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LEVEL 3 MINTER ELLISON BUILDING 25 NATIONAL CIRCUIT FORREST
GPO BOX 369 CANBERRA ACT 2601 AUSTRALIA
DX 5601 CANBERRA www.minterellison.com
T +61 2 6225 3000 F +61 2 6225 1000

Mail correspondence to GPO Box or DX

BY EMAIL: operations1@adcommission.gov.au

Director Operations 1
Anti-Dumping Commission
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Dear Sir

NEWSPRINT FROM FRANCE – STATEMENT OF ESSENTIAL FACTS No. 242

INTRODUCTION

1. We represent UPM France SAS and associated companies (collectively **UPM**) in relation to the above matter.
2. We note the Commission's preliminary contention in the Statement of Essential Facts (**SEF**) that the export price of our client's exports to Australia is less than the normal value of like goods sold in France. While our client does not agree with that contention, we submit that even if dumping was established the export price of UPM's exports of newsprint to Australia has not caused, is not causing and does not threaten material injury to the Australian industry (**NSIA**).
3. Our representations of 21 January 2015 set out a number of grounds in support of our client's claim that the Commission's contrary preliminary finding on material injury is unsustainable. We note that some of those grounds are in some cases not mentioned let alone evaluated in the SEF. We request that that document be read as one with this further submission.

The Central Issue

4. The essence of the Commissioner's preliminary contention on the cause of material injury is set out in sections 8.6.3 and 8.7.3 of the SEF.

In a price sensitive market, this competitive advantage [exporting at allegedly dumped prices] allowed UPM to secure sales when competing directly with NSIA. It is also reasonable to conclude that NSIA's prices in other contracts were influenced by these dumped imports from France.

The Commission proposes to conclude that there is a link between UPM's dumped prices and the adverse price effects experienced by NSIA in the investigation period. In particular, the Commission considers that the Australian industry has, as a result of the dumping of newsprint from UPM, experienced injury in the form of price depression, price suppression and lost sales revenue.

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...The price suppression caused by dumping which has been demonstrated by the lower margin between unit prices and unit costs, has resulted in lower profitability for NSIA. The lower profitability and reduced sales volumes has resulted in reduced profits for NSIA

5. These propositions rely on the Commission's characterisation of UPM as the price setter in the Australian market for newsprint but no evidence is proffered in support of this claim other than to assert that newsprint from France is allegedly dumped. In the newsprint market, however, there is no necessary correlation between the existence of allegedly dumped prices (assessed and published for statistical purpose at the fob level) and price setting because Australian buyers purchase on the basis of delivered prices (DDP or CIF). Any objective analysis of price competition must be based on comparative delivered prices. Such an analysis reveals that UPM has never been the underbidder in the three Australian tenders in which it has participated and the price setter claim is further undermined by the fact that UPM's market share is about █% while the market penetration of price setting exporters from Korea and Indonesia is at least three times greater.
6. In these circumstances the assertion in the SEF that NSIA was forced to suppress its prices in response to allegedly dumped prices from France for tenders in which it competed with UPM and other parties, as well as in the numerous tenders in which UPM was not a participant, is not credible and represents a major failure by the Commission to meet its obligations under Article 3.1 of the *Anti-Dumping Agreement* which provides that:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

7. Positive evidence has been described by the Appellate Body of the WTO as evidence of ... *an affirmative, objective and verifiable character...that...must be credible*¹ and objective examination has been commented on by the same authority in the following terms:

...the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.²

Positive Evidence

8. The contract market for newsprint in Australia consists of four purchasers, WAN, APN, News Ltd and Fairfax, an increasingly dominant local supplier and a limited number of overseas suppliers. Details of participants, bids and outcomes of the tenders conducted

¹ US –Hot-Rolled Steel (AB). para 192

² *ibid.*, para 193

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during the injury investigation period are, or should be, available to the Commission. That information reveals the following facts:

- a. UPM has only competed for Australian newsprint contracts on three occasions, one of which involved a bid as an incumbent supplier. UPM was not the underbidder on any of those occasions
- b. On all three occasions lower bids were submitted by NSIA, on two occasions lower bids were submitted by a Korean exporter and on one occasion a lower bid was submitted by an Indonesian exporter.
- c. In relation to the [REDACTED] request for tender in 2010:
 - NSIA's bid to supply for a further three years was unsuccessful, even though it was less than UPM's successful bid
 - NSIA has conceded that its failure to retain preferred supplier status did not cause any material injury;
 - the successful underbidder was Jeonju;
 - there was no evidence of dumping
 - UPM's supply under the contract was limited to [REDACTED]% of the purchaser's annual requirements.
- d. In relation to the [REDACTED] request for tender in August 2013:
 - the successful underbidders were NSIA and an Indonesian exporter;
 - applying the Commission's own dumping analysis for the investigation period, UPM's unsuccessful tender price of [REDACTED] (copy attached), was an undumped price;
 - NSIA's attempt in its application³ to attribute its failure to regain the exclusive supplier status, that it had last enjoyed in 2008, to dumped imports is patently untenable;
 - Indonesian exports have not been alleged by NSIA to be dumped.
- e. In relation to the [REDACTED] request for tender in December 2013 for the supply of newsprint from 1 July 2014:
 - the underbidders were NSIA and Jeonju;
 - NSIA's bid was unsuccessful;
 - the successful underbidder was Jeonju;
 - UPM's successful bid was limited to supply of [REDACTED]% of the purchaser's future annual requirements;
 - there is no evidence that exports commencing in July 2014 have been dumped.

OBJECTIVE EXAMINATION

9. There is no evidence that UPM's price response to any of the above three requests for tender caused material injury to NSIA. The applicant itself acknowledges that it did not suffer material injury as a result of its lack of success in the 2010 tender. If the applicant suffered material injury because of its limited success in the second tender, in which

³ Public Record: document #001, p.26-27

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UPM's bid at an undumped price was unsuccessful, it can only have been caused by exports from Indonesia that are not alleged to have been dumped. Exports by the successful underbidder for the bulk of the third tender have been found not to be dumped by the Commission and there is no evidence that future exports under the tender will be dumped.

10. The remaining Australian newsprint market consists of *ad hoc* sales to smaller purchasers and contract sales to the remaining two, east coast based, newspaper publishers. The Commission concedes that *ad hoc* sales are a ...*relatively minor market segment*...and a minor part of the applicant's business and consequently a negligible influence on issues of material injury⁴. However in the case of long term contract sales to News Corp and Fairfax (where NSIA is an incumbent supplier⁵) the Commission has advanced the extraordinary claim that NSIA's contract prices with the two publishers have been suppressed as a result of UPM's delivered prices to a West Australian publisher to a degree that has resulted in material injury. Unsurprisingly, no evidence is advanced in support of this claim and no explanation is advanced as to how such market influence could be exercised by a seller whose prices over the whole injury investigation period have been undercut by NSIA and other exporters who, collectively, enjoy a market share of over 90%.
11. The claim is further eroded by consideration of the detailed evidence before the Commission relating to the News Limited contract. That publisher accounts for about 70% of the newsprint contract market and 90% of its requirements are provided by NSIA and the remainder by Jeonju.⁶ No evidence or objective examination or persuasive explanation is advanced as to why a purchaser with News Limited's market power would want to leverage UPM's higher prices to WAN (even in the unlikely event that it had market intelligence on those prices) to get a better deal from NSIA when greater leverage was already available based on Jeongju's prices. Similarly NSIA's focus in responding to this tender would have been to compete with the reported prices of its direct competitor, Jeonju, not on UPM's irrelevant higher prices to a West Australian publisher.
12. Assuredly, the application of the principles of positive evidence and objective examination or a modicum of rationality played no part in the development of these claims and they should be dismissed out of hand. Consequently we submit that the evidence before the Commission does not provide any grounds on which it can be asserted that any alleged dumping of UPM's exports has caused any material injury to NSIA.

OTHER FACTORS

13. Our submission of 21 January 2015 deals with a number of 'other factors' influencing the performance of the Australian industry. In the light of the Commission's observations in the SEF relating to the demand for recycled paper this issue requires further comment.

⁴ SEF: p.39

⁵ Public Record: document #001, p.26

⁶ *ibid.*, document #016, p.018

14. We note that most of those observations are contained in section 3 of the SEF dealing with like goods. In our view this is not the appropriate context for examination of this issue as we do not believe that there is any substantive argument to support a contention that newsprint made from pulp and newsprint manufactured from recycled paper are not like goods. The issue, however, is very germane to any consideration in the present matter of material injury, its causes and its remedies.
15. WAN's position on the issue is very clear. It has used newsprint made from a high proportion of recycled paper exclusively since 1 July 2011 and it intends to continue to do so. This policy is based on the company's commercial judgement that it is advantageous from the perspective of both its shareholders and readers whether or not it is the lowest priced manufacturing input. It is not for the Commission, to question this judgement on the basis of its assessment of which raw material is 'superior'⁷. It is not qualified to make such an assessment and can only observe that there may be differences of opinion between publishers. Nor is it relevant to point to the use by other publishers of newsprint manufactured from pulp as manufacturing generally is littered with examples of differing manufacturing inputs being used to produce similar or substitutable end products.
16. Implementation of WAN's policy necessarily involves sourcing from overseas and since 2010 the company has purchased the bulk of its requirements from Jeonju, the cheapest source of newsprint made from recycled paper. By awarding contracts to UPM for the supply of a small proportion of its requirements, WAN has adopted the same policy of dual sourcing as its fellow Australian publishers⁸ and most Australian manufacturers in industries in which local supply of a major raw material is only available from a local monopoly producer.
17. The Commission itself concedes that dual sourcing has caused injury to NSIA but has failed to identify its significance in the case of WAN's choice of UPM as an auxiliary supply source. WAN's approach underscores UPM's peripheral role in the Australian newsprint market and its complete lack of influence on pricing in that market.
18. WAN's policy means that, for so long as NSIA is unwilling or unable to produce newsprint from a high proportion of recycled paper, it will be forced to continue to source exclusively from overseas. Thus the limitation on NSIA's productive capability is an additional and continuing cause of a degree of injury that must not be attributed to dumped exports. Further, the remedial purpose of the Dumping Duty Act to remove any material injury caused by dumped imports would not be achieved by publishing a dumping duty notice applying to newsprint from France. This conclusion is re-inforced by the application of the Commission's *but for* analytical method.⁹ In the absence of allegedly dumped imports from France the economic performance of NSIA would be unchanged. The only change would be that UPM's exports would be replaced by exports from another overseas source.

⁷ SEF: p.45

⁸ *id.*

⁹ Dumping & Subsidy Manual: p.123

- 19 The factors other than allegedly dumped prices impacting negatively on the economic performance of NSIA can be summarised as follows:
- a. market contraction of 40%;
 - b. undumped Korean exports of around 8.5% market share;
 - c. dumped exports from Korea of about 1.0% market share;
 - d. uninvestigated exports (excluding Indonesia and NZ) of about 1.5% market share;
 - e. Indonesian exports totalling about 3% market share;
 - f. New Zealand exports of about 2.5% market share;
 - g. dual sourcing;
 - h. NSIA's dumping of exports;
 - i. inability to supply newsprint made from recycled paper;
20. Items a. to g. are acknowledged by the Commission to be factors contributing to deterioration in NSIA's performance. In relation to item h. the Commission, unaccountably, *...has not attributed any injury suffered by NSIA to its export activity*¹⁰ ...despite the fact that export sales at a loss had increased by about 900% over four years.¹¹ Clearly the scope of those losses must be taken account of in any objective assessment of the factors contributing to deterioration in NSIA's economic performance.
21. The Commission's exclusion of the unavailability from local production of high percentage recycled content newsprint from any consideration as a contributing factor to injury is contradicted by undisputed history. In 2010/11 NSIA lost its preferred supplier status in relation to WAN's annual requirements of up to around [REDACTED] tonnes of newsprint per year. The reason was not price but the inability to meet product requirements. The result for NSIA was obviously injurious, and materially so. Material injury from that cause continued for a further three years until the same scenario was re-enacted in 2014 with the same outcome due to the same causative factor and not because of price. These facts are an essential part of the injury matrix.
22. In the presence of a range of 'other factors' the correct approach to establishing whether allegedly dumped imports have, of themselves, caused injury that is material is to evaluate the impact of all the other factors to determine whether any remaining element of injury could be properly described as material. In the present case there is a strong case to argue that market contraction of itself crowds out any other factor as a cause of material injury especially in circumstances where, with an expanding market share of

¹⁰ SEF: p.46

¹¹ Public Record: document 001, p.16

80%, it is questionable whether the detriment suffered by NSIA from all sources constitutes material injury in the first place. When the other pressure factors listed above are added to the irreversible market contraction it becomes impossible to assert that any remaining impact on the local industry by UPM as a price taking auxiliary presence in the market could possibly be described as material.

THE COMMISSION'S INJURY & CAUSATION ANALYSIS

23. Some observations on the above analysis are called for.

market share of imports from France doubled¹²

It has not.

The Commission has established that Jeonju, UPM and NSIA compete for the same requests for tender...¹³

UPM has only ever responded to two successive requests for tender from [REDACTED] and one from [REDACTED]. UPM has never tendered to the other east coast publishers that account for the bulk of the market and with whom NSIA enjoys incumbent status.

The decline in sales volume by NSIA was much greater than the decline of imports from UPM¹⁴

It was not. On the applicant's own figures NSIA's sales volume declined by about 16% while UPM's sales volume reduced by almost [REDACTED] %.

The Commission considers that in the absence of dumping, NSIA would have been in a stronger position to achieve sales to WAN because the UPM price offer would have been less competitive.¹⁵

NSIA's position would have been unaltered because WAN has stated unequivocally that it will only purchase newsprint made from a high proportion of recycled material. If WAN had not accepted UPM's offer it would simply have purchased additional material from Jeonju or an alternative price setting overseas source.

It may be expected that in a declining market, injury for the Australian industry in terms of volume effects would be reflected as a greater decline in market share relative to

¹² SEF: p.34

¹³ *ibid.*: p.39

¹⁴ *ibid.*, p.40

¹⁵ *id.*

*dumped imports. Further it may be expected that dumped imports would also gain a disproportionate increase in market share relative to other imports.*¹⁶

The expectations were not realised. There was in fact an increase in the Australian industry's market share and, absent the NZ imports controlled by the applicant, the relative market share of allegedly dumped imports declined.

*Newspaper publishers negotiate proposals for the remaining portion of their needs [spot purchases] with NSIA as well as with newsprint exporters. Despite this being a relatively small part of the total market, these negotiations expose NSIA to competition from exporters and impact the market by informing it of prevailing newsprint prices, including those that pertain to goods exported from France at dumped prices.*¹⁷

UPM never participated in any such negotiations and consequently the alleged impact on the market never occurred. The focus of pricing intelligence was, and continues to be, on the price setters – NSIA and Jeonju.

*In respect of another newspaper publisher, NSIA has submitted that its proposal was unsuccessful and that the only issue was the final price.*¹⁸

If the newspaper publisher was WAN this submission is incorrect. NSIA was the underbidder in response to the 2013/14 request for tender. The reason for NSIA's lack of success was not price but its inability to supply newsprint made from a high proportion of recycled material.

*The Commission has confirmed that NSIA secured supply at reduced prices and reduced volumes in the renegotiation of existing agreements [with certain major customers].*¹⁹

The customers were News Ltd and Fairfax and UPM did not bid for the business of either customer.

*It is apparent that quotations that were being provided in these negotiation processes [with newspaper publishers] were prepared in the context of a market influenced by the prices of imported newsprint.*²⁰

The influential prices were obviously those of underbidders such as Jeonju and Indonesian exporters. UPM was not a participant in two of the negotiation processes, it was unsuccessful against NSIA in a third and its acceptance by WAN as an auxiliary

¹⁶ id.

¹⁷ ibid., p.41

¹⁸ id.

¹⁹ id.

²⁰ id.

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supplier in the remaining process was based on the capability to supply newsprint manufactured from 100% recycled paper.

*The Commission has also established that NSIA has experienced reduced sales volume as a result of dumping from France.*²¹

The claim is incorrect. The only transference of sales volumes occurred in 2010 when UPM achieved status as an auxiliary supplier to WAN on the basis of its ability to meet specification requirements. There is no evidence that UPM's quotation, which was higher than those of NSIA and Jeonju, involved export prices from France lower than then normal values.

*The price suppression caused by dumping...*²²

No explanation, analysis or supporting evidence has been or can be advanced for this statement.

CONCLUSION

24. For all the reasons set out above we submit that the Commissioner must terminate the investigation forthwith into newsprint from France under s269TDA(13) of the *Customs Act 1901* (Cth).

Yours sincerely

MINTER ELLISON



John Cosgrave
Director, Trade Measures

Contact:	John Cosgrave Direct phone +61 2 6225 3781 Fax: +61 2 6225 1781
E.mail:	john.cosgrave@minterellison.com
Partner Responsible:	Michael Brennan Direct phone: +61 2 6225 3043
Our reference:	MRB:JPC 26-7715595

²¹ *ibid.*, p.43

²² *id.*

