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The Director - Investigations 3
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

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Expiry review into A4 Copy Paper exported from Brazil

Dear Director,

This submission is made on behalf of Jackaroo Paper Pty Ltd (Jackaroo) to the current expiry review into A4 copy paper exported from Brazil. Jackaroo wishes to respond to the recent submissions made on behalf of UPM Asia Pacific Pte Ltd ("UPM AP") and Paper Australia Pty Ltd ("Australian Paper").

In its submission of 9 August 2021, UPM AP highlights a critical omission in the application for continuation of measures by Australian Paper. The omission relates to Australian Paper's successful replacement of imports for the supply of A4 copy paper to [redacted], the largest retailer and reseller in the Australian market.

In its responding submission of 23 August 2021, Australian Paper disagrees that it omitted relevant information. Australian Paper points out that:

> *… the agreement for supply between OAP and its customer took place in [date] (and not signed by the parties until [date]). This did not fall within the investigation period proposed by OAP in the application (ending December 2020), nor did it take place within the subsequent period of inquiry recommended by the Commissioner in the initiation report (period ending March 2021).*
>
> *…*
>
> *UPM in its submission also fails to highlight with the Commission the relevant commencement date of the [customer] agreement for supply, which does not commence until [date] i.e. XX months after the end of OAP's proposed inquiry period, and X months after the Commission's preferred inquiry period.*

Australian Paper appears to be suggesting that the Commission's nominated inquiry period for the expiry review sets the scope of information to be gathered and assessed in determining whether recurrence of material is likely. That is, facts and information relating

to events occurring after the nominated inquiry period or in the foreseeable future, are not relevant to the determination of whether measures are no longer warranted.

Jackaroo submits that the position expressed by Australian Paper is plainly flawed and unsupported by WTO jurisprudence.

The Panel in *US — DRAMS*[1] interpreted that Article 11.2 of the WTO Anti-Dumping Agreement (AD Agreement) did not restrict a prospective examination, noting '… *that there is nothing in the text of Article 11.2 of the AD Agreement that explicitly limits a Member to a 'present' analysis, and forecloses a prospective analysis, when conducting an Article 11.2 review.'*

The Appellate Body in *US — Corrosion-Resistant Steel Sunset Review*[2] confirmed that the likelihood determination involved a prospective determination, '… *the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated*. The Appellate Body noted[3] that this prospective determination in a continuation inquiry differed to that undertaken in the original investigation:

> *In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping.*

The Panel in *US — Corrosion-Resistant Steel Sunset Review*[4] highlighted the relevance of historical data as a basis for the inherently prospective likelihood determination of Article 11.3:

> *Future 'facts' do not exist. The only type of facts that exist and that may be established with certainty and precision relate to the past and, to the extent they may be accurately recorded and evaluated, to the present. We recall that one of the fundamental goals of the Anti-Dumping Agreement as a whole is to ensure that objective determinations are made, based, to the extent possible, on facts. Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present. The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments.*

The Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews*[5] outlined the need to base a prospective likelihood determination on "positive evidence":

> *The requirements of 'positive evidence' must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they*

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[1] Panel Report, *US - DRAM from Korea*, WT/DS99/R, 1999, para 6.29, page 137.
[2] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, para 105, page 38.
[3] Ibid., para 107.
[4] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/R, para 7.279, page 69.
[5] Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, WT/DS268/AB/R, para 341, page 125.

> *involve a 'forward-looking analysis'. Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on 'positive evidence'.*

Importantly, the Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews*[6] confirmed that there was no prescribed time-frame for likelihood of continuation or recurrence of injury, and agreed with the Panel '… *that an assessment regarding whether injury is likely to recur that focuses 'too far in the future would be highly speculative', and that it might be very difficult to justify such an assessment. However, like the Panel, we have no reason to believe that the standard of a 'reasonably foreseeable time' set out in the United States statute is inconsistent with the requirements of Article 11.3.*'

The Appellate Body rejected the argument that the requirement in Article 3.7, for threat of material injury to be 'imminent', should be imported into Article 11.3 for limiting to the time-frame within which injury must be determined to continue or recur. The Appellate Body[7] considered that "*sunset reviews are not subject to the detailed disciplines of Article 3, which include the specific requirement of Article 3.7*".

Finally, the Appellate Body[8] rejected the argument that an authority would be required to specify the relevant time-frame for injury to continue or recur:

> *As we have noted above, the text of Article 11.3 does not establish any requirement for the investigating authority to specify the time-frame on which it bases its determination regarding injury. Thus, the mere fact that the time-frame of the injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination. Article 11.3 requires that a determination of likelihood of continuation or recurrence of injury rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions. A determination of injury can be properly reasoned and rest on a sufficient factual basis even though the time-frame for the injury determination is not explicitly mentioned.*

It is clear then that in determining whether material injury will continue and/or recur in the absence of measures, the Commission ought to undertake a prospective examination into the foreseeable future, with the assistance of gathered facts and information from the past and present.

It is unquestionable that Australian Paper's formalised supply agreement with [redacted] provides the Commission with present facts about the Australian industry's foreseeable sales volumes, selling prices, market share, capacity utilisation and other key economic/financial indicators. Equally, it provides valuable insight into likely import

[6] Ibid., para 360, page 131.
[7] Ibid., para 358, page 130.
[8] Ibid., para 364, page 132.

volumes, comparative prices with subject imports from Brazil, and the ability to test claims that imports from Brazil are likely to suppress industry's prices.

Therefore, Jackaroo urges the Commission to request all relevant information from Australian Paper and [redacted], that led to the parties agreeing to terms of the supply arrangement.

Finally, Jackaroo wishes to highlight that this is not the first occasion under which Australian Paper has omitted key information in their response to the Commission's inquiries. In the original investigation, Australian Paper appeared not to disclose their exclusive supply arrangement with Staples, which prevented them from tendering for the supply of 'COS Premium' branded paper. Then in the recent review of measures, Australian Paper clearly failed to disclose that it had itself become a significant importer of copy paper from South Africa. Now it appears that Australian Paper has failed to disclose a major supply agreement with the largest retailer in the Australian market, which naturally has enormous consequences for the structure of the Australian market in the short and medium term, and which is directly relevant to likelihood of material injury recurring in the foreseeable future.

These examples of Australian Paper's lack of disclosure to relevant dumping inquiries should provide the Commission with genuine concerns about the authenticity and reliability of their claims.

John Bracic