

**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>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/ R, adopted 23 October 2002, as modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
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<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>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</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
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<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
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<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

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Annex A Request for the Establishment of a Panel - Document WT/DS312/9

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 company¹ 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 expenses² 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.

[Parties' and Third Parties' Arguments in Sections IV and V deleted from this version.]

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.

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

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.

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 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

⁹⁰ *Ibid.*

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.

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 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.

⁹² Report of the original panel, para. 7.110.

⁹³ *Ibid.*, para. 7.111.

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 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

⁹⁴ Exhibit IDN-11(b), p. 3-4.

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 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) 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 2002.⁹⁶

(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:

Financial Expense Ratio of Indonesian Paper Industry

Company	2002	2001	Remarks
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⁹⁵ Exhibit IDN-11(b), p. 4.

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 cost of goods sold (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 cost of sales. 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.

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.

(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	2001	Total Interest payable	xx	xx	[BCI]%

Corporation	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.

⁹⁷ Exhibit IDN-11(b), p. 5-7.

⁹⁸ Exhibit IDN-11(b), p. 13.

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 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 cent⁹⁹ 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

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.

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.

(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

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 Responses to Panel's Questions, para. 13.

¹⁰⁵ Comments of Korea on Indonesia's Responses 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.

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.

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.

¹⁰⁸ Exhibit IDN-11(b), p. 9.

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 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

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.

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 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 Jl. 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)

¹¹³ Exhibit IDN-7, p. 1-2.

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 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.

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-

6.42 Korea has pointed the Panel's attention¹¹⁸ 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 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.

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

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.

(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 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

¹²⁰ First Written Submission of Indonesia, para. 136.

¹²¹ Report of the original panel, para. 7.110.

¹²² *Ibid.*

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.

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

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.

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 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

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.

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.

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 data".¹³² In response to questioning¹³³, 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 "whether there is any other company in non-paper industry having incurred the level of financial expenses that the Trade Committee applied" (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

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.

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, in order to verify the existence of company of which financial statement shows the financial expenses similar to the level used by the KTC" (emphasis added). Exhibit KOR-S-4, p. 27.

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 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 2.1 of 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

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

¹³⁹ Opening Statement of Korea, para. 45.

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.

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.

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.

(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 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.

¹⁴¹ Report of the original panel, para. 7.273.

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:

"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

¹⁴² Sinar Mas Group's letter dated 6 June 2006 (Exhibit IDN-5, p.4).

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.

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 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,

¹⁴⁶ *Supra*, footnote 91.

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.

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:

"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

¹⁵¹ *Ibid.*

¹⁵² Exhibit IDN-5, p. 4.

¹⁵³ Exhibit IDN-11(b), p. 20.

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 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

¹⁵⁴ First Written Submission of Indonesia, para. 173.

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 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

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.

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 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

¹⁶⁰ *Ibid.*, para. 2.6.

¹⁶¹ *Ibid.*, para. 7.128.

¹⁶² First Written Submission of Indonesia, para. 177.

¹⁶³ First Written Submission of Indonesia, para. 178.

"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 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

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.

industry for its injury re-determination. We asked Indonesia to show as a matter of fact that the KTC 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.

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.

VII. CONCLUSIONS AND RECOMMENDATION

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

- (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 2005¹⁶⁹, 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.

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.

¹⁶⁹ Exhibit IDN-2.

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 2006¹ 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.
