MinterEllison

24 August 2016

By Email

The Director
Operations 2
Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3008

Dear Director

Invalidity of Inquiry into the alleged Dumping and Subsidisation of A4 Copy Paper from the People's Republic of China (PRC)

We act for UPM (China Co., Ltd), UPM Asia Pacific Pte Ltd and UPM Kymmene Pty Ltd who are toll producers, exporters and suppliers of A-4 Copy Paper manufactured in the PRC for the Australian market and interested parties in the above inquiry.

The purpose of this submission is to request that the Commissioner:

- find that his decision to conduct the above inquiry under s.269TC(4) of the *Customs Act 1901* (Cth) (**Act**) was void *ab initio*;
- revoke that decision;[1]
- revoke the notice published under s.269TC(4) of the Act;
- decide under s. 269TC(1)(a) of the Act to reject the application of Paper Australia Pty Ltd (**Australian Paper**) referred to in Anti-Dumping Notice (**ADN**) No. 2016/33; and
- publish an ADN announcing that the inquiry purported to have been initiated on 12 April 2016 has been abandoned.

The reasons for these requests are as follows:

1. A form approved by the Commissioner for the purpose s of s.269TB of the Act and published as Form B108 purports to permit an applicant for the publication of a dumping

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duty notice and a countervailing duty notice to make a combined application for the notices in the one form. The purported permission is contrary to the provisions of Part XVB of the Act and consequently the Commissioner has exceeded his power to approve a form for the purposes of s.269TB.

2. On 8 March 2016 Australian Paper, in a single application utilising the unlawful prescribed form, requested the publication of dumping duty and countervailing duty notices in respect of A4 Copy Paper exported from the PRC. The application was invalid because Division 2 of Part XVB of the Act requires separate applications to be made for the publication of such notices.

3. It is incontestable that for the purposes of the Act and the *Dumping Duty Act* that a dumping duty notice under s.269TG and a countervailing duty notice under s.269TJ are separate notices and, with one exception that we will consider later, are treated separately throughout the legislation. In the provisions of Division 2 dealing with the making of an application for a notice, the consideration of such an application, the rejection or acceptance of such an application, the grounds for termination of an inquiry and the making of a report, the statutory requirement, in all these circumstances, is to deal with one ('an') application. Consistent with this requirement, in every instance in which a dumping duty notice and a countervailing duty notice are referred to together, they are joined by the disjunctive 'or'.

4. While there are examples of Courts concluding that, because of manifest error or a particular set of circumstances, 'or' should be construed conjunctively, no such circumstances exist in the Act and 'or' must be given its plain and ordinary disjunctive meaning[2]. Additional support for this interpretation can be found in both the repetition of the disjunctive approach throughout Division 2 and the overall context of Part XVB and the Dumping Duty Act strongly support the view that the ordinary disjunctive meaning of 'or' must prevail. Consequently dumping and countervailing applications must be separately made and assessed and, if accepted, must be considered and, as the particular case requires, terminated or reported on separately by the Commissioner. The Minister is then obliged to consider dumping and countervailing reports under the separate provisions of s.269TG and s.269TJ respectively and publish separate notices under those two sections.

5. The inclusion in the Act of s.269TJA that authorises joint consideration by the Minister of dumping and countervailing recommendations in a particular circumstance, reinforces the proposition that in all other respects dumping and countervailing inquiries must be conducted separately. The section addresses the circumstance of separate, concurrent (in the temporal sense) dumping and countervailing inquiries and neutralises the problem

[2] *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 626 per Dixon J at 647,

that the Minister would otherwise face of distinguishing the injurious effects of dumping and subsidisation by authorising consideration of the combined effect of the two factors. In addition the section authorises the Minister, after considering separate inquiries conducted in the same timeframe and involving the same goods, to publish simultaneously notices under both s.269TG and s.269TJ, subject to compliance with the lesser duty rule enunciated in s.8(5BA) of the Dumping Duty Act.

6. Absent s.269TJA the impact of dumping or subsidisation on the performance of an Australian industry would have to be undertaken separately and, absent the application of s.8(5BA) of the Dumping Duty Act, the potential would exist for the sum of the export price of particular goods and dumping and countervailing duties to exceed the non-injurious price of those goods. It is only in the specific and very limited circumstances provided for in s.269TJA that the Act authorises the joint consideration of dumping and subsidisation issues. For all other purposes concerning the two issues the Act clearly requires separate applications, separate consideration, separate termination, separate reporting and separate final decisions.

For these reasons we request the early publication by the Commissioner of an ADN announcing that the inquiry purported to have been initiated on 12 April 2016 has been abandoned.

Yours faithfully
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Director, Trade Measures

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