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Percival Legal

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Attention: Mr Tim King, Case Manager

Re : Anti-Dumping Notice No. 2016/33 in respect of A4 Copy Paper Exported from the Republic of Indonesia

Dear Sir

1. We refer to and note that Australian Paper, in a submission dated 29 July 2016, continues to contend that a "particular market situation" exists in Indonesia. It also contends the existence of subsidies for raw materials as inputs to manufacture due to their supply at "less than adequate remuneration".

2. As you will recall these issues were comprehensively addressed in a previous submission on behalf of the Government of Indonesia. See our submissions dated 2 June 2016 and 20 June 2016. They also were addressed by submissions by the Government of Indonesia itself: See submissions dated 23 May 2016 and 13 July 2016.

Particular Market Situation

3. It is important to note the phrase "particular market situation". This phrase assumes the existence of a "market" and that there must be something unique (i.e. "particular") within that market that precludes using domestic prices in that market for the purposes of calculating a normal value and, consequently, permitting a proper comparison between prices in the domestic market export prices.

4. Australian Paper's contention appears to be that in previous cases involving China it was not that the Government of China had artificially reduced inputs to manufacture but, rather, was through some unspecified mechanisms employed by the Government of China (presumably artificially reducing the price of inputs to manufacture), domestic prices in China would be substantially different. Precisely what mechanisms were employed were not identified in the submission.

5. However, in the case of Indonesia, Australian Paper contends that had the Indonesian Government not caused locally sourced timber to be priced at artificially low levels, prevailing pulp and hence uncoated woodfree paper would be priced at higher levels. No evidence has been presented to support this claim.

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6. In other words, Australian Paper contends that the supply of allegedly low priced timber supplied by the Government of Indonesia led to artificially low priced pulp and, consequently, lower costed uncoated woodfree paper by manufacturers of A4 Copy Paper.

7. There is nothing novel in this argument. It was previously advanced and addressed in our previous submissions of 2 and 20 June 2016 and the Government of Indonesia's submissions.

8. To reiterate, we noted that Australian Paper claimed that the Government of Indonesia has subsidised or otherwise interfered in the Indonesian market for A4 Copy Paper and this has resulted in a "particular market situation" precluding a proper comparison between domestic and export selling prices (at page 35 of the Application):

   Australian paper submits that the subsidisation that has provided Chinese and Indonesian exporters with certain benefits, combined with artificially low government-influenced raw material input prices, establishes grounds for determining a particular market situation prevails for A4 copy paper in each of the domestic markets in China and Indonesia.

   This argument continues in Australian Paper's recent submission.

   There is no evidence that the Government of Indonesia is or has been artificially manipulating the prices of inputs to manufacture A4 Copy Paper or otherwise interfering in the Indonesian domestic market for A4 Copy Paper. No such evidence has been advanced by Australian Paper.

9. As previously noted the WTO Anti-Dumping Agreement stipulates that a product is to be considered to be "dumped" if it is exported to a country at an export price that is less than its normal value: Article 2.1 of the WTO Anti-Dumping Agreement. This requires a comparison between the export price and the domestic selling price of the good under consideration.

10. If, as alleged by Australian Paper, that inputs to the manufacture of A4 Copy Paper have been "artificially lowered" due to government influence, it is the Government of Indonesia's submission, as indicated earlier above, that this does not create a "particular market situation" under WTO rules. For there to be a "particular market situation" there must be something unique and distorting in the domestic market that precludes a "proper comparison" between prices in the domestic market with export prices. That is, some action by the Government of Indonesia that distorts the A4 Copy Paper market in Indonesia. But no evidence has been adduced by Australian Paper on what action the Government of Indonesia has taken and how and to what extent that action has allegedly distorted the domestic A4 Copy Paper market in Indonesia.

11. Only if the Government of Indonesia has distorted the domestic A4 Copy Paper market would the calculation of a constructed normal value be warranted to enable a proper comparison. However, absent any such distortion in the Indonesian A4 Copy Paper market, which the Government of Indonesia contends is the case, then no "particular market situation" exists and there is no justification for the Commission to calculate a constructed normal value. Domestic selling prices of A4 Copy Paper in the Indonesian domestic market are properly comparable with export prices to Australia.

12. Further, if there is in fact a reduction of the price of inputs to manufacture, that would apply equally to products produced for the domestic market and those produced for export to Australia and to third countries, as well as to paper products not subject to this investigation.

13. As previously submitted, in the EEC – Cotton Yarn case, the GATT Panel stated that "…the wording of Article 2.4 [now Article 2.2 of the WTO Anti-Dumping Agreement] made it clear that the test for having any recourse [to the use of a constructed normal value] was not whether or not a 'particular market situation existed *per se*. A 'particular market situation' was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit proper comparison. In the Panel's view, therefore, Article

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2.4 specified that there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison."[1]

14. As previously advised, the alleged artificially lowering of the prices of inputs to manufacture does not in some unspecified way distort the Indonesian domestic market for A4 Copy Paper creating a "particular market situation", requiring the calculation of a constructed normal value to permit of the constructed normal value with export prices, particularly when the same inputs to manufacture are used to produce the same products sold in the domestic market as sold for export to Australia as well as to third countries and for other paper products.

15. In US – Softwood Lumber IV (DS257) the Appellate Body concluded that an investigating authority, instead of using prices in the country of export, may use a benchmark price where it is demonstrated that prices in the domestic market are so distorted due to the predominant role of the government intervention in supplying the same or similar goods. Here, the Indonesian domestic A4 Copy Paper market is not dominated by the Government of Indonesia. The Government of Indonesia does not supply A4 Copy Paper into the Indonesian domestic market. Accordingly, the use of a benchmark is neither warranted nor sanctioned under WTO rules.

16. Further, and as indicated above, the issue is not whether a "particular market situation" exists requiring the calculation of a constructed normal value. Rather, the issue is whether inputs to manufacture have been supplied at less than "adequate remuneration". This is a subsidy issue, not a dumping issue. This issue is addressed below. That is, whether inputs to manufacture have been supplied at "less than adequate remuneration" and, if so, whether this amounts to a subsidy that confers a benefit and, therefore, is countervailable, assuming it flows through to Indonesian A4 Copy Paper exported to Australia and, if so, to what extent.

Supply at less than adequate remuneration

17. Australian Paper contends that timber supplied by the Government of Indonesia amounts to a subsidy because it is supplied at "less than adequate remuneration" and this confers a "benefit".

18. Several points need to made on this issue.

19. It is the Government of Indonesia's understanding that major paper manufacturers obtain their sources of timber from timber plantations they or others have established at their own cost and expense. That is, they are not supplied timber by the Government of Indonesia. This is reflected in a submission dated 18 August 2016 on behalf of one of the exporters, APRIL Fine Paper Trading Pte Ltd. Consequently, there can be no issue of the Government of Indonesia supplying timber at "less than adequate remuneration".

20. Further, the fees payable to the Government of Indonesia, namely PSDH, DR and PSDA, are simply fees payable to the Government of Indonesia for use of the land. That is, they are in the nature of royalties for use of the land.

21. The Government of Indonesia is aware that the Commission has visited and verified information provided by an Indonesian entity involved in the timber industry that Indonesian plantation owners cultivate timber on their plantations at their own cost and expense. Any sales of timber cultivated on such plantation are at prices negotiated between the plantation owner and the buyer – i.e. it is effectively a market price.

[1] GATT Panel Report, EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, 42S/17 (adopted 30 October 1995)

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22. Australian Paper wrongly considers the fees payable to the Government of Indonesia by plantation owners as the "price for timber" and also wrongly characterises these payments as "remuneration" received by the Government of Indonesia for the supply of timber. Australian Paper is misconceived. In order for there to be a subsidy, it must be found that the Government of Indonesia is providing timber for "less than adequate remuneration". By characterising these fees as a "price" the Australian industry appears to be trying to manufacture a situation where the PSDH, DR and PSDA are considered to reflect the "remuneration" received by the Government of Indonesia for sales of timber. This not the case. PSDH are not prices but royalty fees. The Government of Indonesia fee is in the nature of a resource use right, that is all. The resource is **not** the timber. The plantation costs of timber are all those of the plantation owners. In any event, as indicated above plantation owners cultivate their own timber, or acquire it from other companies that cultivate timber at their own cost and expense. The Government of Indonesia understands that transactions between plantation owners for the supply of timber are negotiated in arms length negotiations. They do not source timber from the Government of Indonesia.

23. Further, to the extent that the Government of Indonesia supplies timber, no evidence has been advanced by Australian Paper in its Application that the alleged government influences of inputs to manufacture, including the supply of inputs to manufacture, to have been at "less than adequate remuneration". This has been addressed in our previous submission: see our submissions of 2 and 20 June 2006

24. We have previously submitted that Australian Paper's claims concerning the adequacy or inadequacy of remuneration were based on findings by the US Department of Commerce ("USDOC"). However, those findings by the USDOC had significant flaws as previously submitted namely:

1.1 Article 14(d) of the SCM Agreement stipulates that the "adequacy of remuneration" is to be determined in relation to prevailing market conditions for the goods in question "in the country of provision or purchase".

1.2 DOC's findings were flawed in the following ways: -

i. DOC determined the adequacy of remuneration by reference to prices prevailing in Malaysia. It did not examine the price for timber in Indonesia.

ii. Further, there was no analysis as to what constituted the supply of a good, in this case timber, at "less than adequate remuneration" (i.e. what would constitute the supply of timber at adequate remuneration in Indonesia) nor why the supply of timber in Indonesia was less than that which would constitute adequate remuneration in Indonesia, as opposed to any other jurisdiction. What may amount to "adequate remuneration" in one jurisdiction may amount to inadequate remuneration in another jurisdiction. What amounts to "adequate remuneration" in Indonesia needed to be determined to market conditions in Indonesia and then determine whether the adequacy of remuneration has been met by those standards.

iii. DOC's approach, as set out in the relevant US legislation, was to determine the "adequacy of remuneration" based on (i) market prices from actual transactions within the country under investigation; (ii) world market prices that would be available to purchasers in the country under investigation or (iii) an assessment of whether the government price is consistent with market principles.

iv. This methodology seemingly is to establish a benchmark price against which the "stumpage fees" may be compared to determine their "adequacy". However, none of these methodologies actually establish what actually constitutes "adequate" or "inadequate" remuneration for the supply of timber. That is, they do not provide a measure of what is or is not "adequate" or "inadequate"

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remuneration in the supply of timber in Indonesia. What prices are available in other countries, such as Malaysia, do not provide a measure as to what would be adequate remuneration in Indonesia.

v. Further, where the Government of Indonesia provides entities with access to land to log timber but imposes obligations on those entities to remediate sites, comply with environmental regulations, to replant timber logged and other similar obligations in relation to their activities, as well as receiving a fee from those entities in relation to their logging activities, the adequacy of that fee must be measured against the other obligations being imposed. One can cannot assess the "adequacy of remuneration" in isolation of the other obligations being imposed on the entity undertaking the activity being undertaking in respect of which the fee is payable.

vi. In addition, Article 14 of the SCM Agreement requires that the method for calculating the benefit to the recipient of a subsidy is to be based on the national legislation or implementing regulations for the subsidy in question. The applicant acknowledges that it had no knowledge of or any evidence of the legislative basis for this alleged supply of timber at less than adequate remuneration.

25. We note that Australian Paper in its submission provides no new evidence or information on its claims of the supply of timber at "less than adequate remuneration" and, if it is supplied at less than adequate remuneration', that this amounts to a countervailable subsidy.

26. Also, to the extent, if any, timber is supplied by the Government of Indonesia at less than "adequate remuneration", which for the reasons given above we deny, then to be countervailable any such subsidy must confer a "benefit". This not only requires evidence of who obtains the benefit and the amount of the benefit but Article 14 of the SCM Agreement also requires authorities to be "transparent" and "adequately explain" the benefit.

27. This is reflected in section 269TACC(3)(d) of the Customs Act 1901, which stipulates that there is no "benefit' in the supply of goods or services unless supplied for less than adequate remuneration. Further, the adequacy of remuneration must be determined by having regard to the prevailing market conditions for like goods in the country where those goods or services are provided – i.e. in Indonesia

28. Accordingly, the adequacy of remuneration received by the Government of Indonesia for the supply of any timber in Indonesian is to be determined by having regard to prevailing market conditions in Indonesia. This will need to be undertaken to determine whether timber or other goods supplied by the Government of Indonesia, if any, is to be determined by prevailing market conditions in Indonesia. This does not appear to have occurred.

29. Further, we note that in US – Softwood Lumber IV (DS257), the Appellate Body held that where countervailing duties are being contemplated to offset subsidies on upstream inputs to manufacture and the downstream producers operate at arm's length, it must be established that the benefit of the financial contribution must be passed through, directly or indirectly at least in part to the producer of the end product. Also, presumably the amount of the pass-through, if any, would need to be quantified. Australian Paper recognises this in its submission.

30. As the Commission would be aware, any countervailable duties can only be imposed to offset the amount of a countervailable subsidy in the end product. This would require an allocation of the countervailable subsidy across all products in receipt of the subsidy and the extent, if any, the amount of the subsidy flowed through to the end product the subject of the investigation.

Prohibition on the export of logs

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31. As noted in our submission of 20 June 2016, Australian Paper's claim that the "log export bans" relied on findings by USDOC and that such prohibition amount to a subsidy because they increase the supply of timber in Indonesia and, thereby, depress prices.

32. As previously submitted, that argument is fallacious. The logs to which the prohibition applies are logs used in the production for furniture. They are not used in the production of pulp and, ultimately, Indonesian A4 Copy Paper: See our submission of 20 June 2016.

33. Accordingly, such export prohibitions have no relevance to this investigation.

34. Further, as the Government of Indonesia pointed out in its submission of 23 May 2016, there are no restrictions on the export of wood chips, chip wood and wood pulp falling under the Indonesian Tariff Classifications identified in that submission. This obviates any argument that there has been a build-up of product to depress prices.

35. In addition, in US – Export Restraints (DS194), it was determined that an "export restraint" for the purposes of the definition of 'subsidy' in Article 1.1, in particular 1.1(a)(iv) of the SCM Agreement, does not constitute a "financial contribution" within the meaning of that Article. Mere intervention by the government in the market itself does not satisfy the requirements of that Article.

Debt forgiveness

36. As indicated in our submission of 20 June 2016, the debt forgiveness programme, which was introduced to address the Asian financial crisis, expired and was wound up in 2004, some 12 years ago. It has no relevance to this investigation

Appointment of an expert

37. We understand that the Commission has appointed an expert to assist it. The expert appointed, the terms of reference of the export and the date by which the expert is to report have not been disclosed.

38. The identity of the expert and his/her terms of reference cannot be claimed to be confidential. Consequently, they should be placed on the public file for the benefit of interested parties. If, on the other hand, the Commission is of the view that the identity of the expert and his/her terms of reference are confidential, notwithstanding that the expert's report will subsequently be published and placed on the pubic file identifying the expert and the question he/she was requested to answer, then non-confidential summaries should be placed on the public file at this time including the date when the expert's report is to be provided to the Commission.

39. Also, the expert's report should be provided well ahead of the publication of the statement of essential facts to enable interested parties sufficient time to review and comment on it.

40. We assume that the expert has been requested to examine whether the situation in the domestic market (due to government intervention) in Indonesia, as well as China, is such that it is not suitable for assessing the normal value of A4 Copy Paper. We observe that only if the right questions have been asked of the expert will the right answers likely be provided.

41. We observe that any such report should not simply be a treatise on economic theory on the operation of markets. Rather, it should establish on actual, positive probative evidence as to what has occurred in the Indonesian domestic market. As the Commission is aware, WTO rules require that findings must be made on actual positive evidence and not mere conjecture and speculation.

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42. Hence the importance of interested parties to understand the expert's terms of reference to ensure that this forms part of his/her terms of reference, as opposed to simply undertaking a speculative theoretical economic analysis.

Australian Industry

43. We note that this investigation was initiated on 12 January 2016 on reliance on Australian Paper's application for the imposition of anti- dumping measures on A4 Copy Paper exported from China, Indonesia, Brazil and Thailand: See Consideration Report No 341.

44. It is now 29 August 2016 and there is no verification report relating to Australian Paper on the public file. It is unclear why after approximately 8 months the Commission has not been able to verify the information provided by Australian Paper in its application, prepare a report and place it on the public file for the benefit of interested parties.

45. It is only fair and equitable that all interested parties have an opportunity to consider and review the Commission's verification report for Australian Paper, and to respond to the information therein.

Conclusion

46. From the foregoing, it is clear that there is no substance to Australian Paper's claim that a "particular market situation" exists in" Indonesia.

47. In conclusion, the submissions by Australian Paper on "particular market situation" and "inadequate remuneration" must be rejected.

Yours sincerely,

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