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**NON-CONFIDENTIAL**

Mr Tim King
Assistant Director
Australian Anti-Dumping Commission
55 Collins Street
Melbourne Vic 3008

Dear Mr King,

**SUBSIDISATION INVESTIGATION - A4 COPY PAPER FROM INDONESIA**

As you are aware, we represent the Sinar Mas Group ("SMG") on whose behalf this submission is made.

The captioned investigation is a "fishing expedition", based solely on the United States Department of Commerce ("USDOC") final affirmative countervailing duty ("CVD") determination in relation to Certain Uncoated Paper from Indonesia (notified January 2016). Australian Paper's application for this investigation provides no evidence of the existence of subsidies conferring benefit to Indonesian exporters of A4 copy paper to Australia during the investigation period (1 January to 31 December 2015). The application provides no reasonable grounds for the publication of a CVD notice in respect of A4 copy paper exported from Indonesia and should therefore have been rejected by the Commissioner in accordance with s269TC(1) of the Customs Act ("the Act"). Furthermore, the said USDOC's affirmative CVD determination is flawed because its findings leading to this determination are inconsistent with the WTO's Agreement on Subsidies and Countervailing Measures ("SCMA"). Details follow.

The USDOC's findings upon which the flawed CVD determination is based are those in relation to the following Government of Indonesia ("GOI") programs:

- Provision of standing timber for less than adequate remuneration;
- Log export ban; and
- Debt forgiveness through the debtor's buyback of its own debt from the GOI.

Our comments in relation to each of these programs follow.

**Provision of standing timber for less than adequate remuneration (stumpage).**

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The GOI requires that any entity wanting to harvest timber from a government owned plantation must obtain a licence and pay it PSDH fees. Timber is also harvested in Indonesia from privately owned plantations. The GOI has no control over these privately owned plantations and does not charge any fees for harvesting timber on such plantations.

The USDOC was aware of the existence of privately owned plantations in Indonesia, but its finding that a benefit was conferred by the GOI's stumpage program outlined above, ie. domestic prices of timber were distorted by this program, rested entirely on the fact that the GOI was a predominant supplier of standing timber. The USDOC made no evidentiary finding of price distortion in the substantial private standing timber market that exists in Indonesia, of which it was aware.

In determining that under this stumpage program the GOI was providing standing timber at less than adequate remuneration, the USDOC resorted to an external benchmark, ie. Malaysian log prices.

Article 14(d) of the SCMA states that a government provision of goods or services is considered to confer a benefit when it is made for less than adequate remuneration, but its second sentence provides that –

- ***the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.***

The USDOC's use of the external benchmark of Malaysian log prices in determining that the GOI's stumpage program provided Indonesian standing timber at less than adequate remuneration, rather than determining the adequacy of remuneration in relation to prevailing market conditions, is clearly inconsistent with Article 14(d) of the SCMA.

In *US – Carbon Steel (India)*, the Appellate Body explained that the benchmark price would normally be found in the market for the good in question in the country of provision and these in-country prices could be from private or government-related entities.[1] The Appellate Body further stated – *whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision.*[2]

In *US – Countervailing Measures (China)* the Appellate Body made clear that a rule of price distortion just because the government may be the predominant supplier of a good is impermissible. It noted that, in previous cases, *the Appellate Body has cautioned against equating the concept of government predominance with the concept of price distortion, and has highlighted that the link between the two concepts is an evidentiary one.*[3] The Appellate Body reversed the Panel's finding upholding USDOC's rejection of private prices as potential benchmarks. In this Report, the Appellate Body addressed four of the USDOC's CVD investigations. In *Solar Panels*, the USDOC had determined that the Government of China was the predominant provider of polysilicon in the country and that its significant presence in the market led to the distortion of all transaction prices. The Appellate Body rejected the reasoning and held:

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[1] Appellate Body Report, *US – Carbon Steel (India)* [4.151].

[2] Ibid [4.154].

[3] Appellate Body Report, *US – Countervailing Measures (China)* [4.52].

> *In the determination at issue, USDOC did not explain whether and how the relevant 37 producers possessed and exerted market power such that other in-country prices were distorted. Nor did the USDOC explain whether the prices of the 37 government related entities themselves were market-determined.*[4]

Similarly, in *Pressure Pipe*, the USDOC had found that state-owned enterprises contributed 82% of stainless steel coil production in China, and due to the government's significant involvement in the market, it rejected private producer prices as appropriate benchmarks. In this context, the Appellate Body stated:

> *We note that USDOC did not explain in its determination whether and how the mentioned market shares held by SOE's actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers aligned their prices with those of the government-provided goods.*[5]

In addition to its inconsistency with Article 14(d) of the SCMA, as demonstrated above, the USDOC's finding in relation to this alleged provision of standing timber for less than adequate remuneration is also inconsistent with Article 2.1(c) of the SCMA. The USDOC failed to establish that the GOI's collection of stumpage fees constitutes a plan, scheme or systematic series of actions to confer a benefit, ie. it failed to establish that it constitutes a subsidy program.

In *US – Countervailing Measures (China)* the Appellate Body stated that *the reference to "use of a subsidy programme" in Article 2.1(c) suggests that it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind.*[6] It concluded that:

> *The mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement. In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.*[7]

As the Appellate Body recognised, it is not sufficient to find that a financial contribution has been given to an entity. This is especially the case here, where the stated intention of the GOI's collection of stumpage fees is to collect revenue – not confer a benefit. No benefit is conferred at all, it was the USDOC's use of unacceptable out-of-country benchmarks that led to its finding of a benefit.

The GOI's laws governing stumpage fees were not intended to confer a benefit on entities who held licenses to harvest timber. They were designed to benefit the GOI through the payment of fees for timber harvested and for services provided. The USDOC's failure to conduct the necessary examination of whether there was a systemic series of actions that conferred a benefit is inconsistent with Article 2.1(c) of the SCMA.

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[4] Appellate Body Report, *US – Countervailing Measures (China)* [4.96].
[5] Ibid [4.101].
[6] Ibid [4.141].
[7] Ibid [4.143].

Furthermore, the USDOC did not conduct a flow-through analysis to establish that the assumed benefit to Indonesian log producers from the stumpage program flowed through to paper producers. The USDOC merely assumed that the incorrectly determined benefit to timber harvesters under the stumpage program flowed through to producers of uncoated paper and thereby created a countervailable subsidy on exports of that product to the US.

**Log export ban.**

Note:
The Appellate Body Reports referred to above in relation to the stumpage program also have relevance to this program.

The USDOC's determination that the GOI's prohibition of the export of logs constitutes a subsidy is also inconsistent with Article 14(d).

The USDOC did not ascertain that the Indonesian log export ban caused Indonesian domestic selling prices of logs used the production of pulp for paper making to be lower than they would have been in the absence of the log export ban. The USDOC merely assumed that the log export ban provided for lower Indonesian domestic selling prices of logs and to quantify its "benefit" the USDOC again used a benchmark based on prices of logs produced externally (Malaysia). This action is inconsistent with Article 14(d) of the SCMA and certainly does not prove that the log export ban provides for Indonesian domestic log prices being lower than they would be in the absence of the export ban.

Notwithstanding the GOI's reason for prohibiting log exports, the USDOC found the existence of a countervailable subsidy by determining a benefit using the same benchmark as that used in relation to stumpage, ie. Malaysian log prices, which, for reasons discussed above, is inconsistent with Article 14(d) of the SCMA.

In finding that a benefit was conferred by the log export ban, the USDOC also acted inconsistently with Article 2.1(c) of the SCMA.

As outlined above, in *US – Countervailing Measures (China)* the Appellate Body noted that Article 2.1(c) requires that there be a plan or scheme and systematic series of actions that confer a benefit. The USDOC did not evidence that the GOI or any regional, or local government entity had in place a plan, scheme or systematic series of actions to confer a benefit to Indonesian log users.

The GOI's log export ban does not consist of a systematic series of actions – it is a one-only action. The GOI implemented the log export ban in 2001 in reaction to its concern over a growing problem with forest conservation. The law stated:

a) that policies on the export of logs/chip raw materials have been misused by illicit timber companies and illegal traders that threaten the conservation of forestry resources and the environment;
b) that in this connection, it is necessary to stipulate a policy to put an end on the export of logs/chips raw materials.

(this law no longer includes chips).

This text of the law makes clear that the GOI was not attempting to confer a benefit to any entity, but rather was attempting to solve a forest conservation issue. The USDOC did not appear to consider this fact but concluded that by banning log exports the GOI entrusts or directs domestic log suppliers to sell logs at suppressed prices to domestic customers. There is no evidence supporting this conclusion. A ban on the export of logs does not compel the sale of logs at compressed prices. As with its finding of a benefit for stumpage, the USDOC's finding that the log export ban constitutes a benefit rests on its improper use of an out-of-country benchmark.

The USDOC ignored the intent of the GOI's law, which was not designed to provide a benefit to any entity. Nor did the GOI's law constitute a systematic series of actions intended to confer a benefit.

Furthermore, the USDOC did not conduct a flow-through analysis to establish that the assumed benefit of the export log ban to domestic log users flowed through to uncoated paper producers and thereby created a countervailable subsidy on exports of that product to the US.

**Debt forgiveness through the debtor's buyback of its own debt from the GOI.**

Note:
The USDOC's 2016 affirmative finding that this "debt forgiveness" constitutes a countervailable subsidy is based on findings in its 2009/2010 investigation concerning Certain Coated Paper from Indonesia. Consequently, our comments hereunder are in relation to USDOC's findings in the 2009/2010 investigation.

In making its finding that the GOI's 2003 sale of SMG's USD 880 million debt to Orleans Offshore Investment Ltd ("Orleans") represented a countervailable subsidy on exports of coated paper exports to SMG, the USDOC presumed the allocation period for non-recurring subsidies to be the average useful life ("AUL") for renewable physical assets of the US pulp and paper industries, ie. 13 years. As the said sale of debt took place in 2003, the allocation period for it as a non-recurring subsidy expires in 2016. Consequently, the USDOC finding provides no grounds for a finding by the Commission in this investigation that future exports of A4 copy paper by SMG mills will be subsidised by debt forgiveness and therefore there are no grounds for the imposition of CVD on them.

Furthermore, in making this finding, based on the adverse inference of affiliation between Orleans and SMG, that the GOI provided a benefit to SMG by selling SMG debt to an affiliate in contravention of Indonesian law, the USDOC ignored the large volume of evidence Indonesia submitted and its application of the said adverse inference is inconsistent with Article 12.7 of the SCMA.

Article 12.7 of the SCMA states that where an 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 wording of Article 6.8 of the Anti-Dumping Agreement ("ADA") is identical to Article 12.7 of the SCMA with addition of a reference to Annex II of the ADA. Annex II.5 to the ADA provides that "*even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has*

*acted to the best of its ability".* In *Mexico – Anti-Dumping Measures on Beef and Rice*, the Appellate Body noted that the conditions in Annex II to the ADA existed in the SCM Agreement [8] and that *it would be anomalous if Article 12.7 of the SCMA were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in Anti-Dumping investigations...*[9] Hence, the conditions in Annex II apply in this case.

Indonesia acted to the best of its ability in providing information in response to the USDOC's questions, including its location and submission of Orleans' Articles of Association and Certificate of Incorporation, neither of which showed an affiliation between Orleans and SMG. While Indonesia was unable to supply certain other information requested by the USDOC, in disregarding the evidence concerning non-affiliation between Orleans and SMG, the USDOC acted inconsistently with Article 12.7 of the SCMA.

In addition, the USDOC's determination is inconsistent with Article 12.7 of the SCMA because the facts available on the record that the USDOC reported do not reasonably replace the information that Indonesia allegedly failed to provide. The newspaper articles and reports suggesting an affiliation between Orleans and SMG were speculative and merely suggested such affiliation. The USDOC should have given more weight to the actual documents submitted by Indonesia than speculative newspaper articles and rumour and its failure to do so makes its determination inconsistent with Article 12.7 of the SCMA.

In *US – Countervailing Measures (China)*, the Appellate Body stated:

- *An investigating authority must use those "facts available" that "reasonably replace the information that an interested party failed to provide" with a view to arriving at an accurate determination.*
- *"The facts available" refers to those facts that are in the possession of the investigating authority on its written record. As determinations made under Article 12.7 are to be made on the basis of "the facts available", they cannot be made on the basis of non-factual assumptions or speculation.*
- *All substantial facts on the record must be taken into account.*[10]

Finally, the USDOC did not find that the alleged debt forgiveness constituted a plan, scheme, or systematic series of actions that confer a benefit. Consequently, its determination that this debt forgiveness conferred a benefit and therefore constituted a countervailable subsidy program is inconsistent with Article 2.1(c) of the SCMA. (The *US – Countervailing Measures (China)* Appellate Body Report references concerning Article 2.1(c) of the SCMA quoted above in relation to stumpage and log export plan programs, are also relevant to this debt forgiveness).

Two key undisputed facts demonstrate that the alleged debt forgiveness did not constitute a plan, scheme, or systematic series of actions pursuant to Article 2.1(c):

1. The law under which the debt in question was sold prohibited the sale of debt to affiliates; and

[8] Appellate Body Report, *Mexico – Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* [291].
[9] Ibid [295].
[10] Appellate Body Report, *US – Countervailing Measures (China)* [4.178].

2. The transaction documents the USDOC examined did not establish an affiliation between the company that bought the debt (Orleans) and SMG.

Because the law governing the sale of debt prohibited sale to affiliates, there cannot be a plan, scheme, or systematic series of actions pursuant to Article 2.1(c). The USDOC could not support a finding that the law had been broken with on the record evidence because the evidence showed there was affiliation between the purchaser and the debtor. To support that finding the USDOC had to rely on adverse facts available.

**Commission's investigation**

As demonstrated above, the findings of the USDOC's investigation in relation to Certain Uncoated Paper from Indonesia, improperly relied upon for initiation of this investigation, are inconsistent with the SCMA and cannot be relied upon for the Commission's findings in this investigation.

If it is the Commission's intent to continue this investigation, despite its improper initiation, it will be necessary for the Commission's investigation to make, among others, the following findings on an evidentiary basis in relation to the three alleged countervailing subsidy programs:

1. ***Stumpage***

   - Whether the stumpage program causes distortion of domestic timber prices. To do so it will need to examine the substantial private standing timber market. It cannot use an external benchmark as the USDOC did.

   - Whether the stumpage program constitutes a plan, scheme, or systematic series of actions to confer a benefit and therefore constitutes a countervailable subsidy program.

   - Whether any benefit provided by the stumpage program to standing timber harvesters flows through to exporters of A4 copy paper to Australia.

2. ***Log export ban***

   - Whether the log export ban causes Indonesian selling prices of logs used in the production of pulp for paper making to be lower than they would be in the absence of the export ban. And to do so it cannot use an external benchmark.

   - Whether the log export ban is a plan, scheme, or systematic series of actions to confer a benefit and therefore constitutes a countervailable subsidy program.

   - Whether any benefit provided by the log export ban flows through to exporters of A4 copy paper to Australia.

3. ***Debt forgiveness***

   - Whether debt forgiveness, which occurred in 2003, will provide a benefit to A4 copy paper exports to Australian post-2016.

- Whether the facts available concerning debt forgiveness lead to a finding that the GOI provided a benefit to SMG by selling SMG debt to an affiliate (Orleans) in 2003.

- That debt forgiveness constitutes a plan, scheme, or systematic series of actions to confer a benefit and therefore constitutes a countervailable subsidy program.

It is of note that SMG's exporter questionnaire responses provide evidence that –

- [Confidential];[11] and
- [Confidential].[12]

**WTO DSB Panel formation.**

In closing, we bring to your attention the fact that, in response to a GOI application, a DSB Panel has been formed to examine the countervailable subsidy determinations of the USDOC in its 2009/2010 investigation concerning Certain Coated Paper from Indonesia.[13] The determinations to be examined by the Panel are those in relation to the alleged subsidies in this investigation, ie. stumpage, log export ban and debt forgiveness.

It is of important note that these countervailable subsidy determinations by the USDOC in its 2009/2010 investigation concerning Certain Coated Paper from Indonesia formed the basis of its countervailing subsidy determinations in the USDOC's 2015 investigation concerning Certain Uncoated Paper from Indonesia.

Yours sincerely,

Roger Simpson

[11] [Confidential].

[12] [Confidential].

[13] *US – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia* (DS491).