

7.5.1 Conclusion

7.172. For the reasons elaborated above, we decline to make findings as to whether Australia has acted inconsistently with the *chapeau* of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by virtue of having calculated and imposed anti-dumping duties in excess of the dumping margin as established under Article 2 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. Regarding Australia's measure imposing anti-dumping duties on certain Indonesian exporters of A4 copy paper, as set forth in Anti-Dumping Notice No. 2017/39 dated 18 April 2017 accepting the recommendations and the reasons for the recommendations set out in the Final Report, we conclude:

- a. Indonesia has not established that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement when it found that a "particular market situation" existed in the Indonesian domestic market for A4 copy paper;
- b. Australia's measure is inconsistent with Article 2.2, first sentence, of the Anti-Dumping Agreement because the ADC disregarded domestic sales of A4 copy paper of Indah Kiat and Pindo Deli as the basis for determining normal value without properly determining that such sales did "not permit a proper comparison";
- c. Australia's measure is inconsistent with Article 2.2.1.1, first sentence, of the Anti-Dumping Agreement because the ADC has not established that both the first and second conditions in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement are satisfied when rejecting the pulp component of Indah Kiat's and Pindo Deli's records on the basis of the term "normally" and therefore has failed to give effect to the whole of the obligation in that provision;
- d. Australia's measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement because, having improperly rejected the pulp component of Indah Kiat's and Pindo Deli's records, the ADC had no basis to use Brazilian and South American export prices of pulp to China and Korea for the calculation of Indah Kiat's and Pindo Deli's pulp costs when constructing the cost of production of A4 copy paper in Indonesia; because, despite having before it the evidence indicating that Indah Kiat is an integrated producer and obtains pulp at its cost, the ADC failed to provide a reasoned and adequate explanation as to why it did not subtract profit from the pulp benchmark used to replace Indah Kiat's recorded pulp costs in constructing the cost of production of A4 copy paper for Indah Kiat; and because the ADC failed to provide a reasoned and adequate explanation as to why it did not replace the cost of woodchips and utilize Indah Kiat's other costs of producing pulp internally when constructing Indah Kiat's cost of production of A4 copy paper, assuming *arguendo* that the ADC were allowed to replace distorted costs; and
- e. Indonesia has not established that the ADC acted inconsistently with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement when it did not adjust the pulp benchmark used to replace Pindo Deli's recorded pulp costs for profit in constructing the cost of production of A4 copy paper for Pindo Deli.

8.2. We decline to decide whether Australia's measure is also inconsistent with the requirement to calculate the "cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement because the ADC has disregarded the hardwood pulp component of Indah Kiat's and Pindo Deli's records in constructing the cost of production of A4 copy paper in Indonesia and whether Australia has acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by virtue of having calculated and imposed anti-dumping duties in excess of the dumping margin as established under Article 2 of the Anti-Dumping Agreement.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent

with the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Indonesia under that agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that Australia bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

8.5. Indonesia requests that the Panel exercise its discretion under the second sentence of Article 19.1 of the DSU to "suggest ways in which Australia should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-Dumping Agreement and GATT 1994".³³² Indonesia considers that the measures at issue should be withdrawn.³³³

8.6. We note that Article 19.1 of the DSU allows, but does not require, us to suggest ways in which the Member concerned could implement the Panel's recommendations. Furthermore, under Article 21.3 of the DSU, the implementation of DSB recommendations and rulings is left, in the first instance, to the discretion of the implementing Member.³³⁴ We therefore deny Indonesia's request.

³³² Indonesia's first written submission, para. 185.

³³³ Indonesia's first written submission, para. 184.

³³⁴ Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EU – Footwear (China)*, para. 8.12; *EC – Fasteners (China)*, para. 8.8; and *US – Hot-Rolled Steel*, para. 8.11.