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Non-Confidential

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Jakarta, July 13 2016

The Director Operations 2
Anti-Dumping Commission
55 Collins Street
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Australia
Email: operations2@adcomission.gov.au

Attention: Mr Tim King, Case Manager

Subject : Dumping and Subsidy Investigation in Respect of A4 Copy Paper Exported from the Republic of Indonesia - Anti-Dumping Notice NO. 2016/33

Dear Mr. King,

Referring to the application from Paper Australia Pty Limited's (Paper Australia) for the abovementioned subject and also the Anti-Dumping Commission's (Commission) Consideration Report No. 341 dated 29 March 2016 (Report) as well as our previous submission dated 20 June 2016, the Government of Indonesia (GoI) would like to convey the following point of views:

1. The Applicant Failed to Provide Positive Evidence on the Subsidies Identified

a. The issue that this submission addresses is how a "*benefit*" is to be determined consistent with the SCM Agreement. As we outlined in our previous submission, subsidies that are countervailable are defined in Article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures (*SCM Agreement*). Paragraph (a) of the definition sets out when a subsidy is deemed to exist, while paragraph (b) includes the requirement that the subsidies referred to in paragraph (a) must confer a "*benefit*". Provided these conditions are met and the subsidy in question is "*specific*", as provided for in Articles 1.2 and 2 of the SCM Agreement, then the subsidy would be countervailable.

b. Other relevant provision is Article 14(d) of the SCM Agreement which provides that:

"*the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. 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 (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).*" (*Emphasis added*).

These provisions were put into consideration by the WTO Appellate Body in the case of *United States – Countervailing Measures on Certain Products from China* (DS437--18 December 2014). In that case, the Appellate Body determined that, for the purposes of Articles 1.1(b) and 14(d) of the SCM Agreement, the benefit analysis requires a comparison because unless the financial contribution received makes the recipient "*better off*" than it otherwise would have been, no "*benefit*" is conferred. Thus, to determine whether the remuneration paid to a government for a good is "*less than adequate*" requires the selection of a benchmark against which the remuneration can be compared (para 4.44).

c. In this context, Paper Australia's application made unsubstantiated assertions about the existence and nature of the three subsidies in question in its Report. The Commission relied solely on USDOC's report but it did not constitute any evidence of the existence of the subsidy, its nature and/or the amount of the subsidy. It merely reflects the views of the US investigative authority, which may or may not be consistent with WTO rules and may not have been based on adequate or appropriate evidence, particularly when the investigative authority is directed by domestic legislation which disregard the WTO rules and jurisprudence. Based on, among others, this point of view, Indonesia has challenged the United States in the Dispute Settlement Body (WTO-DS 491). Therefore, we are of the view that the Commission should have but appear **not** to have factored in the above considerations prior to initiating the investigation. For this reason only the application should have been rejected by the Commission in the first place.

2. The Applicant Failed to Provide Positive Evidence that the Alleged Subsidies Benefit Flowed Through to the End-Product Causing Particular Market Situation

a. Assuming that the investigating authority concluded that prices have been distorted, **based on positive evidence**, then the Appellate Body on DS 437 case found that the use of an out-of-country prices may provide an appropriate benchmark. The Appellate Body found that **the relevant benchmark** must be determined in relation to the "*prevailing market conditions for the good or service in question in the country of provision*" as indicated by the second sentence of Article *14(d) of t*he SCM Agreement (para 4.45). Further, to the extent that prices paid in the country of provision are market determined, then they would provide *the relevant ben*chmark (para 4.46). Such prices in the country of provision can emanate from a variety of sources, including those paid to private entities and to government (para 4.46 and see also *paras 4.48 and 4.49).*

b. If the subsidy was determined to be countervailable, then it would be necessary to find, **based on positive evidence**, that the subsidies have "*flowed through*" to the end-product, *A4 Copy Paper*, and the extent to which the subsidies have flowed through. It is crucial to ensure that any measures imposed are only necessary to off-set the amount of the subsidy in the end-product exported to Australia. As indicated earlier above, **it cannot simply be assumed that this has occurred.** If the applicant still assumed that it has occurred, then it has to be demonstrated to what extent it has.

c. The Appellate Body considered that the responsibility was on the investigating authority (the Commission) to undertake the necessary analysis in order to determine, based on information provided by the domestic industry and other interested parties, **whether the proposed benchmark** prices are market prices so that it can determine whether the remuneration paid is less than adequate (para 4.47). We note in this regard that Paper Australia has provided no evidence on this matter but simply referred to a report by the USDOC.

d. In undertaking such an analysis the Commission must examine all aspects of the market in question. Even if the government has a predominant position in the market which could suggest that prices may be distorted., it cannot be presumed that this is the case. Rather, the link between predominant position of government as supplier and price distortion is an evidentiary issue that must be established. (paras 4.51 and 4.52)

Having regard to the foregoing WTO jurisprudence, it is obvious that there has not been a proper assessment of whether any of the three "*subsidies*" identified by Paper Australia in its application conferred a "*benefit*" within the meaning of Articles 1.1(b) and 14(d) of the SCM Agreement, nor does the Report comply with WTO rules in this regard.

Lastly, when conducting this investigative analysis the Commission must take into account not only information and evidence submitted by the Government of Indonesia but also that of the Indonesian exporters and producers in their questionnaire responses to determine whether the subsidies

identified by Paper Australia in fact confer a "*benefit*". Should the Commission consider that the information and/or evidence is insufficient, then, in the interests of natural justice, it should notify the interested parties and/or request further information to complete the analysis.

The Government of Indonesia avails itself of this opportunity to seek the Commission's assurance that the Commission will remain fair, transparent and objective in this investigation.

Yours faithfully,

Pradnyawati
Director of Trade Defence

Cc:
1. Act. Director General of Foreign Trade;
2. H.E. Ambassador of Indonesia for Australia, in Canberra;
3. Trade Attache of Indonesia for Australia, in Canberra.