

## For Public Record

21 February 2014

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Ms Joanne Reid  
Director Operations 2  
Anti-Dumping Commission  
Customs House  
5 Constitution Avenue  
CANBERRA ACT 2601

Dear Ms Reid

### **Copy Paper from China – Investigation into Alleged Dumping**

1. We represent UPM Asia Pacific Pte Ltd in relation to the above matter and refer to the Exporter Visit Report (EVR), titled UPM (China) Co., Ltd, published on the public record on 17 February 2014.
2. We take this opportunity to identify those calculations and decisions in the EVR that we submit are wrong and request the Commission to make the necessary corrections to ensure that the Statement of Essential Facts to be published on or before 14 March 2014 contains an accurate representation of the essential facts relating to our client.

### **Normal Value**

3. We submit that two adjustments to the existing calculation of normal value must be made.
4. Firstly, the upward adjustment to normal value on account of export selling expenses is overstated. The adjustment includes the whole amount of the selling commission paid to our client's Australian agent, UPM Kymmene Pty Ltd. Material obtained by the Commission and referred to in document no. 021 on the public record demonstrates that a proportion of the selling commission is attributable to post exportation matters [REDACTED]

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[post exportation activities] and a further proportion constitutes a profit, not a selling expense, achieved by the agent.

The amount attributable to profit and part of the amount attributable to [REDACTED] [post exportation activities] relate to matters ... *arising after exportation* . As the latter two amounts are specifically excluded by s.269TAB(1)(a) of the *Customs Act 1901* (Cth) (**Act**) as a deduction from export price it would be a perversion of the legislation to use them as additions to the normal value.

5. We calculate that the remaining proportion of the selling commission attributable to pre-exportation expenses is no greater than about \$ [REDACTED] and the upward adjustment to the normal value should be modified accordingly to \$ [REDACTED].
6. Secondly, at section 6.7.5 of the EVR the Commission states that it has reduced the downward adjustment to normal value relating to domestic inland transport costs by an amount equal to the amount of the VAT component of those costs. No reason is advanced for the reduction in the adjustment and the consequential increase in the normal value.
7. The VAT component of domestic inland transport costs is a cost that our client incurs on domestic sales of copy paper in China. Because of [REDACTED] [REDACTED] [export transaction details], no VAT is payable on the inland transport component of export sales. Obviously in these circumstances domestic and export prices of copy paper ... *are modified in different ways*<sup>1</sup> ... by the application and non-application, respectively, of VAT to domestic and export inland transport costs.
8. We submit that the current negative adjustment for domestic inland transport charges must be increased to take account of the VAT. No change is required to the positive adjustment for export inland transport charges.

## Identification of Parties

### Exporter

9. In section 4.4 of the EVR the Commission proposes that our client and UPM (China) Co., Ltd. can be considered as a single entity for the purpose of identifying the exporter of copy paper to Australia. The alleged authority cited for this proposition is an

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<sup>1</sup> s.269TAC(8)(c) of the Act

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observation by a WTO Panel in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*. That decision, however, is directed at different issues arising in a different context. The issue before the Panel was whether it was permissible under Article 6.10 of the WTO Anti-Dumping Agreement to treat a group of separate legal entities as a single exporting entity ...*in cases where the number of exporters, producers, importers or types of products involved is so large as to make ...[determination of an individual dumping margin] ...impractical*<sup>2</sup>. An observation of a WTO panel in relation to a permissible interpretation of the term 'exporter' in circumstances where the objective is to resolve a potential conflict between the application of literal meaning and administrative practicality provides no guide to, let alone precedent for, the meaning to be given to 'exporter' in the Act.

10. Even if the Panel's observation was authority for the proposition contended for by the Commission, it would have no application in Australia. The Customs Act generally, and Part XVI in particular, identifies entities in both general terms as a person or specifically as an entity such as an owner, exporter and importer; some of the specific entities are defined, some are not. What is clear is that both general and specific references to entities include companies, corporations or bodies corporate.<sup>3</sup> There is nothing in s.269TAB of the Act, which requires identification of an exporter of particular goods exported to Australia, to indicate an intention of the legislature to permit the Commission to ignore the basic principle that corporations are separate legal entities and proceed to conflate two or more such entities. Indeed the Commission's own practice is usually to follow studiously the consequences of the doctrine of separate legal entities. For example in ascertaining normal value in circumstances where manufacturer A sells to wholly owned Distributor B which, in turn, sells to independent customers, the Commission routinely ignores the first sale because it is not an arms length transaction in terms of s.269TAA(b) of the Act. If the act of 'collapsing' two or more legal entities was lawful the Commission's practice in ascertaining normal value would be unnecessary and the statutory requirement to apply arms length tests before rejecting a transaction on the ground of a relationship between buyer and seller would be circumvented.
11. In the present matter our client and UPM (China) Co., Ltd are corporations and separate legal entities. Only one of the entities can be the exporter for the purposes of s.269TAB of the Act and the roles of the two companies in the export transaction (noting that [REDACTED])

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<sup>2</sup> *Anti-Dumping Agreement* – Article 6.10

<sup>3</sup> *Acts Interpretation Act 1901* Cth: section 2C

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[REDACTED] [transfer details] and the supporting commercial documentation make it clear that it is UPM Asia Pacific Pte., Ltd that is the exporter of the goods.

**Importer**

12. The relevant definition of 'importer' in s.269T of the Act is:

*the beneficial owner of the goods at the time of their arrival within the limits of the port or airport in Australia at which they have landed.*

In all sales of copy paper to Australia our client [REDACTED]

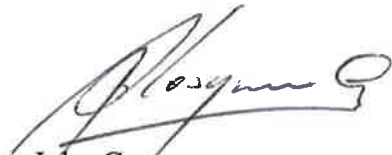
[REDACTED]

[REDACTED] [transfer and payment details]

13. Consequently, we submit that the importer of the goods is UPM Asia Pacific Pte., Ltd.

Yours sincerely

**MINTER ELLISON**



John Cosgrave  
Director, Trade Measures

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