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NON-CONFIDENTIAL

Mr Justin Wickes
Director, Operations 2
Australian Anti-Dumping Commission
55 Collins Street
Melbourne Vic 3008

Dear Mr Wickes,

DUMPING ASSESSMENTS – SINAR MAS GROUP

In our submission of 29 December 2016 on behalf of the Sinar Mas Group ("SMG") in response to Statement of Essential Facts No. 341 ("SEF341"), we advised the Commission that dumping margins determined for SMG exporters, Indah Kiat, Pindo Deli and Tjiwi Kimia, should be revised taking into account normal value adjustments for expenses incurred by their domestic distributor Cakrawala Mega Indah ("CMI")[1].

The background to this normal value adjustment is as follows:

- In its normal value calculations per Verification Reports in relation to the SMG exporters, the Commission made s269TAC(8) adjustments for CMI's sales margin.

- In response to submissions of 22 August and 6 September 2016 by Australian Paper, in its calculation of dumping margins per Preliminary Affirmative Determinations 341A ("PAD341A"), 341B ("PAD341B") and SEF341, the Commission removed the normal value adjustments for CMI's margin on the sole ground that the SMG exporters and CMI are related parties.

- In our submissions of 29 August, 20 September and 5 October 2016 we argued that the normal value adjustment for CMI's domestic sales margin should be made to enable proper comparison of domestic and export prices as required by s269TAC(8) of the Act and Article 2.4 of the Anti-Dumping Agreement, and **that CMI and SMG mills being related has no relevance to this.**

- The Commission did not accept our arguments and in SEF341 maintained its position per PAD341A and PAD341B of not making an adjustment for CMI's sales margin as CMI and SMG mills are related parties.

[1] Submission of 29 December 2016, page 7.

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It is paramount that a WTO Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (WT/DS442/R) was published on 16 December 2016 confirms our argument that the fact that CMI and SMG mills are related parties has no impact on the consideration of whether there should be a s269TAC(8)/Article 2.4 adjustment to normal values of like goods for CMI's sales margin to enable their fair comparison with export prices of SMG mills' A4 copy paper exports.

The said Panel Report relates to an Indonesian claim that a downward adjustment made by the European Union ("EU") to the export price of fatty alcohols imported into Europe for a price mark-up given to a trading company (ICOF-S) related to Indonesian producer (Musin Mas) was an improper adjustment because the price mark-up given to the related trading company was a transfer of funds within a "single economic entity". The Panel upheld the EU's findings supporting its downward adjustment, notwithstanding Indonesia's claim that the trader's mark-up constituted an internal allocation of funds with a "single economic entity" and did not affect price comparability. The Panel upheld the EU's findings that ICOF-S was granted a mark-up linked to export sales only and ICOF-S had functions similar to an agent working on a commission basis. The Panel found that the mark-up was a difference affecting price comparability and concluded that the EU had a sufficient evidentiary basis to adjust the export price in accordance with Article 2.4.

Concerning Indonesia's arguments that the trader's mark-up constituted an internal allocation of funds within a single economic entity, the Panel made the following considerations:

> *7.105. Based on the foregoing, we do not consider the existence of what Indonesia denotes as a "single economic entity" to be the "dividing line" between an "objective expense" and "an internal shifting of funds/allocation of profits without any implication for price comparability", and therefore to be dispositive of whether a given payment is a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.322 Accordingly, we do not share Indonesia's view that transactions between related parties, such as PT Musim Mas and ICOF-S, can never affect the price of the product at issue to a final buyer.323 For the same reasons, we cannot accept the assertion that a payment cannot constitute a difference which affects price comparability simply because "the economic benefit of the sale accrues to the [single economic entity] as a whole".324 The fact that the benefit of a sale to a final buyer might accrue to an overall entity does not negate the possibility that a given expense that is tied only to export or domestic sales (or to both in different amounts) could be incurred within that entity, with the potential to affect price comparability.*
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> *7.106. Rather, in our view, the "dividing line" between: (a) an internal allocation of funds within a single economic entity which is not reflected in the producer's pricing decision; and (b) an expense that is linked to either the export side or the domestic side or to both sides but with different amounts such that price comparability is affected, is dependent on the particular situation and evidence before an investigating authority in a given case where the proper characterization of the payment in question is at issue.325*
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> *7.107. We find support for our understanding in this regard in the text of Article 2.4, which we recall refers to due allowances being made "in each case, on its merits", and that in a given investigation, "[t]he authorities shall indicate to the*

parties in question what information is necessary to ensure a fair comparison". As we have discussed above, this suggests to us that allowances made under Article 2.4 require a case-specific analysis of the evidence in a given investigation. In the absence of any textual reference in Article 2.4 to "single economic entity" or similar concepts, we see no support for the conclusion that Article 2.4 "implicitly requires" consideration of "single economic entity", and that its existence or not is the "dividing line" between payments that do or do not affect price comparability.326

7.111. On the basis of the foregoing, we do not accept Indonesia's argument that for Article 2.4 of the Anti-Dumping Agreement, the existence or not of a single economic entity (as evidenced through common control, ownership, and management) is the "dividing line" between payments that do affect price comparability and those that do not, and that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in their treatment of the evidence and criteria cited by Indonesia relating to the mark-up and the relationship between PT Musim Mas and ICOF-S.

The Panel also addressed Indonesia's arguments that the EU incorrectly adjusted Musin Mas's export price because the value of the adjustment was calculated on the basis of selling, general and administrative ("SG&A") expenses and profits incurred by the trader (ICOF-S) and made the following considerations:

7.128. However, we disagree that the SG&A and profit of an entity involved in the sale of a product under investigation cannot, in any circumstance, be treated as a difference which affects price comparability. In particular, we consider that the intervention of downstream participants in the sales chain may result in "additional costs and profit" which are likely to affect price comparability across markets. From an accounting point of view, these elements of the price would be characterized as the SG&A and profit of the downstream participant, but they would also be characterized as a direct selling expense for the producer/exporter concerned. We also recall the Appellate Body's statement in US – Hot-Rolled Steel that "[t]here are ... no differences 'affect[ing] price comparability'" which are precluded, as such, from being subject to an allowance.360 In the context of Indonesia's claim, the mark-up must be viewed as a whole and not from the perspective of its constituent elements. In addition, it is apparent from the record that the EU authorities only disaggregated the mark-up into components for profit and SG&A in order to quantify the proper amount of the adjustment, having already concluded that the adjustment for the mark-up was warranted.361 We note that Indonesia recognizes this distinction between: (a) identifying where an allowance should be made; and (b) identifying the proper amount for that allowance:

> *Having identified that an adjustment should be made, the investigating authority must next identify or quantify the amount of the adjustment.362*

7.129. The question before us is not therefore whether it was permissible for the EU authorities to deduct the SG&A and profit of the related trader, but rather whether – in the process of making an allowance for a commission – the EU authorities were allowed to use the SG&A and profit as a basis for calculating

> *the value of the adjustment. In this regard, we note the United States' view that an investigating authority is allowed to calculate the value of an adjustment for commission on the basis of the affiliated trader's selling expenses:*
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> > *[I]f the producer/exporter and the trading company are affiliated, the price for comparison purposes could be calculated at the ex-factory level by making an appropriate adjustment based on the selling expenses that the affiliated trader incurred.363*
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> *We agree. When a transfer of funds occurs between two related entities, an investigating authority would be justified in examining whether the actual value of the expense differs from its reported value. Such an examination would, in our view, assist in identifying the proper amount of the adjustment to be made.364 Since there is evidence on the record that the mark-up was designed to cover the cost of the service rendered by ICOF-S, we consider that its SG&A and profit represent a reasonable basis for calculating the actual value of this service.365*

Please note that Mr Paul O'Connor, a member of Australia's Anti-Dumping Review Panel, was Chairperson of the Panel whose report is referred to above.

It must follow the said Panel Report that the Commission must revise dumping margins applicable to SMG mill's exports taking into account an adjustment for CMI's domestic sales mark-up, as it did in its original dumping margin assessment per its Verification Reports re SMG mills after verifying that CMI's sales margin was linked to domestic sales only. To not do so will be a further breach of the Commission's international law obligation to determine dumping margins in accordance with the Anti-Dumping Agreement.

As the Commission's failure to make this adjustment in its determination of dumping margins per PAD341B has contributed to the inflation of the provisional measures applicable to SMG mills' exports, we request immediate revision of the dumping margins and provisional measures applicable to these exports.

Yours sincerely,

Roger Simpson