

MinterEllison

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BY EMAIL – <Investigations2@adcommission.gov.au>

The Director, Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601
AUSTRALIA

Dear Director

Statement of Essential Facts 551 (SEF) – A4 Copy Paper exported from China by UPM Asia Pacific Pte Ltd (UPM-AP)

We represent UPM-AP and associated UPM entities in the current review of anti-dumping measures by the Commission and make this submission in response to the SEF published on 26 March 2021.

We submit that the Commissioner's proposed recommendation applying to our client requires modification in respect of two elements of the proposed form of measures and one of the variable factors.

Form of Measures

At section 7.1 of the SEF the Commission refers to its own *Guidelines on the Application of the Forms of Dumping Duty (Guidelines)* but does not include in its consideration of the appropriate form of measures any of the disadvantages identified in the Guidelines as attaching to the setting of floor prices.

The Commission proposes ... *that the appropriate form of measures is the combination method rather than the ad valorem method, as it effectively imposes a floor price (equal to the ascertained export price) which would prevent exporters from lowering export prices to avoid the effects of the duty.* Prevention of artificial lowering of export prices is, as the Guidelines observe, already addressed by s269ZDBB(5) of the *Customs Act 1901 (Act)* and is not a reason for disregarding the *ad valorem* method. It is true that a floor price is a barrier to exporters reducing their prices below a level that is applied by reference to export prices prevailing usually at least two years ago and currently, in the case of A4 copy paper, the floor price regime is based on 2015 prices. However that regime is at odds with the principle that dumping investigations be conducted in a timely fashion and that outcomes of such investigations be based on the most recent available information.

Timeliness is particularly important when the costs and prices of the goods under consideration are heavily influenced by the variable market prices of key raw material inputs or commodities. In the present matter the price of pulp constitutes **[deleted - Confidential Cost information]** of the cost to make and sell A4 copy paper and the significant variability of that price is illustrated by Chart 6 of *EPR 551/001*. In these circumstances the position of the various interested parties regularly shifts from one of advantage to one of disadvantage and the interests of downstream industries and consumers may be materially affected. In order to avoid these shifts over the next twelve months before the Minister considers whether to

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continue measures based on further revised variable factors, we submit that the Commissioner should recommend that interim dumping duties be calculated by the adoption of the *ad valorem* method.

Currency of Variable Factors

If, however, the Minister decides to maintain the application of the combination method it must be applied in a manner consistent with the published policy of the Commission relating to the currency in which the variable factors are expressed. At page 157 of the Dumping and Subsidies Manual (**Manual**) it is clearly stated that:

The ascertained amounts will be expressed in the following currencies:

- *AEP - denominated in the currency in which the export sales are made*
- *ANV - denominated in the currency in which the domestic sales are made*
- *NIP - denominated in Australian dollars.*

We request that our client's variable factors be expressed in accordance with the Commission's stated policy.

Adjustments

In its Exporter Questionnaire Response UPM claimed that a downward adjustment to normal value for total domestic SG&A expenses was required under s269TAC(8) of the Act. In its exporter visit report the Commission rejected the claim in so far as it related to *...expenses such as general and administrative expenses that are indirect and general in nature. and added that ...there is no evidence that such expenses affect prices and pricing comparability¹.* The implication that a particular expense must affect prices draws on the wording of Article 2.4 of the Anti-Dumping Agreement dealing with the requirement to make a "fair comparison" between an export price and a normal value. That article relevantly states:

Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability

The comparable provision in PartXVB of the Act is s269TAC(8):

Where the normal value of goods exported to Australia is the price paid or payable for like goods and that price and the export price of the goods exported:

- (a) relate to sales occurring at different times; or*
- (b) are not in respect of identical goods; or*
- (c) are modified in different ways by taxes or the terms or circumstances of the sales to which they relate;*

that price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price.

On the basis of differences between the terms or circumstances of domestic and export sales, the Commission routinely makes adjustments to normal value in respect of a range of domestic and export costs without giving any consideration as to whether the cost differences affect the price comparison. Examples include inland freight, packaging, handling, warehousing and credit. This practice accords with the view expressed by the Panel in *US –*

¹ EPR 551/27 – p19

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*Stainless Steel (Korea)*² that ... *the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing.*

In the case of SG&A expenses, however, the Commission takes a contrary approach when it states at page 65 of the Manual that adjustments will not be made for:

...differences in general sales and administration expenses that relate more to the general cost of doing business and are spread across all sales of the company (or expenses such as research and development as these too are spread across all sales of the firm).

The Commission's flawed assertion that some costs are not relevant to pricing decisions does not alter the fact that whether an expense is general or specific it forms part of a fully absorbed cost to make and sell and in the case of an SG&A cost it is an integral element in the production cost formula calculated under Part XVB of the Act by the Commission for such purposes as identifying ordinary course of trade sales and constructing a normal value.

Ignoring the legal text in s269TAC(8) in favour of terms selected from Article 2.4 the Commission attempts to justify this inconsistent treatment of SG&A expenses on two grounds. Firstly it ... *considers that general expenses of this nature do not fall within the scope of the term 'differences in conditions and terms of sale' ...and secondly it advances ... the principle that adjustments will be made only where evidence indicates that price comparability has been affected...*

The first point is mere assertion and could be advanced with absurd consequences in respect of any expense, specific or general. It also ignores the text of s269TAC(8) which requires an adjustment when the domestic price and the export price ... *are modified in different ways by ... circumstances of the sales to which they relate.* There is simply no basis for asserting that some expenses form part of the circumstances of a sale and others do not.

On the issue of the impact of costs on prices and giving precedence to the application of Australian domestic law, the question is whether domestic and export sales prices are modified in different ways by the costs associated with each sale. As we have seen the Commission automatically accepts that certain costs modify prices but rejects any claim that SG&A costs also modify prices.

The relationship between the cost to produce and sell goods and the sales price of those goods is obvious. In the long term if prices do not exceed costs a business is unsustainable. This leads to the reasonable presumption, adopted by the Commission except in relation to SG&A costs, that again in the long term all costs of a product will be reflected in the prices charged for that product. The commercial imperative to make a profit means that apart from decisions or circumstances leading to a corporation temporarily operating at a loss, exceptions to the presumption are rare. In the context of anti-dumping administration the primary exception to the application of the presumption is the practice referred to as marginal cost pricing for export. The practice was a central concern for GATT contracting parties in the development of anti-dumping codes and the emphasis in Article 2.4 on pricing comparability neutralises the potential for a successful adjustment claim in relation to an expense that manifestly has not been taken into account in setting an export price

Central to the consideration of adjustments to domestic selling prices are the concepts of "fair comparison" and "due allowance". Most cases that come before the Commission entail on the one hand domestic sales that involve a multitude of customers, thousands of sales and a

² at para 6.77

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substantial and costly sales, marketing and administration infrastructure and, on the other hand, export sales involving a limited number of transactions and customers and relatively minimal SG&A expenses attributable to the exporter. In these circumstances failure by the Commission to adjust the domestic price to take account of domestic SG&A expenses could never be described as "fair" and would serve only to create a dumping margin (or an increment to a margin) where none existed. As the Appellate Body observed in US - Softwood Lumber V in relation to zeroing, the adoption by an administering authority of a methodology that must inflate dumping margins ... *cannot be described as impartial, even-handed or unbiased*...and does not satisfy the "fair comparison" requirement of Article 2.4.³

Those circumstances apply to UPM whose domestic SG&A costs, as a result of the domestic sales infrastructure referred to above, substantially exceed its export SG&A costs. In addition the Commission is aware from both the present⁴ and earlier investigations⁵ that UPM constructs its prices to fully recover all its costs, including SG&A expenses, **[deleted - Confidential Cost Recovery Information]** consequently the domestic price includes recovery of all costs including SG&A costs. Accordingly, in order to ensure that the comparison of domestic and export prices is not unfair, we submit that it is incumbent on the Minister in the present case to direct that an adjustment on account of the full amount of UPM's domestic SG&A costs be made to the domestic price to arrive at a normal value that is properly comparable with UPM's export price.

Finally we draw the Commission's attention to the fact that its current practice in relation to domestic SG&A costs conflicts with other clear requirements of s269TAC. For example, if the Commission found that a normal value for UPM could not be determined under s.269TAC(1), its application of s269(2)(c) would involve the addition to production costs and profit of all domestic SG&A costs to ensure that the constructed value equated a domestic price paid or payable for the goods. Then to ensure a proper or fair comparison of the constructed value with the export price, s269TAC(9) mandates an adjustment by the Minister of the costs that constitute the constructed value. Having determined the domestic SG&A costs for the purpose of establishing a constructed 'price', it would be unconscionable if the Minister did not make an adjustment for the difference between domestic and export SG&A expenses. Different adjustment practices depending on the normal value methodology adopted, would be insupportable

In conclusion we request that the Commissioner recommend that the Minister's adjustments to UPM's domestic price under s269TAC(8) include a downward adjustment for the full amount of UPM's domestic SG&A expenses.

Yours faithfully
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³ at para 142

⁴ UPM Exporter Questionnaire Response (OUO version) – 23 May 2020 at pp. 8, 19 and 27

⁵ eg., Duty Assessment 0110 – Exporter Questionnaire – 23 November 2017- section D-3.

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