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KOREA – ANTI-DUMPING DUTIES ON IMPORTS OF CERTAIN PAPER FROM INDONESIA

Recourse to Article 21.5 of the DSU by Indonesia

Report of the Panel

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I. INTRODUCTION

1.1 On 22 December 2006, Indonesia requested the establishment of a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") concerning Korea's alleged failure to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in the dispute *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*. At its meeting on 23 January 2007, the DSB referred this dispute to the original panel, if possible, in accordance with Article 21.5 of the DSU, to examine the matter referred to the DSB by Indonesia in document WT/DS312/9. The terms of reference are the following:

> To examine, in light of the relevant provisions of the covered agreements cited by Indonesia in document WT/DS312/9, 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.

1.2 On 5 February 2007, the Panel was composed as follows:

Chairman: Mr. Ole Lundby

Members: Ms Deborah Milstein
Ms Leane Naidin

1.3 China, the European Communities, Japan, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM"), and the United States reserved their third party rights.

1.4 The Panel met with the Parties on 24-25 April 2007. It met with the Third Parties on 25 April 2007.

II. FACTUAL ASPECTS

2.1 This dispute concerns the implementation by Korea of the DSB recommendations and rulings in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*.

2.2 The original anti-dumping investigation on "business information paper and wood-free printing paper" from Indonesia was initiated on 14 November 2002 and completed on 24 September 2003 with the imposition of anti-dumping duties of 8.22 per cent for Indah Kiat, Pindo Deli and Tjiwi Kimia, three paper producers in the Sinar Mas Group from Indonesia, and 2.80 per cent for another Indonesian exporter, April Fine. The Korean Trade Commission ("KTC") also imposed an "all others" rate of 2.80 per cent. The margins for Indah Kiat and Pindo Deli were based on constructed normal values. Since the verification of data pertaining to PT Cakrawala Mega Indah ("CMI"), the trading company[1] that sold in Indonesia the subject product produced by Indah Kiat and Pindo Deli, was not allowed, the KTC calculated CMI's costs on the basis of facts available as provided for under Article 6.8 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement" or "Agreement"). The KTC calculated all elements of CMI's selling, general and administrative ("SG&A") expenses except interest on the basis of the data pertaining to April Fine, another trading company subject to the same

[1] We note that the Parties have diverging views as to the exact scope of CMI's business. Our references to CMI throughout this report as "the trading company" that sold the subject product produced by Indah Kiat and Pindo Deli are without prejudice to our assessment of the KTC's finding on this issue found elsewhere in this report.

investigation, and its interest expenses[2] on the basis of the data pertaining to PT Riau Andalan Kertas ("RAK"), subsidiary of April Fine and subject to the same investigation as a producer.

2.3 In the original panel proceedings, Indonesia raised claims regarding the KTC's dumping and injury determinations and certain procedural aspects of the investigation. We concluded, *inter alia*, that by basing CMI's interest expenses on the data pertaining to RAK without an adequate explanation as to why interest expenses were treated differently from the rest of CMI's SG&A expenses which were based on April Fine's data, the KTC acted inconsistently with its obligation under paragraph 7 of Annex II of the Agreement to exercise special circumspection in the use of information from a secondary source. We also found the KTC's examination of the impact of dumped imports on the domestic industry to be inconsistent with Article 3.4 of the Agreement. Finally, we found that the KTC violated the procedural obligations set forth in paragraphs 4, 5 and 6 of Article 6 of the Agreement. The original panel report was adopted by the DSB on 28 November 2005. Both Parties agreed that Korea would have until 28 July 2006 to implement the DSB recommendations and rulings.[3]

2.4 The KTC carried out a proceeding in order to implement the DSB recommendations and rulings. In these implementation proceedings, the KTC made, among others, a re-determination of dumping for Indah Kiat and Pindo Deli. The KTC sent its Draft Dumping Re-determination to the Sinar Mas Group on 23 May 2006 and invited it to submit its comments by 6 June 2006. The Sinar Mas Group submitted its comments on the Draft Dumping Re-determination on 6 June 2006. The Sinar Mas Group submitted four pieces of evidence along with its comments: CMI's income statement, CMI's financial statements for 2001 and 2002, a legal opinion to the effect that Indonesian law does not require CMI to submit its financial statements for auditing, and a legal opinion regarding the scope of CMI's business. In the same letter, the Sinar Mas Group also sought to access information used in the KTC's Draft Dumping Re-determination and to comment on the assessment of the impact of dumped imports on the Korean domestic industry. On 13 June 2006, the KTC disclosed the requested information regarding its dumping re-determination to the Sinar Mas Group. On 16 June 2006, the Sinar Mas Group responded, arguing that the information used by the KTC was not appropriate. In its final Re-determination, the KTC decided that the [BCI][4] per cent interest rate used for CMI on the basis of RAK's data was reasonable and consistent with the corroborating information. It therefore calculated the same margins of dumping for Indah Kiat and Pindo Deli. The KTC also carried out a new analysis of the impact of dumped imports on the Korean industry, based on the same data collected in the original investigation. The KTC's Implementation Report which contained its final dumping and injury re-determinations was published in the Korean Official Gazette dated 27 July 2006.

2.5 Not persuaded about the consistency with Korea's WTO obligations of the KTC's Re-determination, Indonesia requested to hold consultations with Korea.[5] Consultations were held on 15 November 2006 but did not yield a mutually-satisfactory solution. Indonesia requested the establishment of a panel to review the consistency with the Agreement of the measure taken by Korea to implement the DSB recommendations and rulings.[6] The Panel was established on 23 January 2007 with standard terms of reference.

2.6 Korea requested the Panel to rule that information that had been received by the KTC on a confidential basis, under Article 6.5 of the Anti-Dumping Agreement, from the interested parties in the original anti-dumping investigation at issue should not be disclosed to Indonesian company officials even if these officials were made part of the delegation that will represent Indonesia in these compliance proceedings. Following the exchange of views between the Parties and one Third Party,

[2] The terms "interest expenses" and "financial expenses" are used interchangeably in this report.
[3] WT/DS312/6.
[4] Business Confidential Information.
[5] WT/DS312/8.
[6] WT/DS312/9.

the European Communities, the Panel adopted additional working procedures for the protection of such business confidential information and communicated them to the Parties and the Third Parties through its letter dated 3 April 2007.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. INDONESIA

3.1 Indonesia requests the Panel to find that:

(a) The KTC acted inconsistently with Articles 2.2 and 2.2.2 of the Agreement as it failed to impute a "reasonable amount for administrative, selling and general costs" in its calculation of the constructed value of Indah Kiat and Pindo Deli;

(b) The KTC acted inconsistently with its obligations to make a fair comparison under Article 2.4 of the Agreement and to make a proper determination of dumping under Article 2.1 of the Agreement by using a constructed normal value for the Sinar Mas Group that was determined in a manner inconsistent with Articles 2.2 and 2.2.2 of the Agreement;

(c) The KTC acted inconsistently with Article 6.8 and Annex II to the Agreement, in particular paragraph 7 thereof, by utilising information sourced from RAK rather than April Fine Paper Trading to calculate the "Reseller Interest Expense" component of Indah Kiat and Pindo Deli's constructed values;

(d) The KTC acted inconsistently with Articles 6.1, 6.2, 6.4, 6.6, 6.8 and Annex II of the Agreement by ignoring undisputed facts from the prior investigation, re-opening the record on the overall nature of CMI's activities while failing to provide the Sinar Mas Group with any opportunity to supply relevant information, failing to satisfy itself as to the accuracy of information actually provided by the Sinar Mas Group, rejecting information actually submitted by the Sinar Mas Group and improperly resorting to unreliable secondary information in arriving at its findings;

(e) The KTC failed to comply with its obligations under Articles 6.1, 6.2, 6.4, 6.5 and 6.9 of the Anti-Dumping Agreement, by failing to disclose the factual basis for its injury redetermination and failing to provide the Indonesian exporters with any opportunity to provide their views;

(f) The KTC acted inconsistently with Articles 6.1, 6.2 and 6.4 of the Anti-Dumping Agreement, by failing to provide copies of all information submitted by interested parties to the concerned Indonesian exporters. To the extent that this information was designated as confidential information, the KTC also failed to comply with its obligations under Articles 6.1, 6.2, 6.4 and 6.5 of the Anti-Dumping Agreement by failing to require a party submitting confidential information to show good cause for confidential treatment or to submit a nonconfidential summary thereof or an explanation as to why such summarization was not possible.

3.2 Indonesia argues that Korea has also failed to respect its obligation under Article 1 of the Anti-Dumping Agreement to ensure that an anti-dumping measure is applied only under the circumstances provided for in Article VI of the *General Agreement on Tariffs and Trade* ("GATT") 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement.

B. KOREA

3.3 Korea requests the Panel to reject Indonesia's claims in their entirety and to find that Korea has properly implemented the DSB recommendations and rulings at issue.

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, as well as their answers to the Panel's and each others' questions. The Parties' arguments as presented in their submissions are summarized in this section.

A. FIRST WRITTEN SUBMISSION OF INDONESIA

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

1. Introduction

4.3 In this dispute, Indonesia is challenging various aspects of the measures taken by the Korea to comply with the original panel's findings and the recommendations and rulings adopted by the DSB on 28 November 2005 in *Korea – Anti-dumping Duties on Certain Paper Products from Indonesia.*

2. Factual Background

4.4 In its original determination, in determining the constructed normal value for Indah Kiat and Pindo Deli, the KTC included amounts purporting to represent the expenses incurred by CMI in reselling the investigated product. The KTC included these amounts in order to capture the total selling expenses involved in producing and selling the product under investigation to unrelated distributors and end-users in the Indonesian market. The KTC relied on Indah Kiat's and Pindo Deli's own data to determine the costs of production, including those companies' own SG&A expenses. However, because CMI's own data was considered not to be usable, the KTC used facts available within the meaning of Article 6.8 of the Agreement to determine CMI's selling expenses.

4.5 To determine an amount for "Reseller SG&A Expense", the KTC relied on secondary information sourced from April Fine Paper Trading, an Indonesian trading company that sold the investigated product both in Indonesia and in export markets. For one particular element of CMI's SG&A expenses, however, the KTC used a different approach. To determine an amount for "Reseller Interest Expense", the KTC relied on secondary information sourced from PT. Riau Andalan Kertas ("RAK"), an Indonesian manufacturing company that manufactured the investigated product in Indonesia and was affiliated with April Fine Paper Trading.

4.6 In its final report, the original panel upheld Indonesia's claim that the KTC failed to exercise special circumspection in its use of secondary information to calculate CMI's interest expenses. However, the Panel did not rule on Indonesia's claims under Article 2 of the Agreement.

4.7 Following the DSB's adoption of the original panel's report on 28 November 2005, Indonesia wrote to Korea on 8 December 2005 requesting that Korea implement the panel's findings in a cooperative manner. Indonesia explained that if the KTC were to use the interest expenses of April Fine Paper Trading, a trading company "which carried out activities similar to those of CMI" to calculate CMI's interest expenses, it would find *de minimis* dumping margins for Indah Kiat and Pindo Deli.

4.8 On 23 May 2006, the KTC issued the Draft Dumping Re-determination, which described the manner in which the KTC intended to implement the Panel's rulings regarding the KTC's dumping determinations. The Draft Dumping Re-determination left the KTC's original calculations of

constructed value for Indah Kiat and Pindo Deli essentially unchanged. The KTC continued to use the same information sourced from RAK to calculate CMI's interest expenses.

4.9 On 6 June 2006, the Sinar Mas Group provided its comments on the draft report to the KTC. On 13 June 2006, the KTC forwarded a set of source documents to the Sinar Mas Group. The Sinar Mas Group commented on these source documents in its letter of 16 June 2006.

4.10 On 27 July 2006, the KTC published its Implementation Report in the Korean Gazette. Attached to the Implementation Report were two documents, the KTC's Amended Injury Determination and the final version of the KTC's Dumping Re-determination. In the Dumping Re-determination, the KTC continued to rely on information sourced from RAK to calculate CMI's interest expenses. Part III.1 of the Dumping Re-determination, which purports to implement these rulings, contains the entirety of the KTC's reasoning in support for its decision to use secondary information sourced from RAK to calculate the relevant financial expenses of CMI. The KTC's reasoning in part III.1 is not entirely clear but appears to be based on three grounds:[7]

(a) Even assuming that CMI carried out only trading activities, it *may* incur financial expenses on account of loans taken:

(i) To finance the purchase of *its own* buildings, warehouses and goods, maintenance of inventories, the purchase of company supplies and equipment, wages for employees, overhead expenses, etc.[8]

(ii) To finance investment in manufacturing facilities by *other* related manufacturing companies within the same group when certain specific circumstances prevail.[9]

(b) There "was no good reason to assume that CMI was a trading company without a manufacturing function".[10] The KTC took the view that there was no material that could be used to determine "whether CMI is merely a trading company only with a selling function or a manufacturing company"[11] and relied on secondary information regarding the activities of CMI obtained from an Indonesian company called [BCI].[12]

(c) The information sourced from RAK was corroborated by other information introduced onto the record during the implementation process. This corroborative material consisted of:

(i) Information sourced from DIS regarding CMI's alleged interest expenses in the year 2002.[13]

(ii) Information regarding the interest expenses of four Indonesian paper manufacturing companies,[14] three Indonesian companies operating in sectors

[7] Indonesia notes that Korea has not yet made available an official translation of the Implementation Report. Accordingly, Indonesia reserves the right to expand its arguments on receipt of Korea's official translation.

[8] Dumping Redetermination, Exhibit IDN-11(b), p. 3.

[9] *Ibid*, p.4.

[10] *Ibid*, pp.4-5.

[11] *Ibid*, p.4.

[12] *Ibid*, p.4.

[13] *Ibid*, p.5.

[14] *Ibid*, p.5.

"other than the paper industry"[15], and five Korean companies "doing wholesale or agency business".[16]

4.11 The KTC states that grounds (a) and (b) mandate the conclusion that the KTC is entitled to assume that "CMI incurred some financial expenses".[17]

4.12 In the Injury Re-determination, the KTC continued to find that the imports under investigation had caused injury to the Korean industry, based on a revised analysis within the meaning of Articles 3.4 and 3.5 of the Agreement of the impact of the imports under investigation on the domestic industry. The KTC did not provide any opportunity to the Indonesian exporters to comment on these matters.

3. Legal Argument

(a) Claims Arising from the Determination of Dumping

(i) The KTC failed to calculate properly a "reasonable amount for administrative, selling and general costs" "pertaining to production and sales" of the investigated product within the meaning of Articles 2.1, 2.2, 2.2.2, and 2.4 of the Agreement

4.13 The issue before the Panel is not whether CMI could have any interest expenses, but how, within the meaning of Articles 2.2 and 2.2.2, the reasonable amount of any such expenses pertaining to the production and sale of the investigated product is to be determined.

4.14 Under Articles 2.2 and 2.2.2, this determination would be based on the company's own data. In this case, CMI's data was not accepted and the KTC used facts available within the meaning of Article 6.8 and Annex II. It is important to note, however, that Article 2.2 continues to apply and to govern the determination of the constructed value, even in situations where the investigating authority has recourse to facts available under Article 6.8 as the source of some of the data to be included in the constructed normal value.

4.15 In this case, the KTC did not follow the rules of Articles 2.2 and 2.2.2 in determining the cost of production and reasonable amounts for SG&A expenses pertaining to the production and sale of the investigated product. All of the interest expenses pertaining to the production of the investigated product were included in the SG&A costs of Indah Kiat and Pindo Deli. All that remained was for the KTC to add the costs of selling the investigated product.

4.16 The KTC properly used the expenses of April Fine Paper Trading, a company with the same types of activities as CMI, as the proxy for all of the elements of CMI's SG&A expenses but one. To derive the costs for that one element (interest expenses), however, the KTC used costs of *producing* the investigated product incurred by RAK. Because it had already captured any interest expenses associated with *producing* the goods by using production-related interest expenses as a proxy for CMI's selling-related interest expenses, the KTC thereby overstated the *selling*-related interest expenses to be included in the constructed normal value. Or, put another way, the KTC effectively double-counted a production-related expense element in its total calculation. Thus, the KTC did not make an objective and unbiased determination of CMI's interest expenses and acted inconsistently with its obligations under Articles 2.2 and 2.2.2 to use only a reasonable amount for SG&A expenses and to use only amounts that reasonably reflect the costs pertaining to producing and selling the investigated product.

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[15] *Ibid*, p.6.
[16] *Ibid*, pp.6-7.
[17] *Ibid*, pp. 4-5.

4.17 Accordingly, the Panel should find that the KTC acted inconsistently with Articles 2.2 and 2.2.2 in its determination of the constructed normal value for Indah Kiat and Pindo Deli. By calculating a constructed normal value in excess of what is permitted under Article 2.2 of the Agreement, the KTC also failed to make a fair comparison between normal value and export price within the meaning of Article 2.4 and failed to make a proper determination of dumping within the meaning of Article 2.1 of the Agreement.

(ii) The KTC failed to use the best information available and failed to use special circumspection in its use of facts available as required by Article 6.8 and annex II of the Agreement

4.18 The only aspect of the KTC's determination of the constructed normal value within the meaning of Article 2.2 of the Agreement with respect to which the KTC was required to have recourse to facts available was the *amount* of CMI's *selling expenses*. All other elements of the constructed normal value were duly determined and are not in dispute. The *only* relevant "missing information" to which Article 6.8 and Annex II applies in this case is the amount of financial expenses incurred by CMI as a result of its activity of reselling the investigated product or, to use the words of the original panel, the amount of "financial expenses stemming from its selling activities".

4.19 For practical purposes, in selecting the best information available to represent CMI's financial activities stemming from its selling activities, the KTC effectively had to choose between two sources of secondary information – the production company RAK and the trading company April Fine Paper Trading. The ratio of financial expenses to cost of investigated product sold for RAK is [BCI] per cent. The corresponding ratio for April Fine Paper Trading is [BCI] per cent. Even though it used April Fine Paper Trading as the source for all other selling expenses, the KTC chose to use RAK as the proxy for CMI's interest expenses.

4.20 This choice was flatly inconsistent with Article 6.8 and Annex II of the Agreement. Indonesia submits that an objective and unbiased investigating authority would be compelled to conclude that the RAK information actually used by the KTC as the secondary source for CMI's selling expenses is not only far from being the "best fitting" or "most appropriate" secondary information available, but is, to quote Korea, "disproportionate" and therefore not usable for this purpose.

4.21 The task before the KTC was to arrive at the level of interest expenses associated with the activity of reselling the product under investigation in Indonesia. However, the RAK interest expense figures represent the level of interest expenses associated with the activity of manufacturing the investigated product. In contrast, the information relating to April Fine Paper Trading's financial expenses *does* relate to the activity of reselling the investigated product in the Indonesian market. Therefore, it is presumptively far more appropriate for the purposes of replacing the missing information.

4.22 Indeed, during the original panel proceedings, Korea itself recognised that it could not use "the overall SG&A expenses shown in the income statement of the April Fine subsidiary that bore the costs for manufacture and sales of the subject merchandise [i.e., RAK]," because "this SG&A expense rate was *disproportionate* to the expenses incurred by a company operating at the level of CMI".[18]

4.23 By failing even to consider the comparative merits of the April Fine Paper Trading and RAK data, the KTC completely failed to respond to a critical concern of the original panel – the absence of a justification for the KTC's preference for the RAK data over the April Fine Paper Trading data.

[18] Korea's Rebuttal Submission to the Original Panel, Exhibit IDN-20(b), para 63. See also Korea's Responses to the Original Panel's Questions following the First Meeting, Exhibit IDN-20(c), paras. 31, 51, 110; Korea's Opening Statement at the Second Meeting of the Original Panel, Exhibit IDN-20(d), para. 142.

4.24 Rather than addressing the April Fine Paper Trading data and the concerns of the original panel, the KTC instead devoted its efforts to finding new reasons why it was appropriate to use RAK data. The KTC's reasoning ignores the established facts and fails to provide any coherent or adequate justification for the KTC's choice of secondary information.

(iii) The possibility that a trading company can have financial expenses provides no basis for using the RAK data instead of the April Fine Paper Trading data

4.25 The undisputed fact that CMI *could* have some financial expenses does not provide a ground on which an objective and unbiased authority could prefer RAK data over April Fine Paper Trading data. This undisputed fact does not, in itself, mean that CMI *necessarily* had a particular amount of interest expense to resell the investigated products or, indeed, say anything about the likely *amount* of CMI's interest expenses in a given period. Moreover, it does not follow from this fact that the RAK data is more appropriate than the April Fine Paper Trading data for the purposes of estimating the amount of CMI's financial expenses. Like CMI, April Fine Paper Trading *could* have had interest expenses stemming from its selling activities. The KTC cannot reasonably reject April Fine Paper Trading as a secondary source just because the amount of those expenses in the period of investigation turned out to be [BCI] – just as the Indonesian exporters could not have complained about the use of April Fine Paper Trading as a proxy had April Fine Paper Trading instead incurred interest expenses of, for example, 0.5 per cent during the period of investigation.

4.26 Indonesia also notes that the KTC improperly implies that any and all interest expenses incurred by CMI – even related to supposed financing of *other* manufacturing activities by *other* companies – could legitimately be included in the constructed normal value of the investigated product. Article 2.2 of the Agreement as interpreted by the panel in *Egypt – Rebar*, makes it abundantly clear that only cost items that are reasonably related to the production and sale of the investigated product can be included in calculations of constructed value.

(iv) The KTC has no grounds to assume that CMI incurred anything other than selling expenses pertaining to the investigated product

4.27 The second ground on which the KTC relies to justify its use of RAK data is that the KTC need not assume that CMI was a trading company that incurred only selling expenses pertaining to the production and sale of the investigated product. To be precise, the KTC concluded that "the argument of Pindo Deli and Indah Kiat and [sic.] CMI is a company with a sales function only was groundless" and that "there was no good reason to assume that CMI was a trading company without a manufacturing function".

4.28 It is unclear on what basis the KTC states CMI may not have been only a trading company when that fact was previously undisputed. It is also unclear what implications the KTC seeks to draw from this statement and precisely how those implications affect the choice between the RAK data and the April Fine Paper Trading data.

4.29 However, this statement is without any support in the evidence on record and cannot be used to justify the KTC's choice of facts available. Any implication that CMI was involved in the manufacture of the investigated product is flatly contradicted by the factual findings of the original panel, Korea's own prior statements, and verified evidence on the record. Equally, it is abundantly clear from the factual findings of the original panel, Korea's submissions to the original panel and the KTC's determinations that the only activities that CMI carried out in relation to the investigated product were sales-related activities.

4.30 The KTC's statement is also unsustainable to the extent that it implies that CMI manufactured products *other than the product under investigation.*[19] The only material on record that contains any reference to CMI manufacturing any goods is the DIS Report. However, for a variety of reasons this Report cannot be considered as reliable evidence regarding the types of activities CMI conducted. Yet it constitutes the sole basis on which the KTC purported to depart from the fact, undisputed before the original panel, that CMI was a trading company which carried out resale activities.

(v) In any event, it is irrelevant whether CMI may have manufactured other products

4.31 In any case, even assuming that CMI was engaged in other manufacturing activities – pertaining to for example to pulp or any other product – it is abundantly clear that CMI carried out only selling activities relating to the product under investigation. Therefore, interest expenses arising from any manufacturing activities pertaining to other products could not properly be included in the determination of *selling* expenses relating to the product under investigation. Any such manufacturing-related interest expenses that CMI might have incurred would not have "stem[med] from CMI's selling activities". Instead, they would have stemmed from altogether different activities involving altogether different products. As such they would be simply irrelevant to the KTC's calculations of selling expenses pertaining to the product under investigation and could not be included in the KTC's calculations of constructed value. It is, therefore, irrelevant whether CMI may have manufactured other products and speculation to this effect cannot justify the KTC's use of RAK data as a proxy for CMI's selling expenses.

(vi) The KTC's efforts to check other sources do not validate its choice of secondary information

4.32 In Section III.1(3)B of the Redetermination, the KTC seeks to establish that the RAK data is a reliable proxy for CMI's selling expenses by comparing those data against financial expense data obtained from the DIS Report, four Indonesian companies operating in the Indonesian paper industry, three Indonesian companies operating in sectors "other than the paper industry", and five Korean companies "doing wholesale or agency business".

4.33 Because RAK's interest expenses were used to calculate interest expenses on selling activities in the Indonesian market, the only appropriate comparison that could validate the use of those expenses would be with the expenses incurred by companies which carried out activities similar to those carried out by CMI pertaining to the product under investigation. Unfortunately, the KTC failed to conduct such a comparison. The comparisons used by the KTC do not lend support to its choice of secondary information because the corroborative information employed does not reflect financial expenses pertaining to (i) the activity of reselling (ii) the product under investigation (iii) in the Indonesian market.

4.34 Indonesia requests that the Panel find that the best information available regarding CMI's selling expenses, including interest expenses, was April Fine Paper Trading's selling expenses, including interest expenses, and that by failing to use April Fine Paper Trading's interest expenses as the secondary source for CMI's interest expenses, the KTC acted inconsistently with Article 6.8 and Annex II of the Agreement.

[19] Indonesia notes that the KTC also appears to have improperly re-opened the record with respect to the issue of the nature of CMI's role in the production and sale of the investigated product.

(b) Claims Relating to Korea's Procedural Obligations

(i) The KTC acted inconsistently with Articles 6.1, 6.2, 6.4, 6.6, 6.8 and paragraphs 1,3,5,6, and 7 of Annex II to the Agreement in reconsidering the issue of CMI's activities based on a partial reopening of the record

4.35 During its implementation proceedings, the KTC decided to examine the issue of whether "CMI is a trading company purely conducting sales of articles". In addressing this issue, the KTC did not rely on the undisputed positive evidence from the original investigation or the findings of the original panel. Instead, the KTC relied on secondary material that was not on the record of the original investigation. It also decided to ignore certain material submitted by Indah Kiat and Pindo Deli to the KTC during the original investigation.

4.36 During the implementation process, the KTC gave no notice whatsoever to the Indonesian exporters that the KTC required additional information regarding the activities of CMI. This cannot be reconciled with its obligations under Article 6.1 of the Agreement. Similarly, the KTC's decision to reject information submitted by the Indonesian exporters on their own initiative during the implementation process, such as the Arifandhani Opinion and, indeed, the CMI financial statements is also inconsistent with Article 6.1 of the Agreement.

4.37 These actions were also inconsistent with the KTC's obligation under Article 6.2 to ensure that "throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests". By failing to inform the exporters that it was re-opening an issue that had not been in dispute in the original investigation or to request or even accept information from the exporters regarding that issue, the KTC failed to ensure that the exporters had a full opportunity for the defence of their interests. The failure to give the Indonesian exporters an opportunity to participate in this aspect of the KTC's redetermination also meant that the exporters were deprived of their right under Article 6.4 to timely opportunities to prepare submissions based on evidence relevant to the issue before the KTC.

4.38 To the extent that the KTC re-opened the record of its investigation, its failure to accept and satisfy itself as to the accuracy of the information submitted by the Sinar Mas Group in its 6 and 16 June Comments is also inconsistent with Article 6.6 of the Agreement.

4.39 To the extent that the KTC rejected in its Redetermination the information regarding CMI's functions on which its findings in the original determination were based, including, *inter alia*, the information set out on page 3 of Indah Kiat's Original Questionnaire Response and page 4 of Pindo Deli's Original Questionnaire Response, the KTC's actions cannot be justified under Article 6.8 read with paragraphs 3, 5, and 6 of Annex II to the Agreement. Equally, the KTC's rejection of the information submitted by the Indonesian exporters in their 6 June and 16 June Comments cannot be justified under Article 6.8 read with paragraphs 3, 5, and 6 of Annex II to the Agreement.

4.40 Furthermore, during the implementation proceedings, the KTC did not inform the Indonesian exporters that this information would be rejected and allow the Indonesian exporters an opportunity to provide further explanations within the meaning of paragraph 6 of Annex II. Finally, by its reliance on the flawed DIS Report, the KTC failed to act with special circumspection within the meaning of paragraph 7 of Annex II.

4.41 The KTC cannot have it both ways. Since there was no dispute that CMI was involved only in the resale of the product under investigation and the only issue before the KTC on implementation was the reasonable amount of one element of CMI's selling expenses, there was no need or basis for the KTC to re-visit the issue of CMI's overall activities. To the extent that it chose to do so in order to justify its use of RAK data, however, the KTC was obliged to proceed as if it were addressing this

issue for the first time and to conform with the requirements of Article 6 regarding the collection, analysis, and rejection of factual information.

4.42 Accordingly, the Panel should find that the KTC acted inconsistently with Articles 6.1, 6.2, 6.4, 6.6, 6.8 and Annex II of the Agreement to the extent that it re-opened the issue of CMI's activities without informing the exporters of the information it required, by ignoring undisputed facts from the prior investigation, re-opening the record on the overall nature of CMI's activities while failing to provide the Sinar Mas Group with any opportunity to supply relevant information, failing to satisfy itself as to the accuracy of information actually provided by the Sinar Mas Group, rejecting information actually submitted by the Sinar Mas Group and improperly resorting to unreliable secondary information in arriving at its findings.

(ii) The KTC failed to comply with Articles 6.1, 6.2, 6.4, 6.5 and 6.9 of the Agreement in making its re-determination of injury

4.43 The original panel concluded that 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. Accordingly, KTC was under an obligation to implement the original panel's findings by revising its original injury determination. In order to have a full opportunity to defend its interests during the injury redetermination, the Sinar Mas Group explicitly requested the KTC, in its 6 June Comments, to provide relevant information and essential facts related to the proposed injury determinations and to be provided with an adequate opportunity to defend its interests. Despite this explicit request, which was acknowledged by the KTC in its Dumping Redetermination, the KTC did not disclose the factual basis of its Injury Redetermination to the Indonesian exporters and did not provide them with any further opportunity to comment on the issue of injury.

4.44 Accordingly, Indonesia requests the Panel to find that KTC has acted inconsistently with Articles 6.2, 6.4, 6.5, and 6.9 of the Agreement by failing to disclose any information regarding its injury redetermination and by refusing the Indonesian exporters an opportunity to comment.

(iii) The KTC failed to comply with its obligations under Articles 6.1, 6.2, 6.4 and 6.5 of the Agreement

4.45 In its Dumping Redetermination, the KTC states that it conducted the Dumping and Injury Redetermination based on materials secured in the original investigation and without receiving or obtaining new submissions or materials from interested parties. However, Indonesia understands that the KTC received new materials and submissions related to the Redetermination from the Korean domestic industry or possibly other sources. Those documents have not been made available to Indonesia. Accordingly, Indonesia requests that Korea submit to the Panel all documents received from all other sources during the course of its implementation proceedings. Also, Indonesia requests the Panel to find that KTC acted inconsistently with its disclosure obligations under Articles 6.1, 6.2, 6.4 and 6.5 of the Agreement.

4. Request for Findings, Rulings and Recommendations

4.46 In the light of the considerations set out above, Indonesia requests the Panel to find that the KTC acted inconsistently with Articles 2.1, 2.2, 2.2.2, 2.4, 6.1, 6.2, 6.4, 6.5, 6.6, 6.8, 6.9 and paragraph 7 of Annex II to the Agreement.

4.47 Korea has also failed to respect its obligation under 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

4.48 It is incumbent on this compliance Panel to ensure that its findings leave no room for the KTC to avoid proper implementation, thereby prolonging yet again a WTO-inconsistent measure. Accordingly, Indonesia requests the Panel to exercise its authority under Article 19.1 of the DSU to suggest that on implementation, Korea should determine the dumping margins for Indah Kiat and Pindo Deli using the methodology and calculations set out in Indonesia's letter to Korea dated 8 December 2005 and should then terminate the measure with respect to those exporters.

B. FIRST WRITTEN SUBMISSION OF KOREA

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

1. Background

(a) The Initial Panel Decision

4.50 The Panel's decision of 14 July 2005 in this dispute (the "Initial Panel Decision") upheld virtually all aspects of the KTC's decision in its initial investigation of uncoated wood-free products from Indonesia. Among other things, the Panel held that all of the following were consistent with Korea's obligations under the WTO Agreements:

(i) The KTC decision to treat the three affiliated Indonesian producers of the "Sinar Mas Group" - Indah Kiat, Pindo Deli, and Tjiwi Kimia - as a single "exporter".

(ii) The KTC decision to resort to "facts available" to determine the "export price" and "normal value" for Tjiwi Kimia, in light of the refusal of that company to respond to the KTC's questionnaire.

(iii) The KTC's decision not to consider the purported CMI financial statements, which were submitted only after the verification (and long after the deadline for the Sinar Mas Group's response to the KTC's initial request for those documents).

(iv) The KTC decision to resort to "facts available" to determine the "normal value" for Indah Kiat and Pindo Deli, in light of the refusal of CMI to provide requested information and to allow a full verification of the limited information that was submitted.

(v) The KTC decision to base the normal value for Indah Kiat and Pindo Deli on a constructed normal value, in which the expenses for domestic sales operations were based on "facts available".

(vi) The KTC's determination that a company performing domestic sales operations for Indah Kiat and Pindo Deli would incur some amount of interest expenses, which should be included in the calculation of the constructed normal value based on "facts available".

4.51 The Panel also upheld much of the KTC's injury determination — including its definition of the "like product", its assessment of the price effects of the dumped imports, and its treatment of imports by certain Korean producers of merchandise from countries under investigation.

4.52 This is not to say, of course, that the Panel found that the KTC's initial determination was perfect. Instead, the Panel identified six areas in which the KTC's determination was not consistent with Korea's obligations under the WTO Antidumping Agreement. In particular, the Panel found flaws in (1) the adequacy of the KTC's explanation of its choice of the amounts used, as "facts available", to represent CMI's interest expenses in the calculation of a constructed normal value for Indah Kiat and Pindo Deli; (2) the adequacy of the description of the steps undertaken by the KTC to corroborate the prices used, as "facts available", to determine the normal value for Tjiwi Kimia; (3) the adequacy of the KTC's disclosure of the results of its verification of the Indonesian respondents; (4) the adequacy of the KTC's disclosure of the constructed normal value calculations to the Indonesian respondents, (5) the adequacy of the KTC's explanation of its analysis of the impact of dumped imports on the domestic industry, and (6) the KTC's treatment as confidential information of a submission by the Korean applicants that was by its nature confidential, without requiring a further demonstration by the submitter that there was "good cause" for confidential treatment.

4.53 Significantly, the Panel's decision did not take the position that the WTO Antidumping Agreement *precluded* the KTC from reaching the determination that it had made. Instead, the Panel held only that the KTC had failed to provide adequate explanations of certain aspects of its determination, and also failed to provide the necessary disclosure of certain documents.

(b) The KTC's Implementation Process

4.54 After the Panel's decision was adopted by the DSB, the KTC undertook a proceeding to implement the Panel's recommendation. As part of the implementation process, the KTC provided additional disclosures to the Indonesian respondents of its verification report and constructed normal value calculations, and gave the Indonesian respondents an opportunity to comment on that disclosure. It also obtained an explanation from the domestic Korean industry of the reasons for their request for confidential treatment of the confidential information in their initial application. It also provided a detailed description of the methods used to corroborate the "facts available" information used to determine the normal value for Tjiwi Kimia.

4.55 All of these actions were described in the KTC's draft Implementation Report, which was provided to the Indonesian respondents on 23 May 2006. The Indonesian respondents were given an opportunity to comment, and any comments they raised were addressed in the KTC's Final Implementation Report, which was issued on 26 June 2006. Significantly, Indonesia has not objected to these aspects of the KTC's implementation of the Initial Panel Decision. Accordingly, in the interests of brevity, Korea does not discuss them further.

4.56 Indonesia's claims in this proceeding focus on the steps taken by the KTC to implement the remaining two errors identified in the Panel's ruling: (1) the finding that the KTC had not provided an adequate explanation for its choice of the "facts available" interest expense, and (2) the finding that the KTC had not provided an adequate explanation of its analysis of the impact of dumped imports on the domestic industry. In order to assist the Panel, a further description of the steps taken by the KTC to implement the Panel's rulings on those issues is set forth below.

(i) Implementation of the Panel's Finding Concerning the Interest Expense for CMI

4.57 As noted above, the Initial Panel Decision held that the KTC had failed to provide an adequate explanation of its decision to use the interest expenses reported in the financial statements of RAK as a surrogate for the interest expenses of CMI, given Indonesia's assertion that CMI acted solely as a trading company. In the KTC's view, this ruling raised two distinct issues: (1) whether a

company acting solely as a trading company might incur expenses comparable to those reported by RAK, and (2) whether the evidence supported Indonesia's claim that CMI's performed only sales activities.

4.58 On the first of these issues, the KTC concluded that there was no particular reason to assume that the interest expenses of a company engaged solely in sales would differ from those for a company financing only manufacturing activities (or, for that matter, a company that, like RAK, financed both sales and manufacturing activities). The KTC based this conclusion on logic and on evidence.

- As a logical matter, the KTC explained that selling companies do have financing requirements that can lead them to borrow money. In addition, the KTC also noted that selling companies in a conglomerate (such as the Indonesian Sinar Mas Group) may borrow money to finance the activities of other group companies. And, finally, the KTC also explained that manufacturing companies may have even lower interest expenses than selling companies — where, for example, the manufacturing company has met its financing requirements by issuing shares of stock, or has paid off existing debts out of past earnings.

- As an evidentiary matter, the KTC found that an analysis of companies engaged only in selling activities often had significant interest expenses — in excess, for example, of those reported by RAK. Thus, the evidence did not support Indonesia's contention that all trading companies have similar interest expenses, and that those interest expenses are lower than the expenses of companies engaged in manufacturing.

In light of these considerations, the KTC concluded that there was no *a priori* reason to assume that a company engaged only in trading activities would have a different interest expense rate than a company engaged only in manufacturing activities.

4.59 Given this conclusion, it was, quite frankly, irrelevant whether CMI was engaged solely in trading activities, or whether it had more extensive operations. Nevertheless, the KTC proceeded to address to the question whether the evidence supported the Sinar Mas Group's (and Indonesia's) contention that CMI was engaged solely in trading activities. The KTC found that, as a result of the Sinar Mas Group's refusal to provide necessary information in a timely manner, it was not possible to determine the precise scope of CMI's activities. Based on the available information, it was not possible, for example, to determine whether CMI had an extensive domestic sales network or whether it maintained substantial product inventories in warehouses, which might have led it to have different cash flows than April Fine. Indeed, it was not even possible to determine whether CMI's activities were limited only to sales — since there was some information before the KTC indicating that CMI was engaged in some manufacturing activities. As a result, even if Indonesia were correct in asserting that the interest expenses of a company are determined primarily by its activities, the evidence before the KTC did not allow it to conclude that CMI's activities were equivalent to those of April Fine.

4.60 Finally, the KTC examined whether the interest expense rate that it had previously calculated for RAK could be corroborated as a reasonable interest expense amount for CMI. In this regard, the KTC compared the calculated RAK rate to four separate sources of data:

- Information obtained from a third-party information provider concerning CMI's financial results;

- Information on the interest expenses for four other Indonesian paper companies (including Indah Kiat, Pindo Deli and Tjiwi Kimia and one other company that was not affiliated to the Sinar Mas Group);

- Information on the net interest expenses of three other Indonesian companies that were not engaged in paper manufacturing; and
- Information on the net interest expenses of five Korean companies that were engaged in the wholesale and retail industries.

Based on this information, the KTC concluded that the interest expense rate used as "facts available" represented a "not unreasonable" estimate of the interest expenses incurred by CMI.

(ii) Implementation of the Panel's Finding Concerning the Explanation of the Impact of the Dumped Imports on the Domestic Industry

4.61 As noted above, the Initial Panel Decision held that the KTC's initial explanation of the impact of the dumped imports on the domestic industry was not adequate, because it failed to adequately explain its conclusions concerning each of the factors identified in Article 3.4 of the Antidumping Agreement. Accordingly, as part of its implementation process, the KTC revised its analysis, and issued a revised explanation of its findings on each of the Article 3.4 factors.

4.62 Significantly, Indonesia has not challenged the substance of the KTC's revised injury decision. Instead, Indonesia's arguments concerning the revised injury decision are entirely procedural. The KTC took the position that its revised injury determination stood in the place of its original final injury determination, which was made only after the record was closed and all parties had been given an opportunity to comment on all of the information on the record. As a result, the KTC concluded that implementation of the Panel decision required only that it revise its final analysis and explanation, without reopening the record for new submissions or comments. By contrast, Indonesia claims that the KTC should have given the Indonesian respondents an opportunity to see a draft of the revised determination and to submit comments on the draft.

2. Argument

(a) The KTC's Selection of Facts Available Interest Expense Amount was Consistent with Korea's Obligations under the WTO Agreement

(i) The KTC Correctly Determined that the Precise Scope of CMI's Activities Could Not be Ascertained

- Indonesia's Description of CMI's Role in the Sinar Mas Group is not Supported by the Evidence before the KTC

4.63 Indonesia's arguments concerning the appropriate interest expense to be included in the constructed normal value as "facts available" for CMI's information are premised on the assumption that CMI acted solely as a trading company performing the same tasks as the Singaporean-based company April Fine. Indonesia has contended that its description of CMI's activities was never disputed, and that Korea itself admitted during the initial panel proceeding that CMI's activities related solely to selling products manufactured by other Sinar Mas Group companies. All of Indonesia's arguments concerning the CMI interest expense issue turn on the assumption that CMI's activities and financing requirements were known, undisputed and equivalent to April Fine's.

4.64 In support of this assumption, Indonesia has referred to statements in the KTC's determinations and Korea's submissions to this Panel during the initial panel proceedings that indicated that CMI handled sales of the subject merchandise for the producers Indah Kiat and Pindo Deli. However, those statements by their terms only describe what the Sinar Mas Group had told the KTC. They never purported to provide a description of the full range of CMI's activities with respect to all of the merchandise it handled. And, more importantly, they clearly do not reflect the position Korea took before the Panel.

4.65 In fact, Korea explicitly took the position that the full range of activities performed by CMI with respect to both subject and non-subject merchandise could not be ascertained due to the Sinar Mas Group's lack of cooperation. As Korea explained in its response to *Indonesia's* questions following the first substantive meeting,

> Because the Sinar Mas Group did not permit the KTC to examine CMI's financial statements or accounting records, *the KTC had no basis to determine whether CMI did not, in fact, incur expenses for office, warehouse or manufacturing facilities*.[20]

As a result, Korea never conceded that Indonesia had correctly described CMI's role in the Sinar Mas Group's sales process. To the contrary, Korea clearly stated that it did not agree that Indonesia's characterization of CMI's role was substantiated by the evidence.[21]

4.66 Significantly, the KTC's Final Implementation Report did not take the position that CMI was engaged in warehousing or manufacturing or other non-sales activities. Instead, it held only that, as a result of the Sinar Mas Group's non-cooperation, there was insufficient evidence on the record to support the Sinar Mas Group's argument that CMI performed only trading functions. That position is entirely consistent with the view expressed by Korea during the initial panel proceedings, and with the evidence available to the KTC.

4.67 Finally, it should be noted that Indonesia's characterization of Korea's position ignores the clear distinction that Korea had drawn during the initial Panel proceedings between the financing requirements of CMI and April Fine. In these circumstances, there is no basis for Indonesia's assertion that CMI's activities and financing requirements were known, undisputed and *equivalent to* April Fine's. As a result, Indonesia's arguments simply collapse.

- The Additional Information Submitted by the Sinar Mas Group during the Implementation Proceeding Did Not Confirm Its Description of CMI's Role

4.68 During the course of the KTC's implementation proceeding, the Sinar Mas Group attempted, once more, to submit the purported CMI income statement that it had submitted after the conclusion of the verification in the original investigation. The Sinar Mas Group also submitted documents that it claimed came from CMI's accounting system — apparently as evidence supporting the accuracy of the purported income statement. In addition, the Sinar Mas Group submitted opinions from Indonesian law firms contending (1) that, under Indonesian law, CMI was not required "to submit its financial statement (annual account) to a public accountant for audit," and (2) that, based on a review of certain documents provided to it by CMI, it has concluded that CMI "has never being runs or operates in manufacturing industrial sector". Finally, the Sinar Mas Group also asked the KTC conduct another on-site verification to resolve any questions about the accuracy of this information.

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[20] *See* Korea's Response to Indonesia's Questions following the First Meeting of the Panel, para. 11.

[21] In this regard, Korea specifically noted that the information requested from CMI, which the Sinar Mas Group had refused to provide, was needed to confirm the accuracy of the Sinar Mas Group's description of CMI's role. As Korea explained,

> {T}he KTC needed access to the CMI financial statements and accounting records at verification for a number of reasons.... *They were also needed to confirm the accuracy of the Sinar Mas Group's description of CMI's activities was correct, and that CMI was not incurring expenses for activities (such as warehousing) that the Sinar Mas Group claimed it did not perform*.

See Korea's Response to Panel Questions following the Second Meeting of the Panel, para. 18 (emphasis added).

4.69 The KTC's Final Implementation Report took the position that the purported CMI income statement, the alleged CMI accounting documents, and the legal opinion concerning the audit requirements under Indonesian law were not part of the record and were not relevant to the implementation analysis. As the KTC explained, those documents related to the question whether the purported CMI income statement was complete, accurate and reliable. However, the KTC's initial determination on that issue had been upheld by the Panel and was not being reconsidered in the implementation proceeding.

4.70 On the other hand, even though the separate legal opinion concerning the scope of CMI's activities was not a part of the record, the KTC did analyze and consider its contents. As the KTC noted, that opinion's conclusion were expressly conditioned on the assumptions that: (1) the documents provided to the law firm "are valid, accurate, appropriate with the original, and no{t} amended.", and (2) that CMI "already fulfils its obligations in appropriate with the applicable law and regulation in Indonesia". Without verification that the documents in question were "valid, accurate, appropriate with the original, and no{t} amended.", there was no basis for determining whether the law firm's assumptions were correct. As a result, the KTC did not consider the law firm's opinion to provide a reasonable basis for determining the scope of CMI's activities.

4.71 In these circumstances, there was no evidentiary basis for concluding that CMI performed the same role on the Sinar Mas Group's sales that April Fine performed on sales in Indonesia. Instead, the precise nature of CMI's role could not be determined.

4.72 As discussed more fully below, this finding was *not* critical to the KTC's analysis. Instead, the KTC's determination found that, whether or not CMI was engaged solely in selling activities, the interest expense amount assigned as facts available was reasonable. Nevertheless, the KTC clearly was correct in finding that the Sinar Mas Group's refusal to cooperate in the initial investigation had created a situation in which the KTC could not make a finding about the scope of CMI's activities. Contrary to Indonesia's claims, the mere recognition of the consequences of the Sinar Mas Group's refusal to cooperate did not give rise to an obligation to allow the Sinar Mas Group a new opportunity to submit new information to make up for its previous lack of cooperation.

(ii) The KTC's Selection of a Facts Available Interest Expense for CMI Was Based on an Unbiased and Objective Evaluation of the Facts

- Implementation of the Initial Panel Decision Did Not Require the KTC to Use the Interest Expenses of a Trading Company as "Facts Available" for the CMI-Related Expense

4.73 Indonesia has asserted that the Initial Panel Decision held that the KTC could not use the interest expenses of a manufacturing company as "facts available" for the interest expenses of CMI. But that assertion is plainly incorrect.

4.74 To begin with, the Panel did not make any findings concerning the full scope of CMI's activities. The absence of such findings is hardly surprising. As discussed above, the Sinar Mas Group's failure to cooperate in the investigation prevented any firm conclusions from being drawn about CMI's role.

4.75 Furthermore, even if it had been clear that CMI's role was limited to trading activities, the Initial Panel Decision specifically recognized the possibility that it might be appropriate to use a manufacturing company's interest expenses as "facts available" for a company that was engaged only in trading. As the Panel explained,

> 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...
>
> We have seen no explanation on the record as to 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.[22]

Thus, the only error identified by the Panel was a lack of explanation. As the Panel itself admitted, the use of a manufacturing company's interest expenses as "facts available" for a trading company would be sustainable, as long as the KTC provided an adequate explanation for its decision.

- The Evidence Before the KTC Corroborated the Interest Expense the KTC Selected as Facts Available for CMI

4.76 Indonesia has contended that the KTC was faced with a simple choice: It could choose either to use the interest expense rate calculated from the RAK financial statements or the interest expense rate calculated from the April Fine financial statements, or nothing else. In Indonesia's view, the KTC's use of the RAK interest expense rate was unreasonable, given that RAK was a manufacturing company, while both CMI and April Fine were "trading companies".

4.77 But Indonesia's argument ignores several salient facts.

4.78 *First*, contrary to Indonesia's assertions, the evidence suggested that there were differences in the financing requirements of April Fine and CMI.

4.79 *Second*, as discussed above, the evidence before the KTC did not establish that CMI's activities were limited to a trading function. Instead, as the KTC found, the scope of CMI's activities could not be determined. Thus, there was no basis for assuming that CMI's activities were equivalent to April Fine's.

4.80 *Finally*, both economic theory and the evidence gathered by the KTC demonstrated that the nature of a company's activities did not dictate the amount of interest expenses it would incur. Instead, as the KTC explained, there were a number of reasons companies engaged solely in trading activities might have substantial interest expenses, while companies engaged in manufacturing might have lower expenses. This analysis was borne out by the KTC's review of the interest expenses of a number of Korean companies engaged in wholesale and retail activities. Thus, the linkage assumed by Indonesia between the scope of a company's activities and its interest expense simply did not exist.

4.81 In this regard, the arguments presented by Indonesia reflect a fundamental misunderstanding of the nature of corporate finance. In very simple terms, a company incurs interest expenses only when it borrows money from sources that charge interest (such as bank loans). A company that does not need to borrow money (either for itself or for any affiliates for which it provides financing) does not normally incur interest expenses. However, the fact that a company does not need to borrow money does not mean that its activities do not require any financing. Instead, it may mean only that the company has chosen to finance its activities using sources that do not charge interest (for example, share offerings, or retained interest, or "commissions" from affiliates). Thus, the absence of interest expenses may simply mean that the company has chosen to finance its activities from sources that do not charge interest — and not that the company does not have activities that require financing.

[22] *See* Initial Panel Decision, paras. 7.110-11 (emphasis added) [sic.].

4.82 As a result, the interest expenses of sales companies may differ dramatically, even though other expenses they incur (such as salesmen's salaries or office rent) are similar. Indeed, one would expect two sales companies with the same number of salesmen to have roughly similar salary expenses. One would expect companies with similar office layouts to have similar overhead costs. However, there is no reason to expect two sales companies with the same number of salesmen to have the same interest expenses — because one might finance its activities solely through borrowings (and thus have substantial interest expense), while the other may finance similar activities through other mechanisms (for example, share offerings or retained interest or commissions from affiliates) that do not result in interest expenses.

4.83 In these circumstances, Indonesia's arguments regarding the KTC's selection of the "facts available" interest expense for CMI are simply without merit.

(b) The KTC was not Required to Allow the Indonesian Respondents to Submit Additional Comments on Its Revised Injury Analysis

4.84 As noted above, the Initial Panel Decision held that the KTC's initial explanation of the impact of the dumped imports on the domestic industry was not adequate, because it failed to adequately explain its conclusions concerning each of the factors identified in Article 3.4 of the Antidumping Agreement. Accordingly, as part of its implementation process, the KTC revised its analysis, and issued a revised explanation of its findings on each of the Article 3.4 factors.

4.85 Indonesia has not challenged the substance of the KTC's revised injury determination at all. However, it claims that the KTC committed a procedural error, because it failed to give the Indonesian respondents an opportunity to see a draft of the revised injury determination and to submit comments on the draft. That argument is, however, based on a fundamental misunderstanding of the nature of the implementation process.

4.86 The KTC's injury determination was not based on new information or new arguments. Instead, it was based on the information that had already been made available to the parties and on which the parties had already been allowed to comment in the original KTC investigation. Indonesia's challenge to the original KTC determination did not contend that the Indonesian respondents had in any way been deprived of their rights to see information or defend their interests with respect to the original injury analysis. Furthermore, the Panel found no short-comings in the procedures followed by the KTC in its original injury investigation.

4.87 Indeed, if the Panel's initial decision had found the KTC's explanation of its injury determination to be adequate, there would have been no reason for any implementation on injury issues. The only reason that the KTC was required to implement the Panel decision was that the Panel found inadequate the KTC's analysis of the information and explanation of the decision it had reached after receiving comments from the parties. As a result, implementation of the Panel decision required a revision of the KTC's analysis and explanation of its determination. But that is all that implementation required.

4.88 No additional data relating to the injury issues was obtained in the course of this implementation proceeding. The issues considered by the KTC in the implementation proceeding related solely to the analysis of the previously-collected data under the criteria described in Article 3.4 of the Antidumping Agreement, which all parties had already had an opportunity to comment upon. In reaching its revised injury determination, the KTC considered all of those comments, as well as the holding by the Panel.

4.89 While the KTC's procedures do allow parties to comment on all of the underlying data, they do not allow interested parties to comment on the KTC's final explanation of its determination once the final determination has been reached. Because the KTC's Implementation Injury Determination

stands in the place of the original final injury determination, there was no basis for allowing the parties to comment upon it. Nothing in Korean law or the WTO Agreements required the KTC to solicit comments on its final determination (and accompanying explanation) after the final determination is made.

(c) Indonesia's Assertions that the KTC obtained New Information from the Domestic Industry are Baseless

4.90 Finally, Indonesia has asserted that it "understands that the KTC received new materials and submissions related to the Redetermination from the Korean domestic industry or possibly other sources" and that "{t}hose documents have not been made available to Indonesia". That assertion is, however, unfounded.

4.91 The only "new information" obtained by the KTC during the implementation proceeding consisted of: (1) information obtained from the [BCI] regarding CMI's expenses and activities, (2) information concerning the interest expenses incurred by other Indonesian and Korean companies, and (3) information from the Korean applicants explaining the "good cause" for their claims for confidential treatment, and (4) the information submitted to the KTC by the Sinar Mas Group. The Indonesian respondents were given access to all of this material during the course of the implementation proceeding, and were given an opportunity to comment upon it. Indonesia's claims are, therefore, entirely speculative and completely without merit.

3. Conclusion

4.92 The Initial Panel Decision plainly required the KTC to undertake a further analysis and to provide further explanations. But, by the same token, it very clearly did not dictate any particular outcome — other than that the KTC base its revised determination on an unbiased and objective analysis of the evidence.

4.93 The KTC has plainly complied with that requirement. Its implementation decision should, therefore, be found to be entirely consistent with Korea's obligations under the Agreement.

C. SECOND WRITTEN SUBMISSION OF INDONESIA

4.94 The following summarizes Indonesia's second written submission.

1. Introduction

4.95 The main issue in this case is whether in calculating constructed normal value and selecting best information otherwise available to replace missing information regarding the interest expenses incurred by an affiliated re-seller, the KTC acted inconsistently with Korea's obligations under the Agreement. The issue arises because the KTC used as a proxy for this missing information amounts based on the interest expenses incurred by another company that produced the product under investigation.

4.96 In its first submission, Korea does not directly address Indonesia's arguments regarding the legal standard governing the KTC's actions. Instead, even though the original panel had specifically found that a company's interest expenses are related to its activities, Korea primarily argues that there is no relationship between a company's activities and the nature of the interest expenses it incurs. Based on this view, the KTC attributed to CMI amounts to represent its interest expenses relating to the re-sale of the product under investigation that were more than three times the total amount of all of CMI's other SG&A expenses. In addition, these amounts were almost twice to three times the verified amount of the production companies Indah Kiat's and Pindo Deli's own interest expenses for their own production and sales activities.

2. Standard of Review

4.97 Korea's first submission gives rise to two concerns regarding the standard of review to be applied by the Panel. First, the Panel may not rely on ex post justifications offered by Korea for the determination of the KTC. However, Korea has put forward in its first submission a number of arguments that are not reflected in any way in the KTC's Dumping Re-determination. In particular, while the KTC's Dumping Re-determination contains no discussion whatsoever of April Fine Paper Trading, Korea now seeks to justify its choice of facts available on the ground that CMI's activities were not equivalent to April Fine Paper Trading' s activities. The Panel should not rely on these *ex post* arguments to determine whether the KTC's determination is consistent with the Agreement.

4.98 Second, Korea attempts to disavow or ignore verified facts on the record of the original investigation and factual findings by the original panel. As Korea points out with respect to the re-determination of injury, however, the re-determination of dumping also appears to have been based on the same record as the KTC's original determination. The re-determination of dumping was also based on the same record on which the original panel made its factual findings.

4.99 The KTC cannot depart from, and Korea cannot now dispute, the verified facts from the original investigation and the factual findings of the original panel if the factual record on which the original determination and the original panel's findings were based have not been re-opened or materially changed. Indonesia recalls that paragraph 3 of Annex II to the Agreement provides that all information that is properly submitted must be taken into account by the authorities. Indonesia notes also that Korea did not appeal that the findings of the original panel were not "an objective assessment of the facts of the case" and therefore inconsistent with Article 11 of the DSU.

4.100 Moreover, the Panel must also continue to rely on the factual findings of the original panel to the extent that the record remains unchanged. The extent to which a panel is required to evaluate the facts in an Article 21.5 proceeding in the same manner as the original panel depends on the degree to which the factual record relevant to the finding has changed. As Indonesia explained in detail in its first submission, several factual findings of the KTC in its original determination and both factual and legal findings of the original panel remain valid and pertinent in this Article 21.5 proceeding.

3. Legal Argument

(a) Claims Relating to the Determination of Dumping

(i) Korea has failed to rebut Indonesia's claims that the KTC Acted Inconsistently with Articles 2-1, 2.2, 2.2.2 and 2.4 of the Agreement

4.101 Indonesia has explained that Article 2.2 of the Agreement makes clear that investigating authorities are under an obligation to ensure that amounts included for SG&A costs are "reasonable". Similarly, Article 2.2.1.1 requires that costs be based on sources which "reasonably reflect the cost associated with the production and sale of the product under consideration" and Article 2.2.2 requires that costs must "pertain[..] to production and sales … of the like product by the exporter or producer under investigation".

4.102 In its first submission, Korea did not address this issue. Instead, Korea takes the position that there is no necessary relation between a company's activities and its expenses, especially with respect to a company's interest expenses. It is simply not correct that there is no connection between a company's activities and its expenses. Even if it were correct, the Agreement limits the costs that may be included in the constructed value to costs that reasonably reflect the activities of producing and selling the subject merchandise. Costs that do not pertain to the activities of producing and selling the product under investigation may not be included in the constructed value. Thus, Korea's position that the investigating authority may ignore the nature of the activities for which it seeks to determine the

costs is inconsistent with the straightforward text of Articles 2.2 and 2.2.2, which require that expenses included in the constructed value must be reasonably related to the activities of producing and selling the product under investigation.

4.103 Contrary to Korea's argument, a company normally incurs expenses only in connection with an activity carried out by that company. Interest expenses are no different to any other expenses in this regard. Nothing in the text of the Agreement suggests that interest expenses may be treated differently than any other type of general or selling expense or need not be reasonably related to the production and sale of the product under investigation. As the original panel stated, there is a clear link between a company's activities and its financial expenses: "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".[23]

4.104 Moreover, the European Communities is incorrect to state that interest expenses differ from other general or selling expenses in that they normally affect the pricing of all products rather than the pricing of a particular product.[24] "General" expenses, of which interest expense is but one, by definition affect all products. Thus, expenses such as office costs, insurance, etc. affect all products. While it is not clear what the European Communities means by "pure" selling expenses, Indonesia notes that even salesmen's salaries may affect more than one product, as salesmen may generally sell more than one product.

4.105 In any event, the European Communities appears to acknowledge that, as the original panel found, interest expenses are generally related to particular activities.[25] However, the European Communities appears to confuse the question of whether interest expenses related to a particular activity can be allocated over multiple products, which is not at issue here, with the issue of whether interest expenses incurred to support a particular activity can reasonably be attributed to a wholly different activity. The costs of manufacturing investigated and non-investigated paper products may not differ greatly. However, the cost of manufacturing a paper product and the cost of re-selling it do differ greatly. Accordingly, any allocation of interest expenses to those activities would have to ensure that no interest expenses attributable to the manufacture of the paper were attributed to the re-sale of it.

4.106 In the cases of companies that conduct both manufacturing and selling activities, such as Indah Kiat, Pindo Deli and RAK in the present case, it is normal and reasonable practice to calculate a single interest expense ratio that may be applied to the total production and sales costs of the company to derive a single interest expense. As long as interest expenses are properly allocated between products, there is no need to separate the interest expenses arising from the manufacturing activities from those arising from the selling activities because both are included in the constructed value anyway.

4.107 Moreover, even assuming it was reasonable to assume, as Korea has suggested, that CMI may have had other manufacturing activities and incurred interest expenses with respect to those activities, any interest expenses incurred with respect to those activities would pertain to those activities and not to the activity of re-selling the product under investigation. However, the KTC made no effort to ensure that interest expenses incurred with respect to any such other activities would be attributed to

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[23] Original Panel Report, para. 7.110. Thus, it is incorrect for Korea to suggest that the original panel accepted the KTC's use of RAK data as a proxy for CMI and simply required the KTC to provide additional explanation.

[24] Third Party Submission by the European Communities, 19 March 2007, para. 12.

[25] *Ibid.* ("Interest expenses linked to long term obligations, such as those aimed at *financing capital infrastructure to support the manufacturing activities* . . .") (emphasis added); Original Panel Report, para. 7.110.

those activities. Instead, the KTC simply attributed all of RAK's expenses for the activities to producing and selling the product to the activity of re-selling the product. This is clear from an examination of the figures contained in Exhibit IDN-1. Indonesia notes that Korea discusses only the numerator in its calculation – RAK's interest expense ratio – without discussing the denominator to which it was applied. In fact, the KTC applied this numerator to all of the costs incurred by Indah Kiat and Pindo Deli, including all manufacturing and sales costs incurred by those companies, in order to derive the amount the KTC actually attributed to CMI as interest expenses.

4.108 This meant that the amounts attributed to CMI as interest expenses represented the costs of financing all of the activities of manufacturing and selling the investigated product. It also meant that the amounts attributed to CMI as interest expenses were more than three times the total amount of all of CMI's other SG&A expenses. In addition, the amounts attributed to CMI as interest expenses were almost twice to three times the amount of Indah Kiat's and Pindo Deli's own interest expenses for their own production and sales activities.

4.109 Korea has failed to provide any coherent theory as to how the KTC's actions result in the determination of a reasonable amount of interest pertaining to the activity of re-selling the investigated product. An objective and unbiased investigating authority could not arrive at a "reasonable amount" of interest expenses relating to this activity that is based on a source that includes all of the interest expenses related to the activities of manufacturing and selling the product and that results in an amount almost twice to three times the verified amount of interest expenses relating to the activities of producing and selling the product. Thus, the Panel should reject Korea's arguments and find that the KTC acted inconsistently with Articles 2.2 and 2.2.2 of the Agreement in its determination of CMI's interest expenses.

(ii) Korea has failed to rebut Indonesia's claim that the KTC acted inconsistently with Article 6.8 and Annex II of the Agreement

4.110 Indonesia has explained that Article 6.8 and Annex II of the Agreement require the KTC to select the best information available to replace missing data and to use special circumspection in doing so. Korea has not responded in any detail to Indonesia regarding the legal standard governing the KTC's actions in replacing this missing information. However, there are three general points regarding Korea's apparent approach to the use of best information available that should be borne in mind while considering Korea's arguments on this issue.

4.111 First, recourse to facts available arises only where some information is missing and some fact is not known. In every case of recourse to facts available, the investigating authority will have to make objective and unbiased decisions about how best to replace the missing information. Second, because recourse to facts available arises only where some information is not known, it is inevitable that the information used to replace the missing information will not be exactly the same as the missing information or a perfect facsimile thereof. Nevertheless, the investigating authority is under an obligation to make an objective and unbiased determination of the best information available. Third, the fact that some information is not known does not mean that the investigating authority is entitled to assume every remotest possibility in replacing that information. Without directly saying so, Korea's position appears to be that the KTC was entitled to make every conceivable negative assumption in determining CMI's interest expenses with respect to the re-sale of the investigated product. To the contrary, in replacing missing information, the investigating authority remains under an obligation to act in an objective and unbiased manner, to determine reasonable amounts for SG&A expenses, and to act with "special circumspection" in selecting the best information available. Thus, the fact that CMI's interest expenses are not known does not mean that the KTC is entitled to assume that CMI may have had massive interest expenses related to other activities and that those expenses may be treated in their entirety as pertaining to the re-sale of the investigated product.

(iii) The KTC must consider the nature of the activities carried out by CMI, RAK and April Fine Paper Trading in choosing secondary information

4.112 Korea's first argument is that the KTC was entitled to ignore the differences in the activities carried out by CMI (re-selling activities) and RAK (manufacturing and selling activities) in its analysis because there is no reason to assume that the interest expenses of trading and manufacturing companies are likely to be different. There are several problems with Korea's position.

4.113 First, Korea's position cannot be reconciled with the rulings of the original panel. The original panel ruled that an investigating authority "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 a proxy"[26] and "[p]roduction 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".[27] Thus, the original panel adopted the reasonable and commonsensical position that a company with capital-intensive production activities will normally incur much greater financing expenses relating to those activities than a re-selling company that does not need to finance production machinery and similar capital assets. Thus, a Renault garage in Geneva that re-sells cars would normally be expected to have much lower interest expenses than the Renault factory that manufactures the cars. Any objective and unbiased investigating authority would also proceed on the basis of this commonsensical position.[28]

4.114 Second, Korea states that "both economic theory and the evidence gathered by the KTC demonstrated that the nature of a company's activities did not dictate the amount of interest expenses it would occur".[29] Both propositions are incorrect. Korea states that selling companies "might have substantial interest expenses" and that "it is possible that a company engaged in manufacturing does not necessarily have any borrowings at all".[30] But the mere fact that, in the abstract, different companies may in practice have different interest expenses does not mean that the KTC is free to make any assumptions it pleases in determining CMI's reasonable interest expenses. The fact that a given manufacturing company does not in fact borrow to finance its capital infrastructure while a given selling company needs to borrow to finance its office rental does not change the reasonable and objective reality that manufacturing companies generally incur much greater interest expenses in financing their long-term capital production assets than selling companies generally incur in financing the short-term costs of their sales activities.

4.115 In addition, Korea is also incorrect that although one can expect that the "other expenses" of sales companies will be roughly similar, the interest expenses of sales companies "may differ dramatically". However, a company's borrowing needs and hence its interest expenses are a function of its other expenses. Generally, the amount of money a company needs to borrow will depend on the amount of money it needs to conduct its activities. Thus, the amount of office expenses a selling

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[26] Original Panel Report, para. 7.110. In contrast, Korea argues that "it was, quite frankly, irrelevant whether CMI was engaged solely in trading activities…". Korea's First Submission, para. 28.

[27] *Ibid.*, para. 7.110. In contrast, Korea argues that there is "no *a priori* reason to assume that a company engaged only in trading activities would have a different interest expense rate than a company engaged only in manufacturing activities". Korea's First Submission, para. 27.

[28] The original panel suggested that there may be situations in which it may be appropriate to use interest expenses relating to manufacturing activities as a proxy, see Original Panel Report, para, 7.110. However, Korea has not argued that there are any exceptional situations in this case that would suggest that the normal reasonable presumptions about company activities and corresponding interest expenses should not apply.

[29] Korea's First Submission, para. 53. See also para 4 (stating that the KTC based this conclusion on "logic and evidence").

[30] *Ibid.*, para. 53.

company needs to finance will directly affect the amount of its interest expenses. It may, therefore, be expected that companies with similar costs relating to similar activities will borrow similar amounts of money and incur similar amounts of interest expenses. This is also why interest expenses pertaining to re-selling a product may reasonably be assumed to be lower than the interest expenses pertaining to producing and selling the product: the other costs of re-selling the product, and hence the potential borrowing requirements, are usually much lower than the other costs of producing and selling the product.

4.116 Third, Korea's position that interest expenses are unrelated to a company's activities leads to absurd results. It leaves investigating authorities absolutely unconstrained in their choice of facts available in calculating interest expenses. In Korea's view, any interest expense from any activity of any company operating in any sector or market can be used as facts available to calculate interest expenses for another company. Indeed, Korea proceeds on the assumption that the interest expenses of "Indonesian companies not engaged in paper production" and "non-manufacturing Korean wholesalers and retailers" could have been used to calculate CMI's interest expenses. This interpretation reduces Article 6.8 and Annex II of the Agreement to a nullity as far as the calculation of interest expenses is concerned.

(iv) The evidence on record establishes that April Fine Paper Trading's information is best suited to replace the missing information

4.117 Korea argues that (1) "the scope of CMI's activities could not be determined"[31], (2) "[t]hus, there was no basis for assuming CMI's activities were equivalent to April Fine's"[32], (3) April Fine's "financing requirements could have been significantly different from those of CMI" because of alleged differences in "the nature of cash flows received by April Fine and CMI".[33] None of these arguments is consistent with the evidence on the record. Indonesia also recalls that these arguments appear to be impermissible ex post facto justifications.

(v) The nature of CMI's activities pertaining to the investigated product were fully determined

4.118 The nature and scope of CMI's activities pertaining to the investigated product were determined by the KTC in the original investigation. The KTC ascertained that CMI carried out re-selling activities for Indah Kiat and Pindo Deli in the Indonesian market. This understanding is confirmed by the KTC's Verification Report and the findings of the original panel. It would be inconsistent for Korea to assert anything to the contrary. After all, the determination that CMI resold the investigated product in Indonesia is the entire basis of the KTC's rejection of the domestic sales data submitted by the Sinar Mas Group. Korea also agrees that CMI did not manufacture the investigated product. Accordingly, Korea's various assertions that the "precise" or "exact" scope of CMI's activities could not be determined should not be understood to imply that there could be any doubt or ambiguity about the fact that CMI performed only re-seller trading functions with respect to the investigated product.

4.119 At most, Korea can only assert that the KTC was unable to ascertain from the evidence on record (1) whether CMI was involved in manufacturing products other than the investigated product and (2) specific details about the manner in which CMI carried out its trading functions, for instance whether or not it maintained inventories and warehouses. However, the evidentiary record does not support these assertions.

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[31] *Ibid*, para. 52. See also paras. 6, 28, 37, 42, 44, 45.
[32] *Ibid*. See also paras. 6, 38, 42, 52.
[33] *Ibid*, paras. 38, 51.

4.120 Regarding the first issue, the possibility that CMI may be involved in the manufacture of other products is wholly irrelevant to the KTC's calculations of selling expenses pertaining to the product under investigation and cannot justify any preference for the RAK cost information over the April Fine Paper Trading cost information. No objective and unbiased investigating authority could conclude that CMI was involved in other manufacturing activities. The only evidence that suggests that CMI could be involved in manufacturing activities is the DIS Report. The defects of this report were discussed in detail in Indonesia's first submission. Korea has not responded to these arguments. Thus, no unbiased and objective investigating authority could conclude, based on the evidence before it, that CMI could be involved in manufacturing products other than the investigated product. Regarding the second issue, no objective and unbiased investigating authority could conclude that it was not possible, based on the evidence on record, to determine the manner in which CMI carried out its trading functions concerning the investigated product.

(vi) CMI and April Fine Paper Trading are similar in all material respects

4.121 Even if Korea was correct that the KTC could not precisely identify all of CMI's selling activities, this fact would not support a decision not to use April Fine Paper Trading and instead to use RAK as a proxy for CMI. As noted above, perfect information is never available in situations where recourse must be had to best information available. But even if perfect information about all details of the activities carried out by CMI is not available, the basket of selling expenses incurred by April Fine Paper Trading does not have to be identical to the basket of selling expenses incurred by CMI for April Fine Paper Trading to be used as a proxy for CMI. In any event, Indonesia recalls that the KTC utilized April Fine Paper Trading data to calculate CMI's SG&A expenses because to use RAK data would be "disproportionate". Given that the amount of a company's interest expenses is related to its other costs, the fact that the KTC considered April Fine Paper Trading to be an appropriate proxy for CMI's SG&A expenses would suggest that April Fine would also be an appropriate proxy for CMI's interest expenses.

(vii) CMI's and April Fine Paper Trading's cash flows were not materially different

4.122 Korea's assertion that the difference in how April Fine Paper Trading and CMI were compensated by their parent companies for their re-selling activities undermined the comparability of these companies is without basis. Korea suggests that because April Fine Paper Trading was compensated in the form of [BCI], while CMI took a [BCI] per cent mark-up on its re-sales, CMI would have very different cash flows and financing requirements. Korea does not explain how this is so or, more importantly, how it makes CMI's activities more similar to RAK's than to those of April Fine Paper Trading.

4.123 In any event, from what is known about the compensation received by the two companies, it is quite probable that CMI would have a better cash flow position than April Fine Paper Trading and thus would have less need to borrow. CMI received its compensation at the time of sale (based on cash on delivery terms) and passed the balance of the price back to its parent. April Fine Paper Trading [BCI]. Normally, a commission would be paid after the customer had paid the parent for the sale and the parent calculated the commission due to April Fine Paper Trading. Thus, April Fine Paper Trading may have had to wait longer for its money than CMI and thus, in this respect at least, may have had a greater need for short-term borrowing than CMI.

(viii) The KTC failed to take a comparative and active approach in its choice of facts available

4.124 Korea's entire argument in support of the KTC's use of RAK's expenses as facts available consists of the two negative assertions: first, that there is "no particular reason to assume that interest expenses of a company engaged solely in sales would differ from those a company financing only

manufacturing activities"[34]; and, second, that "there was no basis for assuming that CMI's activities were equivalent to April Fine's".[35]

4.125 Indonesia has rebutted these assertions above. Even if they were correct, however, it would not follow that the RAK data is best suited, most fitting or most appropriate to replace the missing data. Neither Korea nor the KTC has articulated any affirmative reason why the RAK data is comparatively more suitable than the April Fine Paper Trading data to replace the missing information in this case. This failure to provide an affirmative justification cannot be reconciled with the obligation to take an active and comparative approach to the choice of facts available under Article 6.8 and Annex II of the Agreement. The Panel should reject Korea's arguments and find that the KTC acted inconsistently with Article 6.8 and Annex II of the Agreement in determining CMI's interest expenses.

(b) Claims relating to Korea's Procedural Obligations

(i) Korea has failed to rebut Indonesia's claims that the KTC acted inconsistently with Articles 6.1, 6.2, 6.4, 6.6, 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II to the Agreement in re-opening the record

4.126 Indonesia has argued that to the extent that the KTC had partially re-opened the record of the investigation to re-investigate the issue of CMI's activities, the KTC had failed to comply with the procedural requirements of Article 6 of the Agreement regarding the conduct of investigations. Korea argues that the KTC's re-determination "was not based on a finding that CMI actually engaged in manufacturing. Instead, it reflected only the point that the KTC and Korea had made throughout this proceeding – that as a result of the Sinar Mas Group's non-cooperation the exact scope of CMI's activities was not known".[36] It is not clear whether Korea means to say that the KTC did not re-open the record, although elsewhere Korea's submission appears to take this position. Korea also mischaracterises Indonesia's claims by stating that Indonesia contends that the KTC was "under an obligation to conduct a new investigation to determine the scope of CMI's activities".[37] This is incorrect because Indonesia does not argue that the KTC is under an independent obligation to re-open the record. Indonesia only contends that, to the extent that the KTC chose to re-open the record and admit new evidence on CMI's activities, it was under an obligation to do so in an even-handed manner by providing the Indonesian exporters with a corresponding opportunity to submit evidence on CMI's activities.[38]

4.127 Likewise, Korea has not responded specifically to Indonesia's claims regarding the KTC's treatment of the material submitted by the Sinar Mas Group in its 1 June and 16 June Comments. Finally, Korea has not responded to Indonesia's claim that the KTC's reliance on the DIS Report cannot be reconciled with its obligations under paragraph 7 of Annex II to the Agreement. In the absence of any rebuttal by Korea, however, the Panel should find that the KTC acted inconsistently with Articles 6.1, 6.2, 6.4, 6.6, 6.8 and Annex II of the Agreement.

(ii) Korea has failed to rebut Indonesia's claims that the KTC acted inconsistently with Articles 6.1, 6.2, 6.4, 6.5 and 6.9 of the Agreement in making its re-determination of injury

4.128 Indonesia has argued that Korea had acted inconsistently with its obligations under Article 6 of the Agreement by failing to provide the Indonesian exporters with any opportunity to participate in the KTC's re-determination of injury. Korea does not deny that, as a factual matter, no such

[34] *Ibid*, para. 27.
[35] *Ibid*, para. 52.
[36] Korea's First Submission, para. 44.
[37] *Ibid*, para. 43.
[38] See Indonesia's First Submission, para. 157.

disclosure or opportunity was provided to the Indonesian exporters during the implementation proceedings. Korea also mischaracterises Indonesia's claims. Indonesia does not argue that the Indonesian respondents should have been provided with "an opportunity to see a draft of the revised injury determination and to submit comments on the draft". Indonesia argues that its exporters should have been provided with disclosure of the fact that the KTC would base its injury determination on information obtained during the original proceeding and an opportunity to comment in light of this fact.

(iii) Korea has failed to rebut Indonesia's claims that the KTC failed to comply with its obligations under Articles 6.1, 6.2, 6.4 and 6.5 of the Agreement by failing to disclose materials received from the Korean domestic industry

4.129 In its first submission, Indonesia argued that the KTC apparently received new materials relating to its re-determination from the Korean industry and other sources and acted inconsistently with its obligations under Article 6 of the Agreement with respect to such materials. In response, Korea argues that Indonesia's claim is unfounded. However, Korea has failed to provide any index to the record of the KTC's re-determination and, therefore, has failed to rebut Indonesia's claim.

4. Conclusion

4.130 For the above reasons, Indonesia respectfully requests that the Panel reject the arguments advanced by Korea in its first submission and make the findings, rulings and recommendations, as well as the suggestion on implementation, requested in paragraphs 187-195 of Indonesia's first submission.

D. SECOND WRITTEN SUBMISSION OF KOREA

1. An Article 21.5 Proceeding is not a Forum to Revisit Issues on which the Panel's Initial Determination already Found the KTC's Determination to be Consistent with Korea's WTO Obligations

4.131 In its third-party submission, Japan suggests that the Panel should revisit the issue whether the information that the Sinar Mas Group withheld from the KTC during the original investigation was "necessary", and therefore justified the KTC's decision to resort to "facts available" for the interest expense of CMI. As the Panel is aware, that issue was fully litigated by the parties during the initial panel proceedings in this dispute. In its decision in the initial proceeding, the Panel found that the KTC had properly determined that the information withheld by the Sinar Mas Group was necessary, and that the KTC was therefore justified in resorting to "facts available" in light of the Sinar Mas Group's refusal to provide that information.[39] The KTC was under no obligation to justify the use of facts available in its implementation determination, when the Panel had already held that the use of facts available was appropriate.

4.132 Japan's suggestion would, in essence, turn every Article 21.5 proceeding into an endless re-hashing of the arguments and issues that were already decided in favour of the defending party in the initial dispute proceeding. The Panel should reject that proposal. Instead, the Panel should focus its attention only on those issues raised by the KTC's implementation decision, and should ignore attempts by third parties to raise issues relating to aspects of the KTC's initial determination that have already been upheld by the Panel.

[39] *See Korea – Antidumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, 14 July 2005, (hereinafter referred to as "Initial Panel Decision"), paras. 7.43 to 7.56.

2. The KTC Fully Explained the Basis for Its Selection of the "Facts Available"

4.133 Japan also asserts that the KTC was required to explain its selection of the information used as the "facts available" for the information that the Sinar Mas Group refused to provide. In this regard, Japan argues that it was not sufficient for Korea simply to argue that the "facts available" selected was more favourable to the Sinar Mas Group than any of the other information used to corroborate the "facts available".

4.134 It is, of course, true that Korea's First Written Submission did point out that the "facts available" used for the CMI data was more favourable to the Sinar Mas Group than any of the corroborating information. However Korea never claimed that the KTC selected the "facts available" solely on that basis. The comparison with the corroborating information was provided for the very obvious purpose of demonstrating that the "facts available" had been corroborated, in accordance with paragraph 7 of Annex II of the Antidumping Agreement.

4.135 The basis for the KTC's selection of the "facts available" interest expense rate for CMI was fully explained in the KTC's determination (as well as in Korea's First Written Submission). The KTC specifically considered the question whether it might have been more appropriate to base the "facts available" interest rate for CMI on the interest expense of a trading company (such as April Fine). However, the KTC concluded, based on both logic and evidence, that there was no reason to believe that the interest expenses of any company can be predicted based simply on a description of its activities as selling or manufacturing. In light of these considerations, the KTC concluded that there was no *a priori* reason to assume that a company engaged only in trading activities would have a different interest expense rate than a company engaged only in manufacturing activities. Furthermore, all of the information available to the KTC indicated that it was reasonable to assume that CMI's interest expense rate would be similar to the amounts used as "facts available".

3. The KTC Properly Re-Opened the Record to Obtain Additional Information Relating to Issues on which the Panel had found its Original Determination to be Inconsistent with Korea's WTO Obligations

4.136 In its initial decision, the Panel found that the KTC failed to adequately explain its selection of the facts-available interest expense rate for CMI, in light of Indonesia's claims that the KTC had ignored the differences between the financial requirements of selling and manufacturing companies.[40] In its implementation proceedings, the KTC re-opened the record to obtain additional information to confirm whether the difference that Indonesia had posited was reflected in the evidence. As explained in the KTC's determination, the evidence did not support Indonesia's claim that interest expenses are directly correlated with the nature of the activities performed by the company. To the contrary, a number of companies engaged solely in selling activities were found to have substantially higher interest expenses than companies engaged solely in manufacturing.

4.137 Indonesia has not objected to the KTC's decision to re-open the record in this manner. Instead, it contends that the KTC's analysis of the additional evidence was flawed, and that the KTC's decision to re-open the record on the issue of the interest expenses of selling and manufacturing companies required it also to re-open the record on other issues (such as the nature of CMI's activities).

4.138 In its third-party submission, TPKM has apparently suggested that the KTC was not permitted to re-open the record at all. As Korea understands it, TPKM asserts that the KTC's implementation decision should have been based solely on the information that was part of the record at the time of the KTC's original determination. TPKM appears to contend that, if the information on the record at

[40] *See* Initial Panel Decision, para. 7.110.

the time of the original determination is not sufficient to corroborate the secondary information used as facts available, then the secondary information may not be corroborated from "new sources of data". TPKM bases this argument on its concern that the new sources of data "may not appropriately represent the situation of the prevailing state of the industry or the relevant market, while the original investigation was taking place".

4.139 Korea agrees with TPKM that, in certain circumstances, it might not be appropriate for an investigating authority to rely on information relating to a *period* after the original investigation period in making a revised determination. Thus, where the original investigation focused on events during 2002, it might not be appropriate for an investigating authority to use data concerning prices or costs in 2006 in order to corroborate information relating to 2002. In Korea's view, because data relating to one period may not be reflective of sales or costs in another period, the investigating authorities must take special care to ensure that the information on which they rely relates to a relevant time period.[41]

4.140 On the other hand, Korea does not believe that the text of the WTO Agreements or the past decisions of panels or the Appellate Body support the view that an implementation proceeding may only consider information that was actually part of the record at the time of the original investigation. Indeed, Korea notes that the opening of the record in implementation proceedings has been routinely accepted in past cases.[42]

4.141 It appears that TPKM's argument is based on language in paragraph 7 of Annex II of the Antidumping Agreement, which requires corroboration of information from secondary sources "from the information obtained ... during the investigation". When read in context, however, it is clear that the phrase "during the investigation" relates to only a subset of the information that may be used to corroborate secondary sources (that is, "information obtained from other interested parties during the investigation"). That phrase does not relate to other types of information that may be used to corroborate the secondary sources (such as "information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns"). Furthermore, the sentence on which TPKM appears to rely expressly states that it applies only to the extent "practicable". Under this provision, corroboration is required only to the extent "practicable". If corroboration is not "practicable", then it is not required.

4.142 Consequently, TPKM's argument would lead to the conclusion that the corroboration requirement may be eliminated entirely in any implementation proceeding in which the information needed for corroboration was not available on the original record — since corroboration would, in such cases, not be "practicable". In Korea's view, the implementation process under the DSU cannot have been intended to eliminate substantive requirements in the Antidumping Agreement. Thus, where information in the original record is not sufficient to corroborate "facts available", it is proper for the investigating authority to seek out additional information to corroborate the facts available — rather than to declare corroboration not "practicable" and thus unnecessary.

[41] Korea notes that there may be circumstances in which the time period to which the information relates is not as important, because the data in question is unlikely to have changed substantially over time. For example, in evaluating claims regarding the general lending practices of banks or the borrowing practices of companies, it may be reasonable to consider evidence relating to a period for which data is available, even if that period does not correspond precisely to the "investigation period".

[42] See, e.g., *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, 30 November 2006.

4. The KTC's Selection of the Facts Available Interest Rate for CMI Was Reasonable and Consistent with Korea's Obligations under Article 2 of the Antidumping Agreement

4.143 In its third-party submission, the European Communities contends that it is not clear which of the methodologies described in the sub-paragraphs of Article 2.2.2 of the Antidumping Agreement the KTC relied upon in determining the selling, SG&A expenses and interest expenses that were included in the constructed normal value for Indah Kiat and Pindo Deli. The European Communities suggests that the KTC appears to have relied upon the methodology described in sub-paragraph (iii) of the Article 2.2.2 — which refers to "any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

4.144 Korea agrees that the amounts for SG&A and interest expenses and for profits that were used by the KTC were determined using a "reasonable method" and did not "exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". Nevertheless, Korea does not believe that arguments concerning the provisions of sub-paragraph (iii) of Article 2.2.2 are relevant in this proceeding.

4.145 In its First Written Submission in this Article 21.5 proceeding, Indonesia did not make any specific arguments concerning the application of the individual sub-paragraphs of Article 2.2.2 to the methodology adopted by the KTC. Instead, Indonesia made only a general claim that the amounts that the KTC used as "facts available" were not "reasonable". Consequently, Korea does not believe it is necessary to address the issues raised by the European Communities concerning the different methodologies described in the sub-paragraphs to Article 2.2.2, which Indonesia has not raised.

4.146 For the reasons described in Korea's First Written Submission, Korea does not believe there is anything unreasonable about the figures used by the KTC. The KTC's selection of the interest expense amount it used as facts available for CMI was fully explained and entirely consistent with the evidence concerning the expenses of other companies in similar industries and of companies engaged solely in sales and distribution functions.

4.147 One further point should be noted. While Indonesia has quibbled about one of the individual elements used in the determination of the overall amounts for SG&A, interest and profit, it is clear that the aggregate amount used by the KTC for those figures was, in fact, entirely consistent with the amount the Sinar Mas Group had reported. If anything, the effective rate used by the KTC was slightly more favourable than the average of the rates reported by the Sinar Mas Group.

4.148 In these circumstances, Indonesia's complaints cannot be taken seriously. The KTC did not "punish" the Sinar Mas Group companies for their refusal to cooperate. If anything, the KTC *rewarded* them. An investigating authority cannot be said to act in an unreasonable manner when the "facts available" figures it selects are, on the whole, more favourable to an uncooperative respondent than the figures that respondent itself submitted. Indonesia's contentions must therefore be dismissed.

5. The KTC's Implementation Procedures Complied Fully with the Procedural Requirements of Article 6 of the Antidumping Agreement

4.149 The third-party submission by the European Communities raises the issue of the extent to which the obligations of Article 6 of the Antidumping Agreement apply to proceedings undertaken to implement a dispute-settlement decision. Although the analysis presented by the European Communities is helpful and interesting, it does not, in Korea's view, adequately address the issues raised in this proceeding.

4.150 As explained in Korea's first submission, Indonesia has raised two distinct procedural challenges to the KTC's determination. *First*, Indonesia claims that, because the KTC re-opened the

record to include additional evidence to corroborate the "facts available" used for CMI (and allowed the parties to comment on that information), the KTC was also required to re-open the record to permit the Sinar Mas Group to provide additional information on all CMI-related issues. *Second*, Indonesia also claims that, even though the KTC did not obtain or rely on any additional information or argument in reaching its revised injury determination, it was required to provide the Sinar Mas Group an additional opportunity to comment on the revised injury determination.

4.151 Korea understands the European Communities to argue for a frame-work in which the nature of the procedures required in an implementation proceeding depend on the extent to which the implementation requires consideration of additional facts and argument that were not available at the time of the original investigation. Under this framework, where implementation consists solely of modification of the text of the investigating authority's final determination, without consideration of new information or argument, the provisions of Article 6 would not require the investigating authority to allow interested parties to submit information or argument. Thus, the European Communities would appear to agree that the KTC's implementation of the revised injury determination was appropriate.

4.152 On the other hand, where the implementation involves consideration of new information and argument, then the framework proposed by the European Communities would impose an obligation on the investigating authorities to make disclosures of the new information to the interested parties and to allow those parties to submit written comment. As a result, the European Communities would appear also to approve of the procedures the KTC undertook to supplement the record in order to corroborate the "facts available" used for CMI (and to allow the parties to comment on that information).

4.153 In Korea's view, the framework proposed by the European Communities provides a logical approach to defining the procedural requirements for implementation. Nevertheless, Korea does not believe that framework is needed to resolve the issues in this case. Instead, the issues can be resolved simply by considering the actual obligations set forth in Article 6.

4.154 The provisions of Article 6 do require that investigating authorities provide disclosure to the interested parties of "relevant information" and "essential facts", and to allow the interested parties to "defend their interests" and to "present their cases".[43] However, those provisions do not require multiple disclosures of the same "relevant information" and "essential facts", or multiple opportunities to present arguments. Clearly, at some point the investigating authority is entitled to close off debate and retreat to its offices to analyze the issues and prepare a final determination. The requirements of Article 6 are satisfied as long as the interested parties have, before that point, been provided access to *all* of the "relevant information" and "essential facts", and been given an adequate opportunity to present arguments (and respond to arguments by other parties) concerning the "relevant information" and "essential facts".

4.155 In this case, it is beyond dispute that the KTC did provide the Indonesian respondents with access to the "relevant information" and "essential facts" relating to the injury determination during the original investigation.[44] Furthermore, the KTC allowed the Indonesian respondents to comment

[43] Article 6.2 of the Antidumping Agreement requires that parties be given "full opportunity for the defence of their interests" (and especially an opportunity, upon request, to meet with the investigating authorities and adverse parties to present arguments and rebuttals). Article 6.4 requires disclosure to the parties of "all information that is relevant to the presentation of their cases" (other than confidential information. Article 6.9 requires disclosure of the "essential facts ... in sufficient time for the parties to defend their interests").

[44] Indonesia has asserted, without any evidentiary support whatsoever, that there was some "mysterious" new evidence obtained by the KTC that was not disclosed to the Indonesian respondents. *See* Indonesia's First Article 21.5 Submission, paras. 181-86. The simple answer is that there was no such

freely on that material, and to respond to the comments of other parties, during the original investigation. Since the KTC's revised injury determination did not consider any new information or any new arguments by interested parties, the KTC was under no obligation to provide additional opportunities for the Indonesian respondents to submit information or comment on the injury determination. Instead, having allowed full disclosure and a full opportunity for comment, the KTC was free to retreat to its offices to draft its final determination — and then to draft the final determination again after receiving the Panel's decision in the initial proceedings.

4.156 On the other hand, the KTC's revised determination concerning the corroboration of the facts available used for CMI's interest expenses did consider additional information. As a result, the disclosure made on that issue during the original KTC investigation was not sufficient to satisfy the KTC's obligations under Article 6 — because the disclosure during the original investigation did not encompass *all* of the "relevant information" and "essential facts" relating to that issue. Consequently, the KTC was obligated to disclose the additional "relevant information" and "essential" facts to the Indonesian respondents, and to allow them an opportunity to submit arguments relating to that material. And that precisely is what the KTC did.

4.157 Significantly, Indonesia does not contend that there was any inadequacy in the KTC's disclosure of information or in the opportunity to comment allowed on the specific issue on which the KTC re-opened the record — that is, the corroborating information on interest expenses for Indonesian companies and for companies engaged solely in selling activities. Instead, Indonesia contends that the KTC defined too narrow a scope for submission of information and argument. In Indonesia's view, once the KTC re-opened the record to corroborate the facts available, it was required to permit the Indonesian respondents to submit new information supporting their claims about CMI's actual interest expenses and business activities.

4.158 There is, however, a fundamental flaw in Indonesia's arguments. Article 6.1 of the Antidumping Agreement does provide that parties may submit any evidence they consider *relevant*. However, nothing in Article 6.1 (or in any other provision of the Antidumping Agreement) requires an investigating authority to accept the views of the parties on the relevance of information. As long as the investigating authority allows the party to submit the information, it has complied with its obligation under Article 6.1. The investigating authority remains free to disregard the information as irrelevant, as long as it properly explains its decision.

4.159 That is, in fact, what happened in this case. The KTC did not prevent the Sinar Mas Group from submitting information they considered relevant. It also did not prevent the Sinar Mas Group from presenting arguments concerning that information. Instead, the KTC simply concluded that some of the information and argument that the Sinar Mas Group had submitted was irrelevant, because it did not relate to the issue being considered in the implementation proceeding. The KTC's decision on that score was reasonable and properly explained. Article 6 of the Antidumping Agreement does not require anything more.

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information. All of new information obtained by the KTC was disclosed to the Indonesian respondents. None of that information related to the revised injury analysis *See* Korea's First Article 21.5 Submission, paras. 63-64.

Indonesia also asserts that the fact that there was no new injury-related information itself constituted an "essential fact" that should have been disclosed to the Indonesian respondents. *See* Indonesia's First Article 21.5 Submission, para. 179. This argument merely confirms that there was, in reality, nothing for the KTC to disclose. And, in any event, the KTC's decision not to seek new information relating to its injury analysis is part of its reasoning, not a "fact". As the Panel in the Article 21.5 proceeding on *Oil Country Tubular Goods* recently observed, the disclosure obligations of Article 6.9 do not apply to the investigating authority's reasoning. *See United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, 30 November 2006, para. 7.150.

E. ORAL STATEMENTS OF INDONESIA

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

- **Opening Statement of Indonesia at the meeting with the Panel**

1. Introduction

4.161 The central issue in this case is whether the KTC used the most appropriate secondary information to calculate the amount of CMI's interest expenses stemming from its activity of reselling the investigated product in Indonesia. The KTC had to choose between the verified interest expenses of a company engaged in the same activities, April Fine Paper Trading, and the interest expenses of a company engaged in very different activities, RAK. In Indonesia's view, the KTC's decision to choose the latter could not have been made by an objective and unbiased investigating authority.

4.162 The essence of Indonesia's case is quite simple. Indonesia objects to the fundamental disconnect between the missing information in this case and the secondary data that were utilised by the KTC to replace this missing information. The missing information in this case is the amount of interest expenses arising from *reselling activities.* The KTC replaced this missing information by adding amounts for interest expenses arising from *manufacturing activities.* In Indonesia's view, no objective and unbiased investigating authority could calculate the per-ton costs of *reselling* paper in Indonesia by using the per-ton costs of *manufacturing* paper in Indonesia, particularly when verified secondary information regarding the cost of reselling paper is readily available.

4.163 The legal standards that regulate the KTC's choice are found in Article 2.2 of the Anti-Dumping Agreement which imposes an obligation on the KTC to use only "reasonable" amounts for CMI's interest expenses and Article 6.8 and Annex II of the Anti-Dumping Agreement which mandates that the KTC utilise the "best" available secondary information and to act with "special circumspection". Korea has not, thus far, contested Indonesia's explanation of these legal standards. Indonesia therefore trusts that the Panel will carefully apply the relevant legal standards set out in Indonesia's submissions in reaching its decision.

4.164 Korea has responded only partially to Indonesia's claims. For instance, Korea has not meaningfully addressed Indonesia's claim that the KTC doubled-counted manufacturing-related interest expenses and therefore imputed "unreasonable" amounts in the construction of normal value for Indah Kiat and Pindo Deli within the meaning of Article 2.2 of the Anti-Dumping Agreement. In addition, Korea has not fully clarified whether during the implementation proceedings it rejected certain information relating to CMI's activities that remained on the record of the original investigation.

4.165 Korea's responses to Indonesia's claims under Article 6.8 of the Anti-Dumping Agreement require the Panel to consider two alternative arguments.[45] First, Korea argues that the KTC need not compare the activities carried out by CMI and potential secondary sources. Second, Korea contends that the activities performed by CMI are unknown and, therefore, that there is no basis for the contention that CMI and April Fine Paper Trading carried out equivalent activities. Indonesia has responded to these arguments in detail in Indonesia's second submission.[46] Indonesia will not repeat those arguments today. Instead, Indonesia will briefly touch on the implications of adopting Korea's position.

[45] See Indonesia's Second Submission, paras. 35-36.
[46] *Ibid*, paras. 37-62.

4.166 Before doing so, Indonesia discusses briefly Korea's apparent position that the original panel approved the use of RAK as a proxy and that all that was required for Korea to implement the original panel's ruling was for the KTC to reproduce the arguments Korea presented to the original panel as an "explanation" for the KTC's decision to use RAK as the secondary source for CMI's selling expenses.[47] This attempt to portray the original panel's rulings as simply identifying some sort of disclosure lapse in the KTC's original determination is disingenuous. To the contrary, nothing in the original panel report suggests that the original panel took the view that, on the facts of this case, the use of RAK as secondary information to replace the missing information was consistent with the Anti-dumping Agreement. The original panel's task was to make an objective assessment as to whether the KTC's establishment of the facts was proper and its evaluation of those facts unbiased and objective. Clearly, the original panel could not have determined that the use of RAK as secondary information was appropriate in the absence of an explanation of that choice by the KTC.

2. The Basis for the choice of secondary information

4.167 The original panel rulings placed the onus on the KTC to provide a comparative justification of its choice of secondary data and the relative suitability of the RAK data. Nonetheless, the KTC did not provide any reason why the RAK data is more suitable than the April Fine Paper Trading data. In Korea's view, apparently, it is not necessary to do so. Korea's position is that interest expense figures from *any company* are *equally suitable* to replace the missing information because there is no linkage between a company's activities and its interest expenses. Thus, Korea justifies its use of the RAK data on the ground that it is "more favourable"[48] than the interest expenses of, to give just two examples, a company engaged in real estate development in Indonesia[49] and a company engaged in manufacturing, software and electronic game development in Korea.[50] Korea appears to consider that interest expense figures from these companies could have been legitimately used as facts available to determine CMI's interest expenses. However, if these companies can be used instead of a company with the same activities to determine CMI's interest expenses, then *any* company's information can be used.

4.168 To put it simply, in Korea's view, in every investigation where there is missing interest cost information an investigating authority can add interest expense amounts from *any* source as facts available. If Korea's position is accepted, investigating authorities would be wholly unconstrained in calculating interest expenses on the basis of facts available. This is an absurd interpretation of the Anti-dumping Agreement, with far-reaching consequences that the Panel should seek to avoid in its ruling.

4.169 Korea's basic argument is that the interest expense figures used by the KTC "might" be incurred by a trading company.[51] But this is not the standard imposed by the Anti-Dumping

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[47] See e.g., Korea's First Submission, para. 5.

[48] Korea's First Submission, para. 56 (justifying the interest expense amounts used by the KTC on the ground that it is more favourable than the interest expense rates obtained from (1) "other Indonesian paper companies", (2) "Indonesian companies not engaged in paper production", (3) "non-manufacturing Korean wholesalers and retailers").

[49] PT. Duta Pertwi Tbk, one of the "Indonesian companies not engaged in paper production" that Korea refers to, is engaged in real estate development. See KTC Dumping Redetermination, Exhibit KOR-S-4, pp. 28, 38-39. See also 16 June Comments, Exhibit IDN-8, p.2.

[50] Unilab Co Ltd, one of the "non-manufacturing Korean wholesalers and retailers" that Korea refers to, is actually engaged in manufacturing, software and game development. See KTC Dumping Redetermination, Exhibit KOR-S-4, pp. 28-29, 38-39. See also 16 June Comments, Exhibit IDN-8, p.2.

[51] See Korea's First Submission, para. 53 ("Instead, companies engaged solely in trading activities *might* have substantial interest expenses"), KTC Dumping Redetermination, Exhibit KOR-S-4, p. 25 ("Therefore, the KTC concluded that a trading company engaged solely in selling activities *may* incur substantial financial expenses").

Agreement on objective and unbiased investigating authorities. It is simply incorrect to adopt the view that the only discipline on an investigating authority is that it cannot impute figures as facts available that are outside realm of the possible. To accept the standard implicit in Korea's position, that everything that is possible is permissible, would seriously undermine the disciplines on the use of facts available and would render meaningless the requirement that the investigating authority act objectively and with special circumspection in selecting the "best" information available.

4.170 In any event, as Indonesia has explained, Korea's view that the interest expenses of more similar proxies need not be preferred because interest expense levels are unconnected to the nature of a company's activities cannot be reconciled with the text of Articles 2.2 and 6.8, read with Annex II of the Anti-Dumping Agreement[52], the original panel rulings[53], or the verified evidence regarding the interest expenses of manufacturers and resellers in the Indonesian paper industry.[54] Moreover, Korea's view is unsupported by basic logic or economic theory.[55]

4.171 In addition, it is important to note that some of Korea's assertions about these matters are *ex post* justifications for the KTC's actions that were not given by the KTC itself in its Re-determination. The Panel should carefully compare Korea's present assertions about the KTC's reasoning this issue with the actual statements of the KTC in its Dumping Re-determination to ensure that the Panel does not improperly rely on *ex post* justifications.[56]

4.172 In this case, therefore, the Panel should find that it is neither, reasonable, objective, nor circumspect to impute interest expense figures that assume that a trading company such as CMI would normally incur interest expenses three times greater than the total of all its other expenses and roughly double the interest expenses incurred in manufacturing the investigated product. This is especially so because the KTC had available information regarding the interest expenses incurred by a proxy that

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[52] Indonesia's Second Submission, paras 16-17, 59.

[53] *Ibid*, para. 38.

[54] *Ibid*, para. 43.

[55] *Ibid*, paras. 40-42.

[56] For example, Korea argues that an analysis by the KTC of the "evidence" collected from various Indonesian and Korean companies established that there was no linkage between the scope of a company's activities and its interest expense (see e.g., Korea's First Submission, para. 4 ("The KTC based this conclusion on logic and on evidence ... *[a]s an evidentiary matter, the KTC found* that an analysis of companies engaged only in selling activities often had significant interest expenses – in excess, for example, of those reported by RAK. Thus the evidence did not support Indonesia's contention that all trading companies have similar interest expenses, and that those interest expenses are lower than the expenses of companies engaged in manufacturing")). However, the only inference that the KTC actually drew from this evidence in its Dumping Redetermination was that the financial expense ratio used "was confirmed to be valid"(see KTC Dumping Redetermination, Exhibit KOR-S-4, p.29). This statement does not deal with issue of whether similar companies can be presumed to have similar interest expenses. Likewise, Korea argues that the KTC concluded in pages 24-25 of its Dumping Redetermination that, as a matter of logic or economic theory, the nature of a company's activities did not dictate the amount of interest expenses it would incur (see Korea's First Submission, paras. 27, 53. Korea's Second Submission, para. 9). However, the only inference that that the KTC drew from these statements in its Dumping Redetermination was that "whether a company is a trading company or a manufacturing company *may not* be a criterion to determine whether a company *will incur financial expenses or not*" (see KTC Dumping Redetermination, Exhibit KOR-S-4, p.25). This tentative statement does not address the issue of the level or amount of financial expenses; it is directed towards the separate question of whether it is legitimate to assume that trading companies would incur *any* financial expenses. Indonesia notes that the Appellate Body has stated that "the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernable in the reasoning and explanations found in its report" and that "a panel's examination must be ... based on ... the explanations given by the authority in its published report" (see Appellate Body Report, *US – Softwood Lumber VI (Recourse to Article 21.5 by Canada)*, paras. 97 and 93).

carried out activities directly comparable to those carried out by CMI, which it could and should have used to calculate CMI's interest expenses.

3. The proxy most similar to CMI

4.173 Two essential facts are undisputed in this case. First, it remains undisputed that CMI and April Fine Paper Trading both resold the investigated product in Indonesia while RAK did not engage in this activity. Second, it is undisputed that RAK manufactured the investigated product in Indonesia, while neither CMI nor April Fine Paper Trading did so. These essential facts are, in themselves, all that is required to sustain the inference that April Fine Paper Trading is more similar to CMI than to RAK or, in the words of the original panel, that RAK is "less similar" to CMI.[57] None of Korea's speculation to the effect that CMI may have been engaged in manufacturing activities or that there may be minor differences in the kinds of selling expenses and hence financing requirements of CMI and April Fine Paper Trading can change these essential facts or the conclusions that flow necessarily from these facts.

4.174 Korea argues, in effect, that any minor differences between April Fine Paper Trading and CMI make RAK a suitable proxy for CMI's data. However, this argument is fallacious. The relevant question is not whether April Fine Paper Trading and CMI are identical; it is whether April Fine Paper Trading is relatively more similar to CMI than RAK.

4.175 Korea attempts to portray the task of choosing between RAK and April Fine Paper Trading data as a tremendously unusual or complicated exercise requiring enormous amounts of detailed information regarding the activities of CMI. It is not. It is by no means unusual for manufacturing companies to use affiliated resellers to sell their products in the domestic market. And it is by no means unusual for investigating authorities to have to determine the selling, SG&A expenses of such smaller resellers using some secondary information. In order to do so, they do not need full and complete information about every detail of the reseller's selling activities. And they do not need to speculate about remote possibilities that the resellers may be engaged in other types of activities with respect to other products. As Indonesia pointed out in its second submission, there is always some information missing in cases of resort to facts available.[58] But the mere fact that some information is missing – in this case, the amount of CMI's selling expenses – does not mean that the investigating authority is entitled to base its determination on speculation about what expenses a reseller may possibly have with respect to other products.

4.176 Accordingly, the Panel should find that no objective and unbiased investigating authority could conclude that it is not possible to determine which of the two available proxies, April Fine Paper Trading and RAK, are more similar to CMI. Indeed, consistent with its finding in the original proceeding, the Panel should rule that an objective and unbiased investigating authority would necessarily conclude that April Fine Paper Trading is more similar to CMI.

4. Procedural claims

4.177 Korea has failed to respond in any detail to Indonesia's procedural claims regarding the manner in which the KTC arrived at its findings on CMI's activities. It appears to take the position that the KTC is permitted to re-open the record on certain issues but not others. Indonesia awaits precise clarifications on these matters. If the KTC did not re-open the record on the issue of CMI's activities, then it is clear that the KTC is not entitled to rely on the DIS Report in arriving at its conclusions on the overall scope of CMI's activities. If it did re-open the record on this issue, then the KTC was under an obligation to re-open the record in an even-handed manner by giving the exporters

[57] Original Panel Report, para. 7.111.
[58] Indonesia's Second Submission, paras. 31-33.

notice of the information it required, by allowing the Sinar Mas Group to submit information on CMI's activities, and by accepting that information onto the record. In either case, it appears that the KTC's conclusions on this matter are not based on a properly constituted factual record.

4.178 Moreover, to the extent that the record on CMI's activities remains unchanged from the original investigation (1) the KTC cannot depart from its original finding that CMI was a "sales company"[59] without a very compelling justification for doing so, (2) likewise, the Panel cannot depart from the original panel's finding that CMI is a "trading company"[60] without a very compelling justification.

4.179 Indonesia awaits clarification on whether material from the record of the original investigation, such as the CMI organisation charts provided by Indah Kiat and Pindo Deli[61] and the statements in their questionnaire responses detailing CMI's role in the sales process[62] were rejected by the KTC during the implementation proceedings. Indonesia notes that any refusal by the KTC to rely on material that was not rejected by the KTC during the original proceedings, utilised directly or indirectly by the KTC in making its determinations, cited by Korea in support of its position during the original panel proceedings, and relied upon by the original panel in making its rulings or verified during the original investigation, would be wholly unjustified.

4.180 Indonesia disagrees with Korea's reading of Article 6.1 of the Anti-Dumping Agreement as permitting investigating authorities to disregard information as irrelevant "as long it properly explains its decision".[63] Rejection of submitted evidence requires compliance with the stringent requirements of paragraph 3 of Annex II of the Anti-dumping Agreement. No such explanation appears in the KTC's Re-determination. Moreover, Korea's narrow interpretation of Article 6.1 was impliedly rejected by the Appellate Body in *Mexico – Rice*[64] and *US – Anti-Dumping Measures on Oil Country Tubular Goods*[65] when it ruled that the right to present evidence includes a concomitant obligation on the investigating authority to take the submitted information into account.

4.181 Regarding the KTC's failure to provide the essential facts on which it based its injury re-determination and an opportunity to comment to the Sinar Mas Group, Indonesia disagrees with Korea's argument that Articles 6.1, 6.2, 6.4 and 6.9 do not entail a right to be informed of essential facts or an opportunity to comment in proceedings where the investigating authority does not collect "new information" or "new arguments" from interested parties.[66] The text of these provisions does not reflect such any such limitation.

5. Conclusion

4.182 Indonesia recalls that Article 3.10 of the DSU states that the use of dispute settlement procedures is not a contentious act and that all WTO Members have undertaken to engage in these procedures in good faith. In this context, Indonesia is very surprised and disappointed by some of Korea's statements during this proceeding. For example, in the context of a request for a procedural

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[59] See e.g., KTC, Final Dumping Report, Exhibit IDN-19, p. 19 (referring to CMI as "the sales company"), p. 20 (no contestation of the Sinar Mas Group's description of CMI as a "sales company").

[60] See e.g., Original Panel Report, para. 7.102 ("We note that CMI is a trading company…").

[61] Responses to section B.3-3 of the KTC Questionnaire: Indah Kiat's Questionnaire Response, Exhibit IDN-13, p. 118 and Pindo Deli's Questionnaire Response, Exhibit IDN-14, p.161.

[62] Responses to sections B.5, B.6 and B.7 of the KTC's Questionnaire: Indah Kiat's Questionnaire Response, Exhibit IDN-13, pp. 3-5 and Pindo Deli's Questionnaire Response, Exhibit IDN-14, pp 3-6.

[63] Korea's Second Submission, paras. 34-35.

[64] Appellate Body Report, *Mexico – Rice*, para. 292 (interpreting Article 12.1 of the SCM Agreement which is identical to Article 6.1 of the Anti-Dumping Agreement).

[65] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 246.

[66] Korea's Second Submission, paras. 29-31.

ruling, Korea stated the hope that the Indonesian industry might suffer substantial harm.[67] Rather than assisting the Panel in resolving the dispute, such statements serve only to embarrass the party responsible for them. To the extent that Korea has chosen to put these statements on the record, the Panel should consider whether, in light of these statements, Korea would be likely to implement any future ruling in an objective and unbiased manner.

4.183 This dispute has gone on too long. It is clear that based on the evidence in this case, an objective and unbiased investigating authority would not use RAK as a proxy for CMI's interest expenses. It would then find that the Sinar Mas companies were not dumping, even though they may also have failed to provide all of the information requested by the investigating authority. It is equally clear that the KTC is determined not to make such a finding.

4.184 In these circumstances, Indonesia looks to the Panel finally to resolve this dispute, by making not only a clear and unambiguous finding that the KTC's use of the RAK data cannot be reconciled with its obligation to make an objective and unbiased determination, using special circumspection, of the best information available regarding the reasonable SG&A costs of reselling the product under investigation but also the further finding that these obligations require the KTC to utilise the April Fine Paper Trading data, the only verified data on the costs of reselling the investigated product in Indonesia, to calculate *all* of CMI's SG&A expenses, including its interest expenses.

- **Closing Statement of Indonesia at the meeting with the Panel**

4.185 Indonesia regrets that Korea has chosen to prolong this dispute. Indonesia would have expected that, as a Member whose exporters are often the target of anti-dumping investigations, Korea would appreciate the importance of the principle that investigating authorities should arrive at their determinations in an objective and unbiased manner and must ensure that their conclusions are firmly based on the evidence on record. Unfortunately, the KTC's determinations in this case fall far short of the standards set out in the Anti-Dumping Agreement.

4.186 Indonesia is confident that this Panel will conduct a thorough review of the parties' submissions, the KTC's determination and the evidence on record. Indonesia remains confident that following this review this Panel will uphold Indonesia's claims that Korea has failed to its measure into compliance with the Anti-dumping Agreement in a manner that will enable this dispute finally to be resolved.

F. ORAL STATEMENTS OF KOREA

4.187 The following summarizes Korea's arguments in its oral statements

- **Opening Statement of Korea at the meeting with the Panel**

1. The KTC's Selection of Facts Available for CMI Interest Expenses

(a) Indonesia's Arguments Are Based on an Illogical Assumption about the Interest Expenses of Trading Companies that Are Inconsistent with the Facts on the Record before the KTC

4.188 The crux of Indonesia's argument is that it believes that it is unreasonable and unacceptable to use the interest expense for a so-called "manufacturing company" as a surrogate for the interest

[67] Korea's Reply to Indonesia's Letter of 19 March 2007, 22 March 2007, para. 38 ("We recognize, of course, that the disclosure of the Sinar Mas Group's confidential information — including the identities of its customers, the prices at which it sells the merchandise, and its production costs — would be likely to cause competitive harm to the Sinar Mas Group. (Indeed, we hope that the harm will be substantial, so that Indonesia may finally understand why protection of confidential information is important)").

expenses of a so-called "trading company" like (according to Indonesia) CMI. To support this view, Indonesia asks the Panel to consider the hypothetical situation of automobile distributors selling automobiles in Geneva. According to Indonesia, consideration of this example proves that the interest expenses of a trading company may only be estimated by looking at other trading companies.

4.189 Of course, Indonesia has not presented any evidence concerning the actual experience of distributors selling automobiles in Switzerland. Instead, Indonesia relies entirely on assumptions about how such distributors would organize their business. However, by adopting plausible alternate assumptions, it is easy to show that two companies engaged solely in distribution of automobiles in Geneva might have vastly different interest expenses.

4.190 In this regard, it is important to distinguish between functions that affect selling and sales administration expenses and those that affect interest expenses. For example, it may be assumed that the two distributors have similar showrooms, employ the same number of sales personnel, and have similar office support personnel — managers, accountants, secretaries, and service personnel — in their operations. Given these assumptions, the two distributors would probably have similar expenses for rent, for electricity, for salaries and the like. Thus, the selling and office administration expenses of the two distributors might be similar.

4.191 On the other hand, the fact that the two companies sell similar products from similar showrooms, using similar numbers of sales and administrative personnel does not provide a basis for drawing conclusions about the interest expenses the two companies are likely to incur. Instead, the amount of the interest expense incurred by any company depends on how much money the particular company chooses to borrow. And the amount of money the company chooses to borrow is determined by its cash flow and its access to alternative sources of funds. These factors may vary greatly even for companies that appear, on the surface, to be quite similar.

4.192 One critical issue is the capital structure of the company in question. Some companies choose to raise funds by issuing equity (that is, shares of stock). Others choose to raise funds by taking out loans. A company that raises funds by issuing equity may face unhappy shareholders if it does not generate sufficient returns and provide either dividends or stock-price appreciation, but it does not have interest expenses, because share offerings of common stock do not give rise to interest obligations. By contrast, a company that raises funds by borrowing does incur interest expenses, because lenders require borrowers to pay interest on their loans.

4.193 Even for companies with similar capital structures who raise some or all of the funds they need by borrowing, the amount of borrowing needed — and, consequently, the amount of interest expenses incurred — may vary considerably depending on the credit terms that the companies receive from their suppliers and offer to their customers. For example, a company that does not have to pay its suppliers until it receives payment from its customers will not have to borrow funds to finance its purchases. By contrast, a company that has to pay suppliers in advance, but allows customers to delay their payments, will need to find funds to pay for its purchases while it is awaiting customer payment.

4.194 Even if the sales terms are the same, there may be other differences in the nature of their operations that affects their cash flow requirements. For example, one company may hold substantial inventories, while another may not. Furthermore, even if the inventory practices were the same, there might be significant differences in the cash maintenance practices of the two distributors — especially if they are affiliated with their suppliers and subject to corporate financial strategies. Their parents may choose to organize the profits and losses of each subsidiary to minimize overall income tax liabilities by shifting profits to jurisdictions with relatively low tax rates. These strategies may affect the amount of retained earnings an individual subsidiary (such as the hypothetical trading company) has to draw upon to meet cash flow requirements.

4.195 In addition, the fact that a particular company is, on its face, only a sales company, does not mean that it does not finance production equipment. It is entirely possible that such a company might be responsible for borrowing funds to finance purchases of production equipment by its affiliates, especially if the so-called "sales company" has lower borrowing costs. When a manufacturing affiliate has access to relatively lower cost borrowings, the parent company may choose to borrow through the manufacturing company — and then transfer whatever borrowed money the trading company needs to finance its operations by allowing it to delay its payments for purchases from affiliated suppliers, or by adjusting the price charged by suppliers to give the trading company a substantial profit, or by the simple expedient of paying the trading company a commission. By contrast, when the trading company has access to relatively lower cost borrowings, the parent company might choose to finance the manufacturing affiliate's production equipment as well as the trading company's operations, by borrowing on the trading company's account — and then transferring the funds to the manufacturing affiliate by having the trading company pay the manufacturing affiliate in advance, or by setting a high transfer price for the purchases by the trading company, or by having the trading company pay the manufacturing affiliate for "services" provided.

4.196 In short, interest expenses depend on the amount of money borrowed by the company. The amount of money borrowed by any company depends, in turn, on the corporate strategy of the company. The interest expenses for two companies engaged only in sales and distribution may, therefore, differ enormously. There is simply no reason to assume that the interest expenses incurred by one trading company will be similar to the interest expenses of a different trading company. And, by the same token, there is no reason to assume that the interest expenses incurred by a manufacturing company will differ from those of a trading company.

4.197 Significantly, the KTC did not base its decision on hypothetical examples about made up automobile distributors in Geneva. Instead, it looked for actual evidence of the interest expenses of trading companies and manufacturers. And, the data it found indicated that the interest expenses for companies engaged solely in distribution activities were not perceptibly different from the interest expenses for companies engaged in manufacturing.

4.198 Indonesia claims that the KTC's factual evidence should be disregarded, because the KTC allegedly conceded that two of the five trading companies it identified were not, in fact, selling companies, while the data from a third company did not support the KTC's conclusion. These claims are without merit. And, in any event, even if Indonesia's argument were correct, it would still mean that, of the companies that Indonesia agrees were involved solely in trading, two of the three had higher interest expenses than the so-called "manufacturing company" whose interest expenses the KTC used as "facts available". These facts undoubtedly refute Indonesia's assertion that a reasonable investigating authority would *have to* assume that the interest expenses of a trading company would be lower than the interest expenses of a "manufacturing" company.

(b) There Is No Evidence to Support Indonesia's Assumptions that CMI Was Only a Trading Company

4.199 Because of the Sinar Mas Group's failure to submit requested documents or to cooperate during the verification, the available evidence was insufficient to allow any firm conclusions to be drawn regarding the nature of CMI's activities. It is possible that CMI's activities were limited only to trading operations. But it is also possible that CMI's activities were much broader and encompassed manufacturing of various products, possibly even including the subject merchandise. When CMI refused to allow the KTC to review its financial statements and accounting records, it prevented the KTC from reaching any firm conclusions about the scope of CMI's activities.

4.200 Indonesia claims that the KTC was bound by the questionnaire responses filed by Indah Kiat and Pindo Deli, which purported to describe CMI's role in their sales of the subject merchandise. Indonesia ignores the fact that, under Article 6.6 of the Antidumping Agreement, the KTC was

permitted to conduct a verification in order to satisfy itself as to the accuracy of those descriptions of CMI. The KTC did attempt to conduct such a verification. However, that verification was prevented by the Sinar Mas Group's refusal to cooperate. Consequently, the KTC was plainly justified in refusing to accept the accuracy of the Sinar Mas Group's description of CMI's activities.

4.201 The KTC did not rule that the evidence demonstrated that CMI actually engaged in manufacturing or that it had an extensive network of warehouses or that it allowed its customers to delay payment for extended periods or that it financed the purchase of production equipment by Indah Kiat, Pindo Deli and other Sinar Mas Group companies. Instead, the KTC found only that, because of the Sinar Mas Group's refusal to cooperate, it was not possible for the KTC to reach a conclusion that CMI was not performing any of those activities. The evidence did not support the Sinar Mas Group's claim that CMI was engaged only in trading operations with minimal staff and inventory, because the Sinar Mas Group deliberately withheld the evidence that would have been needed to confirm that claim. In these circumstances, the KTC was not under any obligation to accept that the Sinar Mas Group's claims were correct or to determine the interest expenses based on a description of CMI's activities that could not be verified because of the Sinar Mas Group's refusal to cooperate.

(c) The KTC's Selection of the Facts Available Interest Expense for CMI Was Consistent with Article 2.2 of the Antidumping Agreement

4.202 Indonesia asserts that the KTC's determination of the "facts available" interest expense for CMI was inconsistent with the provisions of Articles 2.1, 2.2, 2.2.2 and 2.4 of the Anti-dumping Agreement. Its argument appears to be based on the broad assertion that the "facts available" interest expense used by the KTC was not "reasonable" and did not "pertain" to the production and sale of the subject merchandise.

4.203 As an initial matter, it should be noted that Indonesia's argument fails to address the range of permissible options under the *chapeau* and sub-paragraphs of Article 2.2.2. Those provisions explicitly provide that, when an investigating authority is unable to use the actual amounts for SG&A expenses and profit, it may resort to "any other reasonable method" — including figures that do not "pertain" to the production or sale of the subject merchandise.

4.204 Furthermore, Indonesia has failed to consider the interplay between the provisions of Article 2.2.2 and the KTC's right, under Article 6.8, to resort to "facts available" in light of the Sinar Mas Group's failure to cooperate. In calculating constructed value, the KTC attempted to base its calculation of SG&A expenses and profit based on the actual experience of the Sinar Mas Group companies, as described in the *chapeau* of Article 2.2.2. However, because the Sinar Mas Group refused to cooperate, CMI's actual expenses and profit could not be ascertained. The KTC therefore determined the amounts for CMI's expenses and profit based on "facts available", in accordance with Article 6.8. As long as the KTC's determination of the "facts available" was consistent with the requirements of Article 6.8, its determination of normal value was also consistent with the requirements of Article 2.2.2, because the "facts available" used by the KTC simply replaced the figures for SG&A expenses and profit of the Sinar Mas Group that could not be verified due to the Sinar Mas Group's failure to cooperate. Thus, the methodology used by the KTC was the precise methodology described in Article 2.2.2, but with the twist that, as a result of the Sinar Mas Group's non-cooperation, the KTC had to use "facts available" in applying that methodology.

4.205 To put this another way, the issue is not whether the "facts available" that were used "pertained" to sales of the subject merchandise. Instead, the issue is whether the "facts available" represented an appropriate replacement for the CMI data that the Sinar Mas Group refused to supply. If the "facts available" were an appropriate replacement for the CMI data that the Sinar Mas Group refused to supply, then the KTC was permitted to use the "facts available" in place of the CMI data. Nothing in Article 2.2.2 prevents the use of figures based on "facts available" to replace the actual data that a respondent refuses to provide.

4.206 Finally, as Korea has explained previously, Indonesia's complaints about the alleged "unreasonableness" of the KTC's actions are difficult to take seriously, in light of the fact that the "facts available" used by the KTC were actually more favourable to the Sinar Mas Group than the information the Sinar Mas Group itself reported. If the KTC had used the figures for SG&A expenses and profit reported by the Sinar Mas Group, and had not used "facts available" at all, then the constructed normal value and dumping margins would all have been higher, because the figures reported by the Sinar Mas Group were less favourable than the allegedly "punitive" figures used by the KTC as "facts available".

4.207 Indonesia has focused exclusively on the KTC's selection of the "facts available" interest expense figure. It has ignored the fact that the KTC also used a "facts available" profit figure that was significantly more favourable to the Sinar Mas Group than the profit figures the Sinar Mas Group itself reported. On the whole, the benefit the Sinar Mas Group received from the use of the favourable "facts available" profit figure outweighed the alleged harm from the less favourable interest expense figure.

(d) The KTC's Selection of the Facts Available Interest Expense for CMI Was Consistent with Article 6.8 and Annex II of the Antidumping Agreement

4.208 The KTC's revised analysis recognized that the verified information on the record indicated that a "trading company" that is not affiliated with the Sinar Mas Group had no interest expense, and it considered whether the "trading company" figure, and not the expenses of that company's "manufacturing" affiliate, should be used as "facts available" for CMI. In the end, the KTC concluded that the "manufacturing company" figure was more appropriate, based on the following reasoning:

(i) There was no reason to assume that CMI would have zero interest expense, even if its activities were limited to sales and distribution;

(ii) There was no *a priori* reason to believe that the actual interest expenses of CMI would be more similar to the expenses of a trading company than to the expenses of a company with manufacturing operations; and

(iii) The interest expense was consistent with the available information concerning the interest expenses incurred by sales and distribution companies and by manufacturing companies producing similar and non-similar merchandise.

Indonesia, of course, objects to the KTC's conclusion. But it has not provided any basis for disputing the KTC's analysis.

4.209 In this regard, it should be noted that the Sinar Mas Group did not submit *any* information regarding the interest expenses of other companies involved in sales and distribution in Indonesia. There was no evidence indicating that the interest expenses of the "trading company" were consistent with normal industry experience. As a result, even if the KTC had wanted to adopt the "trading company's" figures as "facts available", there would have been no evidence to corroborate that data.

2. The KTC's Revised Explanation of Its Injury Analysis

(a) The KTC Provided the Indonesian Respondents an Opportunity to Comment on All Factual Information and on All of the Relevant Issues

4.210 In its first submission, Indonesia initially claimed that the KTC's revision of its explanation of the injury determination without allowing the Indonesian respondents an opportunity to comment on a draft was inconsistent with various procedural obligations under the Antidumping Agreement. However, as a result of Korea's response, Indonesia has narrowed its claims considerably. It now

contends only that the "exporters should have been provided with disclosure of the fact that the KTC would base its injury determination on information obtained during the original proceeding and an opportunity to comment in light of this fact".

4.211 As explained in Korea's previous submissions, the provisions of Article 6 of the Antidumping Agreement do require that investigating authorities provide disclosure to the interested parties of "relevant information" and "essential facts", and those provisions also require that investigating authorities allow the interested parties to "defend their interests" and to "present their cases". However, those provisions do not require multiple disclosures of the same "relevant information" and "essential facts", or multiple opportunities to present arguments. Clearly, at some point the investigating authority is entitled to close off debate and retreat to its offices to analyze the issues and prepare a final determination. The requirements of Article 6 of the Antidumping Agreement are satisfied as long as the interested parties have, before that point, been provided access to *all* of the "relevant information" and "essential facts", and been given an adequate opportunity to present arguments (and respond to arguments by other parties) concerning the "relevant information" and "essential facts".

4.212 In this case, the Indonesian respondents were given access to *all* of the "relevant information" and "essential facts" relating to the KTC's injury analysis *during the original KTC investigation.* They were also were also given an opportunity to present arguments (and respond to arguments by other parties) concerning the "relevant information" and "essential facts", *during that investigation*. Contrary to Indonesia's claims, then, the KTC did not make its injury determination "without giving the exporters any opportunity to comment".

4.213 The issue presented by Indonesia is whether the Indonesian respondents were entitled to a second opportunity to comment on the same information (and to respond to the same arguments by other parties) simply because the KTC was required to revise its explanation of its injury determination. Indonesia has not, however, identified any provision of the Antidumping Agreement that requires multiple disclosure of the same information or multiple opportunities to comment on the same issues.

4.214 In fact, Indonesia's arguments are based, in the end, on a misreading of the Panel decision in the *Oil Country Tubular Goods* case. Indonesia has ignored the fact that the Panel in that case specifically ruled that the disclosure obligations of Article 6.9 do not apply to the investigating authority's *reasoning*.

4.215 Korea agrees that, if the KTC had obtained new information or allowed new arguments by any parties concerning the injury analysis, then it would have been required to allow the Indonesian respondents an opportunity to respond. Indeed, when the KTC obtained new information relating to certain dumping calculations issues, it did precisely that — allowing the Indonesian respondents an opportunity to see the new information and to comment upon it. However, the KTC's decision not to request or permit new submissions of injury data is not a new "fact" that required disclosure or an opportunity to comment.

(b) There Is No Basis for Indonesia's Unfounded Claim that the KTC Relied on New Information in Making Its Revised Injury Determination

4.216 As the Panel is undoubtedly aware, Indonesia has asserted that it "understands that the KTC received new materials and submissions related to the Re-determination from the Korean domestic industry or possibly other sources" and that "{t}hose documents have not been made available to Indonesia". That assertion is, however, completely unfounded. The Indonesian respondents were given access to all of this material during the course of the implementation proceeding, and were given an opportunity to comment upon it. Indonesia's claims are, therefore, entirely speculative and completely without merit.

4.217 In its second written submission, Indonesia asserts that Korea should be required to prove that the KTC did not obtain or rely upon any new information in making its revised injury determination. It appears, however, that Indonesia is not familiar with the requirement of a *prima facie* case. As the complaining party, Indonesia bears the obligation to present factual evidence to support its claim. It is not Korea's obligation to refute Indonesia's unfounded accusations.

- **Closing Statement of Korea at the meeting with the Panel**

4.218 Indonesia seems to want to relitigate all of the issues concerning the Sinar Mas Group's refusal to cooperate during the original investigation, and the permissible consequences of that non-cooperation. Korea will not bore the Panel with a further discussion of the meaning of "verified" and "verifiable", or with a discussion of the reasons why the verification of data submitted by Indah Kiat and Pindo Deli was not sufficient to verify the data on CMI's resales. The short answer is that Indonesia's arguments were already rejected by the Panel's original decision, which completely upheld the KTC's finding that it could not rely on the submitted information concerning CMI due to the Sinar Mas Group's refusal to cooperate.[68]

4.219 Furthermore, the scope of the Sinar Mas Group's non-cooperation was not, as Indonesia suggests, limited to information relating to the completeness and price information of the submitted sales listings. Instead, the Sinar Mas Group letter refusing the verification of CMI specifically informed the KTC that:

> 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*.[69]

In light of the Sinar Mas Group's statement, it was plainly impossible for the KTC to have conducted any verification of any CMI-related information other than "the materials requested in relation to the sample sales". It was clear that no other information relating to the nature of CMI's operations would be forthcoming and, as a result, no other information relating to the nature of CMI's operations could be verified.

4.220 It is, of course, clear that sales in Indonesia of subject merchandise produced by Indah Kiat and Pindo Deli were made through CMI. Beyond that, Korea simply does not know what CMI did. Korea does not know what its sales prices or practices were on the sales of subject merchandise produced by Indah Kiat and Pindo Deli — whether, for example, it held inventory of subject merchandise or made sales on credit, or what its actual mark-up might have been. Korea does not know if CMI handled subject merchandise produced by other companies (whether inside or outside of the Sinar Mas Group). Korea does not know if CMI itself produced subject merchandise — whether at its own facilities, or by leasing a part of the facilities of other companies, or by entering into tolling arrangements under which CMI supplied the raw materials and paid another company a fee to transform the raw materials into subject merchandise. Korea does not know what kind of transactions CMI may have had with other Sinar Mas Group companies that might have directly or indirectly provided financing to Indah Kiat, Pindo Deli and other Group manufacturers. Korea simply does not know.

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[68] *See, e.g.*, Initial Panel Decision, paras. 7.54to 7.56, 7.67 to 7.72, and 7.101.

[69] Letter from Arvind Gupta, Sinar Mas, to Bae, Seung-Jin, Director, Dumping Investigation Division, 24 March 2003, Exhibit KOR-29 (provided in Exhibit KOR-S-2).

4.221 The KTC's finding on this issue was, therefore, completely appropriate. The KTC did not find that the evidence on the record demonstrated that CMI held inventory or made sales on credit or manufactured subject or non-subject products. Instead, the KTC held only that, given the information on the record at the time of the original determination, it could not make any decision about the precise scope of CMI's activities.[70] And, because the KTC's inability to reach any conclusion was the result of the Sinar Mas Group's refusal to cooperate, the KTC was plainly permitted to draw inferences about CMI's activities that were less favourable to the Sinar Mas Group.[71]

4.222 Nevertheless, the KTC did not, in fact, take action to punish the Sinar Mas Group. Instead, the KTC selected facts available that resulted in an amount for SG&A expenses and profit that was actually lower than the amount reported by the Sinar Mas Group.[72] The Sinar Mas Group's submissions to the KTC constituted an admission that it was reasonable to believe that its SG&A expenses and profit were, on the whole, even higher than the amount assigned by the KTC. As a result, the Sinar Mas Group should not now be heard to complain that the amount assigned by the KTC was somehow unreasonable.

4.223 In the end, Indonesia's arguments boil down to the proposition that the facts available interest expense adopted by the KTC simply does not feel right to members of Indonesia's delegation. But feelings, whatever they may be, are not the relevant standard. Instead, the Panel must look to the evidence to determine "whether the {KTC's} establishment of the facts was proper and whether {its} evaluation of those facts was unbiased and objective".[73]

4.224 The un-refuted evidence on the record indicated that a wide variety of companies — including those whose operations are limited solely to sales and distribution — experience interest expenses that are greater than the amount used by the KTC as facts available for CMI's interest expense. The KTC's establishment of these facts was proper and its evaluation of these facts was unbiased and objective. Consequently, there is no basis for challenging the KTC's conclusion that the information used as facts available for CMI's interest expense was fully corroborated, as required by paragraph 7 of Annex II of the Antidumping Agreement.

4.225 Korea knows that the Panel had some questions about the different methods used to determine facts available for selling and administration expenses, on the one hand, and for interest expenses on the other. The basic point is that selling and administration expenses necessarily depend on the nature of the selling activities, while interest expenses do not. In order to determine the selling and sales administration expenses incurred in connection with sales of merchandise produced by Indah Kiat and Pindo Deli, the KTC looked to the selling and sales administration expenses of April Fine, as a source

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[70] As the KTC explained,

> ... Pindo Deli and Indah Kiat refused to submit sales and cost data, financial statements (which could not be verified from verification since submitted after the on-the-spot investigation) and related information during on-the-spot investigation. Consequently, any information was not available for the KTC to confirm whether CMI is just a trading company or not...
>
> As a result, the KTC had no information available to verify CMI's management activity throughout on-the-spot investigation. In addition, though Pindo Deli and Indah Kiat asserts that CMI engaged solely in selling activities, the KTC confirmed that nothing in the information obtained from a third source supports their assertion since such information indicates CMI is a manufacturer.

Final Implementation Report at 25-26 (provided in KOR-4). *See also id.* at 34 (Since Sinar Mas Group did not cooperate for on-the-spot investigation by refusing to submit materials on CMI, the KTC has no base to find out activities of CMI.")

[71] *Id.* at 26.

[72] *See, e.g.*, Exhibit KOR-S-10.

[73] *See* Antidumping Agreement, Art. 17.6.

of verified information regarding the costs of selling and sales administration activities in Indonesia. Even if CMI had its own manufacturing operations, the KTC reasonably concluded that CMI's selling and sales administration expenses would be similar to April Fine's. But there was no reason to expect CMI's financial expenses to be similar to April Fine's — both because financial expenses are independent of the nature of the companies activities, and because the verified evidence did not permit the KTC to determine that CMI's overall activities were similar to April Fine's.

4.226 In short, the overall amount the KTC used for total SG&A, interest and profit was, by the Sinar Mas Group's own admission, entirely reasonable. The methods the KTC used to select that information were consistent with the provisions of Article 2.2. The information used as facts available for the CMI interest expense was fully corroborated. That should have been the end of the issue. Korea is sorry that Indonesia has been unwilling to accept these basic facts, and that the Panel has had to be called back into service.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 China, the European Communities, Japan, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM"), and the United States have reserved their rights to participate in the Panel's proceedings as Third Parties. China did not provide a written submission or an oral statement to the Panel. The United States did not provide a written submission to the Panel. The arguments of the European Communities, Japan, and TPKM are set out in their written submissions and oral statements to the Panel and are summarized in this section. The arguments of the United States are set out in its oral statement to the Panel and is also summarized in this section.

A. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

1. Claims arising from the measures taken by Korea to comply with the DSB's recommendations and rulings

(a) On Korea's alleged violation of Article 6.8 and Annex II of the Agreement

(i) The European Communities' views

5.2 The European Communities reads Article 19.1 of the DSU to impose on Members the obligation to do what is necessary to bring their measures into conformity with the panel's findings and conclusions. There may be several ways to do this. Where, for example, the panel finds that a particular figure in an anti-dumping decision is incorrect, the investigating authority would need simply to replace the wrong figure in the text of the decision with the correct one. However, where, as in the present case, the panel concludes that the reasoning of an anti-dumping decision is not sufficiently developed, the investigating authority would need to redraft the relevant part of the decision providing a more complete analysis, to the panels' satisfaction. The European Communities takes the view that investigating authorities have the discretion to decide the amendments they need to introduce to their decision in order to improve its reasoning and, thus, comply with the panel's findings.

5.3 The European Communities considers that Article 6.8 and Annex II of the *Agreement* provide the procedural safeguards that investigating authorities should follow in the collection and evaluation of evidence, in order to ensure the evidence's reliability, accuracy and completeness. The European Communities does not consider that Article 6.8 and Annex II of the *Agreement* were intended to restrict the application of Article 19.1 of the DSU and limit the measures an investigating authority could take in order to comply with a panel report.

5.4 Therefore, the European Communities submits that an investigating authority does not violate Article 6.8 and Annex II of the *Agreement* where, in complying with a panel finding that the

reasoning of the anti-dumping decision is not sufficiently developed, it seeks to develop improved arguments and explanations in its new decision (as long as its alternative action is consistent with the *Agreement*).

(b) On Korea's alleged violation of Articles 2.2 and 2.2.2. of the Agreement

(i) The European Communities' views

5.5 With regard to Korea's claims, the European Communities reserves the right to comment upon the "reasonableness" of KTC's calculations in its oral statement.

5.6 With regard to Indonesia's claims, the European Communities takes the view that a company that simply re-sells the product under investigation, but also manufactures *other* products would normally incur interest expenses stemming from both activities. Interest expenses linked to long term obligations, such as those aimed at financing capital infrastructure to support the manufacturing activities, would normally affect the general cost structure of the company and hence influence the pricing of *all* the products it offers, including those products that the company does not produce itself. This characteristic differentiates those interest expenses from e.g., pure selling expenses that would normally affect the cost and pricing only of the particular product they aim to promote.

5.7 Therefore, the European Communities submits that an investigating authority would not act inconsistently with Articles 2.2 and 2.2.2 of the *Agreement* if, on the facts of a particular case, it calculates the normal value taking into consideration interest expenses resulting from a company's manufacturing activities, even where these manufacturing activities are not directly linked to the sale of the product under investigation. This is particularly true where such interest expenses are linked to long term obligations, such as those aimed at financing capital infrastructure.

2. Claims relating to Korea's Procedural Obligations

(a) On KTC's reconsidering the issue of CMI's activities

(i) The European Communities' views

5.8 The European Communities notes that neither the DSU, nor the *Agreement* defines what would be an "undisputed fact". Moreover, the European Communities reads Article 21.1 of the DSU to mean that the panel's findings and recommendations are the only parts of a panel report that are binding upon a Member, following the adoption of the panel report by the DSB. The European Communities finds no support in either the DSU, or the *Agreement* for the proposition that any general statements of fact in an original panel report should have the same binding effect. The power of Article 21.5 panels to assess the measures taken in compliance with the findings of an original panel report in their totality and examine new and different claims from those raised in the original panel proceedings, further supports the view of the European Communities.

5.9 Therefore, the European Communities submits that, in complying with a panel finding, an investigating authority does not violate Article 6.8 and Annex II of the *Agreement*, where its new decision provides an appreciation of facts that is different to that of its original decision, so long as the investigating authority acts in accordance with the findings and recommendations of the panel.

(b) On Korea's refusal to accept new information on CMI's activities provided by the exporters and on Korea's refusal to provide interested parties with access to information on which it based its re-determination of injury

(i) The European Communities' views

5.10 The European Communities considers that the issue to be determined is the extent to which Article 6 of the *Agreement* applies to the procedures followed by an investigating authority when it takes measures to comply with panel findings.

5.11 The European Communities notes that there is no clause in the *Agreement* stating expressly that *all* of the provisions of Article 6 apply *every time* an investigating authority takes measures to comply with the findings of a panel. This leads the European Communities to conclude that the application of the provisions of Articles 6.1, 6.2 and 6.9 depends on the nature and extent of the measures required to be taken by the investigating authority in order to comply with the findings of the panel.

5.12 If, for example, compliance with the panel findings involves only a limited number of simple textual amendments of the original decision, it would appear unnecessary to require the investigating authority to provide opportunities for all interested parties to meet with each other and hold detailed discussions (as provided by Article 6.2). At the other end of the spectrum, where an investigating authority accepts new material and submissions from some interested parties, it should fully respect the "due process" rights of all interested parties contained in Articles 6.1, 6.2 and 6.9 of the *Agreement*.

5.13 Therefore, the European Communities submits that the obligation of an investigating authority to comply with the provisions of Articles 6.1, 6.2 and 6.9 of the *Agreement* in the implementation phase of a panel report, depends on the nature and extent of the measures required to be taken in order to comply with the findings of the panel. The European Communities further submits that, where an investigating authority accepts new information or material from some interested parties, the provisions of Articles 6.1, 6.2 and 6.9 of the *Agreement* should apply fully.

B. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5.14 The European Communities makes its oral statement because of its systemic interest in the correct interpretation of the Anti-dumping Agreement and the DSU.

1. Introductory remarks

5.15 In its written submission, the European Communities discussed two main themes: First, *what measures* can an investigating authority take in order to comply with the findings of a panel. Second, *what procedures* should an investigating authority follow when it takes measures in order to comply with the findings of a panel.

5.16 The European Communities notes that both parties to this dispute have generally agreed with its conclusions on certain points. For example, the European Communities has suggested that the procedures an investigating authority should follow depend on the nature of the measures it takes in order to comply with the findings of the panel. The European Communities has argued that where the investigating authority accepts new information or material from some interested parties, it should also afford to all interested parties the procedural safeguards provided for in Article 6 of the *Anti-dumping Agreement*. The parties have agreed with this point, as evidenced by paragraph 29 of Korea's second submission and paragraph 65 of Indonesia's second submission.

5.17 The European Communities has also suggested that an investigating authority should be permitted to provide in its new decision a different appreciation of the facts than that in the original decision, provided that it acts in accordance with the findings and recommendations of the panel. The European Communities notes that Indonesia concludes in paragraph 10 of its second submission that an investigating authority "*cannot depart from the verified facts from the original investigation and the factual findings of the original panel, if the factual record on which the original determination and the original panel's findings were based have not been re-opened or materially changed*". The European Communities considers that this statement indicates that Indonesia accepts the European Communities' suggestion that an investigating authority indeed *is allowed* to provide a different appreciation of the facts in its new decision, provided that this is done in accordance with the findings and recommendations of the original panel and can be supported by the evidence.

5.18 In the third party session, the European Communities did not expand further its arguments on the points raised in its written submission. The European Communities trusted that the Panel has taken due note of its views. Instead, the European Communities commented on two other points raised in the parties' second submissions and in Japan's Third Party submission.

2. The Panel's standard of review

5.19 The first comment relates to a point raised by Indonesia. Indonesia states in paragraph 8 of its second submission that in examining whether the KTC's determination is consistent with the *Anti-dumping Agreement*, the Panel "*may not rely on ex post justifications and arguments offered by Korea*". The European Communities finds this statement troubling.

5.20 The European Communities understands that Article 12, paragraph 2 of the *Anti-dumping Agreement* imposes certain obligations on the content of an anti-dumping decision. Among others, it provides that the decision should include, in sufficient detail, the findings and conclusions reached on all issues of fact and law considered material by the investigating authority. Article 12, paragraph 2.2 further provides that the decision should contain all relevant information on the matters of fact and law and reasons which have led to the decision. It should also include the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and the importers. The European Communities has no doubt that a complaining party, such as Indonesia, may request a panel to find that an investigating authority has violated the *Anti-dumping Agreement*, by failing to include in its decision the elements required by Article 12.

5.21 However, Indonesia advances a different argument, which is not related to Article 12 of the *Anti-dumping Agreement*. Indonesia appears to suggest that there should be a general rule of procedure that should prevent panels from taking into consideration any facts or arguments advanced by defending parties, if they have not been already expressly discussed in the text of the measure under review. This goes too far and has no basis in the *Anti-dumping Agreement*. The European Communities considers that such a potential rule of procedure would be problematic. Pushed to an extreme, such a rule could lead to a situation where the defending party would only be allowed to read to the panel sections of the text of the contested measure and nothing more.

5.22 The European Communities also considers that such a general and unconditional rule of procedure would run against the provisions of the *Anti-dumping Agreement*. The special rules of procedure for the settlement of disputes in the field of the *Anti-dumping Agreement* are set out in Article 17. The European Communities notes that Article 17, paragraph 5, line (ii) provides that a panel should "examine the matter, based upon… the facts made available… to the authorities of the importing Member". There is no reference to facts discussed in the contested decision.

5.23 The European Communities reads this provision to mean that the *Anti-dumping Agreement* does not prevent panels from taking into consideration facts that are proven to have been before the investigating authority at the time it reached its decision and to underpin the contested measure, even

though these facts are not expressly discussed in the text of the decision. The European Communities draws support for this conclusion from the panel reports in *EC-Bed linen*, paragraph 6.43 and *US-Lumber* (DS 264), paragraph 7.168.

3. The mandate of Article 21.5 panels

5.24 The second comment relates to a point raised by Japan in its Third Party submission. Japan establishes a link between, on the one hand, the mandate granted to implementation panels by Article 21.5 of the DSU and, on the other hand, an investigating authority's obligation to respect the *Anti-dumping Agreement's* procedural safeguards during the implementation proceedings.

5.25 The European Communities has already provided its views on the proper interpretation of Article 6. The European Communities was pleased to note that the conclusion reached in the last sentence of paragraph 15 of Japan's Third Party submission is very close to its position: Japan agrees that the investigating authority "*must provide all interested parties with full opportunity to defend their interests, if it receives new information from the Korean domestic industry or any other sources*". The European Communities considers that Japan's emphasis on this "*if*", implies agreement with the European Communities' view that the procedural obligations of an investigating authority depend on the nature of the measures taken in order to comply with the original panel's findings. Precisely which obligations apply is to be decided by applying the interpretative rules in the Vienna Convention: ordinary meaning, context and object purpose, in good faith, also having regard where appropriate to the preparatory work. If the entire measure is re-adopted, it is likely that all the relevant procedural rules should apply.

5.26 Korea responded to Japan's comments, by discussing the mandate of Article 21.5 panels. The European Communities cannot readily see the relevance of this discussion for the proper interpretation of Article 6 of the *Anti-dumping Agreement*. The European Communities also note that the mandate of Article 21.5 panels is currently under review by the Appellate Body in the *Chile-Price bands* case. In any event, to the extent that this Panel may decide to discuss the mandate of Article 21.5 panels, the European Communities note that the case law supports the conclusion that Article 21.5 panels should not find against those elements of a measure that were already in place during the original panel proceedings and were expressly found compatible with a covered agreement in the original panel report. The European Communities refer to the Appellate Body's decision in *US-Shrimp*, in paragraphs 91, 92 and 93.

4. Conclusions

5.27 In concluding its statement, the European Communities invited the Panel to confirm the following three points:

- First, that this Panel is allowed to take into consideration facts advanced by the defending party that are proven to have been before the investigating authority at the time it reached its decision and to underpin the contested measure, even though they are not expressly discussed in the text of the measure;

- Second, that the procedural obligations of an investigating authority should depend on the nature of the measures taken in order to comply with the original panel's findings; and

- Third, that this Panel should not find against those elements of the measure under review that were already in place during the original Panel proceedings and were expressly found compatible with a covered agreement in the original Panel report.

C. THIRD PARTY WRITTEN SUBMISSION OF JAPAN

1. Introduction

5.28 As a third party, Japan addresses the following issues discussed in the First Written Submissions of Indonesia and Korea. The comments arise from Japan's systemic interest in ensuring fair and objective application of the Agreement as well as proper compliance with the DSB recommendations:

(a) whether the calculation of the interest expense of CMI by the KTC based on information provided by RAK is consistent with the Korea's obligation under Article 6.8 and Annex II of the Agreement; and

(b) whether the exporter's procedural rights in the implementation process are appropriately secured consistently with the Korea's obligations under Article 6 of the Agreement.

2. Arguments

(a) The legal standard concerning the use of *facts available* as required by Article 6.8 and Annex II of the Agreement

5.29 In the dumping re-determination proceeding, that the KTC, the Korea's antidumping authority, undertook for the implementation of the DSB recommendations, the KTC continued to rely on secondary information in order to re-calculate costs for CMI.

5.30 In Japan's understanding, Article 6.8 of the Agreement permits determinations to be made on the basis of the facts available only if certain conditions are met. That is, use of facts available as secondary information is allowed in the absence of information from its original source in a situation where any interested party refuses access to, or otherwise does not provide, necessary information to the investigating authority within a reasonable period or significantly impedes the investigation. Article 6.8 further provides that the provisions of Annex II shall be observed in resorting to the facts available.

5.31 Paragraph 7 of Annex II to the Agreement regulates the use of facts available, or best information available, by investigating authorities as below:

> 7. 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 (Emphasis added.).

5.32 As is pointed out by Indonesia, the panel and the Appellate Body in *Mexico-Rice* found in detail what is required of investigating authorities in using secondary information under Article 6.8 and Annex II to the Agreement, as follows.[74] *Firstly*, the facts to be employed are expected to be the "best information available".[75] *Secondly*, when culling necessary information from secondary

[74] Appellate Body Report in *Mexico - Rice*, para. 289.

[75] More specifically, the panel in *Mexico – Rice* found that "[t]he use of term "best information" means that information has to be not simply correct or useful *per se*, but the most fitting or "most appropriate"

sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources "with special circumspection".

5.33 Japan considers that these criteria provide reasonable and proper guidance to secure unbiased use of the facts available by the investigating authority. Accordingly, it is the investigating authorities that should ascertain for itself that certain information is the most appropriate and best suited to replace the missing data.

5.34 Japan, as a third party, does not take any specific position as regards factual findings in the present case, including whether or not the KTC's use of information submitted by RAK as facts available for calculation of the interest expense for CMI was based on an unbiased and objective evaluation of the various information before it, or whether or not the evidence supports the Sinar Mas Group's contention that CMI engaged solely in trading activities.

5.35 What Japan would like to emphasize is that, from a systemic viewpoint, disciplines set forth in Article 6.8 and Annex II of the Agreement should be well observed. To meet the criteria shown above in paragraphs 4 to 6 above, in Japan's view, Korea should ascertain for itself whether or not the information used is the most appropriate and best suited to replace the missing data.

5.36 For such purpose, in the first place, Korea should explain why the submitted data is "necessary information" which the interested party refuses access to, or otherwise does not provide "to the investigating authority within a reasonable period or significantly impedes the investigation". Then, Korea should also explain why specific secondary information that KTC used are expected to be the "best" information available. In the present case, Korea contends that "[t]he [BCI] per cent rate adopted by the KTC was actually *more favourable* for the Sinar Mas Group" than the actual interest expense rate of RAK, the CMI interest expense reported by the third-party information provider, other Indonesian companies, or non-manufacturing Korean wholesalers and retailers.[76] However, it does not seem to provide sufficient reasoning whether the KTC used the "best" information available out of all data at its disposal. In sum, Korea's explanation leaves it questionable whether the information Korea used is the *most* appropriate and *best* suited to replace the CMI data.

5.37 Accordingly, Japan, based on its systemic interest mentioned above, asks the Panel to deliberate carefully whether or not Korea's argument justify its use of facts available and its exercise of special circumspection.

(b) The exporter's procedural rights in the implementation process

5.38 Indonesia argues that the KTC resorted to additional data without securing the exporters' procedural rights to defend their interests in the course of the implementation proceeding, while Korea denies it. Korea argues that, as far as the injury re-determination is concerned, the KTC's decision was based solely on the analysis of the previously-collected data under the criteria described in Article 3.4 of the Agreement, which all parties had already had an opportunity to comment upon[77], and that in terms of the several new information that the KTC obtained during implementation

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information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgment correctly if it has made an inherently comparative evaluation of the "evidence available"." (Emphasis in original)

[76] Korea's Written Submission, para. 56.

[77] Korea's Written Submission, para.61.

proceeding, the KTC gave Indonesian respondents not only access to all of this but also an opportunity to comment upon it.[78]

5.39 Japan does not take a specific position with regard to the factual aspects whether KTC resorted to new facts or not during the implementation phase. Japan, however, asks the Panel to deliberate carefully whether or not the KTC acted in full consistency with its obligations under Article 6 of the Agreement, based on the following consideration.

5.40 Japan is of the view that, even in implementation proceeding, full consistency with the obligation under the Agreement is naturally required. That is, the whole re-determination process is subject to the rules set forth in the Agreement, regardless of the range of specific violation identified in the original panel procedure. In this regard, Japan would like to draw Panel's attention to the previous finding by the Appellate Body that a compliance panel is mandated to review the compliance measure not only from the perspective of the DSB recommendations and rulings, but also from that of a covered agreement as cited by the complainant. As the Appellate Body held in *Canada – Aircraft (Article 21.5 - Brazil)* that:

> Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings….. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.[79]

5.41 From this point of view, Japan would be concerned if the Korea's statement that the only error identified by the Panel was a lack of explanation and that revision of the KTC's analysis and explanation of its determination is all that is required for implementation means that Korea is free from the discipline of Agreement in the implementation stage as far as it modifies its reasoning for determination. Japan believes that Article 6 of the Agreement applies to the implementation proceedings requiring the investigating authorities to guarantee procedural fairness to all interested parties. Thus, the KTC must provide all interested parties with full opportunity to defend their interest, *if* it received new information from the Korean domestic industry or any other sources in making a re-determination of injury.

3. Conclusion

5.42 For the foregoing reasons, Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments laid out above, in order to ensure fair and objective application of the Agreement as well as proper compliance with the DSB recommendations.

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[78] *Ibid*. para.64.

[79] Appellate Body Report, *Canada – Aircraft (Article 21.5 - Brazil)* para.41. The Panel also ruled similarly in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Recourse to Article 21.5 of the DSU by Argentina)* (paras. 7.128-7.129).

D. THIRD PARTY ORAL STATEMENT OF JAPAN

1. Introduction

5.43 Japan focuses on some issues argued by the parties to this dispute and endeavours to clarify Japan's position on the issues as much as possible.

2. The legal standard concerning the use of *facts available* as required by Article 6.8 and Annex II of the Agreement

5.44 Japan notes that the Panel and the Appellate Body in *Mexico-Rice* found in detail what is required of investigating authorities in using secondary information under Article 6.8 and Annex II to the Anti-dumping Agreement. Firstly, the facts that should be employed are limited to be the "best information available". It means that such information must be most appropriate and best suited to replace the missing data. Secondly, when getting necessary information from secondary sources, the authority should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against the information submitted by interested parties. In so doing, the authority is obliged to treat data obtained from secondary sources "with special circumspection".

5.45 In Japan's view, these strict criteria are required because of the exceptional or alternative nature of the secondary information. And therefore, Japan emphasizes that the Member's explanation should be clear enough to establish that the information used is the most appropriate and best suited to replace the missing data. Members that are going to use secondary information, therefore, are held accountable in this regard.

5.46 Turning to this specific case, Korea is obliged under the Antidumping Agreement to explain clearly why the specific secondary information that KTC used as a proxy for interest expenses for CMI (a re-seller of the investigated products in Indonesia), that is, interest expenses of a manufacturing company (RAK) instead of those of a trading company (April Fine), are expected to be the *most* appropriate and *best* suited. Although Korea explains in its second written submission that it has given sufficient consideration in this regard, it seems that what Korea has articulated is limited to the explanation on the adequacy of the RAK's interest rate. It remains to be decided in light of the WTO law whether the use of "facts available" adopted by the KTC was well-founded, without further explanation as to *whether there was any alternative information available* and, if there was, *why the information chosen was regarded as the "best" information among all such alternatives*.

3. The Exporter's Procedural Rights in Implementation Process

5.47 Korea asserts in its second submission that Japan wrongfully suggests that the 21.5 Panel should revisit the issues that were already decided in the original panel proceeding. In this respect, Korea seems simply to misunderstand Japan's argument. What Japan pointed out, quoting the decision by the Appellate Body in the *Canadian Aircraft-Article 21.5*, was the need to behave in full consistency with the Antidumping Agreement in the implementation phase, including, *if applicable in the present case*, in resorting to additional data, by guaranteeing procedural fairness to the interested parties as required by Article 6 of that Agreement. It was in the context of the possible use of additional data by the KTC, as argued by Indonesia, in the implementation proceeding that Japan addressed the issue of procedural rights of the interested party, not in conjunction with the justifiability of the KTC's use of "facts available" or any other issue already raised and decided in the original panel proceeding.

5.48 The Appellate Body in *Canadian Aircraft-Article 21.5* provides a meaningful guidance in this regard, as it clarified that the 21.5 panel is not restricted to examine the measures for implementation from the perspective of the claims, arguments and factual circumstances related to the measure that was subject to the original proceedings. Japan quoted this ruling in support of its contention that

Members shall comply with covered agreements in taking any measures for implementation. Especially, the re-determination process for the purpose of implementation of the DSB recommendation is not at all different from the original investigation and other phase of the antidumping procedures. Such re-determination process, too, is subject to the rules provided for in the Antidumping Agreement, and therefore Members can't escape from the procedural disciplines articulated under Article 6 of the Antidumping Agreement, including the requirement of guarantee of procedural fairness to all interested parties.

5.49 As stated in its third-party submission, Japan refrains from taking a particular position on the factual aspects of the case including whether or not the KTC resorted to new facts during the implementation phase. Japan rather asks the Panel to deliberate carefully on such question in light of the above-mentioned viewpoints.

4. Conclusion

5.50 For the foregoing reasons, Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute so as to ensure fair and objective application of the Antidumping Agreement as well as proper compliance with the DSB recommendations.

E. THIRD PARTY WRITTEN SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

1. Introduction

5.51 TPKM welcomes the opportunity to provide its views in these proceedings on the dispute between Indonesia and Korea with respect to the implementation by Korea of the recommendations and rulings of the DSB on *Korea – Antidumping Duties On Imports Of Certain Paper From Indonesia.*

5.52 TPKM makes these written observations because of its systemic interest in the correct interpretation of the *Agreement* and the GATT 1994. As a third party, TPKM addresses in its submission certain critical issues raised in Korea's First Written Submission.

2. TPKM's Views on Article 6.8 of the Agreement

5.53 The issues discussed in this submission mainly relate to Article 6.8 of the *Agreement.* The main issue before this Panel is the manner in which Korea purported to implement the original Panel's findings with respect to the KTC's use, in calculating the constructed normal value for the Indonesian exporters, of facts available within the meaning of Article 6.8 of the *Agreement* in order to determine interest expenses for CMI.

5.54 The original Panel found that the KTC acted inconsistently with Article 6.8 and Annex II of the *Agreement* in its use of facts available to determine interest expenses incurred by CMI. As the Panel explained:

> 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 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.[80]

5.55 In Indonesia's First Written Submission, Indonesia contends that the KTC still failed to implement the Panel's findings with respect to its anti-dumping measures because "it simply left its determination substantively unchanged and merely advanced new and inadequate justifications for its original decision".[81]

5.56 TPKM also notes that in its First Written Submission, Korea contends that: "the flaw identified by the Panel's decision was the absence of an adequate explanation of the KTC's choice of facts regarding the interest expense amount, and not the interest expense *per se.* The KTC's implementation decision corrected that flaw by demonstrating, through logic and evidence, that the interest expense rate it had used was reasonable".[82]

5.57 The problem with this dispute, in TPKM's view, lies in the concept of the "facts available" in Article 6.8 and paragraph 7 of Annex II of the *Agreement.* In other words, to what extent the information obtained by Korea from secondary sources for purposes of calculating CMI's interest expenses against other independent sources at its disposal can be deemed within the scope of application of "facts available".

5.58 Therefore, it appears to TPKM that whether the "new information" obtained by the KTC during the implementation procedure to provide evidentiary basis for concluding its determination on CMI's interest expenses before the implementation proceeding is the permitting use of "facts available." The issue of "facts available" should be judged in light of the "timing" at which facts available are used.

5.59 In Korea's statement, the KTC examined whether the [BCI] per cent interest expense rate that it had previously calculated for RAK could be corroborated as a reasonable interest expense amount for CMI. TPKM notes that as evidence to support its [BCI] per cent determination, the KTC compared the calculated RAK rate to four separate sources of data. TPKM is concerned about whether the four sources of data cited by the KTC as evidence that its estimate of the interest expenses incurred by CMI is "not unreasonable" are new information obtained by the KTC only after its final decision, and during the implementation proceeding. If so, is this "new information" a fair use of the "facts available", and particular available at that time to support its determination.

5.60 The basic objective of anti-dumping measures is to offset dumping only to the extent necessary to address injury to a domestic industry. An important task for the investigating authorities is to determine the margin of dumping by appropriately reflecting the extent of the dumping by responding parties. In some cases, however, the authorities may not be able to obtain all necessary data, but must nonetheless complete the proceeding within the prescribed period. To address such situations, the *Agreement* allows authorities in certain situations to base their findings on information from secondary sources known as "facts available".

5.61 Article 6.8 of the *Agreement* provides that:

> 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

[80] Panel Report, para. 7.111.
[81] First written Submission of Indonesia, para. 4.
[82] First Written Submission of Korea, para 5.

> investigation, preliminary and final determinations", affirmative or negative, may be made on the basis of the facts available."

In addition, Annex II(7) states in part:

> 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".

5.62 Article 6.8 and Annex II of the *Agreement* both clearly provide that the "facts available" can be considered to use when there is no adequate information which results in significantly impeding the proceeding of "the investigation, preliminary and final determinations", and the authority should check secondary sources with special circumspection "during the investigation". Based on the wording in both Article 6.8 and Annex II, it appears that the application of "facts available" is admissible "only" to the circumstances during the investigation period, at least before the final determination.

5.63 Therefore, in TPKM's view, to comply with the Panel's recommendation and finding as to provide adequate explanation of the KTC's choice of that facts available interest expense amount, the KTC's approach is to examine the information from its "original pool" of data during the investigation, and not to collect new sources of data, which may not be "facts available" for use and may not appropriately represent the situation of the prevailing state of the industry or the relevant market, while the original investigation was taking place.

3. Conclusion

5.64 In the light of the preceding observations, TPKM invites the Panel to clarify whether the selection of "facts available" includes only those sources of data available during the investigation, or whether it may also include new source of data that did not become available until after the final determination.

F. THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

5.65 TPKM focuses its comments on the obligation shouldered by the investigating authorities when making their determinations based on "facts available". The relevant provision at issue, will be limited to paragraph 7 of Annex II to the Antidumping Agreement.

5.66 In the original Panel Report, it was decided that the Korean investigating authorities failed to provide explanations on data they had relied upon with respect to financial expenses. In order to bring this flaw into conformity with their WTO obligations, Korea partially re-opened the proceedings and collected additional information to substantiate their reasoning. On this particular matter, TPKM provides its comments and observations in the following three parts.

5.67 First, TPKM would like to argue that the reasonableness and appropriateness of a determination made with "facts available" should always be judged with the information at one's disposal and much more importantly, at that particular point of time. If subsequent information, which was not available at the time of determination, proved that the truth was not the same as illustrated, the subsequent information should not retroactively invalidate the previous determination base on incomplete information. To TPKM, this is the basic concept and very nature of the system applying "facts available". This requirement is also stipulated under paragraph 7 of the Annex II,

which mandates that "the authorities should … check the information from other independent sources at their disposal … and from the information obtained … during the investigation" (Emphasis added). The procedural justice must be preserved in situation where determination was made with "facts available". To us, this is a clear guidance and statutory limitation established by the Antidumping Agreement. If the original Panel could not accept explanation that was not available when making the antidumping determination, this compliance panel should also reject it.

5.68 Second, even if this compliance panel is willing to allow Korea to partially re-open the proceedings, which TPKM's government is not in support of, there are due process concerns that are also indicated by Japan and the European Communities in their Third Party opinions. In the re-opened proceedings, the Indonesian company was willing to provide information from its own prospective, but that plea was rejected because that particular company was consider non-cooperative in the original investigation. By so ruling, Korean investigating authorities had enjoyed an unfair advantage in seeking for information to their liking, which rendered the whole re-opened proceedings unbalanced. TPKM's government is of the opinion that Korea should only stick to either one of their positions: either staying in the framework of the original proceedings and supplement its explanations with information already available at that time, or, alternatively, switch to the mode of a re-opened proceedings where all interested parties should be allowed to enjoy equal right procedurally to present their arguments.

5.69 Last but not the least, there are also policy implications and systematic concerns involved in this matter. By accepting Korean argument, the entire WTO Members would be taught a lessen that, when applying "facts available", the investigating authorities could do whatever they want in the original determination. They are entitled to search for justifications and/or explanations after the completion of the original investigation. Since dispute settlement cases do not happen all the time, why bother going through all the trouble to do it right in the first place?

5.70 In the three WTO cases previously decided, such as the US oil country tubular goods complained by Argentina, the Mexico corn syrup complained by the United States, and the United States countervailing measures complained by the European Communities, the violation of those sunset reviews were all compensated new proceedings. While in the current case, the application of "facts available" is trying to squeeze in for the right to partially re-open. TPKM is now confronted with the most difficult decision: is it allowed for each and every flaw identified under the antidumping investigations to be re-opened? Is there any need to draw the line somewhere?

5.71 TPKM would request this compliance Panel to confirm TPKM's position that the reasonableness and appropriateness should be judged with the information at one's disposal and, more importantly, at that particular point of time. Or, if not so determined, TPKM would appreciate that this Panel could draw the line for us, or at least, to rule on the issue whether "facts available" should be allowed to re-open, even partially, and why?

G. THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

5.72 The United States offers two brief observations regarding Korea's re-determination of injury and Indonesia's claims under Articles 6.4 and 6.9 of the Antidumping Agreement.

5.73 First, Indonesia's claim under Article 6.4 is premised on the argument that the KTC fail[ed] to disclose that it was using the same information as in the original determination, [and] fail[ed] to provide the Indonesian exporters with an opportunity to comment.[83] Under Article 6.4, authorities must:

[83] *See* Indonesia's First Article 21.5 Submission, paras. 173-76.

> **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 ..., and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information. As recently noted by the panel in *United States – OCTG from Argentina (21.5)*, "the text of Article 6.4 makes it clear that it does not apply to the *reasoning* of the investigating authorities".[84] By its express terms, Article 6.4 applies only to "information". The Panel should bear this distinction in mind in assessing Indonesia's claim, especially given Korea's assertions that it did not obtain any additional data relating to the injury issues in the course of the implementation proceeding[85], and that the parties had already been given an opportunity to see and comment on all of the previously-collected data. To the extent that Korea's assertions are correct, the United States notes that Article 6.4 would not impose any further obligations in terms of disclosing the *analysis* of the information or *how* the investigating authorities would use (or not use) that information in support of its determination.**

5.74 Second, Indonesia argues that the KTC failed to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures", within the meaning of Article 6.9 of the Antidumping Agreement. As an initial matter, the United States notes that Article 6.9 of the Antidumping Agreement does not deal with opportunity for comment. It deals only with the disclosure of "essential facts".

5.75 In addition, as the panel explained in *United States – OCTG from Argentina (21.5)*, "Article 6.9 imposes a one-time disclosure obligation on the investigating authorities regarding the essential facts under consideration which would then form the basis of the authorities' final determination whether to apply definitive measures".[86] In addition, the panel noted that "the text of Article 6.9 clarifies that this obligation applies with respect to facts, as opposed to the reasoning of the investigating authorities".[87]

5.76 In the present dispute, Korea asserts that, with respect to the facts under consideration which would form the basis of the authorities' final determination, the KTC had disclosed these fact to the parties in the original proceeding and that no new facts were gathered in the course of the implementation proceeding. To the extent these assertions are factually correct, Korea satisfied its obligations under Article 6.9.

VI. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

6.1 The standard of review that we shall apply in these proceedings is the same as that in the original panel proceedings. We recall that Article 11 of the DSU provides the standard of review for WTO panels in general. Article 11 requires the panels to make an objective assessment of both the factual and the legal aspects of the case.

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[84] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina; Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, 30 November 2006, para. 7.124 (emphasis added) (hereinafter "*United States – OCTG from Argentina (21.5)*").

[85] KTC's First Article 21.5 submission, para 61.

[86] *United States – OCTG from Argentina (21.5)*, para. 7.148.

[87] *United States – OCTG from Argentina (21.5)*, para. 7.148.

6.2 Article 17.6 of the Anti-Dumping Agreement, however, sets forth a special standard of review that applies specifically to panel proceedings dealing with the application of this Agreement. Article 17.6 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.

6.3 Thus, taken together, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement establish the standard of review that we will apply with respect to both the factual and the legal aspects of these proceedings. We shall, therefore, find Korea's measure at issue to be consistent with the WTO Agreements if we find that the Korean investigating authorities have established the facts properly and evaluated them in an unbiased and objective manner, and that the determinations are based on a permissible interpretation of the relevant treaty provisions. We are not to carry out a *de novo* review of the evidence in the record of the implementation proceedings at issue nor to substitute our judgement for that of the Korean investigating authorities even though we might have made a different determination were we examining these records ourselves.[88]

2. Burden of Proof

6.4 The burden of proof in these proceedings is the same as that in the original panel proceedings. 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.[89] 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 the Panel. We also note that it is generally for each party asserting a fact to provide proof thereof.[90] In this respect, therefore, it is also for Korea to provide evidence for the facts which it asserts. Finally, we 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.

3. Function of Compliance Panels

6.5 In accordance with Article 21.5 of the DSU, we are called upon to assess the existence or consistency with a covered agreement of the measure taken by Korea to comply with the DSB recommendations and rulings at issue in these proceedings. We note that the DSU Article 21.5

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[88] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 117.

[89] 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, p. 337.

[90] *Ibid*.

proceedings are distinct from original panel proceedings in the sense that they deal with the existence or consistency with covered agreements of measures taken to comply with the DSB recommendations and rulings, which are different from the measures subject to the original panel proceedings. This does not mean, however, that the DSU Article 21.5 proceedings have to be carried out in isolation from the original panel proceedings. To the extent necessary, panels functioning under Article 21.5 of the DSU can take account of the reasoning of the investigating authorities in an original determination or the reasoning of the original panel, because "[t]he original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events".[91] We shall, therefore, in our evaluation of Indonesia's claims raised in these compliance proceedings, take account of the KTC's reasoning in the original investigation at issue and our own reasoning in the original panel proceedings, where appropriate.

B. CALCULATION OF CONSTRUCTED NORMAL VALUES FOR INDAH KIAT AND PINDO DELI

1. Arguments of Parties

(a) Indonesia

6.6 Indonesia's claim regarding the calculation of the constructed normal values for Indah Kiat and Pindo Deli has two aspects. First, Indonesia argues that the KTC acted inconsistently with Articles 2.2 and 2.2.2 of the Agreement in the calculation of the constructed normal values for Indah Kiat and Pindo Deli. Indonesia's claim relates exclusively to the determination of the interest expenses for CMI, the selling company that was in charge of re-selling the subject product produced by Indah Kiat and Pindo Deli in the Indonesian market in the period of investigation. Indonesia does not challenge other aspects of the calculation of these normal values.

6.7 Indonesia does not question the KTC's assumption that a trading company like CMI could theoretically have financial expenses. Yet, Indonesia submits that the interest expenses that the KTC added for CMI to the constructed normal values for Indah Kiat and Pindo Deli were not reasonable as required under Articles 2.2 and 2.2.2. Indonesia contends that the KTC's use of a producing company's financial expenses as surrogate for CMI did not constitute an objective and unbiased determination because the activities carried out by these two entities were strikingly different. Indonesia notes that the KTC used the data pertaining to April Fine, another trading company subject to the same investigation, for CMI's SG&A expenses other than interest and argues that using a producing company's data when it came to interest expenses was only intended to artificially inflate the margins of dumping for Indah Kiat and Pindo Deli. By doing this, the KTC overstated the selling-related interest expenses in these two constructed values because, unlike April Fine, RAK's activities entailed production as well as selling. According to Indonesia, had the KTC used April Fine's data to determine CMI's financial expenses, it would have found *de minimis* margins for both Indah Kiat and Pindo Deli. Finally in this regard, Indonesia submits that the KTC's determination regarding CMI's financial expenses also ran counter to Articles 2.4 and 2.1 of the Agreement.

6.8 Second, Indonesia contends that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II with regard to determining CMI's interest expenses. Indonesia notes that the KTC had two secondary sources available to it in order to determine the interest expenses of CMI: verified information relating to another trading company subject to the same investigation, April Fine, and that relating to RAK, a manufacturing company and subsidiary of April Fine, also subject to the same investigation. Indonesia also notes that the KTC relied on the data for April Fine in determining all of CMI's SG&A expenses except interest, and RAK's data for

[91] 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, para. 121.

interest expenses and argues that there is no adequate explanation on the record that would explain this differentiation. Indonesia contends that taking into consideration the similarities of the scope of business of the two companies, it would have been more appropriate for the KTC to base its determinations regarding CMI's financial expenses on April Fine's data. According to Indonesia, by relying on the interest expenses of RAK, a manufacturing company, the KTC failed to apply special circumspection as required under paragraph 7 of Annex II. The KTC therefore failed to base its determination regarding the financial expenses of CMI on the most appropriate, most fitting information as required under Article 6.8 and Annex II.

6.9 Indonesia acknowledges that in its Re-determination the KTC also cited information relating to the interest expenses of other companies, including three other Indonesian paper producers, three Indonesian producers from outside the paper industry and five Korean companies engaged in selling other products. However, Indonesia asserts that the new bases cited in the KTC's Re-determination fail to justify its choice of source for CMI's financial expenses. Indonesia submits that these did not establish alternative sources of information for the KTC in terms of determining CMI's financial expenses. Rather, they were used by the KTC in order to justify its preference for using RAK's information for CMI. Finally, Indonesia also notes that the KTC in its Re-determination relied on the information obtained from a publication called [BCI] and asserts that this information was not reliable because it identified CMI as a manufacturing company and mixed the address of CMI with that of Pindo Deli.

(b) Korea

6.10 Korea contends that the inconsistency found by the original panel in the KTC's determination regarding CMI's interest expenses was the absence of an adequate explanation on the use of RAK's data and argues that the KTC corrected that flaw in the implementation proceedings by demonstrating that these data represented a reasonable amount for CMI's interest expenses. Korea disagrees with Indonesia's view that the similarities of the activities carried out by different companies have a bearing on their financial expenses. Indeed, the KTC collected evidence showing that some trading companies could, for a variety of reasons, have higher interest expenses than producers. Evidence also showed some trading companies with higher interest expenses than CMI. Interest expenses are a function of the amount of money borrowed by a company, which depends on the company's corporate strategy.

6.11 Notwithstanding the above observations, Korea submits that there was no conclusive evidence on the record showing that CMI was merely a trading company. Verification of CMI's information was not allowed in the underlying investigation. As a matter of law, therefore, it could not be said that CMI was merely a trading company. Furthermore, evidence placed on the record during the implementation proceedings, i.e. the DIS report, indicated that CMI was involved in some manufacturing activities. Hence, it was not non-objective or biased for the KTC to use RAK's data in determining CMI's interest expenses. Korea also notes that in the implementation proceedings, the KTC compared RAK's interest expenses with four different sets of data and concluded that the amount of the interest expenses for CMI, added to the constructed normal values for Indah Kiat and Pindo Deli, was reasonable.

6.12 Finally in this regard, Korea disagrees with Indonesia's assertion that CMI's activities were so similar to those of April Fine that using financial expenses of a company other than April Fine in determining CMI's financial expenses did not represent an objective assessment. In this regard, Korea contends that, unlike CMI, April Fine [BCI]. This, in Korea's view, represented a significant difference between the financial expenses of April Fine and CMI.

2. Arguments of Third Parties

(a) European Communities

6.13 The European Communities notes that the original panel applied judicial economy on Indonesia's claim under Article 2 of the Agreement. The European Communities submits that depending on the facts of a given case, it may not necessarily be unreasonable for an investigating authority to include in the constructed normal value interest expenses incurred from the production of products not related to the product subject to the investigation.

6.14 The European Communities submits that depending on the nature of the inconsistency found, a Member may bring its WTO-inconsistent measure into conformity with its WTO obligations in different ways. The European Communities notes that Article 19.1 of the DSU provides certain leeway with regard to the manner in which DSB recommendations and rulings may be implemented by the Member concerned. The European Communities does not consider that Article 6.8 of the Agreement limits this flexibility. In particular, in cases where the investigating authorities' determination is found to lack a sound reasoning, the European Communities considers that the authorities may need to redraft their reasoning and make the amendments to their determinations that they deem necessary.

(b) Japan

6.15 Without taking any position regarding the factual aspects of Indonesia's claim, Japan makes certain observations on the use of facts available. Japan recalls that Article 6.8 of the Agreement allows resorting to facts available only when certain conditions are met. More specifically, Japan contends that paragraph 7 of Annex II requires the authorities to make sure that the information that they use as surrogate for the missing information is the best information available. Thus, Korea has to show that the conditions for resorting to facts available were met in the proceedings at issue and that the secondary information used in the place of the missing information was the best information available. According to Japan, the KTC's Re-determination does not seem to have done this because it is limited to discussing the adequacy of the data from an alternative source of information without explaining why the source itself was the most appropriate to replace the missing data.

3. Evaluation by the Panel

(a) Relevant Facts

6.16 We recall that the original investigation that gave rise to this dispute included, among others, two producers from the Sinar Mas Group, Indah Kiat and Pindo Deli. In the original investigation, Indah Kiat and Pindo Deli cooperated with the KTC, but the KTC's request for the verification of the data pertaining to their trading company, CMI, was denied. The KTC therefore decided to construct the normal values for Indah Kiat and Pindo Deli. In these constructed normal values, costs pertaining to the production activities of Indah Kiat and Pindo Deli were based on the data submitted by these companies. Costs of CMI, however, were determined on the basis of facts available. Regarding CMI's SG&A expenses except its financial expenses, the KTC used the figures relating to another company from Indonesia, April Fine, also subject to the same investigation. April Fine was a trading company selling the subject product produced by its subsidiary RAK which was also subject to the investigation at issue. RAK was a producer of the subject product. For CMI's interest expenses, the KTC used data pertaining to RAK.

6.17 In the original panel proceedings, Indonesia challenged the calculation of the constructed normal values for the Indah Kiat and Pindo Deli under Articles 2 and Article 6.8 and Annex II of the Agreement. We found a violation of Article 6.8 and paragraph 7 of Annex II and declined to make a ruling under Article 2. The thrust of our finding of inconsistency was that by using a trading

company's data for CMI's SG&A expenses other than financial expenses and a producer's data for interest expenses without an adequate explanation for this differentiation, the KTC failed to observe its obligation to exercise special circumspection in the use of information from a secondary source as required under paragraph 7 of Annex II of the Agreement. We considered that the investigating authorities would normally be expected to take into account the similarities and dissimilarities between the business activities of the company whose information is used as facts available and those of the company whose information is missing.[92] In the relevant part of our report, we stated:

> "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. [April Fine]. With regard to financial expenses, however, it relied on the data relating to [RAK], a producing company. We have seen no explanation on the record as to why the KTC decided to use the data relating to a company whose activities were less similar to CMI, i.e. [RAK], although it had in its possession data relating to a company, [April Fine], 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."[93]

6.18 In the implementation proceedings following the original panel process, the KTC first addressed the question of whether it would be proper to use a manufacturer's financial expenses as proxy for CMI and concluded that it would. The Re-determination reads in this regard:

> "A. Whether the calculation of the [sic.] CMI's financial expenses based on the financial statements of a manufacturing company is proper
>
> (1) Whether any financial expenses may incur in a company without a manufacturing function
>
> In relation to whether any financial expenses may be incurred by CMI, assuming that CMI operates only as a trading company without a manufacturing function;
>
> A company conducting trading activities only can also be expected to be in need of borrowing funds for the purchase of buildings, warehouses and goods, maintenance of inventories, purchase or supplies and equipment necessary for the company, wages for employees, overhead expenses, etc.
>
> A trading company within a group may represent such group and be used as a vehicle to procure the funds for facilities investment for a manufacturing company within the same group if there are the grounds for the following situations: 1) the cost of financing for the trading company is lower than the manufacturing company because the former's credit rate is higher than the latter; 2) procurement of the funds by the trading company rather than the manufacturing company is more favourable under a tax system; 3) it is necessary for the trading company to procure the funds in order to avoid governmental regulations; 4) it is necessary to avoid risks involving foreign

[92] Report of the original panel, para. 7.110.
[93] *Ibid.*, para. 7.111.

> exchange rate; 5) it is necessary for the trading company to borrow the funds according to an existing loan agreement regarding the procurement of the funds; 6) the trading company functions as an investment company by holding subsidiary's shares, etc. or 7) the determination of the trading company as a vehicle to procure the funds is made according to its policies.
>
> Although a manufacturing company could not initially avoid financial expenses for investment in its manufacturing facilities, it may have no borrowings at all afterwards if it repays such borrowings with its own capitals procured by issuing additional equity, or with the profits earned from its business activities; and in practice, many such companies do exist.
>
> Accordingly, the Trade Investigation Office viewed that a trading company engaged purely in the sale of goods may incur substantial financial expenses, on the basis that a functional classification as a manufacturer or a trading company cannot serve as a sufficient basis for determining whether a company incurs financial expenses."[94] (emphasis added)

6.19 The KTC then inquired into the issue of whether CMI was merely a trading company and concluded that this was not clear from the record. The Re-determination reads in this regard:

> "(2) Whether CMI is a trading company purely conducting sales of articles.
>
> In response to the questionnaires from the Trade Committee about the dumping ratio, Pindo Deli and Indah Kiat answered that CMI sells the goods of the two companies to distributors in Indonesia and end users.
>
> However, Pindo Deli and Indah Kiat refused to submit, at the on-site investigation, sales information, cost information, financial statements (although they submitted an income statement after the completion of investigation, which the Committee could not verify) and related books of CMI during the investigation, and thus, the Trade Committee failed to obtain any materials that can determine whether CMI was a merely trading company only with a selling function or a manufacturing company.
>
> In addition, according to other material that the Trade Committee obtained from a third source, PT. Data Inti Swakarsa ("DIS"), the business type of CMI was indicated as a manufacturer.
>
> In conclusion, not only was the Trade Committee unable to obtain any material that can verify the business activities of CMI during the investigation, but also a third source indicates that CMI operates as a manufacturer, such that the Trade Committee concluded that the argument of Pindo Deli and Indah Kiat that CMI is a company with a sales function only was groundless. In addition, the Trade Committee also concluded that the use of less favourable data against a company which refused to submit the relevant information and at the same time did not cooperate in the investigation was not inconsistent with the WTO Anti-Dumping Agreement."[95] (footnote omitted, emphasis added)

6.20 Next, the KTC compared RAK's interest expense that it used for CMI against four sources: 1) CMI information obtained from the DIS report, 2) financial expenses of four Indonesian paper

[94] Exhibit IDN-11(b), p. 3-4.
[95] Exhibit IDN-11(b), p. 4.

producers, including three Sinar Mas Group companies, 3) financial expenses of three Indonesian producers producing non-paper products, and 4) financial expenses of five Korean trading companies selling non-paper products. Relevant parts of the KTC's Re-determination read in this regard:

> "B. Special Circumspection in determining the level of financial expenses of CMI
>
> Pindo Deli and Indah Kiat refused to submit the financial statements of CMI to the Trade Committee until the end of on-site investigation. After the on-site investigation, they submitted an income statement of CMI, which could be not verified for its accuracy.
>
> Accordingly, in calculating the CV of Pindo Deli and Indah Kiat, the Trade Committee assumed as the financing expenses incurred by CMI the financial expenses in the amount of [BCI]% of the production costs based on the information of April's affiliate submitted by April, an Indonesian company, which cooperated with the dumping investigation.
>
> In the meantime, the Trade Investigation Office reviewed the following third source materials in order to determine whether the financial expense ratio used in the calculation of CV of Pindo Deli and Indah Kiat was proper.
>
> (1) <u>According to CMI's financial information obtained from DIS, an Indonesian credit rating information company, CMI incurred interest payable in the amount corresponding to [BCI]% of cost of sales in 2002</u>.[96]
>
> (2) In order to determine how much financial expenses were incurred by an Indonesian paper company, the Trade Investigation Office reviewed the materials submitted by Pindo Deli and Indah Kiat which are the affiliates of CMI and also are subject to this dumping investigation and the ratio of financial expenses against cost of sales in the 2001 and 2002 financial statements of Pindo Deli, Indah Kiat, Tjiwi Kimia and Lontar Papyrus (PT Lontar Papyrus Pulp&Paper Industry) which were submitted by the Applicants. The results were as follows:
>
> <u>Financial Expense Ratio of Indonesian Paper Industry</u>

Company	2002	2001	Remarks
Pindo Deli	[BCI]%	[BCI]%	Pindo Deli Audit Report
Indah Kiat	[BCI]%	[BCI]%	Materials from Indah Kiat
Tjiwi Kimia	[BCI]%	[BCI]%	Materials from APP
Lontar Papyrus	[BCI]%	[BCI]%	xxx

> Note) The financial expense ratio is the ratio of Interest payable/cost of sales in financial statements.

[96] We note that although this specific figure is not found in the DIS report, Korea demonstrated in response to questioning that 15.3 was the interest expense to cost of goods sold. Response of Korea to Question 3 from the Panel. Indonesia has not contested this calculation. We also note that although Korea describes this figure as a percentage to <u>cost of goods sold</u> (see also the translation of the KTC's Re-determination provided in KOR-S-4, p.27), the translation of the KTC's Re-determination provided by Indonesia from which we quoted in this report describes it as a percentage to <u>cost of sales</u>. The difference in the description of this aspect of CMI's interest expenses in the DIS report, however, is immaterial to our assessment of Indonesia's claim.

(3) In order to check whether there is any other company in non-paper industry having incurred the level of financial expenses that the Trade Committee applied, the Trade Investigation Office obtained and analyzed the financial statements of Indonesian companies and found the companies with the following financial expenses.

Financial Expense Ratio of companies in Indonesia

Company	2002	Remarks
PT. Barito Pacific Timber Tbk	[BCI]%	xx
PT. Apac Citra Centerex Tbk	[BCI]%	xx
PT. Duta Pertiwi Tbk	[BCI]%	xx

Note) 1. The financial expenses of the above companies are calculated based on the financial statements thereof obtained from Surabaya Stock Exchange, and Indonesian stock exchange.

2. The financial expense ratio is the ratio of Interest payable/Cost of Sales in financial statements.

(4) The Trade Investigation Office investigated whether any Korean companies doing wholesale or agency business incurred the level of financial expenses which the Trade Committee applied to CMI and found that such trading companies incurred the financial expenses corresponding to [BCI] per cent or more of cost of sales as follows:

Financial Expense Ratio of retail or wholesale companies in Korea

Company	Year	Financial expenses (Mln. Won)		Cost of Sales (Mln. Won)	Financial expense ratio
Uniwrap Co., Ltd.	2002	Total Interest payable	xx	xx	[BCI]%
	2002	Net Interest payable	xx	xx	[BCI]%
Von Co., Ltd.	2002	Total Interest payable	xx	xx	[BCI]%
	2002	Net Interest payable	xx	xx	[BCI]%
Joongang Green Stuff Co., Ltd.	2002	Total Interest payable	xx	xx	[BCI]%
	2002	Net Interest payable	xx	xx	[BCI]%
Komi Corporation	2001	Total Interest payable	xx	xx	[BCI]%
	2001	Net Interest payable	xx	xx	[BCI]%
Yusung Co., Ltd.	2002	Total Interest payable	xx	xx	[BCI]%
	2002	Net Interest payable	xx	xx	[BCI]%

Note) 1. The financial expense ratio of the above companies were calculated based on audit reports thereof obtained from webpages of the Financial Supervisory Services and the CPA Association.

> 2. The financial expense ratio is the ratio of Interest payable/Cost of Sales in financial statements. With respect to Joongang Green Stuff, the ratio of Interest payable against selling expenses is applied since it is an agency company without cost of sales.
>
> In the meantime, since the above companies conduct no manufacturing activities but only sell the goods supplied by manufacturers, they are deemed to play a similar role as CMI, provided that CMI is a trading company.
>
> As discussed in the foregoing, the Trade Committee confirmed that after comparing the ratio of the financial expenses against cost of sales of [BCI] per cent, first applied by the Trade Committee, with the information obtained from third party sources such as (1) the financial statements of CMI obtained from "DIS", (2) financial statements of Pindo Deli, Indah Kiat, Tjiwi Kimia and Lontar Papyrus, all of which are paper manufacturing companies in Indonesia, (3) financial statements of other companies engaging in other industries in Indonesia and (4) financial statements of the companies engaging in wholesale or agency business in Korea, all subject companies incurred interest expenses in the amount of more than [BCI] per cent of cost of sales.
>
> On the basis of the foregoing information, the Trade Investigation Office confirmed that the application to CMI of the financial expense ratio corresponding to [BCI] per cent of cost of sales was appropriate, which was evidenced by not only April's (a subject company) information but also other materials, in calculating the CV of Pindo Deli and Indah Kiat."[97] (emphasis added)

6.21 The KTC then concluded that the interest rate used for CMI was reasonable and decided to maintain the original margins of dumping calculated for Indah Kiat and Pindo Deli in the original investigation:

> "5) Actions of the Trade Investigation Office
>
> As a result of implementing the WTO Panel's decision, the Trade Committee has not found any reason to change the financial expenses previously determined, and the dumping margin shall be the previous dumping ratio."[98]

(b) Legal Analysis

6.22 We note that Indonesia's claim regarding the calculation of CMI's interest expenses is mainly based on two provisions of the Agreement: Article 2 and Article 6.8. As we did in the original panel proceedings, we consider it appropriate to commence our evaluation of Indonesia's claim with Article 6.8 and then proceed, to the extent necessary for the resolution of the dispute, to Article 2.

6.23 Indonesia argues that the KTC failed to comply with its obligations under Article 6.8 and paragraph 7 of Annex II of the Agreement in its use of facts available in these implementation proceedings. Indonesia notes that in the implementation proceedings, as in the original investigation, the KTC had two alternative sources of information to use in the determination of CMI's financial expenses: data pertaining to April Fine and data pertaining to RAK. The KTC used April Fine's data for all of CMI's SG&A expenses except interest expenses for which it used RAK's data. In Indonesia's view, there is nothing on the record that explains this differentiation. In its choice of facts available, the KTC did not carry out a comparative and evaluative analysis to determine whether the

[97] Exhibit IDN-11(b), p. 5-7.
[98] Exhibit IDN-11(b), p. 13.

RAK information was the most appropriate, best fitting in the circumstances at issue. Indonesia also takes issue with the KTC's finding that the exact scope of CMI's business was unclear. According to Indonesia, this was a settled fact in the original investigation and also acknowledged by Korea in the original panel proceedings. Even if this new factual finding was justified, Indonesia asserts that this did not allow the KTC to determine CMI's interest expenses on the basis of RAK's data. This is because by using the interest expenses pertaining to RAK, a production company, the KTC effectively double-counted Indah Kiat's and Pindo Deli's production-related interest expenses. The information that was missing, however, pertained to CMI's costs on the sales of the subject product. According to Indonesia, therefore, the KTC should have used April Fine's interest expenses as proxy for CMI.

6.24 Korea, in turn, contends that the only inconsistency found by the original panel regarding the KTC's determination was the lack of an adequate explanation for the use of RAK's data as proxy for CMI's interest expenses and that the KTC corrected it in the re-determination process. The KTC first considered that a trading company could have interest expenses, just like a manufacturing company. It then explained that it was not possible to make a finding regarding the exact scope of CMI's business. Finally, the KTC compared RAK's data against different sets of data and concluded that it was reasonable. Consequently, it continued to use RAK's data for CMI's interest expenses.

6.25 The issue is whether, as argued by Indonesia, the KTC's determination regarding CMI's financial expenses is inconsistent with Article 6.8 and paragraph 7 of Annex II of the Agreement.

6.26 Article 6.8 reads:

> "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."

We note that Article 6.8, interpreted in conjunction with the provisions of Annex II of the Agreement, allows investigating authorities to use the best information available to them in cases where an interested party fails to cooperate with the authorities. It allows authorities to fill in the gap caused by such non-cooperation. In the process of filling in the gap, however, the Agreement does not provide the authorities with a *carte blanche*. Provisions of Annex II, which impose certain limitations on the authorities' latitude in the use of facts available, have to be observed. One such limitation is found in paragraph 7 of Annex II, which reads:

> "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." (emphasis added)

We note that paragraph 7 generally requires the investigating authorities to exercise caution in their selection of facts available. It also points out that the investigating authorities have to check the information obtained from secondary sources against other independent sources. Although, the last sentence of paragraph 7 provides that non-cooperation can lead to an outcome less favourable than it would have been had the interested party in question cooperated with the authorities, this does not justify arbitrary selection of the data to be used in the place of the missing data.

6.27 In the proceedings at issue, it is undisputed that verification of CMI's data was not allowed in the original investigation and that the recourse to facts available was justified under Article 6.8. The dispute arises, however, as to whether the KTC complied with the requirements of paragraph 7 of Annex II in its selection of information from secondary sources to replace the missing information. We recall that the KTC used constructed normal values for the two Sinar Mas Group companies, Indah Kiat and Pindo Deli. One of the elements of the costs of these two producers was that related to their selling company, CMI. Because verification of the data pertaining to CMI was not allowed, the KTC used data from secondary sources in order to determine CMI's costs. In this context, the KTC obtained CMI's SG&A expenses other than interest expenses from another trading company subject to the same investigation, April Fine, and interest expenses from a company called RAK, which was April Fine's subsidiary and also subject to the same investigation as a producing company. And here lies the gist of Indonesia's claim. Indonesia asserts that this choice of facts available was arbitrary and intended to inflate the margin of dumping. According to Indonesia, the KTC should have relied on April Fine's data for interest expenses too. In support of its claim, Indonesia mainly relies on the similarities of the activities of CMI and April Fine, both being trading companies of the subject product in Indonesia. We recall that the interest rate used for CMI based on RAK's data was [BCI] per cent[99] while April Fine's interest rate was [BCI] per cent.

6.28 We recall that in compliance proceedings under Article 21.5 of the DSU, it is the measure taken to comply with the DSB recommendations and rulings, not the measure subject to the original panel proceedings, that is reviewed.[100] The new measure has to be reviewed not from the perspective of the claims and arguments developed in the original panel proceedings, but from the perspective of the claims and arguments developed in the implementation proceedings.[101] The fact remains, however, that implementation proceedings are carried out against the background of the original panel proceedings because, as mentioned above (para. 6.5), these two processes constitute a "continuum of events". To the extent appropriate, therefore, we shall take into account our reasoning in the original panel proceedings and that of the KTC in the original investigation at issue in the resolution of Indonesia's claims in these compliance proceedings.

6.29 We note that the KTC's re-determination regarding CMI's financial expenses differs from its original determination in two main regards. The KTC's decision to choose RAK's data for CMI's interest expenses is premised on two grounds. First, the KTC discusses whether using the interest expenses of a manufacturer as proxy for CMI would be appropriate and concludes that it would. This conclusion rests upon two propositions: 1) that a trading company may incur financial expenses, or, put differently, that the interest expenses incurred by a company are independent from the scope of the company's business, and 2) that the KTC was unable to make a finding regarding the exact scope of CMI's business due to the lack of cooperation in the original investigation. Second, the KTC corroborates RAK's interest expense that it uses for CMI against different sets of data and concludes that it was proper. Below, we assess first the consistency with Korea's obligations under the Agreement of the KTC's determination that it was proper to use a manufacturing company's interest expenses for CMI. Subsequently, we assess the corroboration that the KTC carried out for the interest expense that it used for CMI.

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[99] We note that the [BCI] per cent interest rate that the KTC calculated for RAK and used as proxy for CMI was erroneous and was subsequently changed to 12.75 per cent in the original investigation. Parties have no disagreement over this factual issue. See, First Written Submission of Korea, footnote 30; First Written Submission of Indonesia, paras. 100 and 107. These two figures are found in the KTC's calculations submitted in Exhibit IDN-1.

[100] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU ("Canada – Aircraft (Article 21.5 – Brazil)")*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299, paras. 40-41.

[101] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India ("EC – Bed Linen (Article 21.5 – India)")*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965, para. 79.

(i) The Use of a Manufacturing Company's Interest Expenses for CMI

6.30 Regarding the KTC's finding that it was reasonable to use RAK's interest expense for CMI, we first note that the Parties do not dispute the fact that a trading company may incur financial expenses.[102] They do, however, disagree as to the KTC's finding that, on the basis of the record, the exact scope of CMI's business could not be determined. Before evaluating this factual finding, however, we would like to address Korea's contention that the KTC did not make a finding on the issue of the scope of CMI's business.

Did the KTC Make a Finding on the Issue of the Scope of CMI's Business?

6.31 Korea asserts that the KTC actually did not make a finding on the issue of the scope of CMI's business.[103] We note, however, Korea's statement that "the KTC decided to take a look at the scope of CMI's activities as part of the implementation process" (emphasis added).[104] Likewise, Korea also stated that "[t]he KTC therefore concluded that, as part of the implementation proceeding, it should revisit the issue of the scope of CMI's activities to determine what conclusions, if any, could be drawn (emphasis added)".[105] We recall that in its Re-determination, the KTC discussed the Sinar Mas Group's argument that CMI was only a selling company and concluded that this argument was "groundless" (*supra*. para. 6.19). Given the lengthy discussion in the KTC's Re-determination on this specific issue, and notwithstanding Korea's inconsistent statement that the KTC did not make a finding on the issue of the scope of CMI's business, we consider that the KTC did in fact make such a finding.

6.32 We now turn to Korea's assertion that the KTC's finding on the issue of the scope of CMI's business was not relevant to the KTC's decision to use RAK's interest expense for CMI.

Was the KTC's Finding on the Issue of the Scope of CMI's Business Relevant to its Choice of Facts Available?

6.33 Korea argues that the KTC's finding regarding the uncertainty about the scope of CMI's business did not play an important role in the KTC's decision to apply RAK's interest rate for CMI.[106] According to Korea, "the KTC's determination found that, whether or not CMI was engaged solely in selling activities, the interest expense amount assigned as facts available was reasonable".[107] We note, however, that the Re-determination itself clearly shows that the finding on the issue of the scope of CMI's business was one of the bases for the KTC's conclusion that it would be proper to apply RAK's interest rate to CMI. The Re-determination discusses this issue in detail. It starts with the question of whether a trading company may incur financial expenses and concludes that it may. It then moves on to the more specific question of whether the record supports the Sinar Mas Group's assertion that CMI is merely a trading company with no manufacturing activity and concludes that it does not. RAK, a company producing the subject product in Indonesia and subject to the same investigation, is then chosen as a source to determine CMI's financial expenses. After corroborating the [BCI] per cent interest rate of RAK that it uses for CMI, the Re-determination concludes that this rate is reasonable. Given this carefully organized line of reasoning behind the KTC's Re-determination, we do not agree with Korea's contention that the finding on the issue of the scope of CMI's business was irrelevant to the KTC's ultimate decision to base CMI's interest expense on RAK's data.

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[102] Indonesia agrees with the KTC's proposition that selling companies may incur financial expenses like any other company. See, First Written Submission of Indonesia, para. 118.

[103] Response of Korea to Questions 6 and 11 from the Panel.

[104] Comments of Korea on Indonesia's Reponses to Panel's Questions, para. 13.

[105] Comments of Korea on Indonesia's Reponses to Panel's Questions, para. 66.

[106] See, First Written Submission of Korea, paras. 44-45; Opening Statement of Korea, para. 15.

[107] First Written Submission of Korea, para. 45.

6.34 In addition, we note that the discussion of the scope of CMI's business in the KTC's Re-determination is not limited to the parts quoted above (para. 6.19). There are other references to this issue elsewhere in the Re-determination. For instance, in response to the legal opinion submitted by the Sinar Mas Group to the effect that CMI is merely a re-seller, the KTC provides the following reasoning in its Re-determination:

> "To prove that CMI did not engage in manufacturing business, the Sinar Mas Group submitted an opinion of an Indonesian law firm as attached to as annex 4. In this regard, the Panel had never raised a question about the fact that the Sinar Mas Group refused the investigation of the Trade Committee designed to determine CMI's business scope and kind, and reached no conclusion that the Trade Committee should admit the claim of the Sinar Mas Group that CMI had no manufacturing business although the Panel was aware of such claim during the deliberation of the Panel. The Trade Investigation Office, with regard to whether or not to admit the claim that CMI had no manufacturing function and borrowings in the course of implementing the Panel's decision, reviewed all records and materials retained by the Trade Committee including the materials submitted by the Sinar Mas Group, and concluded that there was no evidence of any kind to verify such claim. The opinion of a lawyer submitted by the Sinar Mas Group (annex 4) was not submitted to the Trade Committee at the original investigation and thus was not held a part of the records of this investigation. In the meantime, the opinion contained in annex 4 premises that all documents submitted to the law firm were rightful, correct, and unmodified and that CMI comply with any and all relevant Indonesian laws and regulations, but the fact that the Sinar Mas Group refused the investigation of the Trade Committee during the investigation made this Office sceptical about such premises being satisfied. That is, the opinion on the business of CMI without the premises being satisfied was viewed by the Trade Investigation Office as unreliable. In addition, the Trade Investigation Office viewed that if the Office could not conduct the investigation of such company, no facts were verified, and thus the Office had no reason to accept the legal opinion even if such opinion was submitted."[108] (emphasis added)

We are curious why the KTC devoted such significant portions of its Re-determination to discussing the issue of the scope of CMI's business if, as argued by Korea, this issue was irrelevant to its ultimate decision to use RAK's interest expense for CMI. We therefore conclude that the KTC's Re-determination shows that the issue of the scope of CMI's business was relevant to the KTC's choice of facts available. We recall that the standard of review that we have to observe in these proceedings (*supra*, paras. 6.1-6.3) require us to assess whether the KTC's establishment of the facts was proper. Thus, we have to evaluate whether the KTC's finding that the scope of CMI's business was not clear, was proper. With that in mind, we now turn to the arguments raised by Indonesia in support of its assertion that the KTC's finding on the issue of the scope of CMI's business was not proper.

Did the KTC Properly Establish the Facts in Connection With its Finding on the Issue of the Scope of CMI's Business?

6.35 Indonesia submits that the KTC's finding that the scope of CMI's business was not clear, is devoid of an adequate basis. Indonesia argues that it was clear from the record of the original investigation and from the findings of the original panel that CMI was a trading company. Furthermore, there was no basis for the KTC to assume that CMI had any business activities other than selling the subject product produced by the Sinar Mas Group companies. In this context, Indonesia cites many instances where the KTC described CMI as a trading company in the original

[108] Exhibit IDN-11(b), p. 9.

investigation.[109] Among these instances, however, none constitutes a factual finding that CMI's sole business was to re-sell the subject product produced by Indah Kiat and Pindo Deli. Indonesia also cites observations that we made in our original panel report on this issue. For instance, Indonesia cites our statement 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."[110] (emphasis added)

We note that in the quoted part of our report, we observed the fact that CMI was a trading company that sold the subject product produced by Indah Kiat and Pindo Deli. We also expressed our observation of the then undisputed fact that CMI did not produce the subject product. We note, however, that the exact scope of CMI's business, i.e. whether CMI's business was limited to selling the subject product produced by Indah Kiat and Pindo Deli, was not at issue in the original panel proceedings. It follows that we could not be expected to, and did not, make a factual finding on the exact scope of CMI's business in the original panel proceedings.

6.36 We recall that Korea does not dispute the fact that CMI was the re-seller of the subject product produced by Indah Kiat and Pindo Deli. Korea argues, however, that because verification of CMI's information was not allowed, the KTC was not certain as to whether CMI could have had business activities other than selling the subject product produced by Indah Kiat and Pindo Deli.[111] None of the Parties argues that the KTC made a specific finding in the original investigation on the issue of the scope of CMI's business. This issue was specifically addressed for the first time in the implementation proceedings at issue. We note that the reason why the KTC inquired into this issue was in order to rebut the Sinar Mas Group's argument that because CMI was a trading company engaged merely in the resale of the subject product produced by Indah Kiat and Pindo Deli, it was more similar to April Fine than to RAK and therefore the KTC should have used April Fine's interest expense for CMI. We note that, as Indonesia specifically pointed out, the KTC consistently described CMI as the re-seller of the subject product produced by Indah Kiat and Pindo Deli in the original investigation. Likewise, in the original panel proceedings, we also referred to CMI as the trading company that sold the subject product produced by Indah Kiat and Pindo Deli. Yet the fact remains that neither in the original investigation nor in the original panel proceedings did this specific issue play a key role. Our findings in the original panel proceedings were based on the assumption that CMI was the trading company that sold the subject product produced by Indah Kiat and Pindo Deli. As Korea also points out, this was mainly because "for the most part, the arguments presented by the parties during the initial panel proceeding assumed (for the sake of argument) that CMI was engaged only in selling activities".[112] The reason why this became an important issue in these compliance proceedings is because in the implementation proceedings at issue the KTC made a finding on the issue of the scope of CMI's business and Indonesia disagreed with the KTC's conclusion that the exact scope of CMI's business was not clear. We therefore do not find unreasonable the KTC's inference from the record that it was not certain whether the scope of CMI's business was limited to the sales of the subject product produced by the Sinar Mas Group's producers.

6.37 We note that in addition to the lack of clarity on the record, the KTC also relied on the information in the DIS report in concluding that the exact scope of CMI's business was not clear. We shall therefore also address Indonesia's allegations regarding this report. Indonesia argues that the

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[109] See, for instance, Response of Indonesia to Question 13(e) from the Panel.

[110] Report of the original panel, para. 7.102.

[111] See, for instance, Closing Statement of Korea, para. 5; Comments of Korea on Indonesia's Responses to Panel's Questions, para. 11.

[112] First Written Submission of Korea, para. 36.

KTC's reliance on this report was improper because of the deficiencies found in this report, which were reported by the Sinar Mas Group to the KTC in the implementation proceedings at issue. The first shortcoming that Indonesia cites regarding this report is that it mixes the address of CMI with that of Indah Kiat and the second is that it identifies CMI solely as a manufacturing company without mentioning its trading function. Furthermore, Indonesia contends that the disclaimer that it contains renders the DIS report even less reliable.

6.38 The DIS report provides in relevant parts:

> "Copyright & Disclaimer
>
> This product has been supplied by [BCI] solely for use by its authorised licensees strictly in accordance with their license agreements with DIS. DIS makes no representation to any other person with regard to the completeness or accuracy of the data or information contained herein, and it accepts no responsibility and disclaims all liability (save for liability which cannot be lawfully disclaimed) for loss or damage whatsoever suffered or incurred by any other person resulting from the use of, or reliance upon, the data or information contained herein. Information provided is not financial product advice. This report contains general information only. It is not intended as financial product advice and must not be relied upon as such. You should consider obtaining independent advice tailored to your specific circumstances before making any financial decisions...
>
> Name of Establishment: PT. Cakrawala Mega Indah
>
> Address: Wisma Indah Kiat Building, 3rd Floor JI. Raya Serang Km. 76, Keragilan-Sentul, Serang 42184 Banten
>
> ...
>
> Number of Employee: 100
>
> Business Type: Manufacturer
>
> Establishment Status: National Company
>
> ...
>
> Cakrawala Mega Indah is a national company. The company is a manufacturer, and their business activity include: paper and pulp. With its head office in Jakarta, Cakrawala Mega Indah employs around 100 staff in 2004."[113] (emphasis added)

6.39 We note that the disclaimer found in the preamble to the report is of the kind that would call for caution when using the information that the report contains. It clearly states that the information is of general nature and should not be relied upon in making business decisions. In our view, a report that is not sufficiently reliable for business decisions may not be considered to be any more reliable for purposes of an anti-dumping investigation. Furthermore, we note that the Sinar Mas Group brought to the KTC's attention the fact that the DIS report mixed the addresses of CMI and Indah Kiat. In its letter dated 16 June 2006, the Sinar Mas Group stated:

> "The KTC relies on information sourced from [BCI] to support its choice of secondary sources. In order to respond adequately to the [sic.] this evidence, the

[113] Exhibit IDN-7, p. 1-2.

> Sinar Mas Group will require access to the documents obtained from [BCI]. However, we note that the statements that CMI is a manufacturing company and that CMI's interest expenses total [BCI]% of sales cost are completely false. This can be directly verified by the KTC if it so wishes. We also note that the [BCI] website states that the address of the purported CMI pulp and paper division factory is "Wisma Indah Kiat, 3rd Floor Jl. Raya Serang Km. 76, Kragilan, Serang 42184". However, this is not the address of a CMI factory, instead it is the address of the Indah Kiat factory in Serang. It appears that [BCI] has failed to distinguish between CMI and its affiliated manufacturing companies. This clearly shows that information sourced from [BCI] is faulty. We have attached the relevant printout from the [BCI] website and a reference to the address of Indah Kiat's Serang factory as Annex 5."[114] (footnote omitted, emphasis added)

6.40 In response, the KTC held in its Re-determination:

> "In this regard, the Trade Investigation Office added the materials obtained from "DIS" into evidence in order to corroborate CMI's financial expenses. Therefore, the Trade Investigation Office, in relation to corroboration of CMI's financial expenses, reviewed the materials submitted by the Sinar Mas Group (annex 5), and found that it cannot be used as a basis for denying the materials obtained from "DIS" by the Trade Investigation Office for corroboration because the materials submitted by the Sinar Mas Group was only a print out of the materials of "DIS" and the addresses of CMI and Indah Kiat."[115] (emphasis added)

6.41 We note that the above excerpt from the KTC's Re-determination indicates that the KTC rejected the documents submitted by the Sinar Mas Group to prove its allegation that the DIS report mixed addresses of CMI and Indah Kiat on the grounds that the documents were printouts of the DIS materials and addresses of CMI and Indah Kiat. Korea argues that "[t]he KTC found that the "printouts" submitted by Indonesia to show an alleged error in the DIS report were not persuasive".[116] In response to questioning during the meeting of the Panel with the Parties, however, Korea mentioned that the KTC's version of the DIS report was also a printout from an internet site.[117] Hence, the format in which the KTC itself obtained the mentioned report was not different from the format in which the Sinar Mas Group submitted its DIS materials. We do not find the DIS report that the KTC itself used in its Re-determination to be any more convincing than the DIS materials submitted by the Sinar Mas Group. We therefore do not consider that the KTC relied on a proper justification in not taking into consideration the documents submitted by the Sinar Mas Group with a view to demonstrating the alleged unreliability of the DIS report.

6.42 Korea has pointed the Panel's attention[118] to the following discussion in the KTC's Re-determination on this issue:

> "Firstly, with regard to the argument of Sinar Mas on the information obtained from DIS company, while Indah Kiat is a large company employing more than 17,608 persons at [sic.] of 2001, the information from DIS company described that CMI is a small company having 100 employees only. Given this, DIS company is not deemed to confuse CMI with Indah Kiat when preparing information. Further, it is

[114] Letter by the Sinar Mas Group dated 6 June 2006 (Exhibit IDN-5, p. 3). The Sinar Mas Group repeated the same argument in its letter dated 13 June 2006 (Exhibit IDN-8, p. 1).

[115] Exhibit IDN-11(b), p. 11.

[116] Response of Korea to Question 5 from the Panel.

[117] Korea submitted the version of the DIS report that was in the KTC's possession in Exhibit KOR-S-11-E.

[118] Response of Korea to Question 5 from the Panel, footnote 7.

> possible that CMI can manufacture goods by using Indah Kiat's factory and, thus DIS company may describe the address of CMI as that of Indah Kiat's factory. Therefore, as to the first insistence of Sinar Mas Group, DIS company may not be deemed to confuse CMI with Indah Kiat by reason of indicating the same address for both companies."[119] (footnote omitted, emphasis added)

6.43 We note that in this section of its Re-determination, the KTC argues that because the DIS report indicates the number of CMI's employees as 100, it can not be mixing it with Indah Kiat which has many more employees than that. The KTC also suggests that it may be that the report gave Indah Kiat's address for CMI because the latter is capable of carrying out manufacturing activities by using the facilities of the former. The Sinar Mas Group brought to the KTC's attention an issue that would reasonably raise doubts about the accuracy of the information in the DIS report. The KTC invalidated this doubt on the basis of some other information, the number of employees, found on the same report. Furthermore, the KTC speculated that the reason why the DIS report gives the same address for Indah Kiat and CMI could be because CMI could be engaged in production through the facilities of Indah Kiat. However speculative this may otherwise be found, we do not totally exclude that CMI could, as the KTC mentioned, be producing the subject product by using Indah Kiat's production facilities. We note, however, that the KTC's reasoning is not premised on any evidentiary basis. As such, it remains purely conjectural.

6.44 On the basis of the foregoing, we consider that the KTC's reliance on the DIS report and the manner in which it addressed the Sinar Mas Group's concern over the accuracy of the information in the report indicates that the KTC's establishment of the facts regarding its finding on the issue of the scope of CMI's business was not proper. We recall that the KTC's finding on the issue of the scope of CMI's business was made in the context of the broader issue of whether it would be appropriate to use a manufacturing company's interest expenses for CMI. We also recall that this broad issue constituted the first of the two main bases of the KTC's ultimate decision to use RAK's interest expenses for CMI. As far as the first base of the KTC's ultimate decision is concerned, therefore, we find that the KTC failed to exercise special circumspection within the meaning of paragraph 7 of Annex II.

(ii) The KTC's Corroboration of the Interest Expense Used for CMI

6.45 We now turn to Indonesia's arguments concerning the KTC's corroboration of the interest rate used for CMI with the interest rates pertaining to certain other companies. We recall that the KTC, after using RAK's interest rate as proxy for CMI, compared it against various sources and concluded that the interest rate used for CMI was proper. The first source cited in this context is the DIS report. The KTC's Re-determination points out that CMI's interest rate was indicated as [BCI] per cent of its cost of sales in that document. Second, the KTC looked to the interest rates of Indah Kiat and Pindo

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[119] Exhibit KOR-S-4, p. 38. Although, for the sake of consistency, we have used throughout our findings the translation of the KTC's Re-determination provided by Indonesia, in this instance we quoted from the translation provided by Korea because the latter raised concern about the quality of translation provided by Indonesia. See, Response of Korea to Question 5 from the Panel. This comment related only to this specific quotation and Korea has not generally argued that the Panel should use Korea's translation throughout its findings. We note that the excerpt that we have quoted reads as follows in the translation provided by Indonesia:

> "First, with regard to the Sinar Mas Group's claims regarding the materials from "DIS", it does not seem that "DIS" confused CMI and Indah Kiat based on the fact that the address of CMI concurred with that of Indah Kiat because it described CMI as a small company with XX employees while Indah Kiat as a big company with XX,XXX employees as of 2001, and that CMI is capable of manufacturing the goods using the factory facilities of Indah Kiat in that "DIS" could have described the address of Indah Kiat's factory as CMI's factory."
>
> See, Exhibit IDN-11(b), p. 13.

Deli plus two other Indonesian paper manufacturers, which were significantly more than the [BCI] per cent figure used for CMI. Third, the KTC looked to the interest rates of three Indonesian companies engaged in the production of non-paper products and found that they were also higher than [BCI] per cent. Finally, the KTC analyzed the interest rates of five Korean companies engaged in wholesaling of non-paper products and again found that they were also significantly higher than [BCI] per cent. The KTC then concluded that the interest rate taken from RAK as proxy for CMI was appropriate.

6.46 Indonesia argues that the KTC's corroboration did not validate its choice of RAK as proxy for CMI's interest expenses. Nor did it invalidate the appropriateness of using April Fine's interest expenses for CMI. According to Indonesia, the KTC should have taken into consideration the similarities/dissimilarities between the activities of CMI and those of the companies that it used for corroboration. Because none of them were engaged in "(i) the activity of reselling (ii) the product under investigation (iii) in the Indonesian market", comparing RAK's interest rate against the rates of these companies did not justify the KTC's decision to use RAK's interest expenses for CMI.[120] Indonesia maintains that the KTC should have used April Fine's interest rate for CMI because, unlike RAK which is a manufacturing company, April Fine was engaged in the same kind of activity as CMI. Korea disagrees. According to Korea, the interest expenses that companies may incur are independent from their business activities. Interest expenses are a function of how much money a company borrows to finance its operations. Different companies may have different financial strategies and may therefore use different ways of financing. Indonesia's argument that April Fine would have been the correct proxy for CMI because of the similarities of their business activities should, therefore, be rejected.

6.47 We recall that the main basis of our finding of inconsistency in the original panel proceedings regarding the determination of CMI's interest expenses was the lack of an adequate explanation for using different sources of information for different elements of CMI's SG&A expenses. We reasoned that there would normally be differences between the financial expenses of a producing company and those of a trading company because "[p]roduction activities might require more capital investments and might therefore be more likely to give rise to higher financial expenses."[121] We therefore found unusual the KTC's decision to use RAK's interest rate for CMI. We did not, however, exclude the possibility that in a given investigation the investigating authorities could use a producing company's interest rate as proxy for a trading company, or *vice versa*, as long as the reasons for this approach are adequately explained.[122] We do not consider that there are strict rules that the investigating authorities have to follow in determining the financial expenses of different kinds of companies on the basis of facts available. In the circumstances of the implementation proceedings at issue, however, we find it noteworthy that the KTC used April Fine's data to determine all of CMI's SG&A expenses except interest expenses for which it used the data pertaining to RAK. We do not consider that this approach was inconsistent simply because the nature of CMI's and RAK's businesses were different. We note, however, that the KTC's Re-determination does not explain the reason for this dual approach regarding the secondary sources of information used to determine different elements of CMI's SG&A expenses. In our view, even if there was no difference between the nature of the businesses of CMI and April Fine on the one hand and RAK on the other, the special circumspection requirement of paragraph 7 of Annex II would call for an explanation as to why different sources have been used for different elements of CMI's SG&A expenses. Given the significant difference between the interest expenses of April Fine and RAK, the need for an explanation became, in our view, even more important in the circumstances of the proceedings at issue. As we mentioned in our original panel report, we do not exclude the possibility that a producing company's data may be used in the place of a trading company's data as long as the authorities' determination adequately explains the reason for such an approach. In this case, however, there is no such adequate explanation.

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[120] First Written Submission of Indonesia, para. 136.

[121] Report of the original panel, para. 7.110.

[122] *Ibid.*

6.48 Korea submits that [BCI], April Fine's and CMI's financing requirements were significantly different. Consequently, the Sinar Mas Group's assertion regarding the similarities between these two companies are groundless.[123] Indonesia argues that this difference does not change the fact that the scope of business of these two companies were more similar compared with RAK. Indonesia adds that CMI received its compensation at the time of the sale and transmitted the balance of the customer's payment to the relevant producer in the Sinar Mas Group. This, in Indonesia's view, invalidates Korea's point that April Fine was in a better financial situation than CMI because, [BCI], CMI obtained its compensation at the time of the sale.[124] We note that Korea's argument in this regard does not have a basis in the Re-determination.[125] It therefore constitutes *ex post facto* justification and we can not base our assessment on it.

6.49 As we mentioned at the outset, one element that made the implementation proceedings at issue different from the original investigation subject to the original panel proceedings was the corroboration of RAK's interest rate with various groups of companies. The KTC first cited the [BCI] per cent interest rate indicated in the DIS report for CMI. It then found support for its decision to use RAK's interest rate for CMI in the fact that there were other companies that had interest rates similar to or higher than that of RAK. As far as the corroboration with the DIS report is concerned, we recall that we have already found that the KTC's reliance on the DIS report in connection with its finding on the issue of the scope of CMI's business was not based on a proper justification. Using the information in this report for corroboration, therefore, did not satisfy the obligation set forth in paragraph 7 of Annex II.

6.50 As far as the corroboration with the data pertaining to the other companies is concerned, our general view is that it does not explain why the KTC used RAK's interest expense for CMI. It merely shows that there were some other companies that had an interest expense similar to that of RAK. The KTC could, in our view, have brought together a different list of companies from different sectors and engaged in different areas of activities whose interest expenses could be higher or lower than that used for CMI in these proceedings. In our view, the issue is not whether the interest expenses used by the KTC for CMI were in line with the expenses of some other companies, but rather whether the KTC exercised special circumspection in deciding to use RAK's interest expenses as proxy for CMI. In this regard, we generally note that the KTC's Re-determination focuses on what is "appropriate" or "proper" in terms of representing CMI's interest expenses (*supra*, para. 6.20), rather than showing in what ways, if at all, the KTC exercised special circumspection in the use of the information from the secondary source, RAK, from which such expenses were derived.

6.51 In this connection, we would like to stress that we are not implying that the KTC should have used April Fine's interest expenses as proxy for CMI. Rather, it is the non-existence on the record of an adequate explanation as to why the KTC decided not to use April Fine's data for interest expenses although it used it for all other elements of CMI's SG&A expenses that, in our view, makes the KTC's determination fall short of the special circumspection requirement of paragraph 7 of Annex II. In this regard, we find noteworthy Korea's statement during the original panel proceedings that in the original investigation the KTC decided not to use RAK's SG&A data as proxy for CMI on the grounds that this would have been disproportionate for a company operating at CMI's level.[126] Korea

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[123] First Written Submission of Korea, para. 38.

[124] Second Written Submission of Indonesia, paras. 55-56.

[125] Korea stated that although this information was obtained by the KTC during the original investigation, it was not addressed in the KTC's determination. Response of Korea to Question 8 from the Panel.

[126] In its Second Written Submission in the original panel proceedings, Korea stated:

> "[T]he KTC did not use the overall SG&A expense shown in the income statement of the April Fine subsidiary that bore the costs for manufacture and sales of the subject merchandise, because the KTC concluded that this SG&A expense rate was disproportionate to the expenses incurred by a company operating at the level of CMI." Exhibit IDN-20(b), p. 29-30.

has not drawn our attention to any difference in the circumstances that would justify the change in the KTC's approach in this regard.

6.52 Indonesia also takes issue with the similarities/dissimilarities between CMI and the companies used for corroboration. With regard to the four Indonesian paper manufacturers – Indah Kiat, Pindo Deli, Tjiwi Kimia and Lontar Papyrus – Indonesia argues that these are not appropriate benchmarks because – unlike CMI – they are producers of the subject product. With regard to the three Indonesian producers producing non-paper products, Indonesia argues that they do not establish an appropriate benchmark because they are not engaged in re-selling paper in Indonesia. Finally, with regard to the five Korean companies, Indonesia submits that they do not operate in the Indonesian market, nor are they engaged in the sales of the subject product.[127] Korea, in turn, contends that the financial expenses of a company are independent from the nature of its activities. According to Korea, companies may use different ways to satisfy their financing needs, such as "various forms of debt transactions, stock transactions, and even corporate operating transactions".[128] As we mentioned earlier, it is not the alleged dissimilarities between the nature of CMI's business and that of the companies used for corroboration that makes the KTC's determination inconsistent with the requirement of paragraph 7 of Annex II to apply special circumspection in the use of information from secondary sources when resorting to best information available under Article 6.8 of the Agreement. Rather, it is the non-existence of an adequate explanation as to why different sources have been used to replace different elements of CMI's SG&A expenses that makes the KTC's determination inconsistent in this regard. Corroborating RAK's interest expense with that of some other companies does not constitute such an explanation. It merely shows that some other companies also incurred the same level of interest expense that RAK did in a given period of time. As such, this analysis remains arbitrary.

6.53 In a different vein, Korea argues that "[t]here was no reason to assume that CMI would have zero interest expense, even if its activities were limited to sales and distribution" and that "[t]here was no *a priori* reason to believe that the actual interest expenses of CMI would be more similar to the expenses of a trading company (like April Fine) than to the expenses of a company with manufacturing operations (like RAK)".[129] This reasoning defies logic because it could equally apply the other way round. In other words, one could also argue that there was no reason to assume that CMI's interest expenses would be similar to those of RAK. Korea argues that "[t]he RAK interest expense was consistent with the available information concerning the interest expenses incurred by sales and distribution companies and by manufacturing companies producing similar and non-similar merchandise".[130] Korea refers to the companies whose information was used for corroboration purposes. As we explained above, however, the corroboration carried out by the KTC was based on the information pertaining to a group of companies selected by the KTC. Using the same approach, one could also come up with a list of companies with interest expenses higher or lower than those found by the KTC. We do not consider that the KTC's exercise constituted the kind of evaluative comparative analysis that could satisfy the special circumspection requirement set forth in paragraph 7 of Annex II.[131]

6.54 Korea further argues that "[t]here was no evidence indicating that the April Fine figures were consistent with normal industry experience. As a result, even if the KTC had wanted to adopt the April Fine figures as "facts available", there would have been no evidence to corroborate those

[127] See, for instance, First Written Submission of Indonesia, para. 135.

[128] Comments of Korea on Indonesia's Responses to Panel's Questions, para. 5.

[129] Opening Statement of Korea, para. 49.

[130] (footnote omitted) Opening Statement of Korea, para. 49.

[131] In this regard, we note the reasoning of the panel in *Mexico – Anti-Dumping Measures on Rice*, cited with approval by the Appellate Body. See, Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* ("*Mexico – Anti-Dumping Measures on Rice*"), WT/DS295/AB/R, adopted 20 December 2005, para. 289.

data".[132] In response to questioning[133], Korea has not shown to the Panel where on the record this reasoning by the KTC could be found. Instead, Korea stated that it "assume[d] that the [original] Panel's finding was based, in large part, on the fact that the KTC had not explained whether April Fine's zero interest expense was consistent with general industry experience".[134] Korea has not, however, shown to us what was the basis of this assumption in our original panel report. We also asked Korea whether its argument implied that with regard to elements of CMI's SG&A expenses other than interest the KTC confirmed that the figures taken from April Fine's data were actually consistent with the normal industry practice.[135] Korea has not provided a specific answer to this question. We are therefore not convinced by these arguments.

6.55 Korea contends that "all of the corroborating information obtained by the KTC was consistent with the interest expense ([BCI] per cent) that the KTC used as facts available for CMI. None of the corroborating information was consistent with the alternative interest expense (zero) that the Sinar Mas Group proposed."[136] As we explained above, the fact that the KTC showed that there were other companies that had interest expenses similar to that of RAK does not in our view satisfy the obligation to apply special circumspection in the use of information from a secondary source within the meaning of paragraph 7 of Annex II of the Agreement. This exercise wrongly assumes that the interest expenses of the companies used for corroboration somehow represent the relevant standard for the appropriateness of the interest expense to be used for CMI. We do not consider this type of selective comparison to constitute special circumspection. As we have already mentioned, the KTC could have collected data pertaining to some other companies which could show interest rates close to that of April Fine. In our view, however, this would not change the arbitrary nature of the KTC's corroboration. We note that the very text of the KTC's Re-determination confirms the arbitrary nature of the exercise that lead the KTC to base CMI's interest expenses on RAK's data. The Re-determination indicates, *inter alia*, that the KTC checked "<u>whether there is any other company in non-paper industry having incurred the level of financial expenses that the Trade Committee applied</u>" (emphasis added) (*supra*, para. 6.20).[137] This indicates that instead of verifying the information obtained from RAK against independent sources, the KTC inquired whether there were other companies that had interest rates similar to that of RAK. We have mentioned above that it was clear from the outset that there would be other companies having interest expenses similar to those of RAK, just as there would also be other companies, like April Fine, with zero interest expense. This therefore constitutes an arbitrary analysis and does not satisfy the special circumspection obligation under paragraph 7 of Annex II.

6.56 Finally, we note Korea's assertion that had the KTC used the SG&A and profit figures reported by the Sinar Mas Group for CMI instead of basing itself on facts available, this would have yielded higher constructed normal values and higher margins of dumping for Indah Kiat and Pindo Deli.[138] More specifically, Korea submits that the amount for profits based on facts available was lower than the profits reported by the Sinar Mas Group itself. Korea therefore asks the Panel to allow the KTC to use as facts available the profits figure reported by the Sinar Mas Group if the Panel finds

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[132] Opening Statement of Korea, para. 50.

[133] Question 7(a) from the Panel to Korea.

[134] Response of Korea to Question 7 from the Panel.

[135] Question 7(b) from the Panel to Korea.

[136] Response of Korea to Question 7 from the Panel. See also Opening Statement of Korea, para. 50.

[137] We note that the translation provided by Korea is not different from the one submitted by Indonesia from which we quoted. The version of the KTC's Re-determination provided by Korea reads in this regard:

> "The KTC obtained and analyzed the financial statements of Indonesian companies engaged in industries other than the paper manufacturing, <u>in order to verify the existence of company of which financial statement shows the financial expenses similar to the level used by the KTC</u>" (emphasis added). Exhibit KOR-S-4, p. 27.

[138] Second Written Submission of Korea, paras. 22-24; Opening Statement of Korea, paras. 43-45.

the interest expenses used by the KTC to be inconsistent with the Agreement.[139] We note that this is *ex post facto* justification and we can not base our assessment on it. In addition, we do not consider the issue before us to be the magnitude of the margin of dumping calculated by the KTC. Rather, the issue is whether the KTC complied with its obligation to exercise special circumspection in its use of information from a secondary source. Thus, even if Korea's contention is correct we do not find it relevant to the issue before us.

(c) Conclusion

6.57 The KTC made a finding on the issue of the scope of CMI's business, which was partly based on the DIS report. We have found that the KTC's reliance on the DIS report and the manner in which it addressed the Sinar Mas Group's concern over the accuracy of the information in the report, indicated that the KTC's establishment of the facts regarding its finding on the issue of the scope of CMI's business was not proper. We have also found that the KTC's corroboration of RAK's interest expense with some other companies' expenses did not constitute an adequate explanation as to why the KTC used April Fine's data for CMI's SG&A expenses other than interest and RAK's data for its interest expenses. We therefore conclude that in the implementation proceedings at issue the KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II by failing to exercise special circumspection in the use of information from secondary sources.

6.58 We recall that Indonesia also claims that the interest expenses the KTC added for CMI to the constructed normal values for Indah Kiat and Pindo Deli were not "reasonable" within the meaning of Article 2.2 of the Agreement. In this regard Indonesia asserts violations of Articles 2.2, 2.2.2, 2.4 and 2.1 of the Agreement. We have found the KTC's determination regarding CMI's interest expenses to be inconsistent with Article 6.8 of the Agreement and paragraph 7 of Annex II. We therefore do not consider it necessary to address Indonesia's claim that the same determination also violated Articles 2.2, 2.2.2, 2.4 and 2.1of the Agreement.

C. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE AGREEMENT

1. Alleged Partial Reopening of the Record Regarding the Issue of the Scope of CMI's Business

(a) Arguments of the Parties

(i) Indonesia

6.59 Indonesia notes that in the implementation proceedings at issue, the KTC revisited the issue of whether CMI was merely a selling company that sold the subject product produced by Indah Kiat and Pindo Deli and concluded that the exact scope of CMI's business was not clear on the basis of the record. It therefore used the interest expenses of RAK as surrogate for CMI in the construction of the normal values for Indah Kiat and Pindo Deli. Indonesia notes that on the basis of the record of the original investigation at issue, it was undisputed that CMI was merely a selling company that sold in the Indonesian market the subject product produced by Indah Kiat and Pindo Deli. Indonesia also argues that in the original panel proceedings Korea made statements to this effect. In Indonesia's view, the KTC should not have changed this undisputed factual finding in the implementation proceedings at issue. Once it decided to do otherwise, however, it had to follow the procedural requirements of Article 6 as if this factual finding was made for the first time in the investigation. Indonesia asserts that the KTC acted inconsistently with certain obligations under Article 6 in connection with its factual finding on the issue of the scope of CMI's business.

[139] Opening Statement of Korea, para. 45.

6.60 Indonesia argues that the KTC acted inconsistently with Article 6.1 of the Agreement by not informing the Indonesian exporters of the information it needed in making this finding and by rejecting the information they submitted on this very issue. More specifically, Indonesia argues that the KTC should have informed the Sinar Mas Group that it was re-opening the issue of the scope of CMI's business and invited them to submit information on this matter. According to Indonesia, for the same reasons that it violated Article 6.1, the KTC also violated Articles 6.2 and 6.4 of the Agreement. Furthermore, Indonesia contends that the KTC acted inconsistently with its obligation under Article 6.6 by declining to accept the information submitted by the Indonesian exporters without verifying its accuracy and adequacy. Indonesia also submits that the KTC acted inconsistently with Article 6.8 of the Agreement and paragraphs 3, 5, 6 and 7 of Annex II with respect to the rejection of the information submitted by the Indonesian exporters in the implementation proceedings at issue. Finally, Indonesia submits that to the extent that the KTC rejected information placed on the record of the original investigation regarding the scope of CMI's business, it also acted inconsistently with Article 6.8 of the Agreement and paragraphs 3, 5 and 6 of Annex II.

(ii) Korea

6.61 Korea acknowledges that during the implementation proceedings at issue, the Sinar Mas Group submitted to the KTC CMI's income statements and accompanying documents from CMI's accounting system as well as the legal opinion of an Indonesian law firm indicating that under Indonesian law CMI did not have to submit its financial statements to public accountant for auditing and another legal opinion to the effect that CMI did not have manufacturing activities. The Sinar Mas Group also asked the KTC to carry out a verification visit in order to confirm that the information submitted was accurate. Korea argues, however, that the issue of the scope of CMI's business was not verified in the original investigation because of the rejection of the KTC's request to verify CMI's data. Korea also submits that the information submitted by the Sinar Mas Group was not relevant to the implementation proceedings at issue and was not part of the record because inasmuch as the scope of CMI's business was concerned the KTC's initial determination had been upheld by the original panel and was not being reconsidered. Yet the KTC analysed the legal opinion concerning the scope of CMI's business and concluded that it was not reliable because it was premised on certain assumptions. It follows that the Sinar Mas Group's assertion that CMI, like April Fine, was merely a trading company had no basis. Korea nevertheless underlines the fact that the KTC's Re-determination in the implementation proceedings at issue was not based on the assumption that CMI was a manufacturing company. The KTC simply found that the exact scope of CMI's business had not been determined.

(b) Arguments of Third Parties

(i) European Communities

6.62 The European Communities does not consider that making a finding on a factual issue in the implementation of the DSB recommendations and rulings which differs from the finding made on the same issue in the original proceedings would necessarily violate Article 6.8 and Annex II of the Agreement provided that the investigating authorities comply with the DSB recommendations and rulings.

(ii) The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

6.63 TPKM argues that the issue of the use of facts available has to be judged on the basis of the point of time at which facts available are used. In other words, if the information which was missing at the time a specific determination was made by the investigating authorities subsequently-submitted information should not be allowed to retroactively invalidate the previous decision. The TPKM submits that the KTC enjoyed an unfair advantage over the Sinar Mas Group companies by declining to admit the information that they submitted in the implementation proceedings at issue. According to

TPKM, either the KTC should have limited the factual basis of its Re-determination to the information collected in the original investigation or it should have re-opened the record and allowed the Sinar Mas Group to submit information that they deemed relevant to the KTC's Re-determination.

(c) Evaluation by the Panel

6.64 Above, we have addressed Indonesia's claim regarding the KTC's calculation of CMI's interest expenses. We note that Indonesia's claim under Article 6 concerns alleged procedural inconsistencies in the process that lead to the KTC's determination regarding CMI's interest expenses. More specifically, this claim relates exclusively to the manner in which the KTC made its finding on the issue of the scope of CMI's business. Above (paras. 6.30-6.44), we found, among others, that the KTC's finding on the issue of the scope of CMI's business fell short of the special circumspection requirement of paragraph 7 of Annex II. We do not find it necessary for the resolution of the dispute before us to make findings regarding the procedural aspects of a finding that we have found to be WTO-inconsistent on its substance. We therefore apply judicial economy with respect to this claim.

2. Alleged Violations of Article 6 in the KTC's Injury Re-determination

(a) Arguments of the Parties

(i) Indonesia

6.65 Indonesia asserts that the Sinar Mas Group asked the KTC to disclose the factual basis of its injury re-determination and to allow the Group to comment on such re-determination. The KTC declined this request on the grounds that the injury re-determination was based on the data collected during the original investigation. Indonesia argues that by declining the Indonesian exporters' request, the KTC violated Articles 6.2, 6.4, 6.5 and 6.9 of the Agreement.[140] Indonesia argues that the KTC should also have informed the Sinar Mas Group of its intention to base its injury re-determination solely on the information gathered during the original investigation.

(ii) Korea

6.66 Korea notes that the KTC's revised injury determination was not based on any new information. No additional data were collected during the implementation proceedings. Korea therefore argues that because the parties were allowed to comment on those data in the course of the original investigation, the KTC was under no obligation to give them another opportunity to comment after making its final determination in the implementation proceedings at issue.

(b) Arguments of Third Parties

(i) European Communities

6.67 The European Communities contends that the investigating authorities have to comply with the requirements of Article 6.4 of the Agreement in the implementation proceedings carried out under Article 21.5 of the DSU. The obligations set out under Article 6.4 would, in the European Communities' view, apply to both new information collected in the implementation proceedings and that which was already on the record of the original proceedings. As far as the provisions of Articles 6.1, 6.2 and 6.9 of the Agreement are concerned, the European Communities considers that

[140] Although Indonesia also cited Article 6.1 of the Agreement in its First Written Submission in connection with this claim, it subsequently clarified that this was a typographical error and that it was not pursuing a claim under Article 6.1 with regard to the KTC's injury re-determination. See, Response of Indonesia to Question 19 from the Panel.

they apply in cases where the investigating authorities collect new facts in the implementation proceedings.

(ii) Japan

6.68 Without taking any position regarding the factual aspects of Indonesia's claim, Japan argues that in the implementation proceedings carried out under Article 21.5 of the DSU, the measure taken to comply with the DSB recommendations and rulings is subject to the disciplines of the Agreement in its entirety, irrespective of the specific violations found in the original panel proceedings. According to Japan, Article 6 of the Agreement applies to the implementation proceedings under Article 21.5 of the DSU in order to guarantee procedural fairness to all interested parties. It follows that the KTC had to give interested parties full opportunity to defend their interests if the KTC collected new information concerning its injury determination in the implementation proceedings at issue.

(iii) United States

6.69 The United States disagrees with Indonesia's assertion that the KTC was required to disclose to the Sinar Mas Group the fact that it would base its injury re-determination solely on the information collected in the original investigation. The United States argues that if it is factually correct that the KTC based its injury re-determination solely on the information collected in the original investigation, Article 6.4 did not impose any further obligations on the KTC in the implementation proceedings at issue. This is because, argues the United States, Article 6.4 applies to "information", not "the authorities' reasoning". Likewise, the United States submits that Article 6.9 applies to "essential facts under consideration", as opposed to "the authorities' reasoning". It follows that to the extent that the KTC fulfilled this obligation during the original investigation, it did not have to make another disclosure under Article 6.9 in the implementation proceedings at issue.

(c) Evaluation by the Panel

6.70 We recall that in the original panel proceedings, we found, among others, that the KTC failed to adequately analyze the injury factors set out in Article 3.4 of the Agreement. More specifically, we found that "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".[141] Indonesia does not argue before this compliance Panel that the KTC's injury re-determination failed to implement this aspect of our findings in the original panel proceedings. Indonesia contends, however, that while making its injury re-determination the KTC acted inconsistently with some of its procedural obligations under Article 6 of the Agreement. Korea, in turn, submits that because the KTC's injury re-determination was based solely on the information collected during the original investigation and the procedural obligations now cited by Indonesia were then satisfied, the Panel should dismiss Indonesia's claim.

6.71 We note that Indonesia does not dispute Korea's assertion that the KTC's injury re-determination was based solely on the information collected during the original investigation. It is also factually undisputed that the Sinar Mas Group specifically requested disclosure of the KTC's injury re-determination and the right to make comments on it.[142] The KTC declined such request on the grounds that the injury re-determination was based solely on the information obtained in the original investigation. The KTC's Re-determination provides in relevant parts:

[141] Report of the original panel, para. 7.273.
[142] Sinar Mas Group's letter dated 6 June 2006 (Exhibit IDN-5, p.4).

> "The previous resolution of the Trade Committee regarding anti-dumping investigation on Fine Paper originating from Indonesia and China contains the resolution of the Trade Committee and its grounds after deliberating any and all issues and reviewing opinions of interest [sic.] parties. In amending its previous resolution in accordance with the Panel's decision, the Trade Committee re-analyzes the facts based on materials secured during the previous investigation without receiving any new materials from interested parties; the Office concludes that there is nothing requiring the Trade Committee to obtain a new opinion from the interested parties.
>
> In addition, the resolution of the Trade Committee is one final decision of the Trade Committee after analyzing, reviewing and deliberating all materials collected by the Trade Investigation office. Thus, receiving new opinions of interested parties regarding the resolution of the Trade Committee does not seem reasonable and consistent with the decision-making process of the Trade Committee.
>
> Therefore, the Trade Investigation Office concluded that the request of Sinar Mas Group to read the resolution of the Trade Committee beforehand and to have an opportunity to suggest its opinion [sic.] improper procedurally."[143]

6.72 The broad issue raised in connection with this claim is the extent to which the procedural obligations set forth in various paragraphs of Article 6 apply in a situation where the authorities' implementation of the DSB recommendations and rulings are solely based on the data collected in the original investigation, i.e. where implementation is limited to a new analysis on the basis of the same data. The legal reasoning that we provide below regarding the claims raised by Indonesia under specific subparagraphs of Article 6, therefore, addresses the circumstances of the implementation proceedings at issue where no new information has been added to the record in addition to that which had been collected during the original investigation.

6.73 Before addressing the specific claims raised by Indonesia, however, we find it useful to address a horizontal issue raised by Indonesia regarding the interrelation between the original investigation and the implementation proceedings at issue. Indonesia asserts that the fact that the Indonesian exporters were allowed to make comments on the injury factors in the original investigation does not deprive them of the same right "in the new proceeding".[144] According to Indonesia, the finding in our original panel report rendered the KTC's original determination under Article 3.4 "null and void", and the KTC could not therefore carry out its injury re-determination without giving the Indonesian exporters an opportunity to comment.[145]

6.74 We disagree with Indonesia's characterization of the implementation proceedings at issue as being a new proceeding. Indonesia has not cited any provision in the DSU or elsewhere in the WTO Agreement that would support such a proposition. The proceedings carried out for the purpose of complying with the DSB recommendations and rulings based on the WTO-inconsistencies found in an anti-dumping investigation are not, in our view, new or independent from that original investigation. Rather, as the Appellate Body opined in *Mexico – Corn Syrup (Article 21.5 – US)*, "[t]he original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events".[146] It follows that as a compliance panel operating under Article 21.5 of the DSU, we have to analyze the procedural inconsistencies alleged by Indonesia against the procedural background consisting of the original

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[143] Exhibit IDN-11(b), p. 20.

[144] Response of Indonesia to Question 20 from the Panel.

[145] Response of Indonesia to Question 20 from the Panel.

[146] *Supra*, footnote 91.

investigation as well as the implementation proceedings at issue. As a logical consequence of this approach, when a procedural obligation set forth under Article 6 has been fulfilled in the original investigation, we shall refrain from ruling that it had to be re-observed in the implementation proceedings unless the steps taken by the KTC made it necessary.[147] Otherwise, we would have imposed on the KTC procedural obligations that had no legal or logical connection with the implementation of the DSB recommendations and rulings at issue. With that in mind, we now turn to the specific obligations that Indonesia asserts to have been violated by the KTC in the implementation proceedings at issue.

6.75 The first provision cited by Indonesia in this context is Article 6.2. Indonesia argues that the KTC acted inconsistently with the obligation set forth under Article 6.2 by failing to allow the Indonesian exporters "*any* opportunity to comment on or participate in the injury re-determination".[148] Indonesia does not contend that the KTC should have disclosed its draft injury re-determination to the Indonesian exporters for comment. Rather, Indonesia's assertion is that the Indonesian exporters should have been given an opportunity to comment on "how the Article 3.4 factors should properly be analysed".[149]

6.76 Article 6.2 provides:

> "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."

Article 6.2, interpreted in conjunction with Article 6.1, requires the authorities to provide the interested parties in anti-dumping proceedings with "liberal opportunities ... to defend their interests."[150] To this end, Article 6.2 charges the authorities with the obligation to organize meetings, upon request, to allow interested parties to hear other parties' views. The interested parties' right to defend their interests is not, however, unlimited in time. As mentioned in Article 6.14, the procedural obligations provided for under Article 6 are not intended to preclude the authorities from completing the proceedings in a timely manner.[151]

6.77 We note that in its letter dated 6 June 2006, the Sinar Mas Group made the following request:

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[147] We note Korea's proposition that although the provisions of Article 6 apply "in some manner" to the implementation proceedings at issue, the Panel should base its assessment of whether the KTC complied with its Article 6 obligations on the record of the original investigation and that of the implementation proceedings altogether. In other words, Korea argues that as far as the fulfilment of the obligations set forth under Article 6 is concerned, the Panel should not view the implementation proceedings as being distinct from the original investigation. Response of Korea to Question 10 from the Panel. We note that Korea's proposition parallels our reasoning regarding the relationship between the original investigation and the implementation proceedings at issue.

[148] First Written Submission of Indonesia, para. 172.

[149] Response of Indonesia to Question 20 from the Panel.

[150] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina ("US – Oil Country Tubular Goods Sunset Reviews")*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 241.

[151] *Ibid.*

> "EVALUATION OF INJURY FACTORS
>
> 13. The Sinar Mas Group looks forward to receiving the proposed determinations regarding injury and assumes that it will be provided with an adequate opportunity to defend its interests."[152] (emphasis added)

6.78 The KTC's Re-determination reads in response:

> "In amending its previous resolution in accordance with the Panel's decision, the Trade Committee re-analyzes the facts based on materials secured during the previous investigation without receiving any new materials from the interested parties; the Office concludes that there is nothing requiring the Trade Committee to obtain a new opinion from interested parties.
>
> In addition, the resolution of the Trade Committee is one final decision of the Trade Committee after analyzing, reviewing and deliberating all materials collected by the Trade Investigation Office. Thus, receiving new opinions of interested parties regarding the resolution of the Trade Committee does not seem reasonable and consistent with the decision-making process of the Trade Committee.
>
> Therefore, the Trade Investigation Office concluded that the request of Sinar Mas Group to read the resolution of the Trade Committee beforehand and to have an opportunity to suggest its opinion [sic.] improper procedurally."[153] (emphasis added)

It is therefore factually clear that the Sinar Mas Group asked the KTC for an opportunity to make comments on the KTC's assessment of the impact of dumped imports on the domestic industry and its request was not granted. The issue is whether not granting the Sinar Mas Group's request violated its right to defend its interests as provided for under Article 6.2.

6.79 We note that Indonesia's claim under Article 6.2 differs from its claims under Articles 6.4 and 6.9, discussed below, in that it concerns the right to make comments, not disclosure of information. It is undisputed that the KTC's injury re-determination was based solely on the information collected in the original investigation. Korea argues that because the injury re-determination was based solely on the information from the original investigation, the KTC did not have to provide the Sinar Mas Group with an additional opportunity to make comments on its injury analysis. Indonesia, on the other hand, contends that because the implementation proceedings at issue constituted a "new proceeding" the Sinar Mas Group was entitled to make comments on the evaluation of the Article 3.4 injury factors in such proceedings. We recall our reasoning above (para. 6.74) that because the implementation proceedings at issue were the continuation of the original investigation, the procedural obligations imposed on the KTC relate to this combined process. It follows that a procedural obligation that had been fulfilled in the original investigation had to be observed again in the implementation proceedings only if the steps taken in such proceedings made it necessary. We therefore do not agree with Indonesia's contention that the KTC had to give the Sinar Mas Group an additional opportunity to comment on its injury re-determination simply because the implementation proceedings constituted a new proceeding. Nor do we agree with Korea's assertion that because the injury re-determination was based on the information collected in the original investigation the Sinar Mas Group did not have the right to make comments on the KTC's injury analysis in the implementation proceedings. We can not assume that the same factual basis would in all cases lead to the same analysis regarding the impact of dumped imports on the domestic industry under Article 3.4 of the Agreement. It was, in our view, entirely possible, if not to be expected, that in the implementation proceedings at issue the KTC

[152] Exhibit IDN-5, p. 4.
[153] Exhibit IDN-11(b), p. 20.

would have engaged in an analysis that in some respects would differ. This new analysis, in turn, could have lead to a different conclusion regarding the impact of dumped imports on the domestic industry under Article 3.4. The opposite proposition would suggest that notwithstanding our finding of inconsistency under Article 3.4 in the original panel proceedings the KTC would necessarily reach the same conclusion regarding the impact of dumped imports on the domestic industry, and would imply that our finding was devoid of any potential impact on the implementation proceedings. This can not be the case. We therefore consider that the KTC should have allowed the Sinar Mas Group to comment on the evaluation of the injury factors under Article 3.4 of the Agreement.

6.80 We note that the right provided for under Article 6.2 to have full opportunity to defend one's interests is not limited to make comments on the factual basis of the authorities' determinations. It also entails the right to comment on how the data collected by the authorities have to be assessed. As we have noted above, Article 6.2, interpreted in conjunction with Article 6.1, gives the interested parties in an anti-dumping investigation a broad right to defend their interests. We also recall that these provisions do not provide for indefinite rights. Otherwise, it would have been impossible for the authorities to complete investigations in a timely manner as mentioned in Article 6.14 of the Agreement. We note that the injury re-determination at issue was made after the disclosure of essential facts under Article 6.9 of the Agreement. We also note that Indonesia does not argue that the Sinar Mas Group's right to defend its interests under Article 6.2 was denied in the original investigation. Nonetheless, because it was a new determination – made in the context of the combined process consisting of the original investigation and the implementation proceedings –, we consider that the Sinar Mas Group was entitled to submit comments in order to defend its interests as provided for in Article 6.2. We therefore find that the KTC acted inconsistently with Article 6.2 of the Agreement in the implementation proceedings at issue.

6.81 Next, Indonesia submits that the KTC acted inconsistently with the obligation under Article 6.4 of the Agreement by failing to inform the Sinar Mas Group of the information relevant to the presentation of their case. More specifically, Indonesia argues that the KTC should have informed the Sinar Mas Group of the fact that it would base its injury re-determination solely on the information gathered in the original investigation. This, in Indonesia's view, constitutes relevant, non-confidential information within the meaning of Article 6.4.[154]

6.82 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)

Article 6.4 requires the authorities to give the interested parties the chance to see "information" that is relevant to the presentation of their cases. Thus, the principal characteristic of the obligation set forth under Article 6.4 is that it concerns "information". We interpret the word "information" in Article 6.4 as referring to information before the investigating authorities in the relevant anti-dumping proceeding. This may be information submitted by the interested parties or collected by the investigating authorities themselves. In addition, Article 6.4 applies to a specific category of

[154] First Written Submission of Indonesia, para. 173.

information: it has to be information relevant to the presentation of the interested parties' cases, used by the authorities and not confidential within the meaning of Article 6.5.[155]

6.83 We note that Indonesia does not argue that the KTC should have physically sent the same injury data to the Sinar Mas Group.[156] The only issue that, according to Indonesia, should have been notified is the fact that the KTC intended to base its injury re-determination solely on the data collected in the original investigation. We fail to comprehend, however, how this constituted "information used by the authorities" within the meaning of Article 6.4. What Indonesia refers to is the KTC's intention regarding the implementation of the DSB recommendations and rulings relevant to Article 3.4 of the Agreement. We simply can not agree with the proposition that this intention constituted "information" within the meaning of Article 6.4.

6.84 To support its claim under Article 6.4, Indonesia cites the decision of the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. Regarding the nature of the obligation under Article 6.4, that panel held:

> "We interpret Article 6.4 to require the investigating authorities to allow interested parties to see the information they use in their determinations irrespective of whether that same information may have been used in a previous proceeding and may have been made available to the same interested parties in connection with that past proceeding. Article 6.4 requires the investigating authorities to allow the interested parties to see the information relevant to the presentation of their cases with respect to each proceeding in which the information is used by the authorities."[157]

6.85 Based on this finding, Indonesia argues that "Article 6.4 applies to a redetermination *irrespective of whether* the redetermination is based on the same information that was used in a previous proceeding and made available to the same interested parties in connection with that past proceeding".[158] We note that the factual circumstances surrounding the *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* case were considerably different from those presented in these proceedings. The original panel in that dispute had found certain aspects of the statutory and regulatory provisions of the United States' law dealing with sunset reviews to be in contravention of the obligations set forth in various provisions of the Anti-Dumping Agreement. It also had found certain inconsistencies specific to the sunset review that was at issue in that dispute.[159] With a view to implementing the DSB recommendations and rulings, the United States made certain amendments to its sunset regulations. Following these amendments, the United States Department of Commerce ("USDOC") initiated a new sunset review in order to comply with the DSB recommendations and rulings specific to the sunset review at issue.[160] In the compliance proceedings under Article 21.5 of the DSU, Argentina, the complainant, argued, among others, that the USDOC violated Article 6.4 of the Agreement in the new sunset review by failing to make available certain information to the

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[155] We find support for our proposition in the Appellate Body's decision in *EC – Tube or Pipe Fittings.* Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil ("EC – Tube or Pipe Fittings")*, WT/DS219/AB/R, adopted 18 August 2003, para. 142.

[156] Response of Indonesia to Question 21 from the Panel.

[157] Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina ("US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)")*, WT/DS268/RW, circulated to WTO Members 30 November 2006, para. 7.128.

[158] (emphasis in original) First Written Submission of Indonesia, para. 175.

[159] Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina ("US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)")*, WT/DS268/RW, circulated to WTO Members 30 November 2006, para. 2.5.

[160] *Ibid.*, para. 2.6.

Argentine exporters. The information at issue had been disclosed to the Argentine exporters in the previous sunset review. Hence, the United States argued that the USDOC did not have to disclose the same information to the Argentine exporters in the new sunset review.[161] In the above-quoted part of its report, the compliance panel rejected this argument.

6.86 The implementation proceedings before us, however, supplemented the KTC's determination in the original investigation certain aspects of which we found in the original panel proceedings to be WTO-inconsistent. That is, these implementation proceedings were the continuation of the original investigation, not a phase distinct from it. Furthermore, we note that in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, there was no disagreement that the subject matter of the claim constituted "information" within the meaning of Article 6.4. We therefore disagree with Indonesia on the relevance to the case at hand of the above-quoted finding by the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*.

6.87 Furthermore, we note that Article 6.4 stipulates that the authorities have to provide timely opportunities for the interested parties to see the information relevant to the presentation of their cases. It does not, in our view, impose an independent disclosure obligation on the authorities. That is, it does not require the authorities to disclose information to the interested parties when there is no request to that effect. It follows that even if Indonesia had shown to the Panel that its claim under Article 6.4 concerned "information" within the meaning of this provision, its contention that the KTC failed to disclose this "information" would not amount to a violation of the obligation set forth in Article 6.4.

6.88 On the basis of the foregoing, we find that Indonesia has failed to make a *prima facie* case with regard to its claim under Article 6.4 of the Agreement.

6.89 Indonesia also argues that if the KTC considered the information that had to be disclosed under Article 6.4 to be confidential and refrained from disclosing it to the Sinar Mas Group on the basis of confidentiality, the KTC acted inconsistently with the obligation under Article 6.5 of the Agreement to ask for "good cause" for the confidential treatment of such information.[162] Having found that Indonesia has not proved the existence of "information" within the meaning of Article 6.4, we also find that Indonesia has failed to make a *prima facie* case under Article 6.5.

6.90 Next, Indonesia asserts a violation of Article 6.9 of the Agreement. Indonesia contends that for the same reasons that it violated Article 6.4, the KTC also violated Article 6.9.[163]

6.91 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)

We note that Article 6.9 provides for a one-time disclosure requirement that has to contain the "essential facts" that are under consideration regarding the authorities' decision whether to apply definitive measures. We also note that just as Article 6.4 concerns "information", Article 6.9 concerns "facts". In addition, this obligation only applies to "essential" facts that establish the basis of the authorities' decision whether to apply definitive measures. The scope of application of Article 6.9 is

[161] *Ibid.*, para. 7.128.
[162] First Written Submission of Indonesia, para. 177.
[163] First Written Submission of Indonesia, para. 178.

therefore limited to "essential facts" that are used by the authorities in deciding whether to apply definitive measures.[164]

6.92 Turning to Indonesia's arguments in support of its claim, we note that Indonesia argues that the KTC should have disclosed under Article 6.9 the fact that it intended to base its injury re-determination solely on the information from the original investigation.[165] Here too we disagree with the view that the KTC's intention to base its injury re-determination solely on the data collected in the original investigation constituted an "essential fact" within the meaning of Article 6.9. The scope of the obligation under Article 6.9, in our view, excludes the reasoning of the authorities or their intention as to how certain determinations will be made. We therefore find that Indonesia has failed to make a *prima facie* case with regard to its claim under Article 6.9 of the Agreement.

3. Alleged Acceptance by the KTC of New Information From the Korean Domestic Industry

(a) Arguments of the Parties

(i) Indonesia

6.93 Indonesia argues that the KTC accepted information from the Korean domestic industry, and possibly from other sources as well, and failed to make it available to the Indonesian exporters. The KTC therefore acted inconsistently with its obligations under Articles 6.1.2, 6.2 and 6.4 of the Agreement. Indonesia also contends that to the extent that this information was not disclosed to the Indonesian exporters on the grounds of confidentiality, the KTC acted inconsistently with Article 6.5 of the Agreement by failing to confirm that there was good cause that justified confidential treatment and to ask the sources of the mentioned information to provide a non-confidential version of it for disclosure purposes.

(ii) Korea

6.94 Korea rejects Indonesia's assertion that the KTC received information from the Korean industry during the implementation proceedings at issue.

(b) Evaluation by the Panel

6.95 We note that the Parties' views diverge regarding the factual basis of this claim. Korea disputes Indonesia's allegation that the KTC received new information from the Korean domestic industry for its injury re-determination. We asked Indonesia to show as a matter of fact that the KTC

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[164] In this regard, we note the description by the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* of the obligation set forth in Article 6.9. See, Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina ("US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)")*, WT/DS268/RW, circulated to WTO Members 30 November 2006, para. 7.148.

[165] First Written Submission of Indonesia, para. 179. In the same paragraph of its First Written Submission, while acknowledging that the KTC fulfilled its Article 6.9 disclosure obligation in the original investigation, Indonesia argues that the KTC should have disclosed the same essential facts to the Sinar Mas Group in the implementation proceedings at issue. We asked Indonesia for clarification regarding this argument. Indonesia responded that it is not arguing that the KTC should have physically disclosed in the implementation proceedings at issue the same essential facts under consideration already disclosed in the underlying original investigation. Indonesia limited its arguments to the assertion that the KTC should have disclosed to the Sinar Mas Group the fact that it would base its injury re-determination solely on the data collected during the original investigation. See, Response of Indonesia to Question 22 from the Panel.

received information from the Korean industry in the implementation proceedings at issue. Indonesia responded:

> "Indonesia notes that this claim ... relates to both the redetermination of dumping and injury.
>
> For the purposes of the Panel's decision, the primary factual basis for this claim is that the KTC provided an opportunity to the Indonesian exporters to provide comments on the KTC's dumping redetermination. It is, therefore, reasonable to assume that the same opportunity was provided to the Korean interested parties and that they availed of this opportunity. It is also reasonable to assume that some of the information regarding the interest expenses of Korean companies referred to by the KTC in its dumping redetermination was provided to the KTC by Korean industry sources. Indonesia also relies on the fact that Korea has declined to provide Indonesia and the Panel with any documents obtained from such sources, or even an index of the record of its investigation.
>
> The Panel is entitled to conclude that in the circumstances, Indonesia has made a *prima facie* case that the KTC received new submissions and evidence from the Korean industry and has not acted consistently with its obligations under Article 6 with respect to such submissions and evidence, for the reasons explained in paragraphs 183-185 of Indonesia's first submission."[166] (italic emphasis in original, underline emphasis added)

6.96 We note that Indonesia's claim is not premised on an adequate factual basis. Indonesia mainly invites the Panel to find on the basis of certain presumptions that Indonesia made a *prima facie* case. We recall that the principles of burden of proof applicable to these proceedings (*supra*, para.6.4) require Indonesia to provide proof of its factual assertion that the KTC received information from the Korean industry in the implementation proceedings at issue. Indonesia has not done so.

6.97 Indonesia has invited the Panel to ask Korea to submit to the Panel the index of the record of the implementation proceedings at issue.[167] We have declined this request for two reasons. First, we have to assume that WTO Members engage in dispute settlement in good faith, as required under Article 3.10 of the DSU. We see no reason to doubt Korea's good faith in its statement that the KTC did not receive information from the Korean industry in these implementation proceedings. Second, we do not consider it appropriate to ask the defendant to produce evidence to rebut a *prima facie* case that the complaining party has not made.[168] We therefore conclude that Indonesia has failed to make a *prima facie* case with regard to its claim regarding the alleged acceptance by the KTC of new information from the Korean industry in the implementation proceedings at issue.

VII. CONCLUSIONS AND RECOMMENDATION

7.1 On the basis of the above findings, we conclude that:

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[166] Response of Indonesia to Question 23 from the Panel.

[167] Second Written Submission of Indonesia, para. 74.

[168] In this regard, we find support in the following pronouncement by Appellate Body in *Japan – Agricultural Products II*:

> "Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it." (emphasis in original).
>
> Appellate Body Report, *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products II*"), WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, para. 129.

(a) The KTC acted inconsistently with Article 6.8 of the Agreement and paragraph 7 of Annex II by failing to exercise special circumspection in the use of information from secondary sources in its effort to base its determination of CMI's interest expenses on the best information available,

(b) The KTC acted inconsistently with its obligation under Article 6.2 of the Agreement by declining to provide the Sinar Mas Group with an opportunity to make comments on the evaluation of the injury factors under Article 3.4,

(c) Indonesia has failed to make a *prima facie* case with regard to its claims under Articles 6.4, 6.5 and 6.9 of the Agreement concerning the alleged disclosure violations in connection with the KTC's injury re-determination,

(d) Indonesia has failed to make a *prima facie* case with regard to its claim on the alleged acceptance by the KTC of new information from the Korean industry.

7.2 We have applied judicial economy with regard to:

(a) Indonesia's claim under Articles 2.2, 2.2.2, 2.4 and 2.1 of the Agreement regarding the KTC's determination of CMI's interest expenses on the basis of best information available,

(b) Indonesia's claim under Articles 6.1, 6.2, 6.4, 6.6, 6.8 and Annex II of the Agreement concerning the alleged partial re-opening of the record on the issue of the scope of CMI's business.

7.3 We recall Indonesia's assertion that because of the alleged inconsistencies in the KTC's Re-determination, Korea has also failed to respect its obligation under Article 1 of the Anti-Dumping Agreement to ensure that an anti-dumping measure is applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement. Given the dependent nature of this claim, we need not, and do not, make any findings in this regard.

7.4 Since the original DSB recommendations and rulings in 2005 remain operative, we make no new recommendation.

7.5 Indonesia notes that -notwithstanding our statement in our original panel report on this specific issue- in the calculation of CMI's financial expenses in the implementation proceedings at issue, the KTC disregarded the differences between the scope of business of the company whose information is missing and that of the company whose information is used represent the missing information. This paved the way for the continuation of the anti-dumping duties based on margins calculated through a WTO-inconsistent method. Indonesia therefore invites the Panel to suggest that Korea implement its findings in these compliance proceedings, as pointed out in Indonesia's letter to Korea dated 8 December 2005[169], by basing CMI's interest expenses on April Fine's data in which case margins of dumping for Indah Kiat and Pindo Deli would become *de minimis* and termination of the duties inevitable. Korea has not specifically responded to Indonesia's request for a suggestion from the Panel for implementation.

[169] Exhibit IDN-2.

7.6 We note that Article 19.1 of the DSU states that WTO panels may suggest ways through which the Member concerned could implement their recommendations.[170] With regard to Indonesia's request for a suggestion, however, we recall that our task is to assess whether the KTC's determination was proper, not to make suggestions as to which information it should have used or it should use in the implementation of the DSB recommendations and rulings following these compliance proceedings. We therefore decline to make the suggestion proposed by Indonesia.

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[170] Article 19.1 of the DSU reads:

"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)

ANNEX A

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS312/9
4 January 2007

(07-0030)

Original: English

KOREA – ANTI-DUMPING DUTIES ON IMPORTS OF CERTAIN PAPER FROM INDONESIA

Recourse to Article 21.5 of the DSU by Indonesia

Request for the Establishment of a Panel

The following communication, dated 22 December 2006, from the delegation of Indonesia to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 28 November 2005, the Dispute Settlement Body (the "DSB") adopted the recommendations and rulings in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* (WT/DS312). At the meeting held on 20 December 2005, the Republic of Korea ("Korea") informed the DSB that it intended to fully implement the recommendations and rulings of the DSB in this matter within a reasonable period of time. Indonesia and Korea agreed under Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") that Korea had until 28 July 2006 to implement those recommendations and rulings.

On 27 July 2006, the Korean Trade Commission (the "KTC") published its Implementation Report (Public Notice No. 2006-105 of the Korean Ministry of Finance and Economy) (the "Redetermination") in the Korean Gazette. The Redetermination leaves the underlying anti-dumping measure and the rate of dumping duties unchanged. At the DSB meeting held on 1 September 2006, Korea stated that by adopting the Redetermination it had fully complied with the recommendations and rulings of the DSB. Indonesia did not agree.

On 26 October 2006, Indonesia requested consultations with Korea under Article 21.5 of the DSU and paragraph 1 of the Understanding between Korea and Indonesia of 17 August 2006[1] regarding the consistency of the Redetermination with Korea's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-

[1] This Understanding related to the "sequencing" of proceedings under DSU Articles 21.5 and 22 and was circulated as document WT/DS312/7.

Dumping Agreement"). The request was circulated in document WT/DS312/8. Consultations were held on 15 November 2006. These consultations failed to settle the dispute.

Accordingly, Indonesia and Korea disagree as to the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. Pursuant to Articles 6 and 21.5 of the DSU, Article 17.5 of the Anti-Dumping Agreement and paragraph 2 of the Understanding between the Republic of Korea and the Republic of Indonesia of 17 August 2006, Indonesia hereby requests the establishment of a panel to examine the measures described below. Indonesia requests that this item be placed on the agenda of the next meeting of the DSB.

A. RESELLER SELLING EXPENSES

The Panel found that in calculating normal values based on constructed value for the Indonesian exporters at issue, the KTC acted inconsistently with the Anti-Dumping Agreement with respect to its calculation of the amount of interest expenses to be included in the selling, general and administrative expenses incurred by a related reseller of the like product. In the Redetermination, however, the KTC left unchanged the amount of interest expenses it included in the reseller's selling expenses in the original determination. Accordingly, the Redetermination is inconsistent with the provisions of the Anti-Dumping Agreement described below and fails to properly implement this aspect of the DSB's recommendations and rulings for the following reasons:

(a) The KTC failed to properly calculate a "reasonable amount for administrative, selling and general costs" to be included in the constructed value within the meaning of Article 2.2 of the Anti-Dumping Agreement, and failed to rely on "actual data *pertaining to* production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" within the meaning of Article 2.2.2, in that, *inter alia*, it used expenses incurred by a production company, ignored verified evidence that the reseller would not have incurred such interest expenses, and imputed expenses that were unrelated to the production and sale of the like product. By thus failing to properly determine the constructed value, the KTC also failed to make a fair comparison between normal value and export price within the meaning of Article 2.4 and failed to determine dumping margins properly within the meaning of Article 2.1.

(b) The KTC failed to comply with its obligation to utilise the "best information available", failed to exercise "special circumspection" in its use of secondary sources and failed to properly corroborate the secondary information used as facts available as required by Article 6.8 of the Anti-Dumping Agreement, read together with Annex II, in particular paragraphs 3 and 7 thereof, in that, *inter alia*, it used the expenses incurred by a production company, improperly ignored verified evidence regarding the interest expenses incurred by a reseller affiliated to another producer, failed to properly conduct a comparative assessment of or make a determination whether the secondary information used could reasonably replace the missing information, ignored verified evidence that the reseller would not have incurred such interest expenses in the resale of the like product, failed to provide an adequate explanation of its determination and relied on new, irrelevant, unreliable and unverifiable information regarding the reseller and regarding selling expenses incurred by companies in other industries in Korea.

(c) The KTC failed to comply with its obligation to reach an unbiased, objective and proper determination of dumping under Articles 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement, as well as its obligations under Article 6.8 read together with Annex II, in that, *inter alia*, it treated the reseller as a manufacturing company and in arriving at this conclusion relied on faulty information and disregarded its previous

findings, verified evidence and the findings of the panel regarding the nature and activities of the reseller.

(d) The KTC failed to comply with its obligations under Articles 2, 2.2, 2.2.2, 6.1, 6.2, 6.4, 6.6, 6.8, 17.6(i) and Annex II, in particular paragraphs 3 and 7 thereof, to make a proper determination of normal value and to provide the Indonesian exporters with adequate opportunities to submit evidence and to defend their interests, in that, *inter alia*, it excluded evidence supplied during the implementation process by the Indonesian exporters while accepting on the record new evidence from other sources and failed to take into account direct and verifiable evidence regarding the selling expenses incurred by the reseller.

B. FAILURE TO COMPLY WITH PROCEDURAL OBLIGATIONS

During the implementation phase, the KTC provided the Indonesian exporters with disclosure regarding the manner in which it intended to implement the DSB's rulings with respect to the determination of dumping. However, the KTC failed to provide the Indonesian exporters with any disclosure regarding the manner in which it intended to implement the DSB's rulings with respect to the determination of injury or with any opportunity to comment on issues relating to the re-determination of injury and the causal link between dumping and injury. In particular, the KTC did not disclose to the Indonesian exporters the facts on which it based its injury re-determinations. Accordingly, in the Redetermination:

(a) The KTC failed to comply with its obligations under Articles 6.1, 6.2, 6.4, 6.5 and 6.9 of the Anti-Dumping Agreement, in that it failed to disclose the factual basis for its injury re-determinations and failed to provide the Indonesian exporters with any opportunity to provide their views.

Moreover, the KTC appears to have accepted confidential submissions from the Korean domestic industry and other sources without requiring a showing of good cause, the submission of non-confidential summaries or an explanation as to why such summarization is not possible. In addition, information contained in these submissions was not provided to the concerned Indonesian exporters. Accordingly, in the Redetermination:

(b) The KTC failed to comply with its obligations under Articles 6.1, 6.2, 6.4 and 6.5 of the Anti-Dumping Agreement, in that it failed to require a party submitting confidential information to show good cause for confidential treatment or to submit a non-confidential summary thereof or an explanation as to why such summarization was not possible.

(c) The KTC acted inconsistently with Articles 6.1, 6.2 and 6.4 of the Anti-Dumping Agreement, in that it failed to provide copies of the submissions made by the Korean domestic industry to the Indonesian exporters.

Indonesia continues to reserve its rights in respect of all other aspects of Korea's purported compliance with its obligations in this case.

Indonesia requests that the Panel be established with the standard terms of reference set out in Article 7 of the DSU.

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