MinterEllison

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BY EMAIL: operations2@adcommission.gov.au

Director - Operations 2
Anti-Dumping Commission
GPO Box 1632
Melbourne VIC 3001
AUSTRALIA

Dear Sir

A4 COPY PAPER FROM CHINA – STATEMENT OF ESSENTIAL FACTS (SEF) No. 341

INTRODUCTION

1. We represent UPM Asia Pacific Pte Ltd (**UPM AP**), UPM China Co., Ltd (**UPM China**) and UPM Kymmene Pty Ltd (**UPM Kymmene**) [collectively **UPM**] in relation to the above matter.

2. In the first instance we contend that the investigation should be abandoned because of invalidity. In the event it is not abandoned on that ground, we submit that the Commissioner must terminate the investigation under s.269TDA(1) in so far as it relates to our client on the ground that the properly assessed dumping margin is negligible.

INVALIDITY

3. In section 2.2 of the SEF the Commission examines and rejects a submission by UPM of 24 August 2016 made in the following terms:

> *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;*
> - *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.*

4. The form of that request reflects the terms of a decision of the Commissioner in another unrelated matter, published in ADN 2015/140, to revoke an earlier decision, made in error, to accept an application for an anti-circumvention inquiry. The substance of UPM's request concerned the proper interpretation of Division 2 of Part XVB of the *Customs Act 1901 (Cth)* (**Act**) and is set out in paragraphs 2 to 6 of the submission.

5. The Commission's response is limited to the issue of the lawfulness of Form B108 and it rejects UPM's submission on that issue on the ground that there is no express or explicit requirement in the Act to use separate forms for applications for dumping and countervailing duty notices. We note, however, that as a matter of construction s.269TB(1)(c) of the Act requires an applicant for …*a dumping duty notice or a countervailing duty notice* [emphasis added] … to request the Minister to publish 'that notice'. We also note by way of further example that the grounds for termination of an investigation in s269TDA(1) and (2) depend on establishing that …*application is made for a dumping duty notice* … or…*application is made for a countervailing duty notice*. In our view those requirements establish an obligation to lodge separate applications and as Form B108 is incompatible with that requirement, the Commissioner has exceeded his authority under s.269TB(4)(b).

6. Without resiling in any way from that element of our submission, even if the lawfulness of the form and the applicant's use of that form is put to one side, we maintain our view that the Commissioner's actions following receipt of the application were unlawful for the reasons set out in our earlier submission OF 24 August 2016:

> 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[1]. 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.

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

> 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.

7. The consideration of an application by the Commissioner under s.269TC requires him to establish whether or not there appear to be reasonable grounds for the publication of *…a dumping duty notice or a countervailing duty notice* - a phrase that is used on twelve occasions in Division 2 of Part XVB. Subsection (4) of that section also relies on the disjunctive 'or' when listing the Commissioner's obligations in respect of the contents of an initiation notice and in paragraph (c) clearly implies that an initiation notice is required in relation to each duty notice applied for by the Australian industry.

8. The requirement for separate consideration of applications for dumping and countervailing duty notices is maintained throughout Division 2 resulting in requirements for differentiated assessment of material injury and causation [s.269TEA(1)(d)], differentiated application of cumulative assessments by the Commissioner [s.269TDA(14A)] and separate reports to the Minister [s.269TEA]. It is only in Division 3 of the Act dealing with the Minister's consideration of dumping and subsidisation matters that joint assessment of those matters is countenanced in a particular limited circumstance. Our earlier submission explained the context.

> 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 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.

9. For these reasons we repeat our request set out in paragraph 3 above that the Commissioner publish a notice announcing the abandonment of the current inquiry.

EXPORT PRICE

10. The preliminary assessment by the Commission, in section 6.8.2 of the SEF, of the export prices applying to UPM's exports to Australian customers contains a fundamental contradiction. On the one hand the Commission asserts that because …*the goods were not purchased by the importers from the exporter*[2]… export prices have been determined under s.269TAB(1)(c) but on the other it claims that on the basis of the application of s.269TAA(2) transactions between UPM and Fuji Xerox Australia (**FXA**) were not arms length[3] despite the fact that a precondition for the application of that subsection is that the goods …*are purchased by the importer from the exporter*[4].

11. The summary assessment does not specifically identify the exporter or the importer, although elsewhere in the SEF the nominated exporter in dumping margin tables is UPM China and in subsidy margin tables it is UPM. The views of the Commission expressed over the course of the investigation on the key factors determining the assessment of export price - the identity of the exporter and importer and the issue of arms length transactions - vary significantly.

12. The UPM Kymmene importer verification report states that:

> *Subject to further inquiries, we are satisfied that UPM AP (collectively with UPM China) can be considered to be the exporter of A4 copy paper to Australia. UPM China manufacture the goods and gave up the goods in exchange for consideration paid by the customers in Australia to whom the goods were delivered*[5].

13. In addition to resurrecting the discredited proposition that an 'exporter' can consist of more than one legal entity, the assertion that UPM China relinquished the goods in exchange for payment from Australian customers is false. UPM China had no contractual relationships with Australian purchasers, it relinquished the goods on instructions from UPM AP and received consideration only from UPM AP in the form of a fee for processing manufacturing inputs owned overwhelmingly by the latter entity.

14. The same report concludes that UPM AP is the importer of the goods and …*that import transactions between UPM and its customers are at arms length in terms of s.269TAA*[6]. It also concludes, paradoxically in the light of the identification of the 'exporter(s)' and 'importer', that the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter[7].

15. The UPM Group verification report found, without explanation, that the UPM Group was the exporter and the Australian customers were the importers[8]. The

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[2] SEF, p.36
[3] ibid. p.38
[4] *Customs Act*: s.269TAA(2)(a)
[5] EPR 341 – No.067, p.7
[6] ibid. p.8
[7] ibid. p.10
[8] EPR 341 - No.089, p.8

report also found that …*all sales of A4 copy paper exported to Australia by UPM during the investigation period were arms length transactions*[9].

16. The FXA importer verification report found, without explanation but subject to further inquiries, that UPM China was the exporter of the goods and that FXA was the importer[10]. The report makes no finding as to whether UPM's sales to FXA were, in actuality, at arms length but it did find that because FXA sold the imported goods at a loss that the sales by UPM to FXA should not be 'treated' as arms length[11]. The report then recommends, subject to further inquiries, that UPM's export price to FXA should be established under s.269TAB(1)(b) of the Act[12].

17. In the light of the conflicting views expressed by the Commission in relevant verification reports and the absence of any detailed analysis in the SEF, it is necessary to consider the fundamental factors determining the export price of any goods exported to Australia. Before doing so however, it is also necessary to establish the facts surrounding the sales transaction process and identify the misconstructions of that process contained in the SEF.

The Sales Transaction

18. In section 6.8.2 of the SEF the Commission asserts that:

> *UPM sold A4 copy paper to Australian customers through two distribution channels during the investigation period, through UPM-Kymmene and direct to Fuji Xerox*[13].

19. To the extent that 'UPM' is intended to refer to more than one legal entity it is clearly wrong. The Commission's observation relates to the sale of the goods and there can be only one seller. All the relevant verified material available to the Commission demonstrates that it was UPM AP that sold the goods to Australian customers and furthermore, as owner, it was the only entity that had the legal capacity to sell the goods. In addition the sales to Australia involved only one distribution channel. While the sales involved two different incoterms, all other contractual terms to all Australian customers were identical. In particular those terms negotiated with and applying to all customers, are set out on the reverse of sales invoices (please see confidential Attachment A) [redacted] [Confidential Sales Terms] Sales to those customers, including FXA, were made directly by UPM AP and, as the Commission has acknowledged elsewhere, UPM Kymmene was merely a sales agent.

20. The SEF then claims that …[A]*ll export sales were made through a related trader in Singapore*[14] …To the extent that this claim implies that sales to Australian

[9] id.
[10] EPR 341 – No.106, p.6
[11] id.
[12] ibid., p.8
[13] SEF, p 36
[14] id.

customers were made by UPM China it is patently false as it ignores the fact that at no time did that company have ownership, beneficial or otherwise, of the goods and is also contradicted by all relevant verified documentary evidence in relation to the sales. Reference to UPM AP as a 'trader' is disingenuous and presumably designed to create the false impression that the company is an intermediary in the sense used in *Celpav*[15], a case regularly cited by the Commission that involved a totally different factual situation to the present matter. UPM AP purchases and provides major imported manufacturing inputs to its wholly owned subsidiary UPM China for the contract manufacture of paper products that it exports to markets in Asia and the Middle East including Australia. It is emphatically not a trader or intermediary but a principal that commissions the manufacture of A4 copy paper and sells it as owner to unrelated Australian purchasers.

21. Each sales transaction involves only two principals – UPM AP as the vendor and the Australian customer as the purchaser.

Identifying the exporter and importer – the Commission's views

22. The various proposals by the Commission over the course of the inquiry concerning the identity of the importer encompass UPM China and UPM AP collectively and UPM China or UPM AP separately. The notion that Australian law allows two or more corporate entities to be identified collectively as the exporter in Part XVB of the Act has been comprehensively discredited in Report No. 34 of the Anti-Dumping Review Panel[16] (**Panel**). The essence of the Panel's decision is not confined to the specifics of the case before it but is based on the underlying legal principle that … *it is only in very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored*[17]. The Panel found no evidence of the existence of such circumstances in Part XVB of the Act and consequently the exporter must be a single legal entity.

23. Characterising UPM China as the exporter of A4 copy paper from China is contrary to the Commission's own policy and practice. The company was not a principal in the sales transaction process and it did not meet the requirement set out in the Dumping and Subsidy Manual[18] that the exporter is a person who owns or who has previously owned the goods. By contrast UPM AP is the owner of the goods at all material times. The company receives orders for the goods from the Australian customer, confirms those orders, commissions the manufacture of the goods, prepares the commercial invoice as vendor, provides all necessary services to the Australian customer through its sales agent UPM Kymmene and receives payment for the goods. As we shall see below, the Commission's proposed approach to the assessment of an export price for sales to FXA, that is leveraged off a treatment of those sales as not being at arms

[15] Companhia Votorantium de Celluse e Papel v Anti-Dumping Authority & Ors 1996 FCA 1048
[16] *Steel Reinforcing Bar exported from the Republic of Korea, Singapore, Spain and Taiwan*
[17] ibid at [62]
[18] p. 27

length, can only be contemplated if UPM AP is acknowledged as the exporter and FXA is identified as the importer.

24. On the question of identifying the importer, Section 269 T of the Act defines that entity as the beneficial owner of the goods at the time of their arrival within the limits of an Australian port. Identification of the beneficial owner in the present matter involves a choice between UPM AP and the Australian customer and the exercise of that choice determines the basis for assessment of export price under s.269TAB. In the case of sales to Australian customers other than FXA the outcome from the application of a different basis of assessment is academic. If UPM AP is both the exporter and the importer, export price must ascertained under s269TAB(1)(c), as presently proposed in the SEF, and is an amount equal to the sales prices from UPM AP less overseas freight and insurance. If UPM AP is the exporter and the Australian customers are the importers the export prices must be established under s.269TAB(1)(a) but the calculation and amount of the price remains the same.

25. In the case of sales to FXA the Commission has made a preliminary determination that FXA has onsold the goods at a loss to unassociated persons, that those losses are not recoverable within a reasonable period of time and that consequently by applying s.269TAA(2) the Minister should exercise his discretion to form an opinion that the sale by UPM AP to FXA is not an arms length transaction[19]. While not stated specifically, these findings indicate that the preliminary assessment of export price in the SEF in relation to sales to FXA has been made pursuant to s.269TAB(1)(b). Considering that the application of that paragraph and s.269TAA(2) both require a finding that:

> *the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter*

the calculation in PAD 341A and the SEF of the export price for sales to FXA is only consistent with a finding that UPM AP is the exporter and FXA is the importer. By analogy it also means that the export price in relation to sales to UPM's other Australian customers should be calculated under s.269TAB(1)(a).

26. However this identification of the exporter and importer, which is essential for the application to sales to FXA of s.269TAA(2), is contradicted in the following statement in the SEF:

> *All export sales were made through a related trader in Singapore, therefore the goods were not purchased by the importers from the exporter. For this reason export prices could not be established under subsection 269TAB(1)(a) or 269TAB(1)(b) of the Act. Export prices have been determined in accordance with subsection 269TAB(1)(c) having regard to all the circumstances of the exportation*[20].

27. On the basis of a reasonable expectation that the Commission's final report to the Minister will attempt to eliminate the confusion and contradictions attaching to its preliminary proposals concerning our client's exports to Australia, we note

[19] SEF, p. 36 &38
[20] SEF, p.36

the potential for a denial of natural justice if no opportunity is provided for comment on amended proposals. Consequently we formally request that such an opportunity be provided to our client.

Sales Dumping

28. Before considering the proper assessment of export price in the case of sales by UPM AP to FXA it is necessary to consider the international obligations, domestic law and jurisprudence concerning the practice known as sales dumping or hidden dumping.

29. A supplementary note to Article VI of GATT 1947[21] reads

> *1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.*

30. Article 2.3 of the Anti-Dumping Agreement provides:

> *In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.*

31. Both of these provisions provide a methodology for calculating export price in circumstances where an importer that is associated with an exporter sells the imported goods at a loss. Relationships between entities that make them 'associates of each other' are specified in s269TAA(4). UPM AP and FXA are not associates for the purposes of Part XVB of the Act.

32. Article VI of GATT does not provide an alternative method of establishing export price in circumstances where an importer that sells at a loss is not associated with the exporter and while Article 2.3 countenances the use of the deductive method in cases of a compensatory arrangement, it is clearly referring to an actual compensatory arrangement, not one merely imputed on the basis of an assumptive statutory discretion. The prohibition in Article V of the Anti-Dumping Agreement on proceeding to a final finding of dumping on the basis of …[S]*imple assertion unsubstantiated by relevant evidence* …is obviously inconsistent with proceeding by way of an assumption unsupported by positive evidence.

33. The present terms of s.269TAA(2) were introduced into the Act in 1984[22]:

> *(2) Without limiting the generality of subsection (1), where:*

[21] Annex 1, Ad Article VI
[22] *Customs Tariff (Anti-Dumping) Amendment Act 1984* No.1 of 1984

> *(a) goods are exported to Australia otherwise than by the importer and are purchased by the importer from the exporter (whether before or after exportation) for a particular price; and*
> *(b) the Minister is satisfied that the importer, whether directly or through an associate or associates, sells those goods in Australia (whether in the condition in which they were imported or otherwise) at a loss;*
>
> *the Minister may, for the purposes of paragraph (1)(c), treat the sale of those goods at a loss as indicating that the importer or an associate of the importer will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or a part of the price.*

34. The accompanying explanatory memorandum stated that the proposed subsection provided …*that the Minister may deal with sales dumping or i.e. hidden dumping arrangements irrespective of whether the parties are associates.* No explanation was provided by the Minister for the attempted extension of export price calculation methodology beyond that authorised by GATT and the Anti-Dumping Agreement.

35. The issue of sales dumping was considered by the Federal Court in *Powerlift (Nissan) P/L & Anor v Minister of State for Small Business, Construction and Customs & Ors* [1993]FCA 38 at 70*:*

> *The most normal case of sales dumping will occur where the goods under review have not entered Australia at a price less than the normal value in the country of export, but have thereafter been "dumped" by being sold at a loss by the importer, under an arrangement that the exporter will reimburse the importer for that loss. The significance of s.269TAA(2) is that it permits the Minister, in effect, to assume the existence of a reimbursement agreement, where a loss arises. <u>It does not make it mandatory for the Minister to do so</u>.* [Emphasis added]

36. Presumably to avoid mention of any judicial observation inconsistent with its proposed automatic application of s.269TAA(2) and to avoid the need to consider the factors relevant to the possible adoption of an assumption and the possible formation of an opinion, the Commission excluded the underlined section of the quotation from the SEF[23].

37. Leaving aside, for the moment, issues associated with Australia's obligation to act in a manner consistent with its international commitments, s.269TAA and s.269TAB, in combination, provide 'remedies' for sales dumping in two situations. The first situation was described in *Powerlift* [at 71] in the following terms:

> *At least where the decision-maker is unable to avail him or herself of s 269TAA(2), the determination of whether sales dumping has occurred as part of a step in the process of determining an ultimate export price involves a question of judgment. No legal prescription binds the decision-maker to assume reimbursement and thereby disregard losses. Given a finding of fact that there is a likelihood of reimbursement, compensation or benefit, he may disregard losses. Such a likelihood may often, if not usually, be inferred.*

38. This observation confirms that, absent circumstances in which s.269TAA(2) applies, it is not open to the Minister to assume reimbursement and the existence of a non-arms length transaction. Before the Minister can form an opinion

[23] SEF, p.51

under s.269TAA(1)(c) that a transaction is not arms length he must be satisfied that it is more likely than not (balance of probabilities) that the buyer will receive a reimbursement that offsets a loss incurred on the resale of the goods. If the Minister, on reasonable grounds, is able to form such an opinion and provided the buyer is an importer purchasing from an exporter and selling to an unassociated party, export price can be assessed under s.269TAB(1)(b) on the basis of the buyer's selling price less the deductions set out in s.269TAB(2) specifically for that purpose.

39. However in the present case, as there is absolutely no evidence that there is any 'likelihood' that FXA or its associates will in fact receive a reimbursement from UPM AP or any other member of the UPM group of companies, there are no grounds on which the Minister may 'disregard losses'.

40. The second sales dumping situation addressed in the legislation is that described in s.269TAA(2) of the Act and linked to a formation by the Minister of an opinion under s.269TAA(1)(c). The subsection, as the Commission observes, serves …*to reduce the evidentiary burden faced by the Commission in investigating arms length transactions*[24] …but, as the Commission fails to observe, it does not eliminate that burden. The Commission also claims that the subsection is a deeming provision analogous to s.269TAA(4) and s.269TAA(1). However, there is no discretion in the identification of 'associates' in subsection (4) and paragraph (1)(c), which requires the Minister to exercise a discretion, is not an automatic deeming provision.

Consequences of identification of the exporter and importer

41. As stated above the identification of exporter and importer in relation to the export price applying in sales to Australian customers other than FXA is academic. By contrast, in relation to sales to FXA, it is a central issue. There are four possible permutations in the identification process:

	Exporter	Importer
1.	UPM China	UPM AP
2.	UPM China	FXA
3.	UPM AP	UPM AP
4.	UPM AP	FXA

Permutations 1 to 3 require export price to be ascertained under s.269TAB(1)(c). Permutation 4 requires export price to be determined under either s.269TAB(1)(a) or (b).

Permutations 1 – 3

42. In these three permutations there is no evidence available to the Minister on which to base an opinion that FXA, as buyer, or an associate is likely to be reimbursed for the whole or part of the price. Despite unsupported allegations over some years by the instigator of the current investigation, the Commission has never found any evidence of reimbursements. In fact the only 'evidence', as opposed to unsupported scuttlebutt, before the Commission is the sworn

[24] SEF, p.51

testimony by senior executives of UPM in 2014[25] that apart from volume rebates paid to Australian customers and disclosed to the Commission, there were no other rebates paid by any member of the UPM Group to any of UPM AP's export customers or their associates. That testimony has never been challenged.

43. Consequently the application of s.269TAB(1)(c) to these three permutations arises out of the fact that the goods were not purchased by the importer from the exporter, not because the purchase of the goods was not an arms length transaction. There is nothing in the overall construction of s.269TAA and s.269TAB, read together, to suggest that sales at a loss are a relevant consideration in any assessment of export price unless the sale of the goods by the vendor to the purchaser is not at arms length. In addition to the support provided in *Powerlift* this construction also ensures conformity with Australia's international obligations under Article VI of the GATT and Article 2.3 of the Anti-Dumping Agreement. As we have seen above, the note to the former provision limits the use of the deductive price method to transactions between associated parties and the latter requires either an association between the exporter and importer or an actual compensatory arrangement between those two parties.

44. The unequivocal emphasis in Article 2.3 on actual compensatory arrangements and the complementary substantive requirements of s.269TAA(1)(c) are examined by Lehane J in the following passage from *Nordland Papier AG v Anti- Dumping Authority* 1999 FCA 10 at [29]

> *In that Article* [Article 2.3] *there is to be found, I think, at least the genesis of par (b) and par (c) of s269TAA(1). Unless the words of par (c) clearly require another construction, authority supports the proposition that the paragraphs should be construed consistently with the terms of the international instruments: ICI Australia Operations Pty Ltd v Fraser (1991) 34 FCR 564 at 569, 570; Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority (1995) 56 FCR 406 at 417. The introductory words of the paragraph ("in the opinion of the Minister") and the words "directly or indirectly" provide, in my view, a further clue* [to the construction of the paragraph]. *What is sought to be encompassed, I think, is a series of circumstances where price, ascertained in accordance with ordinary principles, is an unreliable indicator because there is an arrangement between the parties under which price is set at a particular level but the buyer, having agreed to pay the price so established, is to receive some offsetting compensation or benefit or is (directly or indirectly) to receive reimbursement of all or some of the price. The paragraph, strikingly, is not drawn as one intended to operate mechanically having regard to the form of a transaction; it is broadly drawn and is directed to substance, the substance being derived from Art 2.3 of the Marrakesh Agreement.*

45. Further support for this emphasis on substantive requirements is derived from the requirement in s.269TAB(1)(c) that in determining the export price the Minister has …*regard to all the circumstances of the exportation.* Obviously central to those circumstances is the absence of any evidence that FXA will be reimbursed for any losses incurred on the sale of goods in Australia. Furthermore, the 'circumstances of the exportation' referred to in the paragraph

[25] EPR 225, No.046

include, but do not extend beyond, all the circumstances attaching to the purchase by FXA and the sale by UPM AP. The sale by FXA to an unassociated Australian entity at a price that the Commission has found to represent a loss is a unilateral action and forms no part of 'the circumstances of the exportation'.

46. In summary, if proceeding to determine export price under paragraph (1)(c), the Minister has no mandate to disregard any losses incurred by FXA by determining an export price based on the company's selling prices in Australia to unassociated parties.

47. We submit that any determination of export price under paragraph (1)(c) in respect of permutations 1, 2 and 3 must be based on the invoiced price from UPM AP to FXA less transport and other charges arising after exportation.

Permutation 4

48. In reaching a preliminary finding on the export price applying in sales by UPM AP to FXA the Commission does acknowledge that …*the Parliamentary Secretary has a discretion to treat a purchase or sale of goods as falling within subsection 269TAA(1)(c).*[26] It does not, however, identify, let alone analyse any of the factors relevant to the exercise of that discretion. The Commission ignores the statement in *Powerlift* that it is not mandatory to exercise the discretion and proceeds in the SEF on the basis, unlawfully in our view, that a preliminary finding of sales by FXA at a loss automatically justifies the exercise of the discretion. Such a policy is clearly at odds with the following frequently cited observation of Brennan J (as he then was) in *Re Drake and Minister for Immigration and Ethnic Affairs (Number 2) (1979)* 2 ALD 634, at 640-641:

> *[A] policy must be consistent with the statute. It must allow the Minister to take into account the relevant circumstances, it must not require to take into account irrelevant circumstances, and it must not serve a purpose foreign to the purposes for which the discretionary power was created. A policy which contravenes these criteria would be inconsistent with the statute... Also, it would be inconsistent with ss 12 and 13 of the Migration Act if the Minister's policy sought to preclude consideration of relevant arguments running counter to an adopted policy which might be reasonably advanced in particular cases... His discretion cannot be so truncated by a policy as to preclude consideration of the merits of specified classes of cases. A fetter of that kind would be objectionable, even though it were adopted by the Minister on his own initiative ... That is not to deny the lawfulness of adopting an appropriate policy which guides but does not control the making of decisions, a policy which is informative of the standards and values which the Minister usually applies. There is a discretion between an unlawful policy which creates a fetter purporting to limit the range of discretion conferred by a statute, and a lawful policy which leaves the range of discretion intact while guiding the exercise of the power.*

[26] SEF, p.38

49. The authorities require that the exercise of a discretion must be based on reasonable grounds taking into account all relevant considerations. The first relevant consideration is whether there is any evidence that FXA will, in fact, receive a reimbursement. We acknowledge that when considering a matter under s.269TAA(2) the Minister's evidentiary burden is reduced compared to that attaching to the consideration of analogous issues under s.269TAB(1)(c). It is not eliminated, however, as the Parliament expressed its empowerment of the Minister by the word 'may', not 'shall'. The evidentiary threshold is obviously a matter for judgement but it is more than zero and less than the 'likelihood' established in *Powerlift* for cases arising under s.269TAB(1)(c). An example of a situation in which the Minister might reasonably exercise his discretion is where there is uncorroborated material intimating that a reimbursement will be paid to the importer and there is no evidence indicating why the goods have been sold at a loss.

50. Linked to the first consideration is the existence of any evidence available to the Minister that provides reasons why the imported goods have been sold at a loss. The public record indicates that such evidence has been provided to the Commission on a confidential basis and further evidence on the issue may be provided in response to the SEF. Of course our client is not in a position to comment on the specific evidence that the Minister will be required to assess but given that FXA is a member of a group of companies that constitute one of the largest and most respected global suppliers of commercial copier printers in the world, it is not incompatible with legitimate, long term, profitable, whole of business plans that the company may sell A4 copy paper for a period of time at less than the purchase cost. The second consideration for the Minister, therefore, will be to assess whether the reasons advanced for, and circumstances surrounding the loss making sales provide any support for a finding that there is an indication that FXA will receive a reimbursement of part of the price.

51. The third relevant consideration is the stipulation under GATT and the Anti-Dumping Agreement that the application of the deductive export price method to perceived incidents of sales dumping is limited to situations in which the exporter and the importer are associated parties and there is evidence of actual reimbursements by the former to the latter. The regular statements by the Commissioner and the Prime Minister that Australia is committed to honouring its WTO commitments would be undermined by any decision by the Minister in this case to exercise his discretion under s.269TAA(2) and such an action would inevitably be questioned in appropriate forums on the ground of the lack of conformity of the administration of Australian domestic law with the Anti-Dumping Agreement.

52. The fourth consideration is whether s.269TAA(2) of the Act must be construed subject to the Constitution and so as not to exceed the legislative power of the Commonwealth[27]. If the Minister was to determine export price by reference to FXA's domestic price to Australian customers he would effectively be engaged

[27] *Acts Interpretation Act 1901*, section15A

in price setting. While this might be justified as an exercise of the external affairs power in those cases where the Minister's action conformed with its WTO commitments, this justification does not apply in the present matter. Consequently we submit that s.269TAA(2) must be construed in a manner that limits the operation of the Minister's discretion to circumstances in which the exporter and importer are associates and there is evidence of actual reimbursement.

53. The fifth consideration is the gross injustice that would flow from a decision of the Minister to exercise his discretion and determine an export price for transactions between UPM AP and FXA based on the latter's selling prices to unassociated parties. On the basis of the Commissioner's determination for the purposes of PAD 341A the preliminary dumping margin for exports by UPM has risen from 4% to 34.4% in circumstances where our client had absolutely no involvement in, knowledge of or potential to influence the unilateral A4 copy paper pricing policies of FXA. Obviously, if the revised dumping margin is adopted by the Minister it will effectively exclude UPM from the Australian market and severely interrupt the supply arrangements of its Australian customers. Again in the absence of even a scintilla of evidence that UPM will reimburse FXA and in the face of the sworn denials of senior UPM executives referred to above, such an outcome would be a travesty of the principles of procedural justice.

Submissions

54. Based on the above analysis of the law and facts relevant to the ascertainment of export price, we submit that UPM AP is both the exporter and importer of the goods. As UPM AP does not sell the goods at a loss, s.269TAA(2) has no application and as the goods have been exported by the importer and have not been purchased by the importer from the exporter s.269TAB(1)(a) and (b) do not apply. In establishing the export price under s.269(1)(c) the Minister, for the reasons set out in paragraphs 42 to 47 above, must base his determination on the price paid by FXA to UPM AP less post exportation expenses. We also note that this outcome would also apply even if the Minister was to identify the exporter and importer, incorrectly, as the parties listed above in permutations 1 and 2

55. In the alternative, if the Minister identifies UPM AP as the exporter and incorrectly identifies the importer as FXA, we submit that, after taking account of all relevant considerations including Australia's international obligations, there are insufficient grounds to justify the exercise of the discretion in s.269TAA(2). In these circumstances the transaction falls within the terms of s.269TAB(1)(a) – as do all other transactions between UPM AP and its Australian customers – and the export price is the price paid by FXA to UPM AP less post exportation expenses.

NORMAL VALUE ADJUSTMENT

56. In establishing the normal value for UPM's exports of A4 Copy Paper to Australia the Commission in its Confidential Attachment 2 to UPM's exporter verification report justified its upwards adjustment on account of export VAT to a statement at page 63 of the *Dumping and Subsidy Manual* that the *…Commission treats this VAT liability in export sales as having influenced the export price.* However neither s.269TAC(8) &(9) of the Act nor Article 2.4 of the *Anti-Dumping Agreement* authorise the Commission to simply 'treat' the existence of a particular export expense as a ground for making an adjustment. As the ADRP observed at paragraph 48 of Report No 28[28], (when reflecting but not referencing the comments at para 7.352 of a WTO panel in Egypt – Steel Rebar):

> *…s 269TAC(8) of the Act calls for a factual inquiry into the actual effect of the particular differential incidence of taxation on either the price paid or payable for like goods or the export price. This follows from the use of the expression "modified" and the focus in the sub-section on sales, rather than costs.*

57. In noting the similar inquiry requirements of Article 2.4 of the ADA, the ADRP also observed that … [I]*f a difference does not have a demonstrated effect, no allowance should be made in respect of it*[29]. Contradicting its statement at page 63 of the Manual, the Commission itself, as a matter of policy, adopts the same approach with its statement at page 58 that …[A]*djustments will be made if there is evidence that a particular difference affects price comparability.* It further states at page 59 that …[W]*here* [adjustments are] *based on costs it is subject to the principle that adjustments will be made only where evidence indicates that price comparability has been affected.* Such a principle would, of course, be applied by a disinterested administering authority to consideration of an adjustment whether or not it resulted in an increased dumping margin.

58. In the SEF [30] it is claimed that UPM disputes the Commission's factual findings and that our client must provide appropriate evidence in support of its claims. There is of course no dispute concerning the facts surrounding VAT applying to Chinese exports generally and all relevant details applying to UPM were provided to the Commission in a VAT report during the verification visit. The essence of our contention is that the Commission, by its own admission, did not make a …*factual inquiry into the actual effect* [if any] *of the differential incidence of taxation* …applying to UPM's domestic and export sales, nor did it canvas this issue during the verification visit, as claimed in the SEF. We also contend that to fulfil its clear obligation to undertake a factual inquiry the Commission not only does not require any further information from UPM but also has not identified any such information necessary to ensure a fair comparison, vide Article 2.4 of the Anti-Dumping Agreement. It is already in possession of all relevant, verified and accurate price and cost information necessary for an examination of the rates of return achieved by our client relative to the differential cost bases applying to domestic sales of like goods in China and export sales to Australia. Such an examination establishes conclusively that

[28] Hollow Structural Sections from Thailand
[29] ibid. paragraph 49
[30] SEF, p.37

UPM's export VAT liability has no impact on price comparability. [redacted] [redacted] [Confidential financial information]

59. We submit that the present preliminary calculation of normal value must be replaced with a revised calculation that does not include an upward adjustment for export VAT.

CURRENCY CONVERSION

60. UPM's position and all supporting detail on the issue of the rates of exchange to be applied in converting its export prices to Australia to Renminbe for the purpose of comparing those prices to normal values in China was set out in the company's exporter questionnaire response. As indicated in the SEF the issue was canvassed during the Commission's verification visit in the first week of June. At that visit UPM explained its procedures in relation to currency in detail, answered all questions and provided copies of relevant supporting material including online screenshots and Excel records.

61. The Commission did not communicate any view on the appropriate rates of exchange to use for comparison purposes until 23 August 2016 when it provided a copy of a proposed draft confidential attachment to a draft exporter visit report. That attachment expressed the Commission's preliminary view that UPM's position on exchange rates should be rejected. That view, however, was undermined by the presence in the attachment of eight errors of fact and two misconstructions of the law. These shortcomings were brought to the attention of the Commission in a confidential email of 29 September 2016 and further email exchanges with the Commission followed on the difficulties associated with the preparation of a public file version. Such a version was subsequently published in EPR 341 on 21 October 2016. The Commission did not respond to UPM's submissions until the publication of SEF 341 and even that response is confined to the incorrect claim that our client has not supplied 'appropriate evidence'.

62. At the time of the verification visit UPM explained in detail the company's procedures and practices concerning currency management in general and the application of those practices to exports to Australia in the investigation period in particular. As referred to in paragraph 60 above it also provided the verification team with material supporting the explanations. It is a simple matter of fact that in its draft Confidential Attachment 2 the Commission misconstrued UPM's currency management procedures and our email of 29 September 2016 set out the detail of the nature of the Commission's errors and re-iterated the procedures actually followed by UPM.

63. We note that in the six months since the verification visit the Commission has not identified any additional 'appropriate evidence' that it requires and we submit that there is no such evidence. Fully apprised of the correct facts surrounding UPM's currency management procedures and applying the correct construction of the relevant parts of s.269TAF of the Act, the Commission is in a position to

follow its earlier ruling in the Newsprint case and undertake the currency conversion process on the basis proposed by UPM. Confronted by such citations of precedent the Commission is prone to retreat to statements that it is not bound by its own decisions. While such statements are literally correct, they are a challenge to the manifest virtue of consistency in public administration, particularly in circumstances where the administering authority provides no explanation for the inconsistency.

64. We submit that the proper application of s.269TAF of the Act requires the Commission to recalculate normal values based on the currency conversion factors set out in its response to the exporter questionnaire.

SUBSIDISATION

65. We welcome the Commissioner's proposal to terminate the subsidy investigation in relation to UPM on the ground that the amount of any subsidy received by the company is negligible. In view of the Commissioner's proposed action the quantum of any subsidisation is academic but we take this opportunity to record our view that Program 7 – the Preferential Income Tax Program – is not countervailable on the ground that it does not confer a direct or indirect benefit in relation to the goods exported by UPM to Australia.

Yours sincerely
MINTER ELLISON

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ATTACHMENT A

[Confidential Terms and Conditions of Sales]