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Commissioner
Anti-Dumping Commission
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***Attention**: Mr Tim King, Case Manager*

Re : Dumping and subsidy investigation into A4 Copy Paper Exported from the Republic of Indonesia – Particular Market Situation

Dear Sir,

We refer to the preliminary affirmative determinations and to the Statement of Essential Facts made by the Anti-Dumping Commission (Commission) in relation to this investigation, as well as to our previous submissions and those of Indonesian exporters on the fact that a "particular market situation" does not exist in Indonesia in relation to the market for A4 Copy Paper.

We submit that a "particular market situation" does not exist in relation to the Indonesian domestic market of A4 Copy Paper for the following reasons: -

1. ***Definition of 'particular market situation'***

   a) Article 2.2 of the WTO Anti-Dumping Agreement provides that a "particular market situation" exists when, "*because of the particular market situation … in the domestic market of the exporting market, such sales do not permit a proper comparison with the like product being exported …*" to determine whether dumping is occurring.

   b) This is reflected in s. 269TAC(2)(ii) of the *Customs Act 1901*, which provides that a "particular market situation exists where, "because [of] the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1)", that is, in determining a normal value by reference to sales of the goods under consideration by the exporter in the domestic market of the country of export.

c) When a "particular market situation" exists is not defined either in the WTO Anti-Dumping Agreement nor in Part XVB of the *Customs Act 1901*.

d) As indicated by Article 2.2 of the WTO Anti-Dumping Agreement a "particular market situation" exists where a condition exists in the domestic market for the goods under consideration but not in the export market that so distorts the domestic market that it precludes a proper comparison between normal values and export prices for assessing whether dumping is occurring.

e) Effectively what these provisions provide for is that a "particular market situation" exists in the country of export where a factor or factors exist in that market that precludes a proper comparison of export prices with a normal value of the goods under consideration (i.e. domestic selling prices by the exporter as adjusted to account for differences between export and domestic sales to provide a "fair comparison") to determine whether dumping is occurring.

f) Of course, if appropriate adjustments may be made to the domestic selling price to provide a "fair comparison" with export prices, then a "particular market situation" cannot exist. This does not seem to have been addressed by the Commission.

2. Interpretation of what constitutes a "particular market situation"

a) As indicated in the preceding section, what constitutes a "particular market situation" is not defined in either the WTO Anti-Dumping Agreement or in Part XVB of the *Customs Act 1901*. It is a situation that exists in the domestic market for the goods under consideration in the country of export that precludes a proper "fair" comparison between export prices and normal values. However, what the "particular" situation is not defined and neither WTO nor Australian jurisprudence is of assistance in this regard.

b) In a submission dated 28 December 2016 (Item 165 on the Public File) an advisor to PT Indah Kiat Pulp and Paper Tbk, PT Pindo Deli Pulp, Paper Mills Tbk, and PT Pabrik Kertas Tjiwi Kimia Tbk ((SMG) addressed the issue of interpreting these provisions. We endorse the views expressed in that submission. However, we would add the following observations.

c) It is trite law to observe that "dumping" is a form of "price discrimination", a practice usually permitted under domestic law such as in Australia. Dumping needs to be viewed and assessed from an exporter's perspective as it is only an exporter who, under anti-dumping rules, can engage in dumping. Hence the reference to a comparison between the export prices and normal values of an exporter to determine whether or not dumping (i.e. price discrimination) is being engaged in by that exporter.

d) The issue that has arisen in this investigation is whether an alleged upstream subsidy to an input to manufacture used to produce the goods under consideration creates a "particular market situation" in the domestic market in Indonesia for the goods under consideration.

e) The Commission appears to be confused on this issue as indicated in the abovementioned submission on behalf of the SMG. On pages 3 & 4 of that submission the following was quoted from the Commission's Dumping and Subsidy Manual:

> "In considering whether sales are not suitable for use in determining a normal value under subsection 269TAC(1) because of the *situation in the market of the country of export* the Commission may have regard to factors such as:
>
> - Whether the prices are *artificially low*; or
> - Whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under subsection 269TAC(1).
>
> Government influence on prices or costs could be one cause of "artificially low pricing". Government influence means influences from any level of government.
>
> In investigating whether a market situation exists due to governmental influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has *materially distorted competitive conditions*. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market." (at p.35) (emphasis added)

f) It is unclear whether a "particular market situation" exists where domestic prices of the goods under consideration are "artificially low" or where "*competitive conditions have been materially distorted*" or whether either or both of these conditions need to be present. It also is unclear what is an "artificially low price" or what constitutes a "material distortion" of competitive market conditions. Neither is explained.

g) Here it is claimed by the Commission that certain policies of the Government of Indonesia (GOI) have influenced the price of timber used in the production of wood chips and pulp that are used to produce A4 Copy Paper and this has resulted in artificially low prices for A4 Copy Paper in the Indonesian domestic market. But does this prevent a proper "fair" comparison between export prices and normal values?

h) The same inputs to manufacture are used to produce A4 Copy Paper for export and for domestic sale. In other words, both export prices and domestic prices would be "artificially" low prices using the Commission's analysis. Does this preclude a proper (i.e. "fair") comparison between the export prices and normal values of an exporter? The short answer is no, it does not. A comparison between both "artificially" low prices is available to determine whether the exporter is exporting the goods under consideration at dumped prices (i.e. engaging in price discrimination between export sales and domestic sales).

i) To assume that a "particular market situation" exists and to calculate a constructed normal value that purportedly eliminates the alleged government influence on domestic prices, assuming this to be possible, is to distort the normal value with the effect that a proper (i.e. "fair") comparison between it and export prices is not possible. It would be comparing a distorted ("inflated") normal value with an export price that has not been so distorted ("inflated"). It would not be comparing 'like-with-like'. It fails to recognise that the exporter has based its export prices and domestic prices on its production costs for A4 Copy Paper, which are identical, without regard to any upstream subsidies that may or may not have flowed down through to its inputs to manufacture to some undisclosed extent.

j) This is the reason why a constructed normal value is to be calculated using the costs to make and sell plus profits in the "country of origin". That is, to avoid inflating normal values. See the WTO Appellate Body decision in *EU – Biodiesel* and our submission on "constructed normal values".

k) The problem with the Commission in adopting the analysis it has with respect to "particular market situation" is its failure to recognise the difference between dumping and subsidisation and why there are two separate WTO agreements governing each. For dumping, the issue is not whether the price of the goods under consideration in the country of export are "artificially low" but, rather, whether the exporter itself has engaged in price discrimination between its export and domestic sales. Absent such price discrimination resulting in lower export prices than domestic prices, there is no dumping. Simple and straightforward.

l) This is not to assert that there is no remedy where an upstream subsidy by a government or public body has flowed through to an end product. A remedy is available in the form of countervailing duties provided that the requisite requirements for the imposition of countervailing duties are satisfied. It is acknowledged that there would be difficulties in these requirements being satisfied in relation to the end product where the subsidy in question is the subsidisation of an input to manufacture. That is, determining whether and to what extent the upstream subsidy had flowed through to the end product and, if it had, whether it met the definition of a 'subsidy' and whether it was countervailable. This is a question of "fact" and section 269T(2AA) of the *Customs Act 1901* does not

overcome this problem. That, however, is a different issue to whether an upstream subsidy can create a "particular market situation".

m) Finally, it should be added that there has been no suggestion, nor evidence, that the Indonesian domestic market for A4 Copy Paper is not a competitive market, open to both domestic and market competition. [For it to be otherwise would attract anti-competition laws in Indonesia.]

3. ADC's claims that a 'particular market' situation exists is flawed

a) It is claimed in this investigation that the GOI, through various policies that, although having no legal effect, have encouraged the timber and pulp industries distorting prices of products from those industries and that this, in turn, has flowed through to the paper industry, distorting prices in the domestic market for A4 Copy Paper in Indonesia.

b) The policies of the GOI that have been singled out by the Commission are its policy on making available land for timber plantations and its export bans on certain logs.

c) The Commission has argued that these policies have led to an oversupply of timber and pulp for use in the production of paper and this has "artificially" lowered the price of these inputs to manufacture, which, in turn, has led to "artificially" low prices for A4 Copy Paper in the Indonesian domestic market.

d) The Statement of Essential Facts provides no evidence of an oversupply of either timber or pulp for use in the Indonesian paper industry. The Statement of Essential Facts simply sets out that timber, pulp and, for that matter, paper production, according to a variety of sources referred to in the Statement of Essential Facts, has grown in Indonesia but such increases have met demand in both the Indonesian market and export markets with no evidence of an "oversupply".

4. Why a 'particular market' situation does not exist in Indonesia?

a) Companies would not have invested in the establishment of timber plantations, pulp production facilities or in paper production if there was an "oversupply" of such products resulting in "artificially" low prices as there would no reasonable return on investment, which clearly is the opposite of what has occurred.

b) Further, a role of a government is to encourage development and investment in industries in its country. For example, Australian governments encourage the mining industry through various policies and practices, including the granting of exploration licences and mining leases, as it also does for the agricultural industry by the sale or leasing of land, the steel and automobile industries through the provision of subsidies and so on. Such encouragement of industries does not result in

"artificial" prices of products produced by such industries. The automobile industry would be surprised to learn that the subsidies it received led to "artificially" low prices in the Australian automobile market and to a "particular market situation" (i.e. the Australian automobile market was not a competitive market). Such prices for automobiles are determined by market conditions, as are prices, for example, for Australian commodities like coal and iron ore and other products like steel, livestock and beef. Any encouragement of the timber/pulp and paper industries in Indonesia is no different.

c) Further, the making available of land by the GOI for timber plantations cannot be a "subsidy" as defined in both Australia's anti-dumping legislation and the SCM Agreement as it constitutes the supply of land (i.e. real property) and not "goods" (personal property) or the provision of a "service". Leasing of real property by any entity, including by a government, is not the provision of a "service" under any definition of what constitutes a "service", which given the absence of any definition of what constitutes a "service" would be given its ordinary, common meaning.

d) It also is unclear whether the supply or making available of land by sale would not constitute provision of a "service" according to the Commission's reasoning but the supply or making available of land by way of a lease or licence by any entity, including governments, constitutes the supply of a "service". If so, the entire Australian Capital Territory would have received a "service" from the relevant Australian government as all land, with one exception for one building, are on 99 year Torrens title leases.

e) It effectively would mean that Australian governments making land available in Australia to miners, farmers, commercial entities for factories, warehouses and business offices and residential properties to individuals, amongst others, would all constitute the provision of a "service" by those governments. Further, taken to its logical conclusion, this would mean that all activities of a government would constitute a "service" in one form or another. This, of course, is absurd.

f) The Commission appears confused as to what constitutes a "good", "service" and "price" in considering whether the making available land for the establishment of timber plantations by plantation operators at their own costs constitutes a 'subsidy' for the purposes of Part XVB of the Customs Act 1901 and the SCM Agreement.

g) Also out of the 5.4 million hectares that the GOI has sought to make available for the establishment of timber plantations, only 14,000 hectares have actually been made available, as previously submitted in the Government of Indonesia's submission of 16 January 2017. This could not have led to an oversupply of timber.

h) Similarly, the export log ban, as previously submitted, did not apply to timber used to produce pulp for the paper industries but was directed at timber for use in different applications. The Commission claims that it had insufficient information to

confirm this. However, it never sought such additional information from the Government of Indonesia, until after the Statement of Essential Facts, despite the fact that it had more than sufficient time to do so given the numerous extension of time it has received in this investigation and the open invitation from the Government of Indonesia to provide any information that the Comission required or wished to verify.

i) Finally, Indonesia is an importer of wood chips and pulp from a variety of countries overseas in significant quantities, as well as being an exporter of pulp as noted by the Commission in the Statement of Essential Facts. Details of Indonesia's imports of wood chips and pulp will be provided in conjunction with or as part of its response to the Supplementary Questionnaire issued by the Commission on 30 January 2017. The point is that if there was an oversupply of timber/wood chips/pulp resulting from overproduction in Indonesia, then it would not be importing wood chips and pulp.

j) Further, such imports would bring significant import competition to Indonesia's wood chip and pulp markets.

k) In short, the evidence is that there has been no oversupply. If the Commission has evidence to the contrary, we would be pleased if the Commission would provide us with such evidence.

5. ***No reasons given, nor any justification, on why the Commission used so-called "benchmark prices"***

a) To support its finding that Indonesian A4 Copy Paper was "artificially" low, the Commission had recourse to so-called "benchmark prices". These were the price of wood chips exported from Malaysia converted by some alchemy into "log prices" and the prices of pulp from other countries provided to it by two firms namely, RISI Inc. and Hawkins Wright. The "benchmark" prices indicated that Indonesian prices were lower, thereby confirming, in the view of the Anti-Dumping Commission, that Indonesian prices were "artificially" low due to government intervention and influence.

b) In comparing Indonesian prices against these so-called "benchmark prices", the Commission undertook no analysis that the so-called "benchmark prices" were properly comparable with Indonesian prices. According to the Statement of Essential Facts, however, the "benchmark" pulp price was the price of bleached eucalyptus kraft from Brazil sold to China and Korea. It is unclear how or why prices in international sales transactions can serve as a "benchmark" for domestic prices in another country.

c) Similarly, to what extent are Malaysian wood chip prices, somehow converted into log prices, comparable to timber prices in Indonesia and what formula was used to

convert wood chip prices into log prices. Further, is timber cultivation and chip production in Malaysia properly comparable to timber cultivation in Indonesia? What regulatory costs, production costs, environmental costs, infrastructure costs, etc., in Malaysia properly comparable to those in Indonesia. No assessment appears to have been made by the Commission in this regard to determine whether Malaysian wood chips prices converted into log prices are an appropriate "benchmark".

d) In any event, we understand from statements made by the Commission in the Supplementary Questionnaire that timber production costs in "comparable countries" (i.e. Malaysia, Vietnam and the Philippines), according to a recent report received from RISI, were lower than Indonesian timber production costs. This evidences that production costs of timber in Indonesia are not "artificially" low with the consequent flow-on effect that wood chip, pulp and paper prices in Indonesia have not been distorted and are "artificially" low, as claimed. There is and has been no distortion in the Indonesian markets for these products.

e) No analysis apparently has been undertaken and disclosed as to what extent timber and pulp production in other countries and in other transactions used by the Commission as so-called "benchmarks" are affected by the same or different conditions as those prevailing in Indonesia. Absent such analysis, the best that the Anti-Dumping Commission's recourse to so-called "benchmark prices" is to demonstrate that prices for timber and pulp are different in different countries but without any understanding why they were different. This would be further evidenced by the Commission's findings concerning countries, such as Indonesia, having a "comparative advantage" in timber, pulp and paper production as compared with Australian industries producing these products.

f) Of itself, the so-called benchmark prices" are not of themselves evidence of any government intervention or influence. This would need to be established by evidence of government intervention and influence, how such intervention or influence actually affected prices and the extent by which it actually did so. No direct, probative evidence has been referred to by the Commission, nor sought, in this regard.

g) Of interest, however, is that, after publication of the Statement of Essential Facts, the Commission obtained a report from RISI[1] that sets out costs of production of timber and pulp, as we understand it, in a number of "comparable" countries in the Asia Pacific region, namely, Malaysia, Vietnam and the Philippines.

h) That RISI report apparently demonstrates that production costs for timber and pulp in those "comparable" countries are lower than those costs in Indonesia. If so and given that Indonesian exporters fully recover their costs in their prices, as verified by

[1] See the Anti-Dumping Commission's Note for File on the Public File of 6 February 2017 – Item 179.

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the Commission, it would seem that costs in Indonesia have not been "artificially" lowered by intervention or influence by the GOIas they are significantly higher than in the "comparable countries". If anything, this report evidences and confirms that costs have not been "artificially" lowered and, consequently, that a "particular market situation" in the domestic market for A4 Copy Paper does not exist in Indonesia, as has been repeatedly submitted.

i) Further the second RISI report was obtained to determine whether and to what extent Indonesia had a "comparative advantage" over Malaysia, the Philippines and Vietnam in terms of timber production costs, which would seem at odds with using "benchmark" prices for timber and pulp. For a country to have a "comparative advantage", its costs and prices must be different and lower than those of the countries it is being compared against. This is the opposite of using other countries prices as "benchmark" prices. The Commission's methodology is obviously flawed in this respect.

j) As noted at the outset, the purpose of a dumping investigation is to determine, as a question of fact, whether exporters are exporting the goods under consideration at an export price that is less than the domestic price of like goods in the country of export (i.e. the exporter is engaging in 'price discrimination'). This requires that export prices and domestic prices are properly comparable. If the domestic selling prices in the country of export are distorted in the country of export but export prices are not, then this would preclude a proper comparison, as indicated earlier above.

k) Here, the Commission claims that government intervention and influence has artificially lowered the price of certain inputs to the manufacture of paper, namely, timber and pulp. However, those inputs to manufacture are used to produce paper for both the domestic markets and export markets. To the extent, if at all, government has influenced the price of those inputs to manufacture and this has flowed through to the price of paper, it would flow through equally to paper sold for export as well as paper sold domestically.

l) Again, it is only if domestic prices are distorted, but not export prices, can a "particular market situation" arise. If both domestic prices and export prices are equally affected because the same inputs to manufacture are used for the production of the same products for domestic and export sales, then they are properly comparable to determine whether exporters are engaging in price discrimination between export prices and domestic prices for dumping purposes. Where both are affected equally, then a "particular market situation" cannot exist.

m) The Commission has not established, as a "fact" based on evidence, that only prices of A4 Copy Paper in the domestic Indonesian market but not in its export markets

are distorted and, consequently, domestic prices and export prices are not properly comparable for dumping purposes.

n) The reason for this is because neither domestic prices not export prices of A4 Copy Paper have been "artificially" lowered by Indonesian government intervention or influenced either directly or indirectly through inputs to manufacture.

o) Finally, we note that the Commission in its Statement of Essential Facts based many of its preliminary findings on the existence of a "particular market situation" in the Indonesian A4 Copy Paper market were based on "the Commission considers", "the Commission is of the view" and similar expressions. These are expressions of opinion not of fact and, of necessity, are speculative in nature. That is, the Commission does not know, as a question of "fact" based on objective, verifiable evidence, that a particular situation exists. Instead it has merely speculated that the situation in question exists. This defeats the purpose of a statement of essential facts, which is to set out the Commission's preliminary findings of "fact" and the evidence on which those findings are based. The Statement of Essential Facts issued by the Commission in this investigation does not satisfy this requirement.

6. Conclusion

a) In light of the foregoing, it is obvious that there is no evidence to support a finding that a "particular market situation" exists in relation to the domestic market for A4 Copy Paper in Indonesia.

b) Rather, export prices and domestic prices of A4 Copy Paper in Indonesia are properly comparable to assess whether Indonesian exporters are or are not engaging in price discrimination, that is, in dumping exports of A4 Copy Paper to Australia, and domestic selling prices of A4 Copy Paper in Indonesia should be used for this purpose with appropriate adjustments to ensure a 'like-for-like (i.e. a fair) comparison.

c) If the Commission has determined, as a question of "fact" based on evidence, that the domestic selling price of A4 Copy Paper in Indonesia has been distorted by Indonesian government intervention or influence but export prices have not and, therefore, a proper comparison between the two is not possible but a comparison between export prices and artificially inflated normal vales entails a proper (i.e. fair") comparison, we would be grateful for the Commission to advise the basis for that determination and the "facts" on which it is based and the evidence supporting it.

Yours sincerely,

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