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Director, Investigations Unit 1
Anti-Dumping Commission
GPO Box 2013
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AUSTRALIA

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Dear Director

Statement of Essential Facts (SEF) 588 – A4 Copy Paper in the nominal basis weight range of 70 to 100 gsm (subject goods) exported from China by UPM-AP.

We represent UPM Asia Pacific Pte Ltd (**UPM-AP**) and associated UPM entities in relation to the current inquiry into whether the anti-dumping measures applying to the above goods should be continued for a further five years. We make this submission in response to the publication on 17 December 2021 of SEF 588 and contend that the purported essential facts claimed by the Commissioner to support his proposed recommendation that anti-dumping measures continue to apply to exports of the subject goods from China by UPM-AP do not in fact vindicate an assertion that the expiry of those measures would probably result in the continuation or recurrence of dumping causing material injury to the Australian industry.

Consequently we request that the Commissioner recommends that the dumping duty notice cease to apply to exports by UPM-AP on the specified expiry day.

Threshold Issue

Before engaging with the substantive issues involved in this matter we draw attention to the Commission's claim that its investigative processes have addressed UPM-AP's earlier submissions concerning the invalidity of the application for continuation made by Paper Australia. Pty Ltd (**OAP**)¹ because of the failure to reveal that it had secured a new substantial supply contract and increase in market share. With respect, the Commission's assertions on which the claim is based are patently insupportable. In response to the statement that the Commissioner considers that the applicant provided the information required by Form B600 by answering all the questions, we point out that the purpose of the form is to elicit information that is germane to the Commissioner's task under s269ZHB(2)(b) of assessing whether there appear to be reasonable grounds for concluding that expiry of the anti-dumping measures might lead to a recurrence of material injury. Reaching a state of satisfaction as to the existence of such reasonable grounds requires the Commissioner to have access to all relevant information, not just information that supports continuation. Form B600 and the associated guidelines make it clear that information concerning volumes of exports and market shares is relevant information and such information known to the applicant must be divulged irrespective of whether or not it lends support to the expiry or continuation of measures.

In accepting the application in the current matter the Commissioner has ignored the obligation on all parties giving information to Commonwealth entities to ensure that such information is

¹ SEF 588: p.13

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neither false nor misleading and also that it does not omit anything without which the information is misleading². We again submit that, as the information provided in the application was tainted by omission, the Commissioner should rescind the application.

Statutory Test

The statutory test governing the issue of the expiry or continuation of anti-dumping measures after five years of operation is set out in s269ZHF(2) of the Act as follows:

The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.

The qualified prohibition against continuing anti-dumping measures reflects Australia's obligation under Article 11.1 of *the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [Agreement]* to ensure that:

An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury

subject to the exception allowing continuation expressed in Article 11.3 in the following terms:

... unless the authorities determine... that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

The Appellate Body has stated that Article 11.3 establishes a mandatory rule that applies unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and material injury³. In effect the statutory test establishes a rebuttable presumption. Rebutting that presumption requires an administering authority to be satisfied that there is *positive evidence*⁴ that in the event of the expiry of anti-dumping measures it must be *...more probable than not*⁵ ...that a continuation or recurrence of both dumping and material injury would occur. The Federal Court has remarked that *...[T]he scenarios adverted to in s269ZHF(2) involve a consideration of future events based on an evaluation of the present position.*⁶ In the present matter we submit that the Commissioner has focused on past history to the exclusion of any serious evaluation of contemporaneous positive evidence of the present position that is clearly relevant to any assessment of the likelihood of a recurrence of material injury in the event of the expiry of anti-dumping measures.. That positive evidence is derived primarily from the facts surrounding the decision of Officeworks in April 2021 to cease sourcing the subject goods from our client and to enter a supply agreement with OAP with effect from late 2021.

Officeworks Contract

The Commission was made aware in our earlier submissions of 9 August and 3 September 2021 that the contract to supply Officeworks with the subject goods had passed from UPM-AP to OAP with effect in late 2021. The Commission has corroborated that information but, while acknowledging that it is relevant information and claiming that it has been relied on to formulate the *proposed recommendations to the Minister*⁷ ... there is no indication that it has

² *Criminal Code Act 1995*: s137.1

³ Appellate Body Report: *US – Corrosion Resistant Steel Sunset Review* para.104

⁴ Appellate Body Report: *US - Oil Country Tubular Goods Sunset Reviews* para.341; *Agreement – Article 3.1*

⁵ *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 @ [49]

⁶ *ibid.* @ [46]

⁷ SEF 588: p.13.

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been given any weight in the Commission's consideration of export volumes, market shares, pricing, the likelihood of future injury or the materiality of any such injury. Ignoring the relevant information is sought to be justified by the Commission's spurious claim that:

*The nature of non-binding agreements between parties in the Australian market provide customers with the ability to exit the relationship if a more attractive price becomes available. The commission understands that agreements between parties provide a notice period of 60 days if either party wishes to exit the agreement.*⁸

Of course sales agreements are not non-binding and they cannot be discontinued or varied at the whim of a party. Terms and conditions govern the process and timing that applies to the issues of if and when a party may exit or vary an agreement and we understand that the term of the new Officeworks agreement is two years. Furthermore, there are a range of practical constraints in establishing new supply lines that can delay the timing and implementation of changes in sourcing to a degree that goes beyond the periods specified in an agreement.

While the past conduct focused on in the SEF can be relevant to an assessment of future probabilities⁹, the statutory test requires a *forward looking analysis*¹⁰ that draws on the most contemporaneous 'facts' available¹¹. As indicated above those facts are to be found in the details surrounding the decision of Officeworks to change its source of supply of the subject goods and an assessment of the likelihood of a continuation of market factors central to that sourcing decision. The genesis of that decision was a new price list provided by our client to Officeworks of 10 March 2021 detailing substantially increased prices for the subject goods with effect from June 2021 (See price list at Confidential Attachment 1.) The Commission has a copy of the Officeworks response of 15 April 2021 advising it was terminating its supply agreement with UPM-AP due to cost and price increases.

It is these facts which constitute the most relevant contemporaneous material informing a judgement concerning the likelihood of future events. The assessment of likelihood must be undertaken within a future time frame and while neither the Agreement nor Division 6A prescribes a particular time frame, the Appellate Body has observed 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.*¹² The Appellate Body went on to observe that it had no reason to believe that the standard of a "reasonably foreseeable time" set out in the United States statute was inconsistent with the requirements of Article 11.3.

Adopting that standard we contend that there is no evidence to suggest that the severe competitive disadvantages now impacting exporters of the subject goods such as shipping and pulp costs are likely to be alleviated in the reasonably foreseeable future. Consequently, if anti-dumping measures were to expire there is no reasonably foreseeable concurrence of events that would restore UPM-AP's competitive position in the Australian market. The probability of UPM-AP, within a reasonably foreseeable future, being able to resume exports of the subject goods at prices resulting in material injury to the Australian industry is fanciful.

The ADRP has commented that a report under s.269ZHF of the Act requires the ADC to consider what is likely to occur in the future on the happening of a certain event, namely the expiry of the measures.¹³ In the current matter if measures expire on the specified date OAP

⁸ SEF 588: p.55

⁹ ADRP Report 2019/119 @ [69]

¹⁰ Appellate Body Report: US – Corrosion Resistant Steel Sunset Review para.105

¹¹ Panel Report: US – Corrosion Resistant Steel Sunset Review para.7.279

¹² Appellate Body Report: US - Oil Country Tubular Goods Sunset Reviews para.360;

¹³ ADRP Report No.44 @ [61]

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will continue to supply Officeworks and there are no grounds to suggest that those supply arrangements will not be maintained for the reasonably foreseeable future.

Future Exports¹⁴

The Commission's conclusion that exports from China are likely to continue or recur presumably includes exports by UPM-AP. As our client's exports of the subject goods ceased in October 2021 there is no possibility of continuation. The assertion that there is a likelihood of a recurrence is based on the history of past exports and 'switching'. We have already demonstrated above that in the event of the expiry of measures market factors prevailing into the reasonably foreseeable future make it extremely improbable that there will be any switching back to UPM-AP as the supplier to Officeworks or any other Australian customer of the subject goods.

We submit that in the final report to the Minister the Commissioner must reverse his preliminary conclusion.

Future Dumping¹⁵

Contrary to the observation of the Senior Member of the ADRP that *[P]ast dumping may be relevant in an assessment of the likelihood of future dumping but it cannot be considered in isolation¹⁶...* the Commission's conclusions in relation to the continuation or recurrence of dumping of exports from China is also based solely on past history. However the probability of no exports by our client of the subject goods in the reasonably foreseeable future means that there is no probability of dumping in the same period.

Export Pricing

In addition the following errors made by the Commission concerning our client's export pricing and volumes undermine the analysis in the SEF of both pricing and injury.

Notwithstanding the contraction in the Australia market during 2020, the subject exporters achieved higher sales volumes and market share compared to 2019. [p.30]

As UPM-AP only exported the subject goods in the final quarter of 2019 the comparison with full year 2020 volumes is inappropriate.

Paper Australia has put it to the commission that it only regained this particular customer's supply [Officeworks] after agreeing to offer prices comparable to those offered by exporters. The commission confirmed Paper Australia's statement is accurate. [p.55]

We dispute that the price comparison endorsed by the Commission used the increased prices contained in our client's revised price list of 10 March 2021. In addition UPM-AP's quoted prices were FOB and we request details of the fair comparison adjustments that were made to account for the difference in delivery terms.

The commission's price undercutting analysis in section 8.6.1 also revealed that the fully landed and duty inclusive price of the goods imported from China undercut Paper Australia's prices in 2021. [p.56]

Again we dispute that our client's revised prices offered to Officeworks during its assessment of future sourcing alternatives were used by the Commission in its price undercutting analysis. Failure to use those prices as the comparative benchmark

¹⁴ SEF 588: pp.53-55

¹⁵ *ibid*: pp.67-68

¹⁶ ADRP Report 2019/119 @ [69]

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would render the analysis meaningless. In addition as we note below the Commission has falsely attributed a lower 2021 fob price for the subject goods to UPM-AP and in all likelihood has unlawfully used that price in its undercutting analysis.

The commission's analysis of export prices at the FOB point found that prices since 2019 have reduced in the case of all subject exporters. [p.64 – Table 22]

In the three year period from 2019 to 2021 UPM-AP's fob export price to Australia remained constant [See Confidential Attachment 2]. There was no price reduction in 2021, only a notification of an intended price increase.

Table 22 above revealed UPM's export price in 2021 was a reduction on the price that its current dumping margin is determined [p.67]

As can be seen from Confidential Attachment 2 there was no reduction in price. Table 22 and Table 25 both express fob prices in Australian dollars/tonne. That was not the currency of the export transaction, nor was it the currency adopted by the Commission for the purpose of applying a fob floor price under the combination method. It is not the purpose of anti-dumping measures to insulate Australian producers from exchange rate movements.

The commission's price undercutting analysis in chapter 8.6.1 revealed that the fully landed import price for goods exported by UPM in 2021 undercut the Australian industry but were (sic) comparable to the price payable on imports from the other subject countries. [p.68]

Figure 15 in chapter 8.6.1 purports to compare landed prices expressed in AUD\$/tonne and uses the falsely calculated 2021 fob price to claim a landed cost that allegedly undercuts OAP's landed cost. UPM-AP's responsibilities ended with the invoicing of the subject goods on an fob basis at the floor price determined by the Minister. Subsequent matters impacting landed costs, such as exchange rates and shipping costs, are not the exporter's responsibility and cannot be used as a basis for a claim of undercutting. It appears from Figure 15 that if the price for the subject goods from China was correctly expressed in constant terms for all three years that there would not be any evidence of undercutting.

We also note that Figure 15 relies on ABF import declarations for the calculation of export prices. This would lead to an understatement of our client's export prices as the original import declarations would include certain copy paper that the Minister on 11 September 2021 ultimately determined, on the recommendation of the ADRP, was not part of the subject goods description. All dumping duties wrongly applied to the goods determined to not be the subject of the dumping duty notice were subsequently refunded to UPM-AP.

The commission considers it reasonable there would be no incentive for UPM to increase its export prices. [p.68]

On the contrary UPM sought to increase its prices in 2021.

Figure 15 illustrates that duty free fully landed export prices for goods from all subject countries would have undercut Australian industry's prices in 2021. [p.78]

For the reasons stated above this contention by the Commission is clearly not applicable to exports by UPM-AP.

Notwithstanding that Paper Australia lowered its price to win the relevant customer's business, the commission identified that this price has already been undercut by the

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same exporter from China, before Paper Australia is due to commence its supply.
[p.80]

Whether the benchmark for any alleged lowering of prices was UPM-AP's actual prices in 2021 or its proposed increased prices to apply from June 2021 remains unresolved. This is the case in relation to the major product lines supplied to Officeworks and also a miniscule volume of a lower specified product not produced by OAP.

We also note that the integrity of the Commission's conclusions on pricing are compromised by its acknowledgement that its price offer evidence ...*did not relate to the exporters the subject of this inquiry*¹⁷. If correct, this statement means that the Commission has no evidence of price undercutting by our client and that in alleged price comparison exercises it has not taken into account the price increases communicated to Officeworks by UPM-AP in March 2021.

Material Injury

Since OAP has secured the supply contract with Officeworks and achieved an unquestioned market share of around 95%, (a dominant position that is obviously inconsistent with OAP's claim that it is not the price leader in the market¹⁸) any assessment of 'continuing' material injury has become academic. The likelihood of a recurrence of material injury caused by a recurrence of dumped exports is obviously zero for so long as exports are suspended. However even if there was a resumption of dumped exports the competitive environment has changed markedly since Investigations 341 and 551. Those changes have contributed to OAP achieving a near monopoly position, with strong brand recognition, that is most likely to be maintained for the reasonably foreseeable future. Most significantly, as demonstrated by the data contained in Confidential Attachment 3, shipping costs from Shanghai to Australia have increased by over 350% since the beginning of 2020 and have had an effect equivalent to the imposition of a tariff of 30% on imported copy paper. Meanwhile, OAP continues to enjoy the economies associated with proximity to markets, the superior distribution network associated with domestic production and the comparative pulp cost advantages derived from the fact that it operates as an integrated mill sourcing almost all its pulp requirements from associated entities.

It is in the context of these present and foreseeable competitive factors that OAP's assertion that ...*the barriers for customers to seek alternate supply are very low*¹⁹ ...must be dismissed, as a market share of 95% indicates that the barriers are almost insurmountable.

There are no market projections indicating that within a reasonably foreseeable timeframe the shipping and other cost advantages that now insulate a monopoly position are likely to change to any material degree. Consequently in the event of the expiry of measures applying to UPM-AP there are no grounds for concluding that within that timeframe exports, if any, by our client are likely to lead to a recurrence of the material injury that the anti-dumping measure is intended to prevent.

On the requirement of a link between the expiry of measures and the likelihood of material injury the Appellate Body has observed that:

...Article 11.3 requires investigating authorities to determine whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Thus, in order to continue the duty, there must be a nexus between the 'expiry of the duty' on the one hand and

¹⁷ SEF 588: p.25.

¹⁸ *ibid.*

¹⁹ *ibid.*

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'continuation or recurrence of dumping and injury' on the other hand, such that the former 'would be likely to lead to' the latter. The nexus must be clearly demonstrated.²⁰

In the case of UPM-AP no such nexus can be clearly demonstrated.

Consequently we request that pursuant to s269ZHF(1)(a)(ii) the Commissioner recommends to the Minister that the dumping duty notice in respect of the subject goods cease to apply to UPM-AP.

Yours faithfully
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²⁰ Appellate Body Report: *US - Oil Country Tubular Goods Sunset Reviews* para.105