Australian Government
Anti-Dumping Review Panel

ADRP Report No. 133

A4 Copy Paper exported from the People's Republic of China: Anti-Circumvention Inquiry

July 2021

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ABF	Australian Border Force
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AUD	Australian Dollar
Australian Paper	Paper Australia Pty Ltd
China	The People's Republic of China
CIO Regulation	*Customs (International Obligations) Regulation 2015*
CTMS	Cost to Make and Sell
Commissioner	Commissioner of the Anti-Dumping Commission
First Conference	Conference held with the ADC on 8 June 2021
First Conference Summary	Summary of the conference held with the ADC on 8 June 2021
Second Conference	Conference held with UPM on 21 June 2021
Second Conference Summary	Summary of the conference held with UPM on 21 June 2021
Counsel's Advice	Counsel's advice commissioned by the Review Panel relating to s.48 of Customs (International Obligations) Regulation 2015 and Attachment 2 to ADRP Report No. 38. It is also attached to this report as Annexure A.
COS	Complete Office Supplies Pty Ltd

Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
FOB	Free on board
Goods	The goods the subject of the notices published under section 269TG(2) and 269TJ(2), ADN Nos. 2017/39 and 2017/40 respectively
IDD	Interim dumping duty
Original Investigation period	2015 Calendar Year
Original notices	The notices published under section 269TG(2) and 269TJ(2), ADN Nos. 2017/39 and 2017/40 respectively
Manual	Dumping and Subsidy Manual November 2018
Minister	The Minister for Industry, Science and Technology
REI	Response to Importer Questionnaire
REP 552	Anti-Dumping Commission Report No. 552 in relation to the anti-circumvention inquiry into the slight modification of goods in respect of A4 Copy Paper exported to Australia from the People's Republic of China and dated 16 February 2021
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister made on 17 March 2021 pursuant to ADN No. 2021/024.
SCM	Agreement on Subsidies and Countervailing Measures
SEF	Statement of Essential Facts
Then Minister	The then Minister for Industry, Science and Technology
UPM	UPM Asia Pacific Pte Ltd
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the then Minister for Industry, Science and Technology (the then Minister) made under s.269ZDBH(1) of the *Customs Act 1901* (the Act) following an anti-circumvention inquiry in respect of A4 Copy Paper exported from the People's Republic of China ("China") ("the Reviewable Decision"). The applicant for the review was UPM Asia Pacific Pte Ltd ("UPM").

2. For the reasons set out in this report, I recommend that the Minister for Industry, Science and Technology ("the Minister") revoke the Reviewable Decision and substitute it with a new decision declaring that, pursuant to s. 269ZDBH(1)(a) of the Act, the original notices remain unaltered.

Introduction

3. UPM applied under s.269ZZC of the Act for a review of the Reviewable Decision.

4. The application was accepted and notice of the proposed review, as required by s.269ZZI, was published on 28 April 2021.

5. The Senior Member of the Anti-Dumping Review Panel ("Review Panel") directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

Background

6. On 30 March 2020, Paper Australia Pty Ltd ("Australian Paper"), a member of the Australian industry producing like goods, lodged an application requesting that the Commissioner of the Anti-Dumping Commission ("the ADC") conduct an anti-circumvention inquiry in relation to the original notices applying to A4 copy paper exported to Australia from Brazil, China, Indonesia and Thailand.[1]

7. The goods the subject of the original notices were described as follows:

> "uncoated white paper of a type used for writing, printing or other graphic purposes, in the nominal basis weight range of 70 to 100 gsm [grams per square metre] and cut to sheets of metric size A4 (210 mm x 297 mm) (also

[1] ADN No. 2017/39 and ADN No. 2017/40 ("the original notices").

commonly referred to as cut sheet paper, copy paper, office paper or laser paper).

The applicant at the time of the original investigation (Investigation 341) supplied the following additional information to clarify the scope of the goods description:

The paper is not coated, watermarked or embossed and is subjectively white. It is made mainly from bleached chemical pulp and/or from pulp obtained by a mechanical or chemi-mechanical process and/or from recycled pulp."

8. In its application Australian Paper alleged that circumvention activity in relation to the original notices occurred in circumstances prescribed by s.48 of the *Customs (International Obligations) Regulation 2015* ("the CIO Regulation") through the slight modification of goods exported to Australia from China, in particular by exporter and manufacturer of the goods, UPM (China) Co., Ltd, in order to circumvent the applicable anti-dumping measures.

9. Pursuant to s.269ZDBE(1), the Commissioner of the ADC ("the Commissioner") examined the application and was satisfied of the matters in s.269ZDBE(2). Accordingly, the Commissioner did not reject the application and initiated an anti-circumvention inquiry into the alleged slight modification of A4 copy paper exported to Australia from China.[2] The alleged circumvention goods were described as follows:

> *The goods the subject of the application have a weight of 68 gsm but otherwise meet the description of the goods the subject of the original notices* (the circumvention goods).[3]

10. After conducting the circumvention inquiry, the Commissioner was satisfied that a circumvention activity in relation to the original notices occurred in the circumstances prescribed by s.48 of the CIO Regulation. The Commissioner recommended that the Minister declare, by notice published in accordance with s.269ZDBH(9) and with effect on and after 28 April 2020, that for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975* ("the Dumping Duty Act"), the dumping duty notice and countervailing duty notice applying to goods exported

[2] ADN No. 2020/45.
[3] See ADN No. 2020/45.

from China be altered to include different goods that are to be the subject of those notices. The reasons for the Commissioner's recommendation to the Minister were outlined in Anti-Dumping Commission Report No. 552 ("REP 552").

11. The Minister accepted the Commissioner's recommendations and on 17 March 2021 under s.269ZDBH(1)(b) of the Act, declared that for the purposes of the Act and the Dumping Duty Act:

    - the original notices under sections 269TG(2) and 269TJ(2) of the Act applying to A4 copy paper exported to Australia from China be altered to include goods in the nominal weight range of 67 to 69 gsm, with effect on and after 28 April 2020.

    - Accordingly, the goods the subject of the altered notices were described as follows:

        > Uncoated white paper of a type used for writing, printing or other graphic purposes, in the nominal basis weight range of 67 to 100 gsm and cut to sheets of metric size A4 (210mm x 297mm) (also commonly referred to as cut sheet paper, copy paper , office paper or laser paper).

    The Reviewable Decision was published on 19 March 2021.[4]

Conduct of the Review

12. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision or revoke it and substitute a new specified decision. In undertaking the review s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister, in like manner as if it were the Minister, and having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

[4] ADN No. 2021/024.

13. Subject to certain exceptions,[5] the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e. information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister.

14. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information. A conference was held with the ADC on 8 June 2021 for the purpose of obtaining further information from the ADC in relation to the review pursuant to s.269ZZHA of the Act ("the First Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the First Conference Summary"). A conference was held with UPM on 21 June 2021 for the purpose of providing UPM with the opportunity to comment on the First Conference Summary and obtaining further information from UPM in relation to the review pursuant to s.269ZZHA of the Act ("the Second Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Second Conference Summary").

15. In conducting this review, I have had regard to the application for review and documents submitted with the application, and to submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 552 and other documents related to the ADC anti-circumvention inquiry 552 and further information obtained at the conferences to the extent it related to relevant information.

Grounds of Review

16. The grounds of review relied upon by UPM, which the Review Panel accepted, are as follows:

    a. Ground 1: Regulation 48 has no application to the circumstances of present matter because there are no relevant goods the subject of the application for the purpose of the mandatory comparison described in s.48(3), and

[5] See s.269ZZK(4).

consequently the Minister's decision was not the correct or preferable decision and the original notice must remain unaltered.

b. Ground 2: Even if the Regulation 48 does apply to the circumstances of the present matter the circumvention goods have not been slightly modified and consequently the Minister's decision was not the correct or preferable decision and the original notice must remain unaltered.

Legislative Framework

17. Division 5A of Part XVB of the Act sets out, among other matters, the procedures to be followed and the matters to be considered by the Commissioner in conducting an anti-circumvention inquiry. In particular:

- Section 269ZDBB sets out when circumvention activity occurs in relation to a notice published under s.269TG(2) or 269TJ(2).

- Section 269ZDBB(6) provides that a circumvention activity occurs in the circumstances prescribed by the CIO Regulation for the purposes of that section.

- Section 48 of the CIO Regulation prescribes the slight modification of goods exported to Australia as a circumvention activity for the purposes of s.269ZDBB(6).

- For the purpose of s.269ZDBB(6), a circumvention activity involving the slight modification of goods requires a circumstance in which all of the following apply (s.48(2) of the CIO Regulation):

  a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;
  b) before that export, the circumvention goods are slightly modified;
  c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;
  d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;

e) section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia.

- Section 48(3) provides that for the purpose of determining whether a circumvention good is slightly modified, the Commissioner must compare the circumvention good and the good the subject of the notice, having regard to any factor that the Commissioner considers relevant, including any of the following factors:

  a) each good's general physical characteristics;
  b) each good's end use;
  c) the interchangeability of each good;
  d) differences in the processes used to produce each good;
  e) differences in the cost to produce each good;
  f) the cost of modification;
  g) customer preferences and expectations relating to each good;
  h) the way in which each good is marketed;
  i) channels of trade and distribution for each good;
  j) patterns of trade for each good;
  k) changes in the pricing of each good;
  l) changes in the export volumes for each good;
  m) tariff classifications and statistical codes for each good.

18. Section 269ZDBG requires that (for current purposes), the Commissioner give the Minister a recommendation within 155 days after publication of the notice initiating the anti-circumvention inquiry (or such longer period as allowed). In making his recommendation to the Minister the Commissioner must, for current purposes, have regard to the application, the Statement of Essential Facts ("SEF") and submissions received prior to and following the SEF (s.269ZDBG(2)(a)). The Commissioner may also have regard to any other matter that he or she considers to be relevant to the inquiry.

19. Section 269ZDBH(1) provides that, after considering the Commissioner's report and any other information that the Minister considers relevant, the Minister must declare that:

    - the original notice is to remain unaltered; or

- the alterations specified in the declaration are taken to have been made to the original notice, with effect on and after a day specified in the declaration.

Consideration of Grounds

Ground 1: No relevant goods for purpose of mandatory comparison in s.48(3)

20. UPM contends that s.48 of the CIO Regulation has no application to the circumstances of the present matter because there are no relevant goods the subject of the application for the purpose of the mandatory comparison described in s.48(3), and consequently the Minister's decision was not the correct or preferable decision, and the original notice must remain unaltered.

21. UPM stated in its application for review that the Reviewable Decision is based on a finding of the Commissioner in REP 552 that by exporting from China to Australia A4 copy paper weighing 68 grams per square metre (gsm), UPM had engaged in the circumvention activity set out in s.48 of the CIO Regulation and known as the slight modification of goods. UPM stated that the circumvention activity alleged by the Australian industry was the export to Complete Office Supplies Pty Ltd ("COS") by UPM of 68gsm copy paper.

UPM's Arguments

22. In its application for review UPM set out the following information:

    a. UPM began production of 68gsm copy paper in China in 2005 and prior to June 2019 all such production was exported by UPM to [redacted] for sale in that market where the predominant demand is for sub-70 gsm copy paper.[6]

[6] In the confidential version of its application for review, UPM set out (in a table) the annual metric tonnes of copy paper exports by UPM to that market for the period 2014 – 2020, as follows:

b. On 19 April 2017, the Minister published a dumping duty notice imposing anti-dumping measures on exports from China of A4 copy paper weighing between 70 and 100 gsm ("the original notice") and due to the imposition of a dumping duty (later rescinded following an application to the Federal Court) UPM ceased exports of 80gsm product from China in [redacted]

c. UPM had supplied 80 gsm A4 copy paper ex China to COS in the period prior to [redacted] when the customer terminated the contract. Supply to COS resumed in [redacted] with UPM supplying [redacted] tonnes of 80 gsm A4 copy paper produced in Germany in [redacted]

d. In May 2019 supply by UPM of 68gsm copy paper to COS ex China was substituted for shipments from Germany and in [redacted].

e. COS continued and continues to import 80gsm A4 copy paper from other exporters.[7]

f. UPM commenced exports from China of A4 80gsm copy paper in [redacted] to a new Australian customer.

g. In 2020 UPM commenced exports of 68 gsm A4 and A3 copy paper from China to New Zealand.

23. UPM submitted that in addition to the environmental credentials of the 68gsm product and its packaging, the commercial justification for COS to change its source of supply from Germany to China included substantial reductions in delivery times and shipping costs as well as a reduction in ordinary customs duty on A4 copy paper from 5 per cent to zero.

24. UPM submitted that the CIO Regulation posed interpretative challenges and that the Review Panel itself in ADRP Report No. 38 sought Counsel's Advice on one of

[redacted]

[7] During the Second Conference UPM clarified that it understood that COS imports 80 gsm A4 Double A brand from Thailand and COS Premium brand 80gsm A4 from Indonesia, based on the company's website and market intelligence. See Second Conference Summary.

those challenges[8] ("Counsel's Advice"). It submitted further that other challenges may be illuminated by explanations of the object and purpose of the CIO Regulation and the suite of anti-circumvention measures of which it forms a part. UPM made reference to the Explanatory Statement of the amending Regulation that introduced, what later became s.48 of the CIO Regulation, which states:

> *The Regulation prescribes a new circumvention activity in which goods that would have been the subject of a dumping or countervailing notice (and liable to pay duties) are slightly modified, prior to the export of the goods to Australia, to avoid the anti-dumping duty*.[9]

25. UPM contended that in similar vein, in Counsel's Advice, it was observed that, based on provisions in Division 5 of Part XVB of the Act and extrinsic materials, the purpose of the CIO Regulation is, "… to address activities responsive to notices that are aimed at ensuring that exportations that would have been the subject of the notices do not attract the intended duty".[10]

26. UPM submitted that s.48 of the CIO Regulation is part of a suite of measures set out in Division 5A of the Act that are designed to counter a range of activities that circumvent the terms of a dumping or countervailing duty notice. UPM pointed out that the Division was added to the Act by Schedule 2 to the *Customs Amendment (Antidumping Improvements) Act (No 3) 2012 (No 196, 2012).* UPM submitted that the Explanatory Memorandum identified the mischief that the provisions were designed to overcome as, "… a trade strategy used by the exporters and importers of products to avoid the full payment of dumping and countervailing duties."

27. UPM submitted further that the Review Panel itself has observed that, "… [T]he purpose of the relevant CIO Regulation is to prevent exporters avoiding the imposition of measures under the Act by means of arrangements or conduct which are artificial or do not have legitimate commercial justification."[11]

28. UPM contended that these statements establish that the target of the CIO Regulation is exportations of modified goods not the subject of a notice

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[8] Attachment 2 to ADRP Report No. 38. It is also attached to this report as Annexure A.

[9] The Explanatory Statement to the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015.*

[10] Reference was made to footnote 7 of Attachment 2 to ADRP Report No. 38, page 11.

[11] Reference was made to ADRP Report No. 37, para 42.

[circumvention goods] that have replaced exportations of goods that were the subject to a notice and the indicia of a circumvention activity include trade strategies, artificial arrangements and duty avoidance undertaken by exporters and importers that result in the modification of a previously exported product to which a dumping duty notice applied. According to UPM, to establish whether the modification activity has occurred requires examination of the actions of the exporter and importer(s) involved in the previously occurring exportation to Australia of goods subject to a dumping duty notice. UPM contended that this approach is supported by the terms of almost all of the comparative factors listed in s.48(3) that require specific, not general, comparisons of "each good".

29. UPM submitted that until the current inquiry the ADC's policy and practice in relation to the CIO Regulation also reflected a specific approach, with the conduct examined and the comparisons undertaken by the Commission in all five previous 'slight modification" investigations[12] has focussed on the activity of individual exporters and importers and in contrast to its new claim that it, "… does not consider there is a requirement to compare the circumvention goods to goods sold to a particular customer or customers."[13] UPM submitted that the CIO Regulation's requirement of comparisons between "each good" cannot be satisfied by the introduction of some generic proxy for a good the subject of the application.

30. UPM further submitted that the ADC's claim is also inconsistent with its practice in the present matter where a number of the purported s.48(3) comparisons identified in REP 552 use data supplied by UPM in Investigation 551 in relation to its exports of 80 gsm copy paper. However according to UPM, those transactions involved a different importer and did not commence until [redacted] Consequently, according to UPM, data relating to those exports cannot be used in s.48(3) comparisons.

31. UPM submitted that prior to commencing exports of 68 gsm copy paper to Australia [redacted] the last export from China by UPM of 80 gsm product subject to the notice occurred over [redacted] [sic].[14] According to UPM, its only other exports from China to Australia of goods the subject of the notice did not

[12] References was made to ADC Investigations 291, 290/298, 479 and 483.
[13] Reference was made REP 552, Page 14.
[14] During the Second Conference UPM confirmed that this is an error and that the correct relevant date is [redacted].

commence until [redacted] and further stated that it had not previously supplied the customer with the goods the subject of the notice. UPM submitted that in addition to this chronology demonstrating that the patterns of trade do not evidence any substitution of the alleged circumvention goods for goods the subject of the notice, in UPM's opinion, it confirmed that in relation to the alleged circumvention goods there were simply no corresponding goods the subject of the notice that could be used for the purposes of the regulatory comparisons.

32. In its s.269ZZJ submission UPM referred to the ADC's earlier 'slight modification' inquiries and submitted that each finding in those inquiries that the circumvention goods had been slightly modified was supported by a conclusion that the evidence demonstrated a chronologically proximate "switch" from exporting goods the subject of a dumping duty notice to slightly modified circumvention goods. Furthermore, UPM submitted that in no case has the ADC concluded that circumvention goods have been slightly modified in the absence of evidence that circumvention goods have been substituted for goods the subject of the notice.[15] UPM contends that consistency is an important component of administrative decision making.[16]

33. In its s.269ZZJ submission UPM referred to the ADC's "revised" conclusion that:

> *Based on the available information, the Commission considers that the patterns of trade appear to support that the circumvention goods displaced the goods the subject of the notice at the time of the negotiations between COS and UPM, which suggests that the goods are interchangeable with the circumvention goods and indicates that the circumvention goods are slightly modified.*

[15] In this regard UPM referred to REP 291 which it stated illustrates this approach, in which five exporters, found to have replaced exports to Australia of non-alloyed HSS with exports of alloyed HSS soon after the publication of a dumping duty notice applying to the former product, were found to have engaged in a circumvention activity. UPM pointed out that by contrast, in relation to one exporter whose export activities did not demonstrate a switch from non-alloyed to alloyed HSS, the ADC concluded that there was no circumvention activity even though comparisons of each good revealed that costs, prices, sales, marketing and distribution were the same or similar and there was also a degree of interchangeability.

[16] In this regard UPM made reference to Brennan J's observation in *Drake (No 2) (1979) 2 ALD* 634 at 639:

> "Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice."

UPM submitted that in addition to being based on irrelevant considerations, the conclusion is patently flawed, pointing out that at the time of the negotiations between COS and UPM there were no exports by UPM of the goods the subject of the notice and hence no possibility of displacement.

34. Consequently, UPM submitted that as the CIO Regulation has no application in the present matter the Minister's decision was not the correct or preferable decision and that the original notice must remain unaltered.

ADC's Position

35. In REP 552 the ADC stated that it considered that the goods the subject of the original notices are relevant goods for the purpose of the comparison required by s.48(3) of the CIO Regulation because these goods were exported by UPM and other exporters to Australia from the countries subject to the original notices during the original investigation period in 2015 and following the imposition of measures, including in 2019. Therefore, the ADC did not agree with UPM's contention that there is an absence of 'relevant goods'.[17]

36. The ADC also stated in REP 552 that it did not agree with UPM's contention that the circumstances of the sales to COS 'do not fall within the terms' of the comparison required by s.48 of the CIO Regulation, stating that s.48(3) of the CIO Regulation requires the Commissioner to compare the circumvention good and the good the subject of the original notice in determining whether a circumvention good is slightly modified. The ADC stated it does not consider that there is a requirement to compare the circumvention goods to goods sold to a particular customer or customers, or that there is a requirement for this comparison to be undertaken in relation to sales of each good made to the same customers only.[18]

37. In its s.269ZZJ submission the ADC contended that UPM's first ground of review, that s.48 has no application to the circumstances of the present matter, because there are no relevant goods, should be rejected. The ADC submitted that in the inquiry:

[17] See Section 4.3.2.1of REP 552, page 14.
[18] See Section 4.3.2.1of REP 552, page 14.

a. the goods, the subject of the application, set out clearly that the circumvention goods comprised a weight of 68 gsm but otherwise meet the description of the goods the subject of the original notice; and

b. the goods the subject of the original notices are relevant goods for the purpose of the comparison required by section 48(3).

38. The ADC also submitted that after the imposition of measures these goods (the subject of the original notice) were exported to Australia by UPM and other exporters from the countries subject to the original notices, including in 2019. The ADC pointed out that it relied upon evidence contained in import consignments in the Australian Border Force ("ABF") import database dating from 1 January 2015, and verified information provided by UPM in its response to the exporter and importer questionnaires. The ADC stated that it also assessed information provided by COS in its response to the ADC's questionnaire and noted that the inquiry found COS was the sole customer of the circumvention goods. The ADC stated that based on this information, it found that UPM commenced exporting the circumvention goods in commercial quantities to Australia from China in [redacted] and that pursuant to s.48(2)(a), the Commissioner was and remained satisfied that the circumvention goods are exported to Australia from a foreign country (China) in respect of which the notice applies.

Consideration

39. In order for the circumvention activity to occur as prescribed by s.48 of the CIO Regulation, all five circumstances set out in s.48(2)(a) to (e) must occur, each of which is a necessary criterion and all of which are cumulative. The ADC in its s.269ZZJ submission agrees with this.[19]

40. While perhaps not clearly articulated as such, this ground of review relates in effect to s.48(2)(b) of the CIO Regulation, read together with s.48(3). In other words, the ADC having found that the 'circumvention goods' are exported to Australia from a foreign country in respect of which the notice applies, thus satisfying the first mandatory criterion in s.48(2)(a), the next question is whether it can be considered that, "before that export, the circumvention goods are slightly modified", being the

[19] See Paragraph 28 of the ADC's s.269ZZJ submission.

second mandatory criterion set out in s.48(2)(b). This can only be properly considered in light of s.48(3), as discussed in Counsel's Advice:

> *In a sense, although the primary function of s 48(3) is to impose a particular duty on the Commissioner as to the way the Commissioner is to carry out the task under s 48(2), s 48(3) is also akin to a definitional provision that explains the use of "circumvention goods are slightly modified" in s 48(2)(b)* ……[20]

41. The ADC in its s.269ZZJ submission appears to support this interpretation submitting that a proper construction of s.48(2) requires it be read in context, together with section 48(3), "...because of the temporal and substantive ambiguity that section 48(2) presents when read divorced from context…". [21] This interpretation is also not disputed by UPM.

42. In Counsel's Advice it was pointed out that the key to embarking on a proper construction of s.48(2) is s. 48(3) and in particular s.48(3)(d), which requires the Commissioner to consider, "differences in processes used to produce each good" in determining whether the criteria in s 48(2) are met that depend on whether a circumvention good is "slightly modified". It was pointed out in Counsel's Advice that this provision indicated that a specific circumvention good need not already be manufactured and in existence, and then subjected to an alteration, before the criteria concerning "slightly modified" can be made out. It also indicated that a difference between the particular kinds of goods produced by different production processes may lawfully be considered by the Commissioner in deciding whether the criteria concerning "slightly modified" are made out.[22] In this regard and up to this point, this is not too different to what the ADC states in its s.269ZZJ submission.[23]

43. However, thereafter the ADC's view seems to diverge from that of Counsel (and UPM), in particularly with regard to the 'timing' of the circumvention goods and the so-called "notice goods" which are being compared, which I will discuss in more detail below.

44. There would appear to be two parts of s.48(2)(b) that must be satisfied, being (i) that the "circumvention goods are slightly modified" (as determined in accordance

[20] See Paragraph 25 of Counsel's Advice.
[21] See Paragraph 25 of the ADC's s.269ZZJ submission.
[22] See Paragraph 29 of Counsel's Advice.
[23] See Paragraphs 30 – 32 of the ADC's s.269ZZJ submission.

with s.48(3) as discussed above) and (ii) that such 'slight modification' occurs "before the export". [emphasis added] As discussed above, it is not disputed that a circumvention good need not already be manufactured and in existence, and then subjected to an alteration, before the criteria concerning "slightly modified" can be made out. It is also agreed that a difference between the particular kinds of goods produced by different production processes may lawfully be considered by the Commissioner in deciding whether the criteria concerning "slightly modified" are made out.[24] Counsel takes this further, asking the question:

> *….if there is no mandatory criterion imposed by s 48 to the effect that modification of an existing manufactured good is required, what then is the relevant limiting criterion that applies?*

and then proceeds to answers the question posed:

> *In my view, where the slight modification in question does not consist of the alteration of existing manufactured goods falling within the scope of a notice, then it will at least be a necessary criterion for s 48 to apply that a different production process has been adopted by comparison with the production process that previously resulted in the manufacture of the goods to which the notice applies.* [25] [emphasis added]

45. Counsel elaborated further:

> *… the term "circumvention goods" is not used here with precision but serves as a general denotation for the goods that are to be subjected by the Commissioner to the comparison process mandated by s 48(3). Subsection 48(3), as already outlined, requires comparison to be made between the goods the subject of the notice and the circumvention goods. This drafting technique suggests that attention is not required to be directed to whether there has been a subsequent modification of a particular pre-existing object. Rather, the conclusion as to "slightly modified" is reached through comparison of goods, a more generalised inquiry. In a particular case, the goods to be compared may be the product of different production processes, as contemplated by s 48(3)(d). In that event, the goods the subject of the notice*

[24] As per Paragraph 29 of Counsel's Advice.
[25] See Paragraph 32 of Counsel's Advice.

will have been produced at an earlier time, and (in response to the notice) there will subsequently have been a different production process used. In this way, it is meaningful to speak of the goods "before" and "after" modification.[26] [emphasis added]

46. This limiting criterion to which Counsel refers is temporal in nature with the notice goods produced "at an earlier time" and then "in response to the notice" the circumvention goods will "subsequently" be produced (using a different production process). This temporal requirement identified in Counsel's Advice seems to elude the ADC in its analysis:

> *The preferable construction of section 48(2)(b) is that the sentence specifying that "the circumvention goods are slightly modified" is intended to pick up the enquiry provided by section 48(3). Section 48(2)(b) will be established, if I determine a circumvention good is slightly modified after the circumvention goods and the notice goods are compared.* [27] [emphasis added]

47. For the ADC the temporal requirement seems only to relate to the determination of the Commissioner that a circumvention good is slightly modified being after the circumvention goods and the notice goods are compared. On this interpretation the ADC is not concerned that the circumvention goods are produced and exported to Australia before the notice goods are produced and exported to Australia. I disagree, with particular reference to Counsel's requirement that the goods the subject of the notice will have been produced at an earlier time, and (in response to the notice) there will subsequently have been a different production process used. [emphasis added]

48. There were no goods subject to the notice that were produced by UPM at an earlier time (than the circumvention goods) and the circumvention goods which have a different production process cannot be considered to be produced in response to the notice. I therefore consider that UPM is correct in its contention that there were no 'relevant goods' subject to the notice that were produced by UPM at an earlier time (to the export of the circumvention goods) for the purpose of the comparison

[26] See Paragraph 33 of Counsel's Advice. It should be noted that the reference to the phrase at the end of the passage quoted ["before" and "after" modification] is a reference to s.48(2)(c), which was also part of this particular analysis by Counsel although not part of my particular consideration in this part of the discussion relating to UPM's first ground of review.
[27] See Paragraph 34 of the ADC's s.269ZZJ submission.

under s.48(3). It is clear from the background information relating to UPM's exports to Australia, as set out in UPM's application for review, that UPM only commenced exports from China of A4 80gsm copy paper (which were goods subject to the notice) in [redacted] to a new Australian customer, that is after UPM had produced and started exporting the circumvention goods. This timeline simply does not support the temporal requirement for s.48(2)(b) (as read with s.48(3)(j)), made clear in Counsel's Advice and discussed above.

49. The temporal requirement made clear in Counsel's Advice also finds support from various statements referred to by UPM relating to the object and purpose of s.48 of the CIO Regulation both in the Explanatory Statement of the amending Regulation that introduced, what later became s.48 of the CIO Regulation, as well as other statements in Counsel's Advice which referred to the purpose of the CIO Regulation. According to UPM such statements "establish that the target of the CIO Regulation is exportations of modified goods not the subject of a notice [circumvention goods] that have replaced exportations of goods that were the subject to a notice ……" [emphasis added].

50. UPM contends that the patterns of trade do not evidence any substitution of the alleged circumvention goods for goods the subject of the notice, which is borne out by the background information and chronology of exports by UPM to Australia (referred to above, as provided in UPM's application for review). UPM emphasised this requirement of 'substitution' or 'displacement' of goods subject to the original notice by the circumvention goods. In its s.269ZZJ submission UPM referred to all the ADC's earlier 'slight modification' inquiries and submitted that each finding in those inquiries that the circumvention goods had been slightly modified was supported by a conclusion that the evidence demonstrated a chronologically proximate "switch" from exporting goods the subject of a dumping duty notice to slightly modified circumvention goods.[28]

[28] In this regard, in its s.269ZZJ submission UPM referred to REP 291 which it stated illustrated this approach, in which five exporters, found to have replaced exports to Australia of non-alloyed HSS with exports of alloyed HSS soon after the publication of a dumping duty notice applying to the former product, were found to have engaged in a circumvention activity. UPM pointed out that by contrast, in relation to one exporter whose export activities did not demonstrate a switch from non-alloyed to alloyed HSS, the ADC concluded that there was no circumvention activity even though comparisons of each good revealed that costs, prices, sales, marketing and distribution were the same or similar and there was also a degree of interchangeability.

51. In UPM's view it is clear that the 68 gsm A4 copy paper from China displaced the 80 gsm A4 copy paper from Germany which was not a country subject to the anti-dumping measures and therefore there was no substitution or displacement of the alleged circumvention goods for goods the subject of the notice, to satisfy the temporal and other requirements of s.48(2)(b).

52. The ADC's statements relating to 'displacement' of goods subject to the notice seem ambivalent at best. In REP 552 in its discussion of 'patterns of trade' under s.48(3)(j) of the CIO Regulation, the ADC acknowledges that it "does not appear that there is a chronological relationship or correlation between the exportation of the circumvention goods and the imposition of the anti-dumping measures (the original notices)".[29] However, the ADC subsequently comes to the conclusion that, based on the available information, "the Commission considers that the patterns of trade appear to support that the circumvention goods displaced the goods the subject of the notice at the time of the negotiations between COS and UPM……"[30] The ADC in this regard referred to Confidential Attachment 2 for details relating to patterns of trade.

53. During the First Conference I requested clarification from the ADC with reference to UPM's comment that at the time of the negotiations between COS and UPM there were no exports by UPM of the goods the subject of the notice and hence no possibility of displacement. The ADC stated that it was correct that UPM did not export 80gsm A4 copy paper from China following the imposition of measures and during the time of the negotiations between COS and UPM in 2018, but pointed out that it was apparent to the ADC that [redacted], when UPM's goods from China were subject to a dumping duty rate of 34.4 per cent (before the rate of dumping duty was revised to 4 per cent in March 2019), which according to the ADC would have made the goods subject to the original notice very unattractive to COS in terms of the relative cost.[31] The ADC stated it considered that the 68gsm goods from China

[29] See REP 552, page 25.
[30] See REP 552, Page 26.
[31] In this regard, the ADC referred to COS' response to the importer questionnaire and page 12 of Confidential Attachment 2 to REP 552. The ADC made reference in particular to page 5 of COS' confidential importer questionnaire response where it was noted that [redacted]

'displaced' the 80gsm A4 copy paper that [redacted].[32]

54. UPM in its comments on the First Conference Summary during the Second Conference vigorously disputed the ADC's statement that it considered that the 68gsm goods from China 'displaced' the 80gsm A4 copy paper that [redacted] Firstly, UPM referred to the ADC's clear observation in its assessment of patterns of trade for the purpose of s.48(3)(j) in Confidential Attachment 2 to Report 552, that exports of the alleged circumvention goods displaced earlier exports of 80gsm copy paper from Germany.[33] UPM further stated that that logical conclusion has now been replaced by the "bizarre claim" that the alleged circumvention goods have "displaced phantom goods [redacted] never produced". UPM further stated that, "displacement or substitution or switching are real world concepts involving actual goods that cannot be invoked in this case to refer to goods that never existed", pointing out that the ADC acknowledged in Report 552 that the goods displaced by the alleged circumvention goods were exports from Germany that were not goods the subject of the dumping duty notice. UPM noted that the sources cited by the ADC relating to its assertion did not appear to support that assertion and that furthermore UPM noted that it does not have any record [redacted].[34]

55. I reviewed REP 552, Confidential Attachment 2 and the confidential version of COS's importer questionnaire[35] and agree with UPM that there is no evidence of [redacted]. While

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[redacted]. See confidential version of Document #8 of EPR 552.

[32] See First Conference Summary.

[33] Reference was made to the "Assessment" column on page 10 of Confidential Attachment 2 to REP 552 which states:

> "The Commission found that UPM commenced exporting the circumvention goods in [redacted] (based on the bill of lading date and the valuation date in the ABF import database) following [redacted]. Prior to this, UPM has supplied 80gsm copy paper to COS (commencing [redacted]), which UPM exported from Germany, and the circumvention goods displaced the 80gsm copy paper exported to COS from Germany in [redacted]." [emphasis added]

[34] See Second Conference Summary.

[35] See confidential version of Document #8 of EPR 552.

there were references to [redacted] there was clearly no evidence of [redacted]. Indeed, even the wording used by the ADC in Confidential Attachment 2 and finally in REP 552 is indicative of this lack of certainty and clarity regarding [redacted] for example:

- "From its explanation, it is apparent that [redacted] as an alternate to exports from Germany." [emphasis added] [36]

- "Based on the available information, the Commission considers that the patterns of trade appear to support that the circumvention goods displaced the goods the subject of the notice at the time of the negotiations between COS and UPM, …." [emphasis added][37]

56. The ADC concluded in REP 552 that, "the circumvention goods displaced the goods the subject of the notice at the time of the negotiations between COS and UPM for supply from the Asian region,"[38] without making it clear that the so called 'displaced' goods referred to related to what it considered to be an [redacted] This finding of 'displacement' by the ADC was not made clear in REP 552 and was not put to UPM for comment during the investigation. The position of the ADC only became clear during the First Conference as indicated by UPM's comments on the First Conference Summary during the Second Conference. In addition, this finding of the ADC relating to displacement is directly contradictory to the statement made on page 10 of Confidential Attachment 2, relevant portions of which UPM had sight of during the inquiry, that the circumvention goods displaced the 80gsm copy paper exported to COS from Germany. In my view, the lack of any clear evidence of [redacted] and, in particular, the timeline of the patterns of trade of UPM's exports to Australia indicates that the 68gsm products (being the 'circumvention goods') displaced UPM's exports of 80gsm products from Germany (which were not subject to the original notice). Therefore there was no displacement of good subject to the original notice. Even if there was evidence of [redacted], I

[36] "Assessment Column" of Confidential Attachment 2, page 12.
[37] See REP 552, page 26.
[38] "See REP 552, page 27.

do not consider that [redacted] would in fact meet the temporal requirement that the notice goods be produced "at an earlier time" to satisfy the requirements of s.48(2)(b) read with s.48(3)(j), as made clear in Counsel's Advice.

57. In addition, UPM disputed the ADC's implication that because the dumping duty applicable to UPM's exports was not reduced from 34.4 per cent to 4 percent until March 2019 that price negotiations commencing before that time were directed at circumventing the dumping duty notice. [39] The facts, however, would appear to support UPM's position since the first export of the circumvention goods was only in [redacted], after the reduction the duty from 34 to 4 per cent and the formal contract between UPM and COS was entered into thereafter, in August 2019 when the duty was already reduced to 4 per cent.[40] This detracts from the ADC's position that avoidance of the 34.4 per cent duty was the reason for commencing exports of 68gsm copy paper.

58. However, it should still be noted, as the ADC stated during the First Conference, that COS accepted the supply of the circumvention goods in the end, with the ADC noting that the circumvention goods were not subject to the measures at all, whereas there was still a dumping duty of 4 per cent on 80 gsm products from China. In this regard I refer to the Review Panel's own observation in a previous review that, "… [T]he purpose of the relevant Regulation is to prevent exporters avoiding the imposition of measures under the Act by means of arrangements or conduct which are artificial or do not have legitimate commercial justification."[41] In my view there are a number of other factors that detract from the ADC's contention that the supply of 68gsm A4 copy paper to COS was directed at circumventing the dumping duty notice, which are discussed below:

    - Firstly, as the ADC itself pointed out, the reason for the negotiations in 2018 was that [redacted][42] UPM submitted in its application for review that in addition to the environmental credentials of the 68gsm product and its

[39] See Appendix 2 to the Second Conference Summary.
[40] During the Second Conference UPM confirmed that the sales agreement between UPM and COS was signed in August 2019, which was after the first shipment of 68 gsm product from China which was in [redacted] See Second Conference Summary.
[41] See ADRP Report No. 37, para 42, which UPM referred to in its application for review.
[42] See First Conference Summary.

packaging, the commercial justification for COS to change its source of supply from Germany to China included [redacted] reductions in delivery times and shipping costs as well as a reduction in ordinary customs duty on A4 copy paper, from 5 per cent to zero. During the Second Conference I requested UPM to clarify certain aspects of this statement. As a result of these clarifications I concluded that while there would be a clear commercial benefit to UPM switching supply from Germany to China in respect of a reduction of ordinary duties and the reduction in delivery times, it would not explain the switch from the 80gsm to the 68gsm product. However, it became clear that there was a [redacted] commercial benefit in switching to the 68gsm product in respect of shipping costs, since it was lighter than the 80gsm product, resulting in shipping rates per ream being [redacted].[43] This would appear to contribute to a legitimate commercial reason for UPM switching to 68gsm product (together with the environmental reasons) and I refer to the Review Panel's own observation that, "… [T]he purpose of the relevant Regulation is to prevent exporters avoiding the imposition of measures under the Act by means of arrangements or conduct which are artificial or do not have legitimate commercial justification."[44]

- Secondly, and related to the reason for the reduced shipping costs discussed above, the 68gsm product [redacted]. The ADC itself repeatedly makes this point in REP 552 and during the First Conference when it refers to COS' importer questionnaire response stating that [redacted] The ADC pointed out that it was important to undertake the price comparison on a per ream basis because for any given tonne there are more sheets and therefore more reams of the circumvention goods given that the circumvention goods are a lighter sheet of paper [redacted]. The ADC noted that it found that the circumvention goods have a [redacted] than the goods subject to the notice exported from

[43] See Second Conference Summary.

[44] UPM in its application for review made reference to this passage in ADRP Report No. 37, para 42.

[redacted] when compared on a per ream basis. During the First Conference the ADC confirmed that the price comparison was exclusive of the anti-dumping duty.[45] While the ADC appears to emphasise the fact that the 68 gsm product [redacted], in my view it detracts from the ADC's contention that the supply of 68gsm A4 copy paper to COS was directed at circumventing the dumping duty notice, since this price comparison was completely unrelated to, and in fact excluded, the anti-dumping duties. Rather, it points to more of a 'legitimate commercial justification' for the switch to the 68 gsm product, separate from the anti-dumping duties.

- Thirdly, another factors that detracts from the ADC's contention that the supply of 68gsm A4 copy paper to COS was directed at circumventing the dumping duty notice, is that the product has limited consumer appeal in Australia and COS remains the only customer to purchase this product, in limited volumes.[46] It was pointed out in REP 552 that COS had stated that the circumvention goods and the goods are interchangeable in most applications, "however the relatively lower opacity of 68gsm copy paper may limit its adoption in double-sided printing processes".[47] It was also noted in REP 552 that both COS and Australian Paper had indicated that historically, market acceptance of paper with a weight less than 80gsm has been minimal in Australia.[48] UPM also pointed out in its application for review that COS continued and continues to import 80gsm A4 copy paper from other exporters. This was confirmed by the ADC during the First Conference indicating that it had knowledge of COS imports of 80gsm product from [redacted] and [redacted] (both countries subject to the original notice) in the original investigation period and subsequent to original notice, including in [redacted] when UPM commenced exporting the circumvention goods to COS.

[45] See First Conference Summary and Confidential Attachment 2 to REP 552, pages 13 – 14.
[46] Reference is made to the following statements set out in UPM's application for review:
- UPM supplied [redacted] tonnes of 80 gsm A4 copy paper produced in Germany in [redacted]
- In May 2019 supply by UPM of 68gsm copy paper to COS ex China was substituted for shipments from Germany and in [redacted]

[47] See REP 552, page 17.
[48] See REP 552, page 16.

The ADC provided further information to the Review Panel which indicated the volume imported from [redacted] by COS has risen each year since the original investigation period.[49] Commenting on this during the Second Conference UPM stated:

> "The revelation in footnote 1 of the summary that COS' imports of 80 gsm A4 copy paper continue to grow supports the contention that sourcing 68gsm paper from UPM was designed to expand COS' product range, and was not a stratagem to avoid the application of the dumping duty notice."[50]

Indeed, UPM itself staring exporting 80 gsm product (subject to the original notice) to a new customer [redacted], which seems to detract from a deliberate intention to avoid anti-dumping duties. COS remains the only customer for the 68 gsm product from China.

59. In the light of the above discussions, I find that the mandatory requirements of s.48(2) of the CIO Regulation have not been met in that there were no 'relevant goods' subject to the notice that were produced by UPM at an earlier time (to the circumvention goods) for the purpose of the comparison under s.48(3), and that export to Australia of the "circumvention goods" cannot be considered be circumvention activity responsive to the original notice, as contemplated in s.48 of the CIO Regulation . I therefore consider that in respect of UPM's first ground of review that the then Minister's decision was not the correct or preferable decision.

60. Notwithstanding the above finding, there is an aspect of UPM's argument under its first ground of review with which I disagree. UPM contended that to establish whether the modification activity occurred requires examination of the actions of the exporter and importer(s) involved in the previously occurring exportation to Australia of goods subject to a dumping duty notice.[51] The ADC disagreed and stated in REP

[49] See First Conference Summary. Footnote 1 sets out the volumes of imports from [redacted] as follows: [redacted] tonnes [2015]; [redacted] tonnes [2016]; [redacted] tonnes [2017]; [redacted] tonnes [2018]'.
[50] See Appendix 2 to the Second Conference Summary.
[51] UPM contended that this approach is supported by the terms of almost all of the comparative factors listed in s.48(3) that require specific, not general, comparisons of "each good". UPM submitted that until the current inquiry the ADC's policy and practice in relation to the CIO Regulation also reflected a specific approach and that the comparisons undertaken by the ADC in all five previous 'slight modification" investigations has focussed on the activity of individual exporters and importers.

552 that it does not consider that there is a requirement to compare the circumvention goods to goods sold to a particular customer or customers, or that there is a requirement for this comparison to be undertaken in relation to sales of each good made to the same customers only. I agree with the ADC in this regard and point out that the above finding in respect of UPM's first ground of review is not based on the fact that there were no exports by UPM of the goods subject to the notice to COS for comparison purposes under s.48(3), but rather for the reasons elaborated on above. I also do not consider that the reference to "each good" in the comparative factors in s.48(3) reflect "a specific not general" comparison as contended by UPM but rather, as explained in Counsel's Advice, it is a general reference to the "circumvention good" on the one hand and the "the good the subject of the notice" on the other hand, referenced in the chapeau of s.48(3).

61. My agreement with ADC on this aspect of the finding in respect of UPM's first ground of review does not detract from my consideration in respect of UPM's first ground of review that the reviewable decision was not the correct or preferable decision and my recommendation that the Minister declare that the original notice remain unaltered.

Ground 2: Even if Regulation 48 applies the circumvention goods have not been slightly modified

UPM's Arguments

62. UPM contended, based on two arguments, that 68gsm copy paper exported to Australia by UPM (the alleged circumvention good), has not been slightly modified:

    I. The first argument is based on the fact that the alleged circumvention goods are a pre-existing product, a factor that, according to UPM, is central to the question of modification and hence a factor that the Commissioner should have regard to as a relevant factor for the purposes of the chapeau to s.48(3) of the CIO Regulation.

    II. The second argument is that the comparisons undertaken by the Commissioner in relation to the factors set out ins.48(3) do not provide

evidence sufficient to justify a conclusion that the circumvention goods have been slightly modified. According to UPM, in particular in consideration of the key factor of patterns of trade, the Commissioner conceded that the goods displaced by the alleged circumvention goods were not goods subject to the notice.

First Argument - Pre-existing product

63. UPM submitted that unlike previous cases dealing with the application of the CIO Regulation, there has not been an alteration to the manufacturing process used to produce 80gsm product. According to UPM, since commencing production in China in 1998 UPM has produced 80 gsm copy paper and a variety of other grammages including, since 2005, 68gsm paper.

64. According to UPM, the chapeau to s.48(3) requires that the determination of whether a circumvention good is slightly modified must be undertaken by comparing it with the good the subject of the notice. UPM submitted that it appeared that the ADC unlawfully conducted at least some of its s.48(3) comparisons by reference to UPM's resumed 80gsm exports to Australia.[52] UPM submitted that such a comparison, however, cannot sustain a conclusion that the circumvention goods have been modified because they are a pre-existing product that has not been materially altered and shares an identical production line, production process and raw materials with 80gsm copy paper. UPM submitted the ADC also acknowledged that apart from weight (in gsm) they share the same general physical characteristics [s.48(3)(a)] before claiming, paradoxically, that this indicates that the circumvention goods are slightly modified.[53]

65. UPM submitted that the production process for copy paper is essentially the same irrespective of the primary and secondary characteristics of the output and that the ADC determined, correctly, "..that there are no significant differences in the processes used to produce the circumvention goods and the goods the subject of

[52] Reference was made to REP 552, Table 3, on page 15.
[53] Reference was made to REP 552, page 16.

the notice …", before concluding, again "paradoxically", that the absence of differences, '… indicates that the circumvention goods are slightly modified."[54]

66. UPM submitted that on the ground that there are no material differences between the production processes of the circumvention goods and the goods the subject of the notice, the circumvention goods have not been modified and the 'necessary criterion' for the application of Regulation 48 has not been met.

67. UPM submitted further that in REP 552 the ADC ignored the significance of the fact that the alleged circumvention goods are a pre-existing product with a production and sales history extending over fifteen years. According to UPM it only produces copy paper in response to orders but if it did produce for stock the alleged circumvention good could have been supplied 'off the shelf'.

68. UPM submitted that a number of the observations cited above explicating the purpose and object of the CIO Regulation focus on such considerations as avoidance, responsiveness to notices, artificial conduct and arrangements lacking commercial justification. It contends that supplying a pre-existing product is the antithesis of artificial commercial conduct and the absence of responsiveness to notices by UPM is evidenced by the gap of over two years between ceasing exports of the goods the subject of the notice and commencing exports of the alleged circumvention goods. UPM submitted that as a long term and continuing importer of goods the subject of the notice, the decision by COS to purchase a niche product to complement its standard product offering provides no support for any suggestions of circumvention or avoidance.

Second Argument: Patterns of Trade

69. UPM submits that the overall target of Division 5A is to counter certain activities that represent a departure from past commercial practice and that are designed to result in a displacement of imports subject to a dumping duty notice and a substitution with imports that do not fall within the terms of the notice. UPM submits further that the type of arrangement or activity addressed by the CIO Regulation is the substitution

[54] In a footnote UPM stated that the, "same perversity infects the Commission's conclusion at p.19 of REP 552 that even though production costs for each good are not significantly different the circumvention goods are slightly modified." See Footnote 8 on page 5 of the application for review.

of a slightly modified good to which the terms of a dumping duty notice do not apply for a good which does fall within the terms of the notice.

70. Reference is made to UPM's arguments relating to displacement under the first ground of review in which UPM challenges the ADC's finding in REP 552 relating to displacement, in particular the assertion that displacement occurred at the time of the negotiations between UPM and COS. UPM submitted that there is no evidence to support a claim that UPM's exports of 68gsm copy paper displaced any exports of goods the subject of the notice and therefore submitted that the Commissioner must recommend to the Minister that the original notice remain unaltered.

Other Factors

71. UPM submitted that because, for the reasons set out above, it does not consider that the CIO Regulation applies to the circumstances of this matter or alternatively that the alleged circumvention goods have not been modified, it believes it is unnecessary to examine the application of the factors set out in s.48(3). Nevertheless, UPM made some comments on the approach of the ADC, including:

- the finding by the ADC that there are no differences or no significant differences in the application of eight of the factors to each good and its conclusion without positing the nature of any causal connection, that therefore the circumvention good has been slightly modified; and

- the submission that the error in the ADC's approach to the mandatory comparative exercise is that it equates the sameness or near sameness of each good as evidence of slight modification.[55]

72. UPM concludes that ultimately the mischief that the CIO Regulation seeks to address is the action of slightly modifying goods that, unmodified, are goods the subject of a dumping duty notice so that after modification they are no longer the subject of a notice. It submits that the present case does not involve any such circumvention activity by UPM.

[55] See UPM's application for review, page 7.

ADC Position

73. With regard to UPM's first argument, the ADC in REP 552 pointed out that the comparison required by s.48(3) of the CIO Regulation requires a comparison between two different goods, being the circumvention good and the good the subject of the notice, with the circumvention goods (68gsm A4 copy paper) exported to Australia from China, while the goods the subject of the original notice included goods exported to Australia from Brazil, China, Indonesia and Thailand that have a basis weight ranging from 70gsm to 100gsm. The ADC stated that the comparison required by s.48(3) did not require a comparison between a particular good before and after it underwent modification, or a comparison between goods at different stages of modification, nor did it preclude a finding that goods exported to Australia have been slightly modified in a circumstance where the circumvention good may have been previously exported to another country.[56] The ADC further stated that it nevertheless assessed UPM's claim that the circumvention goods are an unaltered specification of UPM's standard or 'pre-existing' product range and are therefore not modified goods. Based on verified data and records pertaining to UPM's sales and production, the ADC found that the circumvention goods are not identical to 68gsm copy paper exported to Japan.[57]

74. Further the ADC found that the circumvention goods were manufactured, "in accordance with a bill of materials that is separate to all other copy paper products manufactured by UPM, and this bill of materials was formulated and introduced by UPM in order to produce the circumvention goods on its existing paper machine, given that the circumvention goods were a relatively new product manufactured for sale by UPM." Therefore, the ADC did not agree with UPM that the circumvention goods are an 'unaltered specification' of UPM's standard or pre-existing A4 copy paper range.[58] Further, it was stated in REP 552 that the ADC also did not agree with UPM's contention that the 'specification of the circumvention goods is unaltered in the context of comparing the general physical characteristics of the goods exported to Japan and Australia'. The ADC stated that while differences in physical characteristics such as thickness, the level of whiteness, opacity and roughness are recognised as secondary when comparing the physical characteristics of the

[56] See Section 4.3.2.4 of REP 552, pages 30 – 31.
[57] For details of this comparison and analysis see REP 552, page 30.
[58] See REP 552, page 31.

circumvention goods and the goods the subject of the notice in determining whether there has been a slight modification of goods, they nevertheless point to the fact that the circumvention goods are a different product and are not identical to the product exported to Japan.[59]

75. The ADC considered that UPM was circumventing the measures by producing and exporting A4 copy paper with a lower weight (i.e., 68gsm A4 copy paper, which is less than 70gsm A4 copy paper that is the subject of the original notice) and therefore, the modification being considered in this particular inquiry is a change or modification to the basis weight of A4 copy paper. The ADC pointed out that in evaluating whether the circumvention goods are 'slightly modified' or whether the aforementioned modification is slight, the Commissioner compared the circumvention goods and the goods the subject of the notice in accordance with s.48(3) of the CIO Regulation.

76. With regard to UPM's second argument relating to patterns of trade and displacement, the ADC's position is set out under UPM's first ground of review.

77. In the ADC's s.269ZZJ submission, the Commissioner stated that it disagreed with UPM's submission that the circumvention goods had not been slightly modified and focussed on the statutory interpretation of s.48 of the CIO Regulation, some of which has already been discussed above in respect of the first ground of review.

78. In its s.269ZZJ submission the ADC referred to UPM's submission that there are no material differences between the production processes of the circumvention goods and the goods the subject of the notice, that the circumvention goods were not modified and the 'necessary criterion' for the application of s.48 is not met. The ADC stated that, on the contrary, its inquiry found sufficient evidence that the production process for the circumvention goods were slightly different to the production process for the notice goods because there was a different bill of materials (or 'recipe') formulated and introduced by UPM that resulted in the circumvention goods. The ADC submitted that the circumvention goods were manufactured in different production runs than other copy paper products produced by UPM (including the notice goods). The ADC submitted that UPM is circumventing the measures by producing and exporting A4 copy paper with a lower weight, with the 'slight modification' being a change to the basis weight of A4 copy paper. It was

[59] See REP 552, page 31.

submitted that the ADC compared the circumvention goods and the goods the subject of the notice, in accordance with s.48(3) of the CIO Regulation and that the Commissioner was satisfied that an alteration to the original notice was required to address the circumvention activity.[60]

Consideration

79. At the outset it should be noted that in this second ground of review there appears to be some overlap with UPM's first ground of review and some repetition of arguments.

80. I have found in respect of the first ground of review that the mandatory requirements of s.48(2) of the CIO Regulation have not been met, in particular the temporal requirements implicit in s.48(2)(b), and that export to Australia of the "circumvention goods" cannot be considered to be circumvention activity responsive to the original notice, as contemplated by s.48. I therefore consider it unnecessary to analyse in detail and draw firm conclusions relating to the Commissioner's comparison undertaken under s.48(3) for the purpose of determining whether the "circumvention goods" were 'slightly modified'. However, I will nevertheless make some comments relating thereto.

81. The ADC conducted its comparison of the circumvention goods under s.48(3) of the CIO Regulation with goods subject to the original notice, being in the main part the 80 gsm A4 copy paper exported by UPM to a new customer which exports commenced [redacted][61] The

[60] See ADC's s.269ZZJ submission, pages 8 -9.

[61] During the First Conference the ADC pointed out that for factors relating to production, cost and some of the price comparisons, the comparisons were undertaken in relation to UPM's 80 gsm A4 copy paper exported [redacted] since they were based on UPM's verified information. The ADC also pointed out that in terms of the other factors listed in s.48(3), such as: the end use, interchangeability, marketing, customer preferences, channels of trade and distribution, the ADC undertook the comparison at a general level and not on a specific consignment level, and for these factors generally compared the circumvention goods and the goods the subject of the original notice, which included goods imported from Thailand, Indonesia, and Brazil. See First Conference Summary. UPM in commenting on the First Conference Summary during the Second Conference pointed out that contrary to the ADC's claim there was no indication in the extensive analysis over 14 pages in Section 4.3.2.2 of REP 552 of anything other than specific comparisons between the alleged circumvention goods and UPM's exports to [redacted]. UPM stated further that similarly in the very detailed comparative assessment set out in Confidential Attachment 1 to REP 552 all assessments are specific to UPM and COS. See Appendix 2 to the Second Conference Summary.

comparison was done on the basis of the ADC's statutory interpretation that when read together with s.48(3)(j), s.48(2) is established if the ADC determines that a circumvention good is slightly modified after the circumvention goods and the notice goods are compared.[62] As discussed above (in respect of the first ground of review), I disagree with this statutory interpretation with particular reference to the temporal requirement referred to in Counsel's Advice that the goods the subject of the notice will have been produced at an earlier time, and (in response to the notice) there will subsequently have been a different production process used. [emphasis added][63]

82. Bearing in mind my disagreement with the basis of the ADC's statutory interpretation of s.48(2)(b) and my finding in respect of the first ground of review, I will nevertheless make some general comments on the ADC's comparison under s.48(3) as to whether the 68 gsm products could be considered to be "slightly modified", as if they were "relevant products" to be compared and as if it was appropriate for the s.48(3) comparison to be made (which I have found that it was not).

83. On this basis and considering all the relevant information, I do not disagree with the ADC's finding of "slight modification" with regard to the lower weight 68gsm A4 copy paper. I agree with the ADC that there was sufficient evidence that the production process for the circumvention goods were slightly different to the production process for the notice good because there was a different bill of materials (or 'recipe') formulated. I also agree that the comparison required by s.48(3) did not preclude a finding that goods exported to Australia have been slightly modified in a circumstance where the circumvention good may have been previously exported to another country, or as claimed by UPM, was a "pre-existing product".[64]

84. I also agree with the ADC's analysis of a number of the factors set out in s.48(3), such as:

- the circumvention goods and the goods have the same general physical characteristics;
- the circumvention goods and the goods have the same end use;

[62] See Paragraph 34 of the ADC's s.269ZZJ submission.
[63] See paragraph 33 of Counsel's Advice.
[64] It should be noted that the ADC in any event found that the circumvention goods are not identical to 68 gsm copy paper exported to Japan.

- the circumvention goods and the goods are interchangeable in most printing and copying applications;
- the processes used to produce the circumvention goods and the goods are similar;
- the way in which the circumvention goods and the goods are marketed in the Australian market is similar;
- the channels of trade and distribution for the circumvention goods and the goods in the Australian market are similar;
- the patterns of trade for the circumvention goods and the goods indicate a high degree of interchangeability between each good; and
- the circumvention goods and the goods appear to be classified to the same tariff subheading and statistical code.[65]

85. While I tend to agree with the ADC's overall conclusion that the circumvention goods are "slightly modified", I consider that in respect of a number of the factors that the ADC did not fully complete its analysis in respect of how each factor contributed to its final conclusion of a finding of "slight modification" and I am of the view that its analysis could have been more detailed. In this respect I consider that there is some validity in UPM's criticism that when the ADC finds that there are no differences or no significant differences in the application of various factors and concludes that therefore the circumvention good has been "slightly modified" in respect of each factor, it perhaps does so "without positing the nature" of any causal connection. In my view the ADC's analysis of how each factor contributed to the ultimate finding of "slight modification" could have been in greater depth and with more explanation.

86. I reiterate that these comments do not, however, detract from my finding based on the above discussion in regard to UPM's first ground of review, that the Reviewable Decision was not the correct or preferable decision and that my recommendation to the Minister is to declare that the original notice remain unaltered. However, it should be made clear that my finding was on the basis that the export of the 68gsm product by UPM from China did not amount to anti-circumvention activity responsive to the original notice, as contemplated by s.48 particularly since the temporal requirements of s.48(2)(b) were not met. My finding was <u>not</u> made on the basis that

[65] See Section 4.3.2.2 and 4.3.2.3 of REP 552, pages 14 – 29.

the comparison under s.48(3) did not demonstrate that the goods were “slightly modified”.

Recommendation

87. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I consider that the Reviewable Decision was not the correct or preferable decision.

88. I therefore recommend that the Minister revoke the Reviewable Decision and substitute it with a new decision declaring that, pursuant to s.269ZDBH(1)(a) of the Act, the original notices remain unaltered.

Leora Blumberg
Panel Member
Anti-Dumping Review Panel
14 July 2021

Re: Section 48 of the *Customs (International Obligations) Regulation 2015*

MEMORANDUM OF ADVICE

Overview

1. In the context of Part XVB of the *Customs Act 1901* (the **Act**) and the *Customs (International Obligations) Regulation 2015* (the **Regulation**), I am asked on behalf of the Anti-Dumping Review Panel to advise on the following questions in relation to s 48 of the Regulation:

   Q1. Where

   (a) a notice issued under s 269TG(2) of the Act or 269TJ(2) of the Act is in force;

   (b) goods are exported from a country to which the notice applies;

   (c) the goods, as exported, do not fall within the scope of the notices; and

   (d) the goods, as exported, are interchangeable with goods to which the notices apply;

   is it necessary for the exported goods to have been physically altered after the goods have been manufactured in order for s 48(2) of the Regulation to apply?

   As an alternative reformulation of the issue:

   Q.2 Is it necessary, in order for s 48(2) of the Regulation to apply, for the exported goods to have been, at some time prior to export, in a state or condition in which the notices would have applied (within s 48(2)(c) of the Regulation), in order for s 48(2) of the Regulation to be applicable?

   Q.3 In the alternative, is it possible for goods to fall within s 48(2) of the Regulation if they are exported in the physical state in which they were manufactured and the goods, as manufactured and exported, do not fall within the scope of the notice?

2. For the reasons explained in this memorandum, in my view the answers to the questions posed are Q1: “No”, Q2: “No” and Q3: “Yes”.

The task

3. In my view, s 48(2) (when read in isolation) is ambiguous on the questions of whether, in order for the provision to apply in relation to particular exported goods:

   (a) those particular goods must have been manufactured in a form to which notices under s 269TG(2) and/or s 269TJ(2) of the Act would apply but are then slightly modified before export; or

   (b) those particular goods need not have been manufactured in a form to which notices under s 269TG(2) and/or s 269TJ(2) of the Act would apply, but some other criterion of applicability is met, and if so, what.

4. The ambiguities in s 48(2) must be resolved by the ordinary principles of statutory construction and by reference to the fact that the Regulation is a legislative instrument and so must be read and construed to be within the power conferred by the enabling Act. That is, s 48(2) must be read and construed subject to the regulation-making power conferred by s 270 of the Act, in a manner that avoids any inconsistency with the provisions of the Act.[1]

5. The High Court has recently reiterated the ordinary principles of the task:[2]

   (a) The task of statutory construction must begin with a consideration of the statutory text. So must the task of statutory construction end.

   (b) The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.

   (c) Objective discernment of statutory purpose is integral to contextual construction. The requirement of s 15AA of the *Acts Interpretation Act 1901* (Cth)[3] that "the interpretation that would best achieve the purpose or object of [an] Act (whether or not that purpose or object is expressly stated ...) is to be

[1] See s 3 of the *Legislation Act 2003* (Cth), in combination with s 270(1) of the Act.
[2] *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22]-[23], references omitted.
[3] Applicable here by reason of s 13(1)(a) of the *Legislation Act 2003* (Cth).

preferred to each other interpretation" is in that respect a particular statutory reflection of a general systemic principle. For: "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

6. Further, it is necessary to achieve to the greatest extent possible a harmonious construction of s 48 which accords to each part of it a function that can be reconciled with any apparently inconsistent parts of it, and might involve discerning a hierarchy of provisions, in other words "which is the leading provision and which the subordinate provision."[4]

Legislative context

7. The relevant provisions of the Act are found in Part XVB of the Act, headed "Special provisions relating to anti-dumping duties".

8. Before examining Division 5A and the Regulation, it is necessary to mention in broad terms certain antecedent matters. Part XVB provides for the publishing of notices triggering anti-dumping duties and countervailing measures by a regime that includes the following key steps:

   (a) Application may be made under s 269TB requesting the publication by the Minister of a dumping duty notice or countervailing duty notice in respect of goods in a consignment of goods that has been, or is likely to be imported into Australia, or like goods that may be imported into Australia, by the lodgment of an application with the Commissioner of the Anti-Dumping Commission[5].

   (b) The lodging of an application triggers a duty on the part of the Commissioner to consider the application and reach a view on certain threshold matters. Depending on the views reached by the Commissioner, this could lead to

[4] *Project Blue Sky v ABA* (1998) 194 CLR 355 at [69]-[71].
[5] Previously this function and various others mentioned in this paragraph were conferred on the CEO of Customs, but from March 2014, the relevant functions that had been conferred on the CEO of Customs were transferred to the Commissioner of the Anti-Dumping Commission: *Customs Amendment (Anti-Dumping Commission Transfer) Act 2013* No 139, 2013, Schedule 1.

public notice being given of certain specified particulars of the application under s 269TC, and amongst other things setting a date for initiation of an investigation and inviting submissions.

(c) Under s 269TEA the Commissioner is required, after holding an investigation, to give a report in respect of the goods the subject of the application to the Minister that contains recommendations, amongst other things, as to whether a dumping duty notice or countervailing duty notice should be published, together with reasons, material findings of fact and particulars of the evidence relied upon to support those findings.

(d) Under s 269TG(1), where the Minister is satisfied as to any goods that have been exported to Australia of certain criteria concerning export price and normal value of the goods, and material injury to an Australian industry producing like goods, then the Minister may by public notice declare that s 8 of the *Customs Tariff (Anti-dumping) Act 1975* (**Dumping Duty Act**) applies to the goods (or to like goods exported after any preliminary affirmative determination under s 269TD).

(e) Under s 269TG(2), where the Minister is satisfied as to goods of any kind of certain criteria concerning export price and normal value of the goods, and material injury to an Australian industry producing like goods, then the Minister may by public notice declare that s 8 of the Dumping Duty Act applies to like goods from the date of such notice (or later date).

(f) Under s 269TJ(1), where the Minister is satisfied as to any goods that have been exported to Australia of certain criteria concerning receipt of a countervailable subsidy in respect of the goods, and material injury to an Australian industry producing like goods, then the Minister may by public notice declare that s 10 of the Dumping Duty Act applies to the goods (or to like goods exported after any preliminary affirmative determination under s 269TD).

(g) Under s 269TJ(2), where the Minister is satisfied as to goods of any kind of certain criteria concerning receipt of a countervailable subsidy in respect of the goods, and material injury to an Australian industry producing like goods,

then the Minister may by public notice declare that s 10 of the Dumping Duty Act applies to like goods from the date of such notice (or later date).

9. Before moving to further matters of legislative context, it is relevant to note certain features of notices under each of s 269TG(2) or s 269TJ(2):

   (a) Each of ss 269TG(2) and 269TJ(2) applies to "like goods" in relation to goods of a "particular kind" identified in the notice.[6]

   (b) Notices under s 269TG(2) must specify the normal value, export price and non-injurious price of the goods to which the declaration (by the notice) relates (s 269TG(3)).

   (c) Notices under s 269TJ(2) must specify the amount of countervailing subsidy that was or would be received in respect of the goods to which the notice relates, and their non-injurious price, both as ascertained by the Minister at the time of publication of the notice (s 269TJ(11)).

   (d) Notices under both ss 269TG(2) and 269TJ(2) may adopt different ways of identifying the particular kind of goods in question, and may identify not only the country from which the goods are exported and an objective description of the goods, but also particular exporters. Only a description of the goods is explicitly required by ss 269TG(2) and 269TJ(2). More details are implicitly required by virtue of the need for the notices to set out the particulars (for each particular kind of goods) required by s 269TG(3) or s 269TJ(11), particulars that will differ depending on country and exporter.

10. In 2011, the Customs Amendment (Anti-dumping Improvements) Bill (No.2) 2011 was introduced, accompanied by an Explanatory Memorandum which addressed potential future improvements of access, international consistency and compliance including a proposal to consider introduction of an anti-circumvention

[6] This is a reasonable construction of each of s 269TG(2) and s 269TJ(2) flowing from the phrase "as to goods of any kind" that appears in them. This construction of s 269TG(2) is endorsed in explicit terms by s 269TG(3)(b), and although the equivalent provision in s 269TJ - s269TJ(11) – is in more general terms, the same construction applies to s 269TJ(2) in my view. The identification of the goods to be the subject of the notice is connected with the identification of goods during antecedent steps in the process under Part XVB: see, e.g. *GM Holden Ltd v Commissioner of the Anti-Dumping Commission* [2014] FCA 708 at [29] and [30], and also [130] (Mortimer J).

framework. One aspect of circumvention activity mentioned was the avoidance of applicable duties:

> … by slight modifications being made to, or disassembly of, goods subject of measures so that the importer can declare that measures do not apply to the modified or disassembled goods. …

11. Anti-circumvention measures are not the subject of express provision in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or in the Agreement on Subsidies and Countervailing Measures, but are in various cases the subject of local legislation or regulations enacted by parties to those agreements, for example, Article 13 of Regulation (EC) No 384/96 and Article 23 of Regulation (EC) No 2026/97, each of which can extend to "the slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics".

12. On 11 June 2013, Schedule 2 to the *Customs Amendment (Anti-dumping Improvements) Act (No 3) 2012* (No 196, 2012) commenced, adding Division 5A headed "Anti-circumvention inquiries" to Part XVB of the Act, together with ancillary provisions. These provisions revolved around the concept of "circumvention activity", which could take various forms defined in s 269ZDBB. The regime provided for the publishing of notices altering anti-dumping duty and countervailing duty notices as a result of inquiries into such "circumvention activities". The Explanatory Memorandum relevantly stated (emphasis added):

> 11. Schedule 2 of the Bill amends the Customs Act to address prescribed circumvention activities by importers and exporters.
>
> 12. Circumvention is a trade strategy used by the exporters and importers of products to avoid the full payment of dumping and countervailing duties. **Circumvention behaviours take various forms and exploit different aspects of the anti-dumping and countervailing system, but they all aim to ensure that the relevant goods do not attract the intended dumping or countervailing duty**.
>
> 13. This Bill will allow the Minister to amend the original notice imposing the dumping or countervailing duty, including by extending the notice so that it applies to different goods, exporters and countries which were not specified in the original notice. …

13. An additional form of circumvention activity (s 269ZDBB(5A)) was added on 1 January 2014 by the *Customs Amendment (Anti-dumping) Measures Act 2013* (No 95, 2013).

14. The key features of the anti-circumvention regime in the Act relevant to the proper construction of s 48 of the *Customs (International Obligations) Regulation 2015* are as follows.

15. Section 269ZDBB(1) establishes that a "circumvention activity" is an activity "in relation to a notice published under s 269TG(2) or s 269TJ(2)", that is, in relation to a (prospectively operative) dumping duty notice or countervailing duty notice.

16. Each of the succeeding subsections of s 269ZDBB, (2)-(5), then follow the same pattern, providing that circumvention activity "occurs" in relation to the notice "if the following apply", followed by a series of circumstances, each of which is a necessary criterion. The criteria differ from subsection to subsection, but one common feature is that each subsection sets up a category of goods defined as "circumvention goods" and another common feature is that exportation of the "circumvention goods" does not engage s 8 or 10 of the Dumping Duty Act (or, in the case of s 269ZDBB(5) only, if the goods were exported under an arrangement with another exporter to whom the notice applies, those provisions do not impose as much duty on the circumvention goods as they would if exported by the other exporter). As to the "circumvention goods" criteria:

    (a) subsection (2) relates to goods in the form of individual parts exported to Australia (amongst other things, where, in assembled form, the assembled goods would be the subject of the notice if exported by an exporter to whom the notice applies);

    (b) subsection (3) is similar to subsection (2) save that it relates to goods in the form of individual parts that are assembled in a second foreign country, to which the notice does not apply;

    (c) subsection (4) relates to goods to which the notice would apply, save that one or more intermediary foreign countries to which the notice does not apply have been interposed; and

    (d) subsection (5) relates to goods to which the notice would apply if exported by a particular exporter, if the goods were exported under an arrangement with

another exporter to whom the notice does not apply, or to whom it applies such that the amount of duty payable is lower.

17. Subsection (5A) also has a "circumvention goods" criterion, but the circumvention goods are defined as those goods to which the notice applies when exported by the actual exporter. Subsection (5A) provides that a further criterion is that either or both of ss 8 and 10 of the Dumping Duty Act apply. The gravamen of subsection (5A) is that over a reasonable period the circumvention goods are sold in Australia without price increases commensurate with the duty payable.

18. Taking its place in this context, s 269ZDBB(6) provides for the prescription by regulation of further "circumstances" in which "circumvention activity" occurs.

19. There were no such regulations until the addition of regulation 183A to the *Customs Regulations 1926* by the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015*, SLI No 15, 2015, which commenced on 1 April 2015. That provision was later re-made as s 48 of the *Customs (International Obligations) Regulation 2015.* The Explanatory Statement to the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015* stated that its purpose "is to specify a new type of circumvention activity in Australia's anti-dumping system to address the practice of slightly modifying goods in order to avoid payment of anti-dumping and countervailing duties already imposed". The Statement went on to say:

> The Regulation prescribes a new circumvention activity in which goods that would have been the subject of a dumping or countervailing notice (and liable to pay duties) are slightly modified, prior to the export of the goods to Australia, to avoid the anti-dumping duty.

20. The procedural framework established under Division 5A includes the following relevant key steps:

    (a) Under ss 269ZDBC and 269ZDBD, an application may be lodged with the Commissioner requesting that the Commissioner conduct an anti-circumvention inquiry in relation to a specified notice published under s 269TG(2) or s 269TJ(2) (defined as the "original notice"). A content requirement for the application is that is must include "a description of the kind of goods that are the subject the original notice", "a description of the

circumvention activities in relation to the original notice that the applicant considers have occurred" and "a description of the alterations to the original notice that the applicant considers should be made".

(b) Under s 269ZDBE, the lodging of such an application triggers a duty on the part of the Commissioner to consider the application and reach a view on certain threshold matters. Depending on the views reached by the Commissioner, this could lead to the publication of a notice that such an inquiry is to be conducted, and giving various required particulars.

(c) After conducting an anti-circumvention inquiry, under s 269ZDBG the Commissioner must give the Minister a report recommending whether the original notice remain unaltered, or be altered because the Commissioner is satisfied that circumvention activities have occurred (and if so, the alterations to be made).

(d) Under s 269ZDBH, after considering the report and any other information that the Minister considers relevant, the Minister must declare by published notice that the original notice remain unaltered or that alterations specified in the declaration be made with effect from a day specified in the declaration. There is a non-exhaustive list of the kinds of alterations that may be made, and it includes "the specification of different goods that are to be the subject of the original notice": s 269ZDBH(2)(a).

21. Section 269ZZA(1)(ca), in Subdivision B of Division 9 of Part XVB of the Act, provides that the Subdivision deals with reviews by the ADRP of decisions by the Minister under s 269ZDBH(1).

Reasoning and conclusions

22. As already noted, statutory construction must begin and end with the relevant text. It is useful to set out s 48 of the *Customs (International Obligations) Regulation 2015* in its entirety:

> **48 Circumvention activities**
>
> (1) For subsection 269ZDBB(6) of the Act, the circumstance set out in subsection (2) of this section is prescribed.

Slight modification of goods exported to Australia

(2) The circumstance is that all of the following apply:

(a) goods (the ***circumvention goods***) are exported to Australia from a foreign country in respect of which the notice applies;

(b) before that export, the circumvention goods are slightly modified;

(c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;

(d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;

(e) section 8 or 10 of the *Customs Tariff (Anti‑Dumping) Act 1975*, as the case requires, does not apply to the export of the circumvention goods to Australia.

(3) For the purpose of determining whether a circumvention good is slightly modified, the Commissioner must compare the circumvention good and the good the subject of the notice, having regard to any factor that the Commissioner considers relevant, including any of the following factors:

(a) each good's general physical characteristics;

(b) each good's end use;

(c) the interchangeability of each good;

(d) differences in the processes used to produce each good;

(e) differences in the cost to produce each good;

(f) the cost of modification;

(g) customer preferences and expectations relating to each good;

(h) the way in which each good is marketed;

(i) channels of trade and distribution for each good;

(j) patterns of trade for each good;

(k) changes in the pricing of each good;

(l) changes in the export volumes for each good;

(m) tariff classifications and statistical codes for each good.

23. A number of preliminary observations may be made. ***First***, the context is that there is already in existence either or both of a notice under s 269TG(2) or s 269TJ(2), and (as already outlined, in paragraph 9 above) any such notice will identify goods of a particular kind. ***Second***, the notice will apply to like goods in relation to the goods of a particular kind identified in the notice, that will or may be exported. ***Third***, the purpose of s 48 is to prescribe an additional "circumvention activity" in relation to the notice. ***Fourth***, the expression "circumvention good[s]" is set up in s 48(2)(a) and is then used in each and every one of the other criteria making up s 48(2), and in the description of the accompanying duty imposed on the Commissioner by s 48(3). In contrast, there is only one reference to good[s] the subject of the notice, in s 48(3). ***Fifth***, the expression "circumvention goods" seems to be used in s 48(2) without precision in both temporal and substantive ways, in the sense that it is used referably to the goods as they are exported to Australia (s 48(2)(a) and (e)), to the goods as they "are slightly modified" before

export (s 48(2)(b)), to the use or purpose of the goods both before and after they "are so slightly modified" (s 48(2)(c)) and to the goods in a hypothetical or counterfactual manner (had they "not been so slightly modified"… s 48(2)(d)).

24. There are two threshold issues presented:

(a) There are competing constructions of "circumvention goods" in s 48(2) available. On first appearances, the simplest construction is that "circumvention goods" must be read as having a strictly fixed meaning throughout s 48, and that as defined in s 48(2)(a), and reinforced by s 48(2)(e), it must mean goods in the form they are exported to Australia. However, this construction seems unworkable when confronted by the use of the expression in each of s 48(2)(b)-(d). They suggest that the expression can be given a more adaptable or flexible content, depending on context.

(b) The expression "slightly modified" appears in the criteria in each of s 48(2)(b)-(d). At first glance, because "circumvention goods" is defined in s 48(2)(a) and used in s 48(2)(e) referably to the form of the goods as they are exported to Australia, it is difficult to see how to construe s 48(2)(b)-(d) in a way that would advance the evidence purpose lying behind the anti-circumvention regime,[7] or that would make any sense of those criteria at all.

25. In my view, the key to resolving both issues, and thus to embarking on the path to the proper resolution of the questions I have been asked about the construction of s 48(2), is that the expression "slightly modified" appearing in connection with "circumvention goods" is to be treated as having a special meaning in s 48(2), discernible from s 48(3). In a sense, although the primary function of s 48(3) is to impose a particular duty on the Commissioner as to the way the Commissioner is to carry out the task under s 48(2), s 48(3) is also akin to a definitional provision that explains the use of "*circumvention goods are slightly modified*" in s 48(2)(b), "*circumvention goods*" and "… *are so slightly modified*" in s 48(2)(c) and "*had the circumvention goods not been so slightly modified*" in s 48(2)(d). Once this

[7] That purpose is discernible from s 269ZDBB(1) and (6) of the Act, and from the extrinsic materials referred to in paragraphs 12 and 19 above: to address activities responsive to notices that are aimed at ensuring that exportations that would have been the subject of the notices do not attract the intended duty.

approach is taken, the apparent imprecision in the use of "circumvention goods" in s 48(2)(b)-(c) is explicable and ceases to matter. The use of that expression in proximity to "slightly modified" in those criteria is in effect a shorthand way of referring to the task spelt out in detail in s 48(3).

26. Section 48(3) begins by referring to the Commissioner's task of "determining whether a circumvention good is slightly modified". That task is the very task that is mandated by aspects of each of s 48(2)(b)-(d). For the purpose of that task, the Commissioner is to "compare the circumvention good and the good the subject of the notice". In this way, s 48(3) is the gateway by which the goods the subject of the notice are introduced into the deliberative process. Comparison with the notice goods is a step which is entirely consistent with, and probably indispensable to, the objectives evidently lying behind the s 48 and the anti-circumvention regime as a whole. That is because the regime is directed to activity that circumvents the obligation to pay duty payable by reason of existing notices.[8] By reason of this aspect of s 48(3), although s 48(2)(b)-(d) do not explicitly mention the goods the subject of the notice, it can be seen that in order to ascertain whether the criteria in s 48(2)(b)-(d) are met, the Commissioner must undertake this comparison. The Commissioner is to do so "*having regard to any factor that the Commissioner considers relevant*". If this were all that was said, the relevant factors would fall to be ascertained from the existing subject matter, scope and purpose of the provision and the statutory construction task would be harder. However, more guidance is provided. The factors that must or may (for present purposes is does not matter which) be considered by the Commissioner include those listed in s 48(3)(a)-(m). Those factors are instructive as to the character of what the Commissioner may lawfully consider to be a slight modification within the scope of s 48(2)(b)-(d), because it may be assumed that the Governor-General in making the Regulation only included factors in this list that would be of potential probative value in determining whether "a circumvention good is slightly modified" and the corresponding criteria in s 48(2)(b)-(d) are met. The only potential constraint on use of the list of factors to inform the proper construction of "circumvention goods are slightly modified" in

[8] Ibid.

s 48(2) would be any inconsistency with the provisions of the Act that might arise, a matter to which I will return.

27. Turning to the three questions I have been asked, they each pose in a different way the question of whether the criteria in s 48(2) can only be met where:

    (a) particular goods have been manufactured and exist for a time in the form they were manufactured;

    (b) in the form they were manufactured, those goods are goods to which the notice would apply if they were exported;

    (c) subsequent to their manufacture but before exportation, the goods are subjected to alteration by reason of which the notices do not apply; and

    (d) the goods, as altered, are then exported.

28. In my view neither text nor context compels the above construction of s 48(2).

29. In my view, as explained above, the key to embarking on a proper construction of s 48(2) is s 48(3). That provision, at paragraph 48(3)(d), requires the Commissioner to consider *"(d) differences in processes used to produce each good*" in determining whether the criteria in s 48(2) are met that depend on whether a circumvention good is slightly modified. This provision indicates that a specific circumvention good need not already be manufactured and in existence, and then subjected to an alteration, before the criteria concerning "slightly modified" can be made out. This provision also indicates that a difference between the particular kinds of goods produced by different production processes may lawfully be considered by the Commissioner in deciding whether the criteria concerning "slightly modified" are made out.

30. To resort the ordinary accepted usage of "modification" or "modified" when used in relation to goods, there is nothing surprising about the notion of a "modification" of a particular type of goods, or of a particular supplier's products, being used to refer to a modification wrought by changes in production processes from time to time. A more limited meaning, requiring an alteration being made to an existing object, would be quite artificial.

31. Further, when regard is given to the purpose of s 48 and the anti-circumvention regime as a whole[9], it seems most unlikely that under s 48(2) anti-circumvention activity would be limited so as to exclude differences between the production processes for goods that are the subject of the notice and the production processes for the goods actually being exported. That would open up a gap in the regime which could be exploited by someone seeking to circumvent a notice.

32. I return to a point made in paragraph 3(b) above: if there is no mandatory criterion imposed by s 48 to the effect that modification of an existing manufactured good is required, what then is the relevant limiting criterion that applies? In my view, where the slight modification in question does not consist of the alteration of existing manufactured goods falling within the scope of a notice, then it will at least be a necessary criterion for s 48 to apply that a different production process has been adopted by comparison with the production process that previously resulted in the manufacture of the goods to which the notice applies. I elaborate on this point in the next paragraph.

33. I acknowledge that two aspects of the criteria in s 48(2) seem at first appearances to be referring to the actual alteration of existing objects: "before" the circumvention goods are exported they "are slightly modified" (s 48(2)(b)), and their use or purpose is the same "before" and "after" they "are so slightly modified" (s 48(2)(c)). The answer, in my view, is that the term "circumvention goods" is not used here with precision but serves as a general denotation for the goods that are to be subjected by the Commissioner to the comparison process mandated by s 48(3). Subsection 48(3), as already outlined, requires comparison to be made between the goods the subject of the notice and the circumvention goods. This drafting technique suggests that attention is not required to be directed to whether there has been a subsequent modification of a particular pre-existing object. Rather, the conclusion as to "slightly modified" is reached through comparison of goods, a more generalised inquiry. In a particular case, the goods to be compared may be the product of different production processes, as contemplated by s 48(3)(d). In that event, the goods the subject of the notice will have been produced at an earlier time, and (in response to the notice) there

[9] Ibid.

will subsequently have been a different production process used. In this way, it is meaningful to speak of the goods "before" and "after" modification.

34. There is a further contextual indication that supports the construction of s 48(2) outlined in paragraphs 28 to 32 above. The context in which s 48 falls to be construed is, as established by s 269ZDBB(1), in determining whether certain *activity* (circumvention activity) has occurred *in relation to an original notice*. The ordinary usage of "activity" is generally to referable to a series of repetitive acts that take place over a period. In that context, it is unsurprising that the regime would be designed to address modifications of goods wrought by differences in the production processes in use over time.

35. I can find no impediment in the Act to the construction of the Regulation outlined in paragraphs 28 to 32 above. In my view, there is no inconsistency with the Act occasioned by s 48 of the Regulation being read and construed as extending the anti-circumvention regime to goods that are not and never were of a kind to which the original notice applied, because s 269ZDBH expressly contemplates that the Minister may alter the original notice to specify different goods.[10]

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[10] Further, although I acknowledge that the consistency of various forms of local anti-circumvention measures with international law obligations (and with the implications arising from the silence on this topic of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures) has been and continues to be the subject of controversy, the construction I have arrived at does not in my view raise any obvious inconsistency with Australia's international law obligations.