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

Dear Sir,

Re: Dumping and subsidy investigation into A4 Copy Paper Exported from the Republic of Indonesia – Constructed Normal Value

The following further submission is made in relation to the Anti-Dumping Commission's calculation of a "constructed normal value" due to its purported finding that a "particular market situation" exists in relation to the sale of A4 Copy Paper in Indonesia[i].

At issue is whether the Anti-Dumping Commission's calculation of a "constructed normal value", assuming the existence of a particular market situation, is consistent with Australia's international legal obligations under Article 2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (**WTO Anti-Dumping Agreement**) and the *General Agreement on Tariffs and Trade 1994*, which incorporates the *General Agreement on Tariffs and Trade 1947* (**GATT**), both in terms of Australia's antidumping legislation and the administration of that legislation.

We submit that it is not having regard to the recent decisions of the WTO Panel and the WTO Appellate Body the WTO Case DS473 '*European Union – Anti-Dumping Measures on Biodiesel from Argentina'* (**EU – Biodiesel**)[1]. A copy of the WTO Panel and the Appellate Body's Report in the EU - Biodiesel Case are available at the WTO website and forms part of this submission.

The Appellate Body made the following points in that case: -

[1] Note: references to paragraphs in this submission are to the paragraph numbers in the Appellate Body's report in the Eu-Biodiesel Case.

- Article 2.2 of the WTO Anti-Dumping Agreement stipulates that a "constructed normal value" should be calculated according to the "*cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profit*".

- Article 2.2.1.1 of the WTO Anti-Dumping Agreement provides, amongst other things that *"… cost shall reasonably be calculated on the basis of records kept by the exporter or producer under investigation provided that such records are in accordance with generally accepted accounting principles in the exporting country and reasonably reflect the costs associated with the production and sale of the production under consideration*".

- The Appellate Body determined that if the records of the exporter under investigation not only are consistent with GAPP in the country of export but also reflect the actual costs incurred by the exporter in producing and selling the production, then those costs should be used in the calculation of the "constructed normal value".[2]

- The existence of a "particular market situation" does not entitle an investigating authority to disregard an exporter's costs of production where the above requirements are satisfied.[3]

- Further the Appellate Body also determined that if prices are lower than international prices does not, of itself, provide grounds for finding that the producer's records did not reasonably reflect the cost of production and sale of the goods in question.[4]

- However, where the records kept by the exporter or producer under investigation do not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs.[5]

- An exporter's records do not apply where (i) they do not comply with GAAP in the country of export or (ii) do not reasonably reflect the actual costs incurred by the producer/exporter in the production and sale of the goods under consideration (see earlier above).

- Even if there were justification not to use the producer/exporter's records but to obtain all or some costs from some other source, the Appellate Body has made it clear that such surrogate costs must be adapted to reflect costs in the country of origin, which here is Indonesia[6].

- Consequently, Australia, via the Anti-Dumping Commission, has breached its obligations under Article 2.2.1.1 of the WTO Anti-Dumping Agreement by disregarding certain costs of Indonesian producers of A4 Copy Paper in calculating a "constructed normal value" for A4 Copy Paper produced in Indonesia because those the records of the exporters under investigation not only are consistent with GAPP in the country of export but also reflect the actual costs incurred by the exporter in producing and selling the products under consideration.

[2] See paras 6.26,6.30 & 6.41 in Section 3,1 of the Attachment.
[3] See paras 6.30 & 6.55 in Section 3.1 of the Attachment.
[4] See para 6.55 in Section 3.1 of the Attachment.
[5] See paras 6.70, 6.73 & 6.74 in Section 3.2 of the Attachment.
[6] See paras 6.81 & 6.82 in Section 3.3 of the Attachment.

- Further in using out of country costs in calculating a constructed normal value, the Anti-Dumping Commission failed to "adapt" those costs to reflect "costs in the country of origin", that is, in Indonesia.

- There is nothing in Australia's anti-dumping legislation on calculating a "constructed normal value", as extracted in the Attachment, that precludes the Anti-Dumping Authority from complying with any of the foregoing requirements as determined by the Appellate Body, and, if there, it would in breach of the WTO Anti-Dumping Agreement.

- In this context, we note that reg. 43(2)(b)(ii) of *the Customs (International Obligations) Regulations* provides that the Minister must calculate cost of production using the exporter's records if such records "*reasonably reflect competitive market costs associated with the production or manufacture of like goods*" (underlining added). It is unclear what is meant by "*competitive market costs associated with the production or manufacture of like goods*". That is, which "costs" associated with the manufacture of like goods must be "competitive market costs", what is a "market competitive cost" and how is this determined? This has not been explicitly considered or defined by the Federal Court, including in the cases *Panasia* and *Dalian Steelforce*.

- This is not a requirement under Article 2.2.1.1 of the WTO Anti-Dumping Agreement. The requirement under this Article is that the exporter's records "*reasonably reflect the costs associated with the production and sale of the product under consideration*".

- It, therefore, appears that reg. 43(2)(b)(ii) of the *Customs (International Obligations) Regulations* does not comply with Article 2.2.1.1 of the WTO Anti-Dumping Agreement or with the Appellate Body's decision in *EU – Biodiesel*.

- In any event, as submitted by the GOI in other submissions and in its response to the Supplementary Questionnaire, it is evident that timber, wood chips and pulp used in the production of A4 Copy Paper when sold by one party to another are sold in arm's length transactions that are subject to competitive market conditions, including import competition, in Indonesia.

- If the Commission has evidence o the contrary, please provide us with details.

Conclusion

Even if a "particular market situation" existed in relation to the domestic market for A4 Copy Paper in Indonesia, this, of itself, does not justify not using costs properly and accurately recording costs incurred by exporters in the production of A4 Copy Paper in the calculation of a "constructed normal value".

Further, even if justification could be made for rejecting some of those costs, any surrogate costs would need to be properly "adapted" to reflect costs in the country of origin, that is, Indonesia, to ensure a "fair" comparison between export prices and normal values. To do otherwise is not to compare "like-with-like". This has not been done by the Anti-Dumping Commission in breach of WTO rules and jurisprudence.

Accordingly, the "constructed normal values" calculated by the Anti-Dumping Commission are inconsistent with WTO requirements and must be re-calculated in compliance with WTO requirements.

Yours sincerely,

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Attachment

Extracts from the Australian Anti-Dumping Legislation, the WTO Anti-Dumping Agreement and Extracts of the Appellate Body's decision in the EU – Biodiesel Case

1. Article 2 of the WTO Anti-Dumping Agreement

Article 2.2

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits (underlining added, footnote deleted)

Article 2.2.1.1

For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

Article 2.2.2.2

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based 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. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters

> or producers on sales of products of the same general category in the domestic market of the country of origin

2. Australian anti-dumping legislation

The relevant legislation is: -

- s.269TAC(2)(a)(ii), s.269TAC(2)(c), ss.269TAC(5A) and(5B) of the Customs Act 1901: http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s269tac.html
- ss.269TAAD(4)(a) and (b) and (5) of the Customs Act 1901: http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s269taad.html
- reg. 43 of the Customs (International Obligations) Regulations[7]: http://www.austlii.edu.au/au/legis/cth/consol_reg/cor2015466/s43.html
- reg. 44 of the Customs (International Obligations) Regulations: http://www.austlii.edu.au/au/legis/cth/consol_reg/cor2015466/s44.html
- reg. 45 of the Customs (International Obligations) Regulations: http://www.austlii.edu.au/au/legis/cth/consol_reg/cor2015466/s45.html

3. Extracts of the Appellate Body's decision in the EU – Biodiesel Case (DS437)

3.1 Use of Exporter's Records in a Constructed Normal Vale

> "6.26 … the "records … reasonably reflect the costs associated with the production and sale of the product under consideration", in accordance with the ordinary meaning of the terms in their context and in light of the object and purpose of the Anti-Dumping Agreement, we understand this condition as referring to whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration."

and:

> "6.30 As explained above, we understand the phrase "costs associated with the production and sale of the product under consideration" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to refer to costs incurred by the investigated exporter or producer that are genuinely related to the production and

[7] Interestingly, r. 43(2)(b)(ii) does not reflect Article 2.2.1.1. It refers to the records that "*reasonably reflect competitive market costs associated with the production or manufacture of like goods*", whereas Article 2.2.1.1 refers to records that "*reasonably reflect the costs associated with the production and sale of the product under consideration*" (underlining added). Why has "competitive costs" been introduced in r.43? It would seem to be inconsistent with, and in breach of, Article 2.2.1.1. Also, it is unclear what is a "*reasonably competitive market cost*"? Is there a "market" for "costs"? "Markets" are for the sale and purchase of goods and services, not of "costs". Consequently, can a "*reasonably competitive market cost*" actually exist. (underlining added)

> sale of the product under consideration. We do not consider that the Panel's interpretation conflicts with our understanding of this phrase. Although Article 2.2.1.1 does not explicitly refer to "actual" costs, the Panel stated that the condition at issue relates to whether the costs set out in a producer's or exporter's records "correspond – within acceptable limits – in an accurate and reliable manner [] to all the actual costs incurred by the particular producer or exporter for the product under consideration". To the Panel, this "calls for a comparison between, on the one hand, the costs as they are reported in the producer['s]/exporter's records and, on the other, the costs actually incurred by that producer." When comparing the two conditions in the first sentence of Article 2.2.1.1, the Panel considered that, "while the costs in the records might be consistent with GAAP, they may still not accord with how they would need to be considered in the context of an anti-dumping investigation, such as in respect of the proper allocation of costs for depreciation or amortization or the relevant time periods." In addition, when examining the panel findings in *EC – Salmon (Norway)*, the Panel noted that the panel in that case focused on the *actual* costs of production incurred by the producers, "because the panel tested whether there existed, in actuality, a rational relationship between the costs allocated and the production activities". Reading the Panel's use of the word *actual* in light of the broader reasoning of the Panel findings, we understand the Panel to have considered that the second condition in the first sentence of Article 2.2.1.1 concerns the costs incurred by the producer under investigation that are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation. Thus, we do not consider that the Panel's use of the word "actual" is in error. Nor do we consider, as the European Union argues, that the condition at issue allows the EU authorities to consider which costs would pertain to the production and sale of biodiesel in normal circumstances, i.e. in the absence of the alleged distortion caused by Argentina's export tax system. Rather, we agree with Argentina that such interpretation would add words to the condition at issue that are not present in Article 2.2.1.1, namely, the costs that "*would* pertain" and "*in normal circumstances*." (footnotes omitted)

and:

> "6.41 We do not subscribe to the European Union's reading of the Panel Report. We note that, to the Panel, the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement requires a comparison between the costs in the producer's or exporter's records and the costs incurred by such producer or exporter. The Panel emphasized that "the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more 'reasonable' than the costs actually incurred." In this connection, the Panel explained that its understanding of this condition does not imply that "whatever is recorded in the records of the producer or exporter must be automatically accepted." To the Panel, an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters" to determine, in particular, whether all costs incurred are captured; whether the costs incurred have been over- or understated; and whether non-arms-length transactions or other practices affect the reliability of the reported costs. The Panel further stated that "Article 2.2.1.1 does not involve an examination of the 'reasonableness' of

> the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful." In light of these statements, we consider the Panel's interpretation of Article 2.2.1.1 to be more nuanced than the European Union's argument suggests." (footnotes omitted)

and:

> "6.55. Concerning its claim that the Panel erred in applying Article 2.2.1.1, the European Union does not advance any argument that is separate and different from its arguments concerning the alleged errors in the Panel's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement. In light of our understanding of Article 2.2.1.1, explained above, we agree with the Panel's statement that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel. For this reason, we agree with the Panel's finding that the European Union acted inconsistently with Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.
>
> **6.1.1.1.5 Conclusions**
>
> 6.56. In sum, we consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement – that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration – relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration. The Panel's interpretation, which is more nuanced than the European Union's arguments on appeal suggest, does not conflict with our understanding of this provision. In our view, the Panel did not err in rejecting the European Union's argument that the second condition in the first sentence of Article 2.2.1.1 includes a general standard of "reasonableness". With respect to the application of Article 2.2.1.1 to the anti-dumping measure on biodiesel, we agree with the Panel that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel."

2.2 When an exporter's records need not be used

> "6.70. We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country. The reference to "in the country of origin", however, indicates that, whatever information or evidence is

used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin."

"6.73. We further observe that, while both obligations apply harmoniously when an investigating authority constructs the normal value, the scope of the obligation to calculate the costs on the basis of the records in the first sentence in Article 2.2.1.1 is narrower than the scope of the obligation to determine the cost of production in the country of origin in Article 2.2. In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin". Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production […] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects. It is in this sense that we understand the Panel to have stated that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 "require that the costs of production established by the authority reflect conditions prevailing in the country of origin". (footnotes omitted)

"6.74. In light of our examination above of the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production … in the country of origin" in Article VI:1(b)(ii) of the GATT 1994, we consider that these provisions do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin. For this reason, we do not consider that Argentina has demonstrated that the Panel erred in stating that these provisions "do not limit the sources of information that may be used in establishing the costs of production", and do not "prohibit an authority [from] resorting to sources of information other than producers' costs in the country of origin" but do "require that the costs of production established by the authority reflect conditions prevailing in the country of origin."

3.3 Adaptation of surrogate costs

"6.81. As noted earlier, when relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin",

and this may require the investigating authority to adapt that information. In our view, domestic prices may reflect world prices and, in such circumstances, a price at the border could, as the European Union argues, be simultaneously characterized as both an international and a domestic price. We do not consider, however, that the Panel failed to take such considerations into account. Rather, the Panel's analysis focused on the EU authorities' understanding of the surrogate price for soybeans. In line with the Panel's understanding, we consider that the mere fact that a reference price is published by the Argentine Ministry of Agriculture does not necessarily make this price a domestic price in Argentina.[2] In addition, we note, as the Panel did, that the EU authorities considered that the reference price published by the Argentine Ministry of Agriculture reflected the level of international prices of soybeans.[2] Other than pointing to the deduction of fobbing costs, the European Union has not asserted, either before the Panel or before us, that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production *in Argentina*. On the contrary, the EU authorities specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina. As the Panel stated, the EU authorities selected and used this particular information precisely because it did *not* represent the cost of soybeans in Argentina. Thus, we agree with the Panel that the surrogate price for soybeans used by the EU authorities did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel. Accordingly, we do not consider that the European Union has established that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel. (footnotes omitted)

6.1.1.2.5 Conclusions

6.82. In sum, we consider that the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production … in the country of origin" in Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information or evidence that may be used in establishing the cost of production in the country of origin to sources inside the country of origin. When relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this may require the investigating authority to adapt that information. In this case, like the Panel, we consider that the surrogate price for soybeans used by the EU authorities to calculate the cost of production of biodiesel in Argentina did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel."