



AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS529/R.

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ANNEX A-1

INTERIM REVIEW

1 INTRODUCTION

1.1. This annex to the Panel Report sets out our responses to the parties' requests made at the interim review stage, as foreseen in Article 15.3 of the DSU.

1.2. With regard to certain requests, we were guided by the consideration that the descriptions of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".¹ We further note that the integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit.

1.3. Furthermore, consistent with the approach of previous panels, we consider it not appropriate for the parties to re-argue, at the interim review stage, arguments already put before a panel.²

1.4. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments. Due to changes as a result of our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.5. In addition to the modifications specified below, we have also corrected a number of typographical and other non-substantive errors throughout the Report, including, where appropriate, some identified by the parties.

2 INDONESIA'S SPECIFIC REQUESTS FOR REVIEW

2.1. Indonesia has not submitted any request for review of the Interim Report.

3 AUSTRALIA'S SPECIFIC REQUESTS FOR REVIEW

3.1 Paragraph 1.7

3.1. Australia notes that in addition to the dates listed in paragraph 1.7 of the Report, the timetable was also revised on 7 June 2019 following a request from Indonesia. Indonesia does not object to the revision proposed by Australia. Having reviewed the record of this dispute, we note that, in response to Indonesia's request and having considered Australia's comments, the Panel informed the parties of extending the due dates for the parties' submissions by email on 2 June 2019. This has been reflected in paragraph 1.7 of the Interim Report. We therefore decline Australia's request to modify paragraph 1.7.

3.2 Paragraph 7.10

3.2. Australia notes that the Final Report (Exhibit IDN-4) referred to "domestic sales" rather than "domestic market sales". In addition, Australia notes that the ADC's 23-page assessment of the alleged market situation in Indonesia for A4 copy paper is set forth in Section A2.9 of Appendix 2 of the Final Report, rather than Appendix 2 in its entirety. Indonesia does not consider the suggested revisions of paragraph 7.10 are necessary, but Indonesia does not object to the revisions. We

¹ Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

² Panel Reports, *EU – Fatty Alcohols (Indonesia)*, para. 6.5; *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; and *India – Agricultural Products*, para. 6.5.

consider Australia's revisions more precisely describe the relevant portions of the ADC's Final Report and have made changes to paragraph 7.10 to implement such revision.

3.3 Paragraph 7.35

3.3. Australia requests paragraph 7.35 be amended to clarify that Australia argued, in terms of context, that the term "particular market situation" is co-located with the descriptions of two conditions that comprise specific circumstances in respect of sales of the like products in the market of the exporting country. Indonesia does not consider the suggested revisions of paragraph 7.35 are necessary, but Indonesia does not object to the revisions. We consider that Australia's suggested revisions more precisely describe Australia's referenced argumentation. We therefore accept Australia's proposed revisions with some minor textual modification. We have also included references to additional submissions of Australia relevant to our understanding of Australia's argumentation.

3.4 Paragraph 7.59

3.4. Australia requests a sentence of paragraph 7.59 be revised to elaborate conditions for its argument that it is sufficient to determine the domestic sales are "not suitable" for use as the basis for normal value. Additionally, Australia requests that the reference to Australia's submissions be expanded to include additional paragraphs of Australia's first written submission. Indonesia objects to the suggested revisions as not necessary for additional clarity or accuracy. We find that including the elements of additional text suggested, while not inaccurate, does not help to clarify the meaning of the sentence in question, and we, therefore, decline to make this revision. We do consider that the expanded reference to certain paragraphs of Australia's submission is relevant, and we have accepted the suggested revision to the references.

3.5 Paragraph 7.62

3.5. Australia requests that its argument be clarified in paragraph 7.62 to make clear that Australia has not taken the position that distorted prices cannot be suitable for use as a basis for normal value in all cases. Indonesia objects to the suggested revision, noting that Australia offers no reference to its submissions to support the suggested revision. We note that the sentence in question references Australia's response to question No. 19 following the first meeting of the Panel. We note also that question No. 19 was specific to this particular case, as question No. 19 referred to *the* domestic market sales in question, *the* Commission's determination, and *the* export sales. In Australia's response to this question, however, it made an argument based on an interpretation of Article 2.2 in contrast to Articles 2.1 and 2.3 to support its assertion that the ADC did not need to examine export sales in considering whether the domestic sales permitted a proper comparison. We consider that Australia's response did not offer a case-specific argument, but the question and response were nevertheless limited to addressing *the* domestic sales in question. We have, therefore, not accepted Australia's suggested revision, and we have instead revised the sentence at issue to more accurately reflect Australia's referenced submission.

3.6 Paragraphs 7.85 and 7.86 (7.85-7.87)

3.6. Australia takes issue with the summary of its argument in paragraph 7.85 (paragraphs 7.85 and 7.86), which characterized Australia's submissions as arguing that the applicable analysis in this case was similar to the analysis that would be undertaken to determine whether domestic sales were made in the ordinary course of trade. Australia proposes a revised summary of its argument in this respect. Australia also requests a revision along the same lines to paragraph 7.86 (7.87), which offers an assessment by the Panel of the ADC's determination in relation to the summary in the prior paragraph of Australia's argumentation. Indonesia objects to the suggested revisions, arguing that Australia's arguments were accurately described and that the proposed revisions are not necessary for additional clarity or accuracy. We recall that the descriptions of the parties' arguments are not intended to reflect the entirety of the parties' arguments, and that a panel has the discretion to address only those arguments it deems necessary to resolve a particular claim. The integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. We consider that certain portions of Australia's revised summary of its argumentation in paragraph 7.85 (paragraphs 7.85 and 7.86) offer a more precise and accurate summary of some of the relevant points as made by Australia in its submissions, and we have, therefore, divided paragraph 7.85 into

two paragraphs and accepted portions of those suggested revisions with minor alterations and additional references. We have not accepted the entirety of Australia's proposed revised summary where we considered that the points could be accurately further summarized more succinctly and where we considered that the points made were redundant of the remaining summary already set forth in paragraph 7.85 (paragraphs 7.85 and 7.86). We do not consider that Australia's proposed revisions to the Panel's assessment made in paragraph 7.86 (7.87) contribute to the accuracy and clarity of the paragraph. We have, however, made certain revisions to this paragraph for greater clarity.

3.7 Paragraph 7.92 (7.93)

3.7. Australia takes issue with the Panel's summary of its argument in paragraph 7.92 (7.93): "Australia argues that the ADC was entitled to reject the relevant costs because, according to Australia, the first sentence of Article 2.2.1.1 envisages that properly recorded costs may be disregarded where the circumstances are not 'normal and ordinary'". Australia submits that it did not use the words "properly recorded costs" in its submissions. The use of these words by the Panel, in Australia's view, gives the impression that Australia argued that an investigating authority must confirm that the two conditions in Article 2.2.1.1 are satisfied before concluding that circumstances are not normal and ordinary. Australia submits that it did not make such an argument. Australia therefore requests that paragraph 7.92 (7.93) be amended to reflect more precisely Australia's argument. Indonesia objects to Australia's proposed revision and considers that the Panel accurately described Australia's argument. We consider that Australia's revision more precisely characterizes Australia's argument and have made changes to paragraph 7.92 (7.93) and footnotes to that paragraph to reflect that revision.

3.8 Paragraph 7.107 (7.108), footnotes 201 (209), 202 (210) and 208 (216)

3.8. Australia asks us to introduce changes to paragraph 7.107 and introduce an additional footnote to that paragraph to reflect more precisely its argument that using Pindo Deli's and Indah Kiat's recorded pulp costs "would not have resulted in 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', as required by the Appellate Body for the construction of costs under Article 2.2.1.1".³ Australia further asks the Panel to provide more complete citations to its submissions in footnotes 201 (209), 202 (210) and 208 (216). Indonesia objects to the revisions proposed by Australia on the grounds that the Panel accurately described Australia's arguments and provided adequate citations. In our view, Australia's proposed revisions add clarity and precision to the cited arguments. We therefore accept Australia's proposed revisions with some minor textual modifications.

3.9 Paragraph 7.114 (7.115)

3.9. Australia submits that the Panel's reasoning in paragraphs 7.114 (7.115) and 7.116 (7.117) suggests that the Panel has found that the term "normally" does provide a separate legal basis to disregard an exporter or producer's records. However, this is not explicitly stated in the Interim Report. Australia requests that the Panel make its finding clear with respect to the legal question it poses at paragraph 7.108 (7.109), as to whether the term "normally" in the first sentence of Article 2.2.1.1 provides a separate basis to disregard an exporter's records. Indonesia objects to the proposed revision and argues that Australia asks the Panel to make the finding which its reasoning does not require. We agree with Australia that it follows from our reasoning in paragraphs 7.110-7.114 (7.111-7.115) that the term "normally" in the first sentence of Article 2.2.1.1 provides a separate basis to disregard an exporter's records. We have therefore modified the last sentence of paragraph 7.114 (7.115) to make this conclusion explicit.

3.10 Paragraph 7.162 (7.163) and footnote 317 (325)

3.10. Australia argues that paragraph 7.162 (7.163), which states in part that "Indah Kiat's data relating to the volume and value of woodchips consumed in the production of pulp was available on the ADC's record", and footnote 317 (325) inaccurately describe the information available on record of the ADC. Specifically, Australia argues that Exhibit IDN-28 (BCI), cited in footnote 317 (325),

³ Australia's request for review of the Panel Interim Report, paras. 22-24 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para 6.24).

records only the value of woodchips (raw materials) consumed to produce pulp for the whole of the investigation period and does not record the volume of woodchips consumed to produce pulp, for the whole of the investigation period. Australia clarifies that the reference to "production" in Exhibit IDN-28 (BCI) is the volume of pulp produced, not the volume of woodchips consumed in the production of pulp. Australia argues that the ADC only had information available relating to the volume of woodchips consumed to produce pulp for the month of November 2015 – not for the whole investigation period. On this basis, Australia requests us to make modifications to paragraph 7.162 (7.163) to clarify that Exhibit IDN-28 (BCI) does not record the volume of woodchips consumed in the production of pulp in 2015 and that the ADC had on its record data relating to the volume of woodchips consumed in the production of pulp only for the month of November 2015.

3.11. Indonesia objects to Australia's request. Indonesia argues that Exhibit IDN-28 (BCI) contains both the total value of woodchips consumed and the per-unit value of woodchips. In Indonesia's view, the total volume of woodchips can be derived by dividing the total value of woodchips by the per-unit value of woodchips. For these reasons, Indonesia requests us to reject Australia's proposed revision.

3.12. In light of the parties' arguments, we have re-examined Exhibit IDN-28 (BCI) providing cost data for Indah Kiat's pulp-making in 2015, and specifically whether it provides both value and volume of woodchips consumed in the production of pulp. We find helpful Australia's clarification that the word "production" in this Exhibit refers to the volume of pulp produced and not the volume of woodchips consumed. Indonesia has not contested this clarification. In response to Australia's comments, Indonesia has not pointed us to a number in this Exhibit which represents the volume of woodchips consumed in the production of pulp. Rather, Indonesia argues that this number can be derived from the data contained in the Exhibit by dividing the total value of woodchips by the per-unit value of woodchips. We understand that the per-unit amount in Exhibit IDN-28 (BCI) refers to the value of woodchips required to produce one ton of pulp. By performing the calculation suggested by Indonesia we arrive at the volume of pulp produced rather than the volume of woodchips consumed by Indah Kiat. We are therefore not convinced by Indonesia's argument and accept Australia's request to modify paragraph 7.162 so that it reflects that Exhibit IDN-28 (BCI) provides the value of woodchips consumed in the production of pulp by Indah Kiat for the period of investigation, but not the volume of woodchips consumed. We have introduced subsequent changes to footnote 317 (325) reflecting the absence of volume data for woodchips in Exhibit IDN-28 (BCI) and the implications of that fact.

3.13. With regard to the second part of Australia's request, we note that, in the course of this proceeding, Australia argued that the ADC was able to determine the volume and value of *pulpwood* consumed by Indah Kiat to make woodchips only for the month of November 2015.⁴ At the second meeting of the Panel, Australia explained in detail the difference between *pulpwood* (an input into production of woodchips) and woodchips (an input into production of pulp), and distinguished the two.⁵ We explained in paragraph 7.162 (7.163) of the Interim Report that, in deciding whether Indah Kiat's cost of woodchips could have been replaced, we do not consider it relevant whether the ADC was only able to determine the cost data for *pulpwood* for one month. We therefore find that our statement in paragraph 7.162 (7.163) responds to Australia's argument made in the course of this proceeding. To the extent Australia now attempts to characterize its argument differently and argues that it was only able to determine the volume of *woodchips* consumed in the production of pulp for one month, we note that the interim review stage is not an opportunity for the parties to re-open arguments already put before a panel. We therefore decline the second part of Australia's request, i.e. to specify in paragraph 7.162 (7.163) that the ADC had on its record data relating to the volume of woodchips consumed in the production of pulp only for the month of November 2015.

⁴ Australia's opening statement at the second meeting of the Panel, para. 55; responses to Panel question No. 30 following the second meeting of the Panel, paras. 202-203, and question No. 19 following the second meeting of the Panel, paras. 105-108.

⁵ Australia's opening statement at the second meeting of the Panel, paras. 52-54.

ANNEX B

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ANNEX B-1**FIRST INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF INDONESIA****EXECUTIVE SUMMARY OF INDONESIA'S FIRST WRITTEN SUBMISSION****I. AUSTRALIA'S FINDING THAT A PARTICULAR MARKET SITUATION EXISTED RESTS ON AN INCORRECT INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT****A. A "Particular Market Situation" Is an Exceptional Set of Circumstances Affecting the Domestic Market**

1. Australia determined that a "particular market situation" existed based on GOI forestry policies that allegedly resulted in a distorted price of hardwood timber, an input in the pulp production process. Australia's interpretation of "particular market situation" is incorrect.

1. The Ordinary Meaning of "Particular Market Situation" Means it Is an Exceptional Set of Circumstances Affecting Sales in a Geographic Region

2. "Particular market situation" is not defined in the Anti-Dumping Agreement. The term "particular" is however defined in the Oxford English Dictionary as "[d]istinguished in some way among others of the same kind; not ordinary; worthy of notice, remarkable; special". A "market" may be defined as "[a] geographical area of commercial activity". A "situation" is defined as: "[p]osition of affairs; combination of circumstances". Consequently, a "particular market situation" is an exceptional combination of circumstances taking place in a geographic region.

2. The Context Provided by Other Provisions of the Treaty Confirms a Particular Market Situation Exists in Limited Circumstances Affecting Price Comparability

3. Article 2.2, itself, provides context for understanding the meaning of the "particular market situation" provision. Article 2.2 provides two other limited exceptions to using domestic sales which apply to the unusual situation where a producer has either no domestic market sales or very few domestic market sales. Both exceptions also concern circumstances affecting sales in the domestic market, as a whole.

4. The Anti-Dumping Agreement, GATT Article VI and a number of other provisions of the GATT also provide context relevant to interpreting Article 2.2 and the meaning of "particular market situation". The fact that Article VI is an exception to Articles I and II indicates part of the context for interpreting Article VI and the Anti-Dumping Agreement is the right of other Members not to have their exports subjected to duties in excess of negotiated bound duties or to have their exports treated less favorably than exports from other countries. Therefore, Article VI and the Anti-Dumping Agreement represent a balance between a right to apply anti-dumping duties within certain limits and a right not to be subjected to anti-dumping duties going beyond those limits.

5. The SCM Agreement is also relevant to an understanding of the meaning of the "particular market situation" provision. The SCM Agreement is concerned with regulating government influence of market prices, i.e. governments may not provide goods to producers for below market prices. In contrast, the Anti-Dumping Agreement is concerned with international price discrimination by individual producers or exporters. Reading the "particular market situation" as Australia does impermissibly interjects the Anti-Dumping Agreement into the sphere of regulating government behavior which is expressly regulated in the SCM Agreement.

3. Object and Purpose

6. By promulgating express rules, an overarching goal of the WTO Agreement was to liberalize trade by lowering tariff barriers and to ensure against arbitrary trade distorting measures as succinctly stated in the Marrakesh Declaration.

7. Article 2 of the Anti-Dumping Agreement contains a number of additional rules on how dumping margins must be calculated by an investigating authority, including Article 2.2, Article 2.2.1, Article 2.2.1.1, Article 2.2.2, Article 2.3, Article 2.4, Article 2.4.1, Article 2.4.2, and Article 2.5. The cited provisions demonstrate the Anti-Dumping Agreement expressly provides the rules Members must follow before imposing an anti-dumping duty and support a narrow interpretation of the "particular market situation" provision.

8. The Agreement, thus, manifests an object and purpose of liberalizing trade, while permitting Members to respond to dumping with anti-dumping measures and delineating the extent of a permissible response by setting forth explicit rules and procedures that must be followed. A narrow interpretation of "particular market situation" as an exceptional combination of circumstances affecting the domestic market is consistent with the object and purpose of liberalizing trade and balancing the rights of Members. A narrow reading of "particular market situation" is consistent with the two other exceptions to using domestic prices found in Article 2.2, i.e., no sales in the ordinary course of trade and a low volume of sales. Each of those exceptions is narrow and, "particular market situation" should, likewise, be interpreted in a narrow manner. Australia's broad interpretation that a "particular market situation" can include a situation where a produce obtains low price inputs for the production of the merchandise under consideration is incorrect because it upsets the balance of liberalizing trade by allowing Members to ignore domestic market prices whenever a producer obtains and uses low price inputs. Nothing in the text or negotiating history supports a broad interpretation of the term "particular market situation" and Members agreed not to regulate "input dumping", which is similar to what Australia has interpreted the "particular market situation" provision as permitting.

4. Negotiating History

9. The negotiating history confirms the ordinary meaning and context of the term "particular market situation" was intended to be narrow in scope. The term "particular market situation" did not appear in the GATT 1947. It was not until the 1967 Anti-Dumping Code that the phrase first appeared but there does not appear to be any negotiating history indicating what the "particular market situation" provision meant and subsequent negotiating history sheds little additional light on the meaning of "particular market situation." The silence surrounding the term's sudden appearance in the 1967 Anti-Dumping code supports Indonesia's narrow interpretation.

10. Using the "particular market situation" provision, as Australia does, to address an alleged distortion in the cost of an input also conflicts with the idea that the parties did not intend for the Anti-Dumping Agreement to regulate "input dumping". The parties ultimately never included provisions covering input dumping in the Anti-Dumping Agreement.

11. The discussion input dumping generated stands in stark contrast to the silence surrounding introduction of the "particular market situation" provision and highlights why, if the provision had the meaning Australia gives it, there would have been evidence in the negotiating history to that effect. It defies common sense that there would have been no discussion about a provision with such broad implications for disregarding actual domestic prices.

B. Australia's "Particular Market Situation" Finding Is Inconsistent with Article 2.2

12. The nature of the "particular market situation" the Australian Anti-Dumping Commission found was due to purported GOI "influence" in the Indonesian timber and pulp industries. According to the Commission, this meant hardwood timber prices in Indonesia were distorted and A4 copy paper producers benefited from cheaper hardwood pulp prices. With respect to basing its "particular market situation" finding based on distortions to an input price the Commissioner noted government influence on prices or input costs could be one cause of artificially low pricing.

13. Indonesia argued Australia had no basis to make a "particular market situation" finding because Australia had no evidence of inter alia an oversupply of timber or pulp in the Indonesian market. Further, Indonesia disputed the relevance of various policies to which Australia cited as insufficient to support the conclusion that such policies artificially lowered the price of inputs.

14. Australia's action is all the more egregious when considering Australia investigated allegations of subsidization by the GOI and determined, to the extent there was subsidization, it did not rise to actionable levels. Australia then mis-interpreted the "particular market situation" provision of the

Anti-Dumping Agreement to achieve what Australia acknowledged it could not do pursuant to the SCM Agreement because Australia's subsidy investigation found there were no distortions. Consequently, Australia's action is inconsistent with Article 2.2 of the Anti-Dumping Agreement because it is based on an incorrect interpretation of "particular market situation".

II. AUSTRALIA ACTED INCONSISTENTLY WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT BY DISREGARDING HOME MARKET SALES EVEN THOUGH A PROPER PRICE COMPARISON WAS POSSIBLE

A. An Investigating Authority Cannot Disregard the Domestic Market Price When a Proper Price Comparison Is Possible

15. Article 2.2 does not permit an investigating authority to disregard domestic market sales prices if they are comparable to export prices even if a "particular market situation" exists.

1. When a "Particular Market Situation" Does Not Affect Price Comparability the Investigating Authority Cannot Disregard Domestic Market Sales Pursuant to the Ordinary Meaning of Article 2.2

16. An investigating authority may only disregard domestic market sales "[w]hen ..., because of the "particular market situation" ... in the domestic market of the exporting country, such sales do not permit a proper comparison". The plain meaning dictates that an investigating authority can use export sales to a third country or can construct the normal value based on the cost of production only when the "particular market situation" prevents a proper comparison.

17. The phrase "proper comparison" in Article 2.2 can only be understood in the context of the comparison Article 2.1 describes of "the export price of the product exported from one country to another" with "the comparable price in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

18. In order to consider when a comparison between prices of export sales and prices of domestic sales would not be "proper", it is necessary to consider the meaning of the word "proper". The Oxford English Dictionary defines "proper" as "[s]uitable for a specified or implicit purpose or requirement; appropriate to the circumstances or conditions; of the requisite standard or type; apt; fitting; correct, right". To determine why the comparison has to be "suitable" or "appropriate," one must consider why the comparison between prices in export sales and prices in domestic sales is being performed. Article 2.1 indicates that the reason for the comparison is to ascertain if a product is being dumped by examining the export price against the domestic market price.

2. Several Provisions of the Anti-Dumping Agreement Provide Relevant Context and Describe Dumping as International Price Discrimination by an Individual Exporter which Is Consistent with Article 2.2's Emphasis on Price Comparability Over the Mere Existence of a "Particular Market Situation"

19. The Anti-Dumping Agreement refers to "dumped", "dumping", "margin of dumping" or "dumping margin". While the Agreement uses a variety of different terms, the Appellate Body in *US – Stainless Steel (Mexico)* stated no significance attaches to that fact, the definition of "dumping" in Article 2.1 is expressed to apply "for the purposes of this Agreement" or for the purposes of the entire Agreement. The Appellate Body further stated that the concepts of "dumping" and "margin of dumping" "are interlinked and must be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement", and that "dumping" and "margin of dumping" have the same meaning throughout the Anti-Dumping Agreement".

20. Dumping, in turn, is "international price discrimination" reflecting the pricing practice of an exporting firm to charge a lower price for exported goods than it does for the same goods sold domestically". Likewise, a WTO technical paper states "[d]umping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country". Indeed, Australia's Senate Economics Legislation Committee endorsed this definition in a report on the Customs Amendment (Anti-Dumping) Bill 2011.

21. Articles 2.1 through 2.5 address various aspects of what the investigating authority must do to make an accurate comparison of domestic market prices to export prices. The purpose behind ensuring an accurate comparison, as indicated above, is to ascertain if there is dumping, i.e., price discrimination. The Anti-Dumping Agreement also makes clear that dumping is an exporter-specific inquiry without relation to government involvement which, as noted above, falls exclusively within the province of the SCM Agreement.

22. The WTO Appellate Body has concluded that "dumping" and "margin of dumping" are "exporter specific concepts" which arise from the pricing behavior of individual exporters, saying: "{d}umping arises from the pricing strategies of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets."

23. Therefore, dumping occurs when an individual exporter sells at a lower price in the export market than in its domestic market, and the margin of dumping is the difference or amount of discrimination between the export sales prices and the domestic sales prices for that individual exporter. It is important to note that the Anti-Dumping Agreement does not authorize the imposition of anti-dumping duties in response to exporters selling at *low* prices in the export market. Instead, the Anti-Dumping Agreement limits the imposition of anti-dumping duties to when an exporter sells at export prices that discriminate, i.e., are at prices below the domestic market price.

3. The Object and Purpose of the Anti-Dumping Agreement is to Allow Members to Address International Price Discrimination Subject to Specified Rules and Limits

24. As noted above, the object and purpose of liberalizing trade while permitting an exception for the imposition of anti-dumping duties subject to specific rules and procedures is relevant for interpreting Article 2.2. Another objective of the Anti-Dumping Agreement is to permit Members to impose anti-dumping duties only in response to price discrimination and to prevent Members from doing so when there is not price discrimination (or is not injury). Clear evidence of that objective is found in Article 2.2 and several other provisions of Article 2 referencing "price comparability". Indeed, the word "comparable" or "comparability" appears eight times in Article 2, including Article 2.1, Article 2.2, Article 2.4, and Article 2.5. Price comparability is so prominent in Article 2 because the purpose of the inquiry is to determine whether international price discrimination is occurring. If the Anti-Dumping Agreement were designed to prevent exporters from selling at low prices, there would be no need to examine price comparability.

4. GATT Case Law Confirms Article 2.2's Emphasis on Price Comparability

25. A relevant GATT panel decision exists which involved a dispute brought just before the entry-into-force of the WTO, involving a nearly identical predecessor provision to Article 2.2. In *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, the respondent, EC, determined the dumping margin using the prices of domestic sales in Brazil (the complainant) as the normal value. The panel explained the key inquiry was not whether a "particular market situation" existed but whether it affected price comparability.

26. The panel's reasoning that the relevant inquiry is whether the "particular market situation" renders the domestic market sales unfit to compare to export sales is of direct relevance to this dispute and confirms the ordinary meaning Indonesia has advanced above. In the action subject to this dispute, Australia's investigating authority stopped the inquiry after determining a "particular market situation" existed, despite the undeniable evidence that price comparisons were possible.

B. Australia Resorted to Constructed Value Based on Finding a "Particular Market Situation" Existed and Not as Article 2.2 Requires on Whether a Proper Comparison Could Be Performed

27. Australia acted inconsistently with Article 2.2 because Australia did not examine whether, because of the alleged "particular market situation", the comparability of domestic market to export price was affected. Australia's failure to do so renders its action inconsistent with Article 2.2 of the Anti-Dumping Agreement.

28. Australia found a "particular market situation" existed based on GOI policies which allegedly lowered the price of hardwood timber. The Indonesian producers argued the Commission had no evidence domestic prices were distorted and unsuitable for comparison with export prices because

the Commission had no evidence the alleged distortions impacted differently domestic and export prices. Beyond acknowledging the argument had been made, the Commissioner's report does not address whether those alleged situations involving government policies in the domestic market actually made any difference to the determination of the margin of dumping that would arise from a comparison between each individual Indonesian exporter's domestic prices and its export prices. The Commissioner's report is confined to addressing the question of whether the exporter's *domestic* prices are different from what they would have been in the absence of the government policies. However, Article 2.2 does not permit deviation from using domestic prices as the basis of normal value if there is a situation in the market which merely makes domestic prices different to what they would be in the absence of that situation. Article 2.2 only permits a deviation from using domestic prices of a specific exporter as the basis of normal value for that specific exporter if there is a situation in the domestic market which has the effect that a comparison between the prices of the domestic sales with the prices of export sales of that export cannot accurately indicate whether the individual exporter is price discriminating between domestic sales and export sales.

29. The nature of the A4 copy paper production process is such that even if input prices for hardwood timber were distorted, the same inputs were used to manufacture the A4 copy sold to the Indonesian domestic market and the A4 copy paper exported to Australia.

30. Australia has given no explanation as to why the allegedly distorted low-priced inputs would not also affect export prices to Australia. Indeed, evidence the Commission gathered in the injury investigation showed imports from Indonesia were priced below those of the other imports suggesting that to the degree Indonesian producers obtained low price inputs, they affected export prices.

31. The Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* found that a low-priced input will affect the export price as well as the domestic price in the analogous context of domestic subsidies in investigations involving market economies like Indonesia. A domestic subsidy is a subsidy that is not an export subsidy. Australia's "particular market situation" finding was equivalent to a finding that the GOI was providing a domestic subsidy in the form of goods for less than adequate remuneration.

III. AUSTRALIA'S FAILURE TO USE THE INDONESIAN PRODUCERS' RECORDS TO CALCULATE THE COST OF PRODUCTION IS INCONSISTENT WITH ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

A. The Well-Established Meaning of Article 2.2.1.1 Requires an Investigating Authority to Use the Producer's Costs if they Reasonably Reflect the Cost to Produce the Merchandise Under Consideration, Not Whether the Costs, Themselves, Are Reasonable

32. Article 2.2.1.1 limits how WTO Member countries may determine whether an exporter is dumping and the size of the margin of dumping. Australia acted inconsistent with the well-established meaning of Article 2.2.1.1 by disregarding the cost of pulp from the Indonesian producer's records and substituting a benchmark pulp price.

1. The Established Ordinary Meaning of Article 2.2.1.1 Requires an Investigating Authority to Use the Exporter's or Producer's Records if they Reasonably Reflect the Cost of Producing the Merchandise Under Consideration

33. In *EU – Biodiesel (Argentina)*, the Appellate Body interpreted the ordinary meaning of Article 2.2.1.1 in a dispute involving nearly identical facts with this dispute as Indonesia informed Australia. The EU authorities determined that the prices of two inputs – soybeans and soybean oil – in the Argentine market were distorted because of Argentine government tax policies. Based on that distortion, the EU determined the Argentine producers' costs for the main raw material were not reasonably reflected in the companies' records.

34. The Appellate Body explained that Article 2.2.1.1 sets forth rules for calculating the cost of production for purposes of determining normal value as indicated by the reference to "paragraph 2" in the opening phrase of the first sentence. The first sentence of Article 2.2.1.1 also specifies that "costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation". The Appellate Body noted records are defined as: "[a]n account of the past; a

piece of evidence about the past; ... a written or otherwise permanently recorded account of a fact or event; ... a document ... on which such an account is recorded".

35. Article 2.2.1.1 then sets forth two conditions that the exporter's or producer's records must meet. The first condition to be met is the producer's or exporter's records must be kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country. The Indonesian producers' books and records were kept in accordance with Indonesian GAAP, so this condition is not at issue in this dispute.

36. The second condition, the interpretation of which is of critical importance to this dispute, is that the producer's or exporter's records must "reasonably reflect the costs associated with the production and sale of the product under consideration". The second condition is satisfied when the records reasonably reflect the costs incurred and not, as Australia interprets the provision, whether the costs, themselves, were reasonable.

37. The only plausible interpretation of Article 2.2.1.1 is evident from the construction of the first sentence. In the phrase "reasonably reflect", "reasonably" is an adverb that precedes the verb "reflect" and thereby modifies "reflect". "Reasonably" is not an adjective modifying the noun "costs". Indeed, the drafters of Article 2.2.1.1 could have used the adjective "reasonable" to modify the noun "costs". The fact the drafters did not do so must be seen as intentional.

38. As the Appellate Body reasoned, the phrase "costs associated with the production and sale of the product under consideration" is preceded by the phrase "reasonably reflect" which means "to mirror, reproduce, or correspond to something suitably and sufficiently". It is important to recall that "reasonably" modifies "reflect" (not "costs") and that "such records," which refers to the records of the exporter or producer under investigation, precedes "reasonably reflect" in the first sentence of Article 2.2.1.1. Put together, the second condition of Article 2.2.1.1 means the exporter's or producer's "records" need to "reasonably reflect" the "costs" of producing or selling the product subject to the investigation. But the reasonableness of the "costs" is not at issue, just whether the records report them in a suitable manner.

2. The Context Confirms Article 2.2.1.1 Is Focused on Whether the Records Reasonably Reflect the Cost of Producing the Merchandise Under Consideration and Not Whether Such Costs, themselves, Are Reasonable

39. As the Appellate Body noted, GAAP concerns general accounting and reporting practices and the first condition is concerned with the producer's or exporter's records being in conformity with general standards. The second condition is more specific and concerns "the records' reasonable reflection of the costs associated with the production and sale of the *product under consideration in a specific anti-dumping proceeding*".

40. The second and third sentences of Article 2.2.1.1 and footnote 6 of the Anti-Dumping Agreement support the above interpretation of the second condition of Article 2.2.1.1. As the Appellate Body has stated, those "provisions set out rules for an investigating authority's allocation and adjustment of costs". Importantly, the Appellate Body noted those provisions "imply it may be inappropriate to attribute certain company costs entirely to the production and sale of the product under consideration".

41. The Appellate Body also found as relevant context Article 2.2 which refers to the "cost of production in the country of origin". Article 2.2.1.1 expressly refers to Article 2.2 and the Appellate Body found "costs" should be understood consistently in the two articles. The interpretative consequence of such an understanding is that Article 2.2.1.1 "should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin".

42. Finally, the Appellate Body found as context that Article 2.2 relates to the establishment of normal value through a proxy for domestic sales prices. The interpretation of the second condition in the first sentence of Article 2.2.1.1 as relating to whether a company's costs reasonably reflect the cost of making the merchandise subject to the investigation is consistent with that context.

3. Requiring an Investigating to Use the Producer's Records if they Reasonably Reflect the Cost of Producing the Merchandise Under Consideration Is Consistent with the Object and Purpose of the Anti-Dumping Agreement

43. While acknowledging the Anti-Dumping Agreement does not have a preamble to guide the inquiry into object and purpose, the Appellate Body in *EU – Biodiesel (Argentina)* stated such things could be discerned from the content and structure of the Agreement. The Appellate Body reasoned the object and purpose "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". The Appellate Body concluded that an interpretation of Article 2.2.1.1 in accordance with the ordinary meaning of the terms in their context and in light of the object and purpose of the Anti-Dumping Agreement of the second condition of the first is:

whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.

4. The Meaning of Article 2.2.1.1 as Requiring Use of a Producer's Actual Costs Is Well Established by WTO Case Law

44. Several panels have addressed the proper interpretation of Article 2.2.1.1 and have agreed with the Appellate Body's understanding as expressed in *EU – Biodiesel (Argentina)*. In *EU – Biodiesel (Indonesia)*, the panel applied the interpretation of Article 2.2.1.1 made by the panel in *EU – Biodiesel (Argentina)*, which the Appellate Body upheld, and went on to find that replacing the producers' cost because an input allegedly was at a low price was inconsistent with Article 2.2.1.1. In *Ukraine – Ammonium Nitrate*, the panel also followed the Appellate Body's interpretation of the second condition in the first sentence of Article 2.2.1.1 and found the investigating authority was not warranted in rejecting Russian gas costs (an input into ammonium nitrate production) because government regulation of gas prices meant the costs incurred by Russian producers was lower compared to prices in other countries.

B. Australia Disregarded Pindo Deli's and Indah Kiat's Costs Because they Did Not Reflect "Competitive Market Costs" which Is Inconsistent with Article 2.2.1.1

45. The Australian investigating authority departed from using the information in the records of Pindo Deli and Indah Kiat (hereafter "the Indonesian producers") to calculate the cost of production of A4 copy paper based on the view that they did not reasonably reflect "competitive market costs" associated with the production or manufacture of A4 copy paper because the cost of hardwood pulp recorded in the companies' records did not reasonably reflect a competitive market cost.

46. Australia applied the phrase "competitive market costs" to mean the costs must, themselves, be reasonable – the exact manner the Appellate Body and panels have ruled to be inconsistent with Article 2.2.1. Indeed, Australia refused to reconcile its application of Australian domestic law with Article 2.2.1.1 despite the Indonesian producers' express argument that Australia's domestic law was inconsistent with Article 2.2.1.1.

47. Instead of examining whether the actual costs recorded in the Indonesian producers' records were, within acceptable limits, accurate and faithful records of the actual cost incurred to produce A4 copy paper, as the Appellate Body and a number of panels have reasoned Article 2.2.1.1 requires, the Commission examined whether the records reflected "competitive market costs". All of the record evidence established that the Indonesian producers records reasonably reflected the cost to produce A4 copy paper and Australia disregarded those costs because the input cost allegedly was distorted.

IV. AUSTRALIA DID NOT CALCULATE THE PRODUCER'S COST OF PRODUCTION IN INDONESIA WHICH IS INCONSISTENT WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT**A. Article 2.2 Requires an Investigating Authority to Calculate a Cost of Production in the Country of Origin**

48. Australia did not calculate the cost of production in Indonesia which is inconsistent with Article 2.2.

1. The Ordinary Meaning of Article 2.2 and the Requirement to Calculate the Cost of Production in the Country of Origin Is Well-Established

49. The Appellate Body and several panels have given careful thought to the interpretation of Article 2.2 of the Anti-Dumping Agreement as it relates to the requirement to calculate the cost of production in the country of origin. The uniform understanding stated by the Appellate Body *EU – Biodiesel (Argentina)* and the various panels to have considered this issue has been Article 2.2 requires the investigating authority to calculate the cost of production in the country of origin. Australia did not calculate a cost of production of A4 copy paper in Indonesia, and its action is inconsistent with Article 2.2.

B. Australia Did Not Calculate a Cost of Production in Indonesia which Is Inconsistent with Article 2.2 of the Anti-Dumping Agreement

50. Australia did not calculate a cost of production in Indonesia as Article 2.2 of the Anti-Dumping Agreement requires but instead calculated the cost of producing pulp in Brazil and South America. Australia made certain adjustments to a benchmark, however, they all related to deriving an FOB cost of production in Brazil or South America, not Indonesia.

V. AUSTRALIA CALCULATED AND IMPOSED ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN DUMPING PERMITTED BY ARTICLE 2 WHICH IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

51. Australia calculated and imposed anti-dumping duties in excess of those permitted by Article 2 which is inconsistent with Article 9.3 which sets a ceiling on the anti-dumping duties that may be imposed as the margin of dumping established in a manner consistent with Article 2.

A. Article 9.3 Sets a Ceiling on the Amount of Duties that May Be Imposed as the Dumping Margin Calculated Consistently with Article 2

52. The Appellate Body in *EU – Biodiesel (Argentina)* has stated that to succeed in a claim under Article 9.3, a complainant must show the anti-dumping duties were "imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2".

B. Australia Did Not Calculate Margins in a Manner Consistent with Article 2 which Resulted in the Imposition of an Impermissibly High Anti-Dumping Duty

53. Australia calculated the preliminary dumping margin using the Indonesian producers' domestic market and export sales prices. Australia calculated the revised preliminary dumping margin based on constructed normal value, substituting the actual costs recorded by the Indonesian producers for hardwood pulp with a benchmark price for Brazilian and South American producers. The difference in the two margins speaks is clear evidence of the degree to which Australia calculated a margin inconsistent with Article 2.

54. The preliminary antidumping duty margins Australia calculated using domestic market sales prices were 2.7 percent for one producer and 18.8 percent for the other. In the revised preliminary determination calculated using constructed normal value, the margins were 80.5 percent for one producer and 65.1 percent for the other. Consequently, Australia's inconsistencies with Article 2 led to the imposition of anti-dumping duties in excess of the margin in violation of Article 9.3.

EXECUTIVE SUMMARY OF INDONESIA'S OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**I. AUSTRALIA'S FINDING THAT A PARTICULAR MARKET SITUATION EXISTED RESTS ON AN INCORRECT INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT**

55. To paraphrase Australia's view, a "particular market situation" is broad and is any condition in the buying and selling that exists in the home market that is not general. However, Indonesia established in its First Written Submission that the ordinary meaning of "particular market situation" supported by the context, object and purpose, and negotiating history is limited in nature and is an exceptional combination of circumstances taking place in a geographic region. Australia's interpretation, therefore, is incorrect.

56. Indonesia also has established a "particular market situation" cannot relate to government intervention because the SCM Agreement expressly regulates situations when a government provides goods for less than adequate remuneration. In contrast, the Anti-Dumping Agreement is concerned with international price discrimination by individual producers or exporters. Australia responds by citing Article 2.7 of the Anti-Dumping Agreement and the second Ad note to Article VI:1 of the GATT 1994. The European Union refers to the Ad Note to Article VI of the GATT 1994, paragraphs 2 and 3 which refers to currency depreciation. But the two provisions to which Australia and the European Union cite are the only two provisions in the Anti-Dumping Agreement that speak to government intervention and they are express and detailed – unlike a "particular market situation" which is not defined and has no negotiating history supporting Australia's interpretation.

57. Australia claims its "particular market situation" determination is not based on the price of an input but every one of Australia's findings flows from that premise. The Commission did not cite a single policy that related directly to the pulp or paper industries.

II. AUSTRALIA ACTED INCONSISTENTLY WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT BY DISREGARDING HOME MARKET SALES EVEN THOUGH A PROPER PRICE COMPARISON WAS POSSIBLE

58. Australia agrees with the interpretation of Article 2.2 Indonesia set forth in its First Written Submission, but Australia applies it in a manner that renders the word "because" and the phrase "do not permit a proper comparison" inutile. To paraphrase, Australia's definition of "proper comparison", which is not vastly different from Indonesia's, is to allow a suitable and accurate comparison to ascertain whether the product is considered dumped". Where Indonesia differs from Australia is Australia's conclusory and unsupported interpretation of a "particular market situation" renders home market sales unsuitable for comparison. Australia's interpretation is incorrect because it effectively reads out of existence the word "because" and the phrase "such sales do not permit a proper comparison". Australia seems to think Article 2.2 should be read as saying if there is a "particular market situation" then a proper comparison is not possible. But what Article 2.2 says is when "because" of the "particular market situation" "such sales do not permit a proper comparison", then the investigating authority can resort to constructed normal value. In other words, the "particular market situation" must be the cause of why a suitable and accurate comparison to ascertain whether the product is dumped cannot be performed. And the purpose of the comparison is to determine whether the export price is below the home market price.

59. Australia's view is in direct conflict with the GATT panel decision in *EC – Cotton Yarn*, What the GATT panel was plainly saying was the "particular market situation" had to cause the sales to be unsuitable to permit a proper comparison – it was not the mere existence of a "particular market situation". Australia argues that the Appellate Body decision in *US – Hot-Rolled Steel* permits the conclusion that prices fixed in a manner incompatible with normal commercial practice or not according to criteria of the marketplace may be considered as not permitting a proper comparison. But as Australia acknowledges, the Appellate Body was discussing circumstances when sales were not made in the ordinary course of trade. Article 2.2 of the Anti-Dumping Agreement already covers the situation when there are no sales in the ordinary course of trade.

60. The United States and the European Union argue in their third-party submissions that the Anti-Dumping Agreement does not require the investigating authority to consider whether a situation with an effect in the domestic market has a similar effect on prices to the export market. But this

reading is fundamentally flawed because it gives no meaning to the word "because" and the phrase "such sales do not permit a proper comparison". The fact that Article 2.2 contains those words means the investigating authority must consider whether because of the particular market situation a proper comparison is no longer possible. The United States and the European Union argue that the Anti-Dumping Agreement permits comparisons that are not symmetrical. But this argument fails for the same reason.

61. The European Union reads into the term "normal value" a meaning that simply is not supported by ordinary meaning, context, object and purpose, or negotiating history. The European Union characterizes the term "normal value" as undefined but that is not correct. Article 2.1 defines "normal value" as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the export country." Article 2.2 provides two alternative bases for normal value: 1) the "comparable price of the like product when exported to an appropriate third country, provided this price is representative" and 2) "the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits". Normal value, thus, is a shorthand reference to one of three defined possibilities for the price to be compared to the export price, but it does not have an independent meaning as the European Union argues.

62. Australia cites to facts it alleges support distortions to the home market price but cites no evidence that it considered whether those same factors flowed through to the export price. Australia's sole rebuttal as to whether it considered whether the low-priced inputs equally affected the domestic and export price was a purported lack of proof. Indonesia established, and it is unrefuted, that the same inputs were used to manufacture the A4 copy paper sold to the Indonesian domestic market and exported to Australia. Indonesia also established that its export prices were lower than those of other countries demonstrating, to the extent the Indonesian producers received low-priced inputs, it affected export prices.

III. AUSTRALIA'S FAILURE TO USE THE INDONESIAN PRODUCERS' RECORDS TO CALCULATE THE COST OF PRODUCTION IS INCONSISTENT WITH ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

63. Australia claims Indonesia's interpretation renders use of the word "normally" in Article 2.2.1.1 inutile, arguing that qualification of the verb "shall" by the adverb "normally" means an investigating authority may use records, other than the producer's own, to determine costs even if the two conditions in Article 2.2.1.1 are met. Australia's interpretation is incorrect.

64. As the panel indicated in *EU – Biodiesel (Argentina)*, and the Appellate Body did not question, the way in which the term "normally" is used is to indicate that the rule may be derogated from the two conditions specified in the first sentence of Article 2.2.1.1. The use of "normally" in Article 2.2.1.1 means the cost of production must, as a rule, be based on the exporter's or producer's cost records and derogation from that rule is limited to the two specified exceptions in the first sentence of Article 2.2.1.1.

65. The Appellate Body in *US – Clove Cigarettes* noted the ordinary meaning of "normally" is "under normal or ordinary conditions; as a rule". The Appellate Body has found that 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 derogation under certain circumstances."

66. In *China – Broiler Products*, the panel in the compliance proceeding reasoned "use of the term 'normally' in a legal obligation indicates a rule from which derogations are permitted subject to the conditions set out in the legal provision".

IV. AUSTRALIA DID NOT CALCULATE THE PRODUCER'S COST OF PRODUCTION IN INDONESIA WHICH IS INCONSISTENT WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

67. Australia does not appear to disagree with Indonesia's argument that Article 2.2 requires calculating the cost of production in Indonesia. Australia claims it calculated a cost of production in Indonesia because it made certain adjustments. But none of the adjustments related to deriving the cost of production in Indonesia. Instead, the adjustments were needed to convert certain elements so that they were stated on an equivalent basis. Converting dry pulp to wet pulp was necessary not

to derive the cost of production in Indonesia but to state the pulp in the same unit of measure. In other words, it was no different than converting from short tons to metric tons. Removing SG&A, ocean freight, and inland transport charges was done for the exact same reason. SG&A, ocean freight, and inland transport charges were included in the benchmark the Commission used and Australia had to remove them because they are not part of the cost production as specified by Australia's own Anti-Dumping Manual.

V. AUSTRALIA CALCULATED AND IMPOSED ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN DUMPING PERMITTED BY ARTICLE 2 WHICH IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

68. Indonesia established in its First Written Submission that Australia violated Article 9.3 by calculating a constructed normal value and, in that calculation, replaced the Indonesian producers' actual hardwood pulp costs. Both of Australia's actions were inconsistent with Article 2. Those inconsistencies resulted in Australia imposing a higher anti-dumping duty than Australia would have imposed had Australia calculated the margin consistent with Article 2. In so doing, Australia violated its obligations under Article 9.3 and Australia has not argued to the contrary. Indonesia respectfully asks the Panel to so find and to recommend Australia bring its measures into conformity with its obligations.

EXECUTIVE SUMMARY OF INDONESIA'S CLOSING STATEMENT AT THE FIRST SUBSTANTIVE MEETING

69. With respect to Indonesia's first claim, Indonesia believes that there are a number of key points Indonesia has established which Australia has not effectively rebutted. The three exceptions to using domestic prices are set forth in Article 2.2 of the Anti-Dumping Agreement and all concern situations that require the existence of an effect on domestic but not export price. Article 2.2 provides an exception when there are no sales in the ordinary course of trade, which means the "particular market situation" must relate to a different circumstance. Australia however confirmed it was equating these two exceptions which Indonesia believes is incorrect. While we all are aware that "particular market situation" is not defined, Indonesia notes that there is no negotiating history supporting Australia's interpretation. Indonesia has clarified that it does not agree with Australia's view that "particular market situation" covers the Government of Indonesia's policies. This is based on the fact that Australia's conclusive finding in its parallel anti-subsidy investigation disclosed that the alleged subsidies were at a de-minimis level and not countervailable. This is more than sufficient to prove that no "particular market situation" is present in Indonesia.

70. For its second claim, Indonesia has established that Article 2.2 requires an investigating authority to determine whether "because" of a "particular market situation" a proper comparison of domestic and export prices is not possible. Australia's interpretation in this regard is incorrect because it reads out the word "because" and the phrase "such sales do not permit a proper comparison" in Article 2.2. Indonesia has taken note from the meeting, however, that Australia acknowledged that a proper price comparison is an element to be fulfilled to apply Article 2.2 of Anti-Dumping Agreement, but it stated that such comparison is not related to export price. In Indonesia's view the position taken by Australia showed nothing other than to emphasize its incorrect interpretation of Article 2.2 of the Anti-Dumping Agreement. With this position, not only has Australia wrongly interpreted Article 2.2 of the Anti-Dumping Agreement but also failed to properly establish and evaluate the facts.

71. Indonesia's third claim is based on nearly identical facts in the case law of *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)*, and *Ukraine – Ammonium Nitrate (Russia)* where the respective panels and Appellate Body uniformly decided that Article 2.2.1.1 requires an investigating authority to use the producer's actual costs, even when it determines that an input cost is distorted. In this dispute, Australia decided not to use the producer's actual costs for no other reason than because of an alleged distortion in the cost of pulp. Australia has not pointed to anything to dispute that the records of certain Indonesian A4 copy paper producers is consistent with GAPP applied in Indonesia, and reasonably reflect the production and sale of the product under investigation. As such, Indonesia believes that the substitution of the actual cost of an input with an out-of-country benchmark is not justified.

72. With respect to Indonesia's fourth claim, Australia does not dispute that it is required to calculate the cost of production in Indonesia. But the adjustments Australia made did not result in the calculation of a cost of production in Indonesia. Finally, because Australia did not calculate the anti-dumping margin in line with Article 2, Australia calculated a dumping margin in excess of what is permitted, and this violates the chapeau of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

ANNEX B-2**FIRST INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF AUSTRALIA****I. INTRODUCTION**

1. Indonesia's claims in this dispute are built on an inaccurate interpretation of the Anti-Dumping Agreement and a misrepresentation of the facts of the investigation before this Panel. In particular, Indonesia's case appears 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. As such, its claims must fail.

2. Australia's submissions demonstrate that the Anti-Dumping Commission properly determined there was a "market situation" in the Indonesian A4 copy paper market such that sales in that market were "not suitable for use in determining" the "normal value" (i.e. because of the "particular market situation" such sales did not "permit a proper comparison" under Article 2.2 of the Anti-Dumping Agreement). 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 and its subparagraphs).

3. Importantly, Indonesia does not challenge all of the Anti-Dumping Commission's findings in relation to imports of A4 copy paper from Indonesia. The varied findings by the Anti-Dumping Commission with respect to Indonesia¹ is a clear illustration of the Anti-Dumping Commission's proper establishment of the facts and its unbiased and objective evaluation of those facts, as required by Article 17.6(i) of the Anti-Dumping Agreement. The Panel cannot overturn such an evaluation by the Anti-Dumping Commission, even though it might have reached a different conclusion.

4. 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, STANDARD OF REVIEW

5. 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 "in accordance with customary rules of interpretation of public international law". The Appellate Body has confirmed customary international law includes Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).²

6. 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

¹ The Anti-Dumping Commission found a negative dumping margin for one Indonesian exporter (Tjiwi Kimia); and imposed anti-dumping duties on another Indonesian exporter (RAK) that Indonesia has not challenged. To the extent that Indah Kiat and Pindo Deli had different results to the other exporters, it was due to their individual circumstances, as properly determined by the Anti-Dumping Commission. The Anti-Dumping Commission also terminated the countervailing duties investigation in respect of Indonesia, and rejected the applicant's "particular market situation" claim made in respect of China. See Final Report, Exhibit IDN-04, section 1.3, pp. 8-9; section 13, p 136; and Appendix 2.2, p. 146.

² Appellate Body Reports, *US — Gasoline*, p. 17, DSR 1996:I, 3, at p. 16; and *Japan — Alcoholic Beverages II*, p. 10, DSR 1996:1, 97 at p. 104.

covered agreement.³ 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."⁴ Thus, the burden of proof in this dispute falls squarely on Indonesia. Australia's submissions demonstrate 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.

7. The Anti-Dumping Agreement is a covered agreement listed in Appendix 1 of the DSU; 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.

8. 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. 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. Article 17.6(i) 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.

III. FACTUAL BACKGROUND

A. Overview of Australia's Anti-Dumping System

9. 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).

10. Australia's investigating authority is the Anti-Dumping Commission, which is headed by an independent Commissioner and is responsible for administering Australia's anti-dumping system. The organisational structure in Australia is not bifurcated, meaning 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.

11. The *Customs Act 1901 (Cth)* and the *Customs Tariff (Anti-Dumping) Act 1975 (Cth)* 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. The *Customs (International Obligations) Regulation 2015 (Cth)* (*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.

12. The Dumping and Subsidy Manual (Manual) provides a comprehensive guide to the policy and practice for all operational activities conducted by the Anti-Dumping Commission. The purpose of the Manual is to promote a consistent approach to investigation findings and decisions, but it does not contain a mandatory set of instructions or constrain the decisions of the Commissioner.

13. 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. Merits review is undertaken by the independent 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.

³ See, for example, Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 14, DSR:1997:I, 323, at p. 335; *EC – Hormones*, para. 104; and Panel Report, *Korea – Dairy*, para. 7.24.

⁴ Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66. (emphasis original)

B. The Investigation Before This Panel

14. On 24 February 2016, a written application was received from Paper Australia Pty Ltd (Australian Paper) seeking the publication of a dumping duty notice in respect of A4 copy paper imported into Australia from Brazil, China, Indonesia and Thailand, and a countervailing duty notice in respect of A4 copy paper imported into Australia from China and Indonesia. Australian Paper's application claimed, *inter alia*, that a "particular market situation" existed in relation to both China and Indonesia and that, as a result, domestic prices of A4 copy paper were not suitable for determining normal values.⁵

15. 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, which included requests for additional information relating to the claim of a "particular market situation". Almost 150 submissions were received and considered by the Anti-Dumping Commission in the course of its investigation, including 14 from the Government of Indonesia and 39 from Indonesian exporters.⁶

16. 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 and the Sinar Mas Group of companies (SMG). 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);⁷ and
- the SMG exports were predominantly exported through unrelated intermediaries by three related companies: PT Indah Kiat Pulp & Paper Tbk (Indah Kiat); PT Pabrik Kertas Tjiwi Kimia Tbk (Tjiwi Kimia); and PT Pindo Deli Pulp and Paper Mills (Pindo Deli)⁸ (the SMG exporters).

17. On 17 March 2017, the Commissioner terminated the countervailing duty investigation relating to Indonesia, finding countervailable subsidies had been received in respect of A4 copy paper exported to Australia from Indonesia during the investigation period, but that these were negligible in value and/or volume.⁹ The Commissioner also terminated the dumping investigation in relation to Tjiwi Kimia, one of the SMG exporters, on the basis that the goods exported by Tjiwi Kimia were not dumped.¹⁰

18. On 17 March 2017, the Commissioner completed Final Report No. 341 in relation to Investigation 341, finding, *inter alia*, dumped exports of A4 copy paper from Indonesia (with the exception of exports from Tjiwi Kimia), and making, *inter alia*, the following recommendations to the responsible Minister relevant to Indonesia:¹¹

- that a particular market situation existed in Indonesia, such that domestic selling prices were not suitable for determining normal values;
- 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 the administrative, selling and general costs associated with that sale and the profit on that sale;¹²
- that anti-dumping duties be imposed in respect of certain A4 copy paper exports from Indonesia.

19. On 18 April 2017, the responsible Minister signed a notice declaring that the goods under investigation were subject to anti-dumping duties, and signed a public notice outlining the findings in relation to the dumping investigation.

⁵ Final Report, Exhibit IDN-04, section 6.5, p. 36.

⁶ Australia's opening statement at the first substantive meeting with the Parties, para. 17.

⁷ Final Report, Exhibit IDN-04, section 6.9.7.1, p. 56.

⁸ Final Report, Exhibit IDN-04, section 6.9.4.1, p. 52; section 6.9.6.1, p. 55; and section 6.9.5.1, p. 54.

⁹ Final Report, Exhibit IDN-04, section 1.3, p. 9 and section 7.1.4, p. 76.

¹⁰ Final Report, Exhibit IDN-04, section 1.3, p. 8 and section 6.9.8.1.6, p. 63.

¹¹ Final Report, Exhibit IDN-04, section 13, pp. 131-139.

¹² 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).

20. Applications for independent merits review were received from, amongst others, the Government of Indonesia, SMG, RAK and a successor company to AFPT. The Anti-Dumping Review Panel subsequently 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; however it rejected the other grounds for appeal made by the Indonesian parties.¹³ This recommendation was adopted by the responsible Minister. 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%.

21. The Indonesian exporters and the Government of Indonesia have not made applications to the Federal Court of Australia for judicial review of the decisions made by the Commissioner or the responsible Minister.

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

22. Under Article VI of the GATT 1994 and the Anti-Dumping Agreement, anti-dumping duties are a valid and permissible response to something that is to be condemned, being injurious dumping.

23. Indonesia 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 1994,¹⁴ rather than a legitimate response to injurious dumping. This incorrect characterisation underpins a number of the fundamental legal errors contained in Indonesia's submissions, particularly those relating to the correct legal interpretation of core terms in the Anti-Dumping Agreement. By invoking these characterisations, Indonesia seeks to promote a more restrictive interpretation of those core terms than is warranted by a good faith examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose.

B. Because of the "Particular Market Situation", Indonesian Domestic Sales of A4 Copy Paper Did Not "Permit a Proper Comparison" with Export Prices

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

24. The proper interpretation of "particular market situation" – clear from its ordinary meaning, 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. Indonesia) that is distinguishable and not general.¹⁵

25. This interpretation is fully consistent with the findings of *EC – Cotton Yarn*, in which the GATT Panel found that a "particular market situation" was "relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison There must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison".¹⁶

26. In accordance with this meaning, Australia properly established there was a "particular market situation" within Article 2.2 of the Anti-Dumping Agreement. In summary, the Anti-Dumping Commission found that:¹⁷

- programs and policies of the Government of Indonesia including the export ban on logs increased the supply of logs in Indonesia, lowering the cost and price of logs and hardwood pulp in Indonesia;

¹³ Anti-Dumping Review Panel Report No. 55 (ADRP Report), Exhibit AUS-10, paras. 585 and 588-589.

¹⁴ Indonesia's first written submission, paras. 42, 48, 55 and 103.

¹⁵ Australia's first written submission, paras. 97-106.

¹⁶ GATT Panel Report, *EC – Cotton Yarn*, paras. 478.

¹⁷ Australia's first written submission, para. 115.

- 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,¹⁸ to supply more A4 copy paper at each possible price point than they otherwise would have; and
- 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, significantly 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.¹⁹

27. Taken together, these factors 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. In addition, these factors were intrinsic to the nature of the sales of A4 copy paper themselves.

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

28. 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".²⁰

29. The proper interpretation of "permit a proper comparison" – clear from its ordinary meaning, 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.²¹ As such, the focus is the proper determination of the "normal value", and not, as Indonesia asserts,²² whether the export price was also affected by the same factors that affected the domestic price.

30. 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. 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.

(a) 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

31. Indonesia asserts that "dumping is an exporter-specific inquiry without relation to government involvement".²³ 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.

32. 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."²⁴ The Appellate Body findings in *EC — Fasteners (China)*²⁵ and *EC — Fasteners (China)*

¹⁸ Final Report, Exhibit IDN-04, section A2.9.3, p. 173.

¹⁹ Final Report, Exhibit IDN-04, section A2.9.2.2, p. 167; and section A2.9.4, pp. 173-174.

²⁰ Appellate Body Report, *EC — Tube or Pipe Fittings*, para. 94.

²¹ Australia's first written submission, paras. 122-132.

²² Indonesia's first written submission, paras. 72 and 88.

²³ Indonesia's first written submission, para. 93.

²⁴ See the second *Ad Note* to Article VI:1 of the GATT 1994.

²⁵ Appellate Body Report, *EC — Fasteners (China)*, para. 285.

(Article 21.5 – China)²⁶ clearly recognised 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. 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.

33. Australia is in no way alleging that Indonesia is a non-market economy - clearly, the nature and degree of government intervention is different in the case of a non-market economy. Nevertheless, as demonstrated by the Anti-Dumping Commission's findings, in the A4 copy paper sector in Indonesia, the domestic price was not suitable to use as the basis for "normal value".

(b) 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

34. In *US – Hot Rolled Steel*, the Appellate Body 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; or are fixed according to criteria which are not those of the marketplace.²⁷

35. While *US – Hot-Rolled Steel* considered a situation where the domestic sales were not in the "ordinary course of trade" rather than a "particular market situation", 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.

(c) The findings of the Anti-Dumping Commission

36. Therefore, 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.

37. This is exactly what the Anti-Dumping Commission did. It concluded that:²⁸

- "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";
- "an export ban imposed by the [Government of Indonesia] on logs distorts the domestic supply of timber" and "the net impact of the export ban on Indonesian logs ... [is] reduced prices";
- "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";
- "pulp is proportionally the largest cost component for the production of the goods and like goods";

²⁶ Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.207.

²⁷ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 140-141.

²⁸ Final Report, Exhibit IDN-04, section 6.5, p. 36; section 6.9.1, p 51; and Appendix 2 at section A2.2, p 146; section A2.5.1, p 150; section A2.9, p 165; and section A2.9.2 at pp 166-172. (emphasis added) See also Australia's first written submission, para. 144.

- "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]";
- "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";
- "Indonesian domestic prices [of A4 copy paper] are artificially low";
- "[t]he domestic price of Indonesian A4 copy paper is significantly below comparable regional benchmarks";
- "[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";
- "[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"; 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]".

38. The Anti-Dumping Commission also took steps to assess the extent to which the low cost and price of logs in Indonesia might be the result of lower timber growing costs in Indonesia as opposed to government intervention. This examination showed, contrary to the claims of the Government of Indonesia, that, "for Indonesia's primary pulpwood (acacia), it is more costly to produce timber in Indonesia than in other Asian countries" and "growing costs for acacia pulpwood in Indonesia were the highest in Asia".²⁹

39. 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"³⁰ 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.

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

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

41. 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". In particular, Indonesia seeks to convince the Panel that:

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

42. 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".³¹ Contrary to Indonesia's first

²⁹ Final Report, Exhibit IDN-04, section A2.5.1, p. 150; and section A2.9.2.2, p. 166. (emphasis added)

³⁰ Final Report, Exhibit IDN-04, section 6.5, p. 36.

³¹ The factors considered to determine a "particular market situation" and "permit a proper comparison" are not necessarily mutual exclusive, and often overlap. This does not mean that there is not a separate analysis of the two requirements (Australia's closing statement at the first substantive meeting with the Parties, para. 15).

written submission, Australia does not simply proceed directly to determining a constructed normal value. In particular, Australia demonstrably 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, which extended far beyond considering whether an input price was distorted.

43. The Anti-Dumping Commission, in the same investigation that is before this Panel, rejected the applicant's "particular market situation" claim in respect of China, even though it found the Government of China exerted significant influence over the size and structure of the hardwood pulp industry, that this intervention had likely distorted the domestic price of hardwood pulp in China, and that Government of China subsidies had likely distorted the A4 copy paper market.³² This is because the Anti-Dumping Commission found that the influence and involvement of the Government of China were "unlikely to have rendered Chinese domestic A4 copy paper prices unsuitable for determining normal values".³³

4. Indonesia's arguments with respect to "particular market situation" and "permit a proper comparison" have no merit

44. Indonesia has not conducted a proper Vienna Convention interpretation of the term "particular market situation". Building on its incorrect assertion that anti-dumping duties are an "exception" to Articles I and II of the GATT 1994, Indonesia misinterprets a "particular market situation" as an "exceptional set of circumstances affecting comparability of domestic market prices in such a way as to affect them unilaterally",³⁴ despite the terms "exceptional" and "unilateral" being entirely absent from the phrase "particular market situation" or the dictionary definition of "particular". Indonesia provides no references or support for its assertion that "silence in the negotiating history"³⁵ supports its narrow interpretation of "particular market situation". The "Draft Recommendation Concerning Treatment of the Practice Known as Input Dumping", cited by Indonesia as evidence that WTO Members did not intend to include a provision in the Anti-Dumping Agreement governing input dumping, was never adopted by the Committee on Anti-Dumping Practices³⁶ and, in any event, concerned a practice that is not before the Panel in this dispute. Finally, it is simply incorrect that "government involvement" is exclusively covered by the SCM Agreement;³⁷ Indonesia's refusal to say whether or not a government imposed price-ceiling or floor would constitute a "particular market situation" is instructive in this regard.³⁸

45. Similarly, Indonesia's arguments in respect of "permit a proper comparison" have no merit, and are based on the incorrect 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.³⁹ These arguments are based on the incorrect assertion, made throughout Indonesia's submissions, that "dumping" and the Anti-Dumping Agreement are solely concerned with "international price discrimination."⁴⁰ However this term does not appear in the GATT 1994 or Anti-Dumping Agreement; and the Appellate Body has referred to the term only in the context of when "normal value" is based on "domestic price", not when it is based on constructed normal value under Article 2.2.

46. Indonesia's argument that in the other situations covered by Article 2.2 ("when there are no sales in the ordinary course of trade and ... when there is a low volume of sales"), "the effect is one-

³² Final Report, Exhibit IDN-04, section A2.2, p 146; section A2.8.1, p 153; and section A2.8.4, p 160.

³³ Final Report, Exhibit IDN-04, section A2.2, p 146. The domestic price of A4 copy paper in China was consistent with regional benchmarks.

³⁴ Indonesia's first written submission, para. 72.

³⁵ Indonesia's first written submission, para. 68.

³⁶ 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.

³⁷ Indonesia's first written submission, para. 93.

³⁸ Indonesia's written response to Panel Question 11 following the first substantive meeting with the Parties; Australia's closing statement at the first substantive meeting with the Parties, para. 18.

³⁹ Indonesia's first written submission, paras. 72 and 88.

⁴⁰ Indonesia's first written submission, paras. 101 and 107.

sided and on the domestic market"⁴¹ is incorrect. And it has provided no proof to support its argument that the "low price inputs" equally affected the domestic and export price of A4 copy paper.⁴² Even if Indonesia were to provide such proof, there is nothing in the language of the GATT 1994 or the Anti-Dumping Agreement that suggests that there must be some sort of "asymmetrical" impact on the domestic prices vis-à-vis export prices in order to find that a "proper comparison" was not permitted. Furthermore, *US – Anti Dumping and Countervailing Duties (China)* – the only dispute that Indonesia refers to in relation to this issue – is not relevant to the application of Article 2 of the Anti-Dumping Agreement.

C. Conclusion

47. The Anti-Dumping Commission provided a reasoned and adequate explanation as to how the evidence supported its factual findings and how those findings supported its determination 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]".⁴³ 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. Indonesia has also failed to show that an "objective and impartial investigating authority could not properly have"⁴⁴ made the determinations above. Indonesia's legal interpretation of "particular market situation" and "permit a proper comparison" are incorrect.

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

48. Article 2.2.1.1 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 two conditions of Article 2.2.1.1 are satisfied.⁴⁵

49. Indonesia submits that Australia acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement 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. These arguments 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.⁴⁶

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

50. 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. Interpreting the first sentence of Article 2.2.1.1 in a way that requires that the "costs ... be calculated on the basis of records kept by the exporter or producer under investigation" whenever the two

⁴¹ Indonesia's first written submission, para. 40.

⁴² Indonesia's first written submission, paras. 118 and 121.

⁴³ Final Report, Exhibit IDN-04, section 6.5, p. 36. See also section 6.9.1, p. 50; section A2.9.1, p. 165; and section A2.9.6.8, p. 185.

⁴⁴ Panel Report, *US – DRAMS*, para. 6.69.

⁴⁵ Emphasis added.

⁴⁶ Australia has not conceded that the records of Indah Kiat and Pindo Deli did satisfy the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, and does not consider it necessary for the Panel to consider this question (Australia's opening statement at the first substantive meeting with the Parties, para. 69).

conditions in Article 2.2.1.1 are satisfied – as Indonesia does⁴⁷ – renders the word "normally" inutile and redundant.

51. 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".⁴⁸

52. 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, 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.⁴⁹

53. This interpretation is fully consistent with the findings of panels and the Appellate Body in relation to the meaning of "normally" in Article 2.2.1.1.⁵⁰ Notably, the panel and Appellate Body in *EU – Biodiesel (Argentina)* left open the possibility of there being circumstances beyond a failure to satisfy the two expressly stated conditions in Article 2.2.1.1 in which an investigation authority would not be required to calculate costs on the basis of records kept by the exporter or producer under investigation.⁵¹

2. 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, so the circumstances were not normal and ordinary

54. 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".⁵²

55. 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. The key question in each case is 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".⁵³ The answer to this question is necessarily dependent on the specific facts of each case.

56. In the facts of the investigation before this Panel, the Anti-Dumping Commission was faced with circumstances that were not normal and ordinary in respect of Indah Kiat and Pindo Deli. A constructed normal value calculated on the basis of Indah Kiat's and Pindo Deli's records 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",⁵⁴ because, like the domestic sales price that

⁴⁷ Indonesia's first written submission, paras. 124 and 136.

⁴⁸ Appellate Body Report, *US – Clove Cigarettes*, para. 273. (emphasis added, footnote omitted)

⁴⁹ Australia's first written submission, para. 194.

⁵⁰ Panel Report, *China – Broiler Products*, para. 7.161; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227.

⁵¹ Panel Report, *EU – Biodiesel (Argentina)*, footnote 380; Appellate Body Report, *EU – Biodiesel (Argentina)*, footnote 120. See also Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.68.

⁵² Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24 (footnote omitted). See also Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; *US – Softwood Lumber V*, para. 7.278.

⁵³ Ibid.

⁵⁴ Ibid.

had been found unsuitable to use as the basis of the "normal value", they would have reflected the "particular market situation". This is clearly set out in the Final Report.⁵⁵

57. 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,⁵⁶ because 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".⁵⁷

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

58. In Appendix 4 to the Final Report, 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."⁵⁸ The Anti-Dumping Commission was unable to identify any acceptable private domestic prices that could be used, and found there was a lack of imports of hardwood pulp into Indonesia 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.⁵⁹

59. 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:⁶⁰

- 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";^{61, 62}
- these pulp prices were obtained from data provided by RISI Inc. and Hawkins Wright Ltd;
- 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";
- "there is broad alignment of South American eucalyptus pulp and traded Indonesian acacia pulp prices";
- "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"; 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".

⁵⁵ The Anti-Dumping Commission found that, reflecting the "particular market situation", the "actual cost of pulp recorded by exporters in their records does not reasonably reflect a competitive market costs ... this renders this component of Indonesian producers' and exporters' records unsuitable for determining the costs to make A4 copy paper for the purposes of constructing normal values" (Final Report, Exhibit IDN-04, section 6.9.1, p. 51).

⁵⁶ Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.

⁵⁷ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24 (footnote omitted). See also Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; *US – Softwood Lumber V*, para. 7.278.

⁵⁸ Final Report, Exhibit IDN-04, section A4.3, p. 230. (emphasis added)

⁵⁹ Final Report, Exhibit IDN-04, section A4.3.2, p. 230-1.

⁶⁰ Final Report, Exhibit IDN-04, section A4.1, p 230; section A4.2, p 230; section A4.3.3, p 231; and section A4.5, pp. 232-233. See also Australia's first written submission, para. 228.

⁶¹ Final Report, Exhibit IDN-04, sections A4.1-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.

⁶² China and Korea were Indonesia's two main destinations for exports of hardwood pulp (Final Report, Exhibit IDN-04, section A2.9.2.3, p. 167).

60. 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.⁶³

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

61. 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, but has cautioned that "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."⁶⁴

62. 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".⁶⁵ 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. 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.⁶⁶ It checked the alignment of South American eucalyptus pulp and traded Indonesian acacia pulp prices, determined that growing costs for acacia pulpwood in Indonesia were not significantly less than growing costs for eucalyptus pulpwood in South America, and 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.⁶⁷

63. Significantly, the Anti-Dumping Commission also found no significant difference between the price of hardwood pulp sourced by Asian importers from South America and the price of hardwood pulp sourced by Asian importers from Indonesia.⁶⁸ That is, the Anti-Dumping Commission found that the export price of Indonesian pulp was not significantly different to the export price of South American pulp. Australia notes Indonesia has indicated that it would have been consistent with Article 2.2 of the Anti-Dumping Agreement if Australia had derived the hardwood pulp component of the constructed normal value by reference to the "export price of Indonesian pulp" – this is effectively what Australia did do.⁶⁹

3. The Anti-Dumping Commission properly adapted the pulp benchmark

64. Furthermore, the Anti-Dumping Commission then adapted the "pulp benchmark" specific to the circumstances of Indah Kiat and Pindo Deli. With respect to Indah Kiat, 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. Indah Kiat made its own hardwood pulp,⁷⁰ so 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. The Anti-Dumping Commission also made deductions to the pulp benchmark based on Indah Kiat's own

⁶³ Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52. The Anti-Dumping Commission was prevented from using these prices as the basis for the hardwood pulp component of the constructed normal value of A4 copy paper because they were confidential and could not be disclosed (Final Report, Exhibit IDN-04, section A4.5.1, p 232).

⁶⁴ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (footnote omitted)

⁶⁵ Indonesia's first written submission, para. 155.

⁶⁶ Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.

⁶⁷ Final Report, Exhibit IDN-04, section A4.5.2, p. 233.

⁶⁸ Final Report, Exhibit IDN-04, section A4.4, p. 231 and section A4.5.2 at p 233.

⁶⁹ 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, para. 27.

⁷⁰ Indonesia first written submission, para. 10.

records, including amounts for the cost of ocean freight and inland transport, for selling, general and administrative expenses and for the cost to convert wet hardwood pulp to dry hardwood pulp.⁷¹

65. 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.⁷² 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

66. 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*.⁷³ 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.

67. Indonesia's arguments also fail to take into account the vertical integration and related-party transactions that characterise Indah Kiat and Pindo Deli (which facilitated SMG and the APRIL Group to "capture" the advantages of the cheap timber which resulted from the interventions of the Government of Indonesia), and the analysis that the Anti-Dumping Commission undertook to ensure the pulp benchmark was suitable to use to arrive at the cost of production of A4 copy paper in Indonesia.⁷⁴

C. Indonesia's Reliance on EU – Biodiesel (Argentina), EU – Biodiesel (Indonesia) and Ukraine – Ammonium Nitrate is Misplaced

68. 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.⁷⁵

69. 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 – including, with respect to the investigation before this Panel, the existence of: a "particular market situation"; the vertical integration of exporters within SMG and the non-arm's length transactions for the input in question; and the fact that a prevailing international export price was available for the input in question.⁷⁶ Further, the reasoning of the panels and Appellate Body in these cases was expressly limited to the interpretation and application of the second condition of Article 2.2.1.1, with no detailed consideration of the meaning of the word "normally".

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

70. 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" whereas Article 2.2.1.1 of the Anti-Dumping Agreement uses the phrase

⁷¹ Final Report, Exhibit IDN-04, section 6.9.8.1.3, p. 62.

⁷² Indonesia's first written submission, paras. 10, 117 and 167; see also footnote 70.

⁷³ Indonesia's first written submission, paras. 2, 153 and 170

⁷⁴ To paraphrase the Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

⁷⁵ Indonesia's first written submission, paras. 142, 145, 155 and 162.

⁷⁶ Australia's first written submission, para. 249.

"such records ... reasonably reflect the costs associated with the production and sale of the product under consideration".⁷⁷

71. Australia notes, at the outset, that Indonesia is making an "as applied", rather than an "as such", challenge,⁷⁸ so Australia's regulations are relevant only insofar as how they were applied in this dispute. Australia operates a dualist legal system under which treaty obligations are given effect via domestic laws and regulations, which may or may not mirror the language of the underlying treaty but which are consistent with the relevant treaty obligations. Subsection 43(2) of the *Customs Regulations* gives effect to both the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, and to the word "normally" in Article 2.2.1.1.

72. 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.

73. 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). 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".⁷⁹

E. Conclusion

74. Australia has established that the Anti-Dumping Commission acted consistently with Article 2.2 and Article 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.⁸⁰ 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 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 their A4 copy paper by reference to the "pulp benchmark".

75. 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. Indonesia has also failed to show that an "objective and impartial investigating authority could not properly have"⁸¹ made the determination above. Indonesia's interpretations of Article 2.2.1.1 of the Anti-Dumping Agreement and the phrase "costs of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement are incorrect.

⁷⁷ Emphasis added. See Indonesia's first written submission, para. 125.

⁷⁸ Indonesia's first written submission, para. 27.

⁷⁹ For example, 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); 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); or might understate the actual costs incurred (Panel Report, *EU – Biodiesel (Argentina)*, footnote 400).

⁸⁰ Australia also acted consistently with Article VI:1(b)(ii) of the GATT 1994 in this regard.

⁸¹ Panel Report, *US – DRAMS*, para. 6.69.

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

76. 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. 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. 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

77. 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

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

ANNEX B-3**SECOND INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF INDONESIA****EXECUTIVE SUMMARY OF INDONESIA'S SECOND WRITTEN SUBMISSION****I. Australia's Interpretation Of "Particular Market Situation" Is Incorrect**

1. Australia's interpretation of "particular market situation" would wrongly expand the concept and implementation of Article 2.2 of Anti-Dumping Agreement for Members to disregard domestic prices in market economies in almost any situation and would be a far broader grant than given in cases of State set prices or nonmarket economies. Indeed, Australia's definition is overly broad such that a large number of subsidy or government policy/intervention situations could potentially be subject to a "particular market situation" finding.

2. Australia argues the meaning of "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". However, the Oxford English Dictionary notes that the definition of "particular" Australia relies upon is "{o}ften preceded by a possessive adjective". Thus, the fact that "particular" is not preceded by a possessive adjective suggests the definition of "particular" Australia relies upon is not appropriate in the context of interpreting the meaning of "particular market situation".

3. Australia also argues Indonesia has no basis for relying on the silence in the negotiating history. But Australia cannot otherwise cite to any negotiating history to support its interpretation of an undefined treaty term. If "particular market situation" was as broad as Australia interprets it, i.e. any situation that is not general, it is inconceivable that the term would not be defined or that there would not have been some negotiating history supporting Australia's interpretation.

4. Australia further concedes that its "particular market situation" finding was based exclusively on the price of an input but claims Indonesia offered no proof that the low price inputs equally affected domestic and export prices.

5. First, Indonesia noted Australia never reached a determination on whether domestic and export prices were equally affected because the Commission did not address that question. Australia now concedes that point. Second, Indonesia recalled the nature of the A4 copy paper production process which involves using timber to produce pulp, and pulp as a direct input to produce paper. Indonesia further argued the same inputs were used to make A4 copy paper sold to the Indonesian domestic market and exported to Australia. Indeed, Australia, itself, verified this fact during its onsite visit. Third, Indonesia cited to evidence on the Commission's record establishing imports of A4 copy paper from Indonesia into Australia had the lowest prices, suggesting any "particular market situation" involving inputs affected both domestic and export prices.

6. It is important to recall that Article 2.2 specifies that it is "because of" the "particular market situation" that the sales do not permit a proper comparison. Based on the facts in this dispute, the "particular market situation" did not cause or prevent domestic prices from being compared to export prices to determine whether there was price discrimination. Australia failed to do so based on its incorrect interpretation and application of its obligations under Article 2.2.

7. Whether the input price affected domestic and export prices is relevant under Indonesia's first and second claims. Under Indonesia's first claim, a situation involving an input that affects prices of domestic and export sales is not a "particular market situation" because, properly interpreted, a "particular market situation" only affects sales in the domestic market. Under Indonesia's second claim, even if a "particular market situation" exists, Article 2.2 still requires an examination of whether the situation prevents the investigating authority from determining whether the domestic price and the export price are comparable, and it is only when they are not that the investigating authority may disregard domestic prices.

II. Dumping Is Price Discrimination And Australia's Attempt To Broaden The Meaning Of The Term Impermissibly Rewrites The Anti-Dumping Agreement

8. Dumping is a defined term. As Indonesia established in its First Written Submission, "dumped", "dumping", "margin of dumping", or "dumping margin" all refer to the same definition of dumping defined by Article 2.1. Article 2.1 defines a product that is dumped as one that is "introduced into the commerce of another country at less than its normal value". Dumping, therefore, is the act of an individual producer or exporter selling exports at prices below normal value.

9. Pursuant to Articles 2.1 and 2.2, "normal value" is one of three possibilities: 1) domestic prices, 2) constructed normal value, or 3) third country sales. By Australia's own definition, "proper" means "suitable and accurate" and "comparison" means "the action, or an act, of comparing, or noting the similarities and differences of two or more things". As explained in detail below, Australia's justification for its interpretation fails because whether a product has been sold for less than normal value in the export market (i.e. has been dumped) can suitably and accurately ascertained when domestic and export prices are similarly affected.

10. Whether a price comparison is "proper" pursuant to Article 2.2 must be determined in view of the purpose of the comparison. Australia does not dispute this and recognizes the purpose of the comparison is to ascertain whether the product is being dumped and to determine the margin of dumping. As the Russian Federation notes, "the word 'proper' in Article 2.2 of the Anti-Dumping Agreement relates to the correct determination of the pricing behavior of {an} individual exporter or foreign producer". China, likewise notes the purpose of the proper comparison in Article 2.2 is to reveal price discrimination of an individual producer.

11. Indonesia recalls the definition of dumping is selling at export prices that are below normal value. The definition of dumping remains exactly the same no matter which basis is used for normal value. When domestic sales are the basis for normal value, the product is dumped if the domestic price is above the export price. When constructed normal value is used, the product is dumped if the constructed normal value is above the export price. When third country sales are used, the product is dumped if the third country sales price is above the export price. In every instance, whether dumping exists is defined based on whether the price in the domestic market, whether actual or surrogate, is above the price in the export market. In other words, the purpose of every comparison remains the same – to determine whether there is price discrimination.

12. Australia and a number of third parties argued that the Anti-Dumping Agreement never uses the term "price discrimination" and seem to imply that dumping is something other than price discrimination. Members considered dumping to be price discrimination when they were drafting the "particular market situation" provision in what is now Article 2.2 of the Anti-Dumping Agreement.

13. The idea that dumping is price discrimination was a central premise during the Kennedy Round, which eventually produced an Anti-Dumping Code which included the "particular market situation" provision. As part of the negotiations, the Group on Anti-Dumping Policies circulated an "Anti-Dumping Checklist" for comment. The first item on the agenda is "Concept of dumping" and subheading A is titled "Price discrimination criteria". Several governments submitted comments and notably, not one voiced an objection about use of the term "price discrimination" in connection with "concept of dumping". Indeed, several governments expressed views that are practically synonymous with those advanced by Indonesia in this dispute.

14. The European Economic Community explained:

Pursuant to Article VI of the General Agreement, dumping is deemed to be the sale of merchandise of one country in the market of another country at less than normal value of such merchandise, such value being not the price in the market of the importing country, but the price of a like product when destined for consumption in the exporting country or, in the absence of such domestic price, the price for export to any third country or the cost of production in the country of origin. Consequently, dumping is a practice of price discrimination in external trade.

Indonesia has advanced the exact interpretation above, noting irrespective of the basis for normal value, the definition of dumping remains unchanged throughout the Anti-Dumping Agreement and seeks to determine whether price discrimination is occurring.

15. Japan expressed views nearly identical to the European Economic Community in its comments on the Anti-Dumping Checklist:

The price discrimination should be taken to mean the difference between the export price and the price of the like product in the domestic market of the supplier ... When there are no comparable domestic prices, e.g., when there are no open sales in the domestic market, price discrimination should be determined by comparison with either of the alternatives provided for in Article VI:1(b)(i) and (ii) of the GATT.

Again, Indonesia has advanced the exact points made by Japan in this dispute, i.e., dumping is price discrimination no matter what basis is used for normal value.

16. In response to the same Anti-Dumping Checklist, Canada stated "his concept of price discrimination between export and domestic market is the basic definition of dumping in Article VI of the GATT". The United States noted "price comparisons for the purpose of determining the existence of price discrimination or of assessing an anti-dumping duty should be based on a comparison of different sales of a specific seller – the firm accused of dumping – and never by averaging sales of several sellers in the home market or in export". The points made by the United States are consistent with two points Indonesia advances in this dispute: 1) dumping is price discrimination and 2) dumping is specific to a firm.

17. Two points concerning the well-accepted idea of dumping as price discrimination during the Kennedy Round are of particular importance. The first is there is no mention by any of the parties of government involvement in the dumping inquiry, the entire discussion of dumping concerns the pricing behavior of individual producers and exporters. Second, dumping as price discrimination by individual producers and exports was the view held when the "particular market situation" provision was negotiated and included in the 1967 Anti-Dumping Code which eventually became Article 2.2 of the Anti-Dumping Agreement. The Panel should give more weight to the statements about the meaning of dumping made by the governments at the time the "particular market situation" provision was negotiated than on the new found and self-serving interpretation advanced by Australia and certain third parties in the context of a particular dispute.

18. Indonesia established in its First Written Submission that an investigating authority must examine whether the comparability of domestic to export prices was affected, even if there was a "particular market situation" and established Australia had not examined whether there was any effect on domestic and export prices. As both China and Korea have indicated, a situation that equally affects export prices is not a "particular market situation". The reason Australia did not do so is based on its interpretation and application of Article 2.2 as not requiring an examination of whether export prices are equally affected by a "particular market situation", such that whether there is dumping, nevertheless, can be determined. As Australia explained, the Commission found domestic sales were not suitable to use because of government intervention that allegedly led to distorted domestic prices for A4 copy paper. Australia concedes that it did not examine export sales.

19. Indonesia established in its First Written Submission that the three situations described in Article 2.2 all concern situations that unilaterally affect prices in the domestic market meaning that a situation, such as one involving an input that affects domestic and export prices, cannot be a "particular market situation". Australia attempted to rebut Indonesia's argument claiming when an exporter sells at below cost prices or low volumes to both domestic and export markets, the Anti-Dumping Agreement permits discarding the domestic price but keeping the export price. Indonesia rebutted the relevance of Australia's point because it did not refute the point Indonesia was making about the two other exceptions described in Article 2.2 as situations that only affect the home market. However, at no point has Indonesia claimed Article 2.2 does not require export sales to be considered. To the contrary, Indonesia has argued the only correct interpretation of Article 2.2 is that the investigating authority must undertake an evidentiary analysis of whether a proper comparison of domestic to export prices can be performed.

20. Australia and certain third parties note that the "proper comparison" is focused only on establishing normal value and the "proper comparison" is not related to the export price. However,

as China notes, what needs to be "proper" is not the domestic price, *per se*, but its comparison with the export price. Korea, similarly states the determination of normal value must be made in light of the export price, otherwise the requirement to ensure a proper comparison would be meaningless. China and Korea both support this argument with reference to the "low volume of sales" provision in Article 2.2.

21. In summary, when there is a low volume of sales in the domestic market, Article 2.2 requires the investigating authority to compare the volume of sales in the domestic market to the volume of sales in the export market to determine whether they constitute five percent or more of sales. The "proper comparison", therefore, is between the domestic sales and the export sales. Consequently, the same is true of the "proper comparison" when there is a "particular market situation". The "proper comparison" when a "particular market situation" exists is between the domestic sales price and the export sales price.

22. Australia argues Indonesia has not offered any proof that domestic and export prices were equally affected by the allegedly distorted price of timber. This simply is not correct. Indonesia has argued from the outset that the nature of the A4 copy paper production process involves using timber to produce pulp, and pulp to produce paper. Indonesia further argued the same inputs were used to make A4 copy paper sold to the Indonesian domestic market and exported to Australia. Indeed, Australia, itself, verified this fact during its onsite visit.

23. Indeed, additional evidence corroborated the conclusion that domestic and export prices were equally affected even if a "particular market situation" existed. As Indonesia noted in its First Written Submission, the Australian Anti-Dumping Commission gathered evidence in the injury investigation showing the price of imports into Australia from Indonesia were below the Australian domestic price and all other imports.

24. Ultimately, Australia concedes it did not even consider whether domestic and export prices were equally affected. This means that if the Panel finds Article 2.2 requires an investigating authority to examine whether a proper comparison of the domestic price to the export price is required even if there is a "particular market situation", Australia's interpretation and application of Article 2.2 in this dispute was inconsistent.

25. Australia argues that a "particular market situation" is analogous to situations involving state controlled economies and nonmarket economies. Australia ignores a number of critical differences. First, the discretion to disregard domestic prices in both the state controlled economy and nonmarket economy context was *not* granted on an ad hoc basis. Second, the grants of authority giving discretion to disregard domestic prices were made in express provisions. Third, the second Ad note to Article VI:1 of the GATT 1994 only applies when the State sets prices.

26. Australia also argues a "particular market situation" is analogous to situations involving nonmarket economies, referring to China's Accession Protocol. But again, Australia's interpretation of the "particular market situation" provision would render it far broader than application of the provisions in China's Accession Protocol.

27. As the Russian Federation and China noted, the need for the second Ad Note to Article VI:1 of the GATT 1994 and for Article 15 of China's Accession Protocol demonstrate Australia's interpretation of the "particular market situation" provision is incorrect. If the "particular market situation" covered government influence or interference on market prices, there was no need to have a separate provision for State controlled economies or as China described, the "painful negotiations to introduce provisions for this purpose". Because Australia's interpretation of the "particular market situation" is so broad, it actually reaches more government behavior than applies in either the context of a State controlled economy or a nonmarket economy.

28. In this dispute, Australia determined a proper comparison was not possible by comparing Indonesian domestic A4 copy paper prices to a benchmark. As Indonesia has established, the proper comparison is between the individual producer's domestic prices and export prices as set forth in Article 2.1. Even if Australia's comparison was not inconsistent with Article 2.2, Australia's interpretation and application of Article 2.2 is still incorrect because Australia based its "particular market situation" finding on the same basis it used to determine a proper comparison could not be made.

29. If Australia had found Indonesian domestic A4 copy paper prices were above or consistent with the benchmark, Australia would not have found a "particular market situation" existed. This is why Australia found there was not a "particular market situation in China.

30. Australia's and certain third parties' interpretation and application renders the following phrases in Article 2.2 without meaning: "because of" and "such sales do not permit a proper comparison" because it renders "particular market situation" and "proper comparison" the same thing. Interpreting Article 2.2 to mean that a "particular market situation" automatically means constructed normal value or third country sales will be used makes the phrases "because of" and "such sales do not permit a proper comparison" unnecessary. In this dispute, Australia's interpretation equated the "particular market situation" with the inability to perform a proper comparison which renders several treaty terms superfluous. As the Russian Federation notes, "the words actually used ... must give meaning and effect to all its terms". The Russian Federation further quotes from the Appellate Body which noted the "duty of any treaty interpreter is to 'read' all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously". Australia's interpretation, which fails to give meaning to all of the terms in Article 2.2, is incorrect.

III. Australia's Interpretation Of Article 2.2.1.1 As Permitting An Investigating Authority To Reject A Producer's Costs Any Time A Situation Exists That Is Not "Normal" Is Incorrect

31. Australia's interpretation of Article 2.2.1.1 is that an investigating authority may disregard a producer's records when circumstances are "outside the normal and ordinary" such as when a "particular market situation" exists. Australia claims the Appellate Body in *EU – Biodiesel (Argentina)* "explicitly left open the possibility" that other circumstances might exist that would allow the investigating authority to disregard a producer's records. Indonesia first addresses the flaws in Australia's textual analysis and then responds to Australia's claim that disregarding a producer's costs for reasons other than the two express exceptions in Article 2.2.1.1, i.e. if a "particular market situation" exists is an open question.

32. Australia's sole textual argument is that "normally" must be given meaning. While Australia emphasized the "normal" and "ordinary conditions" portion of the definition, the Appellate Body concluded in *US – Clove Cigarettes* that "qualification of an obligation with the adverb 'normally' does not, necessarily, alter the conclusion of that obligation as constituting a 'rule'".

33. Not only does Australia ignore that "normally" can be defined "as a rule", Australia also ignores Article 2.2.1.1's use of the conjunction "provided" in the first sentence. "Provided" means "with the provision or condition (that)"; "it being provided, stipulated, or arranged (that)"; "on the condition, supposition, or understanding (that)". By including the word "provided" the drafters intentionally were conditioning application of the rule in Article 2.2.1.1, i.e., costs shall, as a rule, i.e., "normally", be calculated using the producer's records, to the two conditions that followed, i.e., the records are kept in accordance with GAAP and suitably and sufficiently reproduce the costs incurred to produce the merchandise under consideration.

34. Australia also argues the Appellate Body in *EU – Biodiesel (Argentina)* left open the possibility there might be reasons for disregarding a producer's records other than those found in Article 2.2.1.1. This is not an accurate characterization of what the Appellate Body said or did. The Appellate Body merely recalled that the EU was relying on the second condition in the first sentence of Article 2.2.1.1.

35. Australia argues that to require the records kept by Indah Kiat and Pindo Deli, which according to Australia, reflected the "particular market situation" would render resorting to constructed normal value inutile. But this issue already has been settled by the Appellate Body in *EU – Biodiesel (Argentina)*, and the fact that *Biodiesel* was based on sales outside of the ordinary course of trade is a distinction without a difference. The crucial similarity, however, is even if an input is distorted by government influence and normal value is based on constructed normal value, the investigating authority must still use the input price recorded in the producer's records if the two conditions specified in Article 2.2.1.1 are satisfied.

36. It is important to recall, rejecting a producer's records based on the reasonableness of the costs, themselves, is not an open question. The Appellate Body in *EU – Biodiesel (Argentina)* was clear in ruling the costs must reflect the costs incurred that have a genuine relationship with the

production and sale of the product under consideration. As China notes, interpreting "normally" as incorporating a standard of the reasonableness of the costs makes including the two conditions specified after the word "provided" in the first sentence of Article 2.2.1.1 unnecessary.

37. In this dispute, Australia rejected Indah Kiat's and Pindo Deli's costs because they were not reasonable. It does not matter whether Australia now characterizes this as a situation that was not normal because of a "particular market situation", the basis given in the determination for Australia disregarding the cost of pulp recorded in Indah Kiat's and Pindo Deli's records was because it was less than a benchmark price of pulp which meant, in Australia's view, it did not reflect a competitive market cost. That is a reasonableness test, the same as the one the EU applied and the Appellate Body rejected in *EU – Biodiesel (Argentina)*.

IV. Australia Did Not Calculate The Cost Of A4 Copy Paper Production In Indonesia

38. Australia does not appear to disagree with Indonesia's argument that Article 2.2 requires calculating the cost of production in Indonesia. Australia claims it calculated a cost of production in Indonesia because it made certain adjustments. But none of the adjustments related to deriving the cost of production in Indonesia. Instead, the adjustments were needed to convert certain elements so that they were stated on an equivalent basis. Australia's removal of those elements had nothing to do with calculating the cost of production of pulp in Indonesia. The adjusted cost Australia used was the FOB cost of producing pulp in South America and Brazil not Indah Kiat's or Pindo Deli's cost of producing pulp in Indonesia.

V. Australia Has Not Rebutted Indonesia's Claim That A Violation Of Article 2 In The Calculation Of The Dumping Margin Violates The Chapeau Of Article 9.3 Of The Anti-Dumping Agreement And Article VI:2 Of The GATT 1994

39. Indonesia established in its First Written Submission as inconsistent with the chapeau of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because Australia calculated and imposed anti-dumping duties in excess of those permitted by Article 2. Australia's sole rebuttal was the claim is dependent on establishing an inconsistency with Article 2. Consequently, if the Panel finds Australia acted inconsistently with Article 2, it should also find Australia acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

EXECUTIVE SUMMARY OF INDONESIA'S OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING

I. Indonesia Has Demonstrated Australia's Actions Violate Article 2.2 Because They Are Based On An Incorrect Interpretation Of "Particular Market Situation"

40. Indonesia's first claim is that Australia has based its application of the anti-dumping duties upon an incorrect interpretation of "particular market situation" in Article 2.2 of the Anti-Dumping Agreement, one that does not conform to any correct interpretation of "particular market situation". In applying anti-dumping duties on imports of A4 paper from Indonesian exporters, Australia wrongly found that there was a "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement, even though there was no situation in the domestic market which could impact the dumping margin calculated by deducting the prices in export sales from the prices in domestic sales. To succeed on its first claim, it is only necessary for Indonesia to establish that no correct interpretation of "particular market situation" could include any situation in the market which is incapable of making any difference to the dumping margin arrived at by comparing prices in export sales with prices in domestic sales.

41. Australia takes issue with Indonesia's use of the word "exceptional", which Indonesia used to summarize the various dictionary definitions of "particular". Australia is making a distinction without a difference because the Panel could substitute any of the following definitions of "particular" from Indonesia's First Written Submission and still reach the same result: "distinguished in some way among others of the same kind"; "not ordinary"; "worthy of notice, remarkable"; or "special".

42. Australia also takes issue with Indonesia's use of the word "unilateral" but confuses the issue by categorizing it as one of Indonesia's ordinary meaning arguments. Indonesia, however, argued that a "particular market situation" must be interpreted as being "unilateral", i.e., only affecting

domestic sales, based on the context including the context given by the other two exceptions in Article 2.2 that permit departing from domestic prices. Indonesia has never argued the "unilateral" nature of a "particular market situation" was based on an ordinary meaning analysis, and Australia's claim in that regard is incorrect and misleading.

43. Finally, Australia argues against Indonesia's references to the silence in the negotiating history on the meaning of "particular market situation" and how that stands in stark contrast to the extensive discussion generated by input dumping. Indonesia did not offer a definition of "particular market situation" based on the silence in the negotiating history, the existence of which, notably, Australia has not refuted. Whether or not the alleged government intervention in this dispute could be characterized as a form of input dumping, Indonesia's point was that the attempt to regulate such behavior generated a significant amount of discussion.

44. Indonesia notes that while Australia claims it relied on the regional benchmark price of A4 copy paper and not just the low input price of timber to support its "particular market situation" finding, yet Australia acknowledged in response to the Panel's questions following the First Substantive Meeting that the finding was not based on any government program or policy that affected the A4 copy paper market other than those that lowered the cost and price of logs and hardwood pulp.

45. Australia further incorrectly claims in its Second Written Submission that Indonesia has changed the arguments relating to its first and second claims. To the contrary, Indonesia has argued from the outset in claim 1 that Australia's interpretation of the treaty term "particular market situation" is incorrect, and even if a "particular market situation" existed, in its claim 2 Indonesia argues that Australia misinterpreted Article 2.2 because a proper comparison of domestic price to export price was possible.

46. In arguing against Indonesia's interpretation, Australia reaffirms its mistaken view that if a "particular market situation" exists, domestic sales, per se, do not permit a proper comparison. As Indonesia has argued, the Panel must reject Australia's proposed interpretation because it reads the word "because" and the phrase "such sales do not permit a proper comparison" out of Article 2.2.

47. Australia also argues Indonesia has conflated the phrases "particular market situation" with "not permit a proper comparison". Again, Australia confuses Indonesia's argument which was that the meaning of "particular market situation" can be understood in the context of the remainder of Article 2.2, including the phrase "not permit a proper comparison". Indonesia has established based on an analysis that is fully consistent with the VCLT that a "particular market situation" is "an exceptional combination of circumstances taking place in a geographic region". Such a situation affects the market for the exporter's domestic sales and, thus may prevent a proper comparison by rendering domestic sales unfit to permit a proper comparison but it does not, per se, mean a proper comparison cannot be performed.

II. Indonesia Has Demonstrated That Australia's Actions Violate Article 2.2 Because They Are Based On An Incorrect Interpretation Of That Provision

48. Indonesia has established in its second claim that Australia's overall interpretation of Article 2.2 of the Anti-Dumping Agreement as it relates to rejecting domestic prices because of a "particular market situation" is incorrect. Australia attempts numerous justifications in its Second Written Submission, none of which are availing.

49. The GATT Group on Anti-Dumping Policies during the Kennedy Round negotiation, which created the Anti-Dumping Code which first contained the 'particular market situation' exception, was clear that dumping was price discrimination. This included views of the European Economic Community, Canada, the United States and, Japan.

50. In particular, the delegation of Japan to the Group on Anti-Dumping Policies neatly explained that all of the three methods of determining normal value set out in GATT Article VI are related to determining the existence of price discrimination, whether the existence of price discrimination is determined by assessing the difference between the export price and the domestic price, or by assessing the difference between the export price and one of the two alternatives to domestic price "provided for in Article VI:1(b)(i) and (ii) of the GATT". Indonesia's combined analysis of the negotiating history and the context provided in various other provisions of the Anti-Dumping

Agreement and of the object and purpose of the Agreement show the whole agreement is directed to ensuring a reliable and accurate determination of whether exporters are price discriminating between domestic sales and export sales.

51. When one understands the essential point that dumping is price discrimination, then it also becomes clear that the purpose of making the comparison between an exporter's domestic prices and export prices is to determine whether that exporter is price discriminating between the domestic and export markets and if so by what margin, and that a "proper comparison" is one that can serve that purpose. When the price received by the exporter from domestic sales arises from transactions that are in the ordinary course of trade, being compatible with normal commercial practice and fixed according to criteria of the market place but are nevertheless complicated by some situation affecting how the exporter makes sales into the domestic market, which has the effect that the formal contract price of those domestic sales does not properly represent the value received by the exporter from the sale, then comparing the formal contract price of the domestic sales with the export prices will not serve the purpose of determining whether the exporter is price discriminating and, if so, by what margin so it makes sense to use an alternative price which is likely to be a better estimation of what the domestic price would be in the absence of that "particular market situation".

52. One can reduce this concept to its simplest form, by recognizing that the proper determination of whether an exporter is dumping and of the margin of dumping involves a simple subtraction equation which is the domestic price minus the export price equals the margin of price discrimination or margin of dumping. If a situation affects the number on both sides of the minus sign in the equation, then there is no change in the Difference arrived at by the Subtraction of the second number from the first number. If a situation affects only the starting number (Minuend) and not the number being taken away (Subtrahend) then the presence of the situation does change the Difference arrived at by the Subtraction of the second number from the first number.

53. Australia claims it does consider whether the domestic price would permit a proper comparison with the export price. This is misleading because Australia does not actually consider the "particular market situation" effects on the domestic price relative to the effects on the export price. In other words, Australia is not considering whether or how the "particular market situation" affects the equation – Australia is making a per se determination that the domestic price is not suitable for comparison because of the alleged "particular market situation".

54. Australia insists Indonesia has not proven low priced inputs equally affected domestic and export sales prices. However, the evidence shows that import prices of A4 copy from one or more Indonesian producers into Australia were lower than import prices from every other import source, save a single exporter, and even then, imports from one or more Indonesian producers still were cheaper than from this single Thai exporter in 7 out of 12 months of the investigation period.

55. Basis economics support Indonesia's position on the equal effects. This proposition of economic theory, that a domestic subsidy or the availability of low priced inputs would have the same effect on the costs of exporters in relation to their domestic sales as it has on their costs in relation to their export sales was accepted by the panel and the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*. In that case, the Appellate Body had to decide whether the concurrent application of a countervailing duty offsetting a domestic subsidy and an anti-dumping duty offsetting a dumping margin based on a normal value using surrogate country cost method, without making any adjustment for double counting was a violation of the obligation in Article 19.3 of the SCM Agreement to levy countervailing duties "in the appropriate amounts". The question necessitated an analysis of the effects of domestic subsidies. The panel noted a domestic subsidy would lower the production cost for all units of production and would allow the producer to lower prices in both the domestic and export market. The Appellate Body agreed.

56. The only difference is, in this dispute, rather than a domestic subsidy, there is a low priced input, which has the same effect on the exporter's costs for all merchandise, regardless of whether A4 copy paper is sold in export sales or domestic sales. Since the reduction in costs is received by a producer for all units of production regardless of whether they are ultimately sold to the domestic market or to the export market, then the reduction in cost lowers the costs and the minimum price at which the producer is willing to supply. Consequently, the existence of low-priced pulp will have the same impact on the A4 copy paper producer's behavior with respect to domestic sales as it has with respect to export sales: it reduces the amount that the supplier is willing to take in exchange

for supplying an additional unit. In the presence of a domestic subsidy affecting both sides of the dumping margin equation, a comparison of domestic to export prices to determine whether price discrimination was occurring, thus, can properly be performed.

57. Australia argues Indonesia reads the word "proper" out of the phrase "permit a proper comparison". However, Australia's claim is based on a premise, which Indonesia already has established is flawed, which is that a "particular market situation", per se, means domestic prices cannot be compared to export prices. As Indonesia also has demonstrated, and Australia agrees, the word "proper" refers to the comparison specified in Article 2.1. As discussed earlier, where the parties diverge is on whether the Anti-Dumping Agreement defines "dumping" as something other than price discrimination. Indonesia has established that the definition and concept of "dumping" in the Anti-Dumping Agreement is limited to price discrimination.

58. Australia argues that the phrase "proper comparison" relates to the suitability of using domestic sales and prices alone, and this interpretation is confirmed by the other two situations in Article 2.2 that permit domestic sales to be disregarded. Australia is incorrect. The first situation described in Article 2.2 is when there are no sales in the ordinary course of trade. There are no sales to compare because they all have been found outside of the ordinary course of trade by operation of Article 2.1. Article 2.2 simply takes as a given that there are no sales in the ordinary course of trade, which is why the phrase "no sales in the ordinary course" is not connected grammatically to the phrase "such sales do not permit a proper comparison". There is no possibility of a comparison to export sales because there are no domestic sales to compare. However, if Australia's interpretation were correct, i.e. that "proper comparison" means the domestic sales are "unsuitable", the phrase "no sales in the ordinary course" would be linked to the phrase "such sales do not permit a proper comparison". Article 2.2 would then say sales outside of the ordinary course do not permit a proper comparison. But that is not what Article 2.2 says. Indeed, the use of "proper comparison" in Article 2.2 does not mean sales outside the ordinary course are unsuitable and, likewise, it cannot be correctly interpreted as saying sales made when there is a particular market situation, or sales made in low volumes are, necessarily, unsuitable. Instead, "proper comparison" refers to the ability of the investigating authority to determine whether dumping is occurring, as Indonesia has established.

59. By claiming the only consideration in a situation involving a low volume of sales is the volume of domestic sales, Australia wrongly ignores footnote 2 to Article 2.2, which specifies whether domestic sales are at a sufficient volume to permit a proper comparison is an evidentiary question. The only plausible evidentiary question is whether the domestic sales volume is of a sufficient volume to be comparable to export sales. In other words, the evidentiary consideration requires a comparison of domestic sales to export sales.

60. Australia mistakenly interprets and applies Article 2.2 in a manner that when a "particular market situation" exists, those sales, per se, are not to be used as the basis for normal value. This is evident from Australia's statement that the phrase "such sales do not permit a proper comparison" defines when domestic sales should or should not be used.

61. Australia incorrectly claims Indonesia argued the possibility of making comparisons makes them proper. Australia is incorrect. Indonesia has argued under its first claim that the government policies in this dispute that allegedly result in a low priced input do not constitute a "particular market situation". Indonesia has argued under its second claim that price discrimination can be determined in this dispute because the same input is used to produce A4 copy paper for sale in Indonesia and Australia and, thus, a "proper comparison" is possible. Indonesia has never taken the position that a proper comparison is not possible if a "particular market situation" (as defined by Indonesia in its first claim) exists. Likewise, Indonesia has not claimed the possibility of making price comparisons automatically makes them proper. Indeed, Indonesia's position, which is consistent with Article 2.2., is that whether a proper price comparison is possible requires considering the effects of a "particular market situation" on domestic and export costs.

62. Australia acknowledges the term "proper comparison" in Article 2.2 refers to Article 2.1, but Australia argues in its Second Written Submission that the term "proper comparison" should be understood to mean "unsuitable", despite the fact this term does not appear in the text of any of the provisions Australia cites as context, and is in direct contradiction with Australia's own dictionary definitions of "proper comparison". Article 2.2's drafters did not use the word "unsuitable", which they easily could have done but, instead, they used the term "proper comparison" - an explicit

reference to the comparison between normal value and export price specified in Article 2.1. Australia claims two circumstances render domestic prices unsuitable and, thus, incapable of providing a "proper comparison".

63. The first circumstance, according to Australia, is government intervention that distorts costs and prices, which Australia argues is evident from the context provided by the second Ad note to Article VI:1 of the GATT 1994. But that note is exceptional and should be treated as such, and should not be interpreted in a manner that would fundamentally change the meaning of the Anti-Dumping Agreement, as Australia invites the Panel to do.

64. The second circumstance Australia offers is Article 2.2's purpose, which according to Australia is to "set out when the domestic price is to be considered as not a 'comparable price, in the ordinary course of trade'". Article 2.2 does not contain any provision specifying when domestic prices are not in the ordinary course of trade, that is done solely by operation of Article 2.2.1. Article 2.2 sets out two situations that may or may not permit authorities to use third country sales or constructed normal value, depending on whether a proper comparison between domestic sales and export sales is possible. Again, Article 2.2 does not specify when the domestic price is not considered comparable.

65. Australia is not correct in its interpretation of Articles 2.1 and 2.2 of the Anti-Dumping Agreement as having a purpose of identifying when there is an absence of "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Rather, Articles 2.1 and 2.2 of the Anti-Dumping Agreement are a more precise specification of when it is or is not permissible to depart from using domestic sales prices as the basis for normal value. After the addition of the Anti-Dumping Agreement to the rules, the rule in GATT Article VI must be interpreted and implemented within the limits specified by the codification in Article 2.2.

66. Australia relies on the Appellate Body's reasoning in *US – Hot Rolled Steel* concerning the characteristics of sales that are outside the ordinary course of trade and, thus, unsuitable for normal value. In other words, Australia's interpretation relies on the exact same factors to determine whether to exclude sales made outside the ordinary course and sales made in a "particular market situation".

III. Indonesia Has Demonstrated That Australia's Actions Violate Article 2.2.1.1 Because They Are Based On An Incorrect Interpretation Of That Provision

67. Indonesia's third claim challenges Australia's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement as incorrect because it allowed Australia to substitute a benchmark pulp price for the actual price of pulp recorded in the producer's books and records despite the fact that the records were in accordance with Indonesian GAAP and reasonably reflected the cost to produce A4 copy paper. Australia responds that the word "normally" in the first sentence of Article 2.2.1.1 gives it such authority.

68. In response, Indonesia has established that "normally", as used in combination with "provided" in the first sentence of Article 2.2.1.1 means the drafters intended to emphasize that the rule that costs shall be based on the producer's records can only be deviated from in two circumstances – they were not kept in accordance with GAAP or they did not sufficiently reproduce the costs incurred to produce the merchandise under consideration. It simply is not correct that Indonesia has read "normally" out of Article 2.2.1.1 or ignored that "normally" is an adverb qualifying the verb "shall". Indonesia's interpretation gives full meaning to the words and grammatical structure of the first sentence of Article 2.2.1.1.

69. Australia argues the drafters could have omitted "normally" and achieved the same result. This reading is incorrect because the drafters included "normally" along with "provided" to emphasize Article 2.2 was setting forth a rule. Indeed, other provisions of the Anti-Dumping Agreement use the same structure and, like Article 2.2.1.1, the use of "normally" highlights the rule cannot be deviated from other than as specified. Footnote 2 to Article 2.2 is drafted in a similar manner to Article 2.2.1.1. Footnote 2 uses the phrase "shall normally" to introduce the five percent or more rule for an investigating authority to use domestic sales. However, Article 2.2 qualifies this rule by stating it is subject to an exception, which is introduced by the word "provided". Likewise, the structure of Article 5.8 of the Anti-Dumping Agreement, which governs negligibility, is similar to both Article 2.2.1.1 and footnote 2 to Article 2.2, by stating the three percent rule for negligibility

(introduced by the term "shall normally") followed by the exception for investigations involving multiple countries that would be negligible individually (introduced by the word "unless").

70. Other than to say it was not based on the meaning of "normally", which is not in dispute, Australia cannot explain why the Appellate Body's reasoning in *EU – Biodiesel (Argentina)* is not analogous in interpreting Article 2.2.1.1 as requiring an investigating authority to use the input cost recorded in a producer's records even though the input price was distorted and all of the domestic sales were outside the ordinary course of trade. Likewise, the panel's reasoning in *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate* is equally relevant because in both disputes, the panel found Article 2.2.1.1 requires an investigating authority to use the producer's records despite a distorted input cost. Australia also fails to detract from the relevance of the reasoning in *US – Clove Cigarettes* and *China – Broiler Products*.

71. In *US – Clove Cigarettes*, the issue was whether a period of less than six months was sufficient because, as the United States argued as Australia does in this dispute, presence of the word "normally" meant the six month period was not a rule. The Appellate Body rejected that view and determined the six month rule could only be deviated from based on the exception specified in the same provision. In other words, the presence of "normally" did not create a separate, open-ended exception to the rule as Australia argues it does in the first sentence of Article 2.2.1.1.

72. Australia claims Indonesia's reliance on *China – Broiler Products* is misplaced because the panel was considering the second sentence of Article 2.2.1.1 and the panel did not say the failure to consider one or both conditions in the second sentence is the only instance in which an investigating authority can disregard the producer's records. But it is impossible to reconcile Australia's reading with what the panel actually said. The panel considered the use of "normally" in the first sentence of Article 2.2.1.1 and then concluded it meant the only two exceptions permitted by Article 2.2.1.1 are those set out under the provision.

IV. Indonesia Has Demonstrated Australia's Actions Violate Article 2.2 Of The Anti-Dumping Agreement Because Australia Did Not Calculate A Cost Of Production In The Country Of Origin, That Is, In Indonesia.

73. Indonesia's fourth claim established Australia's use of the price for hardwood pulp produced in Brazil and South America, stated on a free on board (or F.O.B.) basis Brazil/South America, is inconsistent with Article 2.2, which requires the cost of production to be calculated in the country of origin, i.e., Indonesia. As an initial matter, Indonesia has argued for the Panel to reject Australia's belated attempt to put new evidence on the record of this dispute with its Second Written Submission. Indonesia also has challenged the evidence, on its face, as unreliable.

74. In addition, Indonesia has challenged the consistency with Article 2.2 of Australia using the price "hardwood pulp originating in South America and Brazil" as a substitute for the cost of production in Indonesia. Indonesia has also challenged the consistency with Article 2.2 of Australia ignoring the fact that the Indonesian producers are integrated or affiliated with pulp producers by failing to remove profit from the pulp benchmark.

V. Indonesia Has Demonstrated Australia Violated Article 9.3 Of The Anti-Dumping Agreement And GATT Article VI:2 By Imposing Anti-Dumping Duties In Excess Of Legally And Justifiable Rates

75. Indonesia has established multiple violations of Article 2 which means Australia has violated Article 9.3 and VI:2 and that benefits accruing to Indonesia under the Anti-Dumping Agreement and under GATT 1994 including Australia's relevant tariff bindings thereunder are being nullified and impaired as a result of the failure of Australia to carry out its obligations under the Anti-Dumping Agreement and Article VI of the GATT 1994.

EXECUTIVE SUMMARY OF INDONESIA'S CLOSING STATEMENT AT THE SECOND SUBSTANTIVE MEETING

76. Australia acknowledged a number of points during the Second Substantive Meeting that confirm its action is inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. First, Australia agrees that its interpretation of "particular market situation" applies to any situation in a market that is not acceptable. The range of situations covered by such a definition has no limit and

is inconsistent with Article 2.2 of the Anti-Dumping Agreement. Second, Australia agrees that it does not have to compare or even consider whether the export price is affected by the "particular market situation". If Australia's over expanded interpretation is accepted, it is only a matter of time before the exception of using a surrogate, in the form of constructed normal value, instead of the actual domestic price becomes the rule.

77. Australia argues the Panel must rule in its favor to respond to instances of government intervention that affect the domestic price of a good that may not come within the SCM Agreement or the provisions in the Anti-Dumping Agreement that refer to government actions. But if Members did not agree to regulate government intervention in either the SCM Agreement or the Anti-Dumping Agreement, then it is incorrect to argue it should, nevertheless, be covered.

78. Australia's interpretation of "normally" in Article 2.2.1.1 is similarly disturbing. No one, including Australia, can argue with the fact that Article 2.2.1.1 contains two conditions for not using a producer's costs. The first is if they are not kept in accordance with generally accepted accounting principles. The second is if they do not reasonably reflect the cost of producing the merchandise being investigated. Australia argues that the word "normally" means there is a third exception for not using a producer's costs, yet one that is broader and far less defined than the other two reasons and it applies any time something in the market is not "normal".

79. The interpretations Australia advances of Article 2.2. and 2.2.1.1 in this dispute are nothing short of an attempt to rewrite the Anti-Dumping Agreement to permit an investigating authority to disregard a producer's domestic sales and then the domestic producer's costs at will.

80. Australia's defense of how it calculated the hardwood pulp replacement cost, which relies on information Australia only placed on the record in its Second Written Submission, fails to show Australia calculated the cost of production in Indonesia for the producers under investigation which violates Article 2.2. Australia claims it only did so in response to a statement in Indonesia's Opening Statement at the First Panel Meeting. But this is incorrect. Australia relied on this information in its First Written Submission in paragraph 228 and in the investigating authority's decision, yet failed to place it on the record until much later. Finally, Australia's violations of Article 2 result in a violation of Article 9.3 because Australia imposed anti-dumping duties in excess of what the Anti-Dumping Agreement allows.

ANNEX B-4**SECOND INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF AUSTRALIA****I. AUSTRALIA ACTED CONSISTENTLY WITH ARTICLE 2.2 IN DISREGARDING
INDONESIAN DOMESTIC PRICES IN DETERMINING THE "NORMAL VALUE"****A. Australia Properly Established There Was a "Particular Market Situation"**

1. The proper Vienna Convention interpretation of "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. Indonesia) that is distinguishable and not general.¹

2. Indonesia is incorrect to argue that the Anti-Dumping Commission's finding in respect of the "particular market situation" was "limited to hardwood timber and pulp"² and was "based exclusively on the price of an input."³ Rather: (a) the lowered cost and price of logs and hardwood pulp, alone, were not the "particular market situation";⁴ (b) an integral part of the "particular market situation" finding was that the price of A4 copy paper in Indonesia was artificially low,⁵ was significantly below regional benchmarks,⁶ 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;⁷ (c) the Final Report expressly stated that "low input costs, of themselves, are not determinative of a market situation",⁸ that "a market situation assessment primarily concerns the domestic market for like goods",⁹ and that "conditions in a significant input market that do not distort the market for like goods will not found a market situation finding".^{10, 11} It is thus also not the case that the Anti-Dumping Commission found that the fact that "a low-priced input [was] used equally to produce A4 copy paper for the domestic and export markets constitute[d] [the] "particular market situation"". ¹²

**B. Australia Properly Found That, Because of the "Particular Market Situation",
Domestic Sales Did Not "Permit a Proper Comparison"**

3. 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 2.2.¹³ Interpreting the phrase "such sales do not permit a proper comparison" is 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

¹ Australia's first written submission, paras. 97-106.

² Indonesia's second written submission, para. 3.

³ Indonesia's second written submission, para. 13.

⁴ Australia's written response to question 6 following the first substantive meeting with the Parties, footnote 29.

⁵ Final Report, Exhibit IDN-04, section A2.7.4, p. 153 and section A2.9.2.2, p. 167.

⁶ Final Report, Exhibit IDN-04, section A2.9.4, p. 173.

⁷ Final Report, Exhibit IDN-04, section A2.9.4, p. 174; see also Australia's first written submission, paras. 114-115.

⁸ Final Report, Exhibit IDN-04, section A2.8.6.3, p. 165.

⁹ Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.

¹⁰ Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162. See also Australia's opening statement at the first substantive meeting with the Parties, para. 31 and Australia's written response to question 13 following the first substantive meeting with the Parties, para. 84.

¹¹ Australia's second written submission, para. 37.

¹² Indonesia's written response to question 5 following the first substantive meeting with the Parties, p. 11.

¹³ Australia's written response to question 5 following the second substantive meeting with the Parties, para. 36.

conduct a suitable and accurate comparison to: (a) ascertain whether the like product is to be considered as being dumped; and (b) determine the margin of dumping.¹⁴

4. The broader context identifies the relevant characteristics of unsuitability in this investigation, including 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.¹⁵ Those characteristics were present and were evident in the price of A4 copy paper in Indonesia. The domestic sales did "not permit a proper comparison" to the export price. The lowered domestic price was quite properly relevant to the "particular market situation" analysis and to the "permit a proper comparison" analysis.¹⁶

C. Indonesia Continues to Misrepresent the Practices and Findings of the Anti-Dumping Commission in Relation to "Particular Market Situation" and "Permit a Proper Comparison"

5. 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". Contrary to Indonesia's submissions: (a) Australia does not find that a "particular market situation" exists every time that an input is distorted – and, in this case, the Anti-Dumping Commission undertook a detailed and exhaustive assessment of whether a "particular market situation" existed, which extended beyond considering whether an input price was distorted; (b) the Anti-Dumping Commission's finding in respect of "particular market situation" was not "based exclusively on the price of an input";¹⁷ (c) Australia does consider whether the domestic price would "permit a proper comparison" with the export price – and, in this case, 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; (d) Australia demonstrably did not simply proceed directly to determining a constructed normal value;¹⁸ (e) Australia does not interpret the term "particular market situation" to mean "any situation that is not normal";¹⁹ and (f) Australia's interpretation does not provide for a "broad grant of authority to Members for disregarding domestic prices any time the investigating authority determines something about prices is not "normal"".²⁰

6. 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".²¹ Contrary to Indonesia's argument, Australia's definition of "particular market situation" is in no way akin to "any situation".²² Furthermore, in order to discard domestic sales in determining the "normal value", an investigating authority must also find that, because of that "particular market situation", domestic sales "did not permit a proper comparison". And, before an investigating authority can impose anti-dumping duties based on a finding of a "particular market situation", it must also find that: (a) 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 (b) the resultant "dumping" has caused injury to the domestic industry.²³

¹⁴ Australia first written submission, paras. 118-132; Australia's written response to question 15 following the first substantive meeting with the Parties, paras. 95-103; Australia's second written submission, paras. 168, 170 and 172; Australia's opening statement at the second substantive meeting with the Parties, para. 12; and Australia's written response to question 5 following the second substantive meeting with the Parties, para. 36.

¹⁵ Australia's second written submission, paras. 172-181 and Australia's opening statement at the second substantive meeting with the Parties, para. 13.

¹⁶ Australia's opening statement at the second substantive meeting with the Parties, paras. 14-15.

¹⁷ Indonesia's second written submission, para. 13.

¹⁸ Australia's first written submission, para. 155.

¹⁹ Indonesia's written response to question 2(b) following the first substantive meeting with the Parties, p. 8.

²⁰ Indonesia's written response to question 10(b) following the first substantive meeting with the Parties, p. 14.

²¹ Indonesia's second written submission, para. 9.

²² Indonesia's second written submission, para. 9.

²³ Australia's opening statement at the second substantive meeting with the Parties, paras. 60-64.

D. Indonesia's Arguments with Respect to "Particular Market Situation" and "Permit a Proper Comparison" Have No Merit

7. In order to satisfy the requirements of 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 in *US – Hot-Rolled Steel* made this clear when it said: "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".²⁴ 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. The entire focus of Article 2.2 is on the domestic sales and their suitability to use as a basis for the "normal value".²⁵

8. In all situations where an investigating authority can discard domestic prices – sales outside of the ordinary course of trade, low volume of sales, command economy, non-market economy conditions, incompatibility with normal commercial practice, and non-marketplace criteria – the analysis as to whether the domestic price is a "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" concentrates on the conditions in the domestic market for the like product. Contrary to Indonesia's arguments, the analysis is not concerned at all with the export price or the comparison between the domestic price and the export price.²⁶

9. Indonesia is conflating the steps of the dumping investigation. As Indonesia itself has recognised: (a) "Article 2 first describes what sales should be in the dataset for normal value and export price and then defines how those datasets are to be evaluated";²⁷ (b) "determining whether a proper comparison is possible [is not] equivalent to calculating a dumping margin";²⁸ (c) the evaluation of whether the domestic sales "permit a proper comparison" "is performed in the stage that is still determining what sales [, if any,] are in the [normal value] dataset";²⁹ (d) at the stage of evaluating whether the domestic sales "permit a proper comparison" "the dumping margin analysis is not yet being performed";³⁰ and (e) if the result of that "evaluation" is that there are no "remaining above cost domestic sales", then the "normal value" is determined on the basis of "third country sales ... or constructed normal value".^{31, 32}

10. Despite this recognition, Indonesia continues to advocate that "as long as it is possible to examine whether price discrimination is occurring by comparing domestic [sales] to export sales, then such sales permit a proper comparison"³³ and that "a proper comparison is possible when the investigating authority can determine whether price discrimination is occurring [by comparing the actual domestic prices to the actual export prices]".³⁴ However, the stage of the dumping investigation when an investigating authority determines whether, because of the "particular market situation", domestic sales "permit a proper comparison" is different from the stage of the dumping investigation when an investigating authority determines the appropriate "dataset" to use for the "export price". Indonesia recognises this when it states that "Article 2 also contains a provision

²⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 165.

²⁵ Australia's opening statement at the second substantive meeting with the Parties, paras. 75-76.

²⁶ Australia's written response to questions 22 and 23 following the second substantive meeting with the Parties, para. 120.

²⁷ Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 58.

²⁸ Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 64.

²⁹ Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 64.

³⁰ Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 64.

³¹ Indonesia's written response to question 24 following the second substantive meeting with the Parties, para. 65.

³² Australia's comments on Indonesia's response to question 24 following the second substantive meeting with the Parties, para. 113.

³³ Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 80. (emphasis added)

³⁴ Indonesia's written response to questions 22 and 23 following the second substantive meeting with the Parties, para. 52.

(Article 2.3) specifying how the export price dataset is to be established"³⁵ and that "the export price dataset can be based on one of three possibilities".³⁶ It is illogical for Indonesia to argue that, at the stage of the dumping investigation that determines the "dataset" for the "normal value", an investigating authority should be considering whether comparing the actual domestic prices and the actual export prices would show the extent of "price discrimination". This is because at that stage of the dumping investigation the "dataset" for the "export price" has not yet been established.^{37, 38}

11. There are three separate and distinct tests set out in the Anti-Dumping Agreement: (a) the "normal value" dataset is determined under Article 2.1 and Article 2.2; (b) the "export price" dataset is determined under Article 2.1 and Article 2.3; and (c) the resulting dataset for the "export price" is compared with the resulting dataset for the "normal value" under Article 2.4. Indonesia's argument ignores this by advocating that, under Article 2.2, the actual domestic prices should form the basis of the "normal value" whenever comparing those actual domestic prices to the actual export prices would show whether "price discrimination" (and, hence, dumping) is occurring. But an investigating authority has not yet established whether the actual export prices should form the basis of the "export price" that it will subsequently use to determine the margin of dumping under Article 2.4. The actual export prices cannot be relevant to determining whether the domestic sales "permit a proper comparison" to the "export price" under Article 2.2 because, under Article 2.3, that "export price" may not even be based on the actual export prices.³⁹ Thus, contrary to Indonesia's arguments, the fact that the Anti-Dumping Commission "did not take the export price into consideration"⁴⁰ 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".⁴¹

12. Indonesia is also incorrect when it argues that "[i]f a producer sells at the same low price in the domestic market and export market, that is not dumping and it is not regulated by the Anti-Dumping Agreement"⁴² and is also incorrect when it argues that "if a producer sells at the same low price in sales in the ordinary course of trade in the domestic market and in sales in the export market, that is not dumping".⁴³ The GATT 1994 and the Anti-Dumping Agreement define dumping as being when the export price is below the "normal value". Thus, the fact that the export price and the price of domestic sales (or the price of domestic sales in the ordinary course of trade) are the same does not necessarily mean that there is no dumping. If 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", then an investigating authority must not use it as the "normal value". Indonesia ignores that there will not be a "comparable price" if, "because of the particular market situation", domestic sales "do not permit a proper comparison".⁴⁴

13. Furthermore, "dumping" extends beyond the situation where an exporter is "selling for less in the export market than in the domestic market".⁴⁵ This argument of Indonesia ignores the alternative bases for "normal value (being third country export prices and constructed normal value) that are available: (a) if there are "no sales of the like product in the ordinary course of trade"; and (b) if, "because of the particular market situation or the low volume of the sales in the domestic

³⁵ Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 74.

³⁶ Indonesia's written response to question 26 following the second substantive meeting with the Parties, para. 74.

³⁷ See also Indonesia's written response to question 26 following the second substantive meeting with the Parties, paras. 71-75.

³⁸ Australia's comments on Indonesia's written response to question 24 following the second substantive meeting with the Parties, paras. 114-116.

³⁹ Australia's comments on Indonesia's written response to question 24 following the second substantive meeting of the Parties, paras. 117-119.

⁴⁰ Indonesia's second written submission, para. 38.

⁴¹ Indonesia's second written submission, para. 38.

⁴² Indonesia's first written submission, para. 102.

⁴³ Indonesia's written response to question 3 following the second substantive meeting with the Parties, para. 5. (emphasis added)

⁴⁴ Australia's comments on Indonesia's written response to question 3 following the second substantive meeting with the Parties, paras. 7-12.

⁴⁵ Indonesia's written response to question 15 following the first substantive meeting with the Parties, p. 17.

market of the exporting country, such sales do not permit a proper comparison to the export prices".⁴⁶

14. As clearly set out in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, "dumping" occurs when the export price is below the "normal value", not merely when "the pricing practice of an exporting firm [is] to charge a lower price for exported goods than it does for the same goods sold domestically".⁴⁷ And, as clearly set out in Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b) of the GATT 1994, there are certain circumstances where an investigating authority is required to not use the domestic prices of the like product as the basis for the "normal value". One of those circumstances is where, "because of the particular market situation ... such sales do not permit a proper comparison" with the export price. This is the circumstance before the Panel in this dispute.⁴⁸

E. Government Intervention Can Result in the Domestic Price Not Being Suitable to Use as the Basis for the Normal Value

15. There is nothing in the text of the GATT 1994 or the Anti-Dumping Agreement to support Indonesia's argument that "government involvement ... falls exclusively within the province of the SCM Agreement"⁴⁹ or that "the Anti-Dumping Agreement is concerned solely with the behaviour of individual producers or exporters absent express language indicating otherwise".⁵⁰ Furthermore, the basis of Australia's "particular market situation" finding was not that the Government of Indonesia provided goods for less than adequate remuneration.⁵¹

F. Footnote 2 of Article 2.2 of the Anti-Dumping Agreement Provides No Support for Indonesia's Arguments

16. Indonesia argues that "the "proper comparison" when a "particular market situation" exists is between the domestic sales price and the export sales price".⁵² But the comparative examination discussed in footnote 2 only addresses the relative magnitudes of the domestic sales and the export sales – it certainly does not consider the price of the domestic sales in comparison to the price of the export sales. Furthermore, the overarching question under footnote 2 is whether the domestic sales were of a sufficient magnitude "to provide for a proper comparison" – the focus remains on the attributes of the domestic sales.⁵³ Indonesia recognised this when it suggested that domestic sales might "not permit a proper comparison" in the context of a "low volume of ... sales" if: (a) they are "not ... representative of how the exporter would behave over a larger volume of sales";⁵⁴ (b) there are "unusual transactions";⁵⁵ or (c) "the evidence establishes" that "the sales are ... unsuitable".⁵⁶

17. Thus, Indonesia appears to have recognised that in order to be suitable to use as the basis for the "normal value", the "domestic price" must be of the correct nature and quality, even if the sale is in the ordinary course of trade.⁵⁷ This is a key shift in Indonesia's argument because Indonesia acknowledges that there may be something inherent in the "domestic sales" that make them "unreliable" – or, as Australia has explained, "unsuitable" – for use as the basis for the "normal value", even if they are in the ordinary course of trade. And, crucially, whether or not the domestic

⁴⁶ Australia's second written submission, para. 161.

⁴⁷ Indonesia's first written submission, para. 91. (footnote omitted)

⁴⁸ Australia's second written submission, para. 163.

⁴⁹ Indonesia's first written submission, para. 93.

⁵⁰ Indonesia's written response to question 10(b) following the first substantive meeting with the Parties, pp. 13-14.

⁵¹ Australia's second written submission, paras. 111-122.

⁵² Indonesia's second written submission, para. 37. (emphasis added)

⁵³ Australia's written response to question 5 following the second substantive meeting with the Parties, para. 32.

⁵⁴ Indonesia's written response to question 21 following the second substantive meeting with the Parties, para. 46. (emphasis added)

⁵⁵ Indonesia's written response to question 21 following the second substantive meeting with the Parties, para. 46. (emphasis added)

⁵⁶ Indonesia's written response to question 21 following the second substantive meeting with the Parties, para. 49. (emphasis added)

⁵⁷ See Australia's opening statement at the second substantive meeting with the Parties, para. 74.

sales are "[un]representative", "unusual" or "unsuitable" has nothing to do with the "comparison" between the actual domestic price and the actual export price.⁵⁸

G. Indonesia has Admitted That Domestic Prices and Export Prices Were Not "Equally Affected" by the Low-Cost Inputs

18. Indonesia argued 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".⁵⁹ It argued that this meant there was no "particular market situation"⁶⁰ and that this meant that the domestic sales permitted a "proper comparison".⁶¹ It argued that "[w]hether the input price affected domestic and export prices is relevant under Indonesia's first and second claims".⁶²

19. Indonesia states that, in respect of its first and second claims, it is presenting the Panel "with narrow questions that do not require [the Panel] to offer a definitive interpretation of "particular market situation" or "proper comparison"". ⁶³ In the words of Indonesia, these "narrow questions" are "whether a low-price input used identically to produce merchandise for the domestic and export market constitutes a "particular market situation" within the narrow meaning of Article 2.2 of the Anti-Dumping Agreement (claim 1) or prevents a proper comparison (claim 2)".⁶⁴ Indonesia's assertion that the "low-price input" equally affected the domestic price and the export price is integral to Indonesia's argument as to why such a "low-price input" could not result in a "particular market situation" and would not prevent a "proper comparison". However, Indonesia admitted at the second substantive meeting with the Parties that the domestic price and the export price were not "equally affected" by the lowered cost and price of logs and hardwood pulp. Thus, the "narrow questions" that Indonesia poses must both be answered in the positive – that is, even on Indonesia's arguments, the "low-price input" can lead to a "particular market situation" and the "low-price input" does prevent a "proper comparison".⁶⁵

20. On Indonesia's argument, the crucial question is "whether [the] alleged situations involving government policies in the domestic market actually made any difference to the determination of the margin of dumping that would arise from a comparison between each individual Indonesian exporter's domestic prices and its export prices".⁶⁶ Indonesia has admitted that the domestic price and the export price were not "equally affected" by the lowered cost and price of logs and hardwood pulp. Thus, Indonesia has admitted that the government intervention would have changed the margin between the domestic price and the export price of A4 copy paper, so that margin would not show the exporter's "international price discrimination". Thus, even on Indonesia's argument, this would mean that the domestic sales did "not permit a proper comparison" and the Anti-Dumping Commission was required to discard the domestic prices as the basis for the "normal value".⁶⁷

21. Australia questions whether Indonesia has made out a *prima facie* case in respect of its first and second claims. Even if the Panel accepted all of Indonesia's arguments on Indonesia's first and second claims, the Panel could not as a matter of law rule in favour of Indonesia on those claims.⁶⁸ This is because Indonesia has admitted that an integral part of its argument in respect of those claims – the alleged fact that the domestic price and the export price were "equally affected" by the

⁵⁸ Australia's comments on Indonesia's written response to questions 5 and 21 following the second substantive meeting with the Parties, paras. 35-36.

⁵⁹ Indonesia's second written submission, para. 15.

⁶⁰ Indonesia's second written submission, paras. 3, 13-14, and 32.

⁶¹ Indonesia's first written submission, paras. 115-122; Indonesia's second written submission, paras. 15-16 and 39-42; Indonesia's opening statement at the second substantive meeting with the Parties, para. 32; and Indonesia's closing statement at the second substantive meeting with the Parties, para. 6.

⁶² Indonesia's second written submission, para. 19.

⁶³ Indonesia's written response to question 20(a) following the second substantive meeting with the Parties, para. 38.

⁶⁴ Indonesia's written response to question 2(b) following the first substantive meeting with the Parties, p. 8.

⁶⁵ Australia's comments on Indonesia's written response to question 20 following the second substantive meeting with the Parties, paras. 99-100.

⁶⁶ Indonesia's first written submission, para. 116.

⁶⁷ Australia's response to question 4 following the second substantive meeting with the Parties, para. 20.

⁶⁸ Appellate Body Report, *EC – Hormones*, para. 104.

reduction in the cost and price of the logs and hardwood pulp – is not true.⁶⁹ Australia recalls, in this regard, that the Panel "cannot make the case for a complainant".^{70, 71}

II. 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. Australia 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. Indonesia's interpretation of the first sentence of Article 2.2.1.1 reads out the word "normally"

22. Indonesia argues that the word "normally" appears in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in order to specify that the exporter's records must be used unless one (or both) of the conditions in the first sentence of Article 2.2.1.1 are not satisfied.⁷² But, if that had been the intention of the provision, the word "normally" would not have been included. Indonesia's interpretation strips the word "normally" of any effect at all. Indonesia's interpretation is that the first sentence of Article 2.2.1.1 means the same thing with the word "normally" included as it would mean without the word "normally" included. But the qualification of the verb "shall" by the adverb "normally" must be given meaning and effect. Interpreting the first sentence of Article 2.2.1.1 in a way that requires that the "costs ... be calculated on the basis of records kept by the exporter or producer under investigation" whenever the two conditions in Article 2.2.1.1 are satisfied – as Indonesia does⁷³ – renders the word "normally" inutile and redundant.⁷⁴

23. The proper Vienna Convention interpretation of the first sentence of Article 2.2.1.1 is that where the circumstances in respect of the records 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.⁷⁵ Australia's interpretation is fully consistent with the findings of panels and the Appellate Body in relation to the

⁶⁹ Australia also notes that in the Request for the Establishment of a Panel by Indonesia, Indonesia stated that the legal basis of its first claim was that Australia's finding of a "particular market situation" was "incorrect and inconsistent with Article 2.2". In developing this claim in its submissions, Indonesia argued that the use of the same hardwood pulp in A4 copy paper sold domestically and A4 copy paper exported to Australia meant that the domestic price and the export price were "similarly affected" (Indonesia's second written submission, para. 2), that "domestic and export prices were equally affected by [the] situation" (Indonesia's second written submission, para. 3), that the Anti-Dumping Commission should have "examine[d] whether the situation affects domestic and export prices", and that Indonesia had provided "proof the low price inputs equally affected domestic and export prices" (Indonesia's second written submission, paras. 13-14; see also para. 15). In its response to question 4 following the second substantive meeting with the Parties, Indonesia conceded that, in fact, the domestic price and the export price were not "equally affected".

Australia also notes that in the Request for the Establishment of a Panel by Indonesia, Indonesia stated that the legal basis of its second claim was that "Australia did not properly consider that such domestic sales price permitted a proper comparison with the Indonesian producers' export price of A4 copy paper to Australia since Indonesian A4 copy paper producers used the same raw material of the same cost to produce A4 copy paper for domestic, Australian and other export markets". In developing this claim in its submissions, Indonesia argued that the use of the "same raw material" meant that the domestic price and the export price were "equally affected", which is why a "proper comparison" was permitted (see, for example, Indonesia's first written submission, paras. 115-122; Indonesia's second written submission, paras. 39-42; Indonesia's opening statement at the second substantive meeting with the Parties, para. 32; and Indonesia's closing statement at the second substantive meeting with the Parties, para. 6). In its response to question 4 following the second substantive meeting with the Parties, Indonesia conceded that, in fact, the domestic price and the export price were not "equally affected".

⁷⁰ Appellate Body Report, *Canada – Renewable Energy*, para. 5.215.

⁷¹ Australia's comments on Indonesia's written response to question 4 following the second substantive meeting with the Parties, paras. 26-29.

⁷² Indonesia's first written submission, para. 131; Indonesia's opening statement at the first substantive meeting with the Parties, para. 44; Indonesia's written response to question 20(a) following the first substantive meeting with the Parties, p. 20; and Indonesia's second written submission, paras. 56-59.

⁷³ Indonesia's first written submission, paras. 124 and 136.

⁷⁴ See, for example, Australia's second written submission, paras. 197-203 and 226.

⁷⁵ Australia's first written submission, para. 194.

meaning of "normally" in Article 2.2.1.1.⁷⁶ Notably, the panel and Appellate Body in *EU – Biodiesel (Argentina)* left open the possibility of there being circumstances beyond a failure to satisfy the two expressly stated conditions in Article 2.2.1.1 in which an investigation authority would not be required to calculate costs on the basis of records kept by the exporter or producer under investigation.^{77, 78}

24. The Anti-Dumping Commission was faced with circumstances that were not "normal and ordinary" with respect to the hardwood pulp component of the records of Indah Kiat and Pindo Deli. Even if the two conditions in Article 2.2.1.1 were satisfied, 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",⁷⁹ 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".⁸⁰ 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.⁸¹

2. The Anti-Dumping Commission did not base its decision to discard the hardwood pulp component of the record of Indah Kiat and Pindo Deli on the second condition of Article 2.2.1.1

25. Indonesia argues that the Anti-Dumping Commission's finding that "the actual cost of pulp recorded by exporters in their records does not reasonably reflect a competitive market cost" was "unmistakably made pursuant to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement".⁸² But subsection 43(2) of the *Customs Regulation* – which requires consideration of whether the records "reasonably reflect competitive market costs associated with the production or manufacture of like goods" – gives effect to both the second condition of the first sentence of Article 2.2.1.1, and to the word "normally" in Article 2.2.1.1.⁸³ The Anti-Dumping Commission's reasoning in support of its decision to discard the hardwood pulp component of the records of Indah Kiat and Pindo Deli was consistent with a reliance on the word "normally" in Article 2.2.1.1, rather than a reliance on the second condition of Article 2.2.1.1 not being satisfied.⁸⁴

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

26. Indonesia argues 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

⁷⁶ Panel Report, *China – Broiler Products*, para. 7.161; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227. See also Australia's first written submission, paras. 195-199.

⁷⁷ Panel Report, *EU – Biodiesel (Argentina)*, footnote 380; Appellate Body Report, *EU – Biodiesel (Argentina)*, footnote 120. See also Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.68.

⁷⁸ Australia's second written submission, para. 231.

⁷⁹ That is, they were not suitable to fulfil the basic purpose of determining a constructed normal value under Article 2.2 – see Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24 (footnote omitted) and Panel Report, *EU – Biodiesel (Argentina)*, para. 7.233. See also Panel Report, *Thailand – H-Beams*, para. 7.112; and Panel Report, *US – Softwood Lumber V*, para. 7.278.

⁸⁰ See Australia's first written submission, para. 215; Australia's written response to question 20(c) following the first substantive meeting with the Parties, para. 141; and Australia's second written submission, para. 219.

⁸¹ Australia's opening statement at the second substantive meeting with the Parties, para. 21.

⁸² Indonesia's written response to question 21 following the first substantive meeting with the Parties, p. 21.

⁸³ See Australia's written response to Panel questions 20(c) and 23 following the first substantive meeting with the Parties, paras. 132-142 and 169-171; and Australia's second written submission, para. 209.

⁸⁴ Australia's written response to question 20(c) following the first substantive meeting with the Parties, paras. 130 and 138-142.

Protocols.⁸⁵ Indonesia goes so far as to suggest that adopting Australia's interpretation would make the second *Ad Note* and those NME provisions "unnecessary"⁸⁶ and that such a result is "absurd".⁸⁷

27. However, in making this argument, Indonesia (and China⁸⁸) 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. 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: (a) the "comparable price of the like product when exported to an appropriate third country, provided that this price is representative"; or (b) "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits". The requirement that a "representative" export price or the "cost of production in the country of origin"⁸⁹ 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. 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.⁹⁰

4. Indonesia's arguments with respect to the Anti-Dumping Commission's decision to discard the hardwood pulp component of the records of Indah Kiat and Pindo Deli are incorrect

28. Indonesia argues 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".⁹¹ Bur, as stated in the Final Report, "low input costs, of themselves, are not determinative of a market situation",⁹² that "a market situation assessment primarily concerns the domestic market for like goods",⁹³ and that "conditions in a significant input market that do not distort the market for like goods will not found a market situation finding".⁹⁴

29. Indonesia argues that the "problem" 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.⁹⁵

30. 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".⁹⁶ And Australia has demonstrated that the "pulp benchmark" was virtually identical to that prevailing export price.⁹⁷ Using the amounts for hardwood pulp that were in the records of Indah Kiat and Pindo Deli would have been the real "problem" because: (a) contrary to the findings of the Appellate Body in *EU – Biodiesel (Argentina)*, those records would not have

⁸⁵ Indonesia's second written submission, paras. 5, 9, 12 and 43-52.

⁸⁶ Indonesia's second written submission, para. 5. See also Indonesia's second written submission, para. 52.

⁸⁷ Indonesia's second written submission, para. 5.

⁸⁸ See China's written response to question 4 to the third parties following the first substantive meeting with the Parties, paras. 37-42.

⁸⁹ "[P]lus a reasonable amount for administrative, selling and general costs and for profits" as per Article 2.2.

⁹⁰ Australia's opening statement at the second substantive meeting with the Parties, paras. 105-108.

⁹¹ Indonesia's second written submission, para. 68.

⁹² Final Report, Exhibit IDN-04, section A2.8.6.3, p. 165.

⁹³ Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.

⁹⁴ Final Report, Exhibit IDN-04, section A2.8.5.2, p. 162.

⁹⁵ Australia's second written submission, paras. 241-249.

⁹⁶ 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.

⁹⁷ Australia's second written submission, paras. 241-249.

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",⁹⁸ and (b) 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]".⁹⁹

B. The Anti-Dumping Commission was Correct to Use the "Pulp Benchmark" for the Hardwood Pulp Component of the Constructed Normal Value

1. The use of the "pulp benchmark" resulted in a proper determination of the "cost of production in the country of origin" under Article 2.2

31. 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.¹⁰⁰

32. Indonesia improperly equates the 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 2.2.¹⁰¹

33. But 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.¹⁰² 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.¹⁰³ Australia has demonstrated that: (a) the "pulp benchmark" used by the Anti-Dumping Commission was virtually identical to that prevailing export price;¹⁰⁴ and (b) Indah Kiat's cost to produce hardwood pulp and Pindo Deli's cost to acquire hardwood pulp were both different to the "pulp benchmark".¹⁰⁵ 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.¹⁰⁶

34. By contrast, 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,¹⁰⁷ because 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".¹⁰⁸

⁹⁸ Appellate Body Report, *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.

⁹⁹ Australia's opening statement at the second substantive meeting with the Parties, para. 102.

¹⁰⁰ See Australia's second written submission, paras. 259-260.

¹⁰¹ Australia's opening statement at the second substantive meeting with the Parties, para. 25.

¹⁰² Australia's opening statement at the second substantive meeting with the Parties, para. 26.

¹⁰³ 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.

¹⁰⁴ Australia's second written submission, paras. 241-249.

¹⁰⁵ Australia's opening statement at the second substantive meeting with the Parties, paras. 23-24.

¹⁰⁶ Australia's opening statement at the second substantive meeting with the Parties, para. 29.

¹⁰⁷ Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52.

¹⁰⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24 (footnote omitted). See also Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.233; *Thailand – H-Beams*, para. 7.112; *US – Softwood Lumber V*, para. 7.278.

35. 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.¹⁰⁹ 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.¹¹⁰

36. 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".^{111, 112}

2. Contrary to Indonesia's arguments, the "pulp benchmark" was not the cost of producing hardwood pulp in South America or Brazil or the sales price of hardwood pulp in South America or Brazil

37. Indonesia argues that the "benchmark pulp price Australia substituted for the costs recorded in the Indonesian producers' records represents the cost of producing pulp in South America and Brazil";¹¹³ that it represents the "pulp price in Brazil and South America";¹¹⁴ and that it was "the free on board South America and Brazil price".¹¹⁵ All of these statements are incorrect.

38. Rather, the "pulp benchmark": (a) consisted of monthly and quarterly import pulp prices into China and Korea based on an average c.i.f. price for hardwood pulp originating from Brazil and South America;¹¹⁶ (b) was "based on verified actual transaction prices collected through broad systematic surveys of small, medium and large size participants, including both buyers and sellers";¹¹⁷ (c) was the price at which hardwood pulp originating in South America and Brazil was sold in Indonesia's primary export markets, namely China and Korea; (d) was virtually identical to the average of the four price series that Indonesia says the Anti-Dumping Commission could have used to "derive[] the cost of pulp and, ultimately, paper production in Indonesia", consistent with Article 2.2;¹¹⁸ and (e) was virtually identical to the prevailing competitive export price of hardwood pulp from Indonesia, as represented by those four price series.¹¹⁹

3. No further adaptation of the pulp benchmark was required

39. Indonesia argues that Australia did not "make any adjustments to [the "pulp benchmark"] to derive the cost of production in Indonesia".¹²⁰ It dismisses the adjustments for dry to wet pulp conversion, and the removal of SG&A, ocean freight and inland transportation charges, arguing that they were not relevant to deriving the cost of production of A4 copy paper in Indonesia.¹²¹

¹⁰⁹ Australia's second written submission, para. 256.

¹¹⁰ Australia's opening statement at the second substantive meeting with the Parties, para. 28.

¹¹¹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (emphasis added)

¹¹² Australia's opening statement at the second substantive meeting with the Parties, para. 30.

¹¹³ Indonesia's opening statement at the first substantive meeting with the parties, p. 24. See also Indonesia's first written submission, para. 168.

¹¹⁴ Indonesia's written response to question 28(a) following the first substantive meeting with the Parties, p. 22.

¹¹⁵ Indonesia's written response to question 35 following the second substantive meeting with the Parties, para. 97.

¹¹⁶ Australia's first written submission, para. 228 and footnote 241.

¹¹⁷ Australia's first written submission, para. 228 and footnote 247.

¹¹⁸ Indonesia's opening statement at the first substantive meeting with the Parties, para. 49.

¹¹⁹ Australia's second written submission, para. 249.

¹²⁰ Indonesia's opening statement at the first substantive meeting with the Parties, para. 46. (footnote omitted)

¹²¹ Indonesia's opening statement at the first substantive meeting with the Parties, para. 48 and Indonesia's written response to Panel question 29 following the first substantive meeting with the Parties, p. 24.

40. The Anti-Dumping Commission adapted the "pulp benchmark" specific to the circumstances of Indah Kiat and Pindo Deli. The Anti-Dumping Commission carefully considered submissions of the Government of Indonesia and the exporters in respect of the "pulp benchmark" and the required adaptations.¹²² Contrary to Indonesia's arguments, the adjustments made by the Anti-Dumping Commission were necessary to adapt the "pulp benchmark" so as to ensure the proper derivation of the cost of production in Indonesia specific to the circumstances of Indah Kiat and Pindo Deli.¹²³

41. Indonesia argues that additional adaptation of the pulp benchmark was required.¹²⁴ This is incorrect. Australia notes the following: (a) "50 to 60 per cent of total [pulp] production" in Indonesia is consumed in Indonesia¹²⁵ – the rest is exported; (b) there was no significant difference between the price of hardwood pulp sourced by Asian importers from South America and the price of hardwood pulp sourced by Asian importers from Indonesia;¹²⁶ (c) the prevailing competitive export price (i.e. the "pulp benchmark") would have been obtained for the Indonesian hardwood pulp if it had been exported from Indonesia rather than being consumed in the production of A4 copy paper, because there were no export tariffs or export quotas on hardwood pulp in Indonesia;¹²⁷ (d) the prevailing competitive export price (i.e. the "pulp benchmark") was therefore a cost of production of A4 copy paper in Indonesia, because it was given up when the hardwood pulp was consumed in the production of A4 copy paper in Indonesia rather than being exported; (e) the benchmark prices used to derive the pulp benchmark were consistent with the confidential 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;¹²⁸ (f) the growing costs for acacia pulpwood in Indonesia were not significantly less than growing costs for eucalyptus pulpwood in South America;¹²⁹ and (g) the Government of Indonesia and the Indonesian hardwood pulp producers 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.^{130, 131}

42. These circumstances and facts clearly establish that the "pulp benchmark" reflected the hardwood pulp component of the cost of production of A4 copy paper in Indonesia. Therefore, it was not necessary for the Anti-Dumping Commission to take additional steps beyond those taken to adapt the "pulp benchmark" when determining the hardwood pulp component of the constructed normal values for Indah Kiat and Pindo Deli.¹³²

43. Indonesia is therefore simply incorrect when it argues that "the hardwood pulp price the Commission used had no connection whatsoever to Indonesia";¹³³ that "Australia did not attempt to calculate a pulp price in Indonesia"¹³⁴ and that, by using the "pulp benchmark", "Australia failed to calculate the cost of production in the country of origin, i.e. Indonesia".^{135, 136}

44. The "cost of production in the country of origin" must include the full costs of production of the like product in the country of origin, including those costs that are not incurred, in whole or in part, as a cash cost to specific entities producing the like product, as is the case in this dispute.¹³⁷

¹²² Final Report, Exhibit IDN-04, section A4.4, p. 231 and section A4.5, pp. 232-233.

¹²³ Australia's second written submission, para. 254.

¹²⁴ Indonesia's first written submission, para. 168; Indonesia's opening statement at the first substantive meeting with the Parties, para. 48; and Indonesia's written response to question 29 following the first substantive meeting with the Parties, p. 24.

¹²⁵ Final Report, Exhibit IDN-04, section A2.9.2.3, p. 167. (footnote omitted)

¹²⁶ Final Report, Exhibit IDN-04, section A4.4, p. 231.

¹²⁷ See Australia's first written submission, para. 114 and Final Report, Exhibit IDN-04, section A.2.9.2.6, p. 170.

¹²⁸ Final Report, Exhibit IDN-04, section 6.9.2.2, p. 52 and section A4.5.1, p. 232.

¹²⁹ Final Report, Exhibit IDN-04, section A4.5.2, p. 233.

¹³⁰ Final Report, Exhibit IDN-04, section A4.5.2, p. 233.

¹³¹ Australia's second written submission, para. 256.

¹³² Australia's second written submission, para. 257.

¹³³ Indonesia's first written submission, para. 166.

¹³⁴ Indonesia's written response to question 28(a) following the first substantive meeting with the Parties, p. 22.

¹³⁵ Indonesia's first written submission, para. 2. See also Indonesia's first written submission, paras. 164-169.

¹³⁶ Australia's second written submission, para. 258.

¹³⁷ Australia's second written submission, para. 259.

45. It has been accepted by panels and the Appellate Body that a non-arm's-length cost (i.e. a non-competitive market cost) in the records of a producer can be discarded and replaced by the arm's-length cost (i.e. the competitive market cost), even though nobody in the transaction incurs that arm's-length cost (i.e. the competitive market cost) as a cash cost. This is clear recognition of the rejection of recorded cash costs and their replacement with higher non-cash costs in the determination of the "cost of production in the country of origin" pursuant to Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. Those higher non-cash costs equal the amount that the input supplier would have received for the input if that input supplier had sold the input at an arm's-length price (i.e. a competitive market price) rather than the non-arm's-length price (i.e. the non-competitive market price) reflected in the records of the producer. It is also the amount that the producer would have received for the input if that producer had sold the input at an arm's-length price (i.e. the competitive market price) rather than consuming it in the production of the product.¹³⁸

46. Australia's use of the "pulp benchmark" – as adapted to the specific circumstances of Indah Kiat and Pindo Deli – ensured that the full amount of the hardwood pulp component of the "cost of production [of A4 copy paper] in [Indonesia]" was used to determine the constructed normal value, not just the amounts included in the records of Indah Kiat and Pindo Deli (which were merely the (lower) cash costs they respectively incurred to produce and acquire hardwood pulp).¹³⁹

4. Indonesia has no basis to resile from its admission that the prevailing export price was a proper amount to use as the hardwood pulp component of the constructed normal value

47. Indonesia has no legal or logical basis for its attempt to completely reverse its position 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]". Australia's submission of the evidence and information regarding the RISI and Hawkins Wright data was not "untimely"¹⁴⁰ – rather, it was "necessary for purposes of rebuttal" within paragraph 5(1) of the Working Procedures and it was submitted by Australia at the first opportunity that Australia had to do so following the submission of the Parties' written responses to the Panel's questions following the first substantive meeting with the Parties. The data itself was "reliable"¹⁴¹ and the Government of Indonesia had full knowledge during the investigation of the methodologies utilised by RISI to collect data. There was no need for the Anti-Dumping Commission to "remove profit"¹⁴² or to adjust for any "mark up".¹⁴³ Contrary to Indonesia's arguments, the evidence on the record indicates that integrated paper producers in Indonesia do, in fact, "export pulp", and that they do so in significant quantities. Furthermore, hardwood pulp is a tradeable commodity, not "merely an intermediate stage in the paper production process" – Indonesia itself concedes that Indah Kiat provides hardwood pulp to Pindo Deli.¹⁴⁴ Furthermore, the prevailing export price of hardwood pulp is a key factor¹⁴⁵ that determines how much hardwood pulp is devoted to paper production as opposed to being sold on the open market and is a key factor¹⁴⁶ that determines whether a producer will expand, contract, or abandon paper production.¹⁴⁷

¹³⁸ Australia's written response to questions 14 and 15 following the second substantive meeting with the Parties, paras. 97-98.

¹³⁹ Australia's second written submission, para. 260.

¹⁴⁰ Indonesia's written response to question 9 following the second substantive meeting with the Parties, para. 24.

¹⁴¹ Indonesia's written response to question 9 following the second substantive meeting with the Parties, para. 24.

¹⁴² Indonesia's written response to question 9 following the second substantive meeting with the Parties, para. 26.

¹⁴³ Indonesia's written response to question 30(b) following the second substantive meeting with the Parties, para. 92.

¹⁴⁴ Indonesia's first written submission, footnote 70.

¹⁴⁵ With all other things held equal.

¹⁴⁶ With all other things held equal.

¹⁴⁷ See, for example, Australia's written response to question 33 following the second substantive meeting with the Parties, paras. 158-177 and Australia's comments on Indonesia's written responses to questions 9, 10, 29 and 30 following the second substantive meeting with the Parties, paras. 44-59 and 130-139.

48. Indonesia's arguments appear to be driven solely by the fact that Indonesia has realised that its acknowledgement 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]" is fatal to its third, fourth and fifth claims.¹⁴⁸

5. Indonesia's reliance on *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate* is misplaced

49. Indonesia asserts that the facts of this dispute are "almost identical" to the facts in *EU – Biodiesel (Argentina)* and *EU – Biodiesel (Indonesia)*,¹⁴⁹ 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*,^{150, 151} that there are no "meaningful differences" between this dispute and those disputes,¹⁵² that "the fact pattern [in this dispute] is almost identical" to those disputes,¹⁵³ and that "the facts [in this dispute] are indistinguishable in any meaningful way from" the facts in those disputes.¹⁵⁴

50. All of these assertions are incorrect. Firstly, none of those disputes considered the determination of a constructed normal value in circumstances where, because of a "particular market situation", domestic sales did not permit a proper comparison. Rather, they were all concerned with a situation where the domestic sales were found not to be in the ordinary course of trade. Secondly, all of those disputes concerned the interpretation and application of the second condition of Article 2.2.1.1, which is not before the Panel in this dispute. Thirdly, those disputes focussed on whether or not the second condition of Article 2.2.1.1 permitted an examination of the "reasonableness" of the costs recorded by the exporters in their records. But the "reasonableness" of the recorded costs was simply not part of the Anti-Dumping Commission's consideration. Fourthly, in relation to the main input to production, and in comparison to the hardwood pulp in the dispute that is before this Panel, neither the soybeans in *EU – Biodiesel (Argentina)*, the crude palm oil in *EU – Biodiesel (Indonesia)* or the gas in *Ukraine – Ammonium Nitrate* could be exported at the prevailing competitive export price by the producers of the like product. Fifthly, the "pulp benchmark" was not a hypothetical figure that might have been incurred under different circumstances¹⁵⁵ or an amount that would have been incurred under "normal circumstances".¹⁵⁶ Unlike the soybean benchmark used by the European Union investigating authority in *EU – Biodiesel (Argentina)*, the "pulp benchmark" was not chosen precisely because it did not represent the relevant cost of hardwood pulp in Indonesia.^{157, 158}

III. INDONESIA HAS FAILED TO DEMONSTRATE THAT AUSTRALIA ACTED INCONSISTENTLY WITH ARTICLE VI:2 OF THE GATT 1994 AND WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

51. Indonesia's has acknowledged that its 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.¹⁵⁹ Australia has demonstrated

¹⁴⁸ Australia's comments on Indonesia's responses to questions 9, 10 and 29 following the second substantive meeting with the Parties, para. 62.

¹⁴⁹ Indonesia's first written submission, para. 142.

¹⁵⁰ Indonesia's first written submission, para. 145.

¹⁵¹ 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.

¹⁵² Indonesia's first written submission, para. 155.

¹⁵³ Indonesia's first written submission, para. 162. Also, in Indonesia's closing statement at the first substantive meeting with the Parties, it stated that "Indonesia's third claim is based on nearly identical facts in the case law of *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate (Russia)*" (para. 5).

¹⁵⁴ Indonesia's opening statement at the first substantive meeting with the Parties, para. 41.

¹⁵⁵ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 (see also Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.8 and 6.41) and Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.22-7.26.

¹⁵⁶ Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.89.

¹⁵⁷ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.

¹⁵⁸ Australia's second written submission, paras. 262-269.

¹⁵⁹ Indonesia's written response to questions 31(a) and 31(b) following the first substantive meeting with the Parties, p. 24.

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. Indonesia's claims under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement must therefore fail.¹⁶⁰

IV. AUSTRALIA HAS NOT NULLIFIED OR IMPAIRED BENEFITS ACCRUING DIRECTLY OR INDIRECTLY TO Indonesia

52. No benefits accruing directly or indirectly to Indonesia under the GATT 1994 or the Anti-Dumping Agreement have been nullified or impaired by Australia.¹⁶¹

V. CONCLUSION

53. Australia has conclusively rebutted the arguments that Indonesia has made in the course of this dispute – including those it has made in its responses to the questions from the Panel following the second substantive meeting with the Parties. Furthermore, Australia has conclusively shown that the measures challenged by Indonesia are consistent with those provisions of the GATT 1994 and the Anti-Dumping Agreement that Indonesia alleges Australia has violated. Indonesia has failed to establish that Australia's action violated the GATT 1994 or the Anti-Dumping Agreement and, in fact, Australia has demonstrated that its actions were entirely WTO-consistent. In addition, the submissions and evidence before the Panel establish that the Anti-Dumping Commission: (a) properly established the facts; (b) evaluated them in an unbiased and objective manner; and (c) 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.

54. Given the above – and recalling the level of deference accorded to an investigating authority under Article 17.6 of the Anti-Dumping Agreement – Australia respectfully requests that the Panel dismiss all of Indonesia's claims.

¹⁶⁰ Australia's second written submission, paras. 274-276.

¹⁶¹ Australia's second written submission, para. 277.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF CHINA**

1. This executive summary integrates the Third Party Written Submission, Oral Statement and Responses to the Panel's Questions by China.

The meaning of "because of the particular market situation, such sales do not permit a proper comparison" in Article 2.2 of the Anti-Dumping Agreement

2. The general rule for the calculation of normal value is to use the domestic price of like product. The "particular market situation", together with the other two circumstances provided for in Article 2.2 of Anti-Dumping Agreement and the circumstance in second Ad Note to Article VI:1 in GATT 1994, are circumstances because of which alternative "exceptional methods" for the calculation of normal value shall be used. Exceptions to the general rule should be interpreted narrowly.

3. The markets other than that of the domestic market of the like product in the exporting Member are not directly implicated in the phrase "particular market situation".

4. Article 2.2 provides that only when the domestic sales impacted by the particular market situation "do not permit a proper comparison", would the domestic sales prices be disregarded for the determination of normal value. The purpose of such comparison is for the determination of dumping and dumping margins. Thus, the features of the market that do not have impact on the domestic price of like product in a way that affects its comparison with the export price could not reasonably be interpreted as "particular" under Article 2.2, even they might be special or distinguishable in one way or another.

5. The word "proper" modifies the word "comparison", not the individual variables per se of "comparison", i.e., the domestic price or the export price. It follows that the investigating authority is required to examine, not whether the "particular market situation" resulted in the domestic price being proper or accurate, but its comparison with export price being proper or accurate.

6. Whether a "comparison" is "proper" would need to be assessed as to whether it is apt to reveal "dumping", i.e., different pricing strategy by an individual exporter or producer in its domestic market and export market, in order to determine if there is "international price discrimination" that warrant the application of antidumping measure. Any government behavior that does not affect the different pricing strategy by individual exporter or producer in the domestic market and export market would not affect the "proper comparison" for the purpose of revealing "dumping".

7. The purchase price of the inputs are generally destination-neutral and the same input prices constitute the bases of costs for both domestic sale and export sales, and the rise or fall of the input price, whether it is due to market force or government involvement, would have the same effect on the domestic price and export price. Such situation in the market equally affects both domestic market and export market, and do not affect the proper comparison between the domestic price and export price for the purpose of the determination of dumping and dumping margin. Therefore, regardless of the alleged government intervention in the input market, the symmetric comparison of domestic price and export price would still be capable of revealing the pricing strategy of the export or producer in different markets for the purpose of determination of dumping.

8. Further, the impact of the "particular market situation" needs to amount to a degree that makes the proper comparison of the domestic price to the export price not "allowed" to disregard the domestic price for the determination of normal value. Even if the "particular market situation" might have some different impact on the domestic price and the export price so that they are not directly comparable in all aspects, if it does not lead to such proper comparison impermissible, it would not qualify for method alternative to using the domestic price for the calculation of the normal value.

9. The normal value established under Article 2.2 would need to provide a foundation for "fair comparison" with export price under Article 2.4. Even though Article 2.2 provides for the determination of normal value, this does not mean normal value under Article 2.2 could be properly established without regard to its comparability with export price. Support could be found in the parallel circumstance in Article 2.2 that due to the low volume of domestic sales, "such sales do not permit a proper comparison". Footnote 2 clearly demonstrated that the impact on proper comparison between domestic sales and export sales is considered when whether the volume of domestic sales is "low" is analyzed, since it is not the absolute volume of domestic sales that is considered, but its relationship with the export volume.

10. It is also noticeable that, "outside the ordinary course of trade" and domestic sales that "do not permit a proper comparison" are two distinct bases for the possible disregard of domestic market sales for the determination of normal value under Article 2.2. These two terms should not be interpreted by incorporating the same legal criteria because this would make one of them redundant. Therefore, it is not correct to introduce the criteria of "normal commercial practice" for "ordinary course of trade" into "particular market situation" that "do not permit a proper comparison".

11. The "particular market situation" in Article 2.2 could not be interpreted as already incorporating a condition of general market economy principle of supply and demand or normal commercial principles, and warrant the use of third country surrogate values for normal values. Otherwise, Members would not have considered it necessary to adopt special rules for use of third country normal value in the Accession Protocols for some Members or to adopt Ad Note 2 to GATT 1994.

12. The Anti-Dumping Agreement addresses issues of pricing behavior of individual foreign exporters or producers, and, in contrast, the SCM Agreement addresses financial contribution by government which confers benefit. There are legally distinct disciplines applicable to a Member's use of anti-dumping duties and its use of countervailing duties. A Member does not have discretion to interpret a provision in one of the Agreements to address the subject issue of the other.

DISREGARDING THE RECORDS OF THE EXPORTER IN THE CALCULATION OF COSTS

13. First sentence of Article 2.2.1.1 imposes a positive obligation on an investigating authority to normally use the books and records of the respondents if two conditions are met: (i) the books and records are consistent with the generally accepted accounting principles (GAAP) of the exporting country, and (ii) they reasonably reflect the costs associated with the production and sale of the product under consideration.

14. Article 2.2.1.1 of Anti-Dumping Agreement provided for specific situations for the derogation of the positive obligation of the investigating authority to calculate the costs based on the records kept by the exporter or producer, when one of the two conditions in the first sentence is not satisfied. It is reasonable to interpret that the word "normally" in the first sentence of Article 2.2.1.1 refers to the absence of the exceptions already specified. "Normally" does not provide a legal ground separate and distinct from the legal ground of a failure to satisfy the two conditions in the first sentence of Article 2.2.1.1 to disregard the costs in the producers' records.

15. If the costs in the records of the respondent satisfy both conditions in the first sentence of Article 2.2.1.1, such costs would be "costs that have a genuine relationship with the production and sale of the product under consideration", and would be capable of generating an appropriate proxy to the domestic prices.

16. Since the facts in *EU-Biodiesel (Argentina)* and those in the current dispute are both concerning domestic input price influenced by government policies, the finding of the panel and Appellate Body in *EU-Biodiesel (Argentina)* directly informs the current dispute.

17. The Appellate Body has found that the domestic input prices influenced by government policies is not a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of inputs associated with the production and sale of subject merchandise, or for disregarding those costs when constructing the normal value.

18. The panel in *EU-Biodiesel (Argentina)* explained that an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the

producers/exporters". The purpose of the examination of the "reliability and accuracy" of the costs referenced by the panel is to determine whether the "reflection" of the costs in the records is "reasonable", not the whether costs themselves are "reasonable".

19. The issue of the costs based on an affiliated party transfer price is not whether the costs *per se* are "reasonable" or reflect so-called market-based conditions, but whether the "reflection" of the costs in the records of the producer/exporter under investigation is "reasonable". In contrast, even if the inputs prices are affected by government policies, as long as the producer/exporter reflects the actual input prices of its purchase in its records, the "reflection" of the costs would be "reasonable".

20. When the domestic input price influenced by government policies forms the basis for the construction of normal value as appropriate proxy to the domestic price, it would be incoherent to allege that the same input prices would constitute "particular market situation" that "do not permit a proper comparison", and warrant the rejection of the domestic price for the determination of normal value in the first place.

CONSTRUCTING NORMAL VALUE WITH THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN

21. The Appellate Body in the *EU – Biodiesel (Argentina)* observed that the phrase "cost of production [...] in the country of origin" in Article 2.2 "do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin", but cautioned that this "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".

22. The Appellate Body did not recognize an "out-of-country" benchmark can be used for the purpose of determining the constructed normal value, but merely observed that "sources of information or evidence" not within the country of origin, in limited circumstances, after necessary adaption, might be used to arrive at the "cost of production in the country of origin".

23. It follows that the adaptations by the investigating authority of the information it collects outside of the country of origin would need to ensure that such information, after the adaptations, represent the cost of production in the country of origin. If, although some kind of adaptations were made, the using of information outside of the country of origin still aims at removing the "perceived distortion" in the costs in the country of origin, such adaptation won't help to adapt the information to satisfy the requirement that "such information must be apt to or capable of yielding a cost of production in the country of origin".

24. It should be noticed that the Appellate Body stated that its interpretation of Article 2.2 of the Anti-Dumping Agreement "is without prejudice to our interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement". Therefore, if the conditions in first sentence of Article 2.2.1.1 are satisfied, the cost of production shall be calculated based on the records of the respondent, and the use of sources of information other than the records of the export or producer, including those not inside of the country of origin, would not arise.

ANNEX C-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION****I. THE EXISTENCE OF A "PARTICULAR MARKET SITUATION" AND ITS IMPLICATIONS**

1. A "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement is a set of circumstances, additional to the other two sets of circumstances envisaged in that provision, that affects the use of the price of sales of the like product in the domestic market of the exporting country for the purpose of determining the normal value of the product under investigation. It is not to be excluded that there may be some overlap between all of these types of situations: for example, the same set of facts might be capable of supporting either a determination of the absence of the ordinary course of trade; or a determination of a "particular market situation"; or both.

2. Where a "particular market situation" exists, the domestic sales price does not reflect the normal value of the like product that would result from the normal operation of the forces of supply and demand in the domestic market of the country of origin, but rather a value that is "abnormal" due to distortions in the formation of the domestic sales price.

3. By contrast, the export price of a product is simply the price at which the product is introduced into the commerce of another country, which must be compared with its normal value in order to determine if a product is being dumped for the purpose of the Anti-Dumping Agreement.

4. Government intervention may create a "particular market situation" where the price of domestic sales of the like product does not reflect its normal value and therefore does not permit a proper comparison with the export price. Public policies and programmes aimed at encouraging or supporting a particular domestic industry can lead to price distortions in markets both upstream and downstream of the encouraged industry, depending on the intensity of the government intervention and the extent to which room is left for market forces to operate normally and in an undistorted manner, within the framework established by the government.

5. The fact that certain types of government intervention may be disciplined under the SCM Agreement does not preclude Members who apply anti-dumping measures in accordance with the provisions of the Anti-Dumping Agreement from finding that the same intervention by the government gives rise to a "particular market situation" within the meaning of Article 2.2. This is also true when the government intervention does not meet the conditions of an actionable subsidy.

6. The finding that a "particular market situation" exists in the country of origin does not imply that the product is being dumped or that anti-dumping duties must be imposed. That remains to be ascertained during the course of the investigation and the determinations may vary in respect of different exporters.

7. In case a "particular market situation" is found to exist in the country of origin, so that a proper comparison with the export price is not possible, the consequence is that the normal value of the products under investigation will be determined either on the basis of "the price of the like product when exported to an appropriate third country" or "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

8. Since Article 2.2 does not impose a hierarchy for using either a third country export price or a constructed normal value to proceed with the comparison with the export price, an investigation authority is free to choose and may resort to a constructed normal value.

II. A "PROPER COMPARISON" WITH THE EXPORT PRICE

9. There is no basis in the Anti-Dumping Agreement for asserting that, in order to exclude a "proper comparison" of the normal value with the export price, the "particular market situation" identified by an investigating authority must affect exclusively the price or cost of a product when

sold in the domestic market of the exporting country. That distinction is not made in Article 2.2 of the Anti-Dumping Agreement and it cannot be inferred either from Article 2.1, which requires the export price of a product to be compared with its normal value.

10. In fact, even if a "particular market situation" affects symmetrically both the domestic price and the export price by a similar amount, such a comparison would be incapable of providing a meaningful answer to the question: is there dumping as that term has been defined by Article VI:1 of the GATT (including the Ad Notes) and the relevant provisions of the Anti-Dumping Agreement?

11. A "proper comparison" is not simply an arithmetical comparison of the domestic sales price with the export price, but rather a comparison of the export price of a product with its normal value or, in other words, a value that is normal.

12. **It is possible to draw up a long list of abnormal** situations in which the prices or costs of the exporters are, in whole or in part, incapable of forming the basis for the calculation of a normal value, or a value that is normal, **in a way that ensures comparability.**

13. In each of these abnormal situations, it is permissible and may be required that an investigating authority concludes that the data is unreliable and unsuitable for use as the basis for the calculation of a normal value with which the export price can be **meaningfully compared**. In other words, an investigating authority may be required to reject such data, in whole or in part, and/or to replace the rejected data with information from some other source, and/or to adjust the data in a manner that ensures comparability or a "proper comparison" between the export price of a product and its normal value.

14. A lack of comparability can result from a distortion that affects only one side of the comparison, asymmetrically, that is, which affects the domestic price or cost but not the export price or the costs underlying the export price, or *vice versa*. However, a lack of comparability can also result from a distortion that affects both sides of the comparison, symmetrically, that is, a distortion that has as a consequence that the data no longer permit a meaningful comparison between the putative normal value on the one hand and the export price on the other hand.

III. DISREGARDING COSTS UNDER ARTICLE 2.2.1.1

15. An investigating authority may disregard the records of costs kept by the exporter or producer under investigation even if the two conditions in Article 2.2.1.1 of the Anti-Dumping Agreement are satisfied. Consequently, an investigating authority is permitted, and may even be required, to reject, replace or adjust the costs of production in the records of the investigated firm if those costs are unsuitable to serve as the basis for calculating a constructed normal value due to a "particular market situation".

IV. CALCULATING COSTS IN THE COUNTRY OF ORIGIN

16. The Appellate Body in *EU – Biodiesel (Argentina)* agreed as a general matter that, under Article 2.2 of the Anti-Dumping Agreement, in certain circumstances, an investigating authority may have recourse to data or evidence from a third country, as a proxy, duly adjusted when necessary.

17. The Appellate Body also made clear that such "out-of-country" data serves as proxy for costs of production in the country of origin. However, the case-law of the Appellate Body makes it equally clear that the data from outside the country of origin does not need to be adjusted back to an amount that is the same as the amount that would result from use of the very data rejected as unreliable or distorted.

18. This guiding principle in respect of the scope of adjustments must also apply to cases where, because of a "particular market situation" identified by the investigating authority, domestic data in the country of origin was first rejected as a basis for determining the normal value of the products concerned and then also rejected as a basis for establishing the cost of production when determining a constructed normal value under Article 2.2.1.1. The obligation to arrive at "the cost of production in the country of origin" does not require the investigating authority to revert to the distorted domestic data that masked that cost of production and resulted in artificially low domestic sales prices.

V. THE NOTION OF "PARTICULAR MARKET SITUATION"

19. A "particular market situation" **does not need to affect all market participants**, but can be limited to just some of them. Whilst Article VI of the GATT 1994 and the Anti-Dumping Agreement do envisage circumstances in which the dumping calculation, and specifically the determination of normal value, may reflect the situation in the relevant "market" as a whole, they equally envisage a calculation grounded in the circumstances of individual producers

20. An investigating authority is entitled to take into account a situation in which the normal operation of the market forces of supply and demand has been distorted, such that the resulting price and cost data is unreliable as a basis for determining normal value, or a value that is normal. This is so **irrespective of the source of the distortion**, that is, whether it is private or public: what matters is whether market power is inappropriately used to smother or distort the normal operation of the market forces of supply and demand. Whether or not this has occurred is something that can only be assessed on a case-by-case basis, having regard to all the facts.

21. The term "situation" refers to the situation in the domestic market. It does not refer to a situation external to the domestic market, which is affecting that domestic market. The term "particular market situation" is not circumscribed by a rule according to which there must be an asymmetrical impact on normal value and export price in order for a "particular market situation" to arise.

22. In this respect, there is a fundamental difference between export price and normal value. Export price is the object of the investigation. The investigating authority is not generally concerned with *why* the export price is what it is: it is just concerned with accurately determining *what* the export price is, and with making a fair and proper comparison between the normal value and the export price. By contrast, the normal value is the benchmark against which the export price is to be compared. It must be established in accordance with Article 2. In particular, it must be based on price or cost data that permits the establishment of a normal value, or a value that is normal, as opposed to price or cost data that is distorted and unreliable.

23. Distinguishing between the "particular market situation" and the individual circumstances that may be combining in order to create a "particular market situation" is something that would need to be done on a case-by-case basis.

24. Article 17.6(ii) of the Anti-Dumping Agreement concerns **interpretation**, not **application**. There are **very many situations** in which the same set of facts in a given Member could be assessed differently by two different investigating authorities in two different Members. Each authority would generally be applying their own municipal legislation, which in turn would generally be aligned and consistent with the Anti-Dumping Agreement. This process is governed by **Article 17.6(i)**, which expressly envisages the possibility of **different conclusions**. According to the terms of Article 17.6(i), if the Panel would conclude that the facts were properly established and the investigating authority's assessment of those facts, in reaching the determination that there was a "particular market situation", was unbiased and objective, then the Panel must reject Indonesia's claims and arguments on that point, even if the Panel might have reached a different interpretation.

25. At the **interpretative** level, there is no requirement that the municipal laws and investigating authorities of all WTO Members interpret the Anti-Dumping Agreement in exactly the same way. Rather, the question is always simply whether or not the municipal law, or instances of its application, are consistent with the balance of rights and obligations set out in the Anti-Dumping Agreement.

VI. PROPER COMPARISON AND FAIR COMPARISON

26. The term "proper comparison" in Article 2.2 is a specific expression of the concept of "comparability", which flows from Article VI of the GATT 1994. It is a fundamental concept that lies at the heart of Article VI and the Anti-Dumping Agreement. Comparability is achieved when normal value and export price have been established and if necessary adjusted in such a manner that comparing them can give a meaningful answer to the question: is there dumping as that term is defined in Article VI and the Anti-Dumping Agreement?

27. The idea behind the reference to a "low volume of the sales in the domestic market" in Article 2.2, as further detailed in footnote 2, is that the relationship between the volume of domestic sales and the volume of export sales should permit a proper comparison. This may not be the case, in particular, where the volume of domestic sales falls below 5% of the volume of export sales.

28. If one has a weighted-average export price based on a very large number of data points then one knows that it should be relatively representative. On the other hand, if one has only very few data points for the establishment of a weighted-average normal value, then one might be legitimately concerned about the risk that it would not be representative, or that it might be susceptible to manipulation. In such circumstances, an investigating authority might reach the conclusion that such a relatively low volume of sales would not permit a proper comparison.

29. There is **no necessary bright line distinction** between the concept of a "particular market situation" on the one hand and other concepts, such as, for example, "ordinary course of trade", or the circumstances referred to in the Second Ad Note to Article VI:1, or the concept of "non-market economy" referred to in some accession protocols. These concepts may overlap and in some cases may even be co-extensive. In some circumstances, **these concepts may operate together** to support a particular conclusion.

30. In Article 2.4, the focus is on the manner in which both normal value and export price have been established and adjusted, and the manner in which they may need to be further adjusted, in order to ensure a fair comparison. In particular, Article 2.4 is focussed on differences affecting the comparison between normal value and export price. The terms "proper comparison" in Article 2.2 and footnote 2 and "fair comparison" in Article 2.4 are both specific expressions of the fundamental principle of comparability, which finds expression throughout Article 2.

VII. RECOURSE TO OUT-OF-COUNTRY DATA

31. The Appellate Body's findings in *EC – Fasteners (China) (Article 21.5 – China)* support the basic observation that if a domestic price has been found unsuitable as a basis for establishing normal value because of a "particular market situation", which has also distorted the underlying cost data, then an investigating authority is also permitted to reject such distorted cost data when making its determination of a constructed normal value.

32. Furthermore, if a particular item of data has been lawfully rejected as distorted and unreliable, and if it has been replaced by other data to be used as a proxy, such other data must surely be adapted as necessary to the case at hand, but does not need to be adjusted back to the very data that has already been lawfully rejected. This basic proposition is also well-supported by the Appellate Body Report in *China – HP-SSST*.

33. The term "normally" supports the proposition that the two conditions in Article 2.2.1.1 do not exhaust the circumstances in which the recorded costs may be rejected as distorted and unreliable. However, it is not the only treaty term that supports that conclusion. Article 2.2.1.1 states expressly that it controls for the "purpose" of paragraph 2. The purpose of paragraph 2 is to establish a normal value (**which is not a defined term**), that is, a value that is normal. A value is normal when it results from the normal operation of the market forces of supply and demand. Therefore, in any situation in which a particular item of data has been lawfully rejected as distorted and unreliable because it does not result from the normal operation of the market forces of supply and demand, such item of data does not need to be brought back into the calculation pursuant to Article 2.2.1.1.

34. Out-of-country data to which an investigating authority lawfully has recourse should be adjusted to reflect the circumstances in the country of origin, but not back to the data initially and lawfully rejected as distorted and unreliable.

35. In other words, the adjustments to be made **do not cover** differences between the country of origin and the third country which result from the distortions in the market of the country of origin that have been duly identified by the investigating authority. Any other significant difference affecting comparability, duly demonstrated, should be adjusted for.

36. The statements referred to in Question 9 of the Panel are not, in themselves, "interpretations" of any provision of WTO law. They do not involve the use of the customary rules of interpretation of public international law as tools to resolve apparent tensions in the terms of the treaty.

37. There is no bar to this Panel taking guidance from the prior Appellate Body Report (referring with approval to the prior panel report) on this point. Although there is no formal system of precedent in WTO law, there is a reasonable expectation of consistency, and particularly a reasonable expectation that a panel will follow prior Appellate Body reports on the same point.

38. However, these statements are not particularly important for this Panel's analysis. Further, the exhibited documents referred to by the panel in DS379 are not currently on the record of these panel proceedings and if that remains the case could not be relied upon by this Panel. In any event, Indonesia's representations are incomplete and therefore technically incorrect. Indonesia omits the qualification that the reasoning holds when normal value is based on domestic prices.

VIII. RELATIONSHIP WITH THE SCM AGREEMENT

39. According to Indonesia, if something attributable to the State would give rise to an adjustment under the Anti-Dumping Agreement, this would somehow represent a circumvention of the definition of a subsidy under the SCM Agreement, and an unlawful extension of the reach of the anti-subsidy disciplines. Indonesia's argument is not merely that a subsidy cannot give rise to an adjustment under the Anti-Dumping Agreement, but that **anything attributable to the State** cannot give rise to an adjustment under the Anti-Dumping Agreement.

40. In fact, Article VI:5 of GATT 1994 expressly and precisely confirms that there may be situations in which the Anti-Dumping Agreement and the SCM Agreement apply concurrently. Moreover, other provisions of the GATT 1994 and the Anti-Dumping Agreement expressly confirm that Indonesia is wrong. For example, the second paragraph of the Ad Note to Article VI refers to "a country" having "a complete or substantially complete monopoly of its trade and where all domestic prices are **fixed by the State**". The Ad Note on multiple currency practices refers expressly to "**practices by governments or sanctioned by governments**". Article 2.4 of the Anti-Dumping Agreement refers to "**taxation**". And so forth.

41. Therefore, Indonesia's assertion that it somehow results from the existence of the SCM Agreement that a "particular market situation" can never be attributable to the State is entirely without merit. The Anti-Dumping Agreement is agnostic as to the identity of the causal agent giving rise to the "particular market situation", and other provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement confirm that the causal agent may be the State.

ANNEX C-3**INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF JAPAN****I. INTRODUCTION**

1. The Government of Japan has joined as a Third Party in this dispute to address some key issues of systemic importance that are before the Panel in relation to the interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA") and Article VI:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), including its *Ad Note*.

II. GATT ARTICLE VI:1 AND ARTICLES 2.2 AND 2.2.1.1 OF THE ADA

2. The first sentence of GATT Article VI:1 defines "dumping" as imports of products "at less than the normal value", but does not explicitly define "normal value" nor require the use of any specific methodology to determine "dumping" of subject imports.

3. On the other hand, the second sentence of Article VI:1 provides a price comparison methodology to determine what constitutes "dumping" (i.e. whether the subject imports are introduced into the commerce of another country "at less than the normal value"). The second sentence provides that imports at prices below the three types of "comparable" prices and costs listed therein are "to be considered" to constitute "dumping". The second sentence does not, however, state that these three prices and costs are the only permissible bases for "normal value", and it expressly presumes that these prices and costs are, in fact, "comparable" (i.e. capable of being compared) to the export price.

4. In fact, "normal value" under both sentences is a concept that is distinct from the enumerated "prices" or "costs" in the second sentence. "Normal value" therefore may encompass something more than or different from the "comparable" prices or costs enumerated in the second sentence of Article VI:1. If the domestic prices or costs specified in the second sentence had been intended to limit the interpretation of "normal value", the second sentence would have stated that the "prices" or "costs" listed therein were "normal value", and that comparisons between these actual "comparable" prices and costs and export prices were the sole means of determining "dumping". Instead, the second sentence illustrates only the relationship of "normal value" (and therefore dumping) to three alternative domestic transaction prices and costs. In short, the phrasing of the second sentence shows that the two provisions therein are examples of ways to determine what is less than normal value, but does not exclusively limit the acceptable ways.

5. Articles 2.1 and 2.2 of the ADA do not contradict this interpretation. The provisions dictate how dumping may be determined by further elaborating on GATT Article VI:1. They do not (i) change the relationship between the first and second sentences of Article VI:1; (ii) strictly define "normal value"; or (iii) alter the definition of "dumping". In fact, Article 2.1 restates the definition of "dumping" as products being "introduced into the commerce of another country at less than its normal value". It further provides that a product is "to be considered" as being dumped if imports are introduced at less than the home market sales price, which corresponds to the price provided for in the second sentence of GATT Article VI:1. Similarly, Article 2.2 provides certain circumstances in which two other options (third country export prices and constructed values) may be compared to export prices – the same options that appear in the second sentence of GATT Article VI:1.

6. Finally, the use of price comparison methodologies specified in the second sentence of GATT Article VI:1 and in Articles 2.1 and 2.2 of the ADA are not required where the domestic economy of the exporting Member does not operate under market economy conditions. In such a case, the use of the Member's domestic prices and costs for price comparison purposes is not required to identify dumping. Accordingly, pursuant to the first sentence of GATT Article VI:1, investigating authorities may use a third country price as a reasonable estimate of the "normal value" in order to determine "dumping", and they are not required to use adjusted prices or costs in the domestic market of the exporting Member. Moreover, jurisprudence relating to "non-market economy" producers is not

relevant to the issues before the Panel, insofar as the exporting Member at issue here is not a "non-market economy".

III. PARTICULAR MARKET SITUATION

7. With respect to "particular market situation" in Article 2.2 of the ADA, which has never before been interpreted by a WTO panel or the Appellate Body, Japan offers several pieces of interpretive guidance.

8. First, the "particular market situation" refers to a "situation" of the market of the exporting country that is "particular" (i.e. "special; not general"¹), and that is therefore not the "normal" or "common" market situation but rather a "special" one. This is confirmed also by the Spanish language version of this provision, which refers to "una situación *especial* del mercado".

9. Second, the application of a "particular market situation" under Article 2.2 is limited to "market" situations, as is the rest of Article 2.2, and these provisions do not necessarily apply to imports from "non-market economy" Members. Based on the above understanding of "normal value", the use of price comparison methodologies specified in the second sentence of GATT Article VI:1 and Articles 2.1 and 2.2 of the ADA are required under the assumption that the domestic economy of the exporting Member operates under market economy conditions. Where the domestic economy of the exporting Member does *not* operate under market economy conditions, such Member's domestic prices and costs cannot be used for price comparison purposes to identify dumping.

10. Third, for "market economy" Members, what constitutes a "particular" situation will differ from Member to Member. Thus, rather than seeking to develop a general definition of a "particular market situation", the determination should be made on a case-by-case basis according to the specific facts and circumstances at issue. Applying this principle to the current case, the Panel may wish to examine carefully the facts on which Australia relied in support of its determination, with a view to determining in this specific case whether the facts support a finding of a "particular market situation".

11. Along similar lines, even if Members interpret the phrase "particular market situation" in the same way, one Member's finding of "particular market situation" may be different from another Member's finding, depending on the factors and evidence that are taken into consideration. Thus, in the case of two Members' investigating authorities assessing the same subject imports of the same exporter, one authority could find that a "particular market situation" exists, while the other finds no such "particular market situation" under the same circumstances, and both findings could be consistent with Article 17.6(i) of the ADA because an investigating authority's exercise involves fact-finding, the consequences of which may differ from one Member to another.

12. Fourth, there is no textual basis in Article 2.2 of the ADA for excluding government influence from being a cause of a "particular market situation". Even in a market economy Member, there may be a special circumstance in a market that affects price comparability, regardless of whether that circumstance is due to government influence.

13. Fifth, there is no textual support in the GATT 1994 or the ADA for the view that Article 2.2 requires a "symmetrical comparison", i.e. that an investigating authority must exclude factors affecting both the domestic price and export price from the scope of a "particular" situation. Instead, such a factor might still distort the market, and thus prevent a "proper comparison" under Article 2.2. Furthermore, requiring an authority to demonstrate that the relevant factor affects domestic prices and export prices "differently" also lacks textual support and would be an inappropriately heavy burden for an importing Member.

14. Finally, Japan sees nothing in the text of Article 2.2 that precludes the possibility that the "particular market situation" affects some, but not all, market participants.

IV. "PROPER COMPARISON"

15. Japan also offers the following interpretive guidance with respect to a "proper comparison" under Article 2.2 of the ADA.

¹ Shorter Oxford Dictionary, p. 2110.

16. First, the word "proper" modifies, and is therefore directly related to, the subsequent noun "comparison". Article 2.2 sets forth the methodology to follow for the determination of "dumping". Thus, the definition of "dumping" in the first sentence of GATT Article VI:1 (i.e. "products of one country are introduced into the commerce of another country at less than the normal value of the products") ultimately dictates the "proper" comparison.

17. Second, "normal value" requires "a proper comparison" or "comparability", and prices or costs that are not market-determined cannot be considered as "comparable" because comparability is only ensured when the comparison between the normal value and the export price is capable of producing a meaningful answer to the question of whether there is dumping, as defined by GATT Article VI and the ADA. Accordingly, where there is only a low volume of like product in the domestic market, and thus insufficient interaction of supply and demand in the market of the like product, such prices and costs may be incapable of permitting a "proper comparison" because they may not substantially reflect market-determined prices and costs.

18. Third, all bases for discarding domestic market sales (i.e. "proper comparison", "no sales ... in the ordinary course of trade", "centrally planned", and "non-market economy") are based upon the concept of price comparability under GATT Article VI. However, the "centrally planned" and "non-market economy" provisions relate to non-market economies where the comparison methodologies under the second sentence of GATT Article VI:1 do not apply. In that situation, pursuant to the first sentence of GATT Article VI:1, investigating authorities may use a third country price as a reasonable estimate of the "normal value" to determine "dumping".

19. On the other hand, the provisions "do not permit a proper comparison" and "no sales ... in the ordinary course of trade" under Article 2.2 of the ADA reflect sub-paragraph (b) of the second sentence of GATT Article VI:1, and are therefore predicated on the premise that the exporting Member is a "market economy" where the second sentence applies. In such a case, the use of a third country price is allowed only as "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country", which may require certain adjustments depending on the specific circumstances of each case.

20. Fourth, while both "proper comparison" in Article 2.2 and "fair comparison" in Article 2.4 of the ADA relate to comparison methodologies, the terms "proper" and "fair" deal with different phases of, and conduct of the different investigating authority in, the determination of dumping. The text of Article 2.4 indicates that is concerned with the investigating authority's adjusting the differences between the export price and the normal value when comparing them. On the other hand, Article 2.2, together with Article 2.1, is concerned with the definition of dumping (i.e. what is the normal value used to determine dumping).

V. ASSERTION THAT "DUMPING" IS LIMITED TO INTERNATIONAL PRICE DISCRIMINATION HAS NO VALID BASES

21. Japan disagrees with the view that dumping is limited to the concept of "international price discrimination", and that any distortions that equally affect domestic and export prices must be exclusively governed by the SCM Agreement. First, there is a telling lack of textual basis for recognizing the concept of "dumping" as a form of private behaviour in the form of "international price discrimination", which neither GATT Article VI nor the ADA mentions. The first sentence of GATT Article VI:1 defines "dumping" as imports of a product at less than its "normal value"; it does not refer to the concept of price discrimination and certainly does not require that normal value always be determined based on the prices in the exporting country.

22. Nor is there any provision providing that anti-dumping remedies cannot counteract "dumping" made possible by subsidies or other government actions. Indeed, GATT Article VI:5 confirms that anti-dumping duties can remedy dumping caused by government actions, as it explicitly provides that anti-dumping duties and countervailing duties should not "compensate for the same situation of dumping or export subsidization". As such, anti-dumping duties can be imposed on dumping caused by government actions, but, where both anti-dumping and anti-subsidy remedies are imposed simultaneously on the same imports, adjustments are required to avoid double remedies for the same situation (e.g. subsidies). Appellate Body decisions in *US - Offset Act (Byrd Amendment)* are not relevant in any way to the current dispute, which relates to an entirely different factual situation and a separate legal question under the ADA.

23. Second, Appellate Body references to "international price discrimination" or "the pricing behavior of exporters or foreign producers" also are not particularly relevant here. In *US – Stainless Steel (Mexico)*, the Appellate Body mentioned "international price discrimination" when concluding that GATT Article VI:1 and Article 2.1 of the ADA address the pricing practice of an exporter, not that of an importer.² The Appellate Body did not suggest, however, that dumping should be reduced to the notion of "international price discrimination" by an exporter, even when the prices and costs in the relevant market of the exporting country are not market-determined due to a "particular market situation". The Appellate Body was never asked to examine this matter when it made its statement about dumping as a form of "international price discrimination".

VI. ALTERNATIVE METHODOLOGIES UNDER ARTICLES 2.2 AND 2.2.1.1

24. With respect to the alternative dumping methodologies set forth in Article 2.2, the Appellate Body has confirmed that this provision is intended to generate an "appropriate proxy" for the price of the like product in the ordinary course of trade in the home market. The Appellate Body added that the costs calculated pursuant to Article 2.2.1.1 must also be "capable of generating such a proxy".³ Accordingly, the proper interpretation of Articles 2.2 and 2.2.1.1 should take into account the role of Article 2.2 to provide "an appropriate proxy" for "the price of the like product in the ordinary course of trade in the domestic market".⁴

25. An investigating authority is required, when constructing normal value under Article 2.2, to use the cost of production *in the country of origin* and not the cost in *some other place*. The source of the cost information may in certain circumstances be obtained from outside the country of origin, but the Appellate Body has explained that "an investigation authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'" including by adjusting the information collected, where required by the specific circumstances of each case.⁵

26. What adjustments are required will depend on the type of information that is used to calculate the cost of production in the country of origin. The investigating authority has some discretion to undertake adjustments, provided that it (i) ensures that the calculated cost represents the cost in the country of origin; and (ii) adequately explains its adjustments. For example, the investigating authority may use out-of-country evidence to calculate the cost of production in the country of origin if the actual costs in the country of origin are found to be unreliable. However, in such a case, the investigating authority should (i) take into consideration the differences in the market conditions between the country of origin and the third country that affect the prices of the cost items; and (ii) provide a proper explanation of why an adjustment was adequate under the circumstances.

27. Moreover, Article 2.2.1.1 of the ADA requires the use of recorded costs that "reasonably reflect the costs associated with the production and sale of the product under consideration". According to the Appellate Body, this means that the records must be used "if they suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".⁶ The Appellate Body also clarified that this condition does not allow an authority to consider which costs would pertain to the production and sale of the product under consideration "in normal circumstances, i.e. in the absence of the alleged distortion", as this would "add words to the condition at issue that are not present in Article 2.2.1.1, namely, the costs that 'would pertain' and 'in normal circumstances'".⁷

28. In other words, there is no separate reasonableness test that applies to those costs that accurately reflect the actual costs that relate specifically to the production and sale of the product under consideration and not some other product.⁸ The Appellate Body in *EU – Biodiesel (Argentina)*, for example, found that the fact that domestic prices of inputs are lower than international prices due to a government regulation "was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production

² Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-95, fn. 208.

³ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

⁴ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

⁵ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

⁶ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26.

⁷ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.30.

⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37.

and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel".⁹

29. This is not to say, however, that any costs as recorded in the records of the producer/exporter must always be used: for example, an investigating authority may examine the reliability and accuracy of the record costs to determine "whether all costs incurred are captured; whether the costs incurred have been over- or understated; and whether non-arms-length transactions or other practices affect the reliability of the reported costs".¹⁰

30. Finally, the term "normally" in Article 2.2.1.1 has been interpreted to mean "under normal or ordinary conditions; as a rule".¹¹ Thus, the use of the term "normally" suggests that even where the two conditions contemplated in the "provided" clause of the first sentence of Article 2.2.1.1 ("in accordance with the generally accepted accounting principles" and "reasonably reflect the costs associated with the production and sale of the product under consideration") are met, the use of an exporter/producer's records is not necessarily mandatory in every case, and an investigating authority may consider other available evidence in certain circumstances. Indeed, if the drafters of the first sentence of Article 2.2.1.1 had intended otherwise, they would have had no need to insert the word "normally". The meaning of "normally" in Article 2.2.1.1 should instead be explored in the overall context of determining normal value and price comparability under Articles 2.2.1.1 and 2.2, as well as other relevant provisions.

VII. CONCLUSION

31. Japan respectfully requests the Panel to consider Japan's positions on the interpretive issues set out above.

⁹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

¹⁰ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41.

¹¹ Appellate Body Report, *US – Clove Cigarettes*, para. 273 (citing *Shorter Oxford English Dictionary*, 6th ed., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1945); see also Panel Report, *China – Broiler Products*, para. 7.161.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE REPUBLIC OF KOREA****I. Proper Interpretation of Article 2.2 of the Anti-Dumping Agreement within the Context of a Finding of a "Particular Market Situation"**

1. Article 2.1 of the Anti-Dumping Agreement defines dumping as the introduction of a product into the commerce of another country at less than its normal value and establishes that the domestic sales price of the product under investigation (the "like product") is the primary basis for determining the "normal value." Article 2.2 then identifies certain circumstances in which an investigating authority may calculate the normal value on a basis other than the domestic sales price, i.e., third country sales or constructed value. One of these circumstances is the existence of a "particular market situation" that prevents a proper comparison. Article 2.2 requires three conditions to be present for an investigating authority to disregard domestic sales prices on this basis: (1) there must be a "particular market situation" in the domestic market of the exporting country; (2) this situation must have an effect on the sales of the like product in the domestic market of the exporting country; and (3) the effect must be such that a "proper comparison" with the export price cannot be made.

2. With respect to the first condition, Korea agrees with Indonesia's description of the ordinary meaning of a "particular market situation" as requiring an exceptional set of circumstances that takes place in a single market, which is the exporting country.¹ In Korea's view, the term "market" within the meaning of Article 2.2 of the Anti-Dumping Agreement depicts a geographical area. Korea also considers a "market" to be characterized by commercial activity that is controlled by supply and demand. In this respect, Korea considers that a "particular market situation" would not include circumstances that arise normally in an economy that is operating on the basis of the market forces of supply and demand.

3. Korea also agrees that the "situation" can be interpreted to mean a "combination of circumstances".² However, in order to avoid the possibility of abuse, Korea considers that an investigating authority must clearly articulate how the situation, whether singular or in combination, is "particular" to the market such that a "proper comparison" is prevented. Thus a finding of a "particular market situation" must be based on an examination of the exceptional circumstances that take place in the market as a whole. Korea considers that such examination could consider relevant market characteristics and that it should focus on the market as a whole, rather than the effect of the situation on specific market participants.

4. In Korea's view, the rules of treaty interpretation do not permit multiple interpretations of the term "particular market situation". Thus, the interpretation of the term is covered under the first sentence of Article 17.6(ii) and recourse to the second sentence is unnecessary. However, Korea notes that one investigating authority might find a "particular market situation" whereas another authority might reach a different conclusion based on the same facts, a situation that appears to be covered under Article 17.6(i). So long as the authority's establishment of the facts was proper and its evaluation of those facts was unbiased and objective, a panel should defer to the evaluation of the authority in determining whether the authority's *application* of Article 2.2 (as properly interpreted under the customary rules of interpretation) was appropriate.

5. With respect to the second condition, Korea considers that the structure of Articles 2.1 and 2.2 confirm that the focus of the "particular market situation" is to identify circumstances that affect the domestic sales price of the like product to such an extent that it is rendered unusable for the purpose of comparing it with the export price. Moreover, Article 2.2 provides for two other situations in which an investigating authority is authorized to disregard the domestic sales as the basis for determining the normal value, both of which concern sales in the "exporting country" – i.e., sales in the domestic market. This further confirms that Article 2.2 only permits deviation from the domestic sales price when there is a circumstance that affects sales in the domestic market of the like product

¹ Korea's third party submission, para. 8.

² Korea's third party submission, para. 8.

such that the price of these sales cannot be used as the normal value.

6. With respect to the third condition, given that the very definition of dumping rests on a comparison between the normal value and the export price, Korea considers it critical that the investigating authority engage in an examination of whether, as a result of the "particular market situation", a "proper comparison" between the normal value and export price is not permitted.

7. As to the meaning of the term "proper comparison", Korea agrees with Indonesia that an examination of whether a comparison is "proper"³—and thus, "suitable" or "appropriate"—requires consideration of the purpose for which the comparison is being made. In Korea's view, the purpose of the "comparison" is to determine whether the subject merchandise is sold in the export market at a price that is lower than the normal value such that factors that affect the normal value and export price differently should be excluded. In this regard, Article 2.2 should be read together with Article 2.1 and the phrase "proper comparison" should be understood to mean that a price comparison conducted in an anti-dumping investigation should be for the purpose of determining whether the subject merchandise is sold in the export market at a price lower than normal value. Korea considers that the phrase "permit a proper comparison" should be interpreted and applied uniformly both in the context of "particular market situation" and "low volume of sales" given that the phrase appears in connection with both situations. Indeed, footnote 2, which clarifies that a volume that would normally be considered insufficient would nonetheless be appropriate if such sales can nonetheless provide for a proper comparison confirms that the purpose of examining the volume of sales is to determine whether such volume would permit a proper comparison.

8. A comparison cannot be "proper"—that is "suitable" or "appropriate"—if it is tainted by factors that affect the normal value and export price differently. For example, if there is a situation that distorts the domestic market of a product but not the export market, an appropriate comparison between prices in the two different markets would not be possible. On the other hand, if there is a situation that affects both the domestic price and export price equally, it cannot be said to prevent a proper comparison. This is because a situation that uniformly affects the price of an input that is incorporated equally into products for domestic sales and products for export would be reflected on both sides of the dumping margin calculation. Such a situation would not impact the gap between the domestic sales price and the export price, which comprises the margin of dumping.

9. It is Korea's view that circumstances affecting the cost of production will not usually prevent a "proper comparison," to the extent that the circumstances do not distinguish between products destined for the domestic market and those destined for export. In this respect, Korea agrees with Indonesia that the Anti-Dumping Agreement does not authorize the imposition of anti-dumping duties in response to exporters simply selling at *low* prices in the export market.⁴ Korea notes that Australia's investigating authority, by examining only the effect of the alleged government intervention on the domestic sales price, appears to have ended up comparing two values that were based on different costs of production. The normal value was calculated on a constructed value basis using an out-of-country benchmark, while the export price was based on the actual cost of production incurred in Indonesia. Korea questions whether a comparison of the normal value and export price that is based on different costs of production can be considered to constitute a "proper comparison" for the purpose of determining whether the export price was below the normal value.

10. Korea further notes that there is nothing in the text of Article 2.2 that prohibits consideration of government influence in the domestic market in determining whether a particular market situation exists. Therefore, Korea does not consider that government influence is *a priori* excluded from the scope of a particular market situation. However, Korea considers that the key issue would be whether the "particular market situation" prevents a "proper comparison," and not whether the government created those circumstances. For example, in Korea's view, a dual pricing system, in which the price of raw material or energy is regulated by the government, is one example that might fit the description of a "particular market situation". Price floors or ceilings may also meet the definition of a "particular market situation" depending on the circumstances of the government intervention. A dual pricing system draws a distinction between the domestic sales price and export price by its design, seeks to benefit the domestic market by suppressing the price of the product sold there, and would affect the domestic sales price and export price differently. It therefore might qualify as a "particular market situation". In the case of a government-imposed price floor or ceiling, a "particular

³ Indonesia's first written submission, para. 88.

⁴ Indonesia's first written submission, para. 101.

market situation" could be found if the price ceiling is limited to the domestic market, allowing exporters to sell the product at any price in foreign markets.

11. Finally, Korea notes that the general principle of ensuring a proper comparison is also present in Article 2.4 of the Anti-Dumping Agreement, which requires that an investigating authority ensure a "fair comparison" between the normal value and the export price by making adjustments for "differences which affect price comparability". Korea thus considers that, while there are differences in the application of Articles 2.2 and 2.4, Article 2.4 confirms that the Anti-Dumping Agreement seeks to exclude from the comparison factors that affect the normal value and export price differently.

II. Government Intervention Under the Anti-Dumping and SCM Agreements

12. Korea considers that there is a fundamental dichotomy between anti-dumping measures and measures against government subsidization. As Indonesia notes, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") is concerned with regulating government influence on market prices, while the Anti-Dumping Agreement is concerned with international price discrimination by individual exporters or producers.⁵

13. Moreover, the text of the SCM Agreement makes clear that the sole remedies for government subsidies are those that are provided for under the provisions of the SCM Agreement, and not any other agreement, including the Anti-Dumping Agreement. In particular, Article 32.1 of the SCM Agreement provides that "no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". Korea considers this provision to mean that a government subsidy must be remedied through permitted measures under the SCM Agreement (such as countervailing duties) and not through the imposition of anti-dumping duties. Therefore, if an investigating authority is examining possible government subsidization within the context of the "particular market situation" provision of Article 2.2 of the Anti-Dumping Agreement, it must first find that the situation is not properly governed by Article 32.1 of the SCM Agreement; in other words, that the situation is neither "specific" to nor "against" subsidization. If an investigating authority does take "specific action against" a subsidy, it will be in violation of Article 32.1 if the measure taken does not fall into one of the enumerated remedies (countervailing duties, provisional measures or price undertakings, or multilateral sanctions).

14. Korea notes that the footnote to Article 32.1 provides that the article "is not intended to preclude action under other relevant provisions of the GATT 1994, where appropriate". Korea does not consider that the footnote provides a basis for an investigating authority to take anti-dumping action against a subsidy that falls within the scope of the SCM Agreement. It would not be "appropriate" to permit remedies to government subsidization under the Anti-Dumping Agreement because the disciplines that apply to a Member's use of anti-dumping duties and its use of countervailing duties are legally distinct.⁶ Korea considers that the footnote simply allows for measures outside of those specified in the SCM Agreement that relate to subsidization, but are not inextricably linked, or strongly correlated, to the constituent elements of subsidization. Where the investigating authority's actions are "specific" to the subsidy, the footnote would not apply and any actions by the investigating authority must fall within one of the enumerated remedies provided under the SCM Agreement.

15. Korea recognizes that in the present case, the Australian investigating authority did not impose countervailing duties for the same programs that formed the basis of its "particular market situation" finding in the anti-dumping investigation. Korea understands, however, that the investigating authority's decision not to impose duties was, at least in part, based on the negligible margin of subsidization, and not because the government action failed to meet the constituent elements of a subsidy under Article 1.1.⁷ The fact that the Australian investigating authority conducted a countervailing duty investigation of these government programs implies that the authority did consider the government intervention at issue to constitute a subsidy that met the constituent elements under Article 1.1. Therefore, Korea considers that it might be necessary to examine whether the investigating authority's actions in the anti-dumping investigation might nonetheless constitute "specific actions" relating to a subsidy. It might also be necessary to assess

⁵ Indonesia's first written submission, para. 46.

⁶ See Appellate Body Report, *US - Anti-Dumping and Countervailing Duties (China)*, para. 570.

⁷ Indonesia's first written submission, para. 17.

whether the design and structure of these measures are such that they create an incentive to terminate the subsidization. If so, the Australian investigating authority's actions might fall under the scope of Article 32.1 of the SCM Agreement.

III. Proper Interpretation of Article 2.2.1.1 within the Context of Conditions to Disregard Records Maintained By The Exporter Or Producer

16. When calculating the normal value on the basis of constructed value, Article 2.2.1.1 of the Anti-Dumping Agreement establishes rules for the calculation of the cost of production that is to be used. Specifically, 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 ...". Article 2.2.1.1 then provides for two specific situations in which the investigating authority may deviate from those records: (1) when the records are not in accordance with the generally accepted accounting principles ("GAAP") of the exporting country; and (2) when the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.

17. Korea does not agree with Australia's argument that the word "normally" provides a separate legal ground under Article 2.2.1.1. Korea understands the use of the term "normally" to establish the presumption that, absent the specific conditions proscribed in the first sentence of Article 2.2.1.1,⁸ the source for calculating cost of production must "as a rule" be the records maintained by the exporter or producer under investigation.⁹ Derogation from that rule is permitted only under specified circumstances; as explained by the panel in *China – Broiler Products*, those circumstances are limited to those proscribed in the first sentence of Article 2.2.1.1.¹⁰ In Korea's view, even if the term "normally" could be interpreted to permit deviation from cost records for reasons other than the two conditions provided in Article 2.2.1.1, such situations should be construed narrowly. For example, Korea considers that an investigating authority should demonstrate that it cannot use available cost records to properly calculate the normal value before it is permitted to use an alternative methodology.¹¹

18. Finally, even when using an alternative methodology, Korea notes that the investigating authority remains constrained by Article 2.2, which mandates that the cost of production must reflect the country of origin. Korea submits that benchmark adjustments are fact- and case-specific, and the calculation of cost in any given investigation must be determined based on the merits, in light of the particular facts of that investigation.¹² An investigating authority must properly adapt the chosen benchmark based on a consideration of all of the facts on the record before it. To the extent that an investigating authority must use an out-of-country benchmark, such a benchmark must reflect the situation *as it exists* in the country of origin, and not as the investigating authority *considers that it should be*, either based on a perceived distortion in the domestic market, or based on international reference prices.¹³

IV. Treatment of Non-Market Economies Under Article 2.2 of the Anti-Dumping Agreement

19. Korea considers that *Ad Article VI* and Article 15 of China's Accession Protocol to constitute limited exceptions to the general rule provided in Articles 2.1 and 2.2 of the Anti-Dumping Agreement. This general rule is that the margin of dumping must be determined through a comparison of the export price with the domestic sales price, or alternatively, with a third country sales price or constructed value if one of three circumstances described in Article 2.2 exists. The "particular market situation" provision constitutes one of the circumstances in which the investigating authority may disregard domestic market sales and determine normal value either through third country sales or constructed value. China's Accession Protocol specifically provides for deviation from the methods described in Articles 2.1 and 2.2, permitting a WTO Member to use a different methodology that is not based on a strict comparison with domestic prices or costs in China under specified circumstances.¹⁴

⁸ Korea's third party submission, paras. 40-49.

⁹ Appellate Body Report, *US – Clove Cigarettes*, para. 273.

¹⁰ Panel Report, *China – Broiler Products*, para. 7.164; Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.29.

¹¹ See e.g. Panel Report, *China – Broiler Products*, para. 7.161.

¹² Panel Report, *Egypt – Steel Rebar*, para. 7.393.

¹³ See Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.

¹⁴ Protocol on the Accession of the People's Republic of China, WT/L/432.

20. As exceptions to this general rule, Korea considers that the circumstances described in *Ad Article VI* and Article 15 of China's Accession Protocol must be viewed as distinct from the circumstances described in Article 2.2. The rules applicable to NMEs are based on the particular influence and intervention of the government that exists in such NMEs rather than individual factors that may affect the comparability between the export price and domestic sales price. On the other hand, a "particular market situation" deals with specific circumstances that affect the domestic market that render domestic sales prices incomparable to export prices, which might *include* government influence or intervention. In order to find a particular market situation for government influence or intervention, however, the investigating authority must find that such government involvement disturbs the proper comparison between normal value and export value.

21. Korea considers the jurisprudence relating to costs of NME producers under Article 2.4 of the Anti-Dumping Agreement provides limited guidance in this Panel's consideration of Indonesia's cost of production under Article 2.2.1.1. The Panel should be cautious in applying findings relating to non-market economy producers in cases involving market economy producers.

V. Interpretive Value of US – Anti-Dumping and Countervailing Duties (China)

22. Lastly, Korea notes that Indonesia cites statements of the panel and Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* which in turn refer to evidence not on the record in this proceeding. Korea does not necessarily consider those statements to constitute "legal interpretations". Nonetheless, Korea considers these statements to hold authoritative value in that they represent statements and observations adopted by the Dispute Settlement Body in interpreting the provisions at issue. Accordingly, Korea considers that the Panel should give weight to these observations in conducting its interpretive analysis.

ANNEX C-5**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE RUSSIAN FEDERATION****I. Introduction**

1. In this executive summary, the Russian Federation summarizes its views presented to the Panel in its oral statement at the third party session of the first substantive meeting with the Panel and answers to the Panel's questions following this meeting.

2. The Russian Federation provides comments on certain issues on the interpretation of Articles 2.2 and 2.2.1.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter – "Anti-Dumping Agreement") which are determinative for the maintenance of the balance of rights and obligations of the WTO Members with regard to anti-dumping disciplines.

II. Neither Article 2, nor any other provisions of the Anti-Dumping Agreement mention the term "input" or "input prices"

3. The Russian Federation would like to stress that neither Article 2, nor any other provisions of the Anti-Dumping Agreement mention the term "input" or "input prices". According to Article 2.1 *a product* is being dumped when it is "introduced into the commerce of another country" at an export price that is "less than its normal value". As the Appellate Body explained, "dumping" and "margin of dumping" can only be established for the product under consideration as a whole.¹ The term "normal value" of the product refers to "the comparable price, in the ordinary course of trade, for the *like product* when destined for consumption in the exporting country".²

4. Article 2.2 of the Anti-Dumping Agreement provides for alternative methods for determination of the normal value of *the like product*. This provision allows, in particular, construction of normal value, but only with respect of the like product as a whole and *not* for the input involved. Also, the other alternative method provides for comparison with a comparable price of *the like product* when exported to an appropriate third country and *not* for the input involved. In case of injurious dumping an anti-dumping duty is imposed on *the product* that is considered and found to be dumped, i.e. *not on the input* of that product.

5. Thus, the focus of the analysis is on the investigated exporter or producer of the product under consideration, i.e. *not* on the producer of the input used for manufacturing the product under consideration.

III. It is exporter, not the government that engages in practices that result in situations of dumping

6. Dumping arises from the pricing behavior of an exporter of the product under consideration.³ An individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* the investigated exporter shall not exceed its margin of dumping.⁴

7. In *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body confirmed that the existence of dumping is determined by comparing the prices set by the individual exporter and examining the choice of the behavior of that exporter in setting these prices.⁵ It follows that the investigated exporter or producer can be responsible only for its pricing policies, but not for government regulation.

¹ Appellate Body Report, *US – Softwood Lumber V*, para. 99.

² Anti-Dumping Agreement, Article 2.1. (emphasis added)

³ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94. (See also Appellate Body Report, *US – Zeroing (Japan)*, para. 156 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 129)).

⁴ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

⁵ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.

IV. The interpretation of the term "proper comparison" in Article 2.2 of the Anti-Dumping Agreement

8. Drafters of Articles 2.2 of the Anti-Dumping Agreement did not provide a specific definition for the term "proper comparison". This fact suggests that drafters did not intend to assign to this term a special meaning that would be different from the one established through the application of customary rules of interpretation of public international law.

9. The Russian Federation recalls that the meaning of the term "proper" is elaborated, in particular, in the context of Article 17.6(i) of the Anti-Dumping Agreement. According to the Appellate Body the ordinary meaning of "proper" suggests "accurate" or "correct".⁶ The interpretation of the word "proper" in the context of Article 2.2.1.1 of the Anti-Dumping Agreement (the second sentence) confirms this understanding.⁷

10. Based on this ordinary meaning, "a proper comparison" is an accurate, correct comparison. The phrase "proper comparison" is part of the expression "such sales do not permit a proper comparison" in Article 2.2 of the Anti-Dumping Agreement. In its turn the phrase "such sales" refers to sales of the like product in the domestic market of the exporting country. Article 2.2 of the Anti-Dumping Agreement concerns the determination of the normal value. The phrase "the margin of dumping shall be determined by comparison with "either" a comparable price of the like product ..." or constructed normal value (i.e. "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits") indicates that an investigating authority needs to compare the export price with the normal value in order to evaluate the pricing behavior of the exporter or producer under the investigation.

11. It follows that the word "proper" in Article 2.2 of the Anti-Dumping Agreement relates to correct determination of the pricing behavior of individual exporter or producer.

12. The use by the drafters of different wordings in different obligations ("proper comparison" in Article 2.2 and "fair comparison" in Article 2.4 of the Anti-Dumping Agreement) with different requirements should be respected. The structure of Article 2 of the Anti-Dumping Agreement and interconnection of its provisions support the understanding that the obligation to ensure fair comparison arises after the normal value and the export price are established. According to the WTO jurisprudence, "the subject-matter of Article 2.4, i.e. differences affecting the comparability of the normal value and the export price, can be contrasted with that of Articles 2.1, 2.2 – including its subparagraphs – and 2.3 which pertain to the methodology for determining the normal value and the export price".⁸

V. The SCM Agreement is not applicable for the determination of dumping

13. The Russian Federation strongly disagrees with the proposition to blur the line between obligations under the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (hereinafter – "SCM Agreement") by including the terms "government regulation"⁹ into the scope of application of the Anti-Dumping Agreement.

14. Anti-Dumping Agreement addresses issues of pricing behavior of foreign exporters or producers. In contrast, the SCM Agreement addresses conferring benefit to the subsidy recipient by government.¹⁰ Therefore, Anti-Dumping Agreement and SCM Agreement regulate different issues. Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement clearly support this understanding.

15. It is inappropriate to include in the scope of one agreement the scope and definitions used in the other agreement. This understanding has been confirmed by the Appellate Body. The Russian Federation recalls that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body clarified that the SCM Agreement is not applicable for the determination of

⁶ Appellate Body Report, *Thailand – H-Beams*, para. 116. (footnote omitted)

⁷ Panel Report, *China – Broiler Products (Recourse to Article 21.5 of the DSU by the United States)*, paras. 7.34-7.37.

⁸ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.296.

⁹ Australia's First Written Submission, paras. 135-139.

¹⁰ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.

dumping.¹¹ The Appellate Body underlined the major difference between dumping and a subsidy as two different phenomena which shall be determined under distinct rules: dumping – under the Anti-Dumping Agreement and subsidy – under the SCM Agreement.

16. In case the difference between the subject issues of the Anti-Dumping Agreement and SCM Agreement is blurred, the line between distinct obligations under the distinct agreements will also be blurred. If that happens, the scope of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement will be changed. Therefore, the object and purpose of the Anti-Dumping Agreement focused on the pricing behavior of the foreign exporters or producers would be inadmissibly expanded. Such an approach is contrary to the intention of drafters to treat different problems differently with different instruments.

VI. Article 2.2 of the Anti-Dumping Agreement provides mandatory rule for constructing normal value on the basis of the cost of production of the like product in the country of origin

17. The Russian Federation wishes to draw the Panel's attention to the terms used in Article 2.2 of the Anti-Dumping Agreement and in Article VI:1(b)(ii) of the General Agreement on Tariffs and Trade 1994 (hereinafter – "GATT 1994") and then to what the Appellate Body said in *EU – Biodiesel (Argentina)* with respect to the use of information or evidence from outside the country of origin.

18. The phrases "the cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "the cost of production of the product in the country of origin" in Article VI:1(b)(ii) of the GATT 1994 concern "the" cost of production of "the" product in "the" country of origin, informing investigating authorities what specific cost shall be used in the construction of the normal value of the product under consideration. These phrases clearly provide that the basis for the construction of the normal value must be the cost of production of the product under consideration *in the country of origin*.

19. The Appellate Body has clarified that if an investigating authority relies on information other than the records of investigated exporters and producers, it "has to ensure that such information is used to arrive at the 'cost of production [of the like product] in the country of origin'".¹² According to the Appellate Body, this may require the investigating authority to adapt that information "in order to ensure that it represent[s] the cost of production" of the like product in the country of origin. The purpose of adaptation is to obtain the amount reflecting the cost of production of the like product in the country of origin, i.e. the cost of production available to domestic producers during the period of investigation. This is the key consideration to determine whether an investigating authority has properly adapted the out-of-country information to arrive at the cost of production in the country of origin.

20. The costs of production in no circumstances can be adjusted, established or refuted with a reference to information that does not have a genuine relation with the product under consideration produced in the country of origin.

21. Thus, Article 2.2 of the Anti-Dumping Agreement does **not** provide for any possibility to construct an input price. Just the opposite – there is mandatory obligation to construct normal value on the basis of **the cost of production in the country of origin** as it is.

VII. Only explicit derogations in the Anti-Dumping Agreement or an Accession Protocols of certain Members can provide the legal basis for an investigating authority to use prices or costs other than those in the country of origin of the product under consideration

22. Recalling the Appellate Body's guidance that "provisions of the Anti-Dumping Agreement are explicit regarding the permissibility of disregarding certain matters",¹³ the Russian Federation stresses that there is a limited number of the explicit provisions that would allow investigating authorities when determining the normal value to disregard costs reflected in investigated producers' and exporters' records (in case both conditions of the first sentence of Article 2.2.1.1 of the Anti-

¹¹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.

¹² Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (emphasis added)

¹³ Appellate Body Report, *US – Continued Zeroing*, para. 286 (referring to the Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 103).

Dumping Agreement are satisfied). Only the second Ad Note to Article VI:1 of the GATT 1994 (which is incorporated by reference into the Anti-Dumping Agreement through Article 2.7 thereof), and the protocols of accession of certain Members can provide the legal basis for an investigating authority to use prices or costs other than those in the country of origin of the product under consideration. These provisions suggest "that their drafters considered explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin".¹⁴ Only with respect to these provisions an investigating authority may rely on the expression "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement.

23. There is no other legal basis in the Anti-Dumping Agreement for an investigating authority to reject records kept by investigated producers and exporters when the two conditions in Article 2.2.1.1 of the Anti-Dumping Agreement are satisfied, and substitute them with prices outside the country of origin in determination of dumping. As the Appellate Body in *US – Carbon Steel*¹⁵ explained, the fact that a particular treaty is silent on a specific issue must have some meaning. Words that are not in the text of Article 2.2.1.1 of the Anti-Dumping Agreement must not be incorporated there.

24. The same applies to the construction of the normal value on the basis of Article 2.2 of the Anti-Dumping Agreement. Any attempts to reject domestic prices and costs and substitute them in constructed normal value with prices outside the country of origin through the application of provisions **other** than Article 2.7 of the Anti-Dumping Agreement or provisions on dumping enshrined in the protocols of accession of certain Members are illegal.

VIII. The term "the particular market situation" does not allow a broad interpretation

25. A number of the WTO Members involved in this proceeding promote a broad interpretation of the term "particular market situation". They use indefinite article "a" to show that there may be indefinite number of such situations.¹⁶

26. To sustain such a broad interpretation of the term "particular market situation", specific treaty language is required.¹⁷ However there is no such treaty language in the Anti-Dumping Agreement. Thus, a broad interpretation of the term "the particular market situation" should fail.

27. The Russian Federation considers that what constitutes "the particular market situation" should be defined in accordance with Article 31 of the Vienna Convention on the Law of Treaties by considering the ordinary meaning of this term in its context, i.e. the operation of the specific rules of the Anti-Dumping Agreement governing the determination of normal value. The proper interpretation is a textual interpretation. As the Appellate Body explained, "the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms".¹⁸

28. With the term "particular market situation" in Article 2.2 of the Anti-Dumping Agreement the definite article "the" is used. Significantly, the terms "like product", "ordinary course of trade", "domestic market", "exporting country", "margin of dumping", "cost of production in the country of origin" are also used with the definite article "the". Thus, according to the text of the Anti-Dumping Agreement there is only one like product, only one ordinary course of trade, only one domestic market, only one exporting country, only one margin of dumping, only one cost of production in the country of origin.

29. Further, both words "market" and "situation" in the term "the particular market situation" are used in Article 2.2 of the Anti-Dumping Agreement in the singular form. The word "particular" takes the position of an adjective in Article 2.2 of the Anti-Dumping Agreement and refers to the noun "situation". Moreover, the text of Article 2.2 of the Anti-Dumping Agreement clearly indicates that the term "the particular market situation" refers to domestic market of the exporting country. The text does not refer to a sector of the domestic market or some market participants.

¹⁴ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.241.

¹⁵ Appellate Body Report, *US – Carbon Steel*, para. 65.

¹⁶ Japan's Third Party Submission, paras.11-12.

¹⁷ Appellate Body Report, *EC – Hormones*, para. 165.

¹⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 37.

30. Article 2.2 of the Anti-Dumping Agreement does not include any textual indication of an ability of the investigating authority to take into account government influence on the domestic market for the product under consideration, in particular such as imposing price floors or ceilings. Neither the term the "particular market situation" can be interpreted to mean a combination of circumstances.

31. The existence of "the particular market situation" does **not** give carte blanche to investigating authorities. Even in cases when sales of the like product in the ordinary course of trade do not permit a proper comparison because of the particular market situation and an investigating authority resorts to the second alternative method to construct the normal value, the latter **shall** be based on the cost of production in the country of origin. There is no way to reject costs in the country of origin and substitute them with prices outside the country of origin in constructing the normal value.

32. Far-reaching interpretation of the term "the particular market situation" as unlimited list of circumstances is contrary to the intention of the drafters as expressed in the text in the Anti-Dumping Agreement. Entitling an investigating authority to disregard domestic sales of the like product in a broad set of circumstances would lead to a change in the scope of the rights and obligations of the WTO Members. Such change is contrary both to Article 2.2 of the Anti-Dumping Agreement and to the requirements of Article 3.3 of the DSU prescribing the maintenance of a proper balance between the rights and obligations of the Members.

33. This interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties is the only legitimate interpretation of the term "the particular market situation". There are no other permissible interpretations of this term within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement. If an investigating authority finds that a situation constitutes "the particular market situation", but this finding is not based on legitimate interpretation of this term, such finding would be inconsistent with Article 2.2 of the Anti-Dumping Agreement.

IX. Conclusion

34. In sum, the text of the Anti-Dumping Agreement does not allow an investigating authority to examine the effect of a governmental measure of the exporting country on input, and, as a result, whether such effect influences the prices of the product under investigation.

35. Such terms as "government regulation", "effect of government regulation", "input" are not in the legal text of the Anti-Dumping Agreement. Any interpretations of the anti-dumping disciplines based on these words would effectively undermine WTO Members' rights under the Anti-Dumping Agreement.

ANNEX C-6**INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF THAILAND****I. INTRODUCTION**

1. This executive summary contains comments made by Thailand in response to the Panel's questions at the third party session on 19 December 2018 pertaining to the interpretation of the *Agreement on the Implementation of Article VI of GATT 1994* ("Anti-Dumping Agreement"). Thailand's views focus on legal questions without taking a position on the facts presented by the parties to the dispute.

II. THE USE OF THE PARTICULAR MARKET SITUATION PROVISION

2. Thailand expresses its systemic concerns on the increasing frequency of using the particular market situation provision by investigating authorities. In this regard, Thailand notes the following.

3. First, resorting to the particular market situation provision should be confined to specific circumstances envisaged in Article 2.2 of the Anti-Dumping Agreement. An investigating authority may depart from the usual method in calculating normal value as a result of the particular market situation only if it necessarily finds that the situation in question prevents a proper comparison of domestic sales price to export sales price. In Thailand's view, Article 2.2 of the Anti-Dumping Agreement does not address *any* market situation, but only the particular situation that does not permit a proper comparison in revealing dumping.

4. Second, the particular market situation does not and should not cover government influence in the form of subsidies within the context of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Thailand urges the panel to exercise caution in interpreting the provisions of the Anti-Dumping Agreement so as not to allow circumvention of the rules under the SCM Agreement, or to condemn government subsidies which are not meant to be condemned under the SCM Agreement.

III. A PARTICULAR MARKET SITUATION REQUIRES A CASE-SPECIFIC ANALYSIS

5. A factual analysis on a case-by-case basis is required in order to determine whether the particular market situation in the sense of Article 2.2 of the Anti-Dumping Agreement exists. To constitute a "particular market situation" under Article 2.2 of the Anti-Dumping Agreement, the key issue is not how many market participants are being affected by the situation in question; rather, it is whether the existence of the situation has an impact on domestic sales price in such a way that it renders the proper comparison with export sales price impermissible for the purpose of dumping determination.

6. In considering whether domestic sales of the product under consideration warrant a proper comparison to export prices, an investigating authority may take into account government influence on the market of the exporting country. However, given the fact that a government in a regulatory capacity may always have certain influence on the market, *e.g.* by imposing minimum wages or environmental standards, the particular market situation provision should not be interpreted to capture *any* government actions that may have an effect on the formation of domestic sales price. A particular market situation may exist only if the investigating authority finds that, based upon the facts and evidence before it, domestic sales price of the product under consideration has been distorted by government interference. Thailand considers that the determination as to whether government influence would amount to interference in the sense that gives rise to a "particular market situation" requires a case-specific analysis.

IV. THE PROPER COMPARISON IS DISSIMILAR FROM THE FAIR COMPARISON

7. Thailand notes that the "fair comparison" under Article 2.4 of the Anti-Dumping Agreement seeks to ensure that a comparison between the normal value and the export price is fair by adjusting differences which may affect price comparability. The proper comparison under Article 2.2 of the Anti-dumping Agreement, on the other hand, relates to the step *before* the adjustment occurs when considering if the domestic sales price may be used as a basis for deriving normal value in order to ensure that the comparison to the export price is proper for the purpose of the determination of dumping.

ANNEX C-7**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE UNITED STATES****EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION****I. CLAIMS REGARDING "PARTICULAR MARKET SITUATION" IN ARTICLE 2.2**

1. Article 2.2 of the Anti-Dumping Agreement establishes certain alternatives for determining normal value when, "because of the particular market situation ... such sales do not permit a proper comparison". Article 2.2, which includes the phrase "proper comparison," links back to the dumping definition in Article 2.1. If a particular market situation affects price comparability, *i.e.*, if a particular market situation indicates that sale prices of the like product do not reflect market-based conditions, such sale prices need not be used as a basis for normal value because they would not "permit a proper comparison".

2. The phrase "particular market situation" as it appears in Article 2.2 addresses a specific condition or set of circumstances taking place in the domestic market. It is the position of the United States that an investigating authority may find that a "particular market situation" exists when the evidence of record demonstrates that a specific condition or set of circumstances renders the comparable price, in the ordinary course of trade, for the like product, unfit as a proper comparison. The United States therefore agrees with Australia that "the ordinary meaning of the term 'particular market situation' ... is broad" and that "there is no support for Indonesia's argument that a 'particular market situation' is an 'exceptional' situation." The United States also agrees with Australia that a "particular market situation" may include "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".

3. The findings of an investigating authority in a countervailing duty investigation do not otherwise prohibit the investigating authority from finding in an antidumping duty investigation that certain actions by a government give rise to a "particular market situation". Article 2.2 contains no textual language which prohibits an analysis of State interference in assessing whether a particular market situation exists that precludes a proper comparison. As a result, an investigating authority may find it appropriate to further analyze whether a particular market situation exists based on State interference. If State interference causes domestic market conditions, including in respect of the domestic market for inputs, to be materially different than market-based conditions (such as those reflecting normal commercial principles), this could result in artificial sales prices of the like product that are not fit for a proper comparison. The United States thus agrees with Australia's statement that State interference "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".

4. Further, since the determination of normal value, by definition, must exclude all transactions not made in the ordinary course of trade, the comparison between normal value and export value is, similarly by definition, an asymmetrical comparison because the determination of export price does not exclude all transactions not made in the ordinary course of trade. As the Appellate Body has explained, "the duties of the investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, ... irrespective of the reason why the transaction is not 'in the ordinary course of trade'. Investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation ... would distort what is defined as '*normal value*'. Accordingly, the United States disagrees with Indonesia that an investigating authority may not disregard domestic sales prices pursuant to a "particular market situation" whenever the identified situation affects both domestic and export sales.

5. It is also nonsensical to assert that the pre-Uruguay Round discussions of an *Ad Hoc Group* about "input dumping" have a bearing on the meaning of "particular market situation". The *Ad Hoc Group* did not discuss input dumping in the context of a particular market situation, nor did it mention

particular market situation in its report. Besides, the issue in this dispute does not involve the question of whether State interference results in input dumping. The issue here involves the question of whether State interference in the marketplace has resulted in a domestic price or cost that does not reflect market-based conditions. An input does not need to be dumped before an investigating authority concludes that domestic price does not reflect market-based conditions. Indeed, a particular market situation may exist where State interference results in a domestic price or cost that is higher than it would have been absent such interference. Therefore, the United States disagrees with Indonesia that statements made by an *Ad Hoc Group* in 1984 should be viewed by the Panel as demonstrating that a "particular market situation" cannot address State interference in the market for an input used to produce the like product.

6. Finally, nothing in the text of GATT 1994 Article VI, the Anti-Dumping Agreement, or other relevant texts, indicates that dumping reflects only discriminatory pricing strategies of individual producers or exporters. The WTO agreements reflect that "dumping" is a price difference. Article 2.1 of the Anti-Dumping Agreement states that "a product is considered as being *dumped*, i.e. introduced into the commerce of another country *at less than* its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". GATT 1994 Article VI:1 uses almost identical language. On the other hand, the phrase "international price discrimination" does not appear in the text of the GATT 1994 or the text of the Anti-Dumping Agreement. Instead, dumping relates to a price difference – where export price is lower than normal value – irrespective of any motivation of the producer or exporter.

II. CLAIMS REGARDING THE SECOND CONDITION OF ARTICLES 2.2.1.1 AND ARTICLE 2.2

7. The introductory phrase "[f]or the purpose of paragraph 2" indicates that Article 2.2.1.1 should be read together with Article 2.2. The costs calculated pursuant to Article 2.2 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". Given that the use of costs under Article 2.2.1.1 must be capable of generating an appropriate proxy for the prices of sales in the ordinary course of trade, the term "cost" must be understood as referring to costs that reflect market-based conditions associated with producing the like product in the exporting country.

8. The United States disagrees with Indonesia that the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement obligated Australia to accept without question the costs recorded in the respondents' records. Article 2.2.1.1, properly interpreted, does not mean that the costs reported in the records kept by the exporter or producer under investigation must always be used absent any consideration. To the contrary, an investigating authority may examine such records. That examination may include, among other considerations, a substantive inquiry into whether the costs kept by the exporter or producer under investigation do not "reasonably reflect" objectively real, economically meaningful data associated with the production and sale of the product under consideration. The United States agrees then with Australia that in such a situation, an unbiased and objective investigating authority would have a basis under the Anti-Dumping Agreement to reject or adjust a cost that does not reflect market-based conditions, so long as its determination was based on a reasoned and adequate explanation.

9. The United States further disagrees with Indonesia's assertion that "the Appellate Body and panels have rejected the argument that [Article 2.2.1.1] relates to whether the costs, themselves, are reasonable". The Appellate Body in *EU – Biodiesel (Argentina)* specifically *rejected* the argument that "no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do". As the Appellate Body explained, "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured; whether the costs incurred have been over- or under-stated; and whether non-arm's-length transactions or other practices affect the reliability of the reported costs".

10. For example, both the panel and Appellate Body in *EU – Biodiesel (Argentina)* confirmed that a cost based on an affiliated party transfer price should not be used under Article 2.2.1.1, even if that transfer price is reflected in the investigated firm's records. Such a non-arm's-length sale is exactly the type of transaction for which an investigating authority may look beyond the four corners

of an investigated firm's records and determine whether the transaction does not reasonably reflect real economic costs involved in producing the product in the exporting country, especially because the reported transfer price may fail to accurately and reliably reflect the interaction between independent buyers and sellers. The authority under Article 2.2.1.1 to reject a non-arms-length transaction makes clear that "costs" that are "associated with" the production and sale of a product must be understood as costs that "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration".

11. The concept that underlies the well-established concern regarding related, affiliated, associated, or non-independent party transactions is that such transactions may not reflect market-based conditions where "buyers and sellers come together voluntarily to decide on what products to produce and sell and buy, and how resources such as labour and capital should be used". The same concept also underlies concerns that may arise for other types of transactions. The question of whether the records of the exporters or producers reasonably reflect the costs associated with production and sale of the product under consideration is a question which needs to be assessed on a case-by-case basis, taking into account the evidence before the investigating authority, and the determination that it makes.

12. The focus of the Panel's inquiry in this matter should be on whether Australia's findings for rejecting input costs, based on the facts and circumstances of its investigation, is one that could have been reached by an objective and unbiased investigating authority. An investigating authority may examine whether a respondent's recorded costs "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration". Australia had a sufficient basis to examine whether input prices distorted by State interference resulted in a particular market situation that rendered domestic market paper prices unfit for a proper comparison under Article 2.2. It would be incongruous to consider that Australia was prohibited from examining whether those *same* recorded pulp costs reasonably reflect the costs associated with the production and sale of the product under consideration for purposes of constructing normal value under Article 2.2.1.1. As explained, those costs, to be used, must be capable of generating an "appropriate proxy" for the price of the like product "in the ordinary course of trade".

13. Finally, Article 2.2 does not prohibit the use of out-of-country information to evaluate recorded costs, or to adjust or replace recorded costs, when formulating the appropriate cost for an individual producer. Article 2.2 also does not require an investigating authority to adapt an out-of-country source for an input price back to the cost that it just rejected as incapable 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. The United States agrees with Australia that "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". Therefore, contrary to Indonesia's position, an investigating authority does not need to adapt an out-of-country source for an input price under Article 2.2 to match the rejected cost for that input.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

14. Just as one could "envis[ion] many reasons for which transactions might *not* be 'in the ordinary course of trade'," it is possible to envision many reasons for which transactions might not permit a proper comparison because of a "particular market situation". An investigating authority would therefore need to determine on a case-by-case basis, based on the facts and circumstances before it, whether domestic market conditions constitute a "particular market situation". If those facts and circumstances indicate that a "particular market situation" exists because of government interference in the marketplace, nothing in the WTO agreements requires an investigating authority to ignore this situation and find that the sales of the like product subject to the "particular market situation" permit a proper comparison. If government interference causes domestic market conditions to be materially different than market-based conditions (such as those reflecting normal commercial principles), this could result in artificial sales prices of the like product that are not fit for a proper comparison.

15. Likewise, if the facts and circumstances indicate that a "particular market situation" affects both sales of the like product and sales of the product under consideration, nothing in the WTO agreements requires an investigating authority to ignore the "particular market situation" and

find that sales of the like product subject to such a situation permit a proper comparison. As the European Union noted, under Article 2.3 of the Anti-Dumping Agreement, the export price of the product under consideration is the price of the product as exported to the importing country. An investigating authority generally is not concerned with why the export price is what it is. Indeed, unlike normal value, the export price may include sales that are *not* in the ordinary course of trade because the prices are below the product's costs of production. Unlike normal value, the export price may include sales that do *not* reflect normal commercial principles. Unlike normal value, the export price may include sales in which the domestic cost of an input used in the manufacture of product as exported does *not* reflect a non-arm's length transaction.

16. Article 2.2 describes two specific conditions or sets of circumstances for when these "such sales" do not permit a "proper comparison" for the calculation of "normal value". A low volume of these sales is one set of circumstances. Here, a problem does not exist with respect to the sales themselves, just with how many there are and whether, from an illustrative standpoint, sufficient data points exist to determine whether "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value".

17. A "particular market situation" is another set of circumstances for when "such sales" do not permit a "proper comparison". Here, a problem does exist with respect to the sales themselves, such that they cannot be used to determine whether "a product is ... introduced into the commerce of another country at less than its normal value". As the Appellate Body explained in *US – Hot-Rolled Steel*, investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation ... would distort what is defined as 'normal value'.

18. The duties of an investigating authority are the same under Article 2.1 of the Anti-Dumping Agreement with respect to transactions of the like product subject to a "particular market situation". An investigating authority must exclude *all* such sales from the calculation of normal value if they do not permit a proper comparison, because to include such sales in this calculation would distort what is defined as "normal value". The phrase "proper comparison" as set out in Article 2.2 therefore reinforces the requirement that, before an investigating authority can determine if the "product is to be considered as being dumped," it must first exclude from the calculation of normal value all transactions of the like product in the domestic market that are subject to the "particular market situation".

19. Finally, the adverb "normally" moderates the obligation established in the first sentence of Article 2.2.1.1, because while "normally" confirms that "under normal or ordinary conditions" costs should be calculated on the basis of the records kept by the exporter or producer under investigation," it also directs that where conditions are demonstrated to be *not* normal or *not* ordinary, costs should *not* be calculated on the basis of these records. The adverb "normally" thus anticipates the two conditions to the first sentence of Article 2.2.1.1 introduced by the conjunction "provided that," as well as reflects that certain costs may be deemed unsuitable through the introductory phrase "[f]or the purpose of paragraph 2". It provides for a degree of flexibility and expressly contemplates that there will be instances when the evidence demonstrates that an investigating authority should *not* calculate costs on the basis of the records kept by the exporter or producer, even when these records satisfy the two conditions that follow the conjunction "provided that".

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

20. A "particular market situation" could affect all market participants, or its impact could be limited to some market participants. The definition of a market "situation" would be the "condition or state of" the market – which may relate to one, some, or all participants. This suggests that what constitutes a particular market "situation" should be evaluated on a case-by-case basis, based on the facts and circumstances before the investigating authority. An investigating authority is permitted to take into account government influence in the domestic market under the particular market situation provision. Also, a situation that equally affects both domestic and export markets can constitute a particular market situation.

21. The phrase "proper comparison" in Article 2.2 of the Anti-Dumping Agreements relates to the comparison that reveals whether a "product is to be considered as dumped", which starts with ascertaining the "normal value" of a product (Article 2.1). The normal value necessary for a dumping

comparison requires a *comparable* price, in the ordinary course of trade, preferably based on the like product in the domestic market of the exporting country (again, Article 2.1). Article 2.2 then reinforces that a suitable normal value is necessary for a "proper comparison". If there are no sales in the ordinary course of trade, resort may be made to a suitable proxy for the comparable price, in the ordinary course of trade, in the domestic market. Alternatively, if the particular market situation or the low volume of sales in the domestic market do not result in a suitable normal value (for example, because the sales do not generate a comparable, market-determined price), Article 2.2 also provides for resort to a proxy for the comparable price, in the ordinary course of trade. Thus, a "proper comparison" is one that starts with a normal value reflecting a *comparable* price, in the ordinary course of trade, that can start to answer the question whether a product is to be considered as dumped.

22. The phrase "proper comparison" in Article 2.2 and the phrase "fair comparison" in Article 2.4 are aimed at different lines of inquiry. Article 2.2 establishes certain alternatives for establishing normal value, when there are no domestic sales in the ordinary course of trade or when, because of a "particular market situation" or a "low volume of ... sales in the domestic market of the exporting country", "such sales do not permit a proper comparison". In contrast, the text of Article 2.4 presupposes that an investigating authority has established a normal value pursuant to Articles 2.1 and 2.2 and an export price pursuant to Article 2.3 and obligates an investigating authority to make a "fair comparison" *between* normal value and export price when determining the existence of dumping and when calculating a margin of dumping.

23. The Panel otherwise should not rely on the statements of the panel and Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, discussed by Indonesia at paragraphs 119-121 of its first written submission, as legal interpretations because Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, which are the basis of the Panel's terms of reference in this dispute, were not the object of a legal interpretation by the panel in *US – Anti-Dumping and Countervailing Duties (China)* and were not raised on appeal. The statements of the panel and Appellate Body are therefore in the nature of *obiter dicta* – statements not necessary to resolve the legal issues before the panel or raised on appeal.

24. Finally, Article VI:5 of the GATT 1994 is the only provision of the covered agreements that pertains to the interrelationship between the Anti-Dumping Agreement and the SCM Agreement. As the only provision linking the remedy in an anti-dumping proceeding with the remedy in a countervailing proceeding, Article VI:5 demonstrates that Members agreed only to constrain concurrent application of anti-dumping and countervailing duties where imposing anti-dumping duties would compensate for "the same situation of dumping or *export* subsidization". If the Members intended to constrain concurrent application in other situations, they would have provided so explicitly.
