export price of hardwood pulp was the proper amount to use for the hardwood pulp component of the "cost of production of [A4 copy paper] in [Indonesia]".\(^{55}\) And Australia has demonstrated that the "pulp benchmark" used by the Anti-Dumping Commission was virtually identical to that prevailing export price.\(^{56}\)

\(^{51}\) Final Report, Exhibit IDN-04, section A2.8.6.3, p. 165.

\(^{52}\) Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.

\(^{53}\) Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.

\(^{54}\) See, for example, Indonesia's opening statement at the first substantive meeting with the Parties, para. 49, Australia's closing statement at the first substantive meeting with the Parties, paras. 26-29, and Australia's second written submission, paras. 241-249.

\(^{55}\) See, for example, Indonesia's opening statement at the first substantive meeting with the Parties, para. 49, Australia's closing statement at the first substantive meeting with the Parties, paras. 26-29, and Australia's second written submission, paras. 241-249.

\(^{56}\) Australia's second written submission, paras. 241-249.
102. Thus, using the amounts for hardwood pulp that were in the records of Indah Kiat and Pindo Deli would have been the real "problem" because:

- contrary to the findings of the Appellate Body in EU – Biodiesel (Argentina), those records would not have resulted in the constructed normal value being an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales";\(^ {57}\) and

- contrary to Article 2.2 of the Anti-Dumping Agreement, they would not have resulted in the derivation of the proper "cost of production [of A4 copy paper] in [Indonesia]".

103. Chairperson, Article 2.2.1.1 cannot be used to dictate that Article 2.2 be interpreted in a way not justified by a proper Vienna Convention analysis of its terms and in a way inconsistent with Appellate Body jurisprudence.

10. **Australia's interpretation does not make the second Ad Note and the NME provisions in Accession Protocols redundant**

104. I would now like to move to Indonesia's argument in its second written submission that Australia's interpretation of the "particular market situation" provision of Article 2.2 permits the discarding of domestic prices in situations beyond those covered by the second Ad Note to Article VI:1 of the GATT 1994 and the NME provisions in certain Accession Protocols.\(^ {58}\) Indonesia goes so far as to suggest that adopting Australia's interpretation would make the second Ad Note and those NME provisions "unnecessary"\(^ {59}\) and that such a result is "absurd".\(^ {60}\)

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\(^ {58}\) Indonesia's second written submission, paras. 5, 9, 12, and 43-52.

\(^ {59}\) Indonesia's second written submission, para. 5. See also Indonesia's second written submission, para. 52.

\(^ {60}\) Indonesia's second written submission, para. 5.
105. Chairperson, in making this argument, Indonesia (and China\textsuperscript{61}) ignore the fact that the investigating authority's discretion in determining the "normal value" is materially different under Article 2.2 than it is under the second Ad Note and the NME provisions in the Accession Protocols.

106. As we have seen, if the domestic price is discarded as the basis for the normal value under Article 2.2, the methodology that an investigating authority must use to determine the "normal value" must be either:

- the "comparable price of the like product when exported to an appropriate third country, provided that this price is representative"; or
- "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits".

107. The requirement that a "representative" export price or the "cost of production in the country of origin"\textsuperscript{62} be used as the basis for the alternative "normal value" is not present in the second Ad Note or the NME provisions in the Accession Protocols. Rather, they have been interpreted to permit the "normal value" to be based on prices and costs in a market economy third country. Article 2.2 does not allow for the use of such a "surrogate" or "analogue" country methodology.

108. Thus, the effect on the margin of dumping (and hence the anti-dumping duties) of a finding under Article 2.2 is materially different from a finding under the second Ad Note or the NME provisions in the Accession Protocols.

\textsuperscript{61} See China's written response to question 4 from the Panel to the third parties following the first substantive meeting with the Parties, paras. 37-42.

\textsuperscript{62} "[P]lus a reasonable amount for administrative, selling and general costs and for profits" as per Article 2.2.
109. This is illustrated by the dispute that is before this Panel. The Anti-Dumping Commission determined the constructed normal value of A4 copy paper for Indah Kiat and Pindo Deli on the basis of the amounts recorded in their records for all of their costs other than hardwood pulp. And, for hardwood pulp, Australia has explained why and how the "pulp benchmark" properly reflected the hardwood pulp component of the cost of production of A4 copy paper in Indonesia. 63

110. The Anti-Dumping Commission derived the "normal value" on the basis of the cost of production of A4 copy paper in Indonesia, as permitted by Article 2.2. This is in no way akin to the "surrogate" or "analogue" country methodology permitted by the second Ad Note and the NME provisions in the Accession Protocols.

111. Thus, contrary to Indonesia's assertions, Australia does not argue, and does not consider, that a "particular market situation" is "analogous to situations involving state controlled economies and nonmarket economies". 64 It represents a distinct and separate situation to that provided for in the second Ad Note and the NME provisions in the Accession Protocols.

11. Concluding remarks

112. Chairperson, members of the Panel, in closing I wish to emphasise that Indonesia's case does not rest upon a proper Vienna Convention interpretation of the words used in the Anti-Dumping Agreement and the GATT 1994.

113. Rather, it rests upon mischaracterisations of the Anti-Dumping Commission's investigation, upon a mistaken belief that "dumping" and the Anti-Dumping Agreement are solely concerned with "international price discrimination", upon an unproven factual assertion that domestic and export prices were "equally affected", and upon an unfounded concern that Australia's interpretation renders unnecessary the second Ad Note and the NME provisions in certain Accession Protocols. Indonesia also reads words into the treaty that are not there (like "exceptional" and "unilateral"), and reads out words that are there (like "normally" and "cost of production in the country of origin").

63 See, for example, Australia's second written submission, paras. 237-260.
64 Indonesia's second written submission, para. 43. See also Indonesia's second written submission, paras. 46, 49 and 51.
114. We recognise that the precise scope and parameters of the phrases "particular market situation" and "such sales do not permit a proper comparison" are not set out in Article 2.2. But Indonesia has not interpreted them in good faith in accordance with their ordinary meaning in their context and in the light of the object and purpose of the Anti-Dumping Agreement, as required by the Vienna Convention. Rather, it has interpreted them in a way that deprives at least one of them of any operation at all. By contrast, Australia's interpretation is consistent with the general rule of treaty interpretation set out in the Vienna Convention, and gives those phrases a limited and measured operation.

115. That concludes Australia's opening statement. On behalf of the Government of Australia, I again thank the Panel and the members of the Secretariat staff for their dedicated work on this dispute. We look forward to answering your questions. Thank you.