

**KOREA – ANTI-DUMPING DUTIES ON IMPORTS
OF CERTAIN PAPER FROM INDONESIA
(WT/DS312)**

Report of the Panel

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LIST OF ANNEXES

ANNEX A

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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I. INTRODUCTION

1.1 On 4 June 2004, the Republic of Indonesia ("Indonesia") requested consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("the GATT"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") regarding, *inter alia*, the imposition by the Republic of Korea ("Korea") of definitive anti-dumping duties on imports of business information paper and uncoated wood-free printing paper from Indonesia and certain aspects of the investigation leading thereto.¹ Korea and Indonesia consulted on 7 July 2004, but failed to settle the dispute.

1.2 On 16 August 2004, Indonesia requested the Dispute Settlement Body ("the DSB") to establish a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT, and Articles 17.4 and 17.5 of the Anti-Dumping Agreement ("the Agreement").

1.3 At its meeting on 27 September 2004, the DSB established a Panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Indonesia in document WT/DS312/2. At that meeting, the parties to the dispute also agreed that the panel should have standard terms of reference. The terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Indonesia in document WT/DS312/2, the matter referred to the DSB by Indonesia in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 18 October 2004, Indonesia requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 25 October 2004, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Ole Lundby

Members: Ms. Deborah Milstein
Ms. Leane Naidin

1.5 Canada, China, the European Communities, Japan and the United States reserved their third-party rights.

1.6 The Panel met with the parties on 1-2 February and on 30 March 2005. It met with the third parties on 2 February 2005.

II. FACTUAL ASPECTS

2.1 On 30 September 2002, the Korea Trade Commission ("the KTC") received an application from the Korean producers for the initiation of an anti-dumping investigation on the imports of "business information paper and wood-free printing paper" originating in China and Indonesia. The KTC sent questionnaires to four Indonesian companies: PT Indah Kiat Pulp and Paper Tbk ("Indah Kiat"), PT Pindo Deli Pulp and Paper Mills ("Pindo Deli"), PT Pabrik Kertas Tjiwi Kimia Tbk ("Tjiwi Kimia"), and PT Riau Andalan Kertas ("April Fine"). The KTC initiated the investigation on 14 November 2002 and issued the public notice of initiation on 26 November 2002. The original deadline for responses to the questionnaires sent to Indonesian companies was extended by three weeks. Indah Kiat and Pindo Deli responded to the questionnaires in a timely manner, while Tjiwi Kimia did not respond.

¹ WT/DS312/1

2.2 The KTC carried out, between 24-27 March 2003, a verification visit to verify information submitted by Indah Kiat and Pindo Deli. The KTC issued its preliminary determinations on 23 April 2003 in which it found a dumping margin of 11.56 per cent for Pindo Deli, 51.61 per cent for Tjiwi Kimia and a negative dumping margin of 0.52 per cent for Indah Kiat. The KTC also made a preliminary determination of threat of material injury. The KTC did not impose any provisional anti-dumping duties.

2.3 The KTC issued its final determination on 24 September 2003. In the context of its final determination, the KTC treated the three Indonesian companies which were part of the Sinar Mas Group, i.e. Indah Kiat, Pindo Deli and Tjiwi Kimia, as a single exporter and calculated one single dumping margin for the three of them, which was 8.22 per cent. In its final determination, the KTC made a determination of material injury. Consequently, Korea imposed an anti-dumping duty of 8.22 per cent for the Sinar Mas Group companies, 2.80 per cent for April Fine and 2.80 per cent for other Indonesian exporters.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. INDONESIA

3.1 Indonesia requests the Panel to find that in imposing the anti-dumping duty at issue, Korea acted inconsistently with its obligations under:

- (a) Article 6.8 of the Agreement by rejecting domestic sales information submitted by the Indonesian exporters Indah Kiat and Pindo Deli, and the CMI financial statements, and instead resorting to facts available to determine normal value for these exporters;
- (b) Article 6.8 and paragraph 3 of Annex II of the Agreement by failing to follow the requirements of paragraph 3 in rejecting the domestic sales information submitted by Indah Kiat and Pindo Deli, and the CMI financial statements and resorting to facts available to determine normal value for these exporters;
- (c) Article 6.8 and paragraph 6 of Annex II of the Agreement by failing to inform the exporters forthwith of the reasons why the domestic sales information of Indah Kiat and Pindo Deli, and the CMI financial statements, were being rejected and by failing to provide the exporters with an opportunity to provide further explanations within a reasonable period of time;
- (d) Article 6.8 and paragraph 7 of Annex II of the Agreement by failing to use special circumspection in using information from secondary sources in the determination of normal value for Indah Kiat and Pindo Deli.
- (e) Article 6.8 and paragraph 7 of Annex II of the Agreement by failing to use special circumspection in using information from secondary sources to determine the dumping margins for Tjiwi Kimia.
- (f) Article 6.8 and paragraph 6 of Annex II of the Agreement by failing to provide Indah Kiat and Pindo Deli with an opportunity to provide further explanations regarding Tjiwi Kimia within the meaning of paragraph 6.

- (g) Article 2.2 of the Agreement by failing to comply with the requirements of Article 2.2 in determining the normal values for Indah Kiat and Pindo Deli.
- (h) Articles 2.2, 2.2.1.1, 2.2.2. and 2.4 of the Agreement by improperly calculating constructed values for Indah Kiat and Pindo Deli, resulting in an unfair comparison with export price for these exporters.
- (i) Article 2.4 of the Agreement by failing to make due allowance for differences affecting price comparability between export prices and normal values for Indah Kiat and Pindo Deli.
- (j) Articles 6.10 and 9.3 of the Agreement by failing to determine an individual margin of dumping for Indah Kiat, Pindo Deli, and Tjiwi Kimia, resulting in the imposition of dumping duties in excess of the margin of dumping established under Article 2.
- (k) Article 5.8 of the Agreement by failing to terminate the investigation of Indah Kiat when it failed to find dumping by that exporter.
- (l) Article 6.7 of the Agreement by failing to provide Indah Kiat and Pindo Deli with the results of the on-site verification of those exporters.
- (m) Articles 6.4, 6.9 and 12.2 of the Agreement by failing to disclose to the exporters how it determined normal value, including the amounts used to arrive at the constructed value.
- (n) Articles 2.6, 3.1, 3.2, 3.4, 3.5, and 3.7 of the Agreement by defining PPC and WF paper as a single like product and reaching its injury determinations based on that definition.
- (o) Articles 3.1, 3.2 and 3.4 of the Agreement by failing to base its analysis of the price and volume effects of the imports under investigation on positive evidence or involve an objective determination and by improperly finding significant price undercutting within the meaning of Article 3.2.
- (p) Articles 3.1 and 3.4 of the Agreement by failing to properly consider all relevant injury factors.
- (q) Articles 3.1 and 3.5 of the Agreement by failing to properly establish a causal link between any injury suffered by the Korean industry and by failing to properly examine other known factors to ensure that injury caused by those factors was not attributed to the imports under investigation.
- (r) Articles 3.1, 3.4 and 3.5 of the Agreement by failing to consider the effect of the Korean industry's own imports in the injury and causation analyses.
- (s) Articles 3.1, 3.2 and 3.5 of the Agreement by treating imports from Indah Kiat as dumped imports for the purpose of the injury analysis.

- (t) Articles 6.1 and 6.9 of the Agreement by failing to establish a proper period of investigation of injury.
- (u) Articles 6.2, 6.4 and 12.2 of the Agreement by failing to provide the exporters with information regarding its like product determination.
- (v) Articles 6.4 and 6.9 of the Agreement by failing to disclose the basis of its material injury determination.
- (w) Article 6.5 of the Agreement by granting confidential treatment to information contained in the domestic industry's application without a showing of good cause or requiring non-confidential summaries.
 - (i) Article 1 of the Agreement by not ensuring that an anti-dumping measure is applied only under the circumstances provided for in Article VI of the GATT and pursuant to investigations initiated and conducted in accordance with the provisions of the Agreement.

3.2 Indonesia requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that the DSB request Korea to bring its measure at issue into conformity with the GATT and with the Anti-dumping Agreement by repealing Regulation No. 330 of the Ministry of Finance and Economy dated 7 November 2003 imposing definitive anti-dumping duties on imports of certain paper products from Indonesia.

B. KOREA

3.3 Korea requests the Panel to reject Indonesia's claims in their entirety.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel. The parties' arguments as presented in their submissions are summarised in this section.

A. FIRST WRITTEN SUBMISSION OF INDONESIA

4.2 The following summarizes Indonesia's arguments in its first submission.

1. Introduction

4.3 At issue in this dispute, Indonesia challenges various aspects of the anti-dumping measures imposed by Korea on imports of certain paper from Indonesia as inconsistent with Article VI of the GATT, Article 1 of the Agreement, and the other provisions of the Agreement discussed herein.

2. Factual Background

4.4 The KTC, the governmental authority responsible for the conduct of anti-dumping investigations in Korea, initiated this investigation on 14 November 2002, in response to an application submitted by five Korean paper producers² (the "applicants" or the "domestic industry").³

² The applicants were Shinho Paper, Hankook Paper, Hansol Paper, Dong- A Paper and Samil Paper. The domestic producers expressing support for the application were Moorim, Shin-Moorim, Kyesung, Namhan, Poongman, Hongwon, Samduk, Daehan and Pan-Asia. See *Application for Investigation Necessary for Imposing Anti-dumping duties*, 30 September 2002 (English translation supplied by Indonesia) (the "Application for Investigation") [Exhibit IDN-1(b)], pp. 16-18.

³ Application for Investigation [Exhibit IDN-1(b)].

The KTC investigated four Indonesian exporters, Indah Kiat, Pindo Deli, Tjiwi Kimia, and April Fine. The KTC defined the "product subject to investigation" as including two categories of information paper and uncoated woodfree paper:⁴ "PPC" (plain paper copier or business information paper used on copies in businesses and home offices) and "WF" (uncoated wood-free printing paper used for printing from printing presses, as well as for production of stationery items).

4.5 Indah Kiat and Pindo Deli each submitted detailed information on all relevant domestic and export sales of both WF and PPC paper.⁵ All domestic sales were made through a trading company called PT Cakrawala Mega Indah ("CMI"). Indah Kiat and Pindo Deli reported complete information regarding sales both to CMI and resales by CMI (referred to hereinafter as the "domestic sales information"). Tjiwi Kimia did not submit a questionnaire response, explaining instead that the volume of its exports to the Korean market was too low to justify an active participation in the investigation.⁶

4.6 The KTC fully verified the domestic sales information submitted by Indah Kiat and Pindo Deli. In its verification plan sent before the verifications, the KTC requested for the first time that Indah Kiat and Pindo Deli "prepare" financial statements of CMI for the years 2001 and 2002 for presentation at the verification⁷ to enable the KTC "to understand Indah Kiat [Pindo Deli] in order to carry out verification successfully."⁸ At the verification, Indah Kiat and Pindo Deli explained to the KTC that they would not be able to submit the financial statements of CMI because they did not control CMI and therefore could not compel the production of its documents, even though they had acted to the best of their ability.

4.7 The KTC did not provide any report on its on-site verifications. However, on 4 April 2003, the KTC held a "disclosure" meeting, at which it announced that it intended to reject entirely the domestic sales information and instead to resort to "facts available" to determine normal value.⁹ The KTC's stated ground for this was that Indah Kiat and Pindo Deli had not submitted the CMI financial statements. However, the KTC agreed to accept the CMI financial statements if they were submitted by 10 April 2003.¹⁰ By letters dated 9 April 2003, Indah Kiat and Pindo Deli submitted CMI's financial statements to the KTC.¹¹ Thus, these statements were submitted *before* the deadline of 10 April 2003 fixed by the KTC at the meeting of 4 April 2003, two full weeks before the KTC's preliminary determination and more than five months before the KTC's final determination.

4.8 In its Preliminary Determination,¹² the KTC rejected the domestic sales information and used facts available for both exporters on the ground that they had failed to provide relevant documents such as the CMI financial statements.¹³ Nevertheless, the KTC found that Indah Kiat, the largest

⁴ See, e.g., KTC, *Investigation Report on Preliminary Calculation of Dumping Rate for Indonesian and Chinese-made Business Information Paper and Uncoated Wood-Free Paper*, 23 April 2003 (English translation supplied by Indonesia) ("Preliminary Dumping Report") [Exhibit IDN 12(b)], pp. 11, 17.

⁵ April Fine also submitted a timely questionnaire response. Indonesia has not raised any claims regarding the KTC's calculation of dumping margins for this exporter in this dispute.

⁶ Letter from Arvind Gupta, General Manager, Sinar Mas Group (on behalf Indah Kiat and Pindo Deli) to Hyun Soo Kim, Deputy Director, Korean Trade Commission of 22 January 2003 [Exhibit IDN-19].

⁷ *Ibid.*, p. 4 (item VII.1.B(d)).

⁸ *Ibid.*, p. 4 (item VII.1.A).

⁹ *Affidavit by Won-Hyun Choi and Michael Shin*, 24 November 2004 [Exhibit IDN-26].

¹⁰ *Affidavit by Won-Hyun Choi and Michael Shin*, 24 November 2004 [Exhibit IDN-26].

¹¹ Letter from Arvind Gupta, General Manager, Sinar Mas Group (on behalf of Indah Kiat and Pindo Deli) to Seung Jin Bae, Director, Dumping Investigation Division, Korean Trade Commission of 9 April 2003 [Exhibit IDN-10].

¹² KTC, *A Resolution for Preliminary Judgement on Dumping of Indonesian and Chinese-made Business Information Paper and Wood-Free Printing Paper and Injury to Domestic Industry*, 23 April 2003 (English translation supplied by Indonesia) ("Preliminary Determination") [Exhibit IDN-11(b)].

¹³ Preliminary Dumping Report [Exhibit 12 (b)], p. 8 (for Pindo Deli), p. 15 (for Indah Kiat).

Indonesian exporter, had a dumping margin of minus 0.52 per cent.¹⁴ The KTC found a dumping margin of 11.56 per cent for Pindo Deli. For Tjiwi Kimia, the KTC used total facts available and determined a dumping margin of 51.61 per cent.

4.9 On 1 September 2003, the KTC disclosed a draft version of its final determination¹⁵, in which the KTC indicated that it had decided to calculate a single dumping margin for Indah Kiat, Pindo Deli, and Tjiwi Kimia, even though it had stated at the preliminary phase that it was not permitted to do so under Korean law. The KTC stated that it considered these exporters to be a "single economic entity." In its Final Determination¹⁶, the KTC calculated a dumping margin of 8.22 per cent per cent for the "single economic entity" comprised of Indah Kiat, Pindo Deli and Tjiwi Kimia. The KTC continued to reject the domestic sales information on the same grounds as before. The KTC also concluded that the dumped imports had caused material injury to the applicants.

3. Legal Argument

(a) Claims arising from the determination of dumping

(i) *Korea's use of "facts available" to calculate normal values for Indah Kiat and Pindo Deli was inconsistent with Article 6.8 and Annex II of the Agreement*

4.10 Under Article 6.8, the investigating authority may resort to facts available only if it has established either that (a) the interested party significantly impeded the investigation; or (b) the interested party did not provide necessary information (or refused access to necessary information) within a reasonable period of time. The KTC did not determine that either circumstance applied in this case and, indeed, could not reasonably have done so based on the evidence before it.

4.11 Both Indah Kiat and Pindo Deli cooperated in submitting complete questionnaire responses and verifying those responses. No discrepancies were found in any of these data during verification. Both parties submitted the CMI financial statements in accordance with the KTC's own revised deadline and indicated their willingness to provide any further information.¹⁷ The CMI financial statements could be used, at the most, to permit the KTC to perform an additional layer of verification of already-verified data, which the KTC was not in any case required to verify exhaustively.¹⁸ Thus, these exporters did not significantly impede the investigation.

4.12 Moreover, these exporters did not fail to provide "necessary information (or refused access to necessary information) within a reasonable period of time" within the meaning of Article 6.8. The domestic sales information was submitted in a timely fashion, as were the CMI financial statements, which were submitted *one day in advance* of the KTC's extended deadline, two weeks before the KTC's preliminary determination and more than five months before its final determination.

4.13 Even assuming that the CMI financial statements were untimely submitted, the KTC would not be entitled to rely on that fact alone to justify discarding both the domestic sales information and

¹⁴ In its determination of dumping margins, the KTC used a period of investigation for dumping of 1 October 2001 to 30 September 2002.

¹⁵ KTC, *Tentative Investigation Report on Dumping Rate circulated at 3 September meeting*, 3 September 2003.

¹⁶ KTC, *Final Resolution on Dumping Imports of Indonesian and Chinese-made Business Information Paper and Uncoated Wood-Free Printing Paper and Injury to Domestic Industry*, 24 September 2003 (English translation supplied by Indonesia) ("Final Determination") [Exhibit IDN-14(b)].

¹⁷ See Final Dumping Report [Exhibit IDN-15(b)], pp. 2-3, which contains charts indicating that all information sought from Indah Kiat and Pindo Deli was submitted and supported by documentary evidence. See also *Affidavit by Roger Simpson*, 24 November 2004 [Exhibit IDN-24].

¹⁸ Panel Report, *US – DRAMS*, para. 6.78 ("Article 6.6 does not explicitly require verification of all information to be relied on").

the statements themselves.¹⁹ The KTC should have found that, in light of all the facts and circumstances, the financial statements were nevertheless submitted within a reasonable period of time²⁰, as they were submitted merely 2 weeks after the initially stipulated deadline. Moreover, Indah Kiat and Pindo Deli encountered difficulties in obtaining and submitting the CMI financial statements, which the KTC was required to take into account.²¹ Also, the KTC was provided with full access to CMI's sales records during the verification.²² The KTC had already verified the domestic sales information, so the CMI financial statements were not necessary within the meaning of Article 6.8.²³

4.14 The KTC also failed to comply with the requirements of Article 6.8 and Annex II regarding the use of facts available. The domestic sales information, and the CMI financial statements, fulfilled all four criteria of Paragraph 3 of Annex II. The domestic sales information was actually *verified* extensively by the KTC. The CMI financial statements could have been verified by the KTC as they were received in sufficient time for the KTC to do so. The domestic sales information was timely submitted and could have been used without "undue difficulty."²⁴ Moreover, there is no reason why the circumstances surrounding the submission of the CMI financial statements would make the use of a distinct category of information, i.e., the *domestic sales information*, unduly difficult.²⁵ Finally, all of the information at issue was submitted within the requested deadlines and in the requested media.

4.15 Paragraph 6 requires an investigating authority to give the supplying party an *opportunity to provide further explanations within a reasonable period*. The KTC denied Indah Kiat and Pindo Deli any opportunity to explain and rectify any "failures" on which the KTC based its resort to facts available. The KTC also failed to comply with the requirements of paragraph 7 of Annex II, by failing to exercise "special circumspection" in its use of secondary information to determine the normal values for Indah Kiat and Pindo Deli.

(ii) *Korea's use of "facts available" to determine Tjiwi Kimia's dumping margin was inconsistent with Article 6.8 and Annex II of the Agreement*

4.16 In determining the normal value for Tjiwi Kimia, the KTC relied exclusively on data supplied by the applicants and thereby failed to act with the "special circumspection" required under paragraph 7. The KTC failed to check the information on which it relied against other sources or the information obtained from other interested parties during the course of the investigation. The massive difference between the dumping margins yielded by the use of the applicants' information and the margins calculated by the KTC for the other exporters, indicates that not only did the KTC fail to check the information provided by the applicants against other sources, but that the applicants' data was wholly unreliable.

4.17 By weight-averaging the dumping margins for all three exporters, the KTC used Tjiwi Kimia's high facts available dumping margin to increase the dumping margin for Indah Kiat and Pindo Deli. In this case, the KTC failed in its duty, pursuant to Annex II, paragraph 6, to notify these exporters and to allow them an opportunity to provide further information regarding Tjiwi Kimia's sales and their relevance to the investigation.²⁶

¹⁹ Appellate Body Report, *US - Hot Rolled Steel*, para. 89.

²⁰ *Ibid.*, para. 87.

²¹ *Ibid.*, para. 104.

²² *Affidavit by Roger Simpson*, 24 November 2004 [Exhibit IDN-24].

²³ See *Affidavit by Roger Simpson*, 24 November 2004 (Exhibit IDN-24). See also *See Final Dumping Report* [Exhibit IDN-15(b)], pp. 2-3, which contains charts indicating that all information sought from Indah Kiat and Pindo Deli was submitted and supported by documentary evidence.

²⁴ *Ibid.*, para. 7.72.

²⁵ *Ibid.*, para. 7.67.

²⁶ See *Argentina - Ceramic Tiles*, para. 6.67.

- (iii) *Korea's use of constructed value to determine normal values for Indah Kiat and Pindo Deli was inconsistent with Articles 2.2 and 6.8 of the Agreement*

4.18 The "constructed value" is one of three possible means of calculating "normal value" set out in Article 2.2 of the Agreement. Under Article 2.2 of the Agreement, the KTC could have departed from the use of home market sales as the basis for normal value only if it had made one of the three findings specified in that Article. The KTC made none of these findings. It did not conduct the viability test of Indonesian market demand because it could not review the completeness of the domestic sales data.²⁷ It did not perform the "sales below cost" test in order to determine whether there were sufficient domestic market sales in the ordinary course of trade.²⁸ Finally, the KTC did not find a "particular market situation" in Indonesia within the meaning of Article 2.2.

- (iv) *Korea's calculation of constructed value for Indah Kiat and Pindo Deli was inconsistent with Articles 2.2, 2.2.1.1, 2.2.2 and 2.4 of the Agreement*

4.19 The KTC's use of the constructed value as the basis for normal value for Indah Kiat and Pindo Deli was inconsistent with Articles 2.1 and 2.2 of the Agreement. The KTC's calculation contains several substantive errors.²⁹ First, the KTC based its calculation in part on the use of facts available, even though the KTC found no errors or deficiencies whatsoever in the exporters' reporting. Second, the KTC added financing expenses attributed to CMI to the calculation, even though CMI is merely a reseller that did not incur any manufacturing-related financing costs. By adding the financing expenses of Indah Kiat and Pindo Deli, the KTC overstated these expenses. Third, the KTC erred by relying on the [[Company A]]³⁰'s SG&A expenses as a proxy for CMI's expenses, because [[Company A]]³¹'s expenses related to manufacturing as well as selling activities. The KTC's errors resulted in an overstatement of the constructed value and rendered its determinations inconsistent with Articles 2.2, 2.2.1.1, and 2.2.2, governing the calculation of the constructed value. These errors also lead to an unfair comparison between normal value and export price, contrary to the requirements of Article 2.4.

- (v) *Korea's failure to make a fair comparison between normal value and export price by adjusting for selling expenses was inconsistent with Article 2.4 of the Agreement*

4.20 There was a clear difference between Indah Kiat's and Pindo Deli's domestic market sales and their export sales that affected the price comparability of these sales. The exporters' domestic sales were made via a reseller, CMI, to the first unrelated purchaser. CMI undertakes selling activities of its own in making the resales. In contrast, the exporters do not provide any distribution services on their export sales of the kind performed by CMI in the Indonesian market. The KTC should have adjusted for selling activities undertaken by CMI to reflect the difference in price comparability caused by the different circumstances of the domestic market sales. By failing to do so, the KTC acted contrary to Article 2.4 of the Agreement.³² Finally, the KTC added CMI's SG&A expenses to the constructed value calculated for Indah Kiat and Pindo Deli, for the purposes of its sales below cost test. However, the KTC did not subsequently remove these expenses for the purpose of the dumping margin calculation, resulting in an unfair comparison and a further violation of Article 2.4.

²⁷ Final Dumping Report [Exhibit IDN-15(b)], p. 9.

²⁸ *Ibid.*

²⁹ Final Dumping Report [Exhibit IDN-15(b)], p. 11.

³⁰ Korea requests that the data in square brackets be treated as confidential.

³¹ *Ibid.*

³² Final Dumping Report [Exhibit IDN-15(b)], p. 13 states that only transportation and packing costs were deducted from normal value.

- (vi) *Korea's treatment of Indah Kiat, Pindo Deli, and Tjiwi Kimia as a single economic entity was inconsistent with Articles 6.10 and 9.3 of the Agreement*

4.21 The KTC should have calculated separate dumping margins for Pindo Deli, Indah Kiat and Tjiwi Kimia, which are separate and distinct legal entities. Absent specific legal authorisation under the Agreement, an investigating authority cannot treat distinct exporters that are separate natural or legal persons as a single "exporter" for the purpose of calculating dumping margins.

4.22 Article 6.10 permits investigating authorities to depart from the requirement to calculate a separate margin for each exporter only in the case of "sampling" where there are too many exporters.³³ While other provisions of the Agreement, such as Articles 4.1(i) and 2.3, expressly authorizes investigating authorities to take into account affiliations between distinct legal entities, Article 6.10 does not do so, and contains no standards for doing so. By treating Indah Kiat, Pindo Deli, and Tjiwi Kimia as a single exporter, the KTC has impermissibly read into the text of Article 6.10 a concept that cannot be found in the text.³⁴ By imposing an anti-dumping duty on Indah Kiat in excess of the *de minimis* margin of dumping actually established for this exporter, the KTC also acted inconsistently with Article 9.3 of the Agreement.

- (vii) *Korea's failure to terminate the investigation of Indah Kiat was inconsistent with Article 5.8 of the Agreement*

4.23 Indah Kiat's individual dumping margin of minus 0.52 per cent in the Preliminary Determination was less than 2 per cent.³⁵ Accordingly, by failing to terminate the investigation in respect of Indah Kiat the KTC breached its obligations under Article 5.8 of the Agreement.

- (viii) *Korea's determinations contain several violations of the disclosure obligations contained in Articles 6.4, 6.7, 6.9 and 12.2 of the Agreement*

4.24 The KTC failed to make an adequate and detailed disclosure of the results of the verification visits, in violation of Article 6.7 of the Agreement. The KTC's failure to specifically disclose how and why it arrived at normal values for Indah Kiat and Pindo Deli, including how it had complied with Article 2.2 in reaching its final determination, is inconsistent with its obligations under Articles 6.4 and 6.9 of the Agreement. This failure also renders the KTC's determination inconsistent with Article 12.2.2, governing the public notice of the conclusion of the investigation, all relevant information and a full explanation of the reasons for the methodology used.

- (b) Claims relating to the determination of injury and causal link

- (i) *The KTC's treatment of PPC and WF Paper as "like products" was inconsistent with Articles 2.6, 3.1, 3.4, 3.5 and 3.7 of the Agreement*

4.25 During the investigation, the exporters argued that PPC and WF are not "like products" within the meaning of the Agreement. They argued that the KTC should have separately considered (1) the effect of Indonesian PPC imports on Korean PPC producers and (2) the effect of Indonesian WF imports on Korean WF producers for the purposes of its injury analysis.³⁶

³³ Appellate Body Report, *US – Sunset Reviews on Corrosion-Resistant Steel*, para. 154. See also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 116.

³⁴ See Appellate Body Report, *India – Patents*, para. 45, where the Appellate Body stated that "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."

³⁵ KTC, English Summary of Preliminary Determination, 9 May 2003 [Exhibit IDN-23], p. 5.

³⁶ *Ibid.*

4.26 The KTC did not address the question of whether PPC and WF are "like products" but instead whether Korean PPC is identical to Indonesian PPC and whether Korean WF is identical to Indonesian WF. Thus, the KTC fundamentally misconstrued the issue before it. Rather than conducting the proper enquiry into whether PPC and WF were "like products" the KTC instead merely enquired into the question, not in dispute, of whether Korean and Indonesian PPC, and Korean and Indonesian WF, were each "like products." This inquiry was simply irrelevant to the essential issue of whether PPC and WF are "like products." The KTC also failed to examine evidence showing that these products were different like products. Thus, the KTC's decision to treat these products as a single like product was inconsistent with Article 2.6.

(ii) *Korea's failure to conduct its injury and causal link determinations in an objective manner and to base these determinations on positive evidence was inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Agreement*

4.27 In examining whether there was significant price undercutting within the meaning of Article 3.2, the KTC did not properly evaluate evidence in the years 2000, 2001 and 2003, the prices of the investigated imports were *higher than* the prices charged by the Korean producers in their domestic market, resulting in violations of Articles 3.1 and 3.2.

4.28 Regarding the injury factors listed in Article 3.4, the KTC failed to properly evaluate these factors in the manner described by the Panel in *EC – Bed Linen (Article 21.5 – India)*.³⁷ While the KTC's injury determination recites the trends in many relevant factors, it does not contain any objective examination of these trends or explain how these trends support a finding of "material" injury.³⁸ In fact, the trends in many of the injury factors offered no support for the KTC's conclusion. The KTC's failure to properly evaluate these factors rendered its findings inconsistent with Articles 3.1, 3.2, 3.4 and 3.7 of the Agreement.

4.29 In its causation analysis, the KTC failed to address the decline in demand in the Korean market that affected the imports under investigation even more than it affected the Korean industry's own shipments. In addition, the evidence before the KTC indicated that the prices of the imports under investigation were greater than those charged by the domestic industry for much of the period of investigation. The KTC also failed to conduct any further analysis of whether imports from other sources may also have caused injury to the Korean industry. The KTC also failed to consider properly that the domestic industry's exports had declined sharply over the period of investigation. The KTC's failure to properly evaluate these factors rendered its findings inconsistent with Articles 3.1 and 3.5 of the Agreement.

4.30 The KTC failed to properly consider the impact on its analysis of the condition of the domestic industry of the fact that the Korean industry itself accounted for a very large portion of the total imports from Indonesia and China by the Korean producers themselves, which cannot be said to have caused injury to the Korean industry themselves. Finally, Indah Kiat's exports (with their *de minimis* margins) to Korea should have been classified as non-dumped imports and treated as such throughout the KTC's injury analysis. These failures rendered the KTC's determination inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Agreement.

(iii) *Korea's injury determinations contain several violations of the disclosure obligations contained in Articles 6.1, 6.4 and 6.9 of the Agreement*

4.31 The KTC's decision to extend the period of investigation for injury to include the first 6 months of 2003³⁹, without permitting the Indonesian exporters access to or any opportunity to

³⁷ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162.

³⁸ *Ibid.*, p. 14.

³⁹ Final Staff Report [Exhibit IDN-16(b)].

comment on the additional data, deprived the Indonesian exporters of their rights under Article 6.1 to an ample opportunity to present evidence relevant to the determination. This was also inconsistent with the requirement of Article 6.1.2 that all information submitted by the domestic producers should be promptly made available to the Indonesian industry and that of Article 6.4 that the KTC provide timely opportunities to see all relevant information used by the KTC and to prepare presentations based on this information. Finally, the KTC acted inconsistently with Article 6.9, which requires the KTC to inform the Indonesian exporters of the essential facts under consideration that form the basis of the KTC's decision, in sufficient time for the Indonesian exporters to defend their interests.

4.32 The KTC also failed to comply with its obligations under Articles 6.2, 6.4 and 12.2 of the Agreement by failing to provide the Indonesian exporters with information relating to its determination on the issue of like products. By failing to disclose details of its price effects analysis and the basis of its injury determination prior to the final determination, the KTC acted inconsistently with its obligation under Article 6.4 and 6.9 of the Agreement.

(iv) *Korea improperly granted confidential treatment to information contained in the Domestic Industry's application in violation of Article 6.5 of the Agreement*

4.33 The KTC granted confidential treatment to information contained in the domestic industry's application domestic industry without (i) requiring the applicants or the domestic industry to provide showing of good cause for such a treatment; (ii) requiring the applicants or the domestic industry to furnish non-confidential summaries "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence"; or (iii) any indication that the information could not be summarized and the reasons why summarization was not possible. This was inconsistent with Articles 6.5, Article 6.5.1 and Article 6.5.2 of the Agreement.

4. Request for Findings, Rulings and Recommendations

4.34 In the light of the considerations set out above, Indonesia requests the Panel to find that in imposing its anti-dumping measure against certain paper products from Indonesia, Korea acted inconsistently with its obligations under Article 6.8 and paragraphs 3, 6, and 7 of Annex II, and Articles 2.2, 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, 6.4, 6.5, 6.9, 6.10 and 12.2 of the Agreement.

4.35 Korea has also failed to respect its obligations under Article VI of the GATT and Article 1 of the Agreement to ensure that an anti-dumping measure is applied only under the circumstances provided for in Article VI of the GATT and pursuant to investigations initiated and conducted in accordance with the provisions of the Agreement. Indonesia requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that the DSB request Korea to bring the measure at issue into conformity with the GATT and with the Agreement.

5. Suggestions on Implementation

4.36 By the time the Panel issues its report on this matter, Indonesian exporters will have been subject to the measure at issue for nearly two years.⁴⁰ This measure has imposed, and continues to impose, a significant financial burden on Indonesia's exports. In these circumstances, Indonesia requests that the Panel exercise its discretion under Article 19.1 of the DSU to suggest ways in which Korea could implement the Panel's rulings and recommendations. Given that Korea's violations of its obligations under the Agreement in this case pervaded its investigation and were fundamental to the outcome of the investigation, Korea could not revise its determinations in accordance with the rulings and recommendations requested by Indonesia without reaching negative determinations of both

⁴⁰ The KTC's Final Determination was issued in September 2003; the Panel's report is expected to be issued in July 2005.

dumping and injury.⁴¹ Accordingly, Indonesia requests that the Panel suggest that Korea repeal Regulation No. 330 of the Ministry of Finance and Economy dated 7 November 2003 imposing definitive anti-dumping duties on imports of certain paper products from Indonesia.

B. FIRST WRITTEN SUBMISSION OF KOREA

4.37 The following summarizes Korea's arguments in its first submission.

1. The KTC's procedures were fair

4.38 Indonesia's claims in this proceeding are based on the contention that the KTC did not allow the Indonesian respondents — and, in particular, the respondents that were subsidiaries of the Indonesian Sinar Mas Group — a fair opportunity to defend their interests.

4.39 The evidence in this case demonstrates, however, that the KTC's investigatory procedures provided ample opportunity for all parties to submit information and arguments. For example:

- As part of its initiation process, the KTC prepared a detailed report reviewing the accuracy and adequacy of the application and made that report publicly available on its web-site.
- After initiating the investigation, the KTC issued detailed questionnaires to the Indonesian respondents with explicit descriptions of the required information.
- Prior to verification, the KTC consulted with the designated representative of the Sinar Mas Group respondents concerning the location of the materials needed for verification, and then sent a detailed verification work-plan to the Indonesian respondents.
- Shortly after verification, the KTC held a disclosure meeting, at which it provided to all parties (including the Sinar Mas Group's representatives) a written disclosure of the proposed preliminary dumping calculations, and an oral description of the problems encountered at the verification.
- In connection with its preliminary determination, the KTC issued a written explanation of its decision on the dumping and injury issues, as well as two additional reports by its KTC's Office of Investigations (one describing all of the information gathered in the dumping and injury investigations, and the other specifically focused on the information and issues relating to the dumping margin calculations and responding to the arguments presented by the interested parties). The non-confidential versions of these documents were posted on the KTC's web-site and mailed to the designated representative of the Sinar Mas Group respondents. In addition, the confidential version of the report on the preliminary dumping margin calculations was faxed to the designated representative of the Sinar Mas Group respondents.
- After its preliminary determination, the KTC requested that the domestic producers of uncoated "wood-free" paper provide updated injury-related information, in accordance with its normal practice. The updated information was summarized by the KTC in an "interim report."
- Before it issued its final determination, the KTC held a hearing on injury issues and a separate disclosure meeting on dumping margin calculation issues. At the injury hearing, the KTC provided copies of its "interim report" to all parties — including the designated Sinar Mas

⁴¹ Panel Report, *Argentina – Ceramic Tiles*, paras. 8.6-7.

Group representatives. At the dumping disclosure meeting, the KTC provided a copy of a written disclosure of the proposed final dumping calculations. Because the representatives of the Sinar Mas Group respondents did not attend the disclosure meeting, the KTC faxed the written disclosure of the proposed final dumping calculations to the designated Sinar Mas Group representative.

- After the injury hearing and dumping disclosure meetings, the Sinar Mas Group respondents were given an opportunity to comment on the materials provided. And, in fact, the Sinar Mas Group respondents did submit comments after those materials were provided to them.
- In connection with its preliminary determination, the KTC issued a written explanation of its decision on the dumping and injury issues, as well as two additional reports by its KTC's Office of Investigations (similar to those issued in connection with the preliminary determination).

These procedures gave the parties full notice of the required information, and also provided all parties with a reasonable opportunity to comment on the information that had been gathered. While Indonesia has attempted to concoct complaints about the KTC's procedure and disclosure, those claims simply do not withstand scrutiny.

4.40 Nevertheless, despite the KTC's efforts to ensure a fair proceeding, the Sinar Mas Group deliberately refused to provide necessary information. Two of the Group's mills — Indah Kiat and Pindo Deli — did respond to the KTC's questionnaires and did participate in the verification. However, a third Group mill — Tjiwi Kimia — simply refused to respond to the KTC's questionnaires at all. Another Group subsidiary — CMI, which handled *all* domestic sales by Indah Kiat and Pindo Deli — refused to provide the KTC access to its financial statements or accounting records during the verification, even though the designated representative of the Sinar Mas Group mills had been informed in advance that those materials would be required and had assured the KTC that the necessary materials would be available. More generally, the KTC found at verification that the representatives of the Sinar Mas Group companies had engaged in delaying tactics and had been “insincere and uncooperative all throughout the on-the-spot investigation.”

4.41 In light of these facts, Indonesia's suggestion that the Sinar Mas Group mills were treated unfairly is unsustainable. Those companies were given more than adequate opportunities to defend their interests. It is not the KTC's fault that the Sinar Mas Group decided, instead, to impede the investigation and withhold necessary information.

2. The KTC's dumping determination was consistent with the requirements of the Agreement

(a) Single dumping margin for the Sinar Mas Group Mills

4.42 Indonesia's primary complaint about the dumping calculations concerns the KTC's decision to calculate a single dumping margin for the Sinar Mas Group mills. According to Indonesia, the fact that the Sinar Mas Group mills are legally distinct under Indonesian corporate law required the KTC to assign separate dumping margins to each, under the provisions of Article 6.10 of the Agreement.

4.43 But, Article 6.10 does not speak in terms of “corporations.” Instead, it states that, “as a rule,” the authorities shall “determine an individual margin of dumping for each known *exporter or producer* ... of the product under investigation.” Nothing in the Agreement precludes investigating authorities from applying a functional definition of “exporter” — and thus treating separate corporations that act as a single entity as one “exporter or producer” for purposes of Article 6.10.

4.44 The evidence in this case demonstrated that the Sinar Mas Group mills had intertwined management structures, that they operated under the oversight of a single “corporate marketing” unit, and that all of the reported sales in the domestic market made through a single affiliated sales organization (CMI). In these circumstances, it was plainly reasonable for the KTC to treat the Sinar Mas Group mills as a single “exporter” for purposes of Article 6.10. Indonesia certainly has not identified any provision of the Agreement that precludes the KTC from interpreting the term “exporter” in that manner.

(b) Facts available for Tjiwi Kimia

4.45 Indonesia also asserts that the KTC improperly determined the export price and normal value for sales by Tjiwi Kimia based on relatively unfavourable information contained in the Korean producers’ initial application. According to Indonesia, the KTC should have assigned an export price and normal value to Tjiwi Kimia that reflected the information submitted by the other mills that did respond to the KTC’s questionnaires, despite Tjiwi Kimia’s complete failure to cooperate with the investigation. In addition, Indonesia argues that the KTC had an obligation to warn the other Sinar Mas Group mills that Tjiwi Kimia’s failure to respond might adversely affect the overall dumping margin assigned to the Group.

4.46 Contrary to Indonesia’s claims, however, paragraph 7 of Annex II of the Agreement specifically authorizes investigating authorities to reach a “less favourable” result when “an interested party does not cooperate and thus relevant information is being withheld.” Indonesia has not claimed that the information in the application (which the KTC relied upon to determine the export price and normal value for Tjiwi Kimia) was not “adequate and accurate.” And, it also has not identified any obligation in the Agreement that would have required the KTC to warn the other Sinar Mas Group companies of the consequences of their selective cooperation. Consequently, there is no basis for Indonesia’s claims.

(c) Facts available for sales through CMI

4.47 Indonesia also claims that the KTC erred in rejecting the submitted data on CMI’s domestic resales of Indah Kiat and Pindo Deli products, due to CMI’s refusal to allow access to its financial statements and accounting records. According to Indonesia, any deficiencies were cured after verification, when the Sinar Mas Group submitted two worksheets purporting to reflect CMI’s income statements for 2002 and 2003.

4.48 But this late submission could not cure the problems caused by CMI’s previous refusal to cooperate. The CMI financial statements and accounting records were needed by the KTC to verify the accuracy of the submitted domestic sales data. CMI’s refusal to allow access to those documents at verification — even though they had been requested both in the original questionnaire and again in the verification plan — prevented verification of the submitted domestic sales data.

4.49 Contrary to Indonesia’s claims, the KTC never asked the Sinar Mas Group to submit the CMI statements after verification, and never set a post-verification deadline for the submission of those statements⁴². CMI’s failure to allow access to those documents when they were needed at verification made any subsequent submission untimely. Moreover, the submission the Sinar Mas Group actually made after verification did not cure the problem, because there was no way for the KTC to verify the accuracy of the submitted worksheets, or to use the worksheets to verify the submitted CMI sales data, without scheduling another verification and having further access to CMI’s accounting records.

⁴² See Affidavit of Sang-Deok Han, Deputy Director, Dumping Investigation Division, 18 December 2004, Exhibit KOR-39.

4.50 As a separate matter, Indonesia also argues that, even if the CMI sales data was properly rejected, the KTC was not permitted to base normal value on “constructed value” without following the hierarchy established by Article 2.2 of the Agreement (under which constructed value normally would not be used unless there was a finding that the “particular market situation” or “low volume” of sales precluded the calculation of normal value based on domestic market sales). Indonesia also objects to the method used by the KTC to calculate constructed value — in particular, the inclusion of an amount corresponding to CMI’s selling, general and administrative (“SG&A”) expenses — and the KTC’s refusal to allow a “level-of-trade” adjustment reducing normal value.

4.51 It is true that, in this case, the KTC was not able to determine whether there was a “particular market situation” or “low volume” of sales. But the KTC’s inability to make that determination was the direct consequence of the Sinar Mas Group’s refusal to provide complete data and to permit verification. The Sinar Mas Group should not, therefore, be heard to complain about the KTC’s failure to conduct an analysis that had been rendered impossible by the Sinar Mas Group’s lack of cooperation. And, in any event, the use of constructed value was consistent with the overall context of the Agreement, because it allowed the KTC to reduce its reliance on “secondary sources,” which are disfavoured as a source of facts available under paragraph 7 of Annex II of the Agreement.

4.52 Finally, the inclusion of an amount corresponding to CMI’s SG&A expenses was appropriate to ensure that the normal value was calculated at the same level of trade as the sales that were used to determine the export price. The information submitted by the Sinar Mas Group respondents indicated that the sales from CMI to its customers were at the same level of trade as the sales from the mills to their customers in Korea. Because the export price was based on sales from the mills to Korean customers, the KTC properly included in normal value the expenses incurred in selling to CMI’s customers in the domestic market (at the same level of trade as the export sales). For the same reason, there was no basis for making an adjustment to reduce normal value to account for differences in level of trade.

(d) Continuation of investigation after determination of *de minimis* preliminary dumping margins for Indah Kiat

4.53 Indonesia argues that, under Article 5.8 of the Agreement, the investigation should have been terminated with respect to Indah Kiat at the time of the KTC’s preliminary determination, because the KTC preliminarily calculated a *de minimis* dumping margin for Indah Kiat. It should be noted, however, that Article 5.8 applies only when the authorities are “satisfied” that there is no dumping, and only when termination is appropriate for the entire “investigation” or “case.”

4.54 In this case, the *de minimis* dumping margin for Indah Kiat was calculated based on a company-specific analysis, and did not reflect a finding of no dumping for the “case” or “investigation” as a whole. Moreover, the KTC’s preliminary determination specifically reserved judgment on the issue whether the Sinar Mas Group companies should be considered separate “exporters” or a single “exporter” in its analysis. Thus, it is clear that, when the KTC made its preliminary determination, it was not “satisfied” that there was no dumping.

4.55 Moreover, the entity covered by the KTC’s final determination (the single, “collapsed” Sinar Mas Group exporter) was not the same as the entity for which the KTC had preliminarily found *de minimis* margins (the Indah Kiat corporation). Consequently, the *de minimis* preliminary dumping margin for Indah Kiat did not require termination of the investigation for the Sinar Mas Group “exporter.”

3. The KTC's injury determination was also consistent with the requirements of the Agreement

4.56 Indonesia's arguments concerning the issues relating to the injury determination are also unconvincing. Indonesia essentially concedes that the KTC analyzed all of the factors relevant to the injury determination. It appears that Indonesia's main complaint is that it would have preferred that the KTC assign different weights to the various factors it considered. Such arguments do not, however, provide a basis for finding the KTC's injury decision inconsistent with the requirements of the Agreement.

(a) Definition of like product

4.57 Indonesia also asserts that the KTC's injury analysis was distorted by an incorrect definition of the domestic "like product" and, hence, of the domestic industry. According to Indonesia, the "like product" defined by the KTC subsumed two distinct items — plain paper copier paper sold in smaller sheets and "other" wood-free paper sold in rolls or larger sheets — which are too dissimilar to be considered a single "like product."

4.58 On closer examination, however, the factual distinction proposed by Indonesia does not hold up. In fact, the evidence on the record demonstrates that plain paper copier paper was sometimes initially sold in rolls or larger sheets, and then cut by the customer into the smaller sheets described by Indonesia.

4.59 More importantly, the legal standard proposed by Indonesia has no basis in the Agreement. The Agreement's definition of "like product" (which is found in Article 2.6) specifies that the "like product" should be defined by similarity to the imported "product under investigation" — and not by differences among the products produced by the domestic industry. This interpretation was recently upheld by the Panel in the *US – Softwood Lumber* case, which held that the Agreement does not create an obligation to limit the like product to a single group of products sharing characteristics."

4.60 The KTC's approach to the like product definition in this case focused on the similarities between the imported product under investigation and the products produced by the domestic industry. It was, therefore, entirely consistent with the definition of "like product" found in Article 2.6, and with the Panel's decision in the *Softwood Lumber* case.

(b) Analysis of import volumes and price effects

4.61 Indonesia also claims that an affirmative injury determination should have been precluded by the fact that the average import prices were higher in *some* periods than the average prices for domestic products, and by the fact that the absolute volume of subject imports fell during the first half of 2003. Indonesia's arguments would, however, create obligations that are not found in the Agreement.

4.62 Articles 3.1 and 3.2 of the Agreement indicate that the investigating authorities must objectively examine evidence of the volume of dumped imports and the effect of dumped imports on prices, but they also caution that no single factor will necessarily give decisive guidance. Article 3.2 explicitly permits the investigating authority to base an injury determination on increases in import volumes *relative* to consumption — even if imports have fallen in absolute terms. Article 3.2 also specifically recognizes that an investigating authority may find that dumped imports affected the domestic industry's prices, in the absence of "price undercutting," based on evidence that "the effect of such imports is *otherwise* to depress prices ... or prevent price increases...."

4.63 The evidence before the KTC showed that there had been a sharp deterioration in the prices for both the domestic products and the dumped imports starting in 2000. It also found that the dumped

imports had steadily increased their share of the Korean market over the entire period examined. Under Article 3.2, these findings provided a sufficient basis for finding that the imports had increased in relative terms and that there had been an adverse effect on prices.

(c) Analysis of imports by Korean producers

4.64 Indonesia also asserts that the KTC erred by failing to consider the impact of the Korean industry's own imports as an alternative cause of injury. But, Indonesia's claims are based on a faulty analysis. While there may have been imports by individual Korean *producers*, there were no significant imports by the "domestic industry."

4.65 In this case, the KTC exercised the authority granted to it by Article 4.1 of the Agreement and excluded from the "domestic industry" those Korean producers that had imported significant volumes of the subject merchandise from the countries under investigation. Because the KTC had excluded the domestic producers with significant imports from the definition of the "domestic industry," it necessarily follows that the remaining producers that were considered part of the "domestic industry" did not have a significant volume of imports of the subject merchandise from the countries under investigation. Thus, Indonesia's argument is based on a false premise. The KTC's injury determination was based on data showing that the Korean producers that were not importing subject merchandise had been harmed by the imports under investigation.

(d) Conclusion

4.66 Indonesia apparently brought this claim based on its belief that the Sinar Mas Group's exporters were the victims of arbitrary governmental action. A fair review of the facts demonstrates, however, that the Sinar Mas Group companies were the victims only of their own recalcitrance. On the whole, the KTC's treatment of the Sinar Mas Group was actually quite mild, and entirely consistent with the limits prescribed by the Agreement. Indonesia's claims should, therefore, be dismissed.

C. FIRST ORAL STATEMENTS OF INDONESIA

4.67 The following summarizes Indonesia's arguments in its first oral statements.

1. Opening Statement of Indonesia at the First Meeting of the Panel

(a) The use of facts available for Indah Kiat and Pindo Deli

4.68 The factual record reveals that contrary to Korea's arguments, the exporters' domestic sales data were extensively verified. Prior to the verification, the Indonesian exporters had cooperated fully in the investigation and had provided all relevant information, including all necessary domestic sales transactions. The KTC verified sample transactions, including both sales to CMI and re-sales by CMI, requested both before and during the verification (see Exhibit IDN-20). The KTC also verified the quantity and value of the reported domestic sales, by tracing those values back to the exporters' financial statements, including a review of a breakdown of the exporters' sales, monthly sales totals, and sales ledgers for selected months. No discrepancies were found.

4.69 Korea's contention that it was not able to verify the data regarding the re-sales by CMI is incorrect. The sample sales transactions reviewed by the KTC *contained data relating to the re-sales by CMI*, including documents from independent sources such as CMI's banks. The KTC was also able to, and in fact did, check the completeness of the exporters' data by means of the sample selected sales traces.

4.70 By checking the reported sales by the exporters against the exporters' own financial statements, the KTC effectively verified that all relevant CMI re-sales were also reported. The questionnaire responses of Indah Kiat and Pindo Deli indicated that neither Indah Kiat nor Pindo Deli makes a sale in the domestic market unless CMI has first obtained a customer and issued an invoice to the customer and that CMI's invoice to the ultimate customer was a prerequisite for the exporters' invoice to CMI. This entails that every invoice from the exporter to CMI matched an invoice from CMI to the unaffiliated customer. Accordingly, by verifying the total of the exporters' own invoices to CMI, the KTC of necessity also verified the total of CMI's invoices to the first unaffiliated customers. The KTC also verified the prices charged by CMI on its re-sales. The KTC also verified, based on a sample of its own choosing, that the [[**]]⁴³ charged by CMI pursuant to an agreement between the exporters and CMI applied in every instance. Again, this was supported by CMI's bank statements.

4.71 The only document that was not provided at verification was the CMI financial statements. The relevant question for the Panel is whether this circumstance rendered the "domestic sales information" unverifiable". Indonesia has submitted evidence to the effect that the KTC indicated during a meeting held on 4 April 2003 that it would be willing to accept the CMI statement if it were submitted by 10 April 2003. The Panel should therefore consider the financial statement to have been timely submitted.

4.72 Even if the KTC had *not* indicated to the exporters that the financial statements would be accepted if submitted by 10 April, the KTC should nevertheless have used the statements. The KTC's failures to take a reasonable approach to deadlines, to examine the difficulties faced by the exporters in this case, and to evaluate whether the financial statements could be relied upon in its determinations all constitute violations of the duty to cooperate identified by the Appellate Body and found in Article 6.8, paragraphs 3 and 6 of Annex II, and Article 6.13.

4.73 The mere fact that the CMI financial statements were not required to be audited does not mean they were not "verifiable" within the meaning of paragraph 3 of Annex II. The KTC should have reviewed the statements and requested any additional information, such as supporting documentation for the financial statements themselves or the link between the financial statements and the questionnaire responses that it needed.

4.74 The CMI financial statements were not necessary to verify the data. Reconciliation using financial statements is not the only way to verify sales data, and loses its importance in the case of a re-seller like CMI. In situations involving a re-seller of goods obtained from several different suppliers, any reconciliation to the re-seller's financial statements is entirely dependent on the accuracy of the identification of the subset of the re-seller's sales that were purchased from the exporter under investigation. Therefore, any additional verification step involving the CMI financial statement would be dependent on the verification already done on identifying all of the sales from the exporters to CMI. Thus, the CMI financial statements would, at most, have permitted an additional, largely superfluous level of verification.

4.75 Korea has also argued that it was not provided with CMI's accounting records. Indonesia has provided evidence that the KTC's team was provided with on-line access to CMI's sales records, as well as an affidavit by the CMI officer that prepared the database of CMI sales and subsequently participated in the verification.

(b) Tjiwi Kimia

4.76 By stating that the KTC relied entirely on information contained in the application to determine the facts available margin for Tjiwi Kimia, Korea effectively concedes that the KTC took

⁴³ Korea requests that the data in square brackets be treated as confidential.

no further steps to check this information against secondary sources and therefore acted inconsistently with Article 6.8 and paragraph 7 of Annex II. It is not enough that the information on which the KTC relied had been deemed sufficient to justify the initiation of the investigation. The standard of evidence required to satisfy the requirements of Articles 5.2 and 5.3 is lower than the standard required to make a preliminary or final determination.

4.77 Korea appears to agree that in an investigation involving a single exporter, the investigating authority is required to notify the exporter of any deficiencies in its questionnaire response before resorting to facts available under Article 6.8 and paragraph 6 of Annex II. Had the KTC treated the three exporters as a single entity early in the investigation, it would have been required to give them an opportunity to address the missing Tjiwi Kimia data. Korea cannot diminish the exporters' rights in this regard simply by waiting until immediately before the final determination to decide to treat the three exporters as a single entity.

(c) Calculation of individual margins for each exporter

4.78 Korea argues that the investigating authority has discretion to interpret the phrase "each known exporter" to refer to "several known exporters" that the investigating authority is permitted to combine into a single entity. As a practical matter, this interpretation would deprive the first sentence of Article 6.10, including the verb "shall determine," of any *effet utile*. Korea does not explain what this sentence would mean if the investigating authority were given unlimited discretion to "collapse" separate exporters, or what standards investigating authorities must use to "collapse" exporters.

4.79 The mere existence of a legal relationship between individual exporters cannot be an objective basis for this decision, as it says nothing about how an individual exporter determines its export prices. The KTC did not make any factual findings that the Indonesian exporters coordinated their prices during the period of investigation. In fact, all of the evidence on the record shows that the three exporters conducted their export sales activities separately. Thus, even if it were legally permissible for the KTC to "collapse" different exporters, the KTC has not provided an explanation that would permit the Panel to conclude that its determination was unbiased and objective.

(d) Fair comparison

4.80 Korea has clarified that it used the entire *production and sales* related SG&A expenses of another Indonesian exporter [[Company A]]⁴⁴ as the basis of the selling expenses attributable to CMI, which resulted in impermissible double-counting of certain SG&A and interest expenses. The CMI financial statements, which included its SG&A and interest expenses, were provided in a timely and usable manner. The KTC could also have avoided double-counting when it used the [[Company A]]⁴⁵ data, by separating [[Company A]]⁴⁶'s sales-related expenses from its overall corporate SG&A figures and using only the sales-related expenses (not production-related expenses) to approximate the expenses incurred by CMI.

4.81 The KTC's double-counting of interest expenses was unjustified. CMI is a trading company that had no assets to finance by borrowing. The KTC verified that the exporters delivered the goods directly to CMI's customer, so CMI could not have incurred any expenses to finance inventories, and that CMI's sales terms were "cash before delivery," so that it did not incur interest expenses to finance its accounts receivable. Thus, the KTC verified that CMI did not incur financing expenses. The use of the full amount of the exporters' own financing expenses was totally unjustified and grossly overstated these actual expenses.

⁴⁴ Korea requests that the data in square brackets be treated as confidential.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

4.82 Regarding the KTC's failure to deduct selling expenses incurred by CMI from normal value, the evidence shows that the sales to unaffiliated customers in the domestic market involve selling activities by CMI and that there are no comparable activities on export market sales. Therefore, the Indonesian exporters incurred a category of expense on domestic sales – CMI's selling expenses – that was not incurred on export sales. Whether this means that these sales were at a different level of trade, or simply involved different circumstances, these expenses clearly affected the price comparability between the normal value and the export price. Using either terminology, an adjustment was necessary under the third sentence of Article 2.4 of the Agreement.

(e) Like product

4.83 Article 2.6 emphasizes that the domestic product must be "like" the imported product "in all respects." This requires not just external consistency between the imported product and the domestic product but also *internal* consistency. To conclude otherwise, that the Agreement permits only that the investigating authority define the domestic like product as having the same external boundaries as the imported product, would be to read the requirement of likeness "in all respects" out of the Agreement and result in an injury analysis that does not objectively reflect an analysis of the competitive impact of the imports under investigation with the domestic products with which they actually compete.

4.84 Korea effectively concedes that the KTC failed to consider whether PPC and WF paper were "like" products. Thus, the Panel should find that the KTC's like product analysis was inconsistent with Article 2.6, and that its injury analysis, based on this flawed definition of the like product, was inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Agreement.

(f) The price and volume effects of imports

4.85 Korea's admission that the evidence showed a "mixed picture" on price effects undermines its Article 3.2 analysis. As the evidence provided by Korea in paragraph 171 of its submission shows, apart from the first year of the period of investigation, the price of the imports was at or above the price of the domestic product for the remainder of the period. Korea's admission that the price data shows a "mixed picture" undermines the KTC's analysis of "significant" price undercutting or depression. The KTC cannot objectively reach an injury finding based in part on the price effects of imports where there is a "mixed picture" regarding those effects.

4.86 Korea also argues that the volume of imports under investigation relative to consumption increased substantially. However, the data supplied by Korea shows that dumped imports in fact declined by 15.3 per cent in the first half of 2003, while the decline in domestic shipments was only 11.9 per cent. In addition, the KTC significantly overstated the import market shares by understating total domestic consumption.

(g) The consideration of injury factors, causation analysis and own imports by the domestic industry

4.87 The KTC's injury analysis amounts to nothing more than a recitation of the data points relating to the factors under consideration. The KTC cannot simply recite the data points and reach a conclusion, but it must exercise judgment to objectively place trends in their context. The injury factors showed conflicting trends that were inconsistent with a finding of injury. For example, the decline in employment coincided with increases in the domestic industry's profits increased. Wages and productivity increased as employment decreased. There was no correlation between the trends in the industry's operating profits and the imports under investigation.

4.88 Likewise, the KTC's causation analysis largely consists of nothing more than a recital of the relevant data points and a sentence reaching a conclusion. The KTC made no effort to evaluate or

place in context the evolution of the industry's operating profits, especially the fact that operating profits were positive during most of the period of investigation, even at periods when imports increased. The KTC made no analysis whatsoever of the effect of the decline in domestic consumption on the performance of the domestic industry. The KTC's examination of two other possible causes of injury (loss of export markets and imports from third countries) was also inadequate and cursory, and failed to ensure that injury from those factors was not attributed to the imports.

4.89 Korea has not explained with any clarity how the KTC actually considered the issue of imports by the domestic industry in its injury determination. Indonesia's claims on this issue are also based on the failure of the KTC to consider the importance of these imports to the assessment of the performance of the domestic industry. However, the KTC did not address this issue in its injury analysis, even though Indonesian exporters raised it.

(h) Procedural issues

4.90 Korea argues that it is not required to provide a written report on the verification and that it is sufficient if it made proper disclosure of the essential facts under consideration pursuant to Article 6.9. Korea misreads the relevant provisions of the Agreement. Article 6.7 contains requirements which are separate and distinct from the requirement under Article 6.9. Korea also argues that oral disclosure of the results of the verification is sufficient. Indonesia is not aware of any instance in which oral disclosure satisfies the procedural obligations of the Agreement. Lastly, Korea argues that it was not required to disclose "actual calculation figures" to the Indonesian exporters. However, these figures are *the* "essential facts" on which the determination of dumping margins is based within the meaning of Article 6.9. Exporters cannot possibly evaluate whether the investigating authority has in fact made a fair comparison within the meaning of Article 2.4 unless they know what comparison was actually made.

2. Closing Statement of Indonesia at the First Meeting of the Panel

4.91 Anti-dumping investigations should not be conducted in an opportunistic manner to facilitate the imposition of protectionist measures. In its written submission and its statement to the Panel, Indonesia has explained in detail how the KTC's actions were outcome-driven in several respects.

4.92 Defending those actions before the Panel, Korea takes the position that the KTC has absolute discretion in the conduct of its investigations and how it responds to issues that arise in the course of the investigation. Korea also considers that Indonesia and its exporters must abide by the KTC's determinations no matter what. In fact, the Agreement contains detailed rules governing how these investigations are to be conducted. These rules strike a balance between the investigating authority's needs, the requirement of fairness and objectivity, and the practical difficulties that inevitably may arise in investigations of this complexity.

4.93 In its first written submission, Indonesia went through the rules of anti-dumping step-by-step, measuring the KTC's conduct against those detailed rules. Korea prefers not to discuss the KTC's actions in the context of those rules, hoping instead that its complaints regarding the Indonesian exporters will distract the Panel from analyzing the KTC's actions under those rules. Indonesia trusts that having conducted its own detailed evaluation of the facts of this investigation and the standards contained in the Agreement, the Panel will conclude the flaws Indonesia has identified in the KTC's investigation constitute violations of the provisions of the GATT Article VI and the Agreement that were identified in Indonesia's first written submission.

D. FIRST ORAL STATEMENTS OF KOREA

4.94 The following summarizes Korea's arguments in its first oral statements.

1. Opening Statement of Korea at the First Meeting of the Panel

4.95 As a frequent target of unfair and arbitrary antidumping actions, Korea recognizes the fundamental importance of the WTO dispute settlement process. Nevertheless, Korea cannot see the merits in Indonesia's complaints. Among other things, Indonesia's arguments fail to recognize the role played by the main Indonesian exporter in creating a situation in which an unfavourable result was inevitable. In addition, Indonesia's claims concerning the injury finding improperly seek to ambush Korea with arguments that were never presented to the KTC. An objective review demonstrates that the KTC's determinations were consistent with the Agreement's requirements.

(a) Single dumping margin for the Sinar Mas Group Mills

4.96 According to Indonesia, Article 6.10 of the Agreement required the KTC to assign separate dumping margins to each corporation that had exports to Korea. But, Article 6.10 requires, "as a rule," a separate dumping margin for each "exporter or producer." Nothing in the Agreement precludes investigating authorities from applying a functional definition of "exporter" — and thus treating separate corporations that act as a single entity as one "exporter or producer" for purposes of Article 6.10.

4.97 At the same time, Korea does not agree with the third parties who suggest that any affiliated corporations may be treated as a single exporter. In Korea's view, a mere potential for affiliates to act in a coordinated fashion is not sufficient. Instead, there must be evidence that the affiliated corporations did in fact act as a single entity. In this case, the KTC's decision to treat them as a single "exporters" was appropriate precisely because the evidence in this case demonstrated that the Sinar Mas Group mills did act as a single entity.

(b) Facts available for Tjiwi Kimia

4.98 Indonesia also objects to the KTC's use of information contained in the Korean producers' application to determine the export price and normal value for Tjiwi Kimia. But the use of these "less favourable" facts available was consistent with paragraph 7 of Annex II of the Agreement — which specifically authorizes investigating authorities to reach a "less favourable" result when "an interested party does not cooperate and thus relevant information is being withheld." Also, contrary to Indonesia's claims, the Agreement does not require investigating authorities to warn respondents about the consequences of non-cooperation. The Agreement itself makes clear what those consequences may be.

4.99 Finally, the arguments about the extent to which the KTC corroborated the "facts available" used to determine Tjiwi Kimia's export price and normal value do not apply. The information relied upon came entirely from independent and reliable sources — *i.e.*, from official Korean government customs statistics and from information obtained by the Korea Trade - Investment Promotion Agency. Furthermore, as part of its analysis, the KTC's staff actually did compare the normal value data in the application to the data submitted by the responding companies, and found it to be comparable.

(c) Facts available for sales through CMI

4.100 Indonesia claims that the KTC should not have rejected the submitted CMI data, because the problems caused by CMI's refusal to allow access to its records at verification were cured when the Sinar Mas Group subsequently submitted two worksheets purporting to reflect CMI's income statements. But this late submission could not cure the problems caused by CMI's previous refusal to cooperate, because there was no way for the KTC to go back in time to verify the accuracy of the submitted worksheets, or to use the worksheets to verify the submitted CMI sales data.

4.101 Indonesia also objects to the method used by the KTC's inclusion in constructed value of an amount corresponding to CMI's selling, general and administrative ("SG&A") expenses, and to the KTC's refusal to allow a "level-of-trade" adjustment. But, the information submitted by the Sinar Mas Group indicated that the sales from CMI to its customers were at the *same* level of trade as the sales from the mills to their customers in Korea. The inclusion of an amount corresponding to CMI's SG&A expenses was appropriate, therefore, to ensure that the normal value was calculated at the same level of trade as the sales that were used to determine the export price.

(d) Continuation of investigation after preliminary determination

4.102 Indonesia argues that, under Article 5.8 of the Agreement, the investigation should have been terminated with respect to Indah Kiat once the KTC preliminarily calculated a *de minimis* dumping margin for Indah Kiat. But Article 5.8 applies only when the authorities are "satisfied" that there is no dumping, and only when termination is appropriate for the entire "investigation" or "case." In this case, the preliminary dumping margin for Indah Kiat was calculated based on a company-specific analysis, and did not reflect a finding of no dumping for the "case" or "investigation" as a whole. Moreover, the KTC's preliminary determination specifically reserved judgment on the issue whether the Sinar Mas Group companies should be considered separate "exporters" or a single "exporter" in its analysis. The entity covered by the KTC's final determination (the single, "collapsed" Sinar Mas Group exporter) was not the same as the entity for which the KTC had preliminarily found *de minimis* margins (the Indah Kiat corporation). Consequently, the *de minimis* preliminary dumping margin for Indah Kiat did not require termination of the investigation for the Sinar Mas Group "exporter."

(e) Like product

4.103 According to Indonesia, the KTC should have found that there were two "like products." On closer examination, however, the factual distinction proposed by Indonesia does not hold up. Moreover, the legal standard proposed by Indonesia has no basis in the Agreement. The Agreement's definition of "like product" specifies that the "like product" should be defined by similarity to the imported "product under investigation" — and not by differences among the products produced by the domestic industry.

4.104 Canada has argued that the term "product under investigation" must impose some limits on the scope of the items included in the investigation. Korea does not disagree with Canada's logic. But Canada's argument is not relevant to this proceeding, because Indonesia has not objected to the KTC's definition of the "product under investigation." Having accepted the KTC's definition of the "product under investigation," Indonesia has no grounds to object to the definition of the "like product," because the "like product" must, under Article 2.6, be defined based on the similarity to the "product under investigation."

(f) Consideration of injury factors

4.105 Indonesia's arguments present a detailed discussion of the updated injury data collected by the KTC, and attempt to show that this data could have supported a finding that the Korean industry had not been injured. It is worth noting, however, that Indonesia's arguments concerning the updated data were never actually made to the KTC during the investigation. Because the Indonesian respondents failed to submit these arguments to the KTC, the KTC never had an opportunity to respond to them.

4.106 In any event, Indonesia's arguments are unpersuasive. The Agreement clearly does require investigating authorities to "consider" various factors in making injury determinations. However, the Agreement does not require any particular analysis of those factors, or mandate any particular result. It is clear in this case that the KTC did consider all of the factors identified in the Agreement. The KTC's determination explained how the analysis of each of these factors led it to an affirmative injury

determination. The KTC's analysis and explanation were logical and reasonable. Nothing more was required under the Agreement.

4.107 In this regard, Indonesia has attempted to create obligations that are not found in the Agreement. Article 3.2 explicitly permits the investigating authority to base an injury determination on increases in import volumes *relative* to consumption — even if imports have fallen in absolute terms. Article 3.2 also specifically recognizes that an investigating authority may find that dumped imports affected the domestic industry's prices, in the absence of "price undercutting," based on evidence that "the effect of such imports is *otherwise* to depress prices ... *or* prevent price increases...." Nothing in these provisions would prohibit an affirmative injury determination when the import prices are higher than the domestic prices, or when imports have gained market share, but fallen in absolute terms.

(g) Analysis of imports by Korean producers

4.108 Finally, Indonesia asserts that the KTC erred by failing to consider the impact of the Korean *industry's* own imports as an alternative cause of injury. These claims are, however, based on a faulty analysis.

4.109 In this case, the KTC exercised the authority granted to it by Article 4.1 of the Agreement and excluded from the "domestic industry" those Korean producers that had imported significant volumes of the subject merchandise from the countries under investigation. Because the KTC had excluded the domestic producers with significant imports from the definition of the "domestic industry," it necessarily follows that the remaining producers that *were* considered part of the "domestic industry" did not have a significant volume of imports of the subject merchandise from the countries under investigation. Thus, Indonesia's argument is based on a false premise.

2. Closing Statement of Korea at the First Meeting of the Panel

4.110 In Korea's view, this dispute is, among other things, about non-cooperation by the three Sinar Mas Group mills. One of them decided not to participate in the investigation at all. The other two refused to allow the Korean investigating authorities access to documentation necessary for verification, leaving the Korean authorities no other choice but to resort to facts available.

4.111 The full cooperation of respondents is a fundamental aspect of anti-dumping investigations. Investigating authorities do not have legal tools to compel respondents to submit the information needed to perform the analysis required by the Agreement. They must depend instead on the willingness of respondents to cooperate - a willingness that may only be encouraged, but not compelled, by threats of unfavourable facts available.

4.112 Despite the Sinar Mas Group's lack of cooperation, the KTC conducted the investigation and made the necessary determinations within the bounds of the disciplines envisaged in the Agreement. The non-cooperating respondents should be left to bear the consequences of their action, instead of their government being forced to try to relieve them of these consequences through the WTO dispute settlement process.

4.113 Having said that, the Korean delegation wishes to take this opportunity to put on record its concern about the composition of the Indonesian delegation which includes employees of Sinar Mas Group. In Korea's view, Indonesia's decision to compose its delegation in this manner, and to share Korea's confidential submission with company employees, constitutes a clear violation of Article 18.2 of the DSU which sets out requirements for protection of confidential information. The confidential information contained in Indonesia's oral statement has now been given to the main Indonesian producer and exporter of the product under consideration. Given Indonesia's admission that the employees of the Sinar Mas Group participated in the preparation of that statement, Korea can only

assume that all the confidential information that Korea submitted to the Panel in its first written submission and related exhibits has been passed on to an Indonesian paper producer that competes directly with its Korean counterparts.

4.114 In view of the seriousness of the violation of Article 18.2 of the DSU in terms of potential commercial damage to the Korean paper industry, the Korean delegation raised an objection to the presence of the Indonesian industry representative in the room in the morning of 1 February 2005. In order to minimize the disclosure of the confidential information, Korea requested that they remain outside the room during the Panel hearing.

4.115 It is unfortunate that the Panel ruled in favour of Indonesia on the basis of Paragraph 15 of its Working Procedures. Korea has reservations about the ruling which entails invalidation of the treaty provisions by a procedural guidance in the Working Procedure. A member's right to determine the composition of its own delegation should not be construed to permit circumvention of the requirement to protect confidential information.

4.116 Korea recognizes that, under the Working Procedures, it is Indonesia's responsibility to ensure that the confidentiality obligations of Article 18.2 are met. However, when the facts demonstrate that Indonesia has not fulfilled that responsibility, the Panel must act. Indonesia's failure to honour its Article 18.2 commitments does not absolve the Panel of its independent responsibilities. At a minimum, the Panel should instruct Indonesia to remove all industry representatives from its delegation, to cease any distribution of the confidential submissions in this proceeding to industry representatives, and to ensure that any copies of confidential submissions that were previously distributed to industry representatives are returned to Indonesian government and destroyed.

4.117 In this regard, Korea found the Panel's suggestion after the ruling to set up a special procedure governing protection of confidential information not to be a viable option, given the advanced stage of the Panel process. Such procedure would only have been meaningful if it had been established, at the latest, prior to the first submission.

4.118 It should also be noted that the Korean delegation did not object to the above-mentioned ruling of the Panel in the interest of expediting the proceedings of this Panel, despite the fact that Korea is the defending party in this dispute. As Korea made it clear immediately after the said Panel's ruling, it reserves its right to raise this issue in the future as appropriate.

E. SECOND WRITTEN SUBMISSION OF INDONESIA

4.119 The following summarizes Indonesia's arguments in its second submission.

1. Introduction

4.120 In resolving this dispute, the Panel must be able to discern from specific statements on the record that matters the KTC was required to address were properly considered and decided. In addition, the Panel may not rely on *ex post* explanations regarding the KTC's reasoning or findings.

2. Legal Argument

(a) Claims arising from the determination of dumping

(i) *Korea's use of "facts available" to calculate normal values for Indah Kiat and Pindo Deli was inconsistent with Article 6.8 and Annex II of the Agreement*

4.121 When the KTC arrived in Indonesia to conduct the verifications, Indah Kiat and Pindo Deli had cooperated fully and comprehensively in the KTC's investigation. These exporters had submitted

all requested data, and had written to the KTC asking whether they would be receiving a supplemental questionnaire. The KTC's verification plan was the first time the KTC specifically requested the Indonesian exporters to "prepare" – not to "submit" – CMI's financial statement. At this point, there is no reason why the KTC could have concluded that these exporters were uncooperative under Article 6.8 and no evidence that the KTC did so.

4.122 The exporters' inability to provide the CMI statements at the start of verification was the first stumbling block in a hitherto normal investigation. Articles 6.8 and Annex II contain detailed procedures that must be applied objectively by the investigating authority in (i) dealing with any such stumbling blocks; and (ii) assessing the nature or size of any stumbling block encountered in the investigation.

4.123 The KTC took *no* steps to deal with the exporters' predicament other than to treat it as a "wilful refusal" and a "refusal to cooperate" that permitted the use of facts available without any further consideration. This is inconsistent with the KTC's obligations under Article 6.8 and Annex II. The KTC failed to consider the practical ability of the interested parties to comply fully with its requests. The KTC took no steps to assist the exporters in overcoming difficulties. The KTC neither assisted nor made allowances for the inability of the exporters to provide the financial statements at the start of verification. The KTC ignored its obligation under paragraph 5 of Annex II not to discard information simply because it is not "ideal in all respects." The KTC improperly failed to consider providing additional time to obtain the CMI financial statements, or to accept these statements when they were finally submitted. To the extent that the KTC rejected the CMI financial statements submitted on 9 April 2003 "*for the sole reason* that it was submitted beyond the deadlines," the KTC also acted inconsistently with Article 6.8. Korea has also not shown how the KTC determined that the CMI financial statements were not submitted within a reasonable period of time. In contrast, the KTC was able to collect data relating to the domestic industry three months after the CMI financial statements and use it in its determinations. The KTC failed to discharge its obligation to consider whether it could use these statements "without undue difficulty" under paragraph 3 of Annex II. The KTC failed to discharge this obligation.

4.124 Information can be "verifiable" under paragraph 3 of Annex II if the accuracy of information can be determined by "*an objective process of examination,*" without limitation to any one way of doing this. Thus, the USDOC manual states that the "ways and means of [verifying completeness] varies from response to response and from respondent to respondent;" that "no two verifications are alike;" and that the verifiers must "above all, be flexible."

4.125 The obligation to report CMI re-sales is defined by the quantity and value of sales from the exporters to CMI: the "total pool of reportable transactions" is found by reference to the database of sales by the exporters to CMI, not CMI's financial statements. The question of whether the exporters properly reported all appropriate re-sales by CMI can only be answered by examining the CMI re-sales of each of the sales to CMI. The CMI financial statements have very limited relevance to this process. The KTC actually verified extensively both the exporters' sales to CMI and CMI's re-sales to the first unaffiliated customer without finding any errors or discrepancies, including a review of CMI's own documents, including invoices; and independently-sourced documents, such as CMI's bank statements. Also, the exporters made available to the KTC the CMI staff member that worked on preparing the sales database, who made her computer records available to the KTC's verifiers. Korea's *ex post* allegations that some of the documents the KTC saw at verification might have been falsified are not supported by the record and are contradicted by the KTC's own findings at verification. Finally, "Perfection is not the standard" for verifications.

4.126 Under paragraph 6, if the investigating authority decides to reject information, it is required to inform the exporters forthwith and to provide it with an opportunity to correct whatever deficiency exists, even if the alleged failure to provide supporting information came in response to a supplemental request in the KTC's verification plan. Korea's argument that the KTC did not invite

the Indonesian exporters to provide the CMI financial statements at the 4 April 2003 disclosure meeting is an admission that the KTC did not fulfil its obligations under paragraph 6. The CMI financial statements were not necessary for other purposes. In addition, any omissions relating to minor adjustment items such as credit notes could not justify the rejection of the entire domestic sales data.

- (b) Korea's calculation of constructed value for Indah Kiat and Pindo Deli was inconsistent with Articles 2.2, 2.2.1.1, 2.2.2, 2.4, and 6.8 of the Agreement

4.127 The KTC should have relied on CMI's submitted financial statements to determine amounts for SG&A and interest expenses for CMI. In addition, the manner in which the KTC calculated CMI's SG&A and interest expenses was inconsistent with both the requirement of Article 6.8 and paragraph 7 of Annex II that the KTC must exercise special circumspection in the use of facts available and with the requirements of Articles 2, 2.2.1.1, 2.2.2, and 2.4 that the investigating authority may only include reasonable amounts relating to the production and sales of the relevant product in its calculation of SG&A and interest expenses to ensure a fair comparison with export price.

4.128 The KTC used SG&A and interest expenses of about [[**]] per cent and [[**]]⁴⁷ per cent respectively as the proxies for CMI. Evidence on the record shows that CMI's SG&A expenses were [[**]]⁴⁸ per cent of cost of goods sold, while total interest expenses were zero. These expenses should have been used by the KTC. In addition, the KTC made no effort to use special circumspection under paragraph 7 or to ensure that the amounts it used were reasonable under Article 2. The KTC had before it verified information that showed that Indah Kiat's and Pindo Deli's SG&A expenses were much lower than the figures used by the KTC. The KTC should have reviewed the breakdowns for these figures to determine whether it was appropriate to include those expenses in its determination of CMI's SG&A and interest expenses. This review would have revealed that the exporters' interest expenses were related almost exclusively to production-related activities, such as loans for construction equipment.

4.129 Article 2.2 provides that the investigating authority may add only a "reasonable amount for administrative, selling and general costs." Article 2.2.2 emphasises that these amounts should be based on actual data where possible. Article 2.2.2(iii) reiterates that any other method used to determine amounts for administrative, selling and general costs must be "reasonable". Articles 2.2.1.1 and 2.2.2 recognise a distinction between concepts of "production and sale" in how it describes the expenses that may reasonably be included in the constructed value. In these circumstances, the KTC's failure to consider verified evidence to determine whether the amounts it intended to use as CMI's SG&A and interest expenses were reasonable was inconsistent with these provisions and constituted a failure to exercise special circumspection within the meaning of paragraph 7 of Annex II.

- (c) Korea's use of "facts available" to determine Tjiwi Kimia's dumping margin was inconsistent with Article 6.8 and Annex II of the Agreement

- (i) *The KTC acted inconsistently with paragraph 7 of Annex II of the Agreement in failing to exercise "special circumspection" in its use of secondary information to determine dumping margins for Tjiwi Kimia*

4.130 The data contained in the application and used by the KTC to determine Tjiwi Kimia's margin were inconsistent with data obtained from independent sources. The application overstated the dumping margins for April Fine by 1600 per cent and overstated Pindo Deli's normal value, before

⁴⁷ Korea requests that the data in square brackets be treated as confidential.
⁴⁸ *Ibid.*

adjustment, by approximately \$135-195/ton (approximately 16-23 per cent). It is clear, therefore, that had the KTC exercised special circumspection in using facts available to determine the margins for Tjiwi Kimia, it would have reached a different result.

4.131 There is no evidence in the record to indicate how the KTC established that KOTRA and KOTIS acted "independently" from the domestic industry in obtaining this information or that the KTC considered the nature of these agencies as a relevant factor in its evaluation of the application data. The duty imposed on the investigating authority is to check the reliability of the *secondary information itself*. In doing so, the KTC is not entitled to overlook glaring inconsistencies between the actual *information* supplied by these agencies and the other information on the record, including its own (albeit flawed) findings regarding normal value and export prices, simply because the ultimate suppliers of this information are supposedly "independent and reliable". There is no evidence that the application data on normal value "fell within the range of domestic sales data reported by the responding companies". Also, the KTC has not explained how it conducted this alleged comparison, given that the data in the application on normal value was not segregated between PPC and WF, while the KTC calculated separate dumping margins for PPC and WF paper.

4.132 Korea defends its decision to collapse the three Sinar Mas companies on the basis that the Sinar Group companies "really did act as a single entity". If the three Sinar Mas companies "acted as a single entity" then *it is eminently reasonable* to assume that the sales prices of that entity would be similar. Also, the KTC cannot assume that the prices charged by Tjiwi Kimia would diverge massively from the prices charged by other Indonesian producers operating in the same markets.

4.133 The investigating authority's duty to act with special circumspection under paragraph 7 of Annex II applies in all cases where "the authorities *have to base their findings*" on information from secondary sources, regardless of whether the interested party concerned cooperates or not. The final sentence of paragraph 7 does not negate this duty. It merely provides that the margin in a situation where an exporter does not cooperate may be greater than if the exporter had cooperated. But this does not give the investigating authority license to ignore the requirement of special circumspection. Moreover, to the extent that the KTC sought to "punish" Tjiwi Kimia, Korea has not explained what standards it used to determine that it was appropriate to "punish" the exporter or how those standards were consistent with paragraph 7.

4.134 For these reasons, the KTC's calculation of Tjiwi Kimia's dumping margin on the basis of the information supplied by the applicants was inconsistent with the procedures required under Article 6.8 and paragraph 7 of Annex II of the Agreement.

(ii) *The KTC's use of "facts available" for Tjiwi Kimia without providing other exporters with an opportunity to submit further explanations was inconsistent with Article 6.8 and paragraph 6 of Annex II of the Agreement*

4.135 Korea acknowledges that paragraph 6 of Annex II to the Agreement imposes a duty on investigating authorities to "provide respondents an opportunity to cure defects in submitted information". When the three exporters were first collapsed into a single entity late in the investigation, they found themselves in the same position as a single exporter that had submitted a questionnaire response in which certain domestic and export sales were not reported. However, the "single economic entity" in this case was not provided any such opportunity to cure defects. The KTC's belated decision to make its final determination for a different entity than its preliminary determination cannot relieve the KTC of its obligations under paragraph 6 or reduce the procedural protections of the Indonesian exporters under that provision. Korea wants to have it both ways – it wants the freedom to treat these companies as one entity, but without any of the obligations that might entail under the Agreement.

4.136 Indonesia's position is simply that the KTC cannot reduce the procedural rights of exporters by waiting until the end of the investigation to resolve issues that affect those rights. Indonesia's claims under paragraph 6 do not relate to particular outcomes, they relate to the *procedures* laid down in paragraph 6 to protect exporters that must be followed before information can be rejected. Indonesia's claims also concern the failure to provide an *opportunity* to rectify defects in submitted information.

- (d) Korea's failure to make a fair comparison between normal value and export price by adjusting for selling expenses was inconsistent with Article 2.4 of the Agreement

4.137 As the exporters noted in their 9 April letter to the KTC on this topic during the investigation, the sales in both markets are made to the same kinds of customers. What matters in this case is that the CMI re-sales involve additional expenses that are not incurred with respect to the export sales. In making a fair comparison, the crucial question is not where the analysis begins (the gross sales price in each market), but where it ends (the net, or ex factory, price at which the fair comparison will be made). At the end-point, the comparison must be at the same level of trade –the investigating authority must adjust for all differences between the gross prices in each market that affect the comparability of those prices. Otherwise, it will make an asymmetrical, unfair comparison of prices, as happened in this case.

4.138 The verified evidence establishes that CMI incurred expenses that were not incurred on the export sales. Accordingly, these expenses affect the price comparability of the CMI re-sale price and Indah Kiat's re-sale price. The KTC's failure to adjust for these expenses resulted in an unfair comparison, contrary to Article 2.4 of the Agreement.

- (e) Korea's treatment of Indah Kiat, Pindo Deli, and Tjiwi Kimia as a single economic entity was inconsistent with Articles 6.10 and 9.3 of the Agreement

4.139 Korea has made clear that a decision to collapse cannot be based on a "potential for coordinated action" between affiliated exporters following the imposition of definitive dumping measures. This implies that any decision to collapse must be based on findings regarding actual coordinated action on pricing during the period of investigation above and beyond the existence of affiliations between exporters.

4.140 The KTC failed to disclose the legal standard it used to make its decision to collapse in this case. There is therefore no way for the Panel to determine what standard, if any, was applied by the KTC. The KTC's stated grounds for its determination deal primarily with the presence of common shareholding and the presence of overlapping directors and commissioners in the three companies. The presence of common shareholding and a certain amount of overlap in the composition of the board of directors and commissioners is merely evidence of the "existence of affiliation", a fact that was never denied by the Sinar Mas Group companies. It does not establish the presence of collaboration and coordination of pricing policies in the domestic and export markets. In addition, the fact that all three affiliated companies produce the subject merchandise and that one of them sold marginal quantities of the subject merchandise to the others is basically irrelevant to the question of whether these firms act jointly in the domestic and export markets. Korea has not pointed to any evidence in the record that shows where the KTC examined the issue of coordination of prices, or asked the exporters for specific information on that topic.

4.141 Korea's reference to the existence of a "single corporate marketing department" as evidence of "extensive coordination and oversight" is an inadmissible *ex post* justification and is incorrect as a matter of fact. Korea's assertion that the companies' sales in Indonesia were closely coordinated through CMI is incorrect. The fact that the re-sales occurred through an affiliated reseller does not indicate that this reseller was in a position to control pricing decisions for the entire Group. CMI was

not in a position to set centralised prices, because, in fact, the minimum prices to the customers were determined separately by each mill.

4.142 The KTC did not explain how it investigated or determined that the overlapping commissioners or non-executive directors actually were involved in managing and coordinating prices among the exporters. Korea's arguments regarding Mr. Gupta's role are also *ex post* and not supported by the facts.

4.143 Korea's allegation that the Sinar Mas Group did not fully respond to questions regarding affiliation is also contrary to the record. Had the KTC analysed the actual pricing practices of the exporters, based on submitted and verified data before it, it would have found that the exporters charged different prices for sales of the same product to the same customers in the same market.

4.144 A finding of coordination of domestic market pricing alone would not suffice to "collapse" affiliated entities. This would not establish that the exporters could coordinate the export sales to avoid dumping duties, but would imply only that there is a *potential* to coordinate prices for export sales.

(f) Korea's determinations contain several violations of the disclosure obligations contained in Articles 6.4, 6.7, 6.9 and 12.2 of the Agreement

4.145 The KTC's purported disclosure of the results of verification mentions only one issue and ignores all other aspects of the verification visit. Moreover, an oral briefing cannot satisfy the requirements of Article 6.7 or 6.9. Finally, the requirements of Article 6.7 cannot be fulfilled by disclosure of the essential facts under Article 6.9.

4.146 The actual calculation figures used in determining normal value and export prices are *the* "essential facts" on which a dumping margin calculation is based and must be disclosed under Article 6.9.

3. Claims relating to the determination of injury and causal link

(a) The KTC's treatment of PPC and WF Paper as "like products" was inconsistent with Articles 2.6, 3.1, 3.4, 3.5 and 3.7 of the Agreement

4.147 Korea now perceives a duty to limit the "product under consideration" to "a single group of products sharing characteristics". Logic dictates also that there is a corresponding duty to limit the "like product" to a single group of products sharing characteristics and to conduct the injury analysis on that basis.

4.148 The investigating authority is under a duty *not to conduct* a single injury determination for unlike products arising from Articles 2.6 and 3; both of which have been identified by Indonesia in its panel request and submissions.

4.149 Korea admits the KTC did not assess whether PPC and WF are like products for which it is appropriate to conduct a single injury analysis. Korea does not refer to findings on the record regarding the likeness or unlikeness of PPC and WF.

4.150 Korea asserts only that PPC and WF "**may** be identical" and "**can** have the exact same" characteristics. The KTC's failure to conduct any objective analysis of whether these products were alike renders its injury and causal link determinations inconsistent with Articles 3.1., 3.2, 3.4, 3.5 and 3.7 read with Article 2.6 of the Agreement.

4.151 If the KTC had examined this issue, it would have had to conclude that PPC and WF are not like products. There are significant differences in how PPC and WF are manufactured. The fact that the Korean Paper Manufacturers Association could distinguish between these two products for the purpose of preparing statistics also shows that this distinction is not "unworkable". The KTC's determination that PPC and WF are "like products" is inconsistent with Article 2.6 of the Agreement and its injury determination therefore inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Agreement.

- (b) Korea's failure to conduct its injury and causal link determinations in an objective manner and to base these determinations on positive evidence was inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Agreement

4.152 The KTC failed to make an objective analysis based on positive evidence of the price and volume effects of the imports under investigation. The KTC appears to have omitted a significant portion of the domestic market from its analysis, artificially inflating the market share of the imports under investigation and deflating the market share of the domestic industry. The KTC also miscalculated the trends in market shares for the first half of 2003, in which the imports under investigation declined. The corrected figures provided by Indonesia indicate that the imports under investigation were losing market share, and that the major increase in that period came from imports from other sources. Because of these methodological errors, the KTC's consideration of the volume effects of the imports under investigation was not based on an objective examination or positive evidence. Regarding the price effects, the KTC's analysis does not properly address the trends in import and domestic prices.

4.153 The KTC's failure to refer the concepts of significant price undercutting, significant price depression, or preventing price increases to a significant degree from the final determination of the KTC itself suggests that the KTC did not properly consider these matters. Korea's admission that the evidence regarding price undercutting showed a "mixed picture" also indicates that the KTC did not appear to attach any meaning to the use of the word "significant" four times in Article 3.2.

4.154 The KTC improperly failed to conduct a proper examination of the injury factors listed in Article 3.4. This obligation lies on the investigating authority in every instance and is not limited by the arguments raised by the exporters. WTO panels have repeatedly made it clear that this obligation is not satisfied by collecting data, reciting it in a determination, and reached a conclusion, but that it requires *the analysis of data through placing it in the context of the particular evolution of the data pertaining to each factor individually, as well as in relation to the other factors examined*.

4.155 The KTC's injury findings consist of roughly one and a half pages of recitals of data for various factors. The only analysis of these data is to indicate whether the figures went up or down from one period to the next. While the KTC's final staff report contains the data recited by the KTC in its injury determination, it does not contain any additional analysis. The KTC's recital of data is followed by a one-sentence conclusion. None of this determination satisfies the standards required under Article 3.4. While Indonesia has explained how the KTC's evaluation of several specific Article 3.4 factors was flawed, Indonesia's claims under Article 3.1 and 3.4 relate not just to those factors, but to the KTC's Article 3.4 analysis *in toto*.

4.156 Korea's arguments with respect to specific factors are flawed. The Bank of Korea data shows positive trends for the companies within the Korean paper industry, and there is no evidence that the KTC took these trends into account. Korea misstates Indonesia's argument that the KTC failed to properly analyse data relating to wages, productivity and employment. In fact, there is no analysis or attempt to provide context for these data in the KTC's injury finding, which merely recites the statistics on employment (but not wages or productivity). The KTC's failure to use the evidence regarding wages and productivity to place the decline in employment in its proper context further illustrates how the KTC failed to properly evaluate these data. Korea's explanation regarding the

impact of non-dumped imports ignores the fact that the data shows that the other imports increased their market share most dramatically at the time at which the imports under investigation were falling (first half 2003) and that this increase in other imports' market share appears to have come at the expense of the domestic industry and to have coincided with that industry's fall in operating profits. Korea suggests that the large investment in facilities by the domestic industry was for non-subject production. This *ex post* explanation suggests there were errors either in the domestic industry's data or the KTC's analysis.

4.157 Korea has not explained the KTC's causation and non-attribution analysis. However, the KTC is under an obligation to conduct this analysis in every case. The KTC's failure to properly conduct this analysis in this case rendered its determination inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Agreement.

4.158 It is not clear whether the KTC excluded all of the domestic producers that imported the products under investigation. The KTC's treatment of domestic producers excluded from the definition of the domestic industry also resulted in the overstatement of the market share of the imports under investigation.

4.159 The KTC should have evaluated whether imports by the Korean industry were related to a shift by the Korean industry from producing the products under investigation to producing other higher value added products. The KTC accepted that the Korean industry's own imports accounted for approximately half of the total Indonesian exports. The KTC should have accounted for the domestic industry's own imports by excluding that quantity of imports from its injury analysis in order to ensure a consistent and symmetrical analysis.

(c) Korea's injury determinations contain several violations of the disclosure obligations contained in Articles 6.1, 6.4 and 6.9 of the Agreement

4.160 The KTC improperly failed to disclose the results of the consumer surveys undertaken by the KTC and the product tests performed by the Korean Agency for Technology and Standards. Korea has not explained why these test results were inherently confidential and why the results could not have been disclosed in a manner that would maintain due regard of any interests of other parties in preserving confidentiality.

4.161 Korea states that the KTC provided injury data for the first half of 2003 at the public hearing held on 27 August 2003. To the best of Indonesia's knowledge, no such information was provided to the representatives of the Sinar Mas Group present at that meeting.

4.162 Korea assumes that there is no requirement to require that good cause be shown for the treatment of confidential information that is "by nature confidential". Article 6.5 of the Agreement mandates a showing of good cause in all situations. The KTC's failure to insist on this requirement constitutes a violation of Article 6.5 of the Agreement.

4.163 Indonesia identified specific deficiencies in the non-confidential version of the application in paragraph 205 of its first submission. Korea has not responded to a single one of those allegations. The KTC made defective disclosure of "normal values, export prices and dumping margins for Indah Kiat, Pindo Deli, and Tjiwi Kimia", "the basis for the Domestic Industry's request for cumulation of imports from Indonesia and China" and "the price effects of imported products".

4.164 Indonesia requests the Panel to find that in imposing its anti-dumping measure against certain paper products from Indonesia, Korea acted inconsistently with its obligations under provisions of the Agreement listed in paragraph 207 of Indonesia's first written submission.

4.165 Indonesia also requests that for the reasons explained in paragraphs 210-211 of its first written submission, the Panel exercise its discretion under Article 19.1 of the *DSU* to suggest ways in which Korea could implement the Panel's rulings and recommendations by suggesting that Korea repeal Regulation No. 330 of the Ministry of Finance and Economy dated 7 November 2003 imposing definitive anti-dumping duties on imports of certain paper products from Indonesia.

F. SECOND WRITTEN SUBMISSION OF KOREA

4.166 The following summarises Korea's arguments in its second submission.

1. The composition of Indonesia's delegation

4.167 Article 18.2 of the *DSU* and paragraph 3 of the Panel's Working Procedures require a WTO Member participating in a dispute settlement proceeding to "treat as confidential information submitted by another Member ... which that Member has *designated as confidential*." These provisions plainly prohibit WTO Members from disclosing to company officials any submissions that have been "designated as confidential" by the WTO Member that submitted them.

4.168 Korea's first written submission in this proceeding was designated by Korea as confidential. Nevertheless, Indonesia included employees of the Sinar Mas Group in its delegation for the first meeting of the Panel, and gave those employees access to documents prepared based on confidential information in Korea's confidential submissions.

4.169 Under Article 6.5 of the Agreement, Korea is required to maintain the confidentiality of information that was submitted to the KTC in confidence by the parties to the antidumping investigation. However, the participation of company officials in Indonesia's delegation necessarily meant that any attempt by Korea to address confidential information in its submissions to the Panel would result in the improper disclosure of that information. Korea has, therefore, continued to object to the participation of company employees in Indonesia's delegation.

4.170 A few days before the deadline for the most recent submissions to the Panel, Indonesia informed the Panel that its delegation for the second meeting of the Panel would include only government officials and legal advisors. Although Indonesia's letter did not fully satisfy Korea's concerns, especially with respect to previous submissions that Korea had designated as confidential, Korea decided to provide the full confidential version of its submissions to Indonesia, subject to the understanding that these submissions would not be disclosed by Indonesia to anyone other than the relevant Indonesian government officials and to legal advisors of Indonesia who agreed to maintain the confidentiality of information provided to them.

4.171 Nevertheless, Korea wishes to re-emphasize the importance of strict adherence to the confidentiality obligations of Article 18.2 of the *DSU*, which are critical to the functioning of the WTO dispute settlement system. Great care should, therefore, be taken to prevent actions, such as the inclusion of company officials in proceedings in which information designated as confidential will be discussed, that would tend to compromise the confidentiality obligations.

2. Dumping calculation issues

(a) Treatment of Sinar Mas Group Mills as a Single Entity

4.172 In its first written submission, Indonesia asserted that Korea was required to define the terms "exporter" and "producer" for purposes of Article 6.10 of the Agreement based on the provisions of Indonesia's municipal corporate law, which would treat each corporation as a legally-distinct entity. However, in its statements during the first Panel meeting, Indonesia appears to have retreated from that position. It appears that Indonesia now concedes that an investigating authority may treat

separate corporations as a single entity in appropriate circumstances, and that the separate corporate form is simply a “relevant” factor.

4.173 However, disagreement still remains concerning the standard for determining the relevant facts. Indonesia would require explicit evidence of coordination on specific export transactions. Korea, instead, would allow the investigating authorities to make reasonable inferences from the totality of the circumstances, even when overt evidence of a collaboration has not been found. In Korea’s view, the totality of the evidence in this case plainly justified the conclusion that the Sinar Mas Group mills were not acting independently. Even if this did not identify specific instances of coordination of activities in export markets, it did provide a reasonable basis for the KTC to infer such coordination.

(b) Facts Available for Tjiwi Kimia

4.174 Indonesia contends that, before the KTC could resort to “less favourable” facts available for Tjiwi Kimia’s export price and normal value, the KTC was required to “cooperate” with the Sinar Mas Group by providing an additional opportunity to submit the Tjiwi Kimia data. Indonesia fails to recognize, however, that the Sinar Mas Group’s refusal to provide information precluded cooperation from the KTC.

4.175 When the KTC first issued its questionnaires, the Sinar Mas Group did not attempt to discuss with the KTC whether the information requested from Tjiwi Kimia was actually “necessary.” The Sinar Mas Group did not consult with the KTC about possible steps to reduce the burdens of compiling the Tjiwi Kimia information. Instead, the Sinar Mas Group unilaterally made the decision to withhold the Tjiwi Kimia information without consulting the KTC at all — before it had given the KTC any description of the Sinar Mas Group or of the relationship among its mills.

4.176 The provisions of Article 6.8 are absolutely clear. When an interested party “refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation,” the investigating authorities may apply facts available. It is clear that the Sinar Mas Group refused to provide necessary information, and it is clear that this refusal “impeded” the KTC’s ability to complete its analysis. In such circumstances, the KTC’s decision to use “facts available” was authorized under the Agreement and, in fact, entirely appropriate.

4.177 As a separate matter, Indonesia claims that the KTC was required to “corroborate” the information it used as facts available for Tjiwi Kimia. But these arguments are also misplaced. The information in the application, which the KTC used as “facts available” for Tjiwi Kimia, came entirely from independent and reliable sources. Once the KTC confirmed that this data accurately reflected the information from those independent and reliable sources, any corroboration requirements under paragraph 7 of Annex II were necessarily satisfied.

4.178 Moreover, although no further corroboration of this data was necessary under the applicable provisions of the Agreement, the KTC actually did take further steps to corroborate the information on export prices and normal values that had been submitted in the application. The KTC’s reliance on this information was, therefore, entirely consistent with the requirements of Paragraph 7 of Annex II.

(c) Facts Available for Indah Kiat and Pindo Deli

(i) *Rejection of Submitted CMI Sales Data*

4.179 As explained previously, the Sinar Mas Group refused to allow the KTC access to the financial statements and accounting records of CMI. The KTC concluded that, without access to the CMI financial statements and accounting records, it could not verify the completeness of the reported

domestic sales. The KTC therefore decided to base the normal value for Indah Kiat and Pindo Deli on a constructed normal value, as “facts available.”

4.180 Indonesia asserts that the completeness of the reported sales could have been verified through the other documentation that the Sinar Mas Group agreed to make available at verification. That argument is, however, based on a fundamental misconception of the nature of the verification process.

4.181 In verifying the “completeness” of submitted sales files, the investigating authorities are trying to “prove a negative” — that there were no reportable transactions that were incorrectly omitted from the sales listing. Because certainty can never be achieved, the goal of the verification is to reduce the risk of inaccuracy to a reasonable level. Verification therefore involves a variety of “completeness” tests intended to achieve a sufficient “level of comfort” with the submitted data.

4.182 As noted in Korea’s first submission, the reconciliation of the reported sales to the selling company’s accounting records and financial statements “lays the foundation” for any other completeness tests, and also serves to establish the validity of the documents presented at verification. The Sinar Mas Group’s refusal to allow that reconciliation, therefore, seriously impeded the verification process. It also undermined whatever confidence the KTC may have had in the submitted data. As an accountant with extensive experience in auditing and verification processes has explained:

[T]he mere fact that the Reseller refused to allow access to its financial statements would have raised serious questions about the accuracy of its information.... The fact that the Reseller objected to disclosure of its financial statement after it had agreed to disclose its detailed customer and pricing information would strongly suggest that the Reseller was hiding something, and that there was some inconsistency between the information in the financial statements and the information already provided in the sales listing.

In these circumstances, the other tests the Sinar Mas Group allowed the KTC to perform could not replace the reconciliation to the financial statements, because they did not allow the KTC to achieve the necessary level of confidence in the completeness of the submitted CMI data.

4.183 There also is no merit to Indonesia’s claims that the completeness of the reported CMI sales data had been verified once the completeness of the mills’ sales to CMI had been established. Contrary to Indonesia’s assertions, the Sinar Mas Group actually admitted that there *was not* a one-to-one correspondence between the sales from the mills to CMI and the sales from CMI to its customers over the course of the entire investigation period, due to differences in “timing.” Instead, there was a discrepancy of roughly [**]⁴⁹ tons. Consequently, the verification of the total quantity of the mills’ sales to CMI did not establish the total quantity of CMI’s sales to its customers.

4.184 Furthermore even if the total quantity of CMI’s sales had been established, questions about the reported prices would have remained. Without access to CMI’s accounting records, there was no way for the KTC to confirm that the invoices presented to it at verification to support the reported sales prices actually matched the invoices that were recorded in CMI’s accounting records. In addition, without a reconciliation to CMI’s financial statement, there was no basis to conclude that there were no unreported discounts, rebates, billing adjustments or additional charges by CMI.

4.185 Indonesia has claimed that, when faced with the Sinar Mas Group’s refusal to submit the requested information, the KTC was required to try to “cooperate” with the Sinar Mas Group to help it overcome these “difficulties.” Indonesia thus attempts to invoke the provisions of Article 6.13 of the Agreement, and, more specifically, the Appellate Body’s decision in *Hot-Rolled Steel Products*

⁴⁹ Korea requests that the data in square brackets be treated as confidential.

from Japan (in which the Appellate Body overturned a finding that a respondent that was unable to obtain information from an affiliate had been “uncooperative”).

4.186 There is, however, simply no parallel between the *Hot-Rolled Steel* case and the present case. Furthermore, there was no evidence that the Sinar Mas Group was unable to obtain information from CMI. Any doubt about the Sinar Mas Group’s ability to obtain the necessary information was removed when the Sinar Mas Group submitted purported CMI income statements only a few days after the verification, after it realized what the consequences of its non-cooperation would be. The Sinar Mas Group’s argument that it could not persuade CMI to allow access to its financial statements and accounting records is nothing more than a cynical attempt to exploit the Appellate Body’s ruling in *Hot-Rolled Steel*.

4.187 Finally, Indonesia claims that the problems caused by the Sinar Mas Group’s refusal to allow the KTC access to the CMI financial statements and accounting records at verification were cured when the Sinar Mas Group subsequently submitted two worksheets purporting to represent CMI’s income statements. A review of the Sinar Mas Group’s submission makes clear, however, that this submission was intended to address a different issue, and not to establish the completeness of the reported sales. At no point during the proceedings before the KTC did the Sinar Mas Group argue that the completeness of the submitted CMI sales data had been verified during the verification or by the subsequent submission of the purported income statements. Instead, that argument was first raised by Indonesia, in its first submission to this Panel.

4.188 In any event, Indonesia’s *post-hoc* efforts to resurrect the submitted sales data are unpersuasive. Because the purported income statements were only submitted *after* verification, they could not have been used to verify the reported sales data *at* verification. The Sinar Mas Group never submitted the worksheets and supporting accounting records that would be needed to reconcile the reported sales data to the purported income statements. Furthermore, the KTC had no basis for assessing whether the purported income statements, which were not audited, were nonetheless accurate and reliable. By the time the Sinar Mas Group finally submitted those statements, it was too late to verify them, because the verification was already finished.

(ii) *Inclusion of Amount Representing CMI’s SG&A Expenses in the Calculation of Constructed Value*

4.189 In its first submission, Indonesia objected to the inclusion of an amount representing CMI’s SG&A and financial expenses in the calculation of the constructed normal value. During the first meeting of the Panel, however, Indonesia clarified that it did not object to the inclusion of *some* amount for CMI’s SG&A and financial expenses. Instead, it now objects only to the particular amounts used by the KTC.

4.190 According to Indonesia’s oral statement, the SG&A and interest expense figures used by the KTC (which were derived from verified information from the unrelated Indonesian respondent [[Company A]]⁵⁰) were incorrect because the purported CMI “income statements” submitted by the Sinar Mas Group after verification presented a better source for the relevant expenses. In addition, Indonesia also argued that the [[Company A]]⁵¹ expenses used by the KTC as “facts available” double-counted “manufacturing related expenses.” These claims are, however, without merit.

4.191 *First*, as discussed above, the purported CMI “income statements” were unreliable and unverifiable. Because they were unaudited, the KTC could not rely on an auditor’s opinion as the basis for an assumption that they were accurate. And, because the KTC only received those

⁵⁰ Korea requests that the data in square brackets be treated as confidential.

⁵¹ *Ibid.*

statements after the verification, it had no way to conduct its own verification to determine whether the figures presented in those statements were correct.

4.192 *Second*, the [[Company A]]⁵² SG&A expenses that the KTC used in place of the CMI expenses did not, in fact, reflect the overall [[Company A]]⁵³ SG&A expenses. Instead, the KTC used the much lower SG&A expense rate derived from a worksheet [[Company A]]⁵⁴ had submitted identifying the selling and sales-related administrative expenses for sales of the subject merchandise.

4.193 *Finally*, Indonesia's suggestion that the SG&A and interest expense figures used by the KTC double-counted manufacturing-related expenses reflects a fundamental misunderstanding of the nature of SG&A and interest expenses. SG&A expenses relate either to selling activities (if they are selling expenses) or to overall company activities (if they are G&A expenses). There is no direct correlation of these expenses with a company's manufacturing activities (or lack thereof).

4.194 In Korea's view, it would have been reasonable for the KTC to use the overall [[Company A]]⁵⁵ SG&A expenses as the basis for its calculation of the "facts available" SG&A expenses for a company operating at the level of CMI. Nevertheless, the KTC did not do so. Instead, it based its calculations on the selling and sales-related administration expenses incurred by [[Company A]]⁵⁶, without including the overall G&A expenses of the affiliated company that manufactured the subject merchandise. This calculation almost certainly understated the applicable G&A expenses. Consequently, there is no basis for Indonesia's complaints.

(iii) *Adjustment for Differences in Level of Trade*

4.195 Indonesia argues that an adjustment should have been made for the differences between the level of trade for the mill's exports to Korea and the level of trade for the CMI resales. Indonesia also claims that, if a *level-of-trade* adjustment was not required, an adjustment would still have been required because the involvement of CMI in the domestic-market sales constituted a difference affecting "price comparability." These arguments are, however, fundamentally flawed.

4.196 Indonesia's request for a level-of-trade adjustment is flatly inconsistent with the Sinar Mas Group's repeated statements during the investigation that the relevant sales in both markets were *at the same level of trade*. Consequently, the KTC's decision not to make a level-of-trade adjustment must be upheld — in accordance with Article 17.5 of the Agreement, which directs the Panel to base its review upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member."

4.197 Furthermore, Indonesia's claim that CMI's involvement resulted in additional expenses is wholly unsubstantiated. As Korea has explained previously, the involvement of CMI in the domestic-market sales might just have meant that the mills had to bear expenses on their export sales that they did not bear on their domestic sales (because CMI was already bearing them on the domestic sales). To the extent that CMI's involvement just reflected a shifting of expenses from the mills to CMI on domestic sales, CMI's involvement would not have resulted in any *additional* expenses — and thus would not have had any impact on price comparability.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Korea requests that the data in square brackets be treated as confidential.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

(d) Continuation of Investigation after Preliminary Determination

4.198 In its first written submission, Indonesia claimed that Korea was required, under Article 5.8 of the Agreement, to terminate the antidumping investigation immediately with respect to Indah Kiat once the KTC made its preliminary determination that Indah Kiat had *de minimis* dumping margins. But this argument ignores the fact that the KTC never indicated that it was “satisfied” that the Sinar Mas Group mills were not dumping.

4.199 The KTC’s preliminary determination specifically noted that it was reviewing certain aspects of its preliminary calculations — in particular, its decision to calculate separate dumping margins for Indah Kiat, Pindo Deli and Tjiwi Kimia. Consequently, it is clear that the KTC was not “satisfied” that there was no dumping at the time it made its preliminary decision. Thus, Article 5.8, which requires termination only when the investigating authorities are “satisfied” that there is not sufficient evidence of dumping, is inapplicable.

4.200 Furthermore, contrary to Indonesia’s claims, the KTC did not impose antidumping duties on Indah Kiat after making a preliminary determination that Indah Kiat had *de minimis* dumping margins. Instead, the KTC’s final determination imposed antidumping duties on the single entity comprised of Indah Kiat, Pindo Deli and Tjiwi Kimia. The KTC had never determined that this single entity had *de minimis* dumping margins. In short, there never was a preliminary determination of *de minimis* dumping margins for the entity that was the subject of the KTC’s final determination.

(e) Disclosure of Verification “Results”

4.201 Indonesia has asserted that the KTC’s failure to disclose its internal verification report was inconsistent with the requirements of Article 6.7. In this regard, Indonesia claims that the disclosure of “results” required by Article 6.7 calls for more extensive detail than the disclosure of “essential facts” under Article 6.9.

4.202 That interpretation cannot, however, be reconciled with the ordinary meaning of the language of the Agreement. Article 6.7 clearly envisions that disclosure of the verification results as part of the “essential facts” under Article 6.9 is sufficient. It states explicitly that the investigating authorities “shall make the results of any such [on-the-spot] investigations available, or shall provide disclosure thereof pursuant to paragraph 9.”

4.203 As a separate matter, Article 6.7 does not, by its terms, require disclosure of a detailed report, or a step-by-step recitation of the process followed, or a full accounting of all documents examined. Instead, it only requires the disclosure of the “results” of verification. The use of the term “results” indicates that the investigating authorities must disclose their conclusions they drew from the verification — not the steps that led to those conclusions.

4.204 In this case, the KTC’s disclosure was sufficient to inform the Sinar Mas Group of the “results” of verification and of all other “essential facts.” Indonesia’s claim must therefore be dismissed.

3. Injury issues

(a) Like product

4.205 As explained in Korea’s first submission, the KTC defined the “product” under investigation in this case to include all wood-free paper meeting the definition set forth in the application. Then, in accordance with Article 2.6 of the Agreement, the KTC identified the most similar products produced by the Korean industry as the “like product.”

4.206 Indonesia has argued that the KTC should have considered “whether the product under consideration contained more than one ‘like product.’” That argument, however, is inconsistent with the definition of “like product” in Article 2.6, which indicates that the “like product” flows directly from the definition of the “product under consideration.” Since Indonesia has not challenged the KTC’s definition of the “product” under consideration, it has no basis for objecting to the definition of the “like product” flowing from the definition of the “product” under consideration.

4.207 Furthermore, even if the definition of the “product” under consideration had been raised, the KTC’s determination would have to be upheld. No evidence was presented to the KTC to support Indonesia’s claim that the uncoated wood-free paper category included two “products” within the meaning of the Agreement. The Indonesian producers submitted only broad conclusory statements that there were differences in physical characteristics, end uses, substitutability, prices, market sectors, HTS classifications, and production processes. They did not identify what the differences were, and they did not provide any evidence to support their claims.

4.208 By contrast, the applicants did address the substantial overlaps between “plain paper copier” paper and other categories of “uncoated wood-free paper” in their application. Since the information submitted by the applicants was uncontested, there would have been no basis for an unbiased and objective investigating authority to find that the two categories proposed by the Sinar Mas Group constituted separate products.

(b) Dumped import volumes

4.209 Indonesia’s arguments have focused on statistics that apparently show a 15.3 per cent decrease in the volume of dumped imports in the first half of 2003. But, a closer review reveals that this apparent “decrease” did not actually reflect a fall in imports. The imports during the first half of 2003 totalled 88,774 tons — which corresponded to an annual rate of 177,548 tons. This annual rate was actually *higher* than the annual rate of imports in any previous year, including the previous record year of 2002 (when dumped imports totalled 176,522 tons). Thus, in absolute terms, the dumped imports were increasing.

4.210 Furthermore, the evidence showed that, in relative terms, the dumped imports in the first half of 2003 had an even higher market share than in any previous year. The KTC decided to base its analysis of import trends during the first half of 2003 on this evidence of increases relative to consumption.

4.211 In this regard, the KTC’s decision to focus on relative market shares was entirely consistent with Article 3.2 of the Agreement, which specifically provides that “[w]ith regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, *either in absolute terms or relative to production or consumption* in the importing Member.” Since the evidence demonstrated that the dumped imports had increased “relative to production or consumption,” the KTC properly relied on that evidence to support its finding of a significant increase in dumped imports.

(c) Adverse price effects of dumped imports

4.212 Indonesia contends that a finding of price undercutting was logically impossible in this case, in view of data showing that, in some years, the average prices for sales of the dumped imports were higher than the average prices for the domestic industry’s sales. But, even if there had been no “price undercutting,” that would not mean that the dumped imports had not “otherwise depress[ed] prices to a significant degree or prevent[ed] price increases, which otherwise would have occurred, to a significant degree.”

4.213 In this case, the KTC found that the evidence demonstrated that the dumped imports had both depressed prices and prevented price increases: The KTC's determination of price depression was based on the evidence that the overall decrease in the domestic industry's prices from 2000 to 2003 was correlated to the consistent fall in the prices for dumped imports over that period. Its determination of price suppression was based on evidence that, as a result of the competition with dumped imports, the domestic industry had been unable to achieve prices that would have enabled them to earn a reasonable level of operating income.

4.214 In short, the evidence was overwhelming that, as the dumped imports increased their market share at ever lower prices, the Korean industry had suffered falling prices that resulted in meagre "operating" profits at best, and consistent losses after taking other ordinary expenses into account. The KTC's finding of price depression and suppression was entirely consistent with this evidence.

(d) Factors relevant to material injury determination

4.215 Indonesia also claims that the KTC failed "to properly consider all injury factors" described in Article 3.4 of the Agreement. However, Indonesia has not identified a single relevant factor that the KTC ignored. To the contrary, Indonesia has specifically conceded that the KTC actually did examine all of the factors identified in Article 3.4.

4.216 Indonesia also argues that the KTC's evaluation of those factors should have led to a different conclusion. But there was no evidence of *any* positive trends for the Korean industry. It faced declining market share, production and prices. And, despite shedding employees at an alarming rate, it remained unprofitable throughout the period. The KTC's determination that the Korean industry was experiencing material injury was, therefore, entirely consistent with the available evidence.

(e) Causal link between imports and injury

4.217 Indonesia asserts that the KTC should have attributed the injury the Korean industry experienced to other causes. But, the KTC did examine all other factors which it thought might be suspected of causing the injury to the Korean industry. It found that none of these had been a cause of the injury the KTC observed.

4.218 In its submissions, Indonesia has attempted to poke holes in the KTC's analysis of specific factors. But, the examples identified by Indonesia are unpersuasive. To the contrary, the evidence showed that the dumped imports increased their market share in every single year, at constantly decreasing prices. As a result, the domestic industry was unable to raise its prices to profitable levels, despite massive cuts in employment. No other factor was to blame for the injury caused by the dumped imports.

(f) Imports by Korean producers that were not part of the domestic industry

4.219 Indonesia asserts that the KTC was required to consider the portion of the dumped imports accounted for by the Korean producers that were excluded from the domestic industry as an "alternative cause" of injury. But, Indonesia has not pointed to any provision of the Agreement that would define imports of the dumped products from the countries under investigation as an "alternative" cause of injury.

4.220 The only provision addressing imports by domestic producers is Article 4.1, which permits the investigating authorities to exclude importing producers from the definition of the "domestic industry." There is nothing in Article 4.1 or in any other provision of the Agreement that permits an investigating authority to classify imports at dumped prices of the product under consideration from the countries under investigation as anything other than "dumped imports."

4. Conclusion

4.221 It is apparently easy for an exporter like the Sinar Mas Group to criticize an investigating authority after the fact for failing to decide the case in the way the exporter would have liked, based on arguments that were never even presented to the investigators. But the evidence shows that KTC and its staff conducted this investigation in accordance with the highest standards of professionalism. It adhered to procedures designed to allow all parties to participate and defend their interests fully. Its decisions reflected an objective and unbiased assessment of the facts, under entirely reasonable interpretations of the relevant legal principles.

G. SECOND ORAL STATEMENTS OF INDONESIA

4.222 The following summarises Indonesia's arguments in its second oral statements.

1. Opening Statement of Indonesia at the Second Meeting of the Panel

(a) Issues relating to the determination of dumping

(i) *Use of Facts Available For Indah Kiat And Pindo Deli*

4.223 Korea continues to take the position that the investigating authority is entitled to have what is, in effect, a zero tolerance policy for any inability by an exporter to provide requested information. This is contrary to the entire scheme of Article 6.8 and Annex II governing the steps that must be taken by an investigating authority before rejecting submitted information. The investigating authority cannot rigidly adhere to deadlines without considering whether it would be possible to accept information submitted after the deadline. Here, the KTC made no such effort. The investigating authority must take into account difficulties faced by an exporter in deciding how to proceed under Article 6.8. This requires some cooperative interaction with the exporters. Here, the KTC did not do so.

(ii) *Rejection of the Domestic Sales Data*

4.224 Korea submitted an affidavit of Mr. Ki-Seok You, a Korean accountant that has represented Korean companies, including the paper industry involved in this case, in anti-dumping investigations. In response to Mr. You's affidavit, Indonesia submits as Exhibit IDN-57 an affidavit by Mr. Albert Hayes, a former US Department of Commerce investigator with extensive experience in conducting USDOC anti-dumping verifications around the world, who has previously testified in WTO dispute settlement proceedings. Mr. Hayes' opinion is that the CMI re-sales data would be verifiable even without the CMI financial statement.

4.225 Mr. You actually supports Indonesia's position. Mr. You acknowledges that it is possible that an investigating authority could have "considered the Reseller's sales data to be verified in the circumstances I have described." It follows from this that the domestic sales information was, at a minimum, *verifiable* by the KTC within the meaning of paragraph 3.

4.226 Korea argues that it would have had to have access to CMI's inventory records in order to see that there was a one-to-one correspondence for all sales. But it is undisputed that CMI never took possession of the goods and therefore had no inventory and no reason to have inventory records. Korea also suggests that the fact that the databases of re-sales by CMI contained slightly more sales than the databases of sales by the exporters to CMI undermines Indonesia's position. Contrary to Korea's argument, this re-affirms Indonesia's arguments. In its verification plan, the KTC asked the Indonesian exporters to explain why there were slight differences between the quantities in the two sets of databases. This indicates that the KTC expected these two databases to match and that it

considered that the "total pool of reportable sales" was defined by the sales by the exporters to CMI. The KTC apparently accepted the explanations provided by the exporters.

4.227 Korea does not directly contradict Indonesia's evidence that it was provided access to CMI's accounting records during the verification, stating only that the relevant KTC officials "are unable to reconcile [Ms. Lim's] statement to their experience or to the documents provided to them." Korea argues that the list of exhibits presented to the KTC officials during the verification and provided to the Panel as Exhibit IDN-20 contains no reference to CMI ledgers. However, Ms. Lim's evidence was that she provided the KTC officials with access to *computerised*, not hard copy, sales records. Second, Korea argues that Ms. Lim's affidavit "does not indicate that the KTC was allowed access to CMI's *accounting* records." That this is incorrect is confirmed by Ms. Lim's further affidavit (Exhibit IDN-60).

4.228 Korea's position that the CMI financial statements were necessary to test "completeness" of the submitted domestic sales is inconsistent with its actions. In its verification plan, under the heading of "completeness", the KTC requested the submission of a reconciliation between the Indah Kiat/Pindo Deli financial statements and the submitted mills sales data as well as several reconciling items. In contrast, there was no express request to submit a reconciliation between the CMI financial statements and the submitted resales data. From the conduct of the KTC prior to and subsequent to the verification it is clear that the KTC did not request the submission of any sort of prior reconciliation to the CMI financial statements in its verification plan.

(iii) *Rejection of the CMI Financial Statements*

4.229 Korea has not explained why it considered the submission of the CMI financial statements on 9 April 2003 not to have been made within a reasonable period of time. Korea has argued that it could not use these financial statements because they were not verifiable, in that they were submitted after verification and were not supported by accompanying worksheets. However, it appears that the KTC was verifying information submitted by the domestic industry as late as August 2003 – four months after the CMI data was deemed unverifiable. An unbiased and objective investigating authority cannot consistently reject information provided by the exporters as untimely and unverifiable while continuing to collect and verify information from the domestic industry for a further three to four months. Likewise, Korea's objections to the format of the CMI financial statements are undermined by the fact that the income statements of [[**]] and [[**]]⁵⁷ are in essentially the same spreadsheet format as those of CMI.

(iv) *Calculation of SG&A and Interest Expenses of CMI*

4.230 Regarding interest expenses, Indonesia's position is that the KTC should have used the actual submitted CMI data. Korea claims that the KTC used for these expenses "an additional amount for the interest expenses of a company operating at the same level of CMI." This, presumably, also refers to [[**]]⁵⁸. However, Exhibit KOR-54 reveals that [[**]]⁵⁹, like CMI, had *no* interest expenses, but instead had small amounts of interest income. Instead, the KTC used the interest expenses of [[**]]⁶⁰ – a manufacturing company *not* operating at the same level as CMI – as the basis for the interest expenses of CMI. This is not what Korea claims the KTC did. It is also not what the KTC *should* have done. As Indonesia has explained, a production company such as [[**]]⁶¹ necessarily incurs significant interest expenses solely related to the manufacturing function. There is no reasonable basis to attribute interest expenses of this nature to a company operating at CMI's level that, in

⁵⁷ Korea requests that the data in square brackets be treated as confidential.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

Korea's words, incurs only selling and sales-related administrative expenses. Korea attempts to rebut Indonesia's argument that CMI could not have incurred financing expenses to finance its accounts receivable by saying that CMI's payment practices were not verified. This is incorrect. The KTC verified CMI's payment terms for 24 different sales without finding any discrepancies.

(v) *Use of Facts Available for Tjiwi Kimia*

4.231 The KTC's decision to use data from the application to calculate the normal values and export prices for Tjiwi Kimia cannot be reconciled with the requirements of paragraph 7 of Annex II. The steps allegedly taken by the KTC were plainly inadequate to discharge the duty imposed on the KTC. Korea's justifications provide no valid grounds for a reasonable investigating authority to (1) rely on secondary data which has been directly contradicted by its own findings, and, (2) assume that a single exporter with an insignificant quantity of export sales has dumping margins far in excess of all other investigated producers.

4.232 The KTC also failed to comply with its duty to provide the single economic entity of Sinar Mas companies with any opportunity to submit data regarding the portion of its sales accounted for by Tjiwi Kimia. Korea now argues that the term "explanation" does not encompass "a second chance to submit new information." However, the ordinary meaning of the term "explanation" encompasses the action of providing further details. Accordingly, paragraph 6 has consistently been interpreted to refer to an opportunity to provide additional evidentiary information, and not simply argument, to explain deficiencies in previously-submitted data. Korea's interpretation would risk rendering paragraph 6 of Annex II largely inutile.

(vi) *Fair Comparison*

4.233 Korea argues that CMI's involvement just reflected a shifting of expenses from the mills to CMI that would not have resulted in any additional expenses. And yet, as noted, the KTC considered that CMI incurred roughly double the amount of SG&A and interest expenses as the producers and exporters Indah Kiat and Pindo Deli. Korea's argument that these massive additional expenses do not affect price comparability between the domestic and export markets is at odds with the KTC's actions and logic.

(vii) *Collapsing the Three Exporters to a Single Entity*

4.234 Korea appears to acknowledge that price decision-making in both markets is the appropriate standard. While it is not clear whether it was actually used by the KTC, this standard at least has the advantage of focusing on the essential issue – pricing in each market – and requiring a showing that the exporters actually or *in fact* acted as a single entity with respect to those pricing activities.

4.235 From the nature of the grounds used by the KTC, it must be concluded that the KTC did not consider price coordination to be a necessary condition for collapsing legally distinct entities and also failed to make any determination that there was price coordination between the different Sinar Mas companies. For this reason, the KTC cannot be considered to have articulated or followed a standard for collapsing that is consistent with Articles 6.10 and 9.3 of the Agreement. Moreover, no unbiased and objective authority could have concluded from the evidence on record that Pindo Deli, Indah Kiat and Tjiwi Kimia coordinated the prices of their domestic and export sales.

(b) *Issues relating to the determination of injury and causation*

(i) *Like Product*

4.236 Indonesia has explained that an injury and causal link determination based on unlike products would be inconsistent with Articles 2.6 and 3 of the Agreement. Accordingly, there is an obligation

on the investigating authority to ensure that its injury determinations are based on "like" products. Nothing in Korea's second submission rebuts this obligation. In addition, Korea has impliedly acknowledged that there must be internal consistency within the product under consideration. It would follow then that there must be internal consistency in the like product. The fact that the Agreement does not expressly define the "product under consideration" does not absolve the investigating authority of its duty to define the "like product" under Article 2.6 as one that is alike the product under investigation in all respects and to conduct injury determinations under Article 3 for "like products," in the plural, so defined.

4.237 It is apparent that the KTC did not make any *findings* on the issue of whether PPC and WF were sufficiently similar to warrant the conduct of an aggregate injury determination. While Korea refers to evidence submitted by an interested party regarding this issue, the presence of evidence on the record is, of course, not the same thing as a finding by the investigating authority regarding that evidence. Accordingly, the Panel must conclude that the KTC did not compare PPC and WF and made no findings regarding the similarities or difference between PPC and WF.

(ii) *The Injury Analysis*

Volume and Price Effects

4.238 Korea consistently relies on its claim that the imports under investigation were continuing to increase their market share even in the first half of 2003 to support virtually every aspect of its injury finding. However, the KTC miscalculated the market share statistics in that it did not properly reflect the fact that the volume of imports under investigation was decreasing at a faster rate than domestic consumption. Moreover, Korea substantially understated total domestic consumption and, therefore, overstated market shares, by failing to include in its analysis domestic shipments by domestic producers excluded from the definition of the domestic industry.

4.239 Korea also now seems to take the position that the KTC did not make any findings regarding significant price undercutting, instead, the KTC made only findings of price suppression and price depression. Korea has not explained the standard used by the KTC in its findings of price suppression and price depression and its findings suffer from a number of deficiencies. Korea's submissions refer to the decline in the domestic industry's market share as the chief indicator that the domestic industry was suffering injury. However, given that price is the factor of competition, it is not possible to attribute the decline in domestic industry *market share* to imports which do not significantly undercut domestic prices.

4.240 Korea repeatedly refers to the domestic industry's consistent ordinary losses as supporting the findings of price suppression, price depression, and injury. These trends have nothing to do with the price effects of imports since their losses depend on significant changes in *non-operating* income and expense.

Article 3.4 Analysis

4.241 The KTC's superficial series of recitals and conclusions is not sufficient to meet the standards of Article 3.4. As a legal matter, the KTC may not find injury simply because it considers that there are no improving trends with respect to the factors examined. Every industry, including paper, is subject to the vagaries of a business cycle. It is the responsibility of the investigating authority to evaluate the trends in injury factors and place them in the context of the business cycle to determine whether flat trends justify the inference that the domestic industry is suffering material injury. As a factual matter, Indonesia notes that several of the injury factors were showing positive or steady trends. Wages and productivity generally increased, and production capacity and output were

generally steady. There was also an increase in facility investment, for facilities that could produce [**]⁶².

Article 3.5 Causation/Non-Attribution Analysis

4.242 In its attempts to explain the KTC's causation analysis, Korea again relies on the KTC's flawed analysis of consumption and market shares. Korea ignores the possible effect of a decline in domestic consumption on prices. Regarding raw material costs, Korea's position that cost fluctuations could not affect the Korean industry's revenues and hence profits. This is directly contradicted by evidence on the record. The KTC should have analysed the extent to which these cost fluctuations affected revenue and operating profits as part of its non-attribution analysis. In fact, the substantial facility investment in 2001 was in facilities that could be used for [**]⁶³. This suggests the Korean industry was in a healthy condition. The KTC should have considered that imports from other countries increased significantly over the period of investigation, especially towards the end of the period. Korea has not responded to Indonesia's argument that the domestic industry's decline in export volumes was greater than the decline in its domestic shipments for the period 1999-2002.

Domestic Industry's Own Imports

4.243 Korea admits that if members of the domestic industry were themselves importing the product under investigation, the analysis "might be more complex." The table provided in Korea's response to the Panel's question 57 indicates that the domestic industry had substantial imports during several portions of the period under investigation. The KTC should have conducted the "more complex" analysis of the impact of these imports on the domestic industry.

(c) Procedural issues

4.244 Indonesia has examined Korea's contention that during the 27 August 2003 hearing, the Indonesian exporters were provided with a document which indicated that the period of investigation for injury had been extended till June 2003. In light of apparent corroboration of Korea's position, Indonesia wishes to withdraw its claim regarding this particular issue.

2. Closing Statement of Indonesia at the Second Meeting of the Panel

4.245 Anti-dumping proceedings are necessary complex and burdensome for all parties – the exporters that participate, the investigating authorities that conduct the investigations, and, not the least, for WTO panels that must review the investigating authorities' determinations. Thus, while this case is also very detailed, it is by no means unique. The Agreement contains detailed rules for the conduct of these investigations. These rules have been interpreted and applied by many previous panels and the Appellate Body. Indonesia is surprised, therefore, by Korea's claim, not supported by any reference to precedent, that the Agreement governs only the "mental" analysis the investigating authority must perform, and that the investigating authority's determinations are no more than written summaries of that analysis. Indonesia trusts that the Panel will follow established standards and base its decision on the KTC's actual determinations.

4.246 In this regard, Indonesia notes that Korea continues to provide new *ex post* justifications. For example, Korea now argues that the KTC in fact required all three Sinar Mas affiliated exporters to provide a single questionnaire response, even though the KTC never articulated this position in its investigation and in fact took the position in its preliminary determination that it was precluded by law from doing so. Had the KTC taken the position early in the investigation that it wanted a single response from all three exporters, the entire course of the investigation would undoubtedly have

⁶² Korea requests that the data in square brackets be treated as confidential.

⁶³ Korea requests that the data in square brackets be treated as confidential.

unfolded differently. But that is not what happened, and the Panel can review only what actually happened. Similarly, Korea now suggests that it excluded importing producers from its analysis of Korean market consumption as some sort of inference adverse to the importers – another previously-unheard theory.

4.247 In its submissions, Korea has provided much new disclosure and discussion of the substantive issues that were before the KTC and are now before the Panel. In many respects, the discussion before the Panel involved precisely the kind of analysis that should have been conducted by the KTC. For example, Korea has attempted to explain the standards applicable to a decision to collapse different exporters into one. Any explanation of these standards was missing from the KTC's determination. Similarly, Korea has attempted to discuss the question of whether PPC and WF are like products, which the KTC did not do (and which Korea continues to maintain it was not required to do). And to give just one example relating to the injury determination, Korea has provided some discussion of import trends on a semester-to-semester basis, although Korea has still not disclosed the half-yearly trends other than for the imports under investigation. Indonesia disagrees with Korea's arguments on these issues. However, had the KTC conducted this kind of evaluation of the evidence – which it was required to do under the Agreement – it is possible that the parties would not be here.

4.248 Korea has suggested that Indonesia's arguments have no practical significance. That is not how Indonesia sees it. An important exporting industry in a developing country has been subject to anti-dumping duties in a situation where the investigating authority first determined that the largest exporter was not dumping and then changed the rationales for its determinations until it was able to conclude that that exporter was in fact dumping. And the investigating authority then made an injury determination that consisted of a single sentence of analysis. The Panel may or may not agree with all of Indonesia's arguments as to whether the KTC's conduct was consistent with the Agreement, but it should be in no doubt as to the practical importance of the issues before it.

H. SECOND ORAL STATEMENT OF KOREA

4.249 The following summarises Korea's arguments in its second oral statement.

1. Opening Statement of Korea at the Second Meeting of the Panel

(a) The proper conceptual framework

4.250 There are several conceptual flaws in Indonesia's arguments. For example, a number of Indonesia's arguments start with the assumption that the Sinar Mas Group was being truthful — and then assert that the KTC erred by not accepting the conclusions that flowed from that premise. But the Agreement does not require investigating authorities to start with an assumption of truthfulness by respondents. The KTC was permitted to approach the Sinar Mas Group's submissions with scepticism, and to require that the Sinar Mas Group demonstrate the accuracy of the submitted information. When the Sinar Mas Group refused to provide necessary documentation that was readily available to it, the KTC was justified in concluding that the accuracy of the submitted information was not established, and that the information could not be used.

4.251 Indonesia's arguments also fail to recognize that interpretation of the WTO Agreements must be carefully based on the text of those Agreements. Throughout this proceeding Indonesia has cited a laundry list of provisions in the Agreement whose obligations it claims Korea has violated. But, it has failed to undertake the hard analysis of the text of those provisions that is needed to clarify what those obligations are, and whether Korea's actions were inconsistent with them.

4.252 Finally, Indonesia's arguments concerning the sufficiency of Korea's final determination assume that the Agreement requires perfect explanations of the analysis performed by the investigating authorities — including full responses to arguments that were never presented to the

investigators. But the provisions of Articles 12.2 and 12.2.2, which set forth the requirements for the investigating authorities' explanations, only require explanations "in sufficient detail" of all "material issues" and of the "main reasons leading to the determination." Of course, the explanations provided must be sufficient to permit a Panel to determine whether an investigating authority properly "assessed" or "considered" or "examined" or "evaluated" the relevant factors. But they do not require perfection — especially on issues that were not raised during the proceedings before the investigators.

(b) Dumping calculation issues

(i) *The KTC's decision to "collapse" the Sinar Mas Group mills*

4.253 Indonesia has conceded that an investigating authority may treat separate corporations as a single entity in appropriate circumstances, and that the separate corporate form is simply a "relevant" factor. However, Indonesia has argued that Korea's description of the facts supporting the conclusion that the Sinar Mas Group acted as a single entity is not correct. The effort is, to say the least, unconvincing. It would require the Panel to disregard the evidence — including the business card of an official in a corporate marketing department that Indonesia claims does not exist, the Sinar Mas Group's own statements about CMI's role in negotiating sales in Indonesia, and the fact that the three Sinar Mas Group mills shared the same president, a majority of directors, and several vice-presidents as well.

(ii) *"Facts available" for Tjiwi Kimia*

4.254 Indonesia has claimed that the KTC failed to properly corroborate the facts available used to determine the export price and normal value for Tjiwi Kimia. But the "facts available" for Tjiwi Kimia were corroborated within the meaning of paragraph 7 of Annex II — by deriving the export price data from official Korean customs statistics, and by basing normal value on information from an independent Korean government agency, and then comparing this information with the data submitted by the responding companies.

4.255 In the end, Indonesia's argument reduces to the proposition that the dumping margin assigned to Tjiwi Kimia could not be significantly higher than those assigned to more cooperative respondents, because that would imply that the "facts available" had not been corroborated against the information submitted by the more cooperative respondents. But this argument would effectively read the third sentence of paragraph 7 of Annex II out of the Agreement, because it would prevent investigating authorities from assigning results to non-cooperative respondents that are "less favourable" than those assigned to cooperative respondents.

4.256 Indonesia also claims that the KTC could not properly resort to "less favourable" facts available for Tjiwi Kimia unless it had given the other Sinar Mas Group mills an additional opportunity to submit the Tjiwi Kimia data. There is nothing in the Agreement that supports this claim. Furthermore, Indonesia's argument is based on a factual error. Contrary to Indonesia's assumptions, the KTC had not initially requested the Tjiwi Kimia information *solely* from Tjiwi Kimia. Instead, its questionnaire to each of the Sinar Mas Group mills requested complete information on all sales by all related parties. Indah Kiat and Pindo Deli were specifically told that, "[f]or *all* related parties," they should "include the sales and cost of these related companies with your sales and cost in the *same* computer data file(s) and submit a *single* narrative response."

4.257 In this case, the Sinar Mas Group did not ask the KTC to modify its questionnaire requirements, and it did not give the KTC the information that would be needed to make an informed decision. Instead, without ever consulting the KTC, the Sinar Mas Group unilaterally decided that it was not going to provide any information on Tjiwi Kimia's sales and production. There is no way to read this as anything other than a refusal by the Sinar Mas Group to provide information that was

specifically requested in the KTC's questionnaire — and that was requested not only from the Group as a whole and from Tjiwi Kimia, but also from each of the Group's other mills.

(iii) *The KTC's rejection of the submitted CMI sales data*

4.258 Indonesia contends that the KTC improperly penalized the Sinar Mas Group for the “difficulties” the Group experienced in obtaining financial statements and accounting records from CMI. However, there is no evidence of any real “difficulties.” Although the CMI income statement had been specifically requested in the KTC's *initial* questionnaire, the Sinar Mas Group did not provide any indication that it was experiencing “difficulties” in obtaining that information until the start of verification, and it never apprised the KTC of the efforts it was making to obtain the requested information. Then, when the Sinar Mas Group realized the consequences of its non-cooperation after the verification was over, it managed to provide purported CMI income statements to the KTC in the space of less than a week. Furthermore, in light of the evidence that CMI was part of the same Division as the other Sinar Mas Group mills and shared the same offices, it was reasonable for the KTC to conclude that the failure of the Sinar Mas Group to supply the requested documentation was a wilful refusal, and not a mere “difficulty.”

4.259 Indonesia also claims that the KTC could have completed its verification successfully without access to CMI's financial statements and accounting records. Significantly, this argument was never raised to the KTC during its investigation. More importantly, it is based on a misunderstanding of the nature of a completeness test (based in large part on a mischaracterization of the practice of the US Department of Commerce).

4.260 In verifying the “completeness” of submitted sales files, the investigating authorities are, in fact, trying to “prove a negative” — to satisfy themselves that there were no reportable transactions that were incorrectly omitted from the sales listing. In this case, the Sinar Mas Group refused to allow the KTC to conduct the most fundamental completeness test — the reconciliation of the reported CMI sales to CMI's normal accounting records and financial statements. The Sinar Mas Group therefore prevented the KTC from “laying the foundation” for any other completeness tests, and from “base-lining” the documents presented at verification. And, more fundamentally, the Sinar Mas Group's refusal to allow the KTC access to the CMI financial statements and accounting records necessarily raised questions about the Sinar Mas Group's credibility. In the end, the verification of completeness comes down to a matter of trust. The Sinar Mas Group's refusal to allow access to the CMI financial statements and accounting records made failure virtually inevitable.

4.261 Indonesia also claims that the completeness of the CMI sales to its customers was established by the verification of the completeness of the sales from the mills to CMI. This argument is based on the premise that there was a one-to-one correspondence between the mills' sales to CMI and CMI's sales to its customers. In fact, there was a discrepancy of some [**] tons — roughly [**]⁶⁴ reams of paper — between the sales from the mills to CMI and the sales from CMI to its customers. Furthermore, even if the total quantity of CMI's sales had been established, questions about the reported prices would have remained. Without access to CMI's accounting records, there was no way for the KTC to confirm that the invoices presented to it at verification to support the reported sales prices actually matched the invoices that were recorded in CMI's accounting records, or that there were no unreported discounts, rebates, billing adjustments or additional charges by CMI.

4.262 Finally, Indonesia claims that the KTC could have verified the completeness of the CMI sales after the verification was over, based on the Sinar Mas Group's post-verification submission of purported CMI income statements. But, the KTC had no basis for assessing whether the purported income statements were themselves accurate and reliable. A verification would have been needed to establish that the purported statements were genuine and fairly presented CMI's results — and to

⁶⁴ Korea requests that the data in square brackets be treated as confidential.

reconcile the reported sales to those statements. By the time the Sinar Mas Group finally submitted those statements, it was too late to verify them, because the verification was already finished.

(iv) *Inclusion of facts available SG&A for CMI in constructed value*

4.263 Indonesia also claims that the amounts included in the constructed value to reflect CMI's selling, general and administrative ("SG&A") and interest expenses were too high. However, its arguments are based entirely on unsupported assumptions about the expenses CMI might have incurred. Indonesia has not demonstrated that the amounts the KTC used were unreasonable. In fact, the amounts used by the KTC were derived from the actual experience of another Indonesian company that sold the subject merchandise in the domestic market at the same level as CMI.

4.264 Indonesia also objects to the KTC's failure to make an adjustment to account for the involvement of CMI in domestic sales. Although Indonesia concedes that the domestic sales by CMI were at the same level of trade as the export sales by the mills, it claims that CMI's involvement nevertheless required an adjustment for "other differences ... affect[ing] price comparability." Again, this argument is based entirely on unsupported assumptions. Indonesia has not demonstrated that the activities performed by CMI on domestic sales were not performed by the mills themselves on export sales. Thus, no adjustment was warranted.

2. Injury determination issues

(a) *Like product*

4.265 Indonesia argues that Korea was under an obligation to define the "product under consideration" in a reasonable manner. However, the definition of the "production under consideration" has not been challenged by Indonesia in this proceeding. Instead, Indonesia has accepted the KTC's definition of the "product under consideration." Indonesia's argument has been that, given this definition, the KTC was required to find that there were two distinct "like products" for this one "product under consideration."

4.266 There is nothing in Article 2.6 that requires that result. Instead, Article 2.6 states that the "like product" is to flow directly from the definition of the product under consideration. Having accepted the KTC's definition of the "product under consideration," Indonesia has no grounds to object to the "like product" definition that flowed directly from it.

4.267 Indonesia's factual claims are also unpersuasive. The Sinar Mas Group never presented any evidence to the KTC establishing that there were differences between plain-paper-copier paper and other wood-free paper. And, in fact, the information submitted to the Panel by Indonesia shows that there were substantial overlaps in those products.

(b) *Trends in the volume of dumped imports*

4.268 Indonesia's arguments have focused on statistics that apparently show a 15.3 per cent decrease in the volume of dumped imports in the first half of 2003. But, a closer review reveals that this apparent "decrease" did not actually reflect a fall in imports. The annual rate of imports on 2003 was actually *higher* than the annual rate of imports in any previous year.

4.269 Indonesia also claims that the KTC miscalculated the market share figures, by excluding the domestic production by Korean producers who were not included in the domestic industry. Indonesia argues that, if one adjusts for these excluded producers, one can calculate that the dumped imports actually lost market share in the first half of 2003. But, the figures Indonesia has used in its recalculation of domestic consumption for the first half of 2003 are wrong. When the correct figures are used, Indonesia's recalculation actually shows that the market share held by the dumped imports

increased by almost [[**]] full percentage points from [[**]] per cent in 2002 to [[**]]⁶⁵ per cent in the first half of 2003.

(c) Price effects of the dumped imports

4.270 Indonesia argues that the KTC's findings are insufficient, because the KTC did not use the word "significant" in describing these price effects. But, the failure of the KTC to utter that "magic word" cannot be dispositive. Instead, the real question before the Panel is whether the KTC's analysis was substantively correct.

4.271 In this case, the KTC found that the Korean industry's prices had fallen by [[**]]⁶⁶ per cent from 2000 to the first half of 2003, due to the impact of the dumped imports. It also found that the Korean industry's prices were [[**]]⁶⁷ per cent below what would have been needed to return a reasonable level of profit. Such price depression and suppression is plainly "significant," under any definition of that term.

(d) Consideration of injury factors

4.272 Indonesia also claims that the KTC failed "to properly consider all injury factors" described in Article 3.4 of the Agreement. However, Indonesia has not identified a single relevant factor that the KTC ignored. To the contrary, Indonesia concedes that the KTC actually did examine all of the factors identified in Article 3.4. A review of the data analyzed by the KTC indicates that the trends for every single injury factor were adverse for the domestic industry.

4.273 As required by the Agreement, the KTC also considered whether the injury the domestic industry had experienced might have been caused by other factors. The KTC's staff collected detailed information on possible alternative causes of injury. The KTC's conclusion that these factors did not explain the injury to the domestic industry was entirely consistent with that evidence.

(e) Consideration of imports by Korean producers

4.274 Indonesia continues to assert that the KTC should have excluded imports by the "Korean industry" from its analysis. However, the "Korean industry," as defined by the KTC, did not include the producers that imported the subject merchandise.

4.275 The Agreement required the KTC to consider the impact of "dumped imports" on the "domestic industry." Indonesia has not identified any provision of the Agreement that would allow, let alone require, the KTC to treat the imports by Korean producers who were excluded from the "domestic industry" as anything other than "dumped imports." The only provision concerning imports by a domestic producer is Article 4.1 — and there is no claim that the KTC failed to comply with the provisions of Article 4.1. Consequently, Indonesia's claims must be dismissed.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Canada, China, the European Communities, Japan and the United States are set out in their written submissions and oral statements to the Panel and are summarised in this section.

⁶⁵ Korea requests that the data in square brackets be treated as confidential.

⁶⁶ Korea requests that the data in square brackets be treated as confidential.

⁶⁷ *Ibid.*

A. THIRD PARTY WRITTEN SUBMISSION OF CANADA

5.2 The following summarizes Canada's arguments in its third party written submission.

5.3 This dispute concerns Indonesia's challenge to various aspects of an anti-dumping measure imposed by Korea on imports of plain paper copier and woodfree printing paper under the Agreement and Article VI of the GATT.

5.4 Canada has a substantial interest in this matter, particularly with respect to Indonesia's claim that Korea improperly defined "like product" under Article 2.6 of the Agreement. Canada is concerned with the proper legal interpretation of the definitions for "like product" and "product under consideration" found in this provision.

5.5 An investigating authority must determine the "product under consideration" in a specific investigation. However, in order to comply with WTO obligations, an investigating authority must act in accordance with Article 2.6 of the Agreement in making a determination.

5.6 In accordance with Article 17.6(ii) of the Agreement, a panel has a duty to determine whether an investigating authority's determination of what constitutes the "like product" and "product under consideration" in a specific investigation rests on a permissible interpretation of Article 2.6 of the Agreement.

5.7 The term "like product" appears in the Agreement in two main contexts: (1) the determination of dumping; and (2) the determination of injury. In the context of the determination of dumping, the term "like product" refers to the product sold in the home market of the exporting country that forms the basis for the calculation of the normal value. In the context of the determination of injury, the term "like product" refers to the product produced by the domestic industry that allegedly suffers injury.

5.8 Article 2.6 defines the term "like product" in relation to the "product under consideration". The "product under consideration" refers to the allegedly dumped product that is the subject of the investigation. The term "like product" must be interpreted in accordance with this definition wherever it appears in the Agreement. All of the words in Article 2.6, including the words "product under consideration", must be given meaning.

5.9 A "like product" is a product that has a common set of "characteristics" with the "product under consideration". Accordingly, a reasonable interpretation of the words in Article 2.6 would suggest that an investigating authority must identify the "characteristics" of the "product under consideration".

5.10 An investigating authority must also divide the "product under consideration" into cohesive groupings of products that share common characteristics (*i.e.*, the investigating authority must determine whether there is one or more "product under consideration") and make separate determinations of dumping and injury with respect to each "product under consideration". Each such determination will necessarily require the identification of a corresponding "like product" to the "product under consideration".

5.11 To find that the "product under consideration" can include a group of products that do not share common characteristics would lead to absurd results. An investigating authority could capture non-injurious dumping by creating an overly broad definition of "product under consideration".

B. THIRD PARTY ORAL STATEMENT OF CANADA

5.12 Canada has indicated in a letter to the Panel dated 25 January 2005, that it will not make an oral statement at the third party session.

C. THIRD PARTY WRITTEN SUBMISSION OF CHINA

5.13 The following summarizes China's arguments in its third party written submission.

1. Introduction

5.14 The People's Republic of China ("China") wishes to comment on the following issues:

- Issue 1: Necessary Information in the Context of the Application of "Facts Available"
- Issue 2: Whether the Obligation of the Investigating Authorities under Paragraph 7 of Annex II Can Be Released by Compliance of the Investigating Authorities with Article 5.3 before the Initiation of the Investigation
- Issue 3: The "Collapsing" of Affiliated Respondents

2. Arguments

(a) Issue 1: necessary information in the context of the application of "facts available"

5.15 In the alleged antidumping investigation, the KTC determined that since Pindo Deli and Indah Kiat, the two respondents to the alleged investigation, failed to "submit data such as financial statements and account documents" of CMI, deemed by the KTC as an affiliate to Pindo Deli and Indah Kiat, the individual normal value of each of them was calculated based on facts available.

5.16 China understands that Article 6.8 of the Agreement, in essence is a sort of "trigger term" for the adoption of "facts available", exhaustively provides for the circumstances under which the investigating authorities can resort to facts available. China will hereby limit its comment only to the circumstance involving "necessary information" provided in Article 6.8 of the Agreement which is the main focus of the alleged dispute described above.

5.17 China notes that there are no provisions in the Agreement expressly defining the "necessary information" referred to in Article 6.8 of the Agreement and therefore believes that the investigating authorities shall have the discretion to determine what information is necessary for a specific investigation. However, such discretion is subject to certain limitations and procedural requirements provided for in the Agreement. These limitations are that (1) the investigating authority shall not request irrelevant information; (2) the investigating authority shall not request the information that creates the extra burden for the interested parties; and (3) when demanding necessary information, the investigation authorities are also required to act in a reasonable, objective and impartial manner. The procedural requirements are (1) the investigating authorities shall determine what exact information is necessary for the specific investigation and give any interested party qualified instructions which are sufficient for the interested party to understand what and to what extent it shall provide as the necessary information demanded by the investigating authorities; and (2) the investigating authorities shall not disregard the information provided by the interested party even if it is not ideal in all respects as long as the interested party has acted to the best of its ability.

5.18 China agrees that in the event that some of the required information necessary for the investigation has not been submitted or, although provided, has been otherwise rejected, the investigating authorities shall not therefore reject the entire information provided regardless of the

accuracy of that information. The investigating authorities shall determine on the basis of the specific facts and circumstances of the investigation at hand as to whether the fact that some information not properly submitted or is rejected otherwise has consequences for the remainder of the information submitted and therefore facts available can be resorted to.

- (b) Issue 2: whether the obligation of the investigating authorities under paragraph 7 of Annex II can be released by compliance of the investigating authorities with Article 5.3 before the initiation of the investigation

5.19 Indonesia claimed that, in the alleged antidumping investigation, the KTC failed to check the information from the applicants on which it relied against the information obtained from other sources during the course of the investigation as required under Paragraph 7 of Annex II of the Agreement. Korea contended that as part of the initiation process, the KTC had examined the information contained in the application and found that it was accurate and adequate as required by Article 5.3 of the Agreement and therefore Indonesia should not challenge the investigating authorities' reliance on that information as "facts available".

5.20 China notes that the dispute in this regard mainly lies in the point that whether the investigating authorities' implementation of the obligations under Article 5.3 of the Agreement at the initiation stage will necessarily release their obligations under Paragraph 7 of Annex II of the Agreement when using the information in the application to determine the dumping margin in the later part of the investigation.

5.21 From the plain language of Article 5.3 of the Agreement, it is clear that the obligations required thereunder for the investigating authorities to examine the application information are right at the initiation stage before the investigation really starts. The purpose of such examination is none other than determining whether evidence in the application is sufficient to justify the initiation of an investigation. However, the obligations required under Paragraph 7 of Annex II for the investigating authorities to use special circumspection are in the later part of an initiated investigation, the purpose of which is to reach findings and justify the determination of dumping margin.

5.22 By comparing the different scenarios implied respectively in Article 5.3 and Paragraph 7 of Annex II, it is noteworthy that, due to the lapse of time, it is undoubted that there will definitely come out more "new" information, i.e. information provided by respondents, which is available for the investigating authorities to use for the investigation after the initiation. It is possible that the information contained in the application which was previously determined to be "accurate and adequate" to justify the initiation of the investigation might be found inaccurate or inadequate in the later part of investigation based on those "new" information duly come out under the Agreement. If the investigating authorities are permitted to refuse the implementation of their obligations under Paragraph 7 of Annex II with the sole excuse that they have implemented the obligations under Article 5.3 of the Agreement, the opportunity for the interested parties to defend their interests as secured by Article 6.2 of the Agreement will definitely be deprived of. Therefore, China concludes that the investigating authorities' implementation of the obligations under Article 5.3 of the Agreement at the initiation stage will not necessarily release their obligations under Paragraph 7 of Annex II of the Agreement when using the information in the application to determine the dumping margin in the later part of the investigation.

- (c) Issue 3: The "collapsing" of affiliated respondents

5.23 In the alleged antidumping investigation, the KTC treated, or "collapsed" in another word, the Sinar Mas Group companies (Indah Kiat, Pindo Deli and Tjiwi Kimia) as a single entity for purposes of calculating the final dumping margin, which was claimed by Indonesia to be inconsistent with Article 6.10 of the Agreement.

5.24 Korea contended that Article 6.10 of the Agreement does not necessarily require the calculation of a separate dumping margin for each corporation that exported the subject merchandise for the simple reason that Article 6.10 of the Agreement does not speak in terms of *corporations*. Since terms “exporters” or “producers” are not explicitly defined by the Agreement, the investigating authorities are consequently permitted to interpret the term “exporter” under Article 6.10 of the Agreement in a functional manner in order to permit separate corporate entities that function as a single economic unit to be considered as a single “exporter”.

5.25 However, as China perceives, the assertion that there is no language of definition in the Agreement does not self justify Korea’s implication that the Agreement strictly treat “exporter” or “producer” and “corporation” as two separate terms. Korea’s interpretation of “producer” and “corporation” in a so-called functional manner is neither authorized nor justified.

5.26 In China’s view, there is no reason to believe that the Agreement absolutely excludes and prohibits the “collapsing” of affiliated respondents in any situations. Considering it is a spirit of the Agreement to conduct a “fair comparison” between the export price and the normal value when determining dumping margins, if the existence of affiliation to any extent damages the “fair comparison”, the investigating authorities shall be permitted to collapse such affiliation. In addition, a reference of this Article 9.5 of the Agreement can also imply, to some extent, in the whole context of the Agreement that the Agreement actually does not exclude the consideration of collapsing affiliated parties when determining dumping margins. Therefore, the investigating authorities shall have discretion as to collapse affiliated responding corporations and determine a single dumping margin for them.

D. THIRD PARTY ORAL STATEMENT OF CHINA

5.27 The following summarizes China’s arguments in its third party oral statement.

5.28 China believes that this dispute raises a number of important questions in respect of the interpretation of the Agreement. China wishes to comment on the following issues which China believes to be important.

(a) Issue 1: Necessary information in the context of the application of “facts available”

5.29 In the alleged antidumping investigation, the KTC determined that since the two respondents to the alleged investigation, namely “Pindo Deli” and “Indah Kiat”, failed to “submit data such as financial statements and account documents” of CMI, which was deemed by the KTC as an affiliate of the two respondents, the individual normal value of each of them was calculated therefore based on facts available.

5.30 China understands that Article 6.8 of the Agreement in essence is a sort of “trigger term” for the adoption of “facts available”, exhaustively provides the circumstances under which the investigating authorities can resort to facts available. China will hereby limit its comment only to the circumstance involving “necessary information” provided in Article 6.8 of the Agreement which is the main focus of the alleged dispute described above.

5.31 China notes that there are no provisions in the Agreement expressly defining the “necessary information” referred to in Article 6.8 of the Agreement and therefore believes that the investigating authorities shall have the discretion to determine what information is necessary for a specific investigation. However, such discretion is subject to certain limitations and procedural requirements provided in the Agreement. These limitations are that (1) the investigating authority shall not request irrelevant information; (2) the investigating authority shall not request the information that creates the extra burden for the interested parties; and (3) when demanding necessary information, the investigation authorities are also required to act in a reasonable, objective and impartial manner. The

procedural requirements are (1) the investigating authorities shall determine what exact information is necessary for the specific investigation and give any interested party qualified instructions which are sufficient for the interested party to understand what and to what extent it shall provide as the necessary information demanded by the investigating authorities; and (2) the investigating authorities shall not disregard the information provided by the interested party even if it is not ideal in all respects as long as the interested party has acted to the best of its ability.

5.32 China agrees that in the event that some of the required information necessary for the investigation has not been submitted or, although provided, has been otherwise rejected, the investigating authorities shall not therefore reject the entire information provided regardless of the accuracy of that information. The investigating authorities shall determine on the basis of the specific facts and circumstances of the investigation at hand as to whether the fact that some information not properly submitted or is rejected otherwise has consequences for the remainder of the information submitted and therefore facts available can be resorted to.

- (b) Issue 2: Whether the obligation of the investigating authorities under paragraph 7 of Annex II can be released by compliance of the investigating authorities with Article 5.3 before the initiation of the investigation

5.33 Indonesia claimed that, in the alleged antidumping investigation, the KTC failed to check the information from the applicants on which it relied against the information obtained from other sources during the course of the investigation as required under Paragraph 7 of Annex II of the Agreement. Korea contended that as part of the initiation process, the KTC had examined the information contained in the application and found that it was accurate and adequate as required by Article 5.3 of the Agreement and therefore Indonesia should not challenge the investigating authorities' reliance on that information as "facts available".

5.34 China notes that the dispute in this regard mainly lies in the point that whether the investigating authorities' implementation of the obligations under Article 5.3 of the Agreement at the initiation stage will necessarily release their obligations under Paragraph 7 of Annex II of the Agreement when using the information in the application to determine the dumping margin in the later part of the investigation.

5.35 From the plain language of Article 5.3 of the Agreement, it is clear that the obligations required there-under for the investigating authorities to examine the application information are right at the initiation stage before the investigation really starts. The purpose of such examination is none other than determining whether evidence in the application is sufficient to justify the initiation of an investigation. However, the obligations required under Paragraph 7 of Annex II for the investigating authorities to use special circumspection are in the later part of an initiated investigation, the purpose of which is to reach findings and justify determination.

5.36 By comparing the different scenarios implied respectively in Article 5.3 and Paragraph 7 of Annex II, it is noteworthy that, due to the lapse of time, it is undoubted that there will definitely come out more "new" information, i.e. information provided by respondents, which is available for the investigating authorities to use for the investigation after the initiation. If the investigating authorities are permitted to refuse to implement their obligations under Paragraph 7 of Annex II with the sole excuse that they have implemented the obligations under Article 5.3 of the Agreement, the opportunity for the interested parties to defend their interests as secured by Article 6.2 of the Agreement will definitely be deprived of. Therefore, China concludes that the investigating authorities' implementation of the obligations under Article 5.3 of the Agreement at the initiation stage will not necessarily release their obligations under Paragraph 7 of Annex II of the Agreement when using the information in the application to determine the dumping margin in the later part of the investigation.

(c) Issue 3: The “collapsing” of affiliated respondents

5.37 In the alleged antidumping investigation, the KTC treated, or “collapsed” in another word, the three respondents as a single entity for purposes of calculating the final dumping margin, which was claimed by Indonesia to be inconsistent with Article 6.10 of the Agreement.

5.38 In China’s view, there is no reason to believe that the Agreement absolutely excludes and prohibits the “collapsing” of affiliated respondents in any situations. Considering it is a spirit of the Agreement to conduct a “fair comparison” between the export price and the normal value when determining dumping margins, if the existence of affiliation to any extent damages the “fair comparison”, the investigating authorities shall be permitted to collapse such affiliation. In addition, a reference of this Article 9.5 of the Agreement can also imply, to some extent, in the whole context of the Agreement that the Agreement actually does not exclude the consideration of collapsing affiliated parties when determining dumping margins. Therefore, the investigating authorities shall have discretion as to collapse affiliated responding corporations and determine a single dumping margin for them.

E. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

5.39 The following summarizes the European Communities arguments in its third party written submission.

1. The interpretation of “each known exporter” under Article 6.10 of the Agreement

5.40 As regards the text of Article 6.10 of the Agreement, the term “each known exporter or producer” is not directly defined. It accordingly bears an autonomous meaning, and there is a certain margin for the investigating authorities to interpret this term. The EC notes that the term “exporter” is different from the term “corporation”. It agrees with Korea that the corporate law of Indonesia cannot determine the matter. Rather, the text of the Agreement allows an investigating authority to consider separate corporate entities that are related as constituting one single “exporter”. The EC also observes that Article 6.10 of the Agreement uses the alternative “exporter or producer”, and thus leaves a certain flexibility to the investigating authority to take due account of the economic circumstances of a given case, when deciding on whom to impose the anti-dumping duty.

5.41 Seen in its context, Article 6.10 of the Agreement first sentence establishes, “as a rule”, the duty to determine individual margins of dumping for each known exporter. The second sentence provides for the exception, namely that under certain conditions sampling is allowed. The Indonesian conclusion in the present case that the second sentence provides for the “only one circumstance where a departure from determining individual margins is allowed” is, however, flawed. It is based on the assumption that “each known producer” refers to each single legal entity and deduces from this that not granting an individual rate to each single legal entity is in breach of Article 6.10 of the Agreement, first sentence, unless the conditions under the second sentence of that provision are met.

5.42 However, the present debate is not about the relationship between the first and second sentences of Article 6.10 of the Agreement, but about the interpretation of the notion “exporter” within the meaning of the first sentence. In short, the argument derived by Indonesia out of the second sentence of Article 6.10 of the Agreement is based on what it is supposed to demonstrate, and is thus without merit. Treating related companies as one “exporter” does not deprive the provisions concerning “sampling” under the second sentence of their effect.

5.43 The same is true for the comparison between Article 6.10 of the Agreement and Article 4.1 (i), footnote 11 and Article 2.3 of the Agreement. Indonesia seems to advance an *a contrario* argument based on the fact that there is no corresponding provision on economic affiliations for exporters under Article 6.10 of the Agreement. In the view of the EC, it would, however, be equally

possible to come to the opposite conclusion: because Article 4.1 (i), footnote 11 and Article 2.3 of the Agreement take account of economic affiliations other provisions of the Agreement may be interpreted in line with their economic *rationale* as well.

5.44 Rather than the provisions just cited, Article 9.5 of the Agreement may be more relevant context. Under this provision, an investigating authority shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, “*provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product*”. If the relationship between exporters and producers is decisive for the revision of individual margins of dumping, the same relationship may also be considered in the initial determination.

5.45 In accordance with Art. 31 (1) third head of the Vienna Convention, Article 6.10 of the Agreement shall also be interpreted in the light of its object and purpose. In the EC’s view, the investigating authorities should determine an individual dumping margin for an exporter or producer that reflects its real economic structure, duly delineated in legal terms. If companies are related, this relationship would give them a possibility to channel exports through an affiliate with the lowest dumping margin, thus rendering the anti-dumping measures ineffective. In short: the object and purpose of the provision is to allow fair treatment of the exporter or producer by the investigating authority, and to ensure the effectiveness of the anti-dumping measures by preventing possibilities of manipulation by the exporter or producer.

5.46 It follows that a determination of individual dumping margins for each legal entity regardless of whether they are economically related to each other would be contrary to the object and purpose of Article 6.10 of the Agreement. Rather, the investigating authorities should be allowed to determine one dumping margin for related companies as a whole.

5.47 Such interpretation reflects the subsequent practice of the Community institutions. The European Commission and the Council of the European Union have consistently held with respect to related companies that calculating individual dumping margins would create the likelihood of manipulation of anti-dumping measures (thus rendering them ineffective) by enabling the related producers to channel their exports to the Community through the affiliate with the lowest dumping margin. In EC practice, related companies would normally be treated together where they belong to the same group, or share directors and facilities, or have other significant financial or economic links. In conclusion, the EC submits that a group that is composed of several legal entities which are related may be treated as one “exporter or producer” in the sense of Article 6.10 of the Agreement.

2. The use of “facts available” under Article 6.8 of the Agreement in conjunction with Annex II of the Agreement

5.48 The EC submits that the division of the “facts available” issue into two claims is questionable. As has been explained in Section II of this written submission, an investigating authority is entitled under the Agreement to treat separate legal corporations as one “exporter or producer”, provided that they are related. It follows that they, as a whole, bear the rights and obligations *vis-à-vis* the investigating authority during the anti-dumping procedure. Therefore, either cooperation or non-cooperation by any part of it may be attributed to the group as a whole. Accordingly, an investigating authority may use “facts available” with regard to an exporter if one of its legal corporations has not cooperated and thereby prevented an investigating authority from obtaining or verifying the necessary information relating to the determination of dumping.

5.49 For these reasons the EC believes that the first and second claim should be dealt with together. The question before the Panel is therefore whether the KTC did properly apply “facts available” for the exporter, i.e. the Group composed of Indah Kiat/Pindo Deli/Tjiwi Kiwi.

5.50 The EC emphasizes that a fair balance must be struck between the interests of an investigating authority to conduct its investigation expeditiously, and the interests of an exporter to be heard.

5.51 First, it goes without saying that submission of evidence within a deadline set by the investigating authority should be considered as timely. As the setting of deadlines creates important legitimate expectations on the side of exporters, the investigating authority bears a certain responsibility to ensure that, when deadlines are set, with legal consequences if they are missed, they are clearly denoted as such. The EC submits that the legal consequences for any ambiguity whether a deadline has been set or revised should be borne by the investigating authority.

5.52 Second, the categorical approach under Korean law not to accept any new evidence after closure of the verification period does not seem to be in line with the above stated duty of an investigating authority to take into account all relevant factors when determining that a document was produced in good time or not. Hence, a practice that shuts off any evidence produced by an exporter after the verification, may well be in breach of Article 6.8 of the Agreement in conjunction with paragraph 3 of Annex II of the Agreement. The KTC must show in the case at hand, why reliance on a document submitted after the closure of the verification would compromise its ability to conduct the investigation expeditiously.

5.53 Third, the Indonesian argument that the two legal entities had difficulties to obtain relevant information from CMI, is without merit since such difficulties arose in the sphere of responsibility of the Sinar Mas Group and would therefore have to be attributed to the exporter, in line with the EC's general observation that the use of facts available should target the related companies as a whole.

5.54 Fourth, both sides point out that the exporter's right to be heard concerns "all information which is verifiable" (paragraph 3 of Annex II of the Agreement, first sentence). Indonesia finds that the document of 9 April 2003 was a "verifiable" CMI financial statement, whereas Korea denies this since the papers were not "self-verifying".

5.55 Again, without attempting to reach a conclusion on the factual aspects of the issue, the EC submits that the question should not be dealt with in isolation. Rather, verifiability is one of the factors that allow an investigating authority to reject submitted evidence as untimely. Accordingly, a statement may be "verifiable" in abstract terms: but if it is submitted only after a verification mission has already taken place, its actual verification would necessitate a second mission. That costs time and money and is not required by the Agreement. In such a case, the investigating authorities may consider this as an important factor in their overall consideration of whether to reject such a document as untimely or not.

3. The termination of an investigation under Article 5.8 of the Agreement

5.56 The European Communities agrees with Korea that Article 5.8 refers to termination of an investigation on a country-wide basis. Article 2 of the Agreement defines dumping. Article 2.1 of the Agreement refers to the word "country" 3 times – and specifically to the product exported "from one country to another". The word "country" is used a further 5 times in Article 2.2 and footnote 2 of the Agreement. These provisions reflect the language of Article VI of the GATT, which also repeatedly refers to imports from one country to another. They indicate that the concept of dumping involves a strong connotation of a country-wide assessment, which may be reflected in the scope of the investigation. Thus, absent particular provisions requiring a company specific approach, a country-wide approach will generally be permissible.

5.57 Article 5.2(ii) of the Agreement requires the provision of the "names of the country or countries of origin or export in question". This is the primary obligation, in the sense that it is mentioned first in this provision, and is not qualified in any way – a complainant cannot state that it does not know the country or countries of origin. There is a secondary obligation – to describe known

exporters or producers and importers. This obligation is, however, subject to the important qualification of the word “known” – if the names of the exporters or producers are not known, they do not need to be indicated in the complaint. It would be permissible to initiate an original investigation even in circumstances where only the country of origin would be known – even if there were no known exporters or producers. Thus, the country-wide nature of the investigation is also reflected in the complaint, right from the start.

5.58 Such an approach is confirmed by Article 12.1.1 of the Agreement, which requires that the public notice of the initiation of an original investigation states the name of the exporting country or countries. There is no obligation to state the names of known exporters or producers.

5.59 The country-wide approach to the initiation of an original investigation is common sense. The primary objective of an anti-dumping proceeding is to address the economic problem (injury) caused by dumped imports from a particular source. The precise identification of exporters and producers in the exporting country is, in terms of the scope of the investigation, incidental and may be difficult or impossible to achieve. If the investigation were initiated in the first place only in relation to known exporters and producers, then each time a further exporter or producer became known, it would presumably be necessary to extend the investigation. An investigating authority has no real means of ascertaining with complete certainty the full list of exporters or producers in the exporting country, and the Agreement imposes no obligation on an investigating authority to actively seek out that information.

5.60 The first sentence of Article 5.8 of the Agreement refers to the rejection of an application under paragraph 1, an application which, the European Communities has just observed, could lawfully be country-wide only – and indeed is likely to be so. The European Communities thus concludes that the first sentence of Article 5.8 of the Agreement imposes an obligation in relation to the investigation – that is, the country-wide investigation. Members may go further, by considering such matters on a company specific basis, but they are not obliged to do so by the terms of Article 5.8 of the Agreement.

5.61 The European Communities understands the final words “the case” in the first sentence of Article 5.8 of the Agreement to refer to the case as reflected in the application – which may lawfully be country-wide. Furthermore, the European Communities understands the words “the cases” in the second sentence of Article 5.8 of the Agreement to have the same meaning (except that the plural is used) as the words “the case” in the first sentence of Article 5.8 of the Agreement. The European Communities agrees that the text might have read: “in a case”. However, the European Communities does not attach any significance to the use of the plural in the second sentence of Article 5.8. It is common when drafting an abstract and normative piece of legislation to have in mind its future application in concrete terms to many individual cases (plural), and that may often be reflected in the drafting. The first sentence of Article 5.8 of the Agreement might just as well have been drafted in the plural. That the singular was used, presumably for reasons of grammar or style, is without significance.

5.62 The European Communities would find it unpersuasive to suggest that by using the plural “the cases” the drafters intended to refer to several company specific cases or investigations, as opposed to “the case” referred to in the first sentence of Article 5.8 of the Agreement – that being a country-wide case. It seems to the European Communities that had the drafters wished to write such a distinction into this provision, they would have done so more clearly – choosing, for example, a different abstract noun, rather than relying on an over-subtle distinction between the singular and the plural.

5.63 The European Communities finds further support for this view in the fact that the French language version of the first sentence of Article 5.8 of the Agreement does not use the word “cas”. That strongly militates in favour of rejecting the notion that the drafters intended to build on a

distinction between the singular and the plural – had they so intended they would surely have ensured that the text had the same meaning in all the language versions.

5.64 Finally, the European Communities would observe that the second sentence of Article 5.8 of the Agreement refers both to *de minimis* dumping margins and to a negligible volume of imports. Both of these are linked to the words “in cases where”. The import threshold factor is clearly country-wide, as reflected, for example, in the fourth sentence of Article 5.8 of the Agreement. It follows that the words “in cases where” cannot, in themselves, lead to the conclusion that the investigating authority must conduct a company specific assessment.

5.65 Accordingly, the KTC’s decision to continue the investigation after the preliminary *de minimis* determination *vis-à-vis* Indah Kiat was consistent with Article 5.8. of the Agreement. Only if the KTC had found in its final determination that the country-wide dumping margin was below the *de minimis* threshold – which it did not – would it have been obliged to immediately terminate its investigation as regards Indonesia.

F. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5.66 The following summarizes the European Communities arguments in its third party oral statement.

1. Introduction

5.67 In its written submission, the European Communities invited the Panel to conclude on four points of law:

- Article 6.10 of the Agreement allows an investigating authority to determine an individual margin for an exporter or producer that may be composed of separate corporations that are related;
- Article 6.8 of the Agreement in conjunction with Annex II allows applying “facts available” to such related companies;
- Article 6.8 of the Agreement in conjunction with paragraph 3 of Annex II is only violated if the investigating authority rejected submitted evidence without having struck a fair balance between its own interests to conduct an investigation expeditiously and the interests of the exporter to be heard, taking into account, *inter alia*, whether the need for a second verification of a document submitted after the closure of a first verification would lead to undue prolongation of the investigation or indeed whether any such second verification would be feasible at all;
- Article 5.8 of the Agreement does not require the termination of a proceeding in respect of companies found to have a *de minimis* dumping margin.

5.68 In this third party session, the European Communities has not developed these arguments further. The European Communities trusts that the Panel has taken due note of the European Communities' views. Instead, the European Communities concentrates on another issue that is of equally systematic importance for the interpretation of the Agreement and that has been addressed by other third parties in their written submissions: the definition of the product under consideration.

2. The definition of the “product under consideration”

5.69 At the outset, the EC notes the Panel’s observation in US – Softwood Lumber that the Agreement does not give guidance on the way in which the “product under consideration” shall be determined⁶⁸.

5.70 Indeed, Article 2.6 of the Agreement only defines the term “like product”. That term refers to two different products: in the context of the determination of dumping the “like product” is the product sold in the home market of the exporting country; in the context of the determination of injury, the same term refers to the relevant product of the allegedly injured domestic industry.

5.71 In contrast, the Agreement does not contain a similar definition for the “product under consideration”. Rather, it presupposes that the investigating authority selects the product forming the subject of its investigation. Nevertheless, the discretion of the authority to select products for investigation purposes is not unfettered under the Agreement.

5.72 Article 2.6 of the Agreement contains a reference to “*the product under consideration*” (emphasis added). Comparably, Article 2.1 of the Agreement speaks of “*a product*” (emphasis added) that is to be considered as dumped under certain conditions. The two provisions just quoted do not employ the plural “products”. The European Communities believes that this wording may offer some guidance to the investigation authorities not to “bundle” clearly distinct and separate products into “one product under consideration”.

5.73 The European Communities’ view can perhaps be best illustrated by examples. Paper can be produced in many different sizes, types and qualities and these may be continuously variable. Whilst there must be some limits on how widely the scope of the subject product can be defined, paper can probably be considered a single product. Accordingly, one anti-dumping investigation may be conducted to establish whether exports of all types of paper from a given country are dumped when compared with the prices at which an identical (or, in the absence of an identical range, a “like”) range of product types is sold on the market of the exporting country and whether this causes material injury to the producers of the same (or “like”) range of product types in the importing country. Similarly, whilst there must be some limits on how narrowly the subject product can be defined, it is probably also possible to conduct an anti-dumping investigation into exports of a more narrowly defined product, provided it can be distinguished from other product types in the continuum. This needs to be examined on a case-by-case basis.

5.74 What is not admissible in the view of the European Communities is to select two products out of a product type range and to “bundle” them together to the exclusion of the other products in the same range. To take an easy example, it is inadmissible to bundle together apples and oranges as a single “product under consideration”. These would constitute two products and “bundling” one with the other could allow an anti-dumping duty to be imposed on a non-dumped product (e.g. apples) when another product is dumped (e.g. oranges).

5.75 Indonesia considers that plain paper copier (“PPC”) and uncoated wood-free printing paper (“WF”) should have been considered as separate products under consideration since they differ in physical characteristics, end-uses, market sectors, HTS classification and manufacturing processes⁶⁹. Korea asserts that the two categories of paper differ only in form (sheet or roll), or for sheets, in size. Furthermore, it was impossible to tell at the time a roll is produced whether it will be destined for the PPC market or the WF market⁷⁰.

⁶⁸ See Panel Report, US – Softwood Lumber, para. 7.153.

⁶⁹ First submission by the Republic of Indonesia, para. 150.

⁷⁰ First submission by the Republic of Korea, paras. 162-163.

5.76 The European Communities does not wish to comment on the factual dispute between the parties but is only concerned that the Agreement is correctly interpreted. In the European Communities' view, the Panel should verify whether the two categories of paper (plain paper copier and uncoated wood-free printing paper) differ only in form (sheet or roll) or size, as argued by Korea, and constitute basically the whole continuum, or whether they are two separate products plucked out of a continuum and/or improperly bundled together, as argued by Indonesia. That is a factual question on which the European Communities does not take a position. Either appears possible.

5.77 Accordingly, it will be for the Panel to decide whether the treatment of PPC and WF by the KTC as “one product under consideration” was compatible with Articles 2.1 and 2.6 of the Agreement (and consequently Article 3.1 of the Agreement). If it establishes that PPC and WF are separate products, the KTC should also have separately considered:

- (1) the effect of Indonesian PPC imports on Korean PPC producers and
- (2) the effect of Indonesian WF imports on Korean WF producers to determine dumping and injury.

3. Conclusion

5.78 In sum, the European Community invites the Panel to first define the meaning of the “product under consideration” and then review whether Korea properly applied it in the present case.

G. THIRD PARTY WRITTEN SUBMISSION OF JAPAN

5.79 The following summarizes Japan's arguments in its third party written submission.

1. Introduction

5.80 Japan welcomes this opportunity to present its views in the proceeding brought by Indonesia over the consistency with Article VI of the GATT, the Agreement, and the Marrakesh Agreement establishing the World Trade Organization (“WTO Agreement”) of the anti-dumping measures imposed by Korea on imports of certain paper from Indonesia.

5.81 Japan has a systemic interest in the interpretation and application of the Agreement, the GATT and the WTO Agreement with regard to anti-dumping investigations. As a third party, Japan would like to address the issue of the interpretation and application of the terms “product under consideration” and “like product” under Article 2.6 of the Agreement in conjunction with Articles 2.1 and 3.1 thereof.

2. Arguments

5.82 Under the Agreement, an antidumping duty investigation can begin only after the “product under consideration” has been defined. The Panel in *US—Softwood Lumber* noted that:

As the definition of “like product” implies a comparison with another product, it seems clear to us that the starting point can only be the “other product”, being the allegedly dumped product. *Therefore, once the product under consideration is defined, the “like product” to the product under consideration has to be determined on the basis of Article 2.6.*⁷¹

5.83 As noted by the Panel in *US—Softwood Lumber*, the definition of the “product under consideration” is the fundamental element in an antidumping duty investigation and is the starting

⁷¹ Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada* (“*US—Softwood Lumber*”), WT/DS264/R, adopted on 31 August 2004, para. 7.153 (emphasis in original).

point for both the determination of dumping and injury under Articles 2 and 3 respectively. Article 2.1 defines dumping under the Agreement that:

For the purpose of this Agreement, *a product* is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is lower than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (Emphasis added.)

5.84 The Appellate Body in *US – Softwood Lumber* stated: “It is clear from the texts of these provisions (Article VI:1 of the GATT and Article 2.1 of the Agreement) that dumping is defined in relation to *a product as a whole* as defined by the investigating authority.”⁷²

5.85 The assessment of injury also begins with consideration of the “product under consideration.” Article 3.1 sets forth:

A determination of injury for the purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the *dumped* imports and the effect of the *dumped* imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. (emphasis added).

5.86 Whether an import is “dumped” is determined in accordance with Article 2.1, which, as discussed above, requires the authorities to determine dumping with respect to the product under consideration. In this way, the definition of the “product under consideration” is the starting point of the injury determination.

5.87 In light of the fundamental importance of the term “product under consideration”, as demonstrated above, particular care should be paid to ensure that the particular “product under consideration” in an antidumping duty investigation is properly defined.

5.88 As noted in Korea’s First Written Submission, the Panel in *US—Softwood Lumber* offered some clarification on the meaning of “product under consideration”: “in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the ‘product under consideration’ should be determined.”⁷³ Japan believes that the Panel’s analysis of “product under consideration” is incomplete. It is true that the Agreement on its face offers no additional clarification or definition of the “product under consideration.” However, since the Agreement does not provide specific additional clarification, it is a basic tenet of treaty interpretation to interpret terms in accordance with their ordinary meaning, as required in Article 31 of the *Vienna Convention on the Law of Treaties*.⁷⁴

5.89 The ordinary meaning of the word “product” is “an article or substance manufactured or refined for sale; a substance produced during a natural, chemical, or manufacturing process; or a result of an action or process.”⁷⁵ The ordinary meaning of the word “product” therefore is a single article or substance, as opposed to a collection of distinct articles or substance. The interpretation of the meaning of “product under consideration” for the purposes of the Agreement must follow this ordinary meaning of the word “product.” It should also be noted that the Agreement, as specifically

⁷² Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted on 31 August 2004, para. 93 (emphasis added).

⁷³ Panel Report, *US—Softwood Lumber*, para. 7.153.

⁷⁴ Paragraph 1 of Article 31 of the Vienna Convention provides “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose.”

⁷⁵ *Concise Oxford English Dictionary*, Tenth Edition, Revised, p. 1140.

set forth in Article 2.1, contemplates defining “a product” under consideration, not “products” under consideration.

5.90 The term “product under consideration” thus prevents an anti-dumping investigation from capturing two separate products. While Japan has no objection to conduct two separate anti-dumping investigations on separate products simultaneously, Japan believes that determination of dumping and injury combining separate products into one “product under consideration” is not permitted. When the scope of the investigation includes two of more clearly distinct products, the investigating authorities should make separate determinations of dumping and injury for each such product. If the authorities determine either dumping or injury combining two separate products, the authorities act inconsistently with Article 2 or 3 of the Agreement, and also would act inconsistently with Article 2.6 when defining the scope of the “like product.”

5.91 In this case, Indonesia argues that “PPC” (plain paper copier) and “WF” (woodfree printing paper) are two distinguishable products.⁷⁶ Japan does not take any specific position on the factual aspect of this issue. If, however, PPC and WF are distinct products, Korea should have separately considered (1) the effect of Indonesian PPC imports on Korean PPC producers and (2) the effect of Indonesian WF imports on Korean WF producers to determine dumping and injury. Therefore, Japan requests that the Panel first complete the analysis of the meaning of the “product under consideration,” then review whether Korea properly defined the “product under consideration” and the “like product” in the instant dispute, and review whether Korea properly made determinations of dumping and injury for PPC and WF separately if the Panel finds that these are distinct products.

3. Conclusion

5.92 For the foregoing reasons, Japan respectfully requests that the Panel clarify the meaning of “product under consideration” under the Agreement, and examine if Korea established the scope of the product under consideration and the like product properly based on evidence in this dispute.

H. THIRD PARTY ORAL STATEMENT OF JAPAN

5.93 The following summarizes Japan's arguments in its third party oral statement.

1. Introduction

5.94 Japan would like to focus on certain arguments for some provisions of the Agreement presented by parties that Japan did not address in detail in its written submission.

2. Article 6.10 of the Agreement prohibits investigating authorities from arbitrary “collapsing”

5.95 Indonesia argues that the KTC's decision not to calculate separate dumping margins for Indah Kiat, Pindo Deli, and Tjiwi Kimia and instead to “collapse” these three companies into a single entity with a dumping margin is inconsistent with Korea's obligations under Article 6.10 of the Agreement.⁷⁷ Korea states that when legally-separate corporations in fact operate as a single economic entity with respect to sales of a subject merchandise, nothing in the Agreement precludes the investigating authorities from applying a functional definition and treating them as a single “exporter.”

5.96 On this issue, Japan would not disagree to all of Korea's argument. It is worth arguing to permit investigating authorities to treat certain companies as a single “exporter or producer” under

⁷⁶ *First Written Submission of Indonesia*, paras. 142-153.

⁷⁷ *First Written Submission of Indonesia*, paras. 120-129.

Article 6.10 of the Agreement in very rare cases. Japan, however, notes that Article 6.10 does not permit unlimited “collapsing.” Investigating Authorities are prohibited from treating several legal entities as one “exporter or producer” arbitrarily.

5.97 The first sentence of Article 6.10 of the Agreement provides as follows:

The authorities *shall*, as a rule, determine an individual margin of dumping for *each known exporter or producer* concerned of the product under investigation.(emphasis added)

5.98 Article 6.10 thus requires investigating authorities to determine an individual margin of dumping for “each” exporter or producer concerned as a rule. The purpose of this general obligation on investigating authorities is not to allow these authorities to calculate margins of dumping arbitrarily. Without this provision, investigating authorities could deliberately find a positive margin of dumping for a company, applying a single margin for two or more separated entities, even though the company was not found to be dumping standing alone.

5.99 The *only* permissible exception to this general obligation is for a special situation, *i.e.* “sampling” in the second sentence of Article 6.10 of the Agreement, where the number of exporters, producers, importers or types of products involved is so large as to calculate an individual margin impracticable. Article 6.10 makes the general obligation of its first sentence all the more rigid by permitting *only one exception*.

5.100 If, however, it is permissible for investigating authorities to treat two or more separated entities as a single “exporter or producer” under the first sentence of the Article 6.10 freely, that would open up in Article 6.10 a vast loophole on this fundamental obligation of calculating an individual margin of dumping. It would make results of this rigid obligation effectively worthless. If so, Members could easily jump over this obligation, just by explaining these entities are “one exporter” in an economical viewpoint. Accordingly, there is a certain margin or limit to treat separated entities as a single “exporter or producer.” At least, investigating authorities are not entitled to treat this kind of “collapsing” arbitrarily.

5.101 On this point, some of the Third Parties in this case are apparently willing to give investigating authorities a relatively free hand for “collapsing” separated entities as a single “exporter or producer.” For example, China insists that investigating authorities shall have discretion as to collapse *affiliated* responding corporations and determine a single dumping margin.⁷⁸ The EC also submits that a group that is composed of several legal entities which are *related* may be treated as one “exporter or producer” in the sense of Article 6.10 of the Agreement.⁷⁹ In the view of Japan, these discretions given to authorities are inappropriate.

5.102 The term “affiliated” or “related” is not used in Article 6.10 of the Agreement. The term “related” is used in Article 4.1(i) of the Agreement, which permits an investigating authority to exclude a producer from the definition of the domestic industry because of the relationship between a producer and an exporter or importer. The situation in Article 4.1(i) is obviously different from that in Article 6.10. Moreover, Article 4.1(i) has a Footnote 11 which specifies the type of relationship in detail, while 6.10 never had such a footnote. Had the negotiators of the Agreement intended to permit to treat “related” or “affiliated” entities as an “exporter or producer,” they would do so explicitly. But they did not. The negotiators never had any intent to “treat Opel and Saab as a single entity simply

⁷⁸ Third Party Submission of China, paras. 24.

⁷⁹ Third Party Submission of the EC, para. 18.

because they are both owned by General Motors,” as Indonesia states in its First Written Submission.⁸⁰

5.103 On this present case, Japan does not take any specific position on the factual aspect of this issue. Japan, however, notes that there is a certain limit or margin to “collapsing” separated entities into a single “exporter or producer” and investigating authorities are not entitled to treat such “collapsing” arbitrary, even if “collapsing” is permitted in some cases.

3. Conclusion

5.104 For the foregoing reasons, Japan respectfully requests the Panel to clarify the meaning of the first sentence of Article 6.10 of the Agreement and examine whether Korea acted inconsistently with Article 6.10 of the Agreement or not.

I. THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES

5.105 The following summarizes the United States' arguments in its third party written submission.

1. **Article 6.10 does not require investigating authorities to determine separate dumping margins for separate legal entities if they constitute a single “exporter” or “producer”**

5.106 Indonesia argues incorrectly that Article 6.10 of the Agreement does not permit an investigating authority to “treat distinct exporters that are separate natural or legal persons as a single ‘exporter’ for the purpose of calculating dumping margins.”⁸¹ Where the facts demonstrate that multiple legal entities constitute a single “exporter” or “producer,” the investigating authority may, consistent with Article 6.10 of the Agreement, determine a single dumping margin for those entities.

5.107 The Agreement does not define either the term “exporter” or “producer.” Moreover, the terms “exporter” and “producer” reflect commercial functions (*i.e.* exporting and producing) rather than corporate structure. Thus, the facts of a particular case may support a finding that the operations of two or more affiliated parties are so closely intertwined that the parties effectively constitute a single “exporter” or “producer” within the meaning of Article 6.10.

2. **Article 2.2 does not limit an investigating authority’s discretion to use constructed value as “facts available” to determine normal value in the absence of timely-submitted, verifiable home market sales data**

5.108 Contrary to Indonesia’s arguments, Article 2.2 does not limit an investigating authority’s discretion to use constructed value as “facts available” to determine normal value for purposes of conducting the dumping calculation under Article 2.1 in the absence of timely-submitted, verifiable home market sales data.

5.109 Article 6.8 expressly permits an investigating authority to rely on “facts available” in making a determination if a party to the proceeding does not provide necessary information within a reasonable period or significantly impedes the investigation. Nothing in Articles 6.8 or 2.2 either limits an investigating authority’s discretion in choosing from among the facts available in making its determination or imposes conditions on the use of certain categories of information, such as the cost information at issue in this dispute. Moreover, paragraph 3 of Annex II makes clear that an investigating authority may disregard certain information if it is not verifiable or not submitted in a timely fashion.

⁸⁰ First Written Submission of Indonesia, para. 122.

⁸¹ First Written Submission of Indonesia, para. 121.

5.110 There is thus no legal basis for concluding that an investigating authority's discretion in the selection of facts available under Article 6.8 is subject to the obligations set out in Article 2.2 regarding the determination of normal value.

3. Article 2.4 of the Agreement requires adjustment to price only where differences in selling expenses affect price comparability

5.111 Indonesia claims that Korea breached its obligation under Article 2.4 of the Agreement by failing to make "due allowance" for certain differences in selling expenses between the Korean and Indonesian markets. Indonesia misstates the obligations under Article 2.4. Contrary to Indonesia's arguments, Article 2.4 obligates an investigating authority to make "due allowance" only for differences that are "demonstrated to affect price comparability." If, as Indonesia appears to suggest, *any* difference in expenses warranted an adjustment under Article 2.4, regardless of whether it had an effect on price comparability, the references to "price comparability" in Article 2.4 would be rendered meaningless.

4. Examining information in the application for initiation under Article 5.3 of the Agreement does not necessarily satisfy the obligation to corroborate information from secondary sources under paragraph 7 of Annex II

5.112 Indonesia claims in its first submission that Korea breached its obligations under paragraph 7 of Annex II of the Agreement because the Korean investigating authorities failed to corroborate certain secondary information used as facts available.⁸² Korea responds by arguing that, as part of the initiation process, the authorities examined the information in the application and found it to be accurate and adequate as required by Article 5.3 of the Agreement.⁸³ The United States notes, in this regard, that the obligations under Article 5.3 and paragraph 7 of Annex II are distinct. The obligation to corroborate information from secondary sources under Paragraph 7 of Annex II is not necessarily satisfied by an investigating authority's examination of the information in an application for initiation during the initiation process. Whether the steps taken to satisfy the obligation under Article 5.3 have also satisfied the obligation under paragraph 7 of Annex II will depend on the facts and circumstances of the particular case.

5. Article 5.8 of the Agreement does not require immediate termination of an investigation upon calculation of a preliminary *de minimis* dumping margin for a responding party

5.113 Indonesia claims that Korea breached its obligations under Article 5.8 of the Agreement because the KTC did not immediately terminate the investigation as to an Indonesian responding party upon calculating a preliminary *de minimis* dumping margin for that company.⁸⁴ Indonesia's argument is based on a flawed interpretation of Article 5.8. Under Article 5.8, the obligation to terminate an investigation upon a finding of no or *de minimis* dumping applies solely with respect to final determinations of dumping.

6. An investigating authority does not act inconsistently with Article 2.6 or fail to take into account differences in the markets for different products simply by defining the "like product" to include items that are not identical to each of the items comprising the product under consideration

5.114 The United States respectfully requests the Panel, in assessing the "like product" claims of Indonesia, to take into account the following general points concerning the definition of the like product in antidumping cases and the relationship between that definition and the injury analysis.

⁸² First Written Submission of Indonesia, paras. 83-88.

⁸³ First Written Submission of Korea, para. 99.

⁸⁴ First Written Submission of Indonesia, para. 130.

5.115 First, the like product analysis under Article 2.6 requires a comparison of the *overall* scope of the product under consideration with the *overall* scope of the like product. There is no requirement that each *individual* item within the like product be “like” each *individual* item within the imported product subject to consideration. Further, as there are no substantive obligations other than those set out in Article 2.6 relating to the definition of the appropriate like product in each particular investigation, it is left to the discretion of the investigating authorities to determine which domestic product is “alike in all respects, or . . . has characteristics closely resembling those of the product under consideration.”

5.116 Second, by determining that there is only one “like product” for purposes of an injury determination, an investigating authority does not necessarily fail to “distinguish between the markets” for different types of the product subsumed within the single like product, as Indonesia suggests.⁸⁵ The Agreement allows for authorities to take into account differences in the markets for different types of products within the same like product.

7. Article 3.2 of the Agreement requires that investigating authorities “consider” whether there was significant price undercutting by subject imports

5.117 Indonesia challenges the KTC’s findings regarding the price impact of subject imports, claiming that there was no positive evidence that would permit an investigating authority to find that there was price undercutting by subject imports within the meaning of Article 3.2 of the Agreement.⁸⁶ The United States agrees that each injury determination – including the one at issue in this dispute – must be supported by positive evidence, as required under Article 3.1. However, the United States notes that Article 3.2 does *not* require the authorities to find significant volume increases, price undercutting, and price effects as a precondition to making an affirmative injury determination. Article 3.2 of the Agreement simply requires that the authorities *consider* whether there have been significant volume increases and significant price undercutting, and whether subject imports have had significant price depressing or suppressing effects.

8. Article 3.5 does not prescribe a particular methodology to be used in determining whether dumped imports are the cause of injury to domestic producers or specify the level of detail at which the analysis must be conducted

5.118 Indonesia challenges Korea’s analysis of whether dumped imports were the “cause” of injury to the domestic producers of the like product, claiming that Korea did not undertake a sufficiently detailed analysis under Article 3.5.⁸⁷ Further, Indonesia claims that Korea failed to conduct a proper analysis of the effects of non-subject imports under Article 3.5.⁸⁸

5.119 The United States notes that while Article 3.5 of the Agreement sets out several factors that “may” be considered by investigating authorities in ascertaining whether there is a “causal relationship” between dumped imports and injury to the domestic industry, it does not specify the type of information that the authorities must collect and examine or the detail in which they must explain their analysis of the information.

5.120 Article 3.5 also provides that the investigating authorities must examine any known factors other than the dumped imports which are injuring the domestic industry to ensure that injury caused by these other factors is not attributed to the dumped imports. However, it does not prescribe the particular methods and approaches to be used by investigating authorities to separate and distinguish the injurious effects of unfair imports from the injurious effects of the other known causal factors.

⁸⁵ See First Written Submission of Indonesia, para. 151.

⁸⁶ First Written Submission of Indonesia, paras. 159-161, 164.

⁸⁷ First Written Submission of Indonesia, paras. 180-187.

⁸⁸ First Written Submission of Indonesia, para. 180.

9. The fact that some domestic producers import the subject merchandise does not preclude an affirmative injury finding

5.121 Indonesia claims that Korea breached various provisions of the Agreement because, in making its injury determination, the KTC failed to take into account the fact that some members of the domestic industry were importing subject merchandise from the countries under investigation.⁸⁹ The United States notes, in this regard, that the fact that domestic producers may be importing some dumped merchandise does not preclude an affirmative injury finding. Article 4.1(i) provides investigating authorities with the *discretion* to exclude from the domestic industry those domestic producers that are importing the dumped product. However, neither Article 4.1(i), nor any other provision of the Agreement, *requires* that such domestic producers be excluded from the domestic industry in order to make an affirmative finding of injury.

10. Article 6.9 requires that interested parties be given advance notice of the *facts* under consideration, not the legal reasoning of the authorities

5.122 Indonesia claims that Korea breached Article 6.9 because the KTC failed to inform the interested parties in advance that it would determine that subject imports were causing present material injury, rather than threatening to cause material injury.⁹⁰ Contrary to Indonesia's arguments, however, Article 6.9 does not obligate the investigating authorities to give interested parties advanced notice of the *legal reasoning* of their determination. Rather, Article 6.9 requires investigating authorities to inform the interested parties of the "essential *facts* under consideration which form the basis for the decision whether to apply definitive measures." (Emphasis added).

J. THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

5.123 The following summarizes the United States' arguments in its third party oral statement.

5.124 As the Panel will recall, the United States has already filed a third party submission in this dispute. In its statement, the United States would like to elaborate on three issues: (i) whether an investigating authority may find that two or more legal entities constitute a single "exporter or producer" under Article 6.10 of the Agreement and calculate a single dumping duty for them; (ii) whether Article 2.2 limits an investigating authority's discretion in selecting among the "facts available" to use in calculating normal value when a respondent does not provide verifiable home market sales data; and (iii) how the "like product" and "product under consideration" may be defined for purposes of making an injury determination.

1. A single dumping margin may be calculated for two or more legal entities under Article 6.10 if they constitute a single "exporter or producer"

5.125 Indonesia has argued in its first written submission that investigating authorities may not find that separate legal entities constitute a single "exporter" within the meaning of Article 6.10 of the Agreement and determine a single dumping margin for the entities. According to Indonesia, investigating authorities *must* consider each separate legal entity to be a separate "exporter or producer" for purposes of calculating dumping margins. The United States disagrees.

5.126 Article 6.10 states that "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned in the investigation." The terms "exporter" and "producer" are not defined in the Agreement. Therefore, nothing in the text of the Agreement supports Indonesia's argument that the term "exporter" can encompass only a single legal entity.

⁸⁹ First Written Submission of Indonesia, paras. 188-195.

⁹⁰ First Written Submission of Indonesia, para. 202.

5.127 Moreover, the terms “exporter” and “producer” reflect commercial functions (*i.e.* exporting and producing) rather than corporate or legal structure. Thus, the facts of a particular case may demonstrate that the operations of one or more separate legal entities are so closely intertwined that – as a matter of commercial fact – they constitute a single “exporter” or “producer.”

5.128 Consider, for example, that XYZ corporation produces widgets in four separate factories. It determines – for tax and other commercial reasons – that it will separately incorporate each of its factories, which will become wholly-owned subsidiaries of XYZ corporation. Prior to the corporate change, a single dumping margin could be calculated for the corporation and its factories. However, after the corporate change, under Indonesia’s interpretation, an investigating authority would be *precluded* from finding that the separately incorporated factories and the parent company constitute a single “producer or exporter” and calculating a single dumping margin for them. In the view of the United States, such a result is not mandated under Article 6.10.

2. Article 2.2 does not limit an investigating authority’s discretion to select among the “facts available” to calculate normal value when a respondent does not provide verifiable home market sales data

5.129 In the investigation that is the subject of this dispute, Korean investigating authorities calculated the normal value of sales for two Indonesian respondents on the basis of “facts available.” They did so because, according to the Korean authorities, the home market sales data submitted by the respondents could not be verified. The Korean authorities selected as the “facts available” certain cost information, which they used to “construct” the normal value of sales. Indonesia is challenging Korea’s actions. Indonesia argues that, under Article 2.2 of the Agreement, cost information can be used to determine normal value only in certain limited circumstances – that is (according to Indonesia), in circumstances where there are either no home market sales of a “like product” or the home market sales do not provide a proper basis for comparison. Indonesia asserts that, because Korean authorities did not make a finding that such circumstances existed, they were precluded from determining normal value on the basis of the cost information.

5.130 In the view of the United States, Indonesia’s argument is off the mark. Article 2.2 establishes a requirement that home market sales be used to calculate normal value where such sales are available and provide a proper basis for comparison. Article 2.2 says nothing about what an investigating authority should do when a respondent fails to cooperate in an investigation and does not provide verifiable home market sales data. That issue is governed by Article 6.8 of the Agreement.

5.131 Article 6.8 permits an investigating authority to rely on “facts available” in making a determination if a party to the proceeding does not provide necessary information within a reasonable period or significantly impedes the investigation. Further, Paragraph 3 of Annex II recognizes that an investigating authority may decide not to take into account information that is not verifiable. Applied together, these provisions allow an investigating authority to disregard home market sales data if they are found to be unverifiable and to determine normal value on the basis of “facts available.”

5.132 Article 6.8 does not require that the limitations under Article 2.2 be observed when making a normal value determination on the basis of “facts available.” Moreover, Article 6.8 does not impose conditions on the use of certain categories of information, such as the cost information at issue in this dispute. Thus, there is no legal basis for Indonesia’s argument that cost information cannot be used as “facts available” to determine normal value unless an investigating authority makes the findings outlined in Article 2.2.

5.133 Moreover, Indonesia’s argument may lead to illogical results. Imagine, for example, that a respondent submits home market sales and cost data for purposes of calculating normal value. The sales data is ultimately found to be inaccurate but the cost data is verified and found to be accurate. Under Indonesia’s proposed approach, the investigating authority could use the cost data instead of

the flawed sales data to calculate normal value only if it found that there were no home market sales of a like product in the ordinary course of trade. If the home market sales data on the record of the proceeding is flawed, however, how can the investigating authority make such a finding without *relying* on the same flawed sales data? In the view of the United States, Article 2.2 cannot be interpreted in a way that would require such a result.

3. The definition of the domestic "like product" and the "product under consideration" in injury determinations

5.134 In its third party submission, the United States provided its views on certain issues raised in Indonesia's submission relating to the definition of the domestic "like product" in injury determinations. The United States would like to submit two other observations today. First, the United States agrees with Canada that, in defining the domestic product that is "like" the "product under consideration" for purposes of an injury determination, nothing in the Agreement precludes an investigating authority from considering both physical characteristics – including technical specifications and quality factors – and market characteristics.⁹¹ In the view of the United States, the market characteristics relevant in defining the domestic "like product" in injury determinations might include end uses, interchangeability, channels of distribution, and perceptions of the market participants. Similarities in production facilities, processes, and employees may also be relevant to this analysis.

5.135 Second, the United States agrees with Korea's explanation in its submission that, for purposes of the injury determination, the "like product" is defined by considering the similarity to the imported "product under consideration."⁹² The United States notes, in this regard, that a "like product" may be similar to a "product under consideration" even if the two include items that have some different characteristics. As the United States explained in its third party submission, the domestic "like product" analysis requires a comparison of the *overall* scope of the product under consideration with the *overall* scope of the like product.

VI. INTERIM REVIEW

6.1 On 24 June 2005, we submitted the interim report to the parties. Both parties submitted written requests for the review of precise aspects of the interim report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting.

6.2 We have outlined our treatment of the parties' requests below. Where necessary, we have also made certain technical revisions to our report.

A. REQUEST OF INDONESIA

6.3 First, Indonesia argues that the Panel should change its findings regarding the KTC's calculation of the constructed normal values for Indah Kiat and Pindo Deli. More specifically, Indonesia submits that the KTC acted inconsistently with Articles 2.2, 2.2.2, 6.8 and paragraph 7 of Annex II of the Agreement by using interest expenses relating to a production company, [[Company B]], for CMI which was merely a trading company.

6.4 Korea responds that financial expenses incurred by a company is independent of its size and activities. Korea also submits that it was proper for the KTC to use [[Company B]]'s financial expenses for CMI because these expenses included both production and sales-related components.

⁹¹ See Third Party Submission of Canada, para. 16.

⁹² See Written Submission of the Republic of Korea, para. 164.

6.5 We note that in our discussion of this claim in our interim report (*infra*, paras. 7.99-7.105), we addressed what we perceived to be the main arguments developed by Indonesia in this regard. At interim review, however, Indonesia drew our attention to certain additional arguments (*infra*, para. 7.108) regarding the calculation of interest expenses for CMI, which we had not addressed in our interim report. Although these arguments could, in our view, have been raised in a more coherent manner, we nevertheless felt obliged to address them and have accordingly revised our finding with respect to this claim, as contained in paragraphs 7.106-7.112 below.

6.6 Second, Indonesia contends that the Panel should clarify whether or not its findings in paragraphs 7.35 and 7.45 refer to its factual finding in paragraph 7.31 that the Sinar Mas Group failed to allow the KTC investigators access to CMI's accounting records other than its financial statements during verification. Korea submits that the Panel made the necessary findings in this regard. We note that our findings in paragraphs 7.35 and 7.45 cited by Indonesia are clearly based on our factual finding in paragraph 7.31 that the Sinar Mas Group failed to allow the KTC investigators access to CMI's accounting records other than its financial statements during verification. We therefore need not make additional findings in this regard.

6.7 Third, Indonesia argues that the Panel failed to make a factual finding to acknowledge the fact that Indah Kiat and Pindo Deli provided certain CMI records, including documents relating to certain sample transactions. Citing paragraph 7.31 below, Korea contends that the Panel made the necessary finding in this regard. We modified paragraph 7.36 of our report to emphasize the fact that information relating to sample transactions between CMI and independent buyers were submitted by Indah Kiat and Pindo Deli.

6.8 Fourth, Indonesia contends that the Panel did not address some of Indonesia's arguments regarding the meaning of the term "verifiable" under paragraph 3 of Annex II. Korea disagrees and submits that the Panel properly discussed Indonesia's arguments in this regard. We note that in paragraphs 7.59-7.67 below, we discussed Indonesia's arguments under paragraph 3 of Annex II regarding the verifiability of the domestic sales data provided by Indah Kiat and Pindo Deli. We therefore decline to make additional findings in this regard.

6.9 Fifth, Indonesia argues that the Panel should clarify its statement in paragraph 7.67 below that a comparison of the list of sales from Indah Kiat and Pindo Deli to CMI on the one hand, and the list of sales between CMI and independent buyers on the other could not have assured the KTC investigators about the completeness of the domestic sales data because this comparison would not shed enough light on the values of the domestic sales transactions. Indonesia re-cites specific arguments it had raised in this regard during these proceedings. Korea disagrees and submits that the Panel has properly addressed Indonesia's arguments on this matter. We note that in paragraphs 7.59-7.67 below we discuss in detail the issue of whether the domestic sales data submitted by Indah Kiat and Pindo Deli were verifiable within the meaning of paragraph 3 of Annex II. In our view, this discussion addresses the relevant arguments parties raised on this issue. We therefore decline to make additional findings in this regard.

6.10 Sixth, Indonesia seeks clarification from the Panel as to whether the Panel's statement in paragraph 7.70 below that "[a]ccuracy ... goes beyond verifying the completeness of domestic sales data and concerns a broader range of information, including CMI's costs associated with the sales of the subject product and its prices" implies that the absence of CMI's cost information was relevant to the question of the accuracy of domestic sales. Korea has made no specific argument in this regard. The statement cited by Indonesia is part of our analysis regarding the issue of whether the record supports the proposition that the sole purpose of requesting CMI's financial statements and accounting records was the completeness test. As such, the mentioned statement is not intended to imply anything as to whether CMI's cost information was relevant to the question of accuracy of domestic sales. We therefore decline to make additional findings in this regard.

6.11 Seventh, Indonesia argues that the Panel failed to address Indonesia's argument that the KTC failed to explain the reasons for its decision to reject the domestic sales data submitted by Indah Kiat and Pindo Deli and to use facts available instead. Indonesia requests us to append a footnote to paragraph 7.73 below to indicate that Indonesia raised such an argument. Korea responds that Indonesia should not be allowed to raise a new argument at the interim review stage. Korea also submits that the KTC did in fact explain the reasons for its decision to reject the domestic sales data presented by Indah Kiat and Pindo Deli. In our view, the assertion that the KTC failed to explain the reasons for its decision to reject the domestic sales data submitted by Indah Kiat and Pindo Deli is inherent in the way we characterized Indonesia's arguments in this regard in paragraph 7.73 of our report. We note that, in paragraph 7.83 below, we expressed our view as to whether the KTC explained the basis of its decision to reject the mentioned domestic sales data. We therefore decline to make additional findings in this regard.

6.12 Eighth, Indonesia requests the Panel to revise its findings in paragraphs 7.79-7.80 below to reflect the fact that the Provisional Report demonstrates that the KTC applied the ordinary course of trade test under Article 2.2 of the Agreement. Korea submits that the fact that the KTC applied the mentioned test in its Provisional Report is legally insignificant as it did not mean that the KTC would not later on decline to use the domestic sales data submitted by Indah Kiat and Pindo Deli in its normal value determinations. Although we do not find it relevant to our legal analysis, we nevertheless appended footnote 152 to paragraph 7.80 to accommodate Indonesia's request, i.e. to acknowledge the fact that in the Provisional Report the KTC did in fact apply the mentioned test.

6.13 Ninth, Indonesia asked for clarification regarding the Panel's interpretation of the term "etc." used in the KTC's Preliminary Dumping Report, quoted in paragraph 7.81 below. Korea submits that no clarification is needed in this regard. We made a slight modification to paragraph 7.81 to accommodate Indonesia's concern.

6.14 Tenth, Indonesia requested a typographical change to paragraph 7.83 below, which we made.

6.15 Eleventh, Indonesia objects to our statement in footnote 185 and argues that the Panel has not addressed its argument that the single entity consisting of the three Sinar Mas Group companies should have been given the rights under paragraph 6 of Annex II. Korea submits that our findings in this regard are sufficiently clear, hence no modification is needed. In order to address Indonesia's concern regarding the specific issue of whether or not the single entity should have been given the rights under paragraph 6 of Annex II, we modified the text of footnote 185.

6.16 Twelfth, Indonesia raised a question regarding the basis of one of our statements in paragraph 7.165 below. Korea submits that no modification is needed to the statement cited by Indonesia. We modified the wording of the mentioned statement in order to address Indonesia's concern.

6.17 Thirteenth, Indonesia submits that in connection with its finding in paragraph 7.210 below, the Panel should explain how the KTC's obligation not to disclose confidential information would allow its refusal to disclose (1) why the reported domestic sales data were rejected, (2) the reasoning relating to the methods provided for under Article 2.2 of the Agreement, and (3) the details relating to the calculation of the normal values for Indah Kiat and Pindo Deli. Korea has raised no specific arguments in this regard. We note that Indonesia repeats the arguments that it has raised on this issue in the course of these proceedings. We therefore decline to make any additional findings in this regard.

6.18 Fourteenth, Indonesia requests the Panel to modify the quotation from Indonesia's response to question 51 from the Panel following the first meeting, found in footnote 243 below. Indonesia also submits that the Panel has failed to address some of its substantive arguments about the like product claim, presented in the remainder of Indonesia's response to question 51. Korea disagrees with Indonesia in this regard. We modified the format of the mentioned quotation to accommodate

Indonesia's request. Regarding the substantive arguments Indonesia raises, we are of the view that we have addressed Indonesia's arguments relevant to the resolution of the mentioned claim. We therefore decline to make any additional findings in this regard.

6.19 Fifteenth, Indonesia contends that the Panel has failed to explain how it found that the KTC properly analyzed whether or not dumped imports had "significant" price undercutting, "significant" price depression or "significant" price suppression on the prices of the Korean industry. Our findings on this issue are found in paragraphs 7.252-7.253 below. As we stated in paragraph 7.253, we do not interpret Article 3.2 of the Agreement to require that the word "significant" appear in the IA's determination. We therefore decline to make any additional findings in this regard.

6.20 Sixteenth, Indonesia requests the Panel to revise its finding that Indonesia's claim regarding the KTC's volume analysis is not within its terms of reference. In this context, Indonesia argues that the Panel collapsed the issue of the increase in the volume of dumped imports from 2002 to the first half of 2003 with the issue of the calculation of domestic consumption. Indonesia submits that it is not clear whether the Panel's conclusion in paragraph 7.264 applies to both of these issues. We note that in the mentioned paragraph, we found Indonesia's claim regarding the KTC's volume analysis to be outside our terms of reference. That obviously applies to all arguments raised by Indonesia to support that claim, including its argument relating to the increase in the volume of dumped imports from 2002 to the first half of 2003 and the calculation of the domestic consumption. We therefore decline to make any additional findings in this regard.

6.21 Indonesia also argues that it is not clear whether Korea raised such a jurisdictional issue before the Panel. Korea submits that even if this was not requested by Korea, the Panel correctly considered this jurisdictional issue *sua sponte*. We discussed Korea's request in this regard in paragraphs 7.255 and 7.256 below. We also note our statement in paragraph 7.257 that even if this issue was not raised by Korea, we would have to address it on our own motion. We therefore decline to make any additional findings in this regard.

6.22 Indonesia argues that its claim regarding the KTC's volume analysis should be found to be within the Panel's terms of reference through its claim under Article 3.2 concerning the impact of dumped imports on the prices of the domestic industry and the one under Article 3.4 regarding the consequent impact of those imports on the state of the domestic industry. Korea disagrees with Indonesia in this regard. We note that we have analyzed Indonesia's request for the establishment of a panel with sufficient care in deciding whether or not its claim on the volume of dumped imports was properly raised in it. We do not consider Indonesia's comments to be convincing to require us to change our analysis in this regard. We therefore decline Indonesia's request.

6.23 Indonesia submits that the issue of whether the KTC excluded from the domestic industry all domestic producers that imported the subject product from the subject countries, raised in paragraph 116 of its second written submission, is not related to the KTC's volume analysis. Indonesia submits that this claim has to do with the KTC's obligation to carry out a WTO-consistent price analysis under Article 3.2 and the analysis under Article 3.4 of the Agreement. As stated above, we are not convinced by Indonesia's proposition that its claim regarding the calculation of domestic consumption has been properly raised in its request for the establishment through its other claims under Article 3.2 or 3.4. We therefore decline to change our finding in this regard.

6.24 Seventeenth, Indonesia argues that the Panel exercised false judicial economy with respect to its claim regarding the KTC's causation analysis. Korea disagrees with Indonesia in this regard. As we explained in paragraph 7.277 below, we applied judicial economy with respect to this claim because the KTC's causation analysis was based on an injury analysis that we found to be WTO-inconsistent. We therefore decline to change our finding in this regard.

6.25 Finally, Indonesia requests the Panel to make factual findings on two issues: (1) that CMI's financial statements submitted by the Sinar Mas Group on 9 April 2003 were part of the record of the investigation at issue, and (2) that the verification report submitted by Korea as Exhibit KOR-7 was not part of the record. Korea submits that the Panel should not make any further findings with regard to these two issues. We note that we made the necessary factual findings on these two issues in paragraphs 7.38 and 7.181 of our report. We therefore decline to make any additional findings in these regards.

B. REQUEST OF KOREA

6.26 Korea requests the Panel to modify its finding in paragraph 7.201 to take into consideration Korea's statement in its response to question 32 from the Panel following the second meeting that the KTC could not disclose confidential information submitted by [[Company A]] to the Sinar Mas Group because of its confidentiality obligations under Article 6.5 of the Agreement. Indonesia submits that the Panel should not modify its finding because Indonesia's claim under Article 6.4 is not limited to confidential information. We note that the main premise of our finding regarding Indonesia's disclosure claim under Article 6.4 of the Agreement is the KTC's failure to disclose confidential information to interested parties who submitted that information. It follows that the fact that the KTC was precluded from disclosing to the Sinar Mas Group confidential information submitted by another interested party would not affect our finding. We therefore decline to modify our finding in this regard.

6.27 Second, Korea requests the Panel to treat certain information in this report as confidential. Indonesia argues that some of the information that Korea wants to be treated as confidential is available in the public version of the KTC's reports and therefore should not be treated as confidential. More specifically, Indonesia argues that redacting the company names could create confusion about the number of companies that were subject to the investigation at issue. We note that Indonesia has not submitted evidence as to whether the information Korea wants to be treated confidential had been made public in the same context that it is used in our report. In the absence of such specific evidence and for the sake of respecting confidentiality of sensitive information, we consider it proper to redact from our findings the information that Korea identified as confidential. However, taking into consideration the concern raised by Indonesia, we have used abbreviations that would preclude confusion as to the identities of companies, while keeping their names confidential.

VII. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

7.1 In light of the claims and arguments made by the parties in the course of these Panel proceedings, we recall, at the outset of our examination, the standard of review we must apply to the matter before us.

7.2 Article 11 of the DSU⁹³ sets forth the appropriate standard of review for panels for all covered agreements except the Anti-dumping Agreement. Article 11 imposes upon panels a comprehensive

⁹³ Article 11 of the DSU, entitled "Function of Panels", states: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements..."

obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.3 Article 17.6 of the Anti-dumping Agreement sets forth the special standard of review applicable to anti-dumping disputes. It provides:

“(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;”

“(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”

7.4 Thus, together, Article 11 of the DSU and Article 17.6 of the Anti-dumping Agreement set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.⁹⁴

7.5 In light of this standard of review, in examining the claims under the Anti-dumping Agreement in the matter referred to us, we must evaluate whether the Korean measure at issue is consistent with relevant provisions of the Anti-dumping Agreement. We must find it consistent if we find that the KTC has properly established the facts and evaluated them in an unbiased and objective manner, *and* that its determinations rest upon a "permissible" interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the anti-dumping investigation at issue, nor to substitute our judgment for that of the KTC, even though we might have arrived at a different determination were we examining the record ourselves.

2. Burden of Proof

7.6 We recall that the general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.⁹⁵ In these Panel proceedings, Indonesia, which has challenged the consistency of Korea's measure, thus bears the burden of demonstrating that the measure is not consistent with the relevant provisions of the Agreement. Indonesia also bears the burden of establishing that its claims are properly before us. We also note that it is generally for each party asserting a fact to provide proof thereof.⁹⁶ In this respect, therefore, it is also for Korea to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

⁹⁴ Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, paras. 54-62.

⁹⁵ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323 at 337.

⁹⁶ *Ibid.*

3. Treaty Interpretation

7.7 We note that many of the claims raised by Indonesia in these proceedings require us to interpret various provisions of the Anti-dumping Agreement.

7.8 We note that Article 3.2 of the DSU indicates that Members recognise that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". In this regard, the Appellate Body, in *United States – Gasoline*, refers to "a fundamental rule of treaty interpretation [which] has received its most authoritative and succinct expression in the *Vienna Convention on the Law of Treaties*"⁹⁷ ("Vienna Convention"), and cites Article 31.1 thereof, which reads as follows:

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁹⁸

7.9 According to the Appellate Body, "[this] general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law'"⁹⁹. We shall, therefore, follow the provisions of Article 31.1 of the *Vienna Convention* when interpreting the provisions of the Anti-dumping Agreement referred to by the parties in these proceedings and base our interpretation on the text of the provision under consideration in its context and in light of the object and purpose of the Anti-dumping Agreement.

B. PROCEDURAL ISSUE

1. Composition of Delegation

7.10 At our first substantive meeting with the parties, Korea, citing Article 18.2 of the DSU, stated that there were representatives of the Indonesian paper industry in the Indonesian delegation and requested that they leave the hearing room because access to confidential information submitted by Korea would give them an unfair competitive advantage over their Korean counterparts. Indonesia submitted that it had full discretion with respect to the composition of its delegation in these proceedings and that it had been respecting its obligation under Article 18.2 of the DSU to protect the confidentiality of the submissions made by Korea.

7.11 In that meeting, we ruled that, as provided in paragraph 15 of our Working Procedures, Indonesia was entitled to determine the composition of its delegation in these proceedings. We also stated that, in accordance with Article 18.2 of the DSU and paragraph 15 of our Working Procedures¹⁰⁰, Indonesia assumed responsibility for its delegation, including respect for the confidentiality of the submissions made by Korea in these proceedings.¹⁰¹

⁹⁷ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("US – Gasoline"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3 at 16.

⁹⁸ (1969) 8 *International Legal Materials* 679.

⁹⁹ Appellate Body Report, *US – Gasoline*, *supra*, note 97 at 17 (footnote omitted).

¹⁰⁰ Paragraph 15 of our Working Procedures provides:

"The parties to the dispute have the right to determine the composition of their own delegations. The parties shall have the responsibility for all members of their delegations and shall ensure that all members of the delegation act in accordance with the rules of the DSU

7.12 We are cognisant of the need to protect sensitive information in the WTO dispute settlement proceedings, and in particular of the importance of protecting confidential information submitted to the IA in an anti-dumping investigation pursuant to Article 6.5 of the Agreement. We note that at the time we made our ruling on this issue¹⁰², Korea had not identified any specific information for which it sought confidential treatment.¹⁰³ Rather, Korea sought to exclude certain representatives of Indonesia from the entirety of the meeting of the parties with the Panel. We further emphasize that we indicated at the meeting our willingness to entertain a request for procedures for the protection of specific Business Confidential Information, an offer echoed by Indonesia,¹⁰⁴ but Korea made no such request. We also note that Indonesia subsequently indicated that it would not in any event include business representatives in its delegation in the second substantive meeting of the Panel with the parties.

2. Access to Submissions

7.13 In its second written submission, Korea stated that it would continue to serve its confidential submissions on Indonesia "subject to the understanding that these submissions [would] not be disclosed by Indonesia to anyone other than the relevant Indonesian government officials and to legal advisors of Indonesia who [had] agreed to maintain the confidentiality of information provided to them".¹⁰⁵ Indonesia responded that Korea could not unilaterally subject to conditions Indonesia's use of Korea's submissions in the preparation of its case. Korea then requested the Panel to direct Indonesia to return to Korea all confidential submissions made by the latter. Korea also indicated that it would serve non-confidential versions of its confidential submissions on Indonesia. We understood this proposition to mean that Korea would submit full confidential versions of its submissions to the Panel, but that only non-confidential versions would be served on Indonesia.

7.14 Regarding the issue of confidentiality of submissions made by parties to WTO dispute settlement proceedings, we note the following provision in Article 18.2 of the DSU:

"Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a

and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings."

¹⁰¹ We find support for this proposition in the following ruling of the panel in *Indonesia – Autos*: "We would like to emphasize that all members of parties' delegations -- whether or not they are government employees -- are present as representatives of their governments, and as such are subject to the provisions of the DSU and of the standard working procedures, including Articles 18.1 and 18.2 of the DSU and paragraphs 2 and 3 of those procedures. In particular, parties are required to treat as confidential all submissions to the Panel and all information so designated by other Members; and, in addition, the Panel meets in closed session. Accordingly, we expect that all delegations will fully respect those obligations and will treat these proceedings with the utmost circumspection and discretion." (footnote omitted)
Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, 4, adopted 23 July 1998, DSR 1998:VI, 2201, para. 14.1.

¹⁰² We made an oral ruling on this issue during our first meeting with the parties, which we then sent to the parties in writing in a fax dated 14 March 2005.

¹⁰³ Korea had designated its entire first submission as confidential.

¹⁰⁴ In its letter dated 10 March 2005, Indonesia offered supplemental working procedures concerning Business Confidential Information.

¹⁰⁵ Again, Korea had designated its entire second submission as confidential.

Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."

7.15 Article 18.2 lays down a general requirement that submissions made by parties to a dispute be treated as confidential by the other parties receiving such submissions. We also note that paragraph 15 of our Working Procedures contains the same requirement. We do not, however, understand Article 18.2 to prevent a party from seeking advice of individuals, as necessary, for its effective participation in the dispute, provided that any persons consulted are held accountable with respect to the provisions of the DSU, including those on confidentiality.¹⁰⁶ We see this as a natural corollary to the proposition that Members are free to determine the composition of their delegations to meetings. It would not be logical if Members were allowed to decide which individuals would represent them in their delegations, but not allowed to decide whose services would be utilized in preparation of their cases.

7.16 Taking into consideration Indonesia's repeated statements that it would respect the confidentiality of Korea's submissions in accordance with Article 18.2 of the DSU and paragraph 15 of our Working Procedures, we see no reason to find that Indonesia has not fulfilled this obligation so far in these proceedings.

7.17 In respect of Korea's proposal to withdraw its existing submissions and submit non-confidential versions of those submissions to Indonesia, considering the fact that Article 18.1 of the DSU precludes *ex parte* communications between the Panel and a party, we stated that while we would entertain any request by Korea to withdraw its submissions or to redact from them certain information, in such a case the submissions withdrawn or information redacted would no longer be before the Panel. We further stated that we were fully conscious of the obligations placed on Members by Article 6.5 of the Anti-dumping Agreement, and remain prepared to work with the parties to design ways to protect any information treated as confidential by the investigating authorities in the underlying investigation. Korea, however, failed to request such procedures.

7.18 We note in this regard that Korea subsequently requested that we exclude certain specific information from the public version of our report¹⁰⁷, and we have complied with this request.

C. KTC'S DECISION TO DISREGARD DOMESTIC SALE INFORMATION AND TO CALCULATE NORMAL VALUES FOR INDAH KIAT AND PINDO DELI ON THE BASIS OF FACTS AVAILABLE

1. Arguments of Parties

(a) Indonesia

7.19 Indonesia argues that the KTC acted inconsistently with Article 6.8 of the Agreement and various provisions of Annex II to the Agreement in its decision to disregard domestic sales data and to use facts available to calculate normal values for Indah Kiat and Pindo Deli. Indonesia bases this claim on three grounds. Firstly, Indonesia submits that the KTC failed to make the necessary finding under Article 6.8 that these exporters either significantly impeded the investigation or failed to provide necessary information within a reasonable period. Secondly, Indonesia submits that the KTC acted inconsistently with Article 6.8 and paragraph 3 of Annex II by refusing to consider domestic sales data submitted by these two exporters, because those data (1) were verifiable, (2) were submitted in a timely manner and in the medium requested by the investigating authority ("IA"), and (3) could

¹⁰⁶ See, Panel Report, *Brazil – Export Financing Programme for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU* ("Brazil – Aircraft (Article 21.5 – Canada II)"), WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:XI, 5481, paras. 3.6-3.7.

¹⁰⁷ Korea submitted its request in its letter dated 10 May 2005, containing its comments on the descriptive part of our report.

be used without undue difficulty. Thirdly, according to Indonesia, the KTC acted inconsistently with Article 6.8 and paragraph 6 of Annex II by not informing Indah Kiat and Pindo Deli of its decision to reject their domestic sales data and not providing them with an opportunity to submit further explanations and rectify their failure.

7.20 According to Indonesia, had the KTC taken into consideration the domestic sales data submitted by Indah Kiat and Pindo Deli, it would have found no dumping with respect to the single entity consisting of Indah Kiat, Pindo Deli and Tjiwi Kimia.

(b) Korea

7.21 Korea submits that the KTC requested CMI's financial statements on different occasions during the investigation at issue. More specifically, it requested that CMI's financial statements and accounting records be made available during verification, but the Sinar Mas Group companies refused to make them available. This, in Korea's view, demonstrates that the Sinar Mas Group companies did not cooperate in the investigation at issue and the KTC properly resorted to facts available. Korea asserts that the domestic sales data submitted by Indah Kiat and Pindo Deli were not verifiable and hence could not be used by the KTC in the absence of CMI's financial statements and accounting records. Korea also submits that the KTC properly explained the reasons for resorting to facts available with respect to calculating normal values for Indah Kiat and Pindo Deli and gave these companies opportunities to comment on that issue.

2. Arguments of Third Parties

(a) European Communities

7.22 According to the European Communities, since the IA is entitled, under Article 6.10, to treat related companies as a single entity in the context of its dumping determinations, if an exporter that is part of a single entity subject to an anti-dumping investigation fails to cooperate with the IA, the latter can legitimately resort to facts available with respect to the single entity pursuant to Article 6.8 and the relevant provisions of Annex II of the Agreement. The European Communities generally argues that a balance should be struck between the need to complete the investigation in a timely manner and the interested parties' right to express their views to the IA. In the investigation at issue, the KTC must show why acceptance of CMI's financial statements after verification would undermine the timely completion of the investigation. The IA should not be allowed to reject the information solely because it was submitted past the deadline set out under the national law of the importing Member.

(b) China

7.23 China argues that although the IA has a certain degree of discretion with respect to defining what is meant by "necessary information" for purposes of Article 6.8, such discretion has to be used in accordance with the procedural requirements implied in the Agreement. According to China, an IA should not be entitled to reject all the information provided by an interested party on the grounds that some information has not been submitted. The IA can only do so when the circumstances of a given investigation so justify.

3. Evaluation by the Panel

(a) Relevant Facts

7.24 The investigation at issue was initiated on 26 November 2002. On the same date, questionnaires were sent to the Indonesian companies involved in the investigation. In addition to information relating to individual exporters, i.e. Indah Kiat, Pindo Deli and Tjiwi Kimia in the case of the Sinar Mas Group, the questionnaires requested that information concerning the sales and costs of

related companies engaged in the production or sale of the subject product, and the financial statements of these related companies, be submitted. The questionnaires read in relevant part:

"For all related parties ... involved with the production or sale of the merchandise under investigation during the period of investigation ... in the domestic market or Korean market or both, include the sales and cost of these related companies with your sales and cost in the same computer file(s) and submit a single narrative response.

...

For sales to related resellers, you must report the sales from the related resellers to the unrelated customers."¹⁰⁸ (emphasis added)

"(4) financial statements or other relevant documents (i.e., profit and loss reports) of all related companies involved in the production or sale of the merchandise under investigation in your domestic and Korean market, and of the parent(s) of these related companies, (5) any financial statement or other financial report filed with the local or national government of the country in which your company is located."¹⁰⁹ (emphasis added)

7.25 Tjiwi Kimia chose not to respond to the questionnaire. Indah Kiat and Pindo Deli submitted their responses to the questionnaires on 24 January 2003. In their responses to the questionnaires, Indah Kiat and Pindo Deli submitted information regarding their sales to CMI. This information was verified by the investigators. They explained to the KTC that **[**]**¹¹⁰ per cent of Indah Kiat's and **[**]**¹¹¹ per cent of Pindo Deli's domestic sales of the subject product were made through CMI. They also submitted a detailed listing of CMI's sales of the subject product to independent buyers.¹¹² CMI's financial statements were not submitted along with questionnaire responses.¹¹³

7.26 The KTC sent its verification plan to the Sinar Mas Group on 10 March 2003. The verification plan grouped the information requested for verification purposes under five headings: "Understanding of Indah Kiat/Pindo Deli", "Verification of the completeness of the data submitted", "Verification of the accuracy and validity of the information on the export prices to Korea and relevant adjustment factors", "Verification of the accuracy and validity of the information on the domestic prices and the relevant adjustment factors" and "Verification of the cost of production".

7.27 Under the first heading, i.e. "Understanding of Indah Kiat/Pindo Deli", the verification plan clearly requested that CMI's financial statements be prepared for verification. The verification plan provides in the pertinent part:

"d. *Prepare* the financial statement of 2001 and 2002 year of PT.CMI ("CMI") and PT.MKP ("MKP")."¹¹⁴ (emphasis in original)

7.28 The verification plan also asked for information in relation to Indah Kiat's and Pindo Deli's sales of the subject product through CMI. For instance, it requested a wide range of documents relating to certain sample transactions between CMI and independent buyers.¹¹⁵ The plan also asked

¹⁰⁸ Exhibit KOR- 5 at 4.

¹⁰⁹ Exhibit KOR- 5 at 13.

¹¹⁰ Korea requests that the data in square brackets be treated as confidential.

¹¹¹ *Ibid.*

¹¹² See, First Written Submission of Korea, para. 104.

¹¹³ First Written Submission of Korea, para. 42.

¹¹⁴ Exhibit KOR- 25 at 221.

¹¹⁵ Exhibit KOR- 25 at 225-226.

for information relating to certain differences between quantities of sales from Indah Kiat and Pindo Deli to CMI and the latter's corresponding sales to independent buyers.¹¹⁶ Finally, information relating to CMI's resale of the subject product to sister mills within the Sinar Mas Group and the [[**]]¹¹⁷ charged by CMI over the prices of Indah Kiat and Pindo Deli was also requested.¹¹⁸

7.29 In response to the verification plan, the Sinar Mas Group pointed out that information relating to CMI's sales to independent buyers could be verified in the Group's office.¹¹⁹

7.30 The verification was carried out between 24-27 March 2003. During the verification, the KTC officials requested CMI's financial statements. In response, the Sinar Mas Group submitted a letter indicating that they were unable to make CMI's financial statements available. The letter reads in relevant parts:

"The KTC verification plan faxed to us on 8 March 2003 requires preparation of the financial statements of CMI and MKP (section VII.I.B.d). We are unable to prepare these statements for the following reasons:

CMI and MKP are not controlled by Indah Kiat or Pindo Deli. While CMI and MKP companies are related to Indah Kiat and Pindo Deli through shareholding they are separate legal entities with their own management which is independent of that of Indah Kiat and Pindo Deli.

...

CMI has no interest in exports to Korea or elsewhere and therefore has no interest in this proceeding.

At Indah Kiat and Pindo Deli's requests, CMI has already prepared a substantial amount of material required by the KTC to which it has committed substantial resources.

CMI considers that the information already prepared and that of Indah Kiat clearly demonstrates that its resell [sic] prices are its buying prices from the mills divided by 95%, i.e. it takes a 5% profit margin from its resell prices.

CMI is not satisfied that its highly confidential financial statements have any relevance to this investigation of Indah Kiat's and Pindo Deli's exports.

We have done our utmost to obtain the required statements from CMI but we cannot control them.

In addition to the financial statements of CMI, the KTC has requested certain further information in relation to CMI's activities. In response to the repeated requests of Indah Kiat and Pindo Deli, CMI has provided the materials requested in relation to the sample sales per sections VII.4.B.a (Indah Kiat) and VII.4.B.a (Pindo Deli) of the verification plan, CMI has made it very clear that it will not provide further in relation to this matter.

We request KTC's understanding that we have acted to the best of our ability in this matter."¹²⁰ (emphasis added)

¹¹⁶ Exhibit KOR- 25 at 226.

¹¹⁷ Korea requests that the data in square brackets be treated as confidential.

¹¹⁸ Exhibit KOR-25 at 226.

¹¹⁹ Exhibit KOR-25 at 1.

7.31 We note that although it is undisputed that the Sinar Mas Group did not provide CMI's financial statements during verification, parties' views diverge as to whether or not the KTC investigators were provided access to other accounting records of CMI, again during verification. Korea asserts that, in addition to the financial statements, the KTC investigators also requested to access CMI's accounting records during verification and that the Sinar Mas Group did not provide such access.¹²¹ Indonesia contends that the Sinar Mas Group provided the KTC investigators with electronic access to CMI's accounting records.¹²² Indonesia submitted two affidavits in support of this assertion.¹²³

7.32 Turning to the record, we note that it indicates that what was requested by the KTC and not provided by the Sinar Mas Group during verification went beyond CMI's financial statements and included some other accounting records. For instance, the Verification Report states in relevant parts:

"- Since Indah Kiat did not submit data on sales made by CMI, an affiliated company, to unrelated parties, we could not verify completeness of Indah Kiat's sales data, as the following could not be performed.

- Verification of the submitted data against CMI's financial statements, independent auditors' reports thereon, general ledgers and sales sub-ledgers, etc...."¹²⁴ (emphasis added)

7.33 The Final Investigation Report reads in pertinent parts:

"During the on the spot investigation, Pindo Deli and Indah Kiat failed to submit relevant data, such as the financial statements, accounting books and records, etc., which would support accuracy and completeness of the resales made through its affiliated company, CMI. Therefore, the Office of Investigation calculated individual normal values on the basis of the facts available..."¹²⁵ (emphasis added)

7.34 We note that multiple reports by the KTC investigators indicate that the KTC sought access to CMI's accounting records other than its financial statements and that such request was declined. We note that the Verification Report was not submitted to the Sinar Mas Group¹²⁶ during the investigation, but the Final Investigation Report was. There is no indication on the record that the accuracy of the above-quoted statements in the Final Investigation Report was contested by the Sinar Mas Group during the investigation. Most critically, we recall that the letter provided by the exporters to the KTC investigators during the verification itself indicated what information had been provided by CMI and stated that "CMI has made it very clear that it will not provide further [information] in relation to this matter." (*supra*, para. 7.30). We also note that the Provisional Report on Investigation of Preliminary Dumping Margins handed out to the Sinar Mas Group during the 4 April meeting stated that the KTC decided to use constructed normal value on the basis of facts available because the respondents had failed to submit "evidence on their affiliated company"¹²⁷ or "evidence on resales cost of their affiliated company"¹²⁸, without necessarily limiting it to CMI's financial statements.

¹²⁰ Exhibit KOR- 29 at 2-3.

¹²¹ See, Response of Korea to Question 6 from the Panel Following the First Meeting.

¹²² See, First Oral Statement of Indonesia, para. 65.

¹²³ See, Exhibits IDN-24 and 35.

¹²⁴ Exhibit KOR- 6 at 3. On page 7, the Verification Report repeats the same statement with respect to Pindo Deli.

¹²⁵ Exhibit KOR-13A at 11.

¹²⁶ First Written Submission of Korea, para. 151.

¹²⁷ Exhibit KOR-7 at 4.

¹²⁸ Exhibit KOR-7 at 11.

7.35 We recall that according to our above-outlined standard of review (paras. 7.1-7.5), Indonesia has to prove this factual matter that it asserts. Given that the record shows that what was requested by the KTC and not submitted by the Sinar Mas Group went beyond CMI's financial statements and also included other accounting records of this company, we conclude that Indonesia has failed to prove this factual assertion on the basis of the facts on the record. We shall therefore base our analysis on our factual finding that the Sinar Mas Group failed to provide CMI's financial statements and accounting records requested by the KTC investigators during verification.

7.36 Apart from information relating to CMI's sales of the subject product, the verification was carried out and completed without any difficulty. Among other things, the KTC officials also verified a number of sample sales transactions by Indah Kiat and Pindo Deli, as well as by CMI to independent buyers.

7.37 A post-verification public hearing was held in Seoul on 4 April 2003. In this meeting, the KTC officials orally informed the Sinar Mas Group representatives that since CMI's financial statements were not made available during verification, the KTC would resort to facts available with respect to determining normal values for Indah Kiat and Pindo Deli. During this meeting, the KTC officials also handed out their Provisional Report on Investigation of Preliminary Dumping Margins. This report contained the KTC's first post-verification dumping margin calculations in the investigation at issue.

7.38 On 9 April, the Sinar Mas Group submitted to the KTC a two-page document, termed CMI's income statements for the years 2001 and 2002. However, the KTC did not change its approach and based normal values for Indah Kiat and Pindo Deli on facts available. Since it considered domestic sales data submitted by the Sinar Mas Group to be unreliable because CMI's financial statements and accounting records were not made available during verification, the KTC decided to construct the normal values for Indah Kiat and Pindo Deli.¹²⁹

(b) Legal Analysis

7.39 We note that the crux of Indonesia's claim is that in its normal value determinations the KTC should have taken into consideration the domestic sales data submitted by Indah Kiat and Pindo Deli in their responses to the questionnaires. Korea responds that it could not take the domestic sales data into account because CMI's financial statements and accounting records were necessary to verify the completeness of that data, and the Sinar Mas Group failed to make those documents available during verification. Thus, we shall first consider whether CMI's financial statements and accounting records represented necessary information which was not provided within a reasonable period so that the KTC was entitled under Article 6.8 to resort to facts available. If we find this to be the case, we shall then consider to what extent that allowed the KTC to disregard the domestic sales data submitted by Indah Kiat and Pindo Deli.

(i) *Did Indah Kiat and Pindo Deli Fail to Provide Necessary Information to the KTC Within a Reasonable Period?*

7.40 Indonesia claims that the KTC acted inconsistently with Article 6.8 of the Agreement by resorting to facts available without establishing that the conditions set out therein were met in this investigation. Korea argues that the KTC did not act inconsistently with Article 6.8 because the Sinar Mas Group failed to make CMI's financial statements and accounting records available during verification and thus failed to provide necessary information within a reasonable period.

7.41 We note that Article 6.8 of the Agreement provides:

¹²⁹ First Written Submission of Korea, para. 132.

"In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."

7.42 Article 6.8 allows an IA to base its determinations on facts available, and to disregard information submitted by an interested party, only if: the interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation. We shall therefore consider whether or not CMI's financial statements and accounting records were necessary information within the meaning of Article 6.8 of the Agreement, and whether or not they were submitted within a reasonable period.

Were CMI's Financial Statements and Accounting Records Necessary Information Within the Meaning of Article 6.8?

7.43 Article 6.8 of the Agreement stipulates that failure to provide necessary information within a reasonable period may allow the IA to resort to facts available. In our view, the decision as to whether or not a given piece of information constitutes "necessary information" within the meaning of Article 6.8 has to be made in light of the specific circumstances of each investigation, not in the abstract. A particular piece of information that may play a critical role in an investigation may not be equally relevant in another one. We shall therefore determine whether or not CMI's financial statements and accounting records constituted necessary information in the circumstances of the investigation at issue.

7.44 We note that in this investigation, the KTC based its normal value determinations on CMI's sales of the subject product to independent buyers, rather than Indah Kiat's and Pindo Deli's sales to CMI.¹³⁰ Therefore, information pertaining to CMI's sales played a critical role with respect to the KTC's normal value determinations. This applies, in particular, to quantities and all aspects of prices of CMI's sales to independent buyers, as well as information relevant to whether those sales were in the ordinary course of trade. It follows that the KTC could legitimately consider as necessary information about CMI's selling activities, including its costs associated with the domestic sales of the subject product. Therefore, the accuracy of Indah Kiat's and Pindo Deli's domestic sales information being central to the KTC's normal value determinations leads, in our view, to the conclusion that CMI's financial statements and accounting records constituted "necessary information" for purposes of the investigation at issue.

Were CMI's Financial Statements and Accounting Records Submitted Within a Reasonable Period Within the Meaning of Article 6.8?

¹³⁰ We note that the Appellate Body in *US - Hot-Rolled Steel*, ruled that basing normal value determinations on downstream sales in the domestic market of the exporter subject to the investigation is allowed under the Agreement. The Appellate Body opined:

"Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom a margin of dumping is being calculated. Nor does Article 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the *Anti-dumping Agreement* are satisfied, the *identity* of the seller of the "like product" is not a ground for precluding the use of a downstream sales transaction when calculating normal value. In short, we see no reason to read into Article 2.1 an additional condition that is not expressed."

Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 94, para. 166.

We note, however, that Indonesia has not challenged the KTC's reliance on downstream sales in determining normal values for Indah Kiat and Pindo Deli in this investigation.

7.45 It is undisputed that, through the verification plan, the KTC informed the Sinar Mas Group that its investigators would need to see CMI's financial statements during verification. The Sinar Mas Group refused to make these statements available during verification. The record also indicates that the Sinar Mas Group failed to allow the KTC investigators access to other accounting records of CMI during verification. The KTC investigators completed their verification without seeing CMI's financial statements and accounting records.

7.46 Following the verification, the KTC held a disclosure meeting on 4 April 2003. The KTC's letter dated 19 March 2003, addressed to the Sinar Mas Group, which convened the mentioned meeting reads in relevant parts:

"[T]he Korean Trade Commission will hold a disclosure meeting ... on April 4, 2003 for the preliminary determination of the magnitude of dumping margin about PT. Indah Kiat Pulp & Paper Tbk., PT. Pindo Deli Pulp & Paper Mills.

In the meeting, we will explain the methodology and the data used for determining the dumping margin. After the meeting, you may submit written opinion concerning our method no later than April 10, 2003."¹³¹ (emphasis added)

7.47 After the disclosure meeting, the Sinar Mas Group submitted certain documents which, in their view, were CMI's financial statements.¹³² This took place on 9 April 2003, i.e. within the 6-day deadline for the submission of a "written opinion concerning [the KTC's] method". Indonesia argues that the KTC should have taken these financial statements into account because during the meeting of 4 April, the KTC officials announced that they would accept CMI's financial statements if they were submitted by 10 April. Indonesia submitted an affidavit to this effect.¹³³ Korea disagrees and submits that the KTC never stated that submission of CMI's financial statements after the verification would have been accepted.¹³⁴

7.48 We note that the parties disagree as to whether or not the KTC indicated that it would accept CMI's financial statements if submitted by 10 April. The record, however, is quite clear that the KTC sought these statements in its original questionnaire, and again in its verification plan. Further, the letter sent by the KTC indicates that 10 April was the deadline for the submission of a "written opinion" regarding the KTC's methodology, and does not refer to the receipt of new information post-verification. It is for a party asserting a fact to provide proof thereof.¹³⁵ In light of the conflicting statements of the parties on this question, and the limited purpose for the deadline reflected in the only contemporaneous written evidence before us, we conclude that Indonesia has not established as a matter of fact that the KTC indicated that it would accept CMI's financial statements if submitted by

¹³¹ Exhibit KOR-28.

¹³² We note that different terms, such as "income statement", "profit-and-loss statement" and, most commonly, "financial statements" have been used by the parties to describe the document submitted to the KTC by the representative of the Sinar Mas Group on 9 April 2003. In response to questioning from the Panel, Korea stated that the document submitted by the Sinar Mas Group purported to be CMI's "income statements" for the years 2001 and 2002. Korea also mentioned that an income statement is part of financial statements of a company, but that financial statements normally include other documents as well. Korea pointed out that the original questionnaire sent to the exporters did not require a complete set of financial statements, hence "[i]f CMI did not have a full set of financial statements, the submission of CMI's 'income statements' (i.e., profit and loss reports) would have satisfied the KTC's request." See, Response of Korea to Question 9 from the Panel Following the First Meeting. We therefore consider that the document submitted by Sinar Mas Group on 9 April 2003 can be referred to as CMI's financial statements for purposes of our evaluation of Indonesia's claim.

¹³³ Exhibit IDN- 26.

¹³⁴ Response of Korea to Question 9 from the Panel Following the First Meeting.

¹³⁵ See, *supra*, note 96.

10 April. It follows that CMI's financial statements were submitted past the deadline established by the KTC in the investigation at issue.

7.49 Having found that the Sinar Mas Group failed to submit the requested information within the deadline fixed by the KTC, the next issue we consider is whether failure to submit this information justified the KTC's refusal to consider it. We note that the relevance of missing a deadline for the submission of information in an anti-dumping investigation was discussed by the Appellate Body in *US - Hot-Rolled Steel*. In that case, the Appellate Body acknowledged that importing Members may impose deadlines for the submission of information in order to allow the IA to complete the investigation in a timely manner. According to the Appellate Body, however, this does not mean that the IA can disregard information every time it is submitted past the deadline. The Appellate Body ruled that time-limits imposed by an importing Member are not absolute and that if information is submitted after the deadline, but within a reasonable period, the IA cannot disregard it and resort to facts available.¹³⁶ Regarding what a reasonable period might mean in this regard, the Appellate Body opined:

"In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit."¹³⁷ (emphasis added)

7.50 We note that the Appellate Body identified certain factors to be taken into consideration in determining whether or not information has been submitted within a reasonable period. With regard to the nature and quantity of the information submitted, we note that CMI's financial statements submitted by the Sinar Mas Group consisted of two pages and contained certain accounting information about this company.¹³⁸ As stated below (para. 7.55), we note that the Sinar Mas Group did not attempt to submit other accounting records that were also requested by the KTC investigators during verification.

7.51 Regarding the difficulties encountered by the two Sinar Mas Group companies in obtaining CMI's financial records, we note that the letter submitted to the KTC investigators during verification by the Sinar Mas Group alleges that the respondents were not in a position to convince CMI to submit further information to the KTC because they did not control them (*supra*, para. 7.30). We also note that Indonesia raised the same argument in these proceedings.¹³⁹ However, as we observed below (para. 7.166), the record indicates that there was a significant degree of commonality of ownership and management between Indah Kiat and Pindo Deli on the one hand, and CMI on the other. Further, we note that although the Sinar Mas Group asserted during verification that they could not compel CMI to provide its financial statements, around two weeks following the verification, the Group was nevertheless able to convince CMI to submit these statements. Finally, we note that there is no supporting evidence on the record (such as copies of correspondence) to document the alleged

¹³⁶ Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 94, paras. 74 and 77.

¹³⁷ Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 94, para. 85.

¹³⁸ Attachment to the Sinar Mas Group letter dated 9 April 2003 (Exhibit KOR-30).

¹³⁹ See, for instance, First Written Submission of Indonesia, para. 53.

difficulties experienced by Indah Kiat and Pindo Deli. We therefore reject Indonesia's contention that the respondents encountered difficulties in obtaining the information requested by the KTC investigators.¹⁴⁰

7.52 With respect to verifiability, we note that the facts at issue in these proceedings are quite different from the facts in *US - Hot-Rolled Steel*. In *US - Hot-Rolled Steel*, the IA requested the respondents to submit within a specific deadline certain information to be used in the IA's dumping margin calculations. Respondents provided the requested information after the deadline, but before verification. The IA considered the submissions to be late and did not verify the belatedly submitted information during verification.¹⁴¹ In the case before us, the KTC stated that it would need CMI's financial statements during verification, but the Sinar Mas Group failed to provide them. This, in our view, makes this deadline different from an ordinary deadline for the submission of information to the IA. Verification is a critical stage in an anti-dumping investigation where the IA's main objective is to satisfy itself about the completeness and accuracy of the information on which it will later base its determinations. Thus, it would, in our view, be unfair to take the view that in a case such as this one, the KTC had to carry out a second verification visit to verify the belatedly submitted information.

7.53 The record contains no indication, and none of the parties has argued before us, that some interested parties could have been prejudiced if CMI's financial statements were used by the KTC in its dumping determinations.

7.54 With respect to the KTC's ability to conduct the investigation expeditiously and the number of days by which the Indonesian companies missed the deadline, we note that CMI's financial statements were submitted two weeks before the KTC's preliminary determination and over five months before its final determination. We further note, however, that the information was originally requested in the initial questionnaires sent to the exporters and again in the verification plan sent before the verification. Thus, the delay in receipt of the information was substantial and had the KTC been required to conduct a second verification, the investigation could have been delayed substantially.

7.55 We therefore conclude that in the investigation at issue, the Sinar Mas Group's submission of CMI's financial statements on 10 April 2003 was not made within a reasonable period as set out in Article 6.8 of the Agreement and that the KTC was entitled to disregard CMI's financial statements and resort to facts available. Furthermore, we note that Sinar Mas Group's post-verification submission was limited to CMI's financial statements, which were submitted for the specific purpose of demonstrating CMI's SG&A and financial expenses. The Group never attempted to submit other accounting records which, as we have found above, were also sought by the KTC during verification and not submitted by the Group. Obviously, therefore, these accounting records were not submitted within a reasonable period either.

7.56 It follows that the KTC did not act inconsistently with Article 6.8 in resorting to facts available with respect to Indah Kiat and Pindo Deli.¹⁴²

¹⁴⁰ In this regard, we note the following statement by the Appellate Body in *US - Hot-Rolled Steel*: "We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the "best of their abilities" – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters."

Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 94, para. 102.

¹⁴¹ See, Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 94, paras. 64-69.

¹⁴² Korea argued that Sinar Mas Group's failure to provide necessary information within a reasonable period also led to significantly impeding the investigation. See, Response of Korea to Question 5 from the Panel Following the First Meeting. We note that "significantly impeding an investigation" is another ground

(ii) *In its Use of Facts Available, Could the KTC disregard Domestic Sales Data Submitted by Indah Kiat and Pindo Deli?*

7.57 Above, we found that since the Sinar Mas Group failed to submit necessary information, i.e. CMI's financial statements and accounting records, within a reasonable time, the KTC was entitled to disregard the belatedly-submitted financial statements and resort to facts available. We recall that since the Sinar Mas Group failed to provide CMI's financial statements and accounting records during verification, the KTC decided to construct normal values for Indah Kiat and Pindo Deli on the basis of facts available. Parties disagree, however, as to whether or not resorting to facts available allowed the KTC to disregard the domestic sales data submitted by Indah Kiat and Pindo Deli.

7.58 Indonesia argues that even if the KTC's decision to resort to facts available was consistent with Article 6.8, that did not necessarily allow the KTC to disregard the domestic sales data submitted by Indah Kiat and Pindo Deli and to construct normal values for Indah Kiat and Pindo Deli on the basis of facts available. Since these data fulfilled the conditions set out under paragraph 3 of Annex II, the KTC was required to take them into consideration in its normal value determinations. More specifically with respect to verifiability, Indonesia argues that the domestic sales data were verifiable because there were ways, other than using CMI's financial statements, available to the KTC investigators which would have allowed them to verify those data. Korea responds that in the absence of CMI's financial statements and accounting records, there was no way for the KTC to consider the domestic sales data submitted by the Sinar Mas Group to be reliable. More specifically, Korea submits that in the absence of these documents, the KTC could not verify the completeness of the submitted domestic sales data. That is, the KTC could not confirm that all reportable domestic sales transactions had been reported by the respondents. Therefore, the KTC was allowed to disregard these data and construct normal values for Indah Kiat and Pindo Deli on the basis of facts available.

7.59 We note that the crux of the claim at issue is whether or not the domestic sales data submitted in Indah Kiat's and Pindo Deli's responses to the questionnaires were verifiable within the meaning of paragraph 3 of Annex II and therefore had to be taken into consideration by the KTC in the calculation of the constructed normal values for these two companies.

7.60 We note that paragraph 3 of Annex II reads:

"All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation." (emphasis added)

7.61 We note that paragraph 3 stipulates that information submitted by an interested party has to be taken into consideration by the IA provided that it satisfies certain conditions. One of these conditions is that the information be verifiable. The issue therefore is whether or not the domestic sales data submitted to the KTC by Indah Kiat and Pindo Deli were verifiable within the meaning of paragraph 3. If we find that these data were verifiable, we shall conclude that the KTC acted inconsistently with Article 6.8 and paragraph 3 of Annex II by disregarding them in its normal value determinations for Indah Kiat and Pindo Deli.

provided for in Article 6.8 for resorting to facts available. However, having found that the KTC was justified in resorting to facts available because of the Sinar Mas Group's failure to provide necessary information within a reasonable period, we need not, and do not, discuss the legal issue raised by Korea's argument.

7.62 In this regard, we note that the domestic sales data submitted by an exporter subject to an anti-dumping investigation may play an important role with respect to the IA's determinations in many respects. This applies, more specifically, to the value and quantity of domestic sales. Many steps that Article 2 of the Agreement requires the IA to take in the context of its dumping determinations necessarily require information regarding the quantity and the value of domestic sales. For instance, to carry out the ordinary course of trade test under Article 2.2, the IA needs information on the quantity of domestic sales. Similarly, under Article 2.2.1, the IA needs information on the costs and domestic prices of the exporter. We also note that Article 6.6 of the Agreement generally requires the IA to take the necessary steps in an investigation to satisfy itself on the accuracy of the information on which it bases its determinations. It follows that the KTC in this investigation had the right to ask the Sinar Mas Group to submit necessary accounting information that would allow the investigators to verify the domestic sales data its companies had submitted.

7.63 We recall our factual finding above (paras. 7.32-7.34) that the KTC investigators requested CMI's financial statements and accounting records during verification and that they were not provided by the respondents. More importantly, we recall that the letter submitted by the Sinar Mas Group on the first day of the verification went beyond a refusal to submit CMI's financial statements in particular and stated that CMI intended not to submit any further information to the KTC investigators (*supra*, para. 7.30).

7.64 Given that during the verification the Sinar Mas Group clearly refused to submit corroborating information, i.e. CMI's financial statements and accounting records, which was highly relevant to the KTC's dumping determinations and also stated that CMI would not submit any further information, we do not see how the domestic sales data submitted by the Sinar Mas Group could have been considered reliable and taken into consideration by the KTC.

7.65 We note Indonesia's argument that the completeness of the domestic sales data reported by Indah Kiat and Pindo Deli could have been verified through a comparison of the list of sales from Indah Kiat and Pindo Deli to CMI with the list of CMI's sales to independent buyers, because there was a "one-to-one correspondence" between these two sets of sales. We note that in Indah Kiat's response to the KTC's questionnaire, this issue was explained as follows:

"[[**]]"¹⁴³

7.66 On the basis of this one-to-one correspondence, Indonesia submits that the KTC could have checked the completeness of Indah Kiat's and Pindo Deli's domestic sales by comparing sales from these companies to CMI with CMI's sales to independent buyers. According to Indonesia, since all sales from Indah Kiat and Pindo Deli to CMI were verified by the KTC investigators, the only thing remained to be done was to compare that list against the list of CMI's sales to independent buyers, which was also submitted to the investigators.¹⁴⁴ In response, Korea asserts that even if this comparison was made, it would only shed light on the completeness of Indah Kiat's and Pindo Deli's sales with respect to their quantity. The issue of whether or not sales by CMI to independent buyers contained any "discounts, rebates, billing adjustments or additional charges by CMI" would remain unanswered.¹⁴⁵

7.67 We do not agree with Indonesia's contention that a comparison of these two lists of sales could have assured the KTC about the completeness of domestic sales reported by Indah Kiat and Pindo Deli. That is because, as Korea argues, this comparison would not verify the values of domestic sales as much as it would have verified their quantities. As we noted above, values of domestic sales are as important in dumping determinations as their quantities. Therefore, we do not

¹⁴³ Korea requests that the data in square brackets be treated as confidential.

¹⁴⁴ Response of Indonesia to Question 22(a) from the Panel Following the First Meeting.

¹⁴⁵ Second Written Submission of Korea, para. 44.

agree with the proposition that the KTC could have assured itself about the completeness of Indah Kiat's and Pindo Deli's domestic sales by comparing the list of their sales to CMI with the list of CMI's sales to independent buyers.

7.68 Furthermore, we note that Indonesia's argumentation is premised on the assumption that the sole purpose for which the KTC requested CMI's financial statements and accounting records was to confirm the completeness of the domestic sales data submitted by Indah Kiat and Pindo Deli. However, we note that the record contradicts this proposition. For instance, the Final Investigation Report reads in relevant parts:

"During the on the spot investigation, Pindo Deli and Indah Kiat failed to submit relevant data, such as the financial statements, accounting books and records, etc., which would support accuracy and completeness of the resales made through its affiliated company, CMI. Therefore, the Office of Investigation calculated individual normal values on the basis of the facts available..."¹⁴⁶ (emphasis added)

7.69 The Final Dumping Report reads in pertinent parts:

"However, during the on the spot investigation, Pindo Deli and Indah Kiat failed to submit relevant evidence, such as the financial statements, accounting books and records, etc., to verify the accuracy and completeness of the data on resales made through its affiliated company, CMI. Therefore, the Office of Investigation calculated an individual normal value on the basis of the facts available..."¹⁴⁷ (emphasis added)

7.70 We note that these reports indicate that, in addition to checking completeness, another stated purpose of requesting these records was to verify the accuracy of the domestic sales data. Accuracy, in our view, goes beyond verifying the completeness of domestic sales data and concerns a broader range of information, including CMI's costs associated with the sales of the subject product and its prices. Indeed, we find it only normal for the IA to seek accounting records of the exporting company under investigation during verification to verify accuracy of the information already submitted, including accounting records of related companies, if any, involved in the domestic sales of the subject product. If that basic request by the IA is rejected, we do not see how an IA could be required nevertheless to accept that the data in question were accurate.

7.71 Indonesia argues that completeness and accuracy of the domestic sales data submitted by Indah Kiat and Pindo Deli were verified through the verification of a number of sample transactions relating to sales to CMI and CMI's resales to independent buyers.¹⁴⁸ It follows that the KTC did not need CMI's financial statements and accounting records. We disagree. Although verifying individual sales transactions could be one of the tools to satisfy the investigators about the completeness and accuracy of domestic sales transactions generally, we do not accept the contention that this could replace or minimize the relevance of doing a verification on the basis of the financial statements and accounting records of the exporter under investigation.

7.72 On the basis of the foregoing, we conclude that the KTC did not act inconsistently with Article 6.8 of the Agreement and paragraph 3 of Annex II in disregarding the domestic sales data provided by Indah Kiat and Pindo Deli in determining normal values for these two companies.

¹⁴⁶ Exhibit KOR-13A at 11.

¹⁴⁷ Exhibit KOR-14A at 12.

¹⁴⁸ See, for instance, First Written Submission of Indonesia, para. 55; Response of Indonesia to Question 6 (b) from the Panel Following the First Meeting.

(iii) *Did the KTC Fail to Inform Indah Kiat and Pindo Deli of its Decision to Reject their Domestic Sales Data and to Provide them with an Opportunity to Express their Views?*

7.73 Indonesia submits that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 6 of Annex II by not informing Indah Kiat and Pindo Deli forthwith of its decision to reject their domestic sales data and giving them an opportunity to provide further explanations and rectify their failure. Korea argues that the KTC did inform the Sinar Mas Group companies of its decision to reject their domestic sales data and also gave them opportunities to make comments in this regard.

7.74 Paragraph 6 of Annex II reads:

"If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations." (emphasis added)

7.75 We note that paragraph 6 provides that in cases where the IA declines to accept information submitted by an interested party, that party has to be informed without delay of the IA's decision and has to be given a chance to provide further explanations regarding that decision. If the IA finds such explanations as being unsatisfactory, then the information can be disregarded, in which case the IA has to explain, in its published determinations, why the information has been rejected. Paragraph 6 does not, however, set out a procedure through which the interested party has to be notified of this rejection.

7.76 We recall our finding above (para. 7.72) that the KTC properly declined to consider the domestic sales data submitted by Indah Kiat and Pindo Deli in its normal value determinations for these companies. It follows that the KTC had, under paragraph 6, to inform these companies of this refusal and give them an opportunity to comment. We now turn to the facts of the investigation at issue to examine whether this was done.

7.77 We note that Indonesia acknowledges that the KTC explained orally, during the meeting held on 4 April 2003, and through the submission of certain written documents, that the domestic sales data submitted by Indah Kiat and Pindo Deli were rejected and facts available were used instead.¹⁴⁹ Indonesia also acknowledges that the KTC stated in the Final Investigation Dumping Report that it had rejected domestic sales information submitted by Indah Kiat and Pindo Deli because of these companies' failure to submit CMI's financial statements.¹⁵⁰ However, Indonesia argues that none of these disclosures was specific enough to explain properly what information had been withheld by Indah Kiat and Pindo Deli which led to the use of facts available.

7.78 We recall that the issue is whether or not the KTC informed the Sinar Mas Group of its decision to reject domestic sales data submitted by Indah Kiat and Pindo Deli and to base its normal value determinations for these two companies on facts available and whether or not it gave them an opportunity to provide further explanations within a reasonable period, as set out under paragraph 6 of Annex II.

7.79 We note that the Provisional Report on Investigation of Preliminary Dumping Margins which was submitted to the Sinar Mas Group during the 9 April meeting, reads in pertinent parts:

¹⁴⁹ First Written Submission of Indonesia, para. 71.

¹⁵⁰ First Written Submission of Indonesia, para. 72.

"Since Respondent failed to submit evidence on resales cost of its affiliated company, CMI, the Office of Investigation arrived at the average cost based on the resales cost of Pindo Deli which was calculated based on the facts available."¹⁵¹

7.80 We note that this statement clearly indicates that the KTC decided to base its determinations regarding CMI's costs on facts available because the respondents had failed to submit the relevant cost data.¹⁵²

7.81 Next, we note that the KTC sent its Preliminary Dumping Report to the Sinar Mas Group on 9 May 2003¹⁵³, which reads in relevant part:

"Respondent submitted within the prescribed time limit the data on domestic sales, export sales and adjustment factors for fair comparison, together with substantiating evidence. However, during the on the spot investigation, Respondent failed to submit relevant evidence, such as the financial statements, etc. concerning sales made through its affiliated company, CMI. Therefore, the Office of Investigation calculated the normal value on the basis of the facts available and calculated the export price based on the data which were submitted by Respondent and verified during the on the spot investigation."¹⁵⁴

7.82 We note that the Preliminary Dumping Report also clearly states that the KTC decided to resort to facts available with respect to determining normal values for Indah Kiat and Pindo Deli because of their failure to provide, among others, CMI's financial statements during verification.

7.83 There are other documents on the record that also explain clearly the basis of the KTC's decision to resort to facts available with respect to determining normal values for Indah Kiat and Pindo Deli.¹⁵⁵ We also note that the Sinar Mas Group submitted CMI's financial statements on 9 April following the 4 April meeting, which indicates that the Group was in fact aware of the reasons for the KTC's rejection of the submitted domestic sales data. We therefore conclude that the KTC complied with its obligation under paragraph 6 of Annex II to inform the Sinar Mas Group of its decision to reject Indah Kiat's and Pindo Deli's domestic sales data and to use facts available instead. We do not agree with Indonesia's contention that these disclosures were not precise enough to explain the grounds for the KTC's decision to resort to facts available. They do, in our view, clearly indicate that the reason why the KTC resorted to facts available in this regard was because CMI's financial statements and accounting records were not provided during verification.

7.84 Regarding the issue of providing further explanations to the IA about its decision to reject submitted information, we note that Indonesia cited no evidence on the record to show that the Sinar Mas Group was not given the chance to provide further explanations within a reasonable period regarding the KTC's rejection of the domestic sales information submitted by Indah Kiat and Pindo Deli. Korea argues that the Group had ample opportunity to comment, but that it did not do so. In the absence of evidence to the contrary, we see no reason to find that the Sinar Mas Group was not given the opportunity to provide further explanations within a reasonable period regarding the KTC's decision to disregard the submitted domestic sales data.

¹⁵¹ Exhibit KOR-7 at 11.

¹⁵² We note that the Provisional Report demonstrates that the KTC applied the ordinary course of trade test under Article 2.2 of the Agreement after using facts available in determining CMI's costs. *Ibid.*

¹⁵³ See, the letter conveying the KTC's Preliminary Dumping Report (Exhibit KOR-31).

¹⁵⁴ Exhibit KOR-8B at 14. The quoted portion of the report addresses the arguments of Pindo Deli. On page 25, the report contains the same statement with respect to Indah Kiat.

¹⁵⁵ See, for instance, the Final Investigation Report (Exhibit KOR-13A at 11) and the Final Dumping Report (Exhibit KOR-14A at 12).

7.85 Finally in this regard, we note Indonesia's argument that the KTC should have given the Sinar Mas Group the right to submit further information to cure the defects in the submitted domestic sales data. In Indonesia's view, paragraph 6 provides an interested party whose information is rejected by the IA with the right to submit further evidence.¹⁵⁶ We do not agree. In our view, what paragraph 6 requires is that the IA has to give the interested party whose information is rejected the opportunity to explain to the IA why the information has to be taken into consideration. This, in turn, would give the IA a second chance to review its decision to reject that information. Paragraph 6 does not, however, give the interested party a second chance to submit information. If paragraph 6 is interpreted to mean that each time there is a defect in the submitted information the interested party concerned has the right to submit further information, the investigation might carry on indefinitely.

7.86 On the basis of the above considerations, we conclude that the KTC did not act inconsistently with Article 6.8 of the Agreement and paragraph 6 of Annex II with respect to informing the Sinar Mas Group of its decision to reject the domestic sales data submitted by Indah Kiat and Pindo Deli and giving them an opportunity to make further explanations within a reasonable period.

D. KTC'S USE OF CONSTRUCTED VALUE TO DETERMINE NORMAL VALUES FOR INDAH KIAT AND PINDO DELI

1. Arguments of Parties

(a) Indonesia

7.87 Indonesia asserts that the KTC violated Article 2.2 of the Agreement by failing to make the necessary determinations under that article before resorting to constructed normal value with respect to Indah Kiat and Pindo Deli. According to Indonesia, the KTC did not make any determination as to whether or not there were no sales of the subject product in the ordinary course of trade in the Indonesian market, or whether the volume of such sales were low, or whether such sales did not permit a proper comparison because of a particular market situation.

(b) Korea

7.88 Korea contends that because domestic sales data submitted by Indah Kiat and Pindo Deli were found to be unreliable and not used by the KTC in its normal value determinations, the KTC could not possibly follow the hierarchy set forth in Article 2.2 before resorting to constructed normal value. The KTC's inability to follow this hierarchy was a direct result of the Sinar Mas Group's non-cooperation, hence it should not complain about the legal consequence of that fact.

2. Arguments of Third Parties

(a) United States

7.89 The United States argues that Article 2.2 of the Agreement does not prevent an IA from using constructed value as the basis of normal value determinations once the IA, consistently with Article 6.8 and Annex II of the Agreement, resorts to facts available because of an interested party's failure to submit necessary information within a reasonable period of time. In the view of the United States, Article 2.2 imposes no obligations with respect to the use of facts available.

¹⁵⁶ See, Response of Indonesia to Question 14(b) from the Panel Following the First Meeting; Response of Indonesia to Question 16 from the Panel Following the First Meeting.

3. Evaluation by the Panel

7.90 Indonesia submits that the KTC violated Article 2.2 of the Agreement by resorting to constructed normal value without making the necessary determinations under that provision which would justify such resorting.

7.91 Article 2.2 of the Agreement reads:

"When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country², such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

² Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison."

7.92 We note that Article 2.2 allows the IA to base its normal value determination on the constructed value only when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison.

7.93 Korea concedes that the KTC resorted to construction without making these determinations because the domestic sales data provided by Indah Kiat and Pindo Deli were unreliable as they failed to submit CMI's financial statements and accounting records to the KTC investigators during the verification.

7.94 The issue is whether or not the KTC violated Article 2.2 of the Agreement by failing to make a determination as to whether or not one of the two bases that would allow resorting to constructed normal value was present in the investigation at issue. We recall our finding above (para. 7.72) that the KTC's decision to disregard the domestic sales data submitted by Indah Kiat and Pindo Deli was not WTO-inconsistent because those data were not verifiable. It follows that the KTC could not possibly carry out the determinations set out under Article 2.2 of the Agreement before resorting to constructed normal value for Indah Kiat and Pindo Deli. We therefore conclude that the KTC did not act inconsistently with Article 2.2 in basing its normal value determination on constructed value under Article 2.2 for these two companies and reject Indonesia's claim.¹⁵⁷

¹⁵⁷ We note that Indonesia also alleged a violation of Article 6.8 of the Agreement in connection with this claim. However, it also stated that the Article 6.8 aspect of its claim was "somewhat dependant" on the Article 2.2 aspect. See, Response of Indonesia to Question 19 from the Panel Following the First Meeting. We therefore need not, and do not, make a finding under Article 6.8.

E. KTC'S CALCULATION OF THE CONSTRUCTED NORMAL VALUES FOR INDAH KIAT AND PINDO DELI

1. Arguments of Parties

(a) Indonesia

7.95 According to Indonesia, even assuming *arguendo* that the KTC could legitimately use constructed normal value in this investigation with respect to Indah Kiat and Pindo Deli, the way it calculated their costs of production was inconsistent with Articles 2.2, 2.2.1.1, 2.2.2 and 2.4 of the Agreement. Although Indah Kiat and Pindo Deli drew the KTC's attention to certain errors made in the calculation of the constructed normal values, the KTC did not respond. The first error stems from the KTC's use of facts available in the calculation of the constructed normal values for Indah Kiat and Pindo Deli. According to Indonesia, the KTC had no reason to depart from the cost data submitted by these two exporters in the calculation of their constructed normal values. By disregarding these data and adding CMI's SG&A expenses to those of Indah Kiat and Pindo Deli in the calculation of their constructed normal values, the KTC violated Articles 2.2, 2.2.1.1, 2.2.2, 6.8 and Annex II of the Agreement. Secondly, Indonesia submits that the KTC erred in adding CMI's financial expenses to those of Indah Kiat and Pindo Deli in the calculation of their constructed normal values. Furthermore, Indonesia argues that the KTC erred in using [[Company A]]'s¹⁵⁸ data in determining CMI's SG&A and financial expenses, rather than CMI's own data.

7.96 Finally, with regard to the calculation of the constructed normal values for Indah Kiat and Pindo Deli, Indonesia asserts that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II by failing to exercise special circumspection in its use of information from secondary sources instead of domestic sales data provided by Indah Kiat and Pindo Deli.

(b) Korea

7.97 Korea contends that CMI played the role of a wholesaler in the Indonesian market whereas Indah Kiat and Pindo Deli played the same role in their sales to distributors and end users in Korea. In order to calculate a normal value at the same level of trade as the export price, the KTC legitimately added CMI's SG&A and financial expenses to the constructed normal values for Indah Kiat and Pindo Deli. Because the Sinar Mas Group failed to provide CMI's financial statements during verification, the KTC used data relating to another Indonesian company, [[Company A]]¹⁵⁹, operating at the same level of trade as CMI in the Indonesian market to calculate CMI's SG&A and financial expenses.

7.98 With regard to Indonesia's assertion that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II by failing to exercise special circumspection in its use of information from secondary sources instead of domestic sales data provided by Indah Kiat and Pindo Deli, Korea submits that all information used in the calculation of the constructed normal values for Indah Kiat and Pindo Deli came from sources that were verified during the investigation at issue. It follows that the KTC did not act inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II in this regard.

2. Evaluation by the Panel

7.99 We recall that the record indicates that in its calculation of the constructed normal values for these two companies, the KTC took the total of the cost of manufacturing, SG&A and interest expenses of the individual exporters (Indah Kiat and Pindo Deli), SG&A and interest expenses of

¹⁵⁸ Korea requests that the data in square brackets be treated as confidential.
¹⁵⁹ *Ibid.*

CMI and finally profits. All costs relating to Indah Kiat and Pindo Deli individually were taken from their responses to the KTC's questionnaires. CMI's SG&A expenses were taken from those of [[Company A]]¹⁶⁰, another Indonesian company subject to the same investigation, and its interest expenses from those of [[Company B]]¹⁶¹, a subsidiary of [[Company A]]^{162 163}.

7.100 In the context of the claim at issue, Indonesia takes issue with the SG&A and financial expenses the KTC used for CMI in calculating the constructed normal values for Indah Kiat and Pindo Deli.¹⁶⁴ Regarding financial expenses, Indonesia submits that the KTC erred by adding to the constructed normal values financial expenses for CMI. According to Indonesia, CMI did not have any such expense because it was not involved in the production of the subject product. Korea responds that there was no evidence on the record that showed that CMI's financial expenses were zero. In order to determine the exact amount of CMI's financial expenses, the KTC needed this company's financial statements and accounting records, which the Sinar Mas Group refused to submit during verification.

7.101 We note that Indonesia has not directed our attention to any evidence on the record that would show that CMI's financial expenses in the POI were in fact zero. Indonesia mentions two letters by the Sinar Mas Group to the KTC in which it was argued that CMI's financial expenses were zero.¹⁶⁵ One of them is the 9 April letter that conveyed CMI's financial statements after the verification. The second is the letter dated 2 June 2003, in which the Sinar Mas Group again cites the financial statements submitted along with the 9 April letter and argues that CMI's financial expenses were zero. We note that both letters rely on CMI's financial statements submitted on 9 April as evidence of the fact that CMI's financial expenses were zero. Further, we recall our finding above (para. 7.55) that the KTC properly rejected the financial statements submitted on 9 April. It follows that the record does not support Indonesia's assertion that CMI's financial expenses in the POI were zero.

7.102 The question then becomes whether or not it was reasonable for the KTC to assume that CMI had financial expenses. We note that CMI is a trading company that does almost all domestic sales of the subject product by Indah Kiat and Pindo Deli. Since it is not involved in the production of the subject product, clearly CMI would not have any production-related financial expenses. However, we do not consider it biased or non-objective for the KTC to assume that CMI could have financial expenses stemming from its selling activities. The same applies to CMI's SG&A expenses. Given the lack of information about CMI's actual SG&A expenses, we do not find it biased or non-objective for the KTC to assume that CMI could have such expenses.

7.103 Having found that it was reasonable for the KTC to assume that CMI could have both SG&A and financial expenses, we shall now address Indonesia's argument that the KTC failed to apply special circumspection in the use of facts available with respect to the two cost items added to the constructed normal values of Indah Kiat and Pindo Deli for CMI. Indonesia's contention applies to both the financial and the SG&A expenses added for CMI. In this regard, Indonesia firstly submits that the KTC had in front of it verified information pertaining to Indah Kiat and Pindo Deli, from which it could have derived CMI's financial and SG&A expenses. According to Indonesia, the KTC

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ See, Exhibit KOR-54; Response of Korea to Question 7 from the Panel Following the First Meeting.

¹⁶⁴ To the extent that Indonesia's arguments in connection with the claim at issue relate to the KTC's decision to disregard the domestic sales data submitted by Indah Kiat and Pindo Deli and base normal values for these two companies on constructed value, we note that we have addressed these claims in preceding sections of our report. More specifically, we note that in para. 7.56 above, we found that the KTC did not err in resorting to facts available with respect to determining normal values for Indah Kiat and Pindo Deli in the investigation at issue. We also found (*supra*, para. 7.94) that the KTC did not act inconsistently with the Agreement in using constructed normal value for Indah Kiat and Pindo Deli.

¹⁶⁵ See, First Written Submission of Indonesia, footnote 105.

could, and should, have taken Indah Kiat's and Pindo Deli's figures as a starting point and have calculated CMI's costs by making the necessary adjustments to them bearing in mind that CMI only sold the subject product and did not produce it.¹⁶⁶ By relying on the data relating to [[Company A]]¹⁶⁷, rather than those of Indah Kiat and Pindo Deli, the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II.

7.104 Paragraph 7 of Annex II provides:

"If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

7.105 We recall that the Sinar Mas Group refused to provide CMI's financial statements and accounting records during verification. The KTC therefore resorted to facts available with respect to determining normal values for Indah Kiat and Pindo Deli. In the context of calculating the normal values, the KTC had no information regarding CMI's financial and SG&A expenses. It therefore used information relating to another investigated company, i.e. [[Company A]]¹⁶⁸, in determining CMI's expenses. [[Company A]]'s¹⁶⁹ information was verified by the KTC.¹⁷⁰ We agree with Indonesia that the KTC could have relied on Indah Kiat's and Pindo Deli's information in deriving the appropriate financial and SG&A expenses for CMI. However, we do not consider that this was the only way for the KTC to proceed in this regard. The KTC also had verified information relating to another investigated company and used it to determine CMI's costs. We do not find this course of action to be inconsistent with the KTC's obligation to apply special circumspection under paragraph 7 in the use of information from a secondary source.

7.106 Secondly, Indonesia argues that the KTC failed to apply special circumspection in its use of information from secondary sources by using SG&A expenses of [[Company A]] and interest expenses of [[Company B]] for CMI.

7.107 With respect to SG&A expenses, Indonesia contends the figures used by the KTC included both production and sales-related components and therefore could not be properly used for CMI, which was merely a selling company, without excluding production-related aspects.¹⁷¹ This, in Indonesia's view, resulted in an overstatement of these expenses and consequently overstatement of the constructed normal values. Korea responds that the KTC only used sales-related administrative expenses of [[Company A]] in deriving CMI's expenses.¹⁷² Indonesia has not rebutted Korea's assertion in this regard.¹⁷³ We therefore conclude that the KTC has added only sales-related parts of

¹⁶⁶ See, Response of Indonesia to Question 18 from the Panel Following the First Meeting; Second Written Submission of Indonesia, paras. 29-38.

¹⁶⁷ Korea requests that the data in square brackets be treated as confidential.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Response of Korea to Question 10 from the Panel Following the First Meeting. See also, Exhibit KOR-56.

¹⁷¹ First Written Submission of Indonesia, para. 110.

¹⁷² Response of Korea to Question 7 From the Panel Following the First Meeting.

¹⁷³ We note, for instance, para. 30 of Indonesia's Second Oral Statement where Indonesia notes Korea's explanation in this regard and does not disagree with it.

[[Company A]]'s SG&A expenses as CMI's in the calculation of the constructed normal values for Indah Kiat and Pindo Deli and reject Indonesia's claim regarding the KTC's determination on CMI's SG&A expenses.

7.108 With respect to financial expenses, Indonesia also argues that the KTC overstated CMI's interest expenses by basing its determinations in this regard on the data pertaining to [[Company B]]. According to Indonesia, since [[Company B]] was a manufacturer of the subject product, the KTC acted inconsistently with its obligations under paragraph 7 of Annex II by taking its expenses as a proxy for CMI.¹⁷⁴ Indonesia also submits that in the circumstances of the investigation at issue, the KTC should have taken interest expenses of [[Company A]] as a proxy, which was zero as indicated on the record. According to Indonesia, the KTC's decision to base CMI's SG&A on [[Company A]] and its interest expenses on [[Company B]] has no legal basis.¹⁷⁵ Korea submits that [[Company B]]'s interest expenses included production as well as sales-related components. Korea also disagrees with Indonesia's proposition that financial expenses incurred by [[Company A]] would have been a better proxy for CMI's expenses because they were both trading companies which were not involved in the production of the subject product. In Korea's view, "the interest expenses incurred by a company are independent of its size and activities."¹⁷⁶

7.109 We recall that the KTC used SG&A expenses of [[Company A]] and financial expenses of [[Company B]] in determining corresponding costs of CMI which were then used in the calculation of the constructed normal values for Indah Kiat and Pindo Deli. [[Company A]] was a trading company that sold, both domestically and in export markets, the products manufactured by [[Company B]] which was a manufacturer of the subject product in Indonesia.¹⁷⁷ Indonesia argues that the KTC should have used the financial expenses of [[Company A]] rather than those of [[Company B]] for CMI because, unlike [[Company B]] which was a producer of the subject product, both [[Company A]] and CMI were trading companies. In Indonesia's view, it was erroneous to treat financial expenses of a producer as proxy for those of a trading company.

7.110 In our view, one might expect certain differences between the types of activities carried out by trading companies and those carried out by producing companies. Production activities might require more capital investments and might therefore be more likely to give rise to higher financial expenses. Selling activities, however, would not normally require as much capital investment as production activities and might therefore create lower financial expenses. Therefore, when applying facts available in an investigation, the IA would normally be expected to take into consideration the similarities and dissimilarities between the activities carried out by the company for which information is obtained from secondary sources and those of the company whose information is used as proxy. We do not suggest that the IA is generally precluded, for instance, from using the interest expenses of a producing company as proxy for those of a trading company. Notwithstanding our observation that the activities carried out by these two types of companies would normally be different from one another, we do not exclude the possibility that - in a given investigation - using the information relating to these companies for one another may be allowed provided that the reasons for that course of action are adequately explained in the IA's determinations.

7.111 In the investigation at issue, we note that the KTC needed information regarding CMI's SG&A and financial expenses in order to use them in the construction of the normal values for Indah Kiat and Pindo Deli. For SG&A, the KTC based its determination on the data pertaining to a trading company, i.e. [[Company A]]. With regard to financial expenses, however, it relied on the data relating to [[Company B]], a producing company. We have seen no explanation on the record as to

¹⁷⁴ See, for instance, Second Oral Statement of Indonesia, para. 31.

¹⁷⁵ Response of Indonesia to Question 12 from the Panel Following the Second Meeting.

¹⁷⁶ Comments of Korea on Indonesia's Closing Statement and Responses to Questions from the Panel Following the Second Meeting, para. 57.

¹⁷⁷ Response of Korea to Question 7 from the Panel Following the First Meeting, footnote 27.

why the KTC decided to use the data relating to a company whose activities were less similar to CMI, i.e. [[Company B]], although it had in its possession data relating to a company, [[Company A]], which carried out activities similar to those of CMI. This, in our view, runs counter to the obligation to exercise special circumspection in the use of information from secondary sources when applying facts available, as set out under paragraph 7 of Annex II. We therefore conclude that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II with respect to determining financial expenses of CMI in the context of calculating the constructed normal values for Indah Kiat and Pindo Deli.

7.112 We note that Indonesia also alleges violations of several subparagraphs of Article 2 of the Agreement with regard to the KTC's use of [[Company B]]'s financial expenses for CMI. Having found that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II in this regard, we do not make any finding under Article 2.

F. KTC'S USE OF FACTS AVAILABLE TO DETERMINE TJIWI KIMIA'S DUMPING MARGIN

1. Arguments of Parties

(a) Indonesia

7.113 Indonesia contends that the KTC violated Article 6.8 of the Agreement and paragraph 7 of Annex II by relying exclusively on the information provided by the applicants in the calculation of Tjiwi Kimia's dumping margin and by failing to compare that information against data submitted by other investigated exporters. According to Indonesia, there can logically be a difference between Tjiwi Kimia's dumping margin and those of the other exporters, but the 51.61 per cent dumping margin which is four times higher than the highest dumping margin calculated for the other Indonesian exporters demonstrates that the KTC did not act in an unbiased and objective manner in its calculation of Tjiwi Kimia's dumping margin.

7.114 According to Indonesia, since, contrary to what it did in the preliminary determinations, the KTC decided to treat the three Sinar Mas Group companies as a single exporter and calculated a single dumping margin for them in its final determinations, the calculation of Tjiwi Kimia's dumping margin on the basis of facts available materially affected the positions of Indah Kiat and Pindo Deli. In the absence of the effect of Tjiwi Kimia's dumping margin, there would have been no finding of dumping for Indah Kiat and Pindo Deli. It follows that the KTC should have provided Indah Kiat and Pindo Deli with an opportunity to submit further explanations and to rectify defects in the submitted information regarding Tjiwi Kimia pursuant to Article 6.8 of the Agreement and paragraph 6 of Annex II. By failing to do so, the KTC violated these provisions.

(b) Korea

7.115 Korea submits that the Sinar Mas Group chose not to cooperate with the KTC in this investigation with respect to Tjiwi Kimia. It follows that the results of non-cooperation could become less favourable for Tjiwi Kimia pursuant to paragraph 7 of Annex II. With respect to Indonesia's argument about the KTC's alleged failure to use special circumspection in the use of facts available for Tjiwi Kimia, Korea submits that at the initiation stage of the investigation, the KTC checked, pursuant to Article 5.3 of the Agreement, the accuracy and adequacy of the information submitted by the applicants with respect to Tjiwi Kimia. The KTC found that the mentioned information came from independent and reliable sources. That, in Korea's view, also satisfied the requirements of paragraph 7 of Annex II. Furthermore, Korea asserts that in the course of the investigation at issue the KTC compared those data against other sources. Therefore, the KTC cannot be said to have acted inconsistently with Article 6.8 and paragraph 7 of Annex II in its use of facts available with respect to Tjiwi Kimia.

7.116 As to Indonesia's argument relating to paragraph 6 of Annex II, Korea submits that that paragraph applies in cases where information submitted by a responding party is not accepted by the IA. Since Tjiwi Kimia did not submit any information to the KTC in this investigation, it cannot logically argue a violation of that paragraph. Nothing in that paragraph, or in Article 6.8 of the Agreement, requires the IA to provide non-cooperating parties with a second chance to submit information.

2. Arguments of Third Parties

(a) China

7.117 China submits that checking, in accordance with Article 5.3 of the Agreement, the accuracy and adequacy of the information submitted by the applicants at the initiation stage of an investigation does not release the IA from its obligation, under paragraph 7 of Annex II, to check against independent sources the information from secondary sources that is being used in the context of facts available. These are two distinct obligations that have to be respected at two different stages of an anti-dumping investigation.

(b) United States

7.118 The United States argues that the obligation under Article 5.3 of the Agreement to verify the accuracy and adequacy of the information submitted in the application is distinct from the obligation under paragraph 7 of Annex II to compare the information from the secondary sources used as part of facts available against independent sources. According to the United States, meeting the first obligation may not necessarily amount to meeting the second one. The Panel, therefore, has to find as a matter of fact whether or not the KTC met its obligation under paragraph 7 of Annex II in the investigation at issue.

3. Evaluation by the Panel

7.119 We note that facts relating to this claim are relatively straightforward. Tjiwi Kimia intentionally chose not to submit information in response to the KTC's questionnaire. In its preliminary dumping determinations, the KTC treated the three Sinar Mas Group companies separately. In its final determinations, however, it treated them as a single exporter and assigned to them one single margin of dumping. In its final margin calculations, the KTC first calculated individual normal values and export prices for each company and then weighted them in order to come up with a final normal value and export price figure. These final figures were then used to calculate the final (single) margin of dumping.¹⁷⁸ In this process, normal value and export price figures for Tjiwi Kimia were obtained from the information submitted by the applicants in the application.

7.120 Indonesia's claim is premised on two arguments. Firstly, Indonesia argues that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II by relying exclusively on the data submitted by the applicants in the calculation of Tjiwi Kimia's dumping margin without corroborating them against independent sources. Secondly, Indonesia asserts that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 6 of Annex II by not providing Indah Kiat and Pindo Deli with an opportunity to submit further explanations and to rectify defects in the submitted information regarding Tjiwi Kimia.

(a) Alleged Violation of Article 6.8 of the Agreement and Paragraph 7 of Annex II

7.121 We note that paragraph 7 of Annex II provides:

¹⁷⁸ First Written Submission of Korea, para. 75.

"If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

7.122 Paragraph 7 states that when an IA uses facts available in accordance with Article 6.8 of the Agreement, and in that context bases its determinations on information obtained from a secondary source, it has to do so with special care. It also provides that, to the extent possible, that information should be compared against information from other independent sources, including information obtained by the IA about other investigated companies in the same investigation. However, paragraph 7 also acknowledges that as long as special circumspection is exercised in the use of information from a secondary source, the results of the investigation may be less favourable for the non-cooperating interested party than had it chosen to cooperate.

7.123 Turning to the investigation at issue, we note that in the process of calculating the single margin of dumping for the three Sinar Mas Group companies, the KTC based Tjiwi Kimia's normal value and export price on the information submitted by the applicants in the application. Korea does not dispute this fact.¹⁷⁹ However, parties' views diverge regarding whether or not that information was later on corroborated by the KTC against information from other independent sources. In this context, Korea generally argues that in certain cases, the fulfilment of the obligation under Article 5.3 may also suffice to meet the requirements of paragraph 7 of Annex II. Based on this view, Korea asserts that in the investigation at issue, there was no need to corroborate the normal value and export price data obtained from the application because these data came from independent and reliable sources such as the Korean government customs statistics ("KOTIS") and the Korea Trade-Investment Promotion Agency ("KOTRA"). Furthermore, Korea asserts that because these data were obtained from such sources, they were deemed to have been corroborated.¹⁸⁰

7.124 We consider the obligations set forth under Article 5.3 and paragraph 7 of Annex II to be different. Firstly, these two sets of obligations apply at different stages of an investigation: Article 5.3 concerns the quality of the evidence that would justify the initiation of an investigation whereas paragraph 7 of Annex II has to do with the evidence on which the IA's final determination may be based. Secondly, the standards of these two obligations are different. The standard under Article 5.3 is that evidence be "adequate and accurate" so as to justify initiation whereas paragraph 7 of Annex II requires that information from secondary sources be compared against that from other independent sources. We therefore do not agree with the view that the fulfilment of the obligation under Article 5.3 of the Agreement may in some cases also satisfy the requirements of paragraph 7 of Annex II. It may be the case that the obligation to corroborate under paragraph 7 may entail little substantive analysis in addition to the analysis carried out under Article 5.3 at the initiation stage. However, that does not make these two obligations the same from a procedural and substantive point of view. They are two distinct obligations that have to be observed by the IA at different stages of an investigation. We therefore disagree with Korea's contention that in certain cases, the fulfilment of the obligation under Article 5.3 may also suffice to meet the requirements of paragraph 7 of Annex II.

¹⁷⁹ First Written Submission of Korea, para. 97.

¹⁸⁰ Second Written Submission of Korea, para. 32; Second Oral Statement of Korea, para. 64; Response of Korea to Question 26 from the Panel Following the First Meeting.

7.125 We have no specific reason to question that the information about Tjiwi Kimia, submitted by the applicants in the application, may have been reliable as it came from independent institutions, i.e. KOTIS and KOTRA. The fact remains, however, that the KTC was under the obligation to take the procedural step, under paragraph 7 of Annex II, to confirm the reliability of that information for purposes of its determinations in the investigation. The issue, therefore, is whether or not the KTC took that step to satisfy the requirements of paragraph 7.

7.126 Korea argues that in the course of the investigation at issue, the KTC did in fact compare the information obtained from the application against information from other independent sources. In this context, Korea submits that the export price was compared against data from KOTIS. The record supports this proposition.¹⁸¹ Korea also argues that the normal value was compared against normal values established with respect to the other investigated companies in the same investigation. We note, however, that there is no indication of such corroboration on the record. Korea submitted an affidavit from a KTC investigator to prove this assertion.¹⁸² We are left in a position where there is evidence on the record that demonstrates that the KTC did corroborate export price information from the data of KOTIS, but no evidence as to whether or not the same was done with respect to the normal value. It is for a party asserting a fact to provide proof thereof.¹⁸³ We therefore consider that Korea has not established as a matter of fact that the KTC compare the normal value figure for Tjiwi Kimia against other independent sources. It follows that Korea has not rebutted the *prima facie* case made by Indonesia in this regard. We therefore conclude that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II by failing to fulfil its obligation to corroborate information obtained from secondary sources for purposes of calculating Tjiwi Kimia's dumping margin against other independent sources at its disposal.

7.127 Regarding Indonesia's argument that the magnitude of the margin of dumping calculated for Tjiwi Kimia also demonstrates that the KTC failed to exercise special circumspection, we are of the view that the magnitude of the margin of dumping may not have a bearing on the WTO-consistency of the KTC's calculation as long as the calculation conforms to the relevant provisions of the Agreement. We therefore disagree with Indonesia in this regard.

(b) Alleged Violation of Article 6.8 of the Agreement and Paragraph 6 of Annex II

7.128 Indonesia argues that since the KTC decided to treat the three Sinar Mas Group companies as a single exporter with respect to its dumping determinations, it should have treated these three companies as a single exporter for purposes of the procedural requirements of the Agreement as well. It follows that the single exporter should have been given "an opportunity to cure defects in submitted information."¹⁸⁴ Korea disagrees. According to Korea, since Tjiwi Kimia did not submit any information to the KTC, there may be no violation of paragraph 6 *vis-à-vis* this company. Similarly, Korea submits that the fact that the KTC treated the three Sinar Mas Group companies as single exporter for purposes of its dumping margin determinations did not alter the implications of paragraph 6.

7.129 We note that paragraph 6 of Annex II reads:

"If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being

¹⁸¹ Exhibit KOR-8A at 39.

¹⁸² Exhibit KOR-44.

¹⁸³ See, *supra*, note 96.

¹⁸⁴ Second Written Submission of Indonesia, para. 52.

satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations." (emphasis added)

7.130 Paragraph 6 provides that in cases where the IA declines to accept information submitted by an interested party, that party has to be informed of the IA's decision and has to be given an opportunity to provide further explanations regarding that decision. If the IA finds such explanations as being unsatisfactory, then the information can be disregarded, in which case the IA has to explain, in its published determinations, why the information has been rejected.

7.131 In this case, it is undisputed that Tjiwi Kimia chose not to submit any information to the KTC. Thus, no submission of information was made on behalf of this company. Our understanding of the obligation set out in paragraph 6 is that submission of information is a prerequisite to invoke this paragraph. In other words, we consider that an interested party that chooses not to submit any information to the IA cannot logically claim a violation of paragraph 6. We are therefore of the view that the KTC did not act inconsistently with Article 6.8 and paragraph 6 of Annex II in not giving either Tjiwi Kimia or the Sinar Mas Group another opportunity to submit information which had already been withheld from the KTC.¹⁸⁵

G. KTC'S ALLEGED FAILURE TO MAKE A FAIR COMPARISON BETWEEN NORMAL VALUE AND EXPORT PRICE

1. Arguments of Parties

(a) Indonesia

7.132 Indonesia notes that Indah Kiat and Pindo Deli made their domestic sales through CMI whereas they exported directly to their customers in Korea. Indonesia asserts that CMI rendered certain additional sales-related services in the Indonesian market, which were not rendered in Indah Kiat's and Pindo Deli's exports to Korea. According to Indonesia, the **[[**]]**¹⁸⁶ that CMI charged over the prices of Indah Kiat and Pindo Deli in the Indonesian market was evidence of the fact that it rendered additional marketing services. It follows that the KTC should have made an adjustment under Article 2.4 of the Agreement for this difference that affected price comparability in the investigation at issue. By failing to do so, the KTC acted inconsistently with Article 2.4.

(b) Korea

7.133 Korea acknowledges that the Sinar Mas Group companies argued during the investigation at issue that additional sales-related activities undertaken by CMI in the Indonesian market deserved an adjustment under Article 2.4 of the Agreement. According to Korea, however, the involvement of CMI in the domestic sales did not automatically necessitate an adjustment under that article. Korea asserts that the Sinar Mas Group never demonstrated that the involvement of CMI in the domestic sales gave rise to a difference that affected price comparability as set out under Article 2.4.

2. Arguments of Third Parties

(a) United States

7.134 The United States submits that, contrary to Indonesia's assertion, not all differences necessitate an adjustment under Article 2.4. For an adjustment to be made under Article 2.4 of the

¹⁸⁵ Having concluded that paragraph 6 of Annex II could not possibly be invoked to submit information on behalf of Tjiwi Kimia because this company had not submitted any information to the KTC, we need not, and do not, discuss the specific issue of whether or not the fact that the KTC treated the three Sinar Mas Group companies as a single exporter changed this outcome.

¹⁸⁶ Korea requests that the data in square brackets be treated as confidential.

Agreement for differences in levels of trade, it has to be shown that the alleged difference affects price comparability.

3. Evaluation by the Panel

7.135 We note, at the outset, that parties agree that the levels of trade of the Sinar Mas Group companies' domestic and export sales were the same in that the sales in both markets were made to the same categories of customers.¹⁸⁷ We are therefore not faced with a claim regarding an alleged difference in the levels of trade *per se*. Indonesia contends that CMI performed certain marketing activities with respect to Indah Kiat's and Pindo Deli's domestic sales, which were not carried out by these companies in their exports to Korea. These additional activities by CMI necessarily gave rise to additional costs, which constituted a factor that affected price comparability within the meaning of Article 2.4 of the Agreement. It follows that the KTC should have made an adjustment with respect to this difference. According to Indonesia, the fact that CMI charged a [[**]]¹⁸⁸ in the domestic sales was evidence of this difference that affected price comparability.

7.136 Korea concedes that the Sinar Mas Group companies made a request for an adjustment under Article 2.4 with respect to the alleged additional costs stemming from CMI's involvement in the domestic sales. Korea asserts, however, that they never provided sufficient evidence to prove that such involvement necessarily gave rise to additional costs that had to be removed in comparing the normal values and export prices for these companies. According to Korea, the fact that these expenses were incurred by CMI, rather than the exporters themselves, did not automatically mean that they deserved an adjustment under Article 2.4.

7.137 We note that the relevant part of Article 2.4 of the Agreement provides:

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." (footnote omitted, emphasis added)

7.138 We note that Article 2.4 of the Agreement, which generally requires the IA to carry out a fair comparison between the normal value and the export price, specifically mentions levels of trade as one possible item for which an adjustment may be needed. In addition to providing a non-exhaustive list of items for which adjustments may be needed, Article 2.4 also generally stipulates that necessary adjustments have to be made with respect to any other factor which affects price comparability. Consequently, to make a *prima facie* case, Indonesia has to demonstrate to the Panel that there was (1) a difference (2) that affected price comparability between the normal value and the export price for which the KTC failed to make an adjustment.

7.139 We note that Indonesia cited two items as the factors that affected price comparability in the investigation at issue: the [[**]]¹⁸⁹ charged by CMI in its sales to independent buyers in Indonesia and the SG&A and interest expenses added by the KTC in the constructed normal values for Indah Kiat and Pindo Deli to account for CMI's expenses related to the sale of the subject product in Indonesia.

¹⁸⁷ See, for instance, Response of Indonesia to Question 28(a) from the Panel Following the First Meeting.

¹⁸⁸ Korea requests that the data in square brackets be treated as confidential.

¹⁸⁹ *Ibid.*

7.140 However, we do not understand Indonesia to assert that the KTC should have made an adjustment for both of these two factors. Indonesia generally argues that the fact that CMI charged a [[**]]¹⁹⁰ in its sales to independent buyers is evidence of the fact that there was a difference between the normal value and the export price, which affected price comparability.¹⁹¹ As to the quantification of the adjustment, we note that the Sinar Mas Group put forward a two-fold argument during the investigation, as shown in the quotation in paragraph 7.142 below: the Group argued that if the KTC bases its normal value determinations on CMI's selling prices submitted by the respondents, account should be taken of CMI's [[**]]¹⁹². If, however, the KTC constructs the normal values, then the expenses added to the constructed normal values for CMI should be removed at the fair comparison stage.

7.141 We recall that the KTC did not use CMI's selling prices, but decided to construct the normal values for Indah Kiat and Pindo Deli. In its construction of these two normal values, the KTC added [[**]]¹⁹³ per cent for SG&A and [[**]]¹⁹⁴ per cent for interest expenses for CMI.¹⁹⁵ Given that the record clearly demonstrates that the KTC used constructed normal values for Indah Kiat and Pindo Deli, we understand Indonesia to argue that the KTC should have made an adjustment to remove the SG&A and the interest expenses added to account for CMI's involvement in the domestic sales of the subject product. In other words, Indonesia's argument is that these two expenses added to the normal values to account for CMI's costs should have been removed when comparing the normal values with export prices in order to make a fair comparison as required under Article 2.4 of the Agreement. In any event, we do not consider this distinction regarding the quantification of the adjustment to have an important bearing on our legal reasoning with respect to this claim because, no matter on what basis the claimed adjustment should have been calculated by the KTC, the issue is whether or not there was in fact such a difference that affected price comparability and for which an adjustment should have been made. In other words, the issue is whether or not domestic sales of the subject product made through CMI in Indonesia contained certain additional expenses stemming from the services rendered by CMI with respect to domestic sales, which were not rendered in exports to Korea.

7.142 Turning to the record of the investigation at issue, as stated above, we note that in its construction of the normal values for the three Sinar Mas Group companies, the KTC added additional SG&A and interest expenses for CMI's re-sales of the subject product. It is also clear that the Sinar Mas Group requested that an adjustment be made to the normal values for Indah Kiat and Pindo Deli to account for these expenses which, in their view, affected price comparability and that the KTC declined that request. The Sinar Mas Group raised this issue at least three times during the investigation. The letter by the Sinar Mas Group dated 9 April 2003 reads in relevant parts:

"[[**]]"¹⁹⁶

7.143 The Sinar Mas Group's letter dated 4 July 2003 reads in pertinent parts:

"[[**]]"¹⁹⁷

7.144 The Sinar Mas Group's letter dated 12 September 2003 reads in relevant parts:

"[[**]]"¹⁹⁸

¹⁹⁰ *Ibid.*

¹⁹¹ Response of Indonesia to Question 16 from the Panel Following the Second Meeting.

¹⁹² Korea requests that the data in square brackets be treated as confidential.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ These two figures were subsequently corrected to [[**]] and [[**]] per cent (Korea requests that the data in square brackets be treated as confidential) for the respective companies. See, Exhibit KOR- 54.

¹⁹⁶ Korea requests that the data in square brackets be treated as confidential.

¹⁹⁷ *Ibid.*

7.145 In response to these requests by the Sinar Mas Group, the KTC's Final Dumping Report reads in pertinent parts:

"7) Adjustments for the Difference in the Level of Trade

Opinion of the Respondents

Respondents requested to take into consideration the difference in the level of trade in determining the normal value, as the products are sold to independent domestic merchants in the domestic market through CMI, the sales company, while the exports to Korea are directly made to Korean importers, thus making the level of trade different for the domestic sale in Indonesia and the exports to Korea.

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First, in order for the difference in the level of trade to be recognized as an adjustment factor of the normal value, the domestic sale in Indonesia must have one more level of trade than exports. Second, such difference in the level of trade must affect the difference between the export price to Korea and the domestic sales price.

- CMI, the sales company, is an affiliated company of Respondent, and thus, forms one economic entity with Respondent. Therefore, the domestic sale in Indonesia does not have one more level of trade than exports.

- Further, for fair comparison, Respondents are required to establish the impact of such difference in the level of trade on the prices of exports and domestic sales. However, Respondents failed to submit such evidence to the Office of Investigation during the on the spot investigation, thereby failing to prove the impact of the difference in the level of trade on the price of exports to Korea and the domestic sales price.

- Therefore, for the above reasons, Respondents' arguments are not acceptable."¹⁹⁹

7.146 The crux of Indonesia's claim, and the main line of reasoning put forward by the Sinar Mas Group in the course of the investigation at issue, is that the involvement of CMI in the domestic sales chain necessarily meant that an adjustment should have been made to make a fair comparison. The fact that CMI charged a ²⁰⁰ over the prices of Indah Kiat and Pindo Deli is, in Indonesia's view, evidence of this fact. Evidence on which Indonesia relies in this regard has also to do with the involvement of CMI in domestic sales. For instance, Indonesia refers to the fact that CMI had to pay its employees who were carrying out sales-related work in addition to the work done by the employees of Indah Kiat and Pindo Deli. Indonesia also mentions that there were two price negotiations in domestic sales: One between Indah Kiat or Pindo Deli and CMI and the other between CMI and independent buyers. Consequently, two sets of sales-related documents were issued with respect to domestic sales.²⁰¹ That is why CMI charged a ²⁰² and why the KTC added SG&A and interest expenses for CMI in the constructed normal values for Indah Kiat and Pindo Deli.

¹⁹⁸ *Ibid.*

¹⁹⁹ Exhibit KOR-14A at 19.

²⁰⁰ Korea requests that the data in square brackets be treated as confidential.

²⁰¹ Response of Indonesia to Question 16 from the Panel Following the Second Meeting.

²⁰² Korea requests that the data in square brackets be treated as confidential.

7.147 We note that in a given investigation there may be differences with respect to sales-related expenses in the export and domestic markets for a variety of reasons. It may also be the case that these differences may affect price comparability. If so, the IA has to make an adjustment to account for the effect of such differences in order to ensure a fair comparison between the normal value and the export price, consistently with Article 2.4 of the Agreement. This may be the case irrespective of whether or not there is a trading company, such as CMI in this investigation, involved in the distribution of the subject product either in the export or the domestic market. In other words, the fact that a trading company handles domestic or export sales of the subject product does not in and of itself mean that there is a difference that affects price comparability and that an adjustment has to be made under Article 2.4. The interested party claiming such an adjustment has to demonstrate that the involvement of the trading company gives rise to a difference that affects price comparability. We note that, just as the Sinar Mas Group did during the investigation at issue, in these proceedings Indonesia repeatedly referred to the costs incurred by CMI as the trading company handling domestic sales of Indah Kiat and Pindo Deli. This, in our view, is not enough to demonstrate that CMI's involvement created a difference between the normal values and the export prices of Indah Kiat and Pindo Deli which affected price comparability. We are not convinced that there were sales-related services rendered by CMI with respect to domestic sales of Indah Kiat's and Pindo Deli's products in the Indonesian market which were not rendered in these two companies' export sales to Korea. Indonesia has failed to make a *prima facie* case in this regard. We therefore reject Indonesia's claim.

H. KTC'S TREATMENT OF INDAH KIAT, PINDO DELI AND TJIWI KIMIA AS A SINGLE EXPORTER

1. Arguments of Parties

(a) Indonesia

7.148 Indonesia notes that Article 6.10 of the Agreement requires that individual margins of dumping be calculated for each exporter involved in an anti-dumping investigation. Indah Kiat, Pindo Deli and Tjiwi Kimia are separate legal entities under Indonesian law. Following the mandate of Article 6.10, therefore, the KTC should have treated them separately in its dumping determinations. According to Indonesia, no provision in the Agreement permits an IA to treat separate legal entities as a single exporter and thereby to assign a single dumping margin to them. Had the KTC treated these three companies separately, there would have been no finding of dumping with respect to Indah Kiat, the largest Indonesian exporter subject to the investigation. It follows that the KTC violated Article 6.10 of the Agreement by treating these three companies as a single exporter for purposes of its dumping margin calculations.

7.149 Assuming that Article 6.10 allows an IA to treat separate legal entities as a single exporter for purposes of its dumping determinations, Indonesia submits that the KTC failed to make the necessary determinations in the investigation at issue which would have justified such treatment. In the absence of evidence indicating actual coordination with respect to both domestic sales and exports to Korea, the existence of overlapping management or shareholding between individual companies cannot be sufficient ground to treat them as a single exporter.

7.150 Indonesia argues that the KTC also violated Article 9.3 of the Agreement by treating the three Sinar Mas Group companies as a single exporter because the calculation of the single margin of dumping subjected Indah Kiat to the anti-dumping duty at issue although that company's preliminary margin was negative.

(b) Korea

7.151 Korea asserts that Article 6.10 does not require the calculation of a separate dumping margin for each individual corporate entity. It requires that an individual dumping margin be calculated for each known exporter or producer. There is no definition of the terms "exporter" or "producer" in the

Agreement. In Korea's view, therefore, the IA can interpret this provision as allowing the treatment of separate corporate entities that function as a single economic unit as a single exporter. Korea characterizes this as a functional definition of the term "exporter" under Article 6.10. Korea argues that the KTC found important management links that justified treating these three Indonesian companies as a single exporter.

2. Arguments of Third Parties

(a) China

7.152 Although China disagrees with Korea's proposition that the terms "corporation" on the one hand and "exporter" or "producer" on the other have been used in such a way that they cannot substitute one another in the context of the Agreement, it nevertheless agrees that in certain circumstances treating different corporations as a single entity for purposes of dumping margin determinations in an anti-dumping investigation may be allowed. China also finds support for its proposition in Article 9.5 of the Agreement which allows the IA not to calculate an individual dumping margin for a new exporter if that exporter is affiliated with another exporter that is already subject to an anti-dumping measure.

(b) European Communities

7.153 The European Communities submits that the terms "exporter" and "producer" used in Article 6.10 have not been directly defined in the Agreement. The IA, therefore, has certain discretion in interpreting these terms by taking due account of the economic circumstances surrounding a given anti-dumping investigation. According to the European Communities, it is not inconsistent with the text, or the object and purpose, of Article 6.10 to treat separate corporations that are related, as a single entity for purposes of dumping determinations in an anti-dumping investigation. The European Communities finds support for this proposition in Article 9.5 of the Agreement. According to the European Communities, if Article 9.5 requires that account be taken of the relationship between foreign exporters in the context of a newcomer's review, the same should hold true under Article 6.10 with respect to the initial investigation.

(c) United States

7.154 The United States argues that Article 6.10 does not disallow the treatment of more than one corporation as a single economic entity for purposes of dumping margin calculations in an anti-dumping investigation. In the view of the United States, the words "exporter" and "producer" which are used in Article 6.10, and not defined in the Agreement, should be interpreted by reference to the commercial functions of the companies rather than their corporate structure.

3. Evaluation by the Panel

7.155 Indonesia asserts that Article 6.10 of the Agreement precludes the treatment of separate legal entities in an anti-dumping investigation as a single exporter and the assignment of a single margin of dumping to them. Assuming *arguendo* that Article 6.10 allows a Member to treat separate legal entities as a single exporter for purposes of dumping margin calculations, Indonesia submits in the alternative that such treatment is possible only if there is evidence of actual coordination in the companies' domestic sales and their export sales to the importing Member, and that the KTC did not find any such evidence in the investigation at issue. Korea disagrees and contends that Article 6.10 requires that an individual dumping margin be calculated for each individual exporter, not for each independent corporate entity. It follows that several companies that act as a single economic entity may be treated as a single exporter.

7.156 We note that Article 6.10 provides:

"The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." (emphasis added)

7.157 The claim at issue concerns the first sentence of Article 6.10. The issue here is whether, and if so under what circumstances, Article 6.10 permits an IA to treat separate legal entities, which export the subject product to the importing Member and which are in certain ways related to one another, as a single exporter and to determine an individual margin of dumping for that exporter. We note that Article 6.10 mentions "exporters" and "producers" of the subject product and requires that an individual margin be calculated for each of them. It does not, however, define these two words. After setting out this general rule, Article 6.10 then goes on to create an exception, i.e. sampling, which allows the IA, under certain circumstances, to limit its examination to a certain number of exporters or producers and to assign the resulting margin of dumping to unexamined exporters or producers. Nowhere in the text of Article 6.10, however, can we find any specific guidance as to whether each separate legal entity must be treated as a distinct exporter or producer.

7.158 Turning to the context of Article 6.10, we find important guidance in Article 9.5 of the Agreement. Article 9.5 reads in pertinent parts:

"If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product" (emphasis added)

7.159 Article 9.5 requires that the IA determine individual margins for exporters and producers who did not export during the POI. Article 9.5 further provides, however, that the IA is not required to calculate an individual dumping margin for a newcomer who is related to an exporter subject to an existing anti-dumping duty. Thus, in the context of new shipper reviews, the mere existence of a relationship to an exporter or producer already subject to anti-dumping duties is sufficient to disqualify an entity from entitlement to an individual margin of dumping. The logic of Article 9.5 would appear to be that to allow related companies to obtain individual rates could undermine the efficiency of the existing duties. We recognize that Article 9.5 applies only after a duty has been put in place, and that the situation in an investigation might well justify a different approach. Nevertheless, Article 9.5 as context strongly suggests that the term "exporter" in Article 6.10 should not be read in a way to require an individual margin of dumping for each independent legal entity under all circumstances.

7.160 Several other provisions of the Agreement, although less directly relevant, nevertheless confirm that the Agreement recognizes that relationships between legally distinct entities may impact behaviour and are thus relevant to the application of the rules of the Agreement. For example, Article 2.3 allows the IA to disregard the export price between affiliated parties in cases where there is reason to believe that, because of an affiliation between the exporter and the importer or a third party, the export price reported to the IA is not reliable. In these cases, the IA may base its export price determination on the price at which the subject product is first resold to an independent buyer in

the importing Member. Similarly, Article 2.1 of the Agreement allows a Member to exclude sales "not in the ordinary course of trade" when determining normal value, and the Appellate Body has made clear that sales might not be in the ordinary course of trade by reason of affiliation.²⁰³

7.161 Thus, we consider that, when read in context, Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations. Having said that, however, we do not consider that Article 6.10 provide the IA with unlimited discretion to do so. While Article 6.10 does not by its terms require that each separate legal entity be treated as a single "exporter" or "producer", neither does it allow a Member to treat distinct legal entities as a single exporter or producer without justification. Whether or not the circumstances of a given investigation justify such treatment must be determined on the basis of the record of that investigation. In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment.

7.162 We note Indonesia's contention that a necessary element in this regard is evidence indicating actual coordination in the domestic sales of the companies in question and their exports to the importing Member in question, a contention disputed by Korea. We recall, however, the standard of review that we are required to apply in respect of questions of law (*supra*, paras.7.1-7.5). Although evidence of actual coordination of domestic or export sales might well be a highly relevant element for consideration in determining whether separate entities may be treated as a single exporter or producer, we do not consider Indonesia's interpretation of Article 6.10 as requiring such evidence to be the only permissible interpretation of that Article. Rather, we consider that Article 6.10, read in its context, and in particular with Article 9.5, could permissibly be interpreted to allow such treatment in other circumstances where the structural and commercial relationship between the companies in question is sufficiently close to be considered as a single exporter or producer.

7.163 With these considerations in mind, we now turn to the facts before the KTC in this investigation. We note that, in its preliminary determination, the KTC rejected the domestic industry's request that the three Sinar Mas Group companies be treated as a single exporter and that a single margin of dumping be assigned to them.²⁰⁴ At the final stage of the investigation, however, the KTC did treat them as a single exporter or producer and assigned a single margin to them. The KTC explained the reasons for its decision in its Final Dumping Report, which states in pertinent parts:

"Upon re-examination, based on the following grounds, the Office of Investigation calculated a single dumping margin for Pindo Deli, Indah Kiat and Tjiwi Kimia by considering them as one entity.

- Ekapersada, the subsidiary of APP, owns [[**]]%, [[**]]% and [[**]]% of the shares of Pindo Deli, Indah Kiat and Tjiwi Kimia, respectively.²⁰⁵

- Among the commissioners of Pindo Deli [[**]], Indah Kiat [[**]] and Tjiwi Kimia [[**]], [[**]] commissioners of Indah Kiat and Tjiwi Kimia and [[**]] commissioners of Pindo Deli and Tjiwi Kimia are identical persons, and [[**]] person serves as a commissioner of all three companies.²⁰⁶

- Among the directors of Pindo Deli [[**]], Indah Kiat [[**]] and Tjiwi Kimia [[**]], [[**]] directors of Indah Kiat and Tjiwi Kimia, [[**]] directors of Pindo Deli and

²⁰³ Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 94, para. 143.

²⁰⁴ Preliminary Dumping Report (Exhibit KOR-8B at 12).

²⁰⁵ Korea requests that the data in square brackets be treated as confidential.

²⁰⁶ *Ibid.*

Tjiwi Kimia and [[**]] directors of Pindo Deli and Indah Kiat are identical persons, and [[**]] persons serve as directors of all three companies.²⁰⁷

- During the POI of the dumping margins, Pindo Deli sold uncoated woodfree paper to Indah Kiat ([[**]] tons) and Tjiwi Kimia ([[**]] tons) through its affiliated company, CMI.²⁰⁸

- Each of Pindo Deli, Indah Kiat and Tjiwi Kimia manufactures and sells the product under investigation."²⁰⁹

7.164 We note that the above-quoted part of the record, where the KTC discusses the basis of its decision to treat the three Sinar Mas Group companies as a single exporter or producer, demonstrates that one parent company, i.e. Ekapersada, owns the [[**]] of the shares of the three companies. This, in our view, shows that the parent company had a considerable controlling power over the operations of its three subsidiaries. Further, we note that there was a significant commonality with respect to the management of the three companies. The record shows that [[**]] commissioners of Indah Kiat and Tjiwi Kimia and [[**]] commissioners of Pindo Deli and Tjiwi Kimia were the same persons and that [[**]] person served as a commissioner of all three companies. Furthermore, [[**]] directors of Indah Kiat and Tjiwi Kimia, [[**]] directors of Pindo Deli and Tjiwi Kimia and [[**]] directors of Pindo Deli and Indah Kiat were the same persons, and [[**]] persons served as directors of all three companies.²¹⁰

7.165 We consider the commonality of management among these three companies, coupled with the fact that they were all owned by the same parent company, to be indications of a close legal and commercial relationship between these three companies. Given these similarities, one might, in our view, expect that commercial decisions for the three companies could be made in substantial part by the same closely interlocked group of individuals, and the management of all three companies could ultimately be answerable to their majority shareholder Ekapersada. We note that the record also indicates that one of these companies, Pindo Deli, sold the subject product to the other two during the POI. This also indicates that these companies could harmonize their commercial activities to fulfil common corporate objectives. The ability and willingness of the three companies to shift products among themselves is, in our view, of some importance to the consideration of whether the three companies should be treated as a single exporter and subject to a single margin determination.

7.166 In addition to these factors specifically referred to by the KTC in the above-quoted part of the Final Dumping Report, the record also shows that CMI acted practically as the sole channel through which all three companies made their domestic sales in Indonesia. We note the following determinations that the KTC made regarding the relationship between the two Sinar Mas Group companies which cooperated with the KTC in the investigation at issue on the one hand and CMI on the other:

"In accordance with Article 23, Paragraph 5 of the Decree, Respondent [Pindo Deli] and CMI can be considered as one economic entity, as one company controls the other company legally or practically for the following reasons: (i) [[**]] shareholders of PT Sinar Mas Tunggal, the parent company of CMI, are directors of APP, the holding company of Pindo Deli; (ii) Pindo Deli controls the sales price of CMI (B-6 1 b of the response: "they cannot sell lower price without Pindo Deli's authority"); (iii) they are described as affiliated companies on the annual report; and (iv)

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Exhibit KOR-14A at 14-15. We note that the KTC's Final Determination repeats the same determination. See, Exhibit KOR-15A at 4.

²¹⁰ Korea requests that the data in square brackets be treated as confidential.

Respondent makes domestic sales of most of the like product through CMI ([[**]])% for PPC and [[**]] for WF).²¹¹ Therefore, the argument of Respondent cannot be accepted."²¹² (emphasis added)

"In accordance with Article 23, Paragraph 5 of the Decree, Respondent [Indah Kiat] and CMI can be considered as one economic entity, as one company controls the other company legally or practically for the following reasons: (i) [[**]]²¹³ shareholders of PT Sinar Mas Tunggal, the parent company of CMI, are directors of APP, the holding company of Indah Kiat; (ii) Indah Kiat controls the sales price of CMI (B-6 1 b of the response: "they cannot sell lower price without Pindo Deli's authority"); (iii) they are described as affiliated companies on the annual report; and (iv) Respondent makes domestic sales of all of the like product through CMI. Therefore, the argument of Respondent cannot be accepted."²¹⁴ (emphasis added)

7.167 Although the foregoing discussion by the KTC focused on the relationship between Indah Kiat and Pindo Deli, respectively, with CMI, rather than to the direct relationship between Indah Kiat and Pindo Deli directly, we find the determination by the KTC and the considerations underlying it to be relevant to our evaluation of the claim at issue. In terms of the determination itself, the conclusion that Indah Kiat and Pindo Deli were each "one economic entity" with the same third company is obviously relevant to the relationship between the former two companies. This determination is based on evidence showing that [[**]] per cent of Indah Kiat's and [[**]] per cent of Pindo Deli's domestic sales of the subject product were made through CMI.²¹⁵ Furthermore, we note that CMI also made Tjiwi Kimia's sales in the Indonesian market.²¹⁶ We also note that the record shows that CMI charged the same [[**]], on its sales of the products produced by Indah Kiat and Pindo Deli.²¹⁷ These facts are, in our view, indicative of a close commercial relationship among the three companies.²¹⁸

7.168 In our view, bearing in mind our standard of review (*supra*, paras. 7.1-7.5), the fact that the three Sinar Mas Group companies made almost all their domestic sales through CMI, coupled with the commonality regarding shareholdings and management and the existence of cross-sales of the subject product among the three companies, is an adequate basis for the KTC's decision to treat the three Sinar Mas Group companies as a single exporter or producer. We therefore reject Indonesia's claim that Korea acted inconsistently with Article 6.10 of the Agreement.

7.169 We note Indonesia's argument that the KTC's decision to treat the three Sinar Mas Group companies as a single exporter also violated Article 9.3 of the Agreement because it subjected Indah Kiat to an anti-dumping duty of 8.22 per cent, although the KTC had calculated a negative preliminary dumping margin of 0.52 for this company.

7.170 Article 9.3 provides:

"The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

7.171 We note that Article 9.3 clearly prohibits the imposition of a duty in excess of the margin of dumping calculated in an investigation. It does not, however, mention a distinction between an

²¹¹ *Ibid.*

²¹² Preliminary Dumping Report (Exhibit KOR-8A at 13).

²¹³ Korea requests that the data in square brackets be treated as confidential.

²¹⁴ Preliminary Dumping Report (Exhibit KOR-8A at 24).

²¹⁵ We recall that the third Sinar Mas Group company, Tjiwi Kimia, did not submit any information to the KTC regarding its sales of the subject product.

²¹⁶ See, Indah Kiat's Response to the KTC's Questionnaire (Exhibit KOR-20 at 2).

²¹⁷ Exhibit KOR-20 at 4; Exhibit KOR-21 at 5.

²¹⁸ Korea requests that the data in square brackets be treated as confidential.

individual margin for separate corporate entities and a single margin calculated for a group of them. We recall our finding above that the KTC did not act inconsistently with Article 6.10 of the Agreement by treating the three Sinar Mas Group companies as a single exporter or producer and assigning a single margin of dumping to them in the investigation at issue. It follows that as long as the single anti-dumping duty imposed in this investigation was not higher than the single margin calculated for the three Indonesian companies, there can be no violation of Article 9.3. We note that Indonesia does not argue a violation of Article 9.3 regarding the duty imposed for the single exporter in this investigation. We do not therefore agree with Indonesia's argument that Article 9.3 was violated because the single margin imposed on the single entity was higher than the individual margin calculated for Indah Kiat in the KTC's preliminary dumping determinations, and reject it.

I. KTC'S ALLEGED FAILURE TO TERMINATE THE INVESTIGATION WITH RESPECT TO INDAH KIAT

1. Arguments of Parties

(a) Indonesia

7.172 Indonesia argues that the KTC violated Article 5.8 of the Agreement by not terminating the investigation with respect to Indah Kiat for which a negative dumping margin had been calculated in the preliminary determinations.

(b) Korea

7.173 Korea argues that the KTC's preliminary determination stated that the KTC was reviewing certain aspects of its preliminary calculations, in particular its decision to calculate separate dumping margins for Indah Kiat, Pindo Deli and Tjiwi Kimia. Therefore, the KTC was not satisfied at the time of its preliminary determination that there was no dumping. In fact, the KTC treated the three Sinar Mas Group companies as a single exporter for purposes of its final determination and calculated a single margin for the three of them. There could therefore be no violation of Article 5.8 with respect to Indah Kiat in the investigation at issue because the KTC did not make individual dumping margin calculations in its final determinations. The KTC never determined that the dumping margin for this single entity was *de minimis*.

2. Arguments of Third Parties

(a) European Communities

7.174 The European Communities contends that Article 5.8 does not require that the investigation be terminated with respect to an exporter for whom a *de minimis* dumping margin has been calculated. According to the European Communities, Article 5.8 requires such termination when the margin for the country as a whole is *de minimis*. The KTC, therefore, did not err in this investigation by not terminating the investigation with respect to Indah Kiat on the grounds that the preliminary dumping margin calculated for this company was *de minimis*.

(b) United States

7.175 According to the United States, the obligation to terminate the investigation pursuant to Article 5.8 where the margin of dumping is *de minimis* only applies to final, as opposed to preliminary, determinations. Given that the Agreement contains no requirement to make a preliminary determination, Indonesia's misinterpretation of Article 5.8 becomes more apparent.

3. Evaluation by the Panel

7.176 We recall our finding above (paras. 7.168-7.171) that the KTC did not act inconsistently with Articles 6.10 and 9.3 of the Agreement with respect to treating the three Sinar Mas Group companies as a single exporter for purposes of its dumping determinations in the investigation at issue. That is, we found that the KTC properly treated them as one exporter and assigned one margin of dumping to them.

7.177 Further, we note the following statement from Indonesia with regard to the nature of this claim:

"Indonesia agrees that Article 5.8 applies to final, as opposed to preliminary, determinations of dumping. Thus, its claim that the KTC should have terminated the investigation with respect to Indah Kiat is dependent on its claims that the KTC improperly "collapsed" Indah Kiat into a "single economic entity" and failed to calculate an individual margin of dumping for Indah Kiat under Article 6.10 of the AD Agreement. If the Panel finds that the KTC improperly "collapsed" these exporters and hence improperly failed to calculate an individual margin of dumping for Indah Kiat, Indonesia requests that the Panel rule on its claims under Article 5.8, as well as its related claims under Articles 3.1, 3.2 and 3.5 of the Agreement described in paragraph 196 of its first written submission."²¹⁹

7.178 We note that Indonesia submits that the Panel should address this claim if it finds that treating the three Sinar Mas Group companies as a single exporter was WTO-inconsistent. Given that we did not find that treating the three Sinar Mas Group companies as a single exporter was WTO-inconsistent and taking into consideration Indonesia's above-quoted statement, we need not, and do not, make any finding on this claim.

J. KTC'S ALLEGED FAILURE TO ABIDE BY THE DISCLOSURE OBLIGATIONS CONTAINED IN ARTICLES 6.4, 6.7, 6.9 AND 12.2 OF THE AGREEMENT WITH RESPECT TO ITS DUMPING DETERMINATIONS

1. Arguments of Parties

(a) Indonesia

7.179 Indonesia submits that the KTC's failure to disclose the results of the verification violated Article 6.7 of the Agreement. The KTC did not make such disclosure even though this was expressly requested by Indah Kiat and Pindo Deli. Indonesia acknowledges that the KTC officials made an oral disclosure regarding the results of the verification. However, Indonesia considers that an oral disclosure cannot satisfy the requirements of Article 6.7. Furthermore, Indonesia asserts that the contents of the mentioned oral disclosure, together with the subsequent written disclosures in the KTC's reports, fell short of disclosing all the verification results.

7.180 Indonesia also argues that the KTC's failure to adequately disclose its method of calculating the constructed normal values for Indah Kiat and Pindo Deli violated Articles 6.4, 6.9 and 12.2 of the Agreement.

(b) Korea

7.181 Korea contends that the KTC investigators prepared a verification report for the KTC's internal use. This report was not released to any of the interested parties in the investigation. During

²¹⁹ Response of Indonesia to Question 48 from the Panel Following the First Meeting.

the disclosure meeting held on 4 April 2003, the KTC officials orally informed interested parties of the verification results. Furthermore, various reports prepared by the KTC and disclosed to the parties in connection with the KTC's preliminary determinations also described the defects found during verification. According to Korea, these disclosures were sufficient to satisfy the obligation contained in Article 6.7, which does not necessarily require the disclosure of a written verification report.

7.182 With respect to the alleged violations of Articles 6.4, 6.9 and 12.2 of the Agreement, Korea argues that the reports released in connection with the KTC's preliminary and final determinations in the investigation at issue were sufficient to inform the Indonesian exporters of all relevant issues relating to the calculation of the normal values for Indah Kiat and Pindo Deli. Korea contends, however, that confidential information was excluded from the scope of these disclosures in accordance with Article 6.5 of the Agreement.

2. Evaluation by the Panel

(a) Alleged Violation of Article 6.7 of the Agreement

7.183 We commence our evaluation of Indonesia's claim with the text of Article 6.7 of the Agreement. That article provides in relevant part:

"Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants." (emphasis added)

7.184 We note that Article 6.7 requires the IA to inform the investigated exporters of the verification results. The text provides that such disclosure can be made either by making the results available so that the exporters can see them if they so wish or through the final disclosure under Article 6.9 before a final decision is taken in the investigation.

7.185 Indonesia asserts that there was no adequate disclosure of the verification results to the investigated Indonesian exporters, i.e. Indah Kiat and Pindo Deli. Indonesia submits that the person acting on behalf of Indah Kiat and Pindo Deli in the investigation at issue specifically requested to see the verification results, but that such request was not granted. Korea submits that the representatives of the Indonesian exporters were informed orally of the verification results and then through the disclosure of certain reports prepared by the KTC, which also included the verification results. In Korea's view, the Agreement does not necessarily require a written disclosure regarding the verification results. Korea submits that this oral briefing met the requirements of Article 6.7 in terms of informing the Indonesian companies about the verification results.

7.186 We note that the record indicates that the KTC organized a disclosure meeting on 4 April 2003, immediately following the verification. The representatives of the Sinar Mas Group participated in this meeting. Parties agree that during this meeting the KTC investigators informed the Sinar Mas Group of the fact that the KTC would base its normal value determinations for Indah Kiat and Pindo Deli on facts available on the grounds that they failed to provide CMI's financial statements during verification.

7.187 With regard to the rest of the disclosures that may have been made during this meeting, however, parties disagree. Indonesia asserts that nothing else was communicated to the Sinar Mas Group in that meeting, whereas Korea argues that a number of other issues were also brought to the attention of the Sinar Mas Group. Korea submitted an affidavit²²⁰ to the Panel in which a KTC official testified that information relating to export price determinations as well as adjustments to the

²²⁰ Exhibit KOR-44.

normal values and export prices for Indah Kiat and Pindo Deli was also conveyed in this meeting. The affidavit also states that the fact that these data were successfully verified was also explained in the meeting. Indonesia disagrees with these assertions. We note that apart from submitting the mentioned affidavit, Korea has not referred to any evidence on the record in this regard. We recall that a party making a factual assertion has the burden to prove it. Korea has failed to prove its assertion that issues other than the KTC's decision to resort to facts available for Indah Kiat and Pindo Deli were also brought to the attention of the Sinar Mas Group during the 4 April meeting. We therefore consider that the disclosure made during the mentioned meeting was limited to the fact that the KTC would base its normal value determinations for Indah Kiat and Pindo Deli on facts available on the grounds that they failed to provide CMI's financial statements during verification.

7.188 Next, we shall address Korea's allegation that certain documents sent by the KTC also informed the Sinar Mas Group of the verification results. In this context, we shall first address the issue of whether or not Article 6.7 requires that the disclosure regarding the verification results be made in a written format. Since Indonesia submits that an oral disclosure would not satisfy Article 6.7²²¹, we understand Indonesia to argue that a written disclosure is necessary. Korea disagrees with Indonesia in this regard. According to Korea, Article 6.7 does not require written disclosure.²²² We agree with Korea that Article 6.7 does not require written disclosure. It requires that the verification results be disclosed to the investigated exporters without specifying the format in which such disclosure is to be made. We note that when they intended that written format be used with respect to certain communications in the course of an anti-dumping investigation, drafters stated it clearly in the Agreement. For instance, Article 5.1 of the Agreement provides that the application for the initiation of an investigation has to be made in writing. Similarly, Article 6.3 provides that oral information submitted to the IA by an interested party may only be taken into account if it is subsequently reproduced in writing. These examples support our interpretation that Article 6.7 does not require that disclosure be a written disclosure. As long as it can be proved that the substantive requirements of that provision have been fulfilled, the format of the disclosure would not matter.

7.189 We now turn to the contents of the documents mentioned by Korea to examine whether they informed the Sinar Mas Group of the verification results. We note that in this regard Korea refers to the Preliminary Dumping Report and the Preliminary Investigation Report prepared by the KTC.²²³ The Preliminary Dumping Report states in pertinent parts:

"Although the Office of Investigation requested for the financial statements of CMI during the on the spot investigation, Respondent refused to provide the financial statements for reasons that CMI and Respondent were separate legal entities and that Respondent could not control CMI. Therefore, the Office of Investigation calculated the sales cost of CMI on the basis of the facts available, as it was not able to verify CMI's resale data against the financial statements, related accounting books and records and substantiating evidence thereon."²²⁴

7.190 The Preliminary Investigation Report reads in pertinent parts:

"However, during the on the spot investigation, Respondent failed to submit relevant data, such as the financial statements, etc. concerning sales made through its affiliated company, CMI (PT, Cagrawala Mega Indah). Therefore, the Office of Investigation calculated the normal value on the basis of the facts available and calculated the

²²¹ Response of Indonesia to Question 40 from the Panel Following the First Meeting.

²²² First Written Submission of Korea, para. 155.

²²³ First Written Submission of Korea, footnote 180.

²²⁴ Preliminary Dumping Report (Exhibit KOR-8B at 12). The quoted part of the report addresses the arguments of Pindo Deli. On page 23, the report contains exactly the same statement with respect to Indah Kiat.

export price based on the [sic.] data which were submitted by Respondent and verified during the on the spot investigation."²²⁵

7.191 We note that these reports clearly disclose that the respondent Indonesian exporters failed to provide CMI's financial statements during verification and that the KTC therefore based their normal values on facts available. However, the reports contain no clarification with respect to the other aspects of the verification and hence do not add much to the content of the oral briefing that took place on 4 April 2003.

7.192 On the basis of the above explanations, it becomes factually clear that the contents of the disclosure regarding verification made through the oral briefing during the April 4 meeting and the KTC's reports issued following the verification were limited to the fact that the Sinar Mas Group failed to submit CMI's financial statements during verification and that the KTC decided to use facts available with respect to Indah Kiat and Pindo Deli. The issue is whether or not this limited disclosure was enough to satisfy the requirements of Article 6.7. In our view, the purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results. It is therefore important that such disclosure contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully. This is because, in our view, information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties' cases.

7.193 On the basis of these considerations, we find that in this case the KTC's disclosure of the verification results *vis-à-vis* the Sinar Mas Group fell short of meeting this standard. It did not inform the two Sinar Mas Group companies of the verification results in a manner that would allow them to properly prepare their case for the rest of the investigation. We therefore conclude that the KTC acted inconsistently with Article 6.7 of the Agreement in this regard.

(b) Alleged Violations of Articles 6.4, 6.9 and 12.2 of the Agreement

7.194 Indonesia argues that the KTC violated Articles 6.4, 6.9 and 12.2 of the Agreement by failing to disclose (1) why the reported CMI data were not accepted, (2) the reasoning regarding which one of the methods provided for under Article 2.2 of the Agreement was used in determining normal values for Indah Kiat and Pindo Deli, and (3) on what basis and how, in terms of its mechanics, it calculated the constructed normal values for Indah Kiat and Pindo Deli. Korea disagrees and submits that the reports released by the KTC in the course of the investigation at issue were sufficient to inform the Indonesian exporters of all the issues identified by Indonesia.

(i) Article 6.4

7.195 Article 6.4 reads:

"The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information."

²²⁵ Preliminary Investigation Report (Exhibit KOR-9A at 11). The quoted part of the report addresses the arguments of Pindo Deli. On page 16, the report contains exactly the same statement with respect to Indah Kiat, except the inclusion of CMI's full name.

7.196 We note that Article 6.4 addresses the right of interested parties in an anti-dumping investigation to see the information contained on the record that is relevant to prepare submissions to defend their positions in the investigation. It also makes clear that this right does not extend to confidential information on the record. Logically, therefore, in order to prevail in a claim under this article, the complaining party has to show that an interested party requested to see non-confidential information that was used by the IA in its determinations and that this request was declined. Following from our understanding of the nature of the obligation set out under Article 6.4, we note that most of the arguments raised by Indonesia to support its claim are not of the kind that can logically be put forward under Article 6.4, with one exception. We therefore do not make any findings with regard to the arguments that are not relevant to Indonesia's claim under Article 6.4.

7.197 Indonesia's only argument which, in our view, may be properly raised under Article 6.4 is that the Indonesian exporters made a specific request to access information relating to the KTC's calculation of the constructed normal values for Indah Kiat and Pindo Deli but that this request was declined by the KTC.²²⁶ We note that the letter sent by the Sinar Mas Group to the KTC in this regard reads in relevant parts:

"[[**]]"²²⁷

7.198 We note that the letter was sent following the receipt of the non-confidential version of the Preliminary Dumping Report.²²⁸ In the letter, the Sinar Mas Group clearly requests to see confidential information regarding the calculation of the margins of dumping for Indah Kiat and Pindo Deli. We asked Korea what the KTC's reaction was in response to this letter. Korea stated that in response to that letter, the KTC sent the confidential version of the Preliminary Dumping Report to the Sinar Mas Group.²²⁹ Furthermore, Korea stated that the KTC also sent the confidential versions of the Preliminary Investigation Report²³⁰ and the Provisional Report on Final Dumping Margins²³¹ to the Sinar Mas Group. Indonesia did not dispute these facts.

7.199 We note that for both Indah Kiat and Pindo Deli, the confidential version of the Preliminary Dumping Report states their normal values, export prices and the adjustments made to them.²³² It does not, however, provide any details of the calculations made to reach these final figures. The Preliminary Investigation Report contains exactly the same information with respect to these two companies, without further detail.²³³ The same applies to the Provisional Report on Final Dumping Margins. This report only provides information regarding the final adjusted normal value and export price for the single entity consisting of the three Sinar Mas Group companies, without explaining, for instance, which cost figures were used in the calculation of the constructed normal value.²³⁴ In this regard, we note Korea's acknowledgement that this report "did not provide the actual figures for cost of manufacture, SG&A expenses or profit used in the KTC's calculation of the constructed normal value."²³⁵

7.200 We asked Korea whether or not confidential information relating to the dumping margin calculations for Indah Kiat and Pindo Deli was disclosed to these companies. Korea responded:

²²⁶ First Written Submission of Indonesia, para. 137.

²²⁷ Korea requests that the data in square brackets be treated as confidential.

²²⁸ The non-confidential version of the Preliminary Dumping Report is found in Exhibit KOR-8B.

²²⁹ Response of Korea to Question 42 from the Panel Following the First Meeting.

²³⁰ First Written Submission of Korea, para. 157.

²³¹ Response of Korea to Question 46 from the Panel Following the First Meeting.

²³² See, Exhibit KOR-8A at 17, 18, 28 and 29.

²³³ See, Exhibit KOR-9A at 14, 15, 18 and 19.

²³⁴ See, Exhibit KOR-12 at 6.

²³⁵ Response of Korea to Question 43 from the Panel Following the First Meeting.

"Articles 6.4, 6.9 and 12.2 do not *require* investigating authorities to disclose *any* confidential information to *any* interested parties. They also do not *preclude* an IA from disclosing an interested party's own confidential information to that party, if the investigating authorities choose to do so.

In this case, the KTC did disclose to the Sinar Mas Group the confidential version of its preliminary dumping margin analysis as well as the confidential version of its provisional final dumping margin analysis. These analyses plainly described the methodology used by the KTC to determine the export price and normal value. They also provided the actual figures for export price and normal value, and for the adjustments made to export price and normal value. In addition, although these analyses did not provide the actual figures for cost of manufacture, SG&A expenses or profit used in the KTC's calculation of the constructed normal value, they did provide the SG&A, interest and profit rates that were used as "facts available."

The confidential versions of the KTC's preliminary and provisional final dumping margin analyses that were sent to the Sinar Mas Group included all confidential information relating to the Sinar Mas Group that was included in those reports."²³⁶ (footnotes omitted, emphasis in original)

7.201 We recall that the reports sent to the Sinar Mas Group did not contain all the confidential information relating to their dumping margin calculations. We also note Korea's view that the KTC did not have to disclose the confidential part of these calculations even though that confidential information was provided by these companies themselves. We recall that Article 6.4 precludes the IA from disclosing confidential information to the interested parties. However, that provision cannot, in our view, possibly be interpreted to deny an interested party access to its own confidential information. That is, confidentiality cannot be used as the basis for denying access to information against the company which submitted the information. The notion of confidentiality, as elaborated upon in Article 6.5 of the Agreement, is about preserving confidentiality of information that concerns one interested party *vis-à-vis* the other interested parties. To the extent that the KTC used confidential information submitted by other interested parties in the calculation of the constructed normal values for Indah Kiat and Pindo Deli, the relevant provisions of Article 6.5 on confidentiality would preclude the KTC from disclosing that part of the information to the Sinar Mas Group. We note, however, that Korea has raised no such argument. Nor does the record contain any indication to that effect. We therefore conclude that the KTC acted inconsistently with its obligations under Article 6.4 of the Agreement with respect to disclosing information regarding the calculation of the constructed normal values for Indah Kiat and Pindo Deli to those companies.

(ii) *Article 6.9*

7.202 We recall that in the context of its claim regarding the KTC's alleged failure to respect its disclosure obligations in connection with its dumping determinations, Indonesia puts forward a number of arguments and asserts that they lead to a violation of Articles 6.4, 6.9 and 12.2 of the Agreement. In order to distinguish its claim under Article 6.9 from the one under Article 6.4, we invited Indonesia to explain the exact nature of its claim under Article 6.9 and the ways in which it differed from its claim under Article 6.4. Indonesia responded:

"Unlike Article 6.4, Article 6.9 contains no exception for confidential information. Moreover, Article 6.9 only requires a one-time disclosure prior to the final determination, while Article 6.4 applies throughout the investigation. Article 6.9 only requires the disclosure of essential facts but it does not provide a right to prepare presentations on the basis of the information before the investigating authority. In the

²³⁶ Response of Korea to Question 46 from the Panel Following the First Meeting.

present case, Indonesia's claims under Article 6.9 do not differ significantly from its claims under Article 6.4 in respect of the KTC's failure to disclose aspects of its dumping determination. However, to the extent that Article 6.9 is understood as a requirement to make a one-time disclosure prior to the final determination, Indonesia's claims in respect of the inadequate disclosure by the KTC throughout the duration of the investigation are only maintainable under Article 6.4."²³⁷ (emphasis added)

7.203 Article 6.9 provides:

"The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

7.204 We note that Article 6.9 requires the IA to disclose the essential facts establishing the basis of its final determination whether to apply definitive measures in an investigation. As Indonesia submits, we note that the obligation under Article 6.9 is one that requires the IA to make a one-time disclosure and that is before a final determination is made as to whether or not a definitive measure will be applied. Indonesia stated that its claim would not be maintainable under Article 6.9 if we consider that Article 6.9 only requires the IA to make a one-time disclosure in the course of an investigation. We also note that addressing Indonesia's claim under Article 6.9 based on the same arguments would not in any event provide further assistance in resolving the dispute before us. We therefore need not, and do not, make a ruling in this regard.

(iii) *Article 12.2*

7.205 Indonesia bases its allegation regarding the violation of Article 12.2 in this investigation on the same arguments that it raises with respect to Articles 6.4 and 6.9. That is, Indonesia argues that the KTC violated Article 12.2 of the Agreement by failing to disclose (1) why the reported CMI data were not accepted, (2) the reasoning regarding which one of the methods provided for under Article 2.2 of the Agreement was used in determining normal values for Indah Kiat and Pindo Deli, and (3) on what basis and how, in terms of its mechanics, it calculated the constructed normal values for Indah Kiat and Pindo Deli. Korea disagrees and submits that the reports released by the KTC in the course of the investigation at issue were sufficient to inform the Indonesian exporters of all the issues identified by Indonesia.

7.206 Article 12.2 provides:

"Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein."

7.207 We note that Article 12.2 contains general provisions regarding public notices to be given by the IA at certain stages of an anti-dumping investigation. One of these is the imposition of a final anti-dumping duty. Article 12.2 also states that each public notice has to set forth, or make available

²³⁷ Response of Indonesia to Question 44 from the Panel Following the First Meeting.

through a separate report, sufficiently detailed information about issues of fact and law on which the IA bases its determination.

7.208 In our view, this aspect of Indonesia's claim differs from the ones under Articles 6.4 and 6.9 in that the KTC could not include any confidential information regarding the calculation of the constructed normal values for Indah Kiat and Pindo Deli in the public notice of imposition because of Article 6.5 of the Agreement, which requires the protection of confidential information in an investigation.

7.209 We note that the public notice of imposition contains the following general statement regarding the KTC's dumping determinations:

"Through preliminary investigation, the Korean Trade Commission confirmed that there existed sufficient evidence to presume dumping and material injury to the domestic injury [sic.] caused by such dumping. Through final investigation following the preliminary investigation, the Korean Trade Commission calculated dumping margins of the product under investigation upon confirmation of dumping of the product under investigation, and determined that there was material injury to the domestic industry caused by the dumping."²³⁸

We also note that the KTC's Final Determination and the Final Investigation Report were attached to the final notice.

7.210 Given that the KTC was precluded from including confidential information in the public notice by virtue of Article 6.5 and that the KTC's Final Determination and the Final Investigation Report were attached to the public notice, we are of the view that Indonesia failed to make a *prima facie* case with regard to the alleged violation of Article 12.2 of the Agreement. We therefore reject this aspect of Indonesia's claim.

K. KTC'S TREATMENT OF "PLAIN PAPER COPIER" AND "UNCOATED WOOD-FREE PRINTING PAPER" AS LIKE PRODUCTS

1. Arguments of Parties

(a) Indonesia

7.211 Indonesia notes that the KTC divided the subject product in the investigation at issue into two groups for purposes of its dumping determinations, i.e. "plain paper copier" ("PPC") and "wood-free printing paper" ("WF") and made separate dumping determinations with respect to each one of them. However, the KTC did not make the same distinction for purposes of its injury determinations and carried out an aggregate injury determination for these two types of paper on the basis of the assumption that they were like products. Indonesia argues that PPC and WF are not like products. PPC is boxed paper sold to offices and homes mainly for the use in photocopiers and printers. WF is printing paper sold in large rolls and sheets to offset printers and publishers for commercial use. WF is also used in making notebooks and other stationary products. Indonesia also cites other grounds on which these two types of paper differ. According to Indonesia, therefore, to conform to the provisions of Article 2.6 of the Agreement, the KTC should have analyzed the effect of Indonesian PPC on Korean PPC producers and the effect of Indonesian WF on Korean WF producers, separately. It follows that by carrying out an aggregate injury determination for PPC and WF without affirmatively determining that they were like products within the meaning of Article 2.6, the KTC acted inconsistently with Articles 2.6, 3.1, 3.2, 3.4, 3.5 and 3.7 of the Agreement.

²³⁸ Exhibit KOR-16.

(b) Korea

7.212 Korea argues that under Article 2.6 of the Agreement, like product is defined by reference to the similarity between the imported product and the domestically produced product. Therefore, Indonesia's reference to the differences among the products produced by the domestic industry has no legal basis under the Agreement. Besides, Korea contends that PPC and WF only differ in form or in size. Apart from that, they are identical because they have the same colour, strength, weight and surface qualities. Differences in form and size cited by Indonesia do not provide a sufficient basis to treat these two paper types as different for purposes of injury determinations in an anti-dumping investigation.

2. Arguments of Third Parties

(a) Canada

7.213 Canada argues that an interpretation of Article 2.6 of the Agreement should give meaning to all words contained therein, including "product under consideration" and "characteristics". A reasonable interpretation of that article would require the IA to identify the characteristics on the basis of which the product under consideration is defined. It follows that, when necessary, the IA must divide the product under consideration into cohesive groupings and carry out a separate dumping and injury determination for each one of them. In Canada's view, leaving the definition of the product under consideration to the IA's complete discretion could lead to absurd results, which would, under Article 32 of the Vienna Convention, give rise to an impermissible interpretation of Article 2.6.

(b) Japan

7.214 Japan submits that, as noted by the panel in *US – Softwood Lumber V*, the definition of the "product under consideration" is critical with respect to both dumping and injury determinations in anti-dumping investigations. Japan is of the view that in cases where two separate products are at issue, separate dumping and injury determinations have to be made with respect to each one of them. Carrying out a combined dumping and injury determination for such distinct products would, in Japan's view, run counter to the provisions of Articles 2 and 3 of the Agreement, respectively.

(c) United States

7.215 The United States submits that Article 2.6 of the Agreement does not require that each item within the product under consideration be like each item within the like product. According to the United States, since there are no substantive provisions about the like product issue in the Agreement except Article 2.6, the IA has a certain discretion with respect to the determination of like product in an investigation. This does not mean, however, that the IA cannot take account of different markets for different types of products within like product.

3. Evaluation by the Panel

7.216 We note that it is undisputed that the investigation initiated by the KTC concerned dumped imports of PPC and WF originating, *inter alia*, in Indonesia. The KTC determined that Korean PPC and WF were identical to imported PPC and WF²³⁹ and carried out a single injury determination with respect to dumped imports of PPC and WF. Indonesia agrees with the KTC's determination that PPC and WF originating in Indonesia are identical to PPC and WF produced in Korea, respectively.²⁴⁰ It contends, however, that PPC in general is not like WF because they have differences with respect to physical characteristics, end-uses, substitutability, market sectors in which they compete, HS

²³⁹ See, the KTC's Final Investigation Report (Exhibit KOR-13 at 3-4).

²⁴⁰ First Written Submission of Indonesia, para. 144.

nomenclatures and manufacturing processes. According to Indonesia, Article 2.6 required that PPC and WF be treated separately in the KTC's injury determinations because they are not like products as defined therein. Korea disagrees and contends that Article 2.6, which is the only provision in the Agreement regarding the like product issue, defines "like product" by reference to "the product under consideration". However, Article 2.6 does not define "the product under consideration". Consequently, Indonesia's claim has no legal basis under the Agreement. Korea also objects to Indonesia's assertions regarding the differences between PPC and WF. According to Korea, differences cited by Indonesia do not justify treating these two types of paper as separate products in the context of injury determinations.

7.217 We recall once again that Indonesia argues that the KTC's like product definition was inconsistent with Article 2.6 of the Agreement because the KTC presumed that WF and PPC were like products, which, in Indonesia's view, they are not. The issue therefore is whether or not the like product definition found in Article 2.6 of the Agreement required the KTC to determine that PPC and WF were like products before proceeding to carry out a single injury determination with respect to these two types of imported paper.

7.218 Article 2.6 of the Agreement provides:

"Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." (emphasis added)

7.219 We note that Article 2.6 takes "the product under consideration" as the starting point of the definition of "like product". It then stipulates that the like product is the product that is identical to the product under consideration, or one that has physical characteristics that closely resemble those of the product under consideration. The phrase "Throughout this Agreement" indicates that this definition applies to the definition of like product for both dumping and injury determinations in an anti-dumping investigation. Therefore, once the product under consideration is defined, the IA has to make sure that the product it is using in its injury determination is like the product under consideration. As long as that determination is made consistently with the parameters set out in Article 2.6, the IA's like product definition will be WTO-consistent.

7.220 In the investigation at issue, the KTC determined the "the product under consideration" to be PPC and WF. The KTC also determined that the definition of the domestically produced PPC and WF was identical to the definition of the PPC and WF imported from Indonesia. It follows that the KTC's like product definition was consistent with the provisions of Article 2.6.²⁴¹

7.221 Indonesia argues that the KTC had to determine that PPC and WF were like products. We note that these two, together, constituted "the product under consideration" in the investigation at issue. We see no basis in Article 2.6 for the proposition that the like product definition also applies to the definition of "the product under consideration". We are aware of no provision in Article 2.6, or

²⁴¹ We find support for our approach in the following finding by the panel in *Softwood Lumber V*: "As the definition of "like product" implies a comparison with another product, it seems clear to us that the starting point can only be the "other product", being the allegedly dumped product. Therefore, once the product under consideration is defined, the "like product" to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the "product under consideration" should be determined."

Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("US – *Softwood Lumber V*"), WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R, para. 7.152.

any other article in the Agreement, that contains a definition of "the product under consideration" itself.²⁴² In any event, we note Indonesia's statement that it is not challenging the KTC's determination regarding "the product under consideration".²⁴³

7.222 Finally in this regard, we note Indonesia's assertion that the KTC made separate dumping determinations with respect to PPC and WF in the investigation at issue. We also note, however, that the KTC's final determination reveals that one single margin of dumping was calculated for "PPC and WF" by the KTC in this investigation. The Final Dumping Report reads in relevant part:

I. Calculation of dumping rate

The final dumping margin of the 3 APP Companies is 8.22%, which is the weighted average of the dumping margins for each model based on the export volume of each model exported to Korea.²⁴⁴

7.223 The chart in the Final Dumping Report that follows the above-quoted part indicates dumping calculations for PPC and WF as being [[**]] per cent and [[**]] per cent, respectively.²⁴⁵ Therefore, it seems that the KTC divided the subject product into two models for purposes of its dumping determinations, but ultimately computed one single margin that applied to the subject product as a whole.²⁴⁶

7.224 On the basis of the above considerations, we reject Indonesia's claim that the KTC's like product definition was inconsistent with Article 2.6 of the Agreement. It follows that the KTC's injury determination based on this like product definition was not inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Agreement.

²⁴² In this regard, we note the finding by the panel in *Softwood Lumber V*, *Ibid*.

²⁴³ Korea argued that to the extent that Indonesia challenges the KTC's determination regarding "the product under consideration", the Panel should decline to address that claim because it was not raised in Indonesia's request for the establishment of a panel. In response to questioning from the Panel, Korea stated that by raising this argument it did not request the Panel to make a preliminary ruling under Article 6.2 of the DSU on jurisdictional grounds because it was Korea's understanding that Indonesia did not challenge the KTC's determination regarding "the product under consideration". Korea mentioned, however, that if Indonesia challenges that determination then it would require the Panel to make such a procedural ruling. See, Response of Korea to Question 51 from the Panel Following the First Meeting.

In response to questioning from the Panel, Indonesia stated that it did not challenge the KTC's determination regarding "the product under consideration". In this regard, Indonesia pointed out:

"Indonesia would simply observe that it has not, in fact, challenged the KTC's definition of the product under consideration, in the sense that either PPC or WF paper should have been entirely excluded from the scope of the KTC's investigation. Instead, Indonesia challenged the KTC's conduct of a single injury investigation on the basis of a flawed definition of the "like product" as inconsistent with Articles 2.6, 3.1, 3.2, 3.4, 3.5, and 3.7 of the AD Agreement."

Response of Indonesia to Question 51 from the Panel Following the First Meeting.

We therefore did not make any ruling with respect to the KTC's determination regarding "the product under consideration".

²⁴⁴ Exhibit KOR-14A at 24.

²⁴⁵ Korea requests that the data in square brackets be treated as confidential

²⁴⁶ In this regard, we note the Appellate Body's finding that multiple averaging, i.e. dividing the product under investigation into product types or models for the purpose of calculating a weighted average normal value and a weighted average export price for each one of them, is consistent with the Agreement. See, Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("US – Softwood Lumber V"), WT/DS264/AB/R, adopted 31 August 2004, para. 81.

L. KTC'S ALLEGED FAILURE TO BASE ITS INJURY AND CAUSAL LINK DETERMINATIONS ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE

1. Arguments of Parties

(a) Indonesia

7.225 Indonesia asserts five substantive violations by Korea of its obligations under the Agreement with respect to the KTC's injury and causal link determinations in the investigation at issue. Firstly, Indonesia argues that the KTC's price and volume analyses were inconsistent with the Agreement. With respect to price, Indonesia submits that for substantial periods during the injury POI, prices of Indonesian exporters were above those of Korean producers. Even if at certain points during this period prices of Indonesian exporters fell below those of Korean producers, the KTC could not legitimately conclude that Indonesian exporters' prices undercut or suppressed Korean producers' prices. Furthermore, Indonesia argues that the KTC did not make any determination as to whether or not the effect of Indonesian exporters' prices was "significant", and therefore, the KTC's price analysis was inconsistent with Articles 3.1, 3.2 and 3.4 of the Agreement. With regard to the analysis of the volume of dumped imports, Indonesia submits that the KTC acted inconsistently with Articles 3.1 and 3.2 of the Agreement by disregarding the fact that the volume of dumped imports declined by 15.3 per cent in the first half of 2003.

7.226 Secondly, Indonesia argues that the KTC acted inconsistently with Articles 3.1 and 3.4 of the Agreement by failing to analyse the relevance of many of the injury factors set out in Article 3.4. Indonesia does not argue that the KTC failed to collect data about these injury factors. Rather, according to Indonesia, many injury factors signalled a healthy domestic industry, yet the KTC failed to explain how it nevertheless reached the conclusion that there was material injury.

7.227 Thirdly, Indonesia contends that the KTC acted inconsistently with Articles 3.1 and 3.5 of the Agreement in its causation analysis. In this context, Indonesia submits that the KTC failed to analyse developments in the first half of 2003, although this period was part of the POI for the injury determination. Indonesia also contends that in its non-attribution analysis, the KTC failed to properly analyse the impact on the Korean domestic industry of the increase in the volume of imports from other sources. According to Indonesia, the KTC also failed to analyze the effect of some other factors in its non-attribution analysis.

7.228 Fourthly, Indonesia submits that the KTC violated Articles 3.1, 3.2, 3.4 and 3.5 of the Agreement by failing to exclude imports made by the Korean industry from the volume of dumped imports considered in its injury determination.

7.229 Finally, Indonesia asserts that the KTC violated Articles 3.1, 3.2 and 3.5 of the Agreement by considering exports by Indah Kiat as dumped imports for purposes of its injury determination when this exporter's individual dumping margin was *de minimis*.

(b) Korea

7.230 Korea argues that the KTC's price analysis was consistent with the Agreement. The KTC determined that prices of dumped imports were below the Korean producers' prices in 1999 and 2002, equal to them in 2000 and above Korean producers' prices in 2001 and in the first half of 2003. With regard to the volume of dumped imports, Korea points out that this claim was not raised in Indonesia's request for the establishment of a panel. Regarding the substance of this claim, Korea submits that they increased in absolute terms over the period from 1999 to the first half of 2003. Even though there was a decline in the volume of dumped imports in absolute terms from 2002 to the first half of 2003, the overall trend was upward and there was also a clear increase in the volume of dumped imports relative to domestic consumption in Korea.

7.231 With regard to the injury factors under Article 3.4 of the Agreement, Korea submits that the KTC properly evaluated all of them. Based on its overall evaluation of these injury factors, the KTC concluded that the Korean industry suffered material injury. According to Korea, there is no provision in the Agreement which requires that a particular weight be given to certain injury factors.

7.232 Korea argues that the KTC's causation analysis was also in line with the Agreement. In its causation analysis, the KTC analysed the effect of dumped imports on the domestic industry. This included an analysis of the volume and prices of dumped imports. The KTC also evaluated the potential impact of factors other than dumped imports on the Korean industry and found no evidence that suggested that any such factor contributed to the material injury suffered by the domestic industry.

7.233 Regarding imports of the subject product made by the Korean producers, Korea contends that the KTC excluded from the definition of the domestic industry those producers who imported significant quantities of the subject product from the countries under investigation. The rest of the domestic producers did not have significant imports.

7.234 With regard to exports made by Indah Kiat, Korea submits that since the dumping margin calculated for this company was properly attributed to the calculation of the single margin for the three Sinar Mas Group companies, there was no reason to exclude these exports from the volume of dumped imports for purposes of the KTC's injury determination.

2. Arguments of Third Parties

(a) United States

7.235 The United States submits that Article 3.2 of the Agreement requires the IA to "consider" whether there has been a significant price undercutting, suppression or depression. It does not, however, require the IA to find that there have been significant price effects as a precondition to making an affirmative injury determination.

7.236 Regarding causality, the United States argues that all that Article 3.5 requires is a finding by the IA that there is a causal relationship between dumped imports and injury. It does not specify in what detail and on the basis of what information the causation or non-attribution analysis has to be carried out.

7.237 Regarding imports of the subject product by the domestic producers, the United States contends that neither Article 4.1(i) of the Agreement, nor any other provision, requires that domestic producers importing the subject product be excluded from the domestic industry. The Agreement simply provides the IA with the option of excluding such domestic producers from the definition of the domestic industry. According to the United States, the fact that the domestic producers are also importers of the subject product may in some cases indicate that the impact of dumped imports is significant.

3. Evaluation by the Panel

(a) KTC's Price and Volume Analyses

(i) KTC's Price Analysis

7.238 Indonesia asserts that the data collected by the KTC with respect to prices could not support its finding that dumped imports caused material injury to the Korean industry. More specifically, Indonesia raises two arguments. Firstly, Indonesia contends that since for substantial periods during the POI, prices of Indonesian exporters were higher than those of Korean producers, the KTC could

not properly find that the Indonesian exporters' prices had an impact on the prices of Korean producers. Secondly, Indonesia submits that the KTC acted inconsistently with Article 3.2 of the Agreement because it failed to make a determination as to whether or not the price effects that it found were "significant".

7.239 With respect to price undercutting, Korea notes that the trend in prices in this particular investigation was somewhat mixed in the sense that prices of Indonesian exporters were at various times above, below, or equal to, the prices of Korean producers. Korea also notes that the KTC did not limit its price analysis to undercutting, but also analyzed price depression and suppression. With respect to Indonesia's argument relating to whether the price effects were "significant", Korea submits that the KTC's determination did not use the word "significant", but nevertheless demonstrated that there was significant price depression and suppression.

7.240 We shall commence our evaluation of Indonesia's claim with the relevant provisions of the Agreement regarding price analyses in injury determination. Articles 3.1 of the Agreement reads:

"A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

7.241 Article 3.2 reads:

"With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

7.242 Article 3.1 provides that an injury determination under the Agreement requires an examination of (a) the volume of dumped imports, (b) effect of dumped imports on the prices of the domestic industry and (c) the consequent impact of these imports on the domestic industry in the importing country. Article 3.2 sets out details pertaining to the examination of the volume of dumped imports and their impact on the domestic industry's prices. Regarding the price analysis, Article 3.2 stipulates that the IA has to consider whether dumped imports have had one of the three possible effects on the prices of the domestic industry: (a) significant price undercutting, (b) significant price depression or (c) significant price suppression. In our view, what Article 3.2 requires is that the IA consider whether or not any of these three price effects are present in a given investigation. It does not, however, require that a determination be made in this regard.²⁴⁷ Finally, we note that the last

²⁴⁷ We find support for our conclusion in the following finding of the panel in *Thailand – H-Beams*: "We examine the nature of the obligation in Article 3.2. We note that the text of Article 3.2 requires that the investigating authorities "consider whether there has been a significant increase in dumped imports". The *Concise Oxford Dictionary* defines "consider" as, *inter alia*: "contemplate mentally, especially in order to reach a conclusion"; "give attention to"; and "reckon with; take into account". We therefore do not read the textual term "consider" in Article 3.2 to require an explicit "finding" or "determination" by the investigating authorities as to whether the increase in dumped imports is "significant"." (footnote omitted)

sentence of Article 3.2 mentions that no one or several of these three injury factors can necessarily give decisive guidance. That is, even if the IA finds certain positive trends with respect to some of these factors, it can nevertheless reach the conclusion that there is injury, provided that that decision is premised on positive evidence and reflects an objective examination of the evidence as required by Article 3.1 of the Agreement.

7.243 One initial issue raised in these proceedings with respect to the KTC's price analysis is whether, in an investigation where the prices of dumped imports were above, or equal to, those of the domestic industry in certain segments of the injury POI, the IA is precluded from finding that dumped imports had a negative effect on the domestic industry's prices. In our view, as long as the IA's analysis conforms to the requirements of Article 3.1 of the Agreement, that is, an objective examination based on positive evidence, changes in the relative levels of prices of dumped imports and the domestic industry during the POI do not necessarily preclude the IA from concluding that dumped imports had negative effects on prices.²⁴⁸ We therefore do not agree with Indonesia's argument that because the prices of dumped imports remained above, or equal to, those of the domestic industry in certain segments of the POI, the KTC could not conclude that the Korean industry was suffering material injury. With that in mind, we now turn to the facts of the investigation at issue.

7.244 We note that the KTC's final injury determination in the investigation at issue is found in two documents: The Final Investigation Report and the Final Determination. The Final Investigation Report mainly contains the information gathered by the investigators whereas the Final Determination contains the KTC's conclusions based on its analysis of those data. We shall therefore base our evaluation of the claims at issue on these two documents.

7.245 We note that the Final Investigation Report contains a chart that shows the trends in the prices of dumped imports preceded by the recital of the data in that chart.²⁴⁹ In the section on causation, the Final Investigation Report also contains information regarding the KTC's analysis of the three types of price effects. This section also consists of charts that show figures with respect to each of the three price effects and a recital of the data in the charts.²⁵⁰

7.246 The Final Determination sets out the KTC's price analysis in two places. Firstly, the Final Determination contains the following statements under the heading "Trend of Import Volume and Price of the Cumulated Dumped Imports":

"In addition to the above import trend of the cumulated dumped imports, the domestic resale price of the cumulated dumped imports was reviewed. Although the domestic resale price of the cumulated dumped imports was KRW [[**]] thousand per ton in 1999, and increased to KRW [[**]] thousand in 2000 by 20.9%, it continuously fell to

Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741, para. 7.161.

²⁴⁸ We find support for this view in the following finding of the panel in *EC – Tube or Pipe Fittings*:

"Sales at undercutting prices could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. The fact that certain sales may have occurred at "non-underselling prices" does not eradicate the effects in the importing market of sales that were made at underselling prices."

Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("EC – Tube or Pipe Fittings"), WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R, para. 7.277.

²⁴⁹ Exhibit KOR-13A at 41.

²⁵⁰ Exhibit KOR-13A at 62-64.

KRW [**] thousand in 2001, KRW [**] thousand in 2002, and KRW [**] thousand in the first half of 2003.²⁵¹

Accordingly, the Commission determined that the volume of the cumulated dumped imports has increased in both absolute and relative terms, and that their sales price has been falling."²⁵² (footnote omitted)

7.247 Secondly, the Final Determination contains a more detailed analysis of the price effects of dumped imports under the heading "Causal Relationship between Dumped Imports and the Material Injury to the Domestic Industry".

7.248 With regard to price undercutting, the chart on page 62 of the Final Investigation Report shows that prices of dumped imports were below those of the Korean industry in 1999 and 2002 and that they were above the Korean industry's prices in 2000, 2001 and the first half of 2003.²⁵³ The Final Determination contains the following discussion on price undercutting:

"[T]he Commission first examined whether the dumped imports were sold at a low price. The resale price of the cumulated dumped imports per ton was lower than the sales price of the domestic products by KRW [**] thousand in 1999, was higher than the sales price of the domestic products by KRW [**] thousand and KRW [**] thousand in 2001, respectively, but was lower than the sales price of the domestic products by KRW [**] thousand in 2002, and was higher by KRW [**] thousand in the first half of 2003.²⁵⁴"²⁵⁵ (footnote omitted)

7.249 With respect to price depression, the Final Investigation Report recites the same price data, puts them in the form of a graph and contains another chart where price fluctuations with respect to both dumped imports and domestic producers' sales can be seen.²⁵⁶ The Final Determination contains the following evaluation with respect to price depression:

"Second, it was reviewed whether the price of the dumped imports caused a fall in the sales price of the domestic products. The resale price of the cumulated dumped imports per ton was KRW [**] thousand in 1999, and increased 20.9% to KRW [**] 949 thousand in 2000, but decreased 6.6% in 2001, 0.6% in 2002 and 0.4% in the first half of 2003, respectively. Accordingly, the sales price of the domestic products per ton was KRW [**] thousand in 1999, and increased 10.1% to KRW 948 thousand in 2000, but decreased 8.1% to KRW [**] thousand in 2001, increased 2.4% in 2002 and decreased 4.6% in the first half of 2003.²⁵⁷ Thus the Commission found that the sales price of the domestic products has been falling due to the continued fall in the price of dumped imports."²⁵⁸ (footnote omitted)

7.250 Concerning price suppression, the situation is similar to price depression. The Final Investigation Report contains the data relevant to the price suppression analysis. It contains a graph and a chart that show that the prices of the Korean producers remained below a target price throughout the POI.²⁵⁹ The Final Determination contains the following analysis:

²⁵¹ Korea requests that the data in square brackets be treated as confidential.

²⁵² Exhibit KOR-15A at 13.

²⁵³ Exhibit KOR-13A at 62.

²⁵⁴ Korea requests that the data in square brackets be treated as confidential.

²⁵⁵ Exhibit KOR-15A at 16.

²⁵⁶ Exhibit KOR-13A at 62-63.

²⁵⁷ Korea requests that the data in square brackets be treated as confidential.

²⁵⁸ Exhibit KOR-15A at 16.

²⁵⁹ Exhibit KOR-13A at 64.

"Third, it was reviewed whether the dumped imports suppressed an increase in the sales price of the domestic products. The sales price of the domestic products per ton was lower than the target sales price by KRW [**] thousand in 1999, KRW [**] thousand in 2000, KRW [**] thousand in 2001, KRW [**] thousand in 2002, and KRW [**] thousand in the first half of 2003, respectively.²⁶⁰ Thus, the Commission found that the sales price of the domestic products was suppressed."²⁶¹ (footnote omitted)

7.251 On the basis of our review of the Final Investigation Report and the Final Determination, we conclude that the KTC has clearly considered whether there was price undercutting, price suppression and price depression caused by dumped imports.

7.252 We now turn to Indonesia's argument that the KTC failed to determine or at least consider whether these price effects were "significant". In Indonesia's view, failure to address the issue of whether or not the price effects were "significant" constitutes a violation of Article 3.2.²⁶²

7.253 We note that the record contains no discussion as to whether or not the price effects found by the KTC were "significant". However, we do not read Article 3.2 as requiring that the word "significant" appear in the text of the IA's determination. Furthermore, as we stated above (para. 7.242), Article 3.2 does not generally require the IA to make a determination about the "significance" of price effects or indeed as to whether there were price effects as such. All it requires is that the IA consider whether there has been significant price undercutting, price depression or price suppression. In our view, therefore, the requirements of that article will be satisfied if the determination demonstrates that the IA properly considered whether or not prices of dumped imports had one of the three price effects set out under Article 3.2.²⁶³ We are of the view that the KTC's determination in this investigation properly addressed the issue of whether or not dumped imports caused significant price undercutting, price depression or price suppression to the domestic industry's prices. Consequently, we do not agree with Indonesia that the KTC acted inconsistently with Article 3.2 of the Agreement by failing to determine or consider whether or not dumped imports caused "significant" price undercutting, price depression or price suppression.

7.254 We therefore reject Indonesia's claim that the KTC's analysis concerning the price effects of dumped imports on the Korean industry was inconsistent with Articles 3.1, 3.2 and 3.4 of the Agreement.

(ii) *KTC's Volume Analysis*

7.255 Indonesia submits that the KTC failed to analyse the volume of dumped imports in the first half of 2003, which was part of the KTC's POI for the injury determination. Since there was a

²⁶⁰ Korea requests that the data in square brackets be treated as confidential.

²⁶¹ Exhibit KOR-15A at 16.

²⁶² Second Written Submission of Indonesia, para. 99.

²⁶³ In this regard, we find support in the following finding of the panel in *Thailand – H-Beams*: "We therefore do not read the textual term "consider" in Article 3.2 to require an explicit "finding" or "determination" by the investigating authorities as to whether the increase in dumped imports is "significant". While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as "significant", and to give a reasoned explanation of that characterization, we believe that the word "significant" does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms." (footnote omitted)
Panel Report, *Thailand – H-Beams*, *supra*, note 247, para. 7.161.

decrease of 15.3 per cent in the volume of dumped imports from 2002 to the first half of 2003, Indonesia asserts that the KTC could not properly conclude that there had been an increase in the volume of dumped imports. Indonesia also asserts that the domestic consumption figures used by the KTC in its analysis of the increase in the volume of dumped imports relative to domestic consumption were flawed because the KTC ignored an important portion of domestic consumption in its calculations. Consequently, the KTC overstated the market share of dumped imports. Indonesia contends that had the KTC calculated domestic consumption correctly, it would have found a decrease in the market share of dumped imports in the first half of 2003, rather than the increase found by the KTC. Korea points out that this claim was not raised in Indonesia's request for the establishment of a panel. Regarding the substance of the claim, Korea generally argues that the KTC based its volume analysis on trends in the absolute volume of dumped imports, as well as trends in the volume relative to domestic consumption. With regard to the change in the volume of dumped imports from 2002 to the first half of 2003, in particular, Korea notes that the KTC analyzed the impact of this decline relative to domestic consumption.

7.256 Given Korea's assertion that this claim was not raised in Indonesia's request for the establishment of a panel, we shall first make a finding in that regard. We will only address the substance of Indonesia's claim if we find the claim to be properly before us.

7.257 We note that paragraph 13 of the Working Procedures states that any requests for preliminary rulings have in principle to be submitted before the first meeting with the parties. We also note that Korea raised this jurisdictional matter relatively late during these proceedings, i.e. in its comments on Indonesia's closing statements in our second meeting with the parties. It would, obviously, have been preferable had Korea raised it earlier in these proceedings. However, we consider this to be a fundamental issue as it concerns our jurisdiction. We cannot make a finding on a claim which has not been raised by Indonesia in its request for establishment in conformity with the provisions of the DSU outlined below, and which is therefore not properly before us.²⁶⁴

7.258 We recall that, under Article 7 of the DSU, it is Indonesia's panel request that determines our terms of reference in these proceedings. Article 6.2 of the DSU, which sets out the requirements applicable to the requests for the establishment of a panel, provides:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

7.259 According to Article 6.2, therefore, a panel request must identify the specific measures at issue and must provide a brief summary of the legal basis of the complaint. Together, these two elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU. It is important that the panel request be sufficiently clear for two reasons: first, it defines the scope of the dispute and second, it serves the due process objective of notifying the parties and third parties of the nature of a complainant's case.²⁶⁵ We must therefore scrutinize carefully Indonesia's panel request "to ensure its compliance with both the letter and the

²⁶⁴ We find support for our proposition in the decisions of the Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US)* and *US – Carbon Steel*. See, Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States ("Mexico – Corn Syrup (Article 21.5 – US)")*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 36; Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ("US – Carbon Steel")*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 123.

²⁶⁵ *Ibid.*, para. 126.

spirit of Article 6.2 of the DSU."²⁶⁶ In doing that, we shall consider Indonesia's panel request as a whole and take into account the circumstances of the present proceedings.²⁶⁷

7.260 With these considerations in mind, we now turn to the text of Indonesia's panel request to decide whether it conforms to the requirements of Article 6.2 of the DSU. We note that Indonesia's request for the establishment of a panel mentions the word "volume" only in paragraph 3 which reads:

"3. Korea initiated the investigation notwithstanding its failure to make an objective examination of the participation of the applicant Hansol Paper Co. ("Hansol") in the definition of "domestic industry", despite Hansol's significant volume of imports from Indonesia during the period of investigation for injury. This is inconsistent with Article 3.1 and Article 4.1(i) of the AD Agreement." (emphasis added)

We note that paragraph 3 specifically concerns the alleged deficiencies in the KTC's decision to initiate the investigation at issue. In that context, this paragraph refers to the volume of imports made by Hansol, one of the domestic producers of the subject product, and asserts that Hansol should have been left out of the domestic industry for purposes of the investigation at issue. We therefore do not consider this section to refer to the alleged deficiencies in the KTC's analysis regarding trends in the volume of dumped imports in the course of the investigation at issue.

7.261 We note that Article 3.2 of the Agreement, on which Indonesia's claim regarding the KTC's volume analysis is mainly based, has been mentioned in three instances in the request for establishment. Paragraph 28 of the request for establishment reads:

"28. Korea's incorrect classification of imports from PT Indah Kiat as dumped imports as a result of treating PT Indah Kiat, PT Pindo Deli and PT Tjiwi Kimia as a single economic unit, as well as Korea's incorrect classification of *all* imports from Indonesia and China, including imports that occurred outside the period of investigation for dumping, as dumped imports and the consequent incorrect determination of injury and causal link between the alleged dumped imports and injury is inconsistent with Article 3.1, Article 3.2, Article 3.4, Article 3.5 and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT." (emphasis added)

We note that paragraph 28 concerns imports made from Indah Kiat, and imports made outside the injury POI. We cannot construe this specific reference to Article 3.2 as one that takes issue with the alleged deficiencies in the KTC's analysis regarding trends in the volume of dumped imports.

7.262 The second reference to Article 3.2, found in paragraph 30 of the request for establishment, reads:

"30. Korea's failure to adequately evaluate the effect of the dumped imports on prices in the domestic market for like products is inconsistent with Article 3.1, Article 3.2, Article 3.5 and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT." (emphasis added)

We note that paragraph 30 only raises a claim regarding the alleged deficiencies in the KTC's price analysis. It does not seem in any way to relate to the KTC's volume analysis.

7.263 The third and the last reference to Article 3.2 reads:

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, para. 127.

"32. Korea's failure to objectively examine the participation of the domestic industry in the importation of the allegedly dumped imports and Korea's erroneous attribution of the injury that occurred in the first half of 2003 to dumped imports that entered the Korean market 3-15 months earlier is inconsistent with the requirements set out in Article 3.1, Article 3.2, Article 3.4, Article 3.5, and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT." (emphasis added)

We note that paragraph 32 concerns dumped imports made by the Korean industry, and the KTC's linking injury that occurred towards the end of the injury POI to dumped imports that entered the Korean market 3-15 months earlier. As such, it cannot be construed to raise a claim regarding the KTC's volume analysis in the investigation at issue.

7.264 On the basis of the foregoing, it is clear to us that the request for establishment does not contain any reference to the KTC's volume analysis in its final injury determination, and thus fails to set out any legal basis for a complaint concerning that aspect of the determination. We therefore conclude that Indonesia failed to raise a claim regarding the alleged WTO-inconsistencies in the KTC's volume analysis during the investigation at issue. As the purported claim is thus not properly before us, we decline to make any findings in this regard.

(b) KTC's Evaluation of the Impact of Dumped Imports on the Korean Industry

7.265 Indonesia acknowledges that the KTC gathered data concerning each injury factor set out in Article 3.4 of the Agreement. However, Indonesia contends that the KTC failed to evaluate these factors. More specifically, Indonesia asserts that the KTC did not explain how it came to the conclusion that the Korean industry suffered material injury notwithstanding the fact that a number of injury factors showed positive trends with respect to the state of the Korean industry. Indonesia cites profits, wages, employment, productivity, production capacity, output and investments as the factors regarding which the Korean industry showed positive signs.

7.266 Korea argues that the KTC considered all injury factors set out in Article 3.4 in its injury determination. Korea cites factors such as production, capacity utilization, sales, market share and inventories as supporting the KTC's overall conclusion that the Korean industry suffered material injury. According to Korea, the KTC was justified with respect to the relative weight assigned to certain injury factors given that the Agreement contains no rule as to the weight to be given to the Article 3.4 injury factors.

7.267 We note that Article 3.4 of the Agreement provides:

"The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

7.268 We note that the WTO panels and the Appellate Body have consistently held that an analysis of the impact of dumped imports on the domestic industry in the importing Member shall comprise an

evaluation of all factors set out in Article 3.4.²⁶⁸ To fulfil that obligation, the IA has obviously to collect the data relating to each of the factors set out in Article 3.4. However, the obligation under Article 3.4 is not limited to the compilation of the relevant data. Having gathered the relevant data, the IA then has to evaluate them in context and in connection with one another. The WTO jurisprudence has also consistently approved this proposition.²⁶⁹ Recently, the panel in *Egypt – Steel Rebar* stated that "for an IA to "evaluate" evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data."²⁷⁰

7.269 We note that Indonesia acknowledges that the KTC did collect the relevant data regarding the injury factors set out under Article 3.4. The issue, therefore, is whether or not the KTC analyzed these data in context and reached a reasoned conclusion with respect to the impact of dumped imports on the Korean industry.

7.270 We note that Korea cites the text of the Final Investigation Report and the Final Determination as evidence that the KTC carried out a WTO-consistent analysis of the impact of dumped imports on the Korean industry. The Final Determination²⁷¹ and the Final Investigation Report²⁷² both contain analyses of injury factors on which the KTC's determination was based. We also note, however, that these two reports do not seem to have a section where the KTC evaluates the relevance of these factors with respect to its overall conclusion on injury, except the following concluding paragraph in the Final Determination:

"Accordingly, the Commission determined that there exists material injury to the domestic industry, such as reduced production quantity, reduced sales quantity, increased inventory, reduced sales amount, low operating income ratio, and reduced employment etc."²⁷³

7.271 We note that there were certain factors, such as capacity, profits, wages, cash flow, which fluctuated rather than showing negative trends throughout the POI. For instance, the domestic industry's production capacity increased from 751,668 tons in 1999 and 2000 to 754,168 tons in 2001 and then to 758,668 tons in 2002.²⁷⁴ Operating income rose from a loss of [[**]] million KRW in 2000 to a profit of [[**]] KRW in 2001 and further to a profit of [[**]] KRW in 2002.²⁷⁵ Average wages constantly grew throughout the POI, rising from [[**]] KRW in 1999 to [[**]] KRW in the first half of 2003. Cash flows increased from [[**]] million KRW in 2000 to [[**]] million KRW in 2001 and to [[**]] million KRW in 2002.^{276 277}

²⁶⁸ See, for instance, Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701, para. 125.

²⁶⁹ See, for instance, Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* ("Egypt – Steel Rebar"), WT/DS211/R, adopted 1 October 2002, para. 7.236.

²⁷⁰ *Ibid.*, para. 7.44.

Applying this standard to the facts of the case before it, the panel in *Egypt – Steel Rebar* found that the Egyptian IA had "failed to *evaluate* productivity, actual and potential negative effects on cash flow, employment, wages, and ability to raise capital or investments." *Ibid.*, para. 7.51.

²⁷¹ Exhibit KOR-15A at 13-15.

²⁷² Exhibit KOR-13A at 45-51.

²⁷³ Exhibit KOR-15A at 15. In response to questioning from the Panel as to where in its final determinations the KTC discussed the relevance of the injury factors set out in Article 3.4, Korea referred to the same sections of the Final Investigation Report and the Final Determination cited above. See, Response of Korea to Question 59 from the Panel Following the First Meeting.

²⁷⁴ Final Investigation Report (Exhibit KOR-13A at 45).

²⁷⁵ Final Investigation Report (Exhibit KOR-13A at 47).

²⁷⁶ Korea requests that the data in square brackets be treated as confidential.

²⁷⁷ Final Investigation Report (Exhibit KOR-13A at 50).

7.272 We do not suggest that these data precluded the KTC from making an affirmative finding of material injury in the investigation at issue. However, we are of the view that the KTC failed to properly evaluate the relevance of these injury factors in making its conclusion regarding the material injury suffered by the Korean industry. We consider that the IA's obligation to evaluate all relevant economic factors under Article 3.4 shall be read in conjunction with the overarching obligation to carry out an "objective examination" on the basis of "positive evidence" as set out under Article 3.1. Therefore, the obligation to analyse the mandatory list of fifteen factors under Article 3.4 is not a mere "checklist obligation" consisting of a mechanical exercise to make sure that each listed factor has somehow been addressed by the IA. We recognize that the relevance of each one of these injury factors may vary from one case to the other. The fact remains, however, that Article 3.4 requires the IA to carry out a reasoned analysis of the state of the industry. This analysis cannot be limited to a mere identification of the "relevance or irrelevance" of each factor, but rather must be based on a thorough evaluation of the state of the industry. The analysis must explain in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 lead to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of material injury.²⁷⁸

7.273 In the investigation at issue, we note that the KTC did not provide any analysis which adequately explains why the data collected with respect to the Article 3.4 injury factors lead to a determination of material injury, except the statement found in the KTC's Final Determination that "there exists material injury to the domestic industry, such as reduced production quantity, reduced sales quantity, increased inventory, reduced sales amount, low operating income ratio, and reduced employment etc."²⁷⁹ As we pointed out above, the IA's determination may find certain injury factors to be more relevant than others in a given investigation. However, the bottom line is that it has to evaluate the data pertaining to each factor set out under Article 3.4. Consequently, since the KTC did not adequately evaluate the injury factors, especially those that showed a positive trend, and explain their relevance in the determination of material injury, we find that it acted inconsistently with its obligations under Article 3.4 of the Agreement.

7.274 We note that Indonesia argued that the KTC's failure to evaluate all injury factors also violated Article 3.1 of the Agreement.²⁸⁰ It seems to us that Indonesia's claim under Article 3.1 in this regard is dependent on its main claim under Article 3.4. Having found a violation of Article 3.4 in this regard, we consider that a finding of inconsistency with respect to Article 3.1 would neither

²⁷⁸ We find support for our approach in the following finding of the panel in *Thailand – H-Beams*: "We are of the view that the "evaluation of all relevant factors" required under Article 3.4 must be read in conjunction with the overarching requirements imposed by Article 3.1 of "positive evidence" and "objective examination" in determining the existence of injury. Therefore, in determining that Article 3.4 contains a mandatory list of fifteen factors to be looked at, we do not mean to establish a mere "checklist approach" that would consist of a mechanical exercise of merely ensuring that each listed factor is in some way referred to by the investigating authority. It may well be in the circumstances of a particular case that certain factors enumerated in Article 3.4 are not relevant, that their relative importance or weight can vary significantly from case to case, or that some other non-listed factors could be deemed relevant. Rather, we are of the view that Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of "relevance or irrelevance" of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury." (footnote omitted, emphasis added).

Panel Report, *Thailand – H-Beams*, *supra*, note 247, para. 7.236.

²⁷⁹ *Supra*, note 273.

²⁸⁰ See, for instance, First Written Submission of Indonesia, para. 176.

elucidate the scope of that provision nor assist in any meaningful way in the implementation of our finding. We therefore need not, and do not, make any finding on this aspect of Indonesia's claim.

(c) KTC's Causation Analysis

7.275 Indonesia puts forward a number of arguments in the context of its claim regarding the KTC's causation analysis in the investigation at issue. Firstly, Indonesia submits that the KTC failed to consider the decrease in the volume of dumped imports in the first half of 2003. Secondly, it did not consider the fact that prices of dumped imports remained above those of the Korean domestic industry for long periods during the POI. Thirdly, the KTC failed to consider whether or not imports from other sources caused the injury suffered by the Korean producers. Fourthly, the KTC did not take into account the decline in the Korean industry's exports of the subject product. With respect to its non-attribution analysis, Indonesia also argues that the KTC failed to consider the impact of the domestic industry's excessive investments, the decline in the domestic industry's internal consumption and the facts that the prices of dumped imports remained above those of the domestic industry and their volume declined in the POI.

7.276 Korea submits that the KTC's causation analysis complied with the requirements of Article 3.5. The KTC based its causation analysis mainly on the impact of dumped imports on the domestic industry's market share. The KTC also evaluated the impact of the other factors cited by Indonesia.

7.277 We recall our finding above (para. 7.273) that the KTC acted inconsistently with its obligations under Article 3.4 of the Agreement with respect to the evaluation of the impact of dumped imports on the Korean industry. Given this inconsistency we have found with respect to the KTC's injury determination in the investigation at issue, we do not consider that addressing Indonesia's claim regarding the KTC's causation analysis would provide any further assistance in resolving the dispute before us because that analysis was based on a WTO-inconsistent injury determination. We therefore do not address Indonesia's claim on causation.

(d) KTC's Treatment of the Korean Industry's Imports of the Subject Product as Dumped Imports

7.278 Indonesia asserts that the KTC should have considered the fact that the Korean producers were importing substantial quantities of the subject product from Indonesia as an injury factor under Article 3.4 of the Agreement. Second, Indonesia submits that the KTC should have considered this fact, under Article 3.5, as a potential other factor that might have contributed to the material injury suffered by the Korean industry.

7.279 Korea submits that there is no legal basis in the Agreement to support Indonesia's view that the fact that Korean producers imported the subject product from the subject countries has to be evaluated as an injury factor under Article 3.4 of the Agreement. More generally with regard to imports made by the Korean producers, Korea notes that Article 4.1 of the Agreement gives the IA the discretion to exclude domestic producers who are importers of the subject product in an anti-dumping investigation from the domestic industry. Korea submits that in accordance with the mentioned provision of the Agreement, the KTC excluded Korean producers, importing significant quantities of the subject product from the countries under investigation, from the domestic industry for purposes of the investigation at issue. It follows that the remaining domestic producers did not have significant imports of the subject product into Korea from the countries under investigation. Therefore, not analyzing the impact of these imports under Article 3.5 was not inconsistent with that provision.

7.280 We recall the provisions of Article 3.4:

"The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices

having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

7.281 Article 3.4 sets out a list of factors that have to be taken into account by the IA in evaluating the impact of dumped imports on the state of the domestic industry in importing Member. We note that the fact that the domestic industry also imports the subject product from the countries subject to the investigation is not mentioned as an injury factor under Article 3.4. We also note, however, that this list is not exhaustive. That is, Article 3.4 does not preclude the possibility that there may be other factors that should be analyzed by the IA, depending on the circumstances of a specific investigation. However, we are puzzled by Indonesia's argument that the KTC should have treated the fact that the Korean producers imported the subject product from the subject countries as an injury factor under Article 3.4. We do not see in what sense this fact could qualify as an injury factor under Article 3.4. In response to questioning from the Panel, Indonesia stated that the fact that Korean producers were importing the subject product demonstrated their strategy to move from the subject product to higher value-added products. This, in Indonesia's view, should have been considered as an indicator regarding the state of the Korean industry.²⁸¹ We do not agree. We do not see the factor cited by Indonesia as one that describes the state of the Korean industry. Rather, it seems to reflect a business decision made by the Korean industry, which may or may not have been the result of dumping. Thus, in our view, rather than being an injury factor to be considered under Article 3.4, this issue would logically be addressed, if at all, in the context of the KTC's causation analysis under Article 3.5. We therefore reject Indonesia's argument under Article 3.4 and turn to its argument under Article 3.5.

7.282 Article 3.5 provides:

"It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

7.283 We note that Article 3.5 requires that the IA in an anti-dumping investigation determine that dumped imports are the cause of the injury suffered by the domestic industry. It does not, however, set out a methodology through which that determination has to be made. The second sentence states that the causation analysis has to be carried out on the basis of all available evidence before the IA. It follows that if the IA demonstrates, on the basis of positive evidence, that dumped imports are causing the injury suffered by the domestic industry, the requirement of the first sentence of Article 3.5 would be satisfied. The third sentence of Article 3.5, the so-called non-attribution clause, stipulates that the IA has to analyze whether there are factors other than dumped imports that are also contributing to the injury and to refrain from attributing that injury to dumped imports.

²⁸¹ Response of Indonesia to Question 57(b) from the Panel Following the First Meeting.

7.284 Indonesia contends that the KTC acted inconsistently with Article 3.5 by not assessing the impact of imports made by Korean producers as part of its non-attribution analysis under that article. Korea submits that since the KTC excluded the producers that had significant imports of the subject product from the subject countries, the remaining producers did not have significant imports. Therefore, there could be no violation of Article 3.5 stemming from the KTC's failure to take these imports into account as part of its causation analysis under that article.

7.285 We note that the record indicates that the KTC did in fact exclude two of the Korean producers who imported significant amounts of the subject product from the subject countries, i.e. Kye Sung Paper Co., Ltd. and Hansol Patech Co., Ltd., from the scope of the domestic industry. The remaining 14 Korean producers imported the subject product from the subject countries in 1999 and 2000. Their imports ceased as of 2001. The share of these domestic producers in total dumped imports were [[**]] and [[**]] per cent in 1999 and 2000, respectively.^{282 283} We note that the share of the Korean producers making up the domestic industry in the total dumped imports declined from 1999 to 2000 and then stopped completely from 2001 on. Thus, by the time of the KTC's determination, imports by the Korean producers making up the domestic industry had been reduced to zero and could not have been causing injury. Even assuming that in theory imports by the domestic industry might be considered as an "other factor" causing injury, on the basis of the facts of this case we cannot conclude that the KTC was required to treat imports by the domestic producers which had ceased as of 2001 as such an "other factor". We therefore do not agree with Indonesia's assertion that the KTC was required to treat these imports as a potential other factor that could have contributed to the injury suffered by the Korean industry under Article 3.5 of the Agreement.

7.286 We note that in the context of this claim, Indonesia also raises its argument about the KTC's alleged failure to properly calculate total domestic consumption.²⁸⁴ We recall that we have found Indonesia's claim regarding the KTC's analysis of the volume of dumped imports to be outside our terms of reference (*supra*, para. 7.264). Indonesia's argument regarding the calculation of total domestic consumption concerns the KTC's analysis of the volume of dumped imports relative to domestic consumption. It follows that this aspect of Indonesia's claim is outside our terms of reference. We therefore do not make any finding in that regard.

7.287 Finally in this regard, we note Indonesia's argument that the KTC should have excluded imports made by Korean producers from the scope of dumped imports for purposes of its injury determination in the investigation at issue.²⁸⁵ In this context, Indonesia refers to imports made by producers making up the domestic industry.²⁸⁶ However, we are unaware of any provision in the Agreement which could support the proposition that dumped imports made by the domestic industry have to be excluded from the scope of dumped imports for purposes of the IA's injury determination. Imports from sources subject to an anti-dumping investigation may properly be treated as dumped imports irrespective of the identity of the importers making these imports. We therefore do not agree with Indonesia's view in this regard either.

7.288 On the basis of the foregoing, we reject Indonesia's claim that the KTC acted inconsistently with Articles 3.4 and 3.5 of the Agreement with regard to the treatment of dumped imports made by the Korean producers from the subject countries.

²⁸² Korea requests that the data in square brackets be treated as confidential.

²⁸³ See, the chart provided in the Response of Korea to Question 57 from the Panel Following the First Meeting.

²⁸⁴ See, Second Written Submission of Indonesia, para. 116.

²⁸⁵ First Written Submission of Indonesia, para. 189.

²⁸⁶ Response of Indonesia to Question 58(a) from the Panel Following the First Meeting.

(e) KTC's Treatment of Imports from Indah Kiat as Dumped Imports

7.289 Indonesia submits that the KTC acted inconsistently with Articles 3.1, 3.2 and 3.5 of the Agreement by treating imports from Indah Kiat as dumped imports in this investigation because the preliminary dumping margin calculated for this company was *de minimis*. Since Indah Kiat was the largest Indonesian exporter of the subject product into Korea, this inclusion significantly increased the amount of dumped imports in the context of the KTC's injury determination. Korea states that since the KTC treated the three Sinar Mas Group companies as one exporter in its dumping determinations, it properly included all exports made by these three companies as dumped imports for purposes of its injury determination, including Indah Kiat's.

7.290 We recall our finding above (paras. 7.168-7.171) that the KTC did not act inconsistently with Articles 6.10 and 9.3 of the Agreement with respect to treating the three Sinar Mas Group companies as a single exporter for purposes of its dumping determinations in the investigation at issue. That is, we found that the KTC properly treated them as one exporter and assigned one margin of dumping to them.

7.291 Further, we note the following statement from Indonesia with regard to the nature of this claim:

"Indonesia agrees that Article 5.8 applies to final, as opposed to preliminary, determinations of dumping. Thus, its claim that the KTC should have terminated the investigation with respect to Indah Kiat is dependent on its claims that the KTC improperly "collapsed" Indah Kiat into a "single economic entity" and failed to calculate an individual margin of dumping for Indah Kiat under Article 6.10 of the AD Agreement. If the Panel finds that the KTC improperly "collapsed" these exporters and hence improperly failed to calculate an individual margin of dumping for Indah Kiat, Indonesia requests that the Panel rule on its claims under Article 5.8, as well as its related claims under Articles 3.1, 3.2 and 3.5 of the Agreement described in paragraph 196 of its first written submission."²⁸⁷

7.292 We note that Indonesia submits that the Panel should address this claim if it finds that treating the three Sinar Mas Group companies as a single exporter was WTO-inconsistent. Given that we did not find that treating the three Sinar Mas Group companies as a single exporter was WTO-inconsistent and taking into consideration Indonesia's above-quoted statement, we need not, and do not, make any finding on this claim.

M. KTC'S ALLEGED FAILURE TO ABIDE BY THE DISCLOSURE OBLIGATIONS CONTAINED IN ARTICLES 6.1, 6.2, 6.4 AND 6.9 OF THE AGREEMENT WITH RESPECT TO ITS INJURY DETERMINATION

1. Arguments of Parties

(a) Indonesia

7.293 Indonesia argues that at the final determination stage of the investigation at issue, the KTC extended the POI for the injury determination to cover the first half of 2003, but it did not provide the Indonesian exporters with an opportunity to comment on the data relating to the additional period. This deprived these exporters of their right to comment on this decision, in violation of Articles 6.1, 6.1.2, 6.4 and 6.9 of the Agreement. Indonesia further contends that the KTC's failure to disclose to the Indonesian exporters the results of the technical test carried out by the Korean Agency for Technology and Standards and those of a customer survey, which were used in the context of the

²⁸⁷ Response of Indonesia to Question 48 from the Panel Following the First Meeting.

KTC's like product determination, was in violation of Articles 6.2, 6.4, 6.9 and 12.2 of the Agreement. Indonesia also asserts that the KTC acted inconsistently with Articles 6.4 and 6.9 of the Agreement by failing to inform the Indonesian exporters of its decision to change the basis of its injury determination from threat to material injury. Finally, Indonesia argues that by not disclosing the results of its analysis regarding the price effects of dumped imports, the KTC acted inconsistently with Articles 6.4 and 6.9 of the Agreement.

(b) Korea

7.294 Korea asserts that the Indonesian exporters were given a full opportunity to comment on the injury data concerning the first half of 2003. This was done through the disclosure of the KTC's Interim Report to the interested parties during the meeting held on 27 August 2003. Regarding the results of the technical test and the customer survey, Korea contends that the KTC treated these two documents as confidential and therefore could not disclose them to the Indonesian exporters.

2. Arguments of Third Parties

(a) United States

7.295 Regarding the disclosure requirements of Article 6.9, the United States argues that nothing in that article requires the IA to disclose its legal reasoning. The disclosure requirements of Article 6.9 are limited to the essential facts under consideration which form the basis of the IA's determination. More specifically, the United States submits that Article 6.9 does not require the IA to disclose whether its injury determination will be based on material injury or threat thereof.

3. Evaluation by the Panel

(a) Disclosure of the Data Relating to the First Half of 2003

7.296 Indonesia submits that the KTC violated Articles 6.1, 6.4 and 6.9 of the Agreement by not giving the Indonesian exporters an opportunity to see, and comment on, the data relating to the first half of 2003. Korea submits that the Indonesian exporters had an opportunity to comment on the data relating to the first half of 2003 as they received, in the public hearing held on 27 August 2003, a copy of the non-confidential version of the KTC's Interim Report. Korea also submits that the representatives of the Sinar Mas Group made comments on that report.

7.297 We note that in its second oral statement, Indonesia pointed out that it withdrew this aspect of its claim because the document submitted by Korea in Exhibit KOR-50 corroborated Korea's position in this regard.²⁸⁸ We therefore do not make any finding with respect to this aspect of Indonesia's claim.

(b) Disclosure of the Results of the Technical Test and the Customer Survey Regarding the Like Product Issue

7.298 Indonesia notes that, in the context of its like product determination, the KTC cited the results of a technical test carried out by the Korean Agency for Technology and Standards and those of a customer survey. According to Indonesia, the KTC's failure to inform the Indonesian exporters of the substance of these two documents was in violation of Articles 6.2, 6.4, 6.9 and 12.2 of the Agreement. Korea contends that Indonesia's claim in this regard is without merit because these two documents contained confidential information, which could not be disclosed by the KTC.

²⁸⁸ Second Oral Statement of Indonesia, para. 93.

(i) Article 6.4

7.299 We note that Article 6.4 provides:

"The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information." (emphasis added)

7.300 Article 6.4 stipulates that interested parties have the right to see all non-confidential information that is relevant to the presentation of their cases in an investigation. When an interested party requests to see that information, Article 6.4 requires that they be allowed to see it, to the extent this is practicable for the IA. Consequently, in order to establish a *prima facie* case with respect to this particular claim, Indonesia has to demonstrate that the Sinar Mas Group requested to see non-confidential information on the record of the investigation at issue and that the KTC declined such request.

7.301 In this regard, we note Indonesia's assertion that, in its letter dated 18 October 2003, the Sinar Mas Group requested the disclosure of the results of a technical test carried out by the Korean Agency for Technology and Standards and those of a customer survey and that the KTC never responded. That letter provides in pertinent parts:

"We are in receipt of non-confidential versions of the Commission's Final Investigation Reports on Dumping Rate, Dumping and Injury and its Final Resolution on Dumping and Injury, all of 24 September 2003.

We request your prompt supply of confidential information pertaining to findings in respect of Indah Kiat, Pindo Deli and Tjiwi Kimia appropriately not included in the non-confidential versions but important to our understanding of the findings. The information required is outlined hereunder:

...

2. Final Investigation Report on Dumping and Injury

a) Details of comparison of physical properties between domestic products and dumped imports per the table in Section II.3.A as they relate to the exports of Pindo Deli, Indah Kiat and Tjiwi Kimia."²⁸⁹ (emphasis added)

7.302 We note that the letter acknowledges that the Sinar Mas Group received the non-confidential version of the KTC's Final Investigation Report. Indeed, it clearly requests to see confidential information regarding the KTC's like product determination found in Section II.3.A of the Final Investigation Report. In our view, this indicates that the Sinar Mas Group recognized that this information was appropriately not included in the non-confidential version of the Final Investigation Report. It is therefore clear that what the Sinar Mas Group requested to see was the texts of these two documents, which were treated by the KTC as confidential. The issue is whether or not the KTC's refusal to make these documents available to the Sinar Mas Group was inconsistent with Article 6.4 of the Agreement.

7.303 Indonesia has made no claims under Article 6.5 of the Agreement regarding the treatment of these documents as confidential. As noted above, Article 6.4 clearly states that the right to see the

²⁸⁹ Exhibit IDN-31.

information on the record is limited to the non-confidential information. Since the Sinar Mas Group's request pertained to confidential information, we are of the view that there is no legal basis for Indonesia's claim under Article 6.4 in light of the acknowledged facts. We therefore reject this aspect of Indonesia's claim.

(ii) *Article 6.2*

7.304 Indonesia asserts that by not disclosing the results of the technical test carried out by the Korean Agency for Technology and Standards and those of the customer survey, the KTC also violated the requirements of Article 6.2 of the Agreement. According to Indonesia, in the absence of this information, the Indonesian exporters were unable to defend their interests.

7.305 Article 6.2 of the Agreement reads:

"Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally." (emphasis added)

7.306 We note that Article 6.2 addresses interested parties' right to defend their interests in an investigation. To that end, Article 6.2 stipulates that interested parties shall be given the opportunity meet other interested parties with opposing views about the investigation to be able to exchange views. We do not consider Article 6.2 to address interested parties' right to see the information on the record. That right is addressed in Article 6.4, which has also been invoked by Indonesia in these proceedings. We therefore consider that there is no legal basis for Indonesia's claim under Article 6.2 in light of the acknowledged facts. We therefore reject this aspect of Indonesia's claim too.

7.307 Assuming *arguendo* that Article 6.2 could be interpreted as relating to interested parties' right to see the information on the record, Indonesia's claim would still fail because, by its own terms, Article 6.2 excludes confidential information from the scope of the right it creates. In this regard, we note again that Indonesia has not challenged the confidential treatment of these two documents by the KTC under Article 6.5 of the Agreement. Thus, there would be no legal basis for a claim under Article 6.2 on the basis of the facts of this case.

(iii) *Article 6.9*

7.308 Indonesia asserts that by not disclosing the results of the technical test carried out by the Korean Agency for Technology and Standards and those of the customer survey, the KTC also violated the requirements of Article 6.9 of the Agreement. In response to questioning from the Panel regarding the nature of this aspect of its claim, Indonesia stated that its claim under Article 6.9 would only apply if the KTC made a comparison between PPC and WF generally.²⁹⁰

7.309 The text of the KTC's Final Investigation Report demonstrates that the KTC did not make a comparison between PPC and WF generally. The KTC compared imported PPC and WF with Korean PPC and WF, respectively, and concluded that "[t]he domestic products [were] identical to the

²⁹⁰ Response of Indonesia to Question 29 from the Panel Following the Second Meeting.

product under investigation in terms of the product name, definition, usage and manufacturing process."²⁹¹

7.310 Thus, as the factual basis Indonesia considers necessary for its claim does not exist, we need not, and do not, make a finding regarding this aspect of Indonesia's claim.

(iv) *Article 12.2*

7.311 Indonesia asserts that by not disclosing the results of the technical test carried out by the Korean Agency for Technology and Standards and those of the customer survey, the KTC also violated Article 12.2 of the Agreement.

7.312 We note that Article 12.2 reads:

"Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein."

7.313 Article 12.2.2, which sets out additional detail concerning the public notice on the imposition of a final anti-dumping duty, reads in relevant part:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information." (emphasis added)

7.314 We note that Article 12.2.2 clearly states that the IA's disclosure obligation with respect to a public notice imposing a definitive anti-dumping duty is subject to the protection of confidential information. With that in mind, we now turn to the facts of the investigation at issue.

7.315 We note that the public notice of imposition of the anti-dumping duty in question does not specifically address the like product issue. We note, however, that the Final Determination and the Final Investigation Report were attached to the final public notice.²⁹² That is, these two reports were part of the public notice itself. Section II.3.A of the KTC's Final Investigation Report contains a sufficiently detailed description of the KTC's like product determination. We recall that the two tests were confidential and that Indonesia has not raised any claim under Article 6.5 of the Agreement regarding their confidentiality.

7.316 Article 12.2 does not allow an IA to disclose confidential information in its public notice imposing a final measure. Therefore, Indonesia failed to establish a legal basis for its claim in light of the facts acknowledged. We therefore reject this aspect of Indonesia's claim.

²⁹¹ Final Investigation Report (Exhibit KOR-13A at 4).

²⁹² See, Exhibit KOR-16.

(c) Change With Respect to the Basis of the KTC's Injury Determination

7.317 Indonesia alleges that the KTC acted inconsistently with Articles 6.4 and 6.9 of the Agreement by failing to inform the Indonesian exporters of its decision to change the basis of its injury determination from threat to material injury.

7.318 In its second written submission, however, Indonesia withdrew this claim.²⁹³ We therefore do not make any finding with regard to this claim.

(d) Failure to Disclose Findings Regarding the Price Effect of Dumped Imports

7.319 Indonesia argues that by not disclosing the results of its analysis regarding the price effects of dumped imports, the KTC acted inconsistently with Articles 6.4 and 6.9 of the Agreement. Indonesia asserts that although the Sinar Mas Group specifically requested to see this information, the KTC never replied.²⁹⁴ In this regard, Indonesia refers to the letter dated 18 October 2003, which reads in pertinent parts:

"We are in receipt of non-confidential versions of the Commission's Final Investigation Reports on Dumping Rate, Dumping and Injury and its Final Resolution on Dumping and Injury, all of 24 September 2003.

We request your prompt supply of confidential information pertaining to findings in respect of Indah Kiat, Pindo Deli and Tjiwi Kimia appropriately not included in the non-confidential versions but important to our understanding of the findings. The information required is outlined hereunder:

...

2. Final Investigation Report on Dumping and Injury

c) An indexed summary of the comparison of the resale prices of dumped products and domestic products per section IV.2.c."²⁹⁵ (emphasis added)

7.320 Korea submits that the mentioned letter by the Sinar Mas Group came more than three weeks after the KTC had disclosed its final determination about the investigation at issue. Therefore, the KTC did not respond to this letter.

7.321 We note that the Article 6.4 aspect of Indonesia's claim in this regard is very similar to its claim under Articles 6.4 and 6.9 regarding the KTC's alleged failure to disclose the results of the technical test carried out by the Korean Agency for Technology and Standards and those of the customer survey in that they both concern a request to see confidential information on the record. In its above-quoted letter, the Sinar Mas Group requests to see confidential information relating to the KTC's analysis on the impact of the Indonesian exporters' prices on those of the Korean industry. That is, they acknowledge the confidential nature of that information.

7.322 We recall once again that Indonesia has made no claim under Article 6.5 of the Agreement concerning the confidential treatment of these documents. As we stated above (para. 7.300), Article 6.4 clearly states that the right to see the information on the record is limited to the non-confidential information. Since the Sinar Mas Group's request was directed at confidential information, we are of

²⁹³ Second Written Submission of Indonesia, para. 121; Response of Indonesia to Question 68 from the Panel Following the First Meeting.

²⁹⁴ First Written Submission of Indonesia, paras. 202-203.

²⁹⁵ Exhibit IDN-31.

the view that Indonesia failed to establish a legal basis for its claim under Article 6.4 in light of the facts acknowledged. We therefore reject this aspect of Indonesia's claim too.

7.323 Turning to the Article 6.9 aspect of Indonesia's claim, we first note that parties agree that the Sinar Mas Group received, as did others, the non-confidential version of the KTC's Final Investigation Report on 1 October 2003.²⁹⁶ Indonesia argues that the disclosure provided in that report with regard to the price effect of dumped imports on the Korean industry was not sufficient to satisfy the requirements of Article 6.9.

7.324 Article 6.9 provides:

"The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests." (emphasis added)

7.325 We note that, regarding the price effect of dumped imports, the non-confidential version of the KTC's Final Investigation Report provides:

"Impact of the Dumped Imports on the Price of Domestic Products and Likelihood of Increase in the Demand for Imports

The resale price of the dumped imports was lower than the sales price of the domestic products by KRW ** thousand in 1999, was higher than the sales price of the domestic products by KRW * thousand and KRW ** thousand in 2000 and 2001, respectively, but was lower than the sales price of the domestic products by KRW ** thousand in 2002 and was higher by KRW ** thousand in the first half of 2003."²⁹⁷

7.326 We also note that the above-quoted section of the report is followed by a chart that demonstrates the changes in the prices of dumped imports and the domestic producers in the form of percentages over the POI. The core of Indonesia's claim is that the KTC's failure to include in this chart the absolute figures with respect to the Korean industry's prices was inconsistent with Article 6.9. Indonesia contends that since the prices of the Korean producers in this chart belonged to the industry as a whole rather than individual producers, the KTC should have included them in the chart.²⁹⁸

7.327 Since Indonesia has made no claim under Article 6.5 to challenge the KTC's decision to treat the information on the prices of the Korean industry as confidential, we cannot make a finding with regard to the confidentiality of those price data.

7.328 Regarding the conformity with Article 6.9 of the explanations provided in the mentioned report, we consider that the trends in prices may be seen as one essential fact that established the basis of the KTC's decision to apply the definitive anti-dumping duty at issue. We note that the report explains trends in the prices of dumped imports and those of the Korean industry in the POI. We do not agree with Indonesia's view that failure to include absolute figures for the Korean industry's prices rendered this disclosure inconsistent with the requirements of Article 6.9. We see no support in the text of Article 6.9, or elsewhere in the Agreement, for Indonesia's proposition. We therefore reject this aspect of Indonesia's claim too.

²⁹⁶ See, KTC's letter addressed to the Sinar Mas Group conveying the Final Investigation Report (Exhibit KOR-38).

²⁹⁷ Exhibit KOR-13B at 55.

²⁹⁸ Response of Indonesia to Question 31 from the Panel Following the Second Meeting.

N. TREATMENT OF THE INFORMATION CONTAINED IN THE DOMESTIC INDUSTRY'S APPLICATION AS CONFIDENTIAL

1. Arguments of Parties

(a) Indonesia

7.329 Indonesia argues that the KTC provided confidential treatment to the information submitted in the Korean domestic industry's application for the initiation of the investigation without requiring a showing of good cause. This, in Indonesia's view, violated Articles 6.5, 6.5.1 and 6.5.2 of the Agreement.

(b) Korea

7.330 Korea argues that the information submitted by the Korean domestic industry in the application for the initiation of the investigation was by nature confidential and therefore could not be disclosed by the KTC pursuant to Article 6.5 of the Agreement. According to Korea, since the information submitted in the application was by nature confidential, no good cause needed to be shown for that information to be treated as confidential under Article 6.5.

2. Evaluation by the Panel

7.331 As an initial factual matter, we note that Indonesia agrees that the applicants submitted a non-confidential version of their application.²⁹⁹ Indonesia argues, however, that the non-confidential version was inconsistent with Article 6.5 of the Agreement in that the KTC failed to require good cause to treat certain information in the application as confidential. In this regard, Indonesia cites information relating to the allegations of dumping and injury by the domestic industry, which was either deleted or indexed in the non-confidential version of the application.

7.332 We also note that Indonesia is not taking issue with Korea's assertion that information in the application cited by Indonesia was by nature confidential. That is, Indonesia does not disagree that this information could appropriately be treated as confidential. Parties do disagree, however, as to whether or not the Agreement requires that good cause be shown for the confidential treatment of the information that is by nature confidential. Indonesia asserts that good cause has to be shown in these circumstances. Korea disagrees with Indonesia and contends that no good cause is required for information that is by nature confidential.

7.333 We note that Article 6.5 of the Agreement reads in pertinent parts:

"Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it." (footnote omitted)

7.334 We note that Article 6.5 provides for the confidential treatment of two types of information: information which is confidential by nature and information which, although not confidential by nature, has been submitted by an interested party on a confidential basis. Article 6.5 stipulates that

²⁹⁹ Response of Indonesia to Question 69 from the Panel Following the First Meeting.

both types of confidential information may not be disclosed by the IA without specific authorization by the party submitting it.

7.335 The only issue presented by this claim is whether or not the requirement of showing good cause in order for information to be treated as confidential under Article 6.5 applies to information that is by nature confidential as well as to information that is submitted on a confidential basis. We note that the phrase "upon good cause shown" is preceded by both types of confidentiality in the text of Article 6.5. We are therefore of the view that the text of Article 6.5 makes it clear that the good cause requirement applies to both categories of confidential information.³⁰⁰ That is, some showing of good cause is necessary for the confidential treatment of information that is by nature confidential. The degree of that requirement may, however, depend on the type of information concerned. In the investigation at issue, there is no indication that the KTC requested that any good cause be shown in order to treat as confidential information submitted in the application, which was by nature confidential. We therefore conclude that the KTC acted inconsistently with Article 6.5 in the investigation at issue by not requiring that good cause be shown with respect to the information submitted in the application which was by nature confidential.³⁰¹

7.336 Before concluding our findings concerning the specific claims raised by Indonesia, we note Indonesia's assertion that to the extent that the Korean measure was inconsistent with the provisions of the Agreement cited by Indonesia in connection with each of its specific claims, it was also inconsistent with the requirement of Article 1 of the Agreement to impose anti-dumping measures in accordance with the provisions of the Agreement. Indonesia has not raised an independent claim based on the obligations set out in Article 1. Rather, we understand Indonesia's claim to be dependent on our finding of an inconsistency with respect to the specific claims raised by Indonesia. In our view, to the extent that we have found an inconsistency with respect to the specific claims raised by Indonesia, making an additional ruling under Article 1 would neither elucidate the scope of that provision nor assist in any meaningful way in the implementation of our finding. With respect to Indonesia's claims where we have found no inconsistency, we would not need to make a finding under Article 1 because of the dependent nature of Indonesia's claim under that Article.

7.337 We therefore need not, and do not, make any finding under Article 1 of the Agreement.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above findings, we conclude that:

- (a) In respect of the KTC's dumping determination:
 - (i) The KTC did not act inconsistently with Article 6.8 of the Agreement in resorting to facts available with respect to Indah Kiat and Pindo Deli,

³⁰⁰ We find support for our proposition in the following finding of the panel in *Guatemala – Cement II*: "Instead, the requirement to show "good cause" appears to apply for both types of confidential information, such that even information "which is by nature confidential" cannot be afforded confidential treatment unless "good cause" has been shown." (footnote omitted)
Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295, para. 8.219.

³⁰¹ We note that Indonesia also argued that the KTC acted inconsistently with Articles 6.5, 6.5.1 and 6.5.2 of the Agreement by failing to require a non-confidential version of the application from the applicants. See, First Written Submission of Indonesia, para. 206. We note, however, that Korea submitted, in Exhibit KOR-1B, the non-confidential version of the application. In response to questioning from the Panel in this regard, Indonesia stated that "its claims concern the nature of this non-confidential version." See, Response of Indonesia to Question 69 from the Panel Following the First Meeting. We therefore do not make any finding on this aspect of Indonesia's claim.

- (ii) The KTC did not act inconsistently with Article 6.8 of the Agreement and paragraph 3 of Annex II in disregarding domestic sales data submitted by Indah Kiat and Pindo Deli,
 - (iii) The KTC did not act inconsistently with Article 6.8 of the Agreement and paragraph 6 of Annex II with respect to informing Indah Kiat and Pindo Deli of its decision to reject their domestic sales data and giving them an opportunity to provide further explanations,
 - (iv) The KTC did not act inconsistently with Article 2.2 of the Agreement by using constructed normal values for Indah Kiat and Pindo Deli,
 - (v) The KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II with regard to exercising special circumspection in its use of information from secondary sources instead of domestic sales data provided by Indah Kiat and Pindo Deli,
 - (vi) The KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II, but did not act inconsistently with Article 6.8 of the Agreement and paragraph 6 of Annex II with respect to determining Tjiwi Kimia's margin of dumping,
 - (vii) The KTC did not act inconsistently with Article 2.4 of the Agreement with respect to the alleged difference stemming from CMI's involvement in domestic sales of Indah Kiat and Pindo Deli, which allegedly affected price comparability,
 - (viii) The KTC did not act inconsistently with Articles 6.10 and 9.3 of the Agreement by treating the three Sinar Mas Group companies as a single exporter and assigning a single margin of dumping to them,
 - (ix) The KTC acted inconsistently with Article 6.7 of the Agreement with respect to the disclosure of the verification results,
 - (x) The KTC acted inconsistently with Article 6.4 of the Agreement with regard to disclosing details of the calculations of the constructed normal values for Indah Kiat and Pindo Deli,
 - (xi) Indonesia failed to make a *prima facie* case with respect to its claim under Article 12.2 of the Agreement with regard to the KTC's alleged failure to disclose details of the calculations of the constructed normal values for Indah Kiat and Pindo Deli,
 - (xii) The KTC did not act inconsistently with Articles 2.6, 3.1, 3.2, 3.4, 3.5 and 3.7 of the Agreement of the Agreement with respect to its like product definition,
- (b) In respect of the KTC's injury determination:
- (i) The KTC did not act inconsistently with Articles 3.1, 3.2 and 3.4 of the Agreement with respect to its price analysis,
 - (ii) The KTC acted inconsistently with Article 3.4 of the Agreement with respect to its assessment of the impact of dumped imports on the domestic industry,

- (iii) The KTC did not act inconsistently with Articles 3.4 and 3.5 of the Agreement with regard to the treatment of the dumped imports made by the Korean producers from the subject countries,
 - (iv) The KTC did not act inconsistently with Articles 6.2, 6.4 and 12.2 of the Agreement with respect to disclosing the results of the technical test carried out by the Korean Agency for Technology and Standards and those of a customer survey, and did not act inconsistently with Articles 6.4 and 6.9 of the Agreement with respect to disclosing its determination concerning the effect of the prices of dumped imports on the Korean industry,
 - (v) The KTC acted inconsistently with Article 6.5 of the Agreement by not requiring that good cause for confidential treatment be shown with respect to the information submitted in the application which was by nature confidential,
- (c) We decline to address the following claims on the grounds of judicial economy:
- (i) Alleged violation by the KTC of Article 5.8 of the Agreement by not terminating the investigation *vis-à-vis* Indah Kiat,
 - (ii) Alleged violation by the KTC of its disclosure obligations under Article 6.9 of the Agreement with respect to its dumping determinations,
 - (iii) Alleged violation by the KTC of Articles 3.1 and 3.5 of the Agreement with respect to its causation analysis,
 - (iv) Alleged violation by the KTC of Articles 3.1, 3.2 and 3.5 of the Agreement by treating imports from Indah Kiat as dumped imports,
 - (v) Alleged violation by the KTC of Article 6.9 of the Agreement with respect to disclosing the results of the technical test carried out by the Korean Agency for Technology and Standards and those of a customer survey,
 - (vi) Alleged consequent violation by the KTC of Article 1 of the Agreement stemming from the violations of the provisions of the Agreement cited in connection with Indonesia's specific claims,
- (d) We do not address the following claims because they have been withdrawn by Indonesia:
- (i) Alleged violation by the KTC of Articles 6.1, 6.4 and 6.9 of the Agreement by not giving the Indonesian exporters an opportunity to see, and comment on, the data relating to the first half of 2003,
 - (ii) Alleged violation by the KTC of Articles 6.4 and 6.9 of the Agreement by failing to inform the Indonesian exporters of its decision to change the basis of its injury determination from threat to material injury,
- (e) We do not address Indonesia's claim under Articles 3.1 and 3.2 of the Agreement regarding the KTC's analysis of the volume of dumped imports as we have found that claim not to be within our terms of reference.

8.2 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 of benefits under that agreement. Accordingly, we conclude that, to the extent Korea has acted inconsistently with the provisions of the Anti-dumping Agreement, it has nullified or impaired benefits accruing to Indonesia under that agreement. We therefore recommend that the Dispute Settlement Body request Korea to bring its measures mentioned in paragraph 8.1(a)(v), 8.1(a)(vi), 8.1(a)(ix), 8.1(a)(x), 8.1(b)(ii) and 8.1(b)(v) above into conformity with its obligations under the WTO Agreement.

IX. ARTICLE 19.1 OF THE DSU

9.1 Indonesia requests that we use our discretion under article 19.1 of the DSU to suggest that Korea implement our recommendation in this case by revoking the measure at issue. Korea did not specifically respond to this request.

9.2 We note that Article 19.1 of the DSU provides:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." (footnotes omitted)

9.3 We note that the general rule under Article 19.1 of the DSU with respect to the recommendations of WTO panels is to recommend that the Member concerned bring its measure into conformity with the relevant provisions of the covered agreements at issue. Exceptionally, Article 19.1 also authorizes the panels to suggest ways in which such recommendations could be implemented.

9.4 Taking into account the circumstances of the proceedings at issue, we see no reason to depart from the general rule and make a suggestion regarding implementation. We therefore decline Indonesia's request.

ANNEX A

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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ANNEX A

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS312/2
20 August 2004

(04-3485)

Original: English

KOREA – ANTI-DUMPING DUTIES ON IMPORTS OF CERTAIN PAPER FROM INDONESIA

Request for the Establishment of a Panel by Indonesia

The following communication, dated 16 August 2004, from the delegation of Indonesia to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 4 June 2004, the Republic of Indonesia ("Indonesia") requested consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") regarding the imposition by the Republic of Korea ("Korea") of definitive anti-dumping duties on imports of business information paper and uncoated wood-free printing paper from Indonesia¹ and certain aspects of the investigation leading thereto. The request was circulated on 10 June 2004 as document WT/DS312/1, G/L/681, G/ADP/D54/1. Korea and Indonesia held consultations in Geneva on 7 July 2004. However, consultations have failed to settle the dispute.

Article 1 of the AD Agreement requires that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated* and conducted in accordance with the provisions of [the AD] Agreement" [*footnote omitted]. Indonesia considers that Korea's definitive anti-dumping duties on imports of business information paper and uncoated wood-free printing paper from Indonesia do not meet these requirements. In this regard, Indonesia notes the following:

¹ Imposed under Resolution No. 2003-22, issued by Korea Trade Commission dated 24 September 2003.

Relating primarily to the initiation of the investigation

1. Korea initiated the investigation notwithstanding its failure to make a determination that the application had been made by or on behalf of the domestic industry. This is inconsistent with Article 5.4 of the AD Agreement.
2. Korea's determination that business information paper and uncoated wood-free printing paper are like products is inconsistent with the definition of "like products" as set out in Article 2.6 of the AD Agreement. Consequently, the definition of "domestic industry" utilised by Korea in its determination that the application has been made by or on behalf of the "domestic industry" is flawed. For this reason, Korea's initiation of the investigation is inconsistent with Article 5.4 of the AD Agreement.
3. Korea initiated the investigation notwithstanding its failure to make an objective examination of the participation of the applicant Hansol Paper Co. ("Hansol") in the definition of "domestic industry", despite Hansol's significant volume of imports from Indonesia during the period of investigation for injury. This is inconsistent with Article 3.1 and Article 4.1(i) of the AD Agreement.
4. Korea initiated the investigation notwithstanding the failure of the applicants to include in the application sufficient and adequate evidence of dumping, injury, and causal link between the alleged dumped imports and the injury, particularly in respect of:
 - (i) the occurrence of certain injury factors, *inter alia*, market share, domestic prices, output, profits, ability to raise capital or investment, employment, productivity, actual and potential negative effects on cash flow, growth, and the magnitude of the margin of dumping,
 - (ii) the existence of causal link between the alleged dumped imports and injury, as the information and evidence on injury submitted by the applicants relate to a period of investigation (1999-2001) during which – except for the quarter October to December 2001 – there was no occurrence of dumping for the purpose of the investigation (according to the Notice of Initiation, the period of investigation for dumping was 1 October 2001 to 30 September 2002),In these circumstances, Korea's initiation of the investigation is inconsistent with Article 5.2 and Article 5.3 of the AD Agreement.
5. Korea initiated the investigation notwithstanding that the period for injury and the period for dumping overlapped only for a period of three months. Korea's failure to *simultaneously* consider the evidence of both dumping and injury in the decision to initiate the investigation is contrary to Article 5.7 of the AD Agreement.
6. Korea failed to provide in the Notice of Initiation any information regarding the factors on which the allegation of injury was based. This is inconsistent with Article 12.1.1(iv) of the AD Agreement.
7. Korea granted confidential treatment to information contained in the domestic industry's application and to supplementary information provided by the domestic industry without (i) requiring the applicants or the domestic industry to provide showing of good cause for such a treatment, (ii) requiring the applicants or the

domestic industry to furnish non-confidential summaries "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence", or (iii) any indication that the information could not be summarized and the reasons why summarization was not possible. The granting of such confidential treatment without requiring the showing of good cause is inconsistent with Article 6.5 of the AD Agreement. Furthermore, Korea's failure to require the furnishing of non-confidential summaries or any indication that that information could not be summarized and the reasons why summarization was not possible are contrary to Article 6.5, Article 6.5.1 and Article 6.5.2 of the AD Agreement.

Relating primarily to the conduct of the investigation

8. Korea requested information on a firm which was not subject to the investigation – *i.e.* PT Cakrawala Mega Indah ("CMI") - without having obtained the agreement of that firm, and without having notified the Government of Indonesia of such request in the context of an on-the-spot investigation. This is inconsistent with Article 6.7 and Annex I of the AD Agreement.
9. Korea did not consider and accept information related to the sales of CMI and the financial statements of CMI, notwithstanding that they were (i) verifiable, (ii) appropriately submitted and could be used without undue difficulties, and (iii) submitted in a timely fashion. This is inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II of the AD Agreement.
10. Korea failed to explain the reasons for its non-acceptance of the information related to the sales of CMI and the financial statements of CMI. This is inconsistent with Article 6.8 and paragraph 6 of Annex II of the AD Agreement.

Relating primarily to the preliminary determination

11. Korea's determination that business information paper and uncoated wood-free printing paper are like products is inconsistent with the definition of "like products" as set out in Article 2.6 of the AD Agreement. Furthermore, Korea's failure to explain this conclusion in sufficient detail is contrary to the requirements set out in Article 12.2 of the AD Agreement.
12. Korea's resort to constructed value as the basis for determining normal value for PT Pindo Deli and PT Indah Kiat is inconsistent with Article VI:1 and Article VI:2 of GATT and Article 2.1 and Article 2.2 of the AD Agreement.
13. Korea's construction of the normal value in respect of PT Pindo Deli and PT Indah Kiat without taking into consideration actual data from CMI pertaining to sales in the ordinary course of trade of the like products subject to investigation, notwithstanding the fact that all information requested by Korea was supplied by the exporters in time, is inconsistent with Article 2.2, Article 2.2.1.1, and Article 2.2.2 of the AD Agreement.
14. Korea's resort to best information available in order to construct administrative, selling and general costs of PT Pindo Deli and PT Indah Kiat is inconsistent with Article 6.8 and paragraphs 3, 5 and 6 of Annex II of the AD Agreement.
15. Korea failed to provide in sufficient detail findings and conclusions reached on the determination of normal value. In particular, Korea failed to provide details of the

amounts for, and methods and evidence used in determining, cost of production, administrative, selling and general costs, financial expenses and profits. This is inconsistent with Article 12.2 of the AD Agreement.

16. Korea's failure to make a fair comparison between the export price and the constructed normal value of PT Pindo Deli and PT Indah Kiat *inter alia*, by failing to take into account that domestic sales were made through an intermediary – CMI – while export sales were made directly to consumers, is inconsistent with Article VI:1 and Article VI:2 of GATT and Article 2.1 and Article 2.4 of the AD Agreement.
17. For exporters who did not submit information to Korea (*i.e.*, PT Tjiwi Kimia and unidentified exporters of Indonesia), Korea arbitrarily applied the "best information available" to determine the dumping margin for Tjiwi Kimia. This is inconsistent with the provisions of Article 6.8 and paragraph 7 of Annex II of the AD Agreement.
18. Korea failed to immediately terminate the investigation in respect of PT Indah Kiat notwithstanding its determination that the margin of dumping for PT Indah Kiat was *de minimis*. This is inconsistent with Article 5.8 of the AD Agreement.

Relating primarily to the final determination

19. Korea's determination that business information paper and uncoated wood-free printing paper are like products is inconsistent with the definition of "like products" as set out in Article 2.6 of the AD Agreement. Furthermore, Korea's failure to explain this determination in sufficient detail, notwithstanding the views expressed by Indonesian exporters that business information paper and uncoated wood-free printing paper are not like products, is contrary to Article 12.2 of the AD Agreement.
20. Korea's failure to determine individual margins of dumping for PT Indah Kiat, PT Pindo Deli and PT Tjiwi Kimia is contrary to Article 6.10 of the AD Agreement. In the light of this claim, the consequent levy of an anti-dumping duty in excess of individual margins of dumping, if any, is inconsistent with the requirements of Article VI:2 of GATT and Article 9.3 of the AD Agreement.
21. Korea's determination of a single normal value, export price and dumping margin for PT Indah Kiat, PT Pindo Deli and PT Tjiwi Kimia is inconsistent with Articles 2.1, 2.2 and 2.4 of the AD Agreement.
22. Korea's resort to constructed value as the basis for determining normal value for PT Pindo Deli and PT Indah Kiat is inconsistent with Article VI:1 and Article VI:2 of GATT and Article 2.1 and Article 2.2 of the AD Agreement.
23. Korea's construction of the normal value in respect of PT Pindo Deli and PT Indah Kiat without taking into consideration actual data, including data pertaining to sales of CMI in the ordinary course of trade of the like products subject to investigation and data regarding the costs attributable to CMI and without following any of the methods mandated under Article 2.2.2 of the AD Agreement is inconsistent with Article 2.2, Article 2.2.1.1, and Article 2.2.2 of the AD Agreement.
24. Korea's resort to best information available in order to construct administrative, selling and general costs of PT Pindo Deli and PT Indah Kiat is inconsistent with Article 6.8 and paragraphs 3, 5, 6 and 7 of Annex II of the AD Agreement.

25. Korea failed to provide in sufficient detail findings and conclusions reached on the determination of normal value. In particular, Korea failed to provide details of the amounts for, and methods and evidence used in determining, cost of production, administrative, selling and general costs, financial expenses and profits. This is inconsistent with Article 12.2 of the AD Agreement.
26. Korea's determination of normal value for PT Tjiwi Kimia is inconsistent with Article 2.1, and Article 6.8, paragraphs 3, 5, 6 and 7 of Annex II of the AD Agreement.
27. Korea's failure to make a fair comparison between the export price and the constructed normal value in respect of PT Pindo Deli, PT Indah Kiat and Tjiwi Kimia, *inter alia*, by failing to take into account that domestic sales were made through an intermediary – CMI - while export sales were made directly to consumers and by failing to make a fair comparison at the same level of trade is contrary to Article VI:1 and Article VI:2 of GATT and Article 2.1 and Article 2.4 of the AD Agreement.
28. Korea's incorrect classification of imports from PT Indah Kiat as dumped imports as a result of treating PT Indah Kiat, PT Pindo Deli and PT Tjiwi Kimia as a single economic unit, as well as Korea's incorrect classification of *all* imports from Indonesia and China, including imports that occurred outside the period of investigation for dumping, as dumped imports and the consequent incorrect determination of injury and causal link between the alleged dumped imports and injury is inconsistent with Article 3.1, Article 3.2, Article 3.4, Article 3.5 and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT.
29. As a result of the incorrect characterization of business information paper and uncoated wood-free paper as like products, Korea's incorrect assessment of the impact of the dumped imports on the domestic industry is inconsistent with Article 3.1, Article 3.4, Article 3.5 and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT.
30. Korea's failure to adequately evaluate the effect of the dumped imports on prices in the domestic market for like products is inconsistent with Article 3.1, Article 3.2, Article 3.5 and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT.
31. Korea's failure to evaluate all relevant economic factors and indices having a bearing on the state of the domestic industry is contrary to Article 3.1, Article 3.4, Article 3.5 and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT.
32. Korea's failure to objectively examine the participation of the domestic industry in the importation of the allegedly dumped imports and Korea's erroneous attribution of the injury that occurred in the first half of 2003 to dumped imports that entered the Korean market 3-15 months earlier is inconsistent with the requirements set out in Article 3.1, Article 3.2, Article 3.4, Article 3.5, and Article 3.7 of the AD Agreement, and Article VI:1 and Article VI:6 of GATT.
33. In relation to further information provided by the domestic industry concerning the domestic industry's performance up to first half of 2003, Korea's denial of access to such information by not making it available to the other interested parties in a timely manner or by not allowing other interested parties to see it is inconsistent with Article 6.1.2 and Article 6.4 and Article 6.9 of the AD Agreement. Furthermore, Korea's failure to inform the Indonesian exporters of the essential facts relating to

injury before the final determination was made is inconsistent with Article 6.9 of the AD Agreement.

In Indonesia's view, the foregoing cannot be reconciled with Article VI of the GATT, Article 1 of the AD Agreement, and the specific provisions cited above. Therefore, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT, and Articles 17.4 and 17.5 of the AD Agreement, Indonesia hereby requests the Dispute Settlement Body to establish a panel to examine the matter described above.
