北京市东城区东长安街 1 号
东方广场 E2 座 2107，邮编 100738
2107, Office Tower E2 Oriental Plaza,
No. 1 East Chang An Avenue,
Beijing 100738

T +86 10 8587 0068
F +86 10 8587 0079

Case No. AD0021

Comments on Statement of Essential Facts

Optical Fibre Cables Imported into the United Kingdom from China

SDG Group

July 17, 2023

Non-confidential Version

卓纬律师事务所
CHANCE BRIDGE LAW FIRM

CONTENT

I. Introduction

1. Set forth below are the comments on Statement of Essential Facts (SEF) and Provisional Affirmative Determination (PAD) provided by Shenzhen SDG Information Co., Ltd. (SDG) and Shenzhen SDGI Optical Network Technologies Co., Ltd (SDGI) in the context of anti-dumping investigation concerning imports of Optical Fibre Cables (OFC) into the United Kingdom (UK) from China.

2. For easy reference, we also use SDG Group as an abbreviation for both companies, except comments that are specifically related to either SDG or SDGI, we will indicate which comments are related to which SDG Group's company.

3. Considering findings of PAD are largely reflected in the SEF, the submission will in general be focused on the SEF as this is the basis on which the provisional measure is recommended to implement concerning imports of OFC from China.

II. Definition of the UK Industry and Initiation of Investigation

II.1 Definition of the UK Industry

4. Article 4.1 of WTO Anti-dumping Agreement (the AD Agreement) prescribes that

> "For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that: …"

5. In DS 601/R, the Panel explains: [1]

> Regarding the quantitative connotation, previous DSB reports have found that while Article 4.1 does not explain in numerical terms what exact proportion of domestic production represents a major proportion, it should be a relatively high proportion of the total domestic production.[2]
>
> With respect to the qualitative connotation, previous DSB reports have found that domestic producers of the like product who are included in the domestic industry must be representative of the total domestic production.[3]

[1] WT/DS601/R, China – Anti-dumping measures on stainless steel products from Japan, para. 7.27.
[2] Appellate Body Report, EC – Fasteners (China) (Article 21.5 – China), para. 5.299 (quoting Appellate Body Report, EC – Fasteners (China), para. 412).

[3] Appellate Body Reports, Russia – Commercial Vehicles, para. 5.13; EC – Fasteners (China) (Article 21.5 – China), para. 5.303.

6. In this OFC case, SDG Group finds no reasoned explanations given by the Trade Remedy Authority (TRA) with respect to the determination of "major proportion" of total UK domestic production.

7. SDG Group notices that paragraph 231 of the SEF states that "Other than the Applicant, no other UK producers registered an interest in the case."

8. It is understood that the purposes of having a proper definition of a domestic industry (or scope of the UK industry) making up a certain percentage of total domestic production is essentially not only in compliance with Article 4.1 but also concerned the injury findings to be made under Article 3.1 of the AD Agreement regarding the UK industry.

9. Paragraph 275 of the SEF indicates that TRA relied on the source of data provided by CRU to offer an estimate of the UK production of OFC per facility. SDG Group would like to be informed by TRA the following:

   - How TRA obtained and verified the data of CRU to compare with the information TRA had collected from all the known UK producers of OFC.

   - If other UK producers did not express opposition to the application, this means TRA must have had some degree of communications with those OFC producers.

   - If communications to that effect are placed on the record, or enquiries made by TRA to other producers of OFC for purpose of defining the UK industry of OFC.

   - How was "major proportion" of total production of OFC determined and how was it calculated in line with the above-referenced interpretations given by the Panel and the Appellate Body.

10. "Data accessible via subscription" cannot be used to justify for not disclosing the underlying data. Failure to disclose such data, it would be tantamount to depriving the right of SDG Group to make any meaningful comments on such issue relating to the definition of UK industry.

11. Based on what the SEF described concerning definition of the UK industry, SDG Group submits that TRA failed to provide substantiated explanations whether and how "*a major proportion*" of UK domestic industry was made in the light of requirements of Article 4.1 of the AD Agreement.

12. SDG Group believes that TRA, before initiating the investigation, should be in contact with the known UK producers and in possession of the production data of OFC in UK.

13. Resorting to an alternative source of information, such as CRU, TRA must have exhausted all the primary source of information available.

II.2 Initiation of Investigation

14. Given the unclearly defined UK industry, SDG Group refers to paragraph 227 of the SEF, in which it states that:

> "The Applicant was the only UK producer of OFC ***to support the application***; however, as the applicant has at least 25% of the total production in the UK of the like goods and ***the application was not opposed by other UK producers*** of the goods concerned whose collective output is greater than or equal to that percentage, the market share requirements is met in accordance with regulation 52(2) of the Regulations." (*emphasis added*)

15. In this regard, SDG Group would like to point out that the threshold of 50% referred to in Article 5.4 of the AD Agreement is a requirement regarding whether the application is made "by or on behalf of the domestic industry"; the threshold of 25% is related to whether an investigation can be initiated.

16. These two percentage thresholds (50% and 25%) address two different meanings and circumstances, i.e., under what conditions an application can be considered has been made "by or on behalf of the domestic industry" and under what conditions an investigation shall be initiated.

17. If TRA digressed the issue of 50% condition by merely focusing on the threshold of 25% rule, this had evaded the threshold of 50% as is required by the first condition laid down in Article 5.4 of the AD Agreement.

18. Article 5.4 of the AD Agreement prescribes:

> The application shall be considered to have been made "***by or on behalf of the domestic industry***" if ***it is supported by those domestic producers*** whose collective output constitutes ***more than 50 per cent*** of the total production of the like product produced by that portion of the domestic industry ***expressing either support for or opposition to the application*** … (*emphasis added*)

19. At paragraph 275 of the SEF, it states that the Applicant's volume of production is estimated to account for more than 50% of the overall UK production during the POI. This statement does not reconcile with the percentage of 25% indicated at paragraph 227 of the

SEF.

20. As SDG Group stated, the SEF concentrated on percentage of 25% supplied by the Applicant, which is a condition for initiating an investigation, but vaguely explained if the application had met the first condition of 50% and how that percentage was determined.

21. SDG Group considers TRA failed to comply with the legal requirements provided for in Article 4.1 and Article 5.4 of the AD Agreement.

III. Sampling – Investigation Procedures Are Flawed

22. According to paragraph 233 of the SEF, TRA applied sampling at time of initiating the case on 20 June 2022. Three exporting producers were initially selected as sampled exporting producers according to the sample questionnaire replies provided by all the known Chinese exporters. They are YOFC, ZTT and SDG Group.

23. On 28 June 2022, 8 days after the proposed sample, YOFC decided not to continue to respond to the dumping questionnaire; on 27 June 2022, 7 days after the proposed sample, ZTT also declined to responding to the dumping questionnaire. Consequently, SDG Group was the only sampled exporting producer left ***in the initial sample pool***, who subsequently fully cooperated with TRA throughout the entire investigation.

24. Despite the fact that two initially sampled exporters discontinued their further cooperation to present full response to dumping questionnaire at the stage of sampling procedures,[4] TRA nevertheless proceeded the investigation on SDG Group – the only sampled company.

25. The resultant findings of the investigation under such circumstances had led to the imposition of measures equivalent to a "countrywide single duty rate" for all the exporters from China.

26. This is not consistent with relevant provisions of the AD Agreement, because TRA failed to respect the rules laid down in relevant provisions of the AD Agreement pertaining to sample investigation.

27. Article 6.10 of the AD Agreement provides:

> "… In case where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested

[4] This situation applied to subsidy investigation.

> parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or ***to the largest percentage of the volume of the exports from the country in question*** which can reasonably be investigated.(*emphasis added*)
>
> 6.10.1 of the AD Agreement
>
> Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen ***in consultation with and with the consent of the exporters, producers or importers concerned***."(*emphasis added*)
>
> The last sentence of Article 9.4 (i) and (ii):
>
> "provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6."

28. It is clear that the intention of the drafters of the law is to provide a set of rules and conditions to deal with situations where a large number of exporters is involved in an anti-dumping investigation, to allow an investigating authority to apply sample techniques for purpose of investigation, provided that certain obligations shall be duly observed.

29. For instance, in the US trade remedy investigations, the Commerce's normal practice is to consistently choose two exporters as mandatory respondents; while EU would often than not opt for three compulsory respondents, and in some cases choose two or four exporters from a known sample pool at the initial stage of investigation.

30. In a normal investigation, an investigating authority must determine an individual duty rate for each of the respondent in order to comply with rules in Article 6.10 of the AD Agreement. However, a sample investigation differs to a clear extent from a normal investigation, in that, an investigating authority shall first calculate an individual duty rate for the sampled exporters respectively (Article 6.10), and then the weighted average margin of dumping established with respect to the selected exporters or producers to be applied to those non-sampled cooperating exporters as required by the rules in Article 9.4 of the AD Agreement.

31. Exception to the rules of Article 9.4 (i) is that when there is any zero or *de minimis* margin of dumping determined in an investigation or under circumstances referred to in paragraph 8 of Article 6, zero or *de minimis* or information referred to Article 6.8 must be disregarded from the weighted average calculations.

32. This exception rule is an important context to understand what the meaning of sample

investigation under Article 9.4 and 9.4(i). This paragraph means that there must be at least two sampled exporters to be investigated in an investigation, otherwise it is no longer an investigation under Article 9.4 and 9.4(i). It will simply render Article 9.4(i) to be nullity or redundant if a sample investigation is concerned only one exporter.

33. Disregarding the information under the circumstances referred to Article 6.8 or zero or *de minims* margin of dumping determined are the results of the sampled exporters who effectively enter into full investigation procedures, i.e., response to dumping questionnaire, on-site verification, complying with each step of procedures until findings being made, during which process, zero or *de minimis* may be determined, or information may be disregarded due to failure to fulfil the obligations to present requisite and necessary information.

34. To be brevity, those three scenarios are not applicable to any exporter who is initially sampled but shortly afterwards declined to continue to go further by responding to the dumping questionnaire.

35. In the OFC case, TRA initially selected three exporters as sampled companies, later on two out of three dropped out, and instead of going second round of sampling, TRA continued its investigation only on one sampled company – SDG Group.

36. Such investigation is not an investigation under Article 6.10, 6.10.1 and Article 9.4, 9.4(i) of the AD Agreement, although it is under the premise of sampling.

37. If an investigating authority decides to apply sample for purposes of investigation, it is required to take a proactive action to select potential sampled exporters as is specified by Article 6.10.1 of the AD Agreement.

38. When two initially sampled exporters discontinued their intention to move forward at the stage of sampling procedures, TRA did not make any efforts to begin second round of selection of potential sampled exporters from more than 10 known Chinese exporters. It is quite often that an investigating authority encounters a situation like the OFC case in that sampled exporters may decide to withdraw from further cooperation.

39. To proceed sample investigation of OFC, TRA should have continued to select potential exporters from the sample pool.

40. The requirements of "to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated," obliges an investigating authority to select sampled exporters to the requirements of the largest percentage of the volume of the exports from country in question.

41. In this context, SDG Group would like to refer to an investigation conducted by the EU Commission to illustrate how samples were completed by the EU Commission to fulfil the obligations imposed by the AD Agreement on the investigating authorities in regard to sample investigation:

> "The two exporting producers in questions: Chromeni Steels Private Limited ('Chromeni') and Jindal Group accounted for 100% of the Indian exports volume of SSCR from India to the Union during the investigation period. The Commission therefore abandoned sampling with regard to India." … "the Commission selected a sample of two groups of exporting producers on the basis of the largest representative volume of exports from Indonesia to the Union during the investigation period, which could reasonably be investigated within the time available … The sampled groups of exporting producers accounted for 71% of the estimated total export volume of SSCR from Indonesia to the Union during the investigation period."[5]

42. In comparison with the OFC case, SDG Group did not see explanations given by TRA concerning (1) whether SDG Group's export volume alone was representative of total export volume from China; (2) whether TRA made any effort to select more exporters from the sample pool; (3) whether selection of one or more exporters would cause TRA to be unable to complete the investigation; (4) why SDG Group alone as a sampled exporter would meet the requirements of Article6.10, 6.10.1.

43. Absence of any reasoned explanations given by TRA with regard to the samples, SDG Group submits that the current investigation has been proceeded on wrong legal procedures and the findings made in the SEF and PAD are of legal defects. Furthermore, the duty rate of 31.3% that is applied to the rest of non-sampled cooperating Chinese exporters is in contradiction with Article 9.3 of the AD Agreement.

44. In sum, the SEF and the PAD are in violation of Articles 4.1, 5.4, 6.10, 6.10.1, 9.3, and 9.4, 9.4(i) of the AD Agreement.

45. In light with the above statements, SDG Group respectfully asks TRA to terminate the investigation forthwith because the procedures are flawed.

[5] OJ L 88/28, COMMISSION IMPLEMENTING REGULATION (EU) 2022/433 of 15 March 2022 Imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitive collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia.

IV. Determination of Particular Market Situation

IV.1 Is OFC under particular market situation in China

46. TRA in the OFC case determined that the sector of OFC industry in China is under particular market situation (PMS) on the grounds of government support, state influence and control and subsidy programs. On that basis, TRA surrogated the entire costs and prices of SDG Group with the costs of Turkish producers to determine normal value for purposes of price comparison, which led to 31.3% dumping margins.

47. SDG Group disagreed to the analysis of TRA that SDG Group is operating commercial activities under PMS.

48. Article 2.2 of the AD Agreement provides:

> 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 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 of administrative, selling and general costs and for profits.
>
> *Foot note omitted*

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49. It is clear that Article 2.2 is drafted to make sure that a proper price comparison can be made to determine whether dumping is existed. Several scenarios that domestic sale transactions may not be suitable to compare prices are listed therein. In case any of the scenario incurs, margin of dumping can be determined by (1) comparable price of the like product when exported to an appropriate third country, or (2) with the cost of production plus SG&A and the profits.

50. At paragraph 305 of the SEF, TRA explained that export prices are affected by the market conditions in the UK, signifying TRA disregarded domestic sales transactions (or normal value) for reasons of PMS but accepted export prices from SDG Group as they are reflecting the conditions of market competition.

51. If this were the case, SDG Group raises the following questions to TRA for clarifications:

    1. If SDG Group's export prices that are affected by international market conditions including the UK market can be considered as reliable prices, why TRA did not use first option in Article 2.2 to determine margin of dumping, even though there is no hierarchy order between options 1 and 2 (CNV). TRA should have provided reasoned explanations

its decision to disregard the export prices to a third country before using surrogate costs of Turkey producers.

2. When an investigating authority is facing more than two options to eventually select one of them to investigate, the WTO case laws set clearly rulings that an investigation authority must give its reasoned explanations why one option is chosen and disregarded others for the purposes of investigation. Failure to do so, findings made by an investigating authority will be in contradiction with specific provisions of the AD Agreement.

52. In the opinion of SDG Group, if selling prices in domestic market appear to not permit a proper comparison, export price to a third country can also be considered as an option to form a comparison basis, especially as TRA confirmed that export price of SDG Group to the UK market is influenced by "normal" market conditions, which logically means export price of SDG Group to other third country markets would also be reliable.

53. SDG Group wonders why TRA did not use export price of SDG Group as a normal value to compare its export price to the UK market but resort to values in a surrogate country Turkey to compare the prices.

54. Most likely TRA has been guided by the Applicant to a belief that OFC market in China is under PMS, thus, by surrogating CNV is the easiest approach to make a price comparison despite the fact that TRA recognized export price of SDG Group reflects "normal" market conditions, which should be considered as an alternative comparison.

55. Let us turn to the analysis and determination made by TRA regarding the alleged PMS by the Applicant.

56. PMS is a market as opposed to a "normal" market situation, however, both market situations are relative. If SDG Group follows the reasoning and approaches taken by TRA in the OFC case, there is in fact no normal market in the world including UK market, EU market and US market because it is widely known that all of the countries enact supporting policies, formulating industrial plans, mapping out guidance and even intervening the market price-setting on key materials and energy and so on and so forth.

57. The key point SDG Group wishes to make it clear that analysis and determination of whether a market can be characterized as PMS must be rested on and supported by detailed specific relevant evidence and in-depth objective analysis.

58. It is beyond dispute that any market could possibly contain particular elements, depending how an investigating authority objectively examines the "*particularities*" of the market. Pre-cooked ideas, prejudice attitude, biased examination and result-oriented analysis on a

given market would be naturally easy to find out existence of PMS in a sector of industry of a country.

59. Supposing there were a PMS existed in a country, Article 2.2 permits the investigating authority to determine the margin of dumping by two methodologies, i.e., price of the like product when exported to an appropriate third country … or with the cost of production ***in the country of origin***, known as "constructed normal value" as explained at paragraph 49 above.

60. There are no rules in the AD Agreement to allow an investigating authority to surrogate entire costs including input materials of the like product of an exporter in the country of origin. Government support does not automatically lead to a conclusion that domestic selling prices must be distorted. PMS cannot be naturally equated to the government support.

61. It is recalled that Article 2.2.1.1 provides that costs shall normally calculated on the basis of records by the exporter or producer under investigation. This is to say that government support may not absolutely cause the recorded costs to be unreasonable and incompatible with the GAAP of the country of origin.

62. In case an investigating authority truly finds PMS existed that affects certain cost factors, such factors shall reasonably be adjusted by appropriate information to reflect the situation of in a country of origin, not randomly replace the cost factors that affected by particular situation without substantiated evidence and reasoned analysis.

IV.2 Analysis of OFC PMS by TRA

63. According to paragraph 314 of the SEF, TRA conducted PMS analysis on the basis of the allegations put forward by the Applicant: government support, state influence and control, land, bank loans, energy cost, labor cost and policy and raw materials.

64. Before moving on, SDG Group submits that TRA failed to provide an adequate opportunity to actively engage the company with TRA's evaluation regarding the submission of SDG Group concerning the allegations of PMS, even though SDG Group rebutted in the questionnaire response and stated that it operated commercial activities in line with the market force, responding to the market signal and negotiating with all the market players to complete transactions.

65. During the course of investigation, in particular online verifications, TRA did not raise any questions relating to PMS or request further information/documentation with respect to PMS from SDG Group. Until issuance of the SEF and PAD, SDG Group had an impression

that PMS was no longer an issue in the OFC case.

66. Absent instructions from TRA and no effective communications between SDG Group and TRA with regard to the examination of PMS, SDG Group believe that TRA acted in contradiction with Articles 6.1 and 6.2 of the AD Agreement.

67. With respect to the analysis on PMS by TRA, SDG Group notices that TRA had simply made either statements or citated various government documents, which contain no actual and substantial investigation what specific evidence and conditions SDG Group operated business under PMS.

68. For instance, how each of the input material price and the costs of OFC failed to reflect the market force; to what extent its selling prices of OFC were set in response to the government instructions/policies; whether its choices in selecting suppliers and/or buyers were restricted.

69. It is recalled that the online verifications demonstrated SDG Group's account is in line with the GAAP and the costs of OFC were reasonably recorded. Throughout the entire online verifications, TRA did not raise any doubt or concerns about the reliability, accuracy and reasonableness of SDG and SDGI's cost accounting records; TRA did not find any factual evidence to prove SDG Group operated under PMS.

IV.2.1 Government support

70. Citation of certain laws, policies and decrees enacted by the government of China (GOC) at paragraphs 318 – 323 of the SEF are not formed an evidentiary ground to conclude that PMS was therefore existed. TRA failed to present reasoned explanations how those government support differentiated the OFC market from a normal market. Documents alone cannot be served to support TRA's conclusion that OFC market is subject to "*particular* "situation.

71. Being a "PMS" means a market is fully influenced by non-market factors, which compels market players to disregard market supply and demand, ignore market signal, fail to respond to market force, leave consideration of competition unattended and set price in response to the call of the government policies or guidance. In short, economic players in the PMS make commercial decisions derogate from a normal situation. The combination of all those elements and government policies should inevitably give rise to a situation where sales prices are "artificially set", regardless of whether they are low or high.

72. The immediate question is that supposing PMS affects price setting that reflects no market force, the analysis of TRA concerning PMS shall be presented substantiated reasoning

based on positive evidence to demonstrate that cost factors and selling prices of OFC in China are "artificially set" or "artificially influenced" by the GOC support.

73. Apart from citations of the GOC support and narratives, SDG Group did not see analysis and determination supported by factual evidence and specific data to prove cost factors and selling prices are operated under PMS.[6]

74. As explained above, during the online verifications, TRA did not verify whether SDG and SDGI's cost factors, input materials and domestic sale prices of OFC are set by responding to the market signal or not. Therefore, the statement regarding determination of OFC lends no evidentiary support to TRA's conclusion.

IV.2.2 State influence and control

75. With regard to state influence and control, SDG Group respectfully draws the attention of TRA to several WTO case laws that "state control" or "sharing holding" *per se* in a company does not necessarily and automatically mean an enterprise is lack of independence in operating its business activities or is restricted to freely enter into commercial dealings to set negotiated prices.

76. It is true that SDG Group has state shares, however, this element alone cannot be inferred SDG Group's management is surrendered to the state's instructions and policies. Again, the online verifications showed that SDG Group was free to choose markets, free to select customers and suppliers, free to conclude deals following the negotiations. Should PMS exist, the situation of SDG Group would not appear as what the online verifications showed, i.e., operating and managing the business in an manner like any independent legal entity in the market.

77. In this regard, SDG Group also requests the Applicant and TRA to redact the CRU's report into a meaningful non-confidential summary of (China) state influence and control. It is seen that such allegation is constituted part of TRA's decision about PMS, and it is quite critical to be informed and understood the content of CRU report indicating precisely state influence and control specific to the sector of OFC industry in China.

78. TRA cannot expect an interested party who is left in dark to respond meaningfully to the allegations put forward by the Applicant. Subscription of CRU report cannot be justified

[6] Certain legal documents cited by TRA were expired. The reason for that is that TRA mostly reproduced documents listed in the EU Working Document, which is outdated. Furthermore, this Working Document contains salient features of being biased and prejudice with regard to the China's market. SDG Group finds it surprising that TRA relied in part its statement on this Working Document without its independent examination, even though this Working Document was used as a reference.

for not disclosing the information in a form allowing an interested party to obtain basic understanding.

79. Investigation must be proceeded even-handed. Procedural rights must be duly protected, otherwise the right to a fair hearing accorded to all interested parties would be harmed.

IV.2.3 The alleged subsidy programs in the context of PMS analysis

80. Leaving aside whether certain subsidy programs had been properly determined in law and in fact, SDG Group finds it baffled that TRA attributed subsidy programs as part of its analysis to support its determination that PMS is existed in the sector of OFC in China.

81. Domestic subsidy may possibly reduce selling prices of the like product in both domestic and export markets. WTO Subsidy and Countervailing Measures Agreement (SCM Agreement) is specifically formulated to address the impacts of subsidy on an investigated product, i.e., countervailing measure can be imposed if it is found subsidy existed. Will subsidy programs granted by a government to a product can be considered the market to be "*particular*" - a concept in the context of determination of dumping? The answer is no.

82. Article 2.2 of the AD Agreement is concerned about whether domestic sale prices permit a proper compassion because of the PMS, which forms a contrast to subsidy investigation. Unlike dumping investigation, a subsidized product does not need to determine if its sale prices permit a proper comparison or not.
83. Analysis on PMS must be conducted with caution and prudence to characterize whether a market is truly "particular".

84. As a matter of fact, there is no clear and generally accepted definition of what could be constituted PMS. Even in the Panel Report of DS529 *Australia – Anti-dumping Measures on Paper*, the Panel interpretated the PMS by basing on the specific circumstances surrounding the paper market in Indonesia, Indonesian government concrete actions towards paper market and the consequent impacts of all the relevant factors together on the Indonesian paper market that domestic market is considered to be PMS.

85. In concluding, determination of PMS cannot be made by merely enumerating government policies, laws and regulations. Analysis leading to a conclusion of PMS must be substantiated by factual evidence specifically related to the product being investigated and the market behaviors of company involved as well as the price setting, record of costs associated with production and sales in the market.

V. Determination of Margin of Dumping for SDG and SDGI

86. SDG and SDGI submit comments on determination/calculations of dumping margins made by TRA.

V.1 SDG

87. After examining Table Export Questionnaire Data in CAS369 - 2 - Dumping Calculation concerning SDG, there are several errors made by TRA resulting in wrong margin of dumping, as follows:

V.1.1 Domestic Freight Expenses

88. The domestic freight was deducted as adjustments to calculate the Net Inv Value (Inv Currency). However, the currency unit of Inv Value is USD, but the currency unit of domestic freight is not USD, but RMB. SDG extracts part of the submitted Annex B4.1, in which the reported the currency unit of domestic freight is RMB (column AR) as below:

[Table contains specific export transaction data, which is not subject to meaningful redaction on the business sensitive information. Disclosure of which would bring damage to the company's competitive position in the market.]

89. Therefore, the deducted domestic freight expenses should be 20.08 (******/******), instead of ******.

V.1.2 Ocean Freight and Insurance

90. The Ocean Freight and Insurance (column AC) was also deducted as adjustments to calculate adjusted EP. SDG draws the attention of TRA to the fact that all the delivery term was FOB, **not CIF**. In order to arrive at CIF level, the reported Ocean Freight and Insurance in Annex B4.1 is an estimated value based on actual FOB price to uplift to the level of CIF. This calculation is reported based on the instruction and requirement in the questionnaire, in which, it is required to have FOB up to CIF value.

91. In column S and AM of submitted Annex B4.1, SDG had indicated such information in the table. TRA can also double check the reported information from the submitted sales documents.

[Table contains specific export transaction data, which is not subject to meaningful redaction on the business sensitive information. Disclosure of which would bring damage to the company's competitive position in the market.]

92. Therefore, the reported Ocean Freight and Insurance is an estimated amount from FOB to

CIF level as is required by the questionnaire, it is not the actual expenses occurred, TRA should not deduct the CIF value from the invoice value. This artificially reduced the actual export prices of SDG.

V.1.3 Currency unit of Adjusted EP

93. In column AL and AM, TRA calculated adjusted EP (total and unit), but in the formula, the Net Inv Value (column Y) is an accounting booked currency, i.e. RMB, which was first changed into USD (column Y / column X), and then multiplied by exchange rate (column AO), thus the final result was entirely distorted.

94. In addition, the currency unit of Net Inv Value (column Y) and the adjustments (column AA-AK, the ocean freight in column C should not be deducted as explained in point 2 above) is the same, i.e., RMB, there is no need to apply exchange rate.

95. SDG is requesting TRA to revise its calculations based on the actual figures and submitted tables as well as supporting documents. The correct dumping margin of SDG should not be as high as provisionally determined at 63.1%.

V.2 SDGI

96. Concerning the calculation of the dumping margin for SDGI, there is the same issue with regard to the domestic freight as SDG, i.e., the domestic freight was deducted as an adjustment in RMB currency from the invoice value in USD currency. This erroneous deduction resulted in an excessive reduction in export prices.

97. Since TRA is in possession of all the transaction tables and supporting documents and that same errors were made by TRA in terms of calculations of dumping margins for SDGI, SDG Group will not resubmit the relevant tables.

98. Taking into consideration the above error, the dumping margin calculated for SDGI shall not be as high as provisionally determined at 26.2%.

99. SDG Group strongly requests TRA correct those errors to restore the true results of the group margin of dumping, given that all those reported transactions, terms of delivery, exchange rate, terms of payment, accounting screenshots, sales ledger accounts and accounting records had all been duly verified.

V.3 Erroneous determination of SG&A and profit margins

100. SDG Group does not understand the rational and legal basis TRA determined the amount

of SG&A and profits when constructing normal values for both SDG and SDGI, because on one hand, TRA rejected entire costs and domestic prices of SDG and SDGI by resorting to the costs or normal value of the Turkish producers, on the other hand, TRA used actual amount of both companies' recorded amount of SG&A derived from the account of P&L.

101. Such an obvious inconsistent and unexplained approaches taken by TRA to surrogate entire values on grounds of PMS and then used actual amount of reported by both companies' SG&A and profits may have resulted in unreasonable (artificial) margin of dumping, which clearly runs counter to the fair principles an investigating ought to respect.

102. This has also placed SDG Group in a position to put forward their comments on margins of dumping that were established by inconsistent methodologies, not because TRA used an actual amount of SG&A and profits, the results would not be undistorted given the decision of PMS made by TRA in the first place.

103. TRA will agree with SDG Group that SG&A is part of cost of production, which is recorded in the P&L, same as COGS, a periodical cost, is also recorded in the P&L to produce a company's operating results, measured by actual amount of profitability. If a starting point is wrong (determination of PMS), no matter how correct approaches to be taken in a subsequent process, the findings are wrong and therefore flawed.

104. In the OFC case, TRA had completely rejected all the costs on the grounds of PMS that domestic sale prices do not permit a proper comparison, then a logic approach would be a surrogate value of SG&A to be consistent with the surrogating approaches to replace the costs.

105. TRA cannot adopt two different methods or approaches to determine the full cost of production to arrive at resultant margin of dumping for SDG Group. This would in fact distort the surrogate normal value established and give rise to a wrong comparison of prices that would have led to fabricated margins of dumping for SDG and SDGI respectively.

106. With regard to the amount of profits established, SDG Group believes that TRA chose the highest amount of profits intended to increase the total amount of constructed normal value to widen up margin of dumping.

107. According to the PAD, the margin of dumping was provisionally determined more than 60% and the profits more than 20% on exported OFC to the UK market. From the perspectives and theories of determination of dumping – not necessarily from an

economic point of view – such a higher amount of profit achieved on the exported OFC to the UK market that was yielded more than 60% dumping margin belies a true picture of a company's operating activities, implying an intended creative margin of dumping.

108. The Panel in DS405 explained:

> "Even assuming it to be the case that relevant data on the basis of which the cap could be calculated was not available to the Commission in this case, we failed to see how this excuses the Commission from complying with the requirements of the AD Agreement. More to the point, however, in the case before us, it is undisputed that the Commission made no attempt to calculate the cap called for in Article 2.2.2.(iii). While we understand the European Union's argument as to why it would be inappropriate to use the data of the other Chinese producers of footwear who had not been granted MET as a basis for calculating the cap, there is no indication, or even any argument, that the Commission itself considered the calculation of the cap at the time it made its determination. Moreover, there is no indication that the Commission ever looked into whether there were producers who sold "products of the same general category" whose data might have been used in this regard. We consider this failure particularly troublesome in view of the fact that the Commission considered it reasonable to use the data of producers of products in the chemical and engineering sectors as the basis for determining the amounts for SG&A and profits, but apparently never even considered whether it might be reasonable to use the data of these companies to calculate the cap, Given that it is undisputed as a matter of fact that the Commission did not determine "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", it is apparent that the Commission could not, and did not, ensure that the amount for profit it establish for Golden Step did not exceed this level."[7]

109. This passage of interpretation is very illustrative and informative regarding the point of how to determine the profits in line with Article 2.2.2(iii) of the AD Agreement in the OFC investigation. Bearing in mind, TRA determined SDG Group and the sector of OFC in China is operating under PMS, the establishment and methods of the profits is as same as the determination for SG&A.

110. The Panel made it clear that determining the amount of profits, an investigating authority shall duly observe (1) the amount of profit must be reasonably established; (2) such amount must be subject to a "cap", which is normally realized by producers, or by "products of the same general category"; (3) reasoned explanations must be given by the investigating authorities for the decision they take and the findings they formulate.

111. TRA must be aware that in the circumstances of the PMS, this does not mean an investigating authority can determine any number of profits without complying with the requirements of Article 2.2.2(iii) of the AD Agreement.

[7] DS405 – Panel Report, European Union – Anti-dumping Measures on Certain Footwear from China, para. 7.300.

112. Considering the fact that TRA determined more than 20% profits for SDG and SDGI in the OFC case when constructing normal value, the particular methods used by TRA to reach the level of more than 20% profits, SDG Group submits that TRA's determination of profits is in blatant violation of Article 2.2.2(iii) of the AD Agreement, which brought about in significant part ***abnormally high*** dumping margins for SDG and SDGI.

113. SDG Group would like the TRA to respect the rules of Article 2.2.2(iii) of the AD Agreement by taking into account of the Panel Report cited above to arrive at findings supported by objective examination based on positive evidence.

VI. Conclusion

114. Given the procedural defects, improper evaluation of factual evidence and TRA's inadequate reasoned explanations on certain key legal and factual points, in particular TRA has acted in contradiction with legal requirements of Articles 2.2, 2.2.1.1, 4, 5.4, 6.10, 6.10.1, 9.3, 9.4, 9.4(i), 2.2.2(iii) and Article 3 of AD Agreement, there is no need for SDG Group to elaborate its comments in relation to the findings made by TRA in the context of injury.

115. It is obvious that the starting point of the procedures as well as subsequent investigating steps is not consistent with the legal requirements of the AD Agreement, injury investigation and the resultant findings are naturally tainted.

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Submitted for and on behalf of SDG Group

Pu Lingchen