

MinterEllison

26 May 2021

Ms Leora Blumberg
Panel Member
Anti-Dumping Review Panel
C/- Legal, Audit & Assurance
Department of Industry, Science, Energy and Resources
10 Binara Street
Canberra City ACT 2601

BY EMAIL: ADRP@industry.gov.au

Dear Ms Blumberg

ADRP Review No. 133 – A4 Copy Paper exported from the People’s Republic of China: Anti-Circumvention Inquiry

We act for UPM Asia Pacific Pte Ltd (**UPM AP**) an interested party and the applicant in the above matter and make this submission pursuant to s269ZZJ of the Customs Act 1901 (**Act**).

We refer to our client's submission in Attachment C-1 to the application supporting the grounds on which the applicant believes that the decision of the Minister to specify alterations to the original notice was not the correct or preferable decision. Matters addressed in that submission include consideration of the purpose and object of Regulation 48. We contend that the Minister's decision and the report on which it is based ignores the purpose and object of the Act and fails to engage with some of the key terms and concepts of the Regulation.

S 269ZDBC(6) of the Act provides the authority for the prescription in the Regulation of a *circumvention activity*. Each of those words implies agency and, as the activity requires the movement of goods from a foreign country to Australia, it is the entities involved in that movement that may be the parties to a circumvention activity. "Circumvention" suggests an action or stratagem designed to avoid the outcomes that would apply if the action or stratagem was not undertaken. In the present context the rationale for the circumvention activity would be the beneficial avoidance of the application of a dumping duty notice.

The Commission's approach in Report 552 is to focus almost exclusively on the "factors" set out in subsection (3) of the Regulation and to give weight to consideration of matters not relevant to the central requirement to compare the circumvention good and the good the subject of the notice. Contrary to the observation of the Review Panel that ... *the ADC does not have a discretion to ignore a factor which would otherwise be relevant to the exercise to be conducted under Regulation 48(3)*¹, relevant factors supporting a conclusion that there has not been any circumvention activity are either ignored or given insufficient weight by the Commissioner.

Such factors include the production and sale of 68gsm copy paper by UPM over more than fifteen years, the absence of evidence of activity designed to circumvent the dumping duty notice, the continuing purchases by COS of imported 80gsm copy paper from other suppliers, the absence of any financial advantage resulting from the purchase of goods not subject to the

¹ ADRP Report 38 at para 111

notice, the purchase by COS of 68gsm A3 copy paper and UPM AP's sales to New Zealand of 68gsm A4 copy paper and above all the absence of an objective, relevant and cogent comparison of the patterns of trade for each good.

While we acknowledge that none of the factors alone, listed or unlisted, is determinative of the issue of circumvention, we submit that it is the comparison of patterns of trade that is pivotal to reaching an informed, objective and robust conclusion. That comparative factor not only has the potential to illuminate other considerations such as interchangeability, end use, customer preferences, trade and distribution channels, export volumes and circumvention activity itself but it also most directly addresses the mischief that the Regulation is designed to counter. The pre-eminence of the factor in the Commission's conduct of earlier 'slight modification' inquiries is undeniable. 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, in no case has the Commission 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.

Report 291 illustrates this approach. 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. By contrast in relation to one exporter whose export activities did not demonstrate a switch from non-alloyed to alloyed HSS, the Commission 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.

The Commission's usual response to submissions pointing out that a proposed recommendation is inconsistent with earlier decisions is to claim, correctly, that it is not bound by administrative precedent. Nevertheless consistency is an important component of administrative decision making as Brennan J observed 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.

If the Review Panel's deliberations in the present matter extend beyond the correctness of the decision to the issue of preferability, we submit that a decision that is consistent with earlier decisions is preferable to one that is not.

Based on its examination of UPM's patterns of trade in the alleged circumvention goods and the goods the subject of the notice, the Commission concluded, correctly, that:

Based on the events outlined above, 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)².

The Commission then seeks to disavow its own finding of fact that UPM had not replaced supply to Australia of goods the subject of the notice with exports of the alleged circumvention goods by embarking on an examination of UPM's alternative global supply options. However this examination does not relate to either the comparison mandated by the chapeau to

² Report 552. p.25

Regulation 48(3) or to activity relating to a dumping duty notice as required by s269ZDBB and consequently must be set aside as irrelevant.

So too must the Commission'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.

In addition to being based on irrelevant considerations, the conclusion is patently flawed. 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.

In summary we submit that the weight of evidence in this matter supports the conclusion that the activities undertaken by UPM AP and COS were not circumvention activities within the meaning of the Regulation. The fact that the relevant dumping duty notice did not apply UPM's exports of copy paper to COS was merely incidental to the availability of a pre-existing product that met certain marketing aspirations involving a copy paper specification that the applicant had dismissed as not being commercially viable in the Australian market. No doubt it is that dismissal that led the applicant in 2013, 2016 and 2019 to exclude 68gsm copy paper from the goods description in its applications for dumping duty notices. It is not the purpose of the anti-circumvention provisions of the Act to reverse the consequences of a repeated action by an applicant when the proper course of action is the making of a fresh application specifying an additional product range that is alleged to be dumped and causing injury.



John Cosgrave
Director, Trade Measures
T: +61 419 254 974
Email: john.cosgrave@minterellison.com
Partner: Michael Brennan T: +61 2 6225 3043
OUR REF: MRB/JPC 10313022

MinterEllison
Constitution Place,
1 Constitution Avenue,
Canberra City, ACT 2601