



Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 19 February 2020 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party² may lodge an application to the ADRP for review of a Ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time

Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences

The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information

You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

Contact

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

¹ By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

² As defined in section 269ZX *Customs Act 1901*.

PART A: APPLICANT INFORMATION

1. Applicant's details

UPM Asia Pacific Pte Ltd
Address: F23, Tower 2, Grand Gateway, No. 3, Hongqiao Rd., Shanghai, China
Type of entity (trade union, corporation, government etc.): Corporation

2. Contact person for applicant

Full name: Wendy Weng
Position: Group Legal Officer
Email address: hairong.weng@upm.com
Telephone number: +86-21-64485560

3. Set out the basis on which the applicant considers it is an interested party:

UPM Asia Pacific Pte Ltd (UPM-AP) is the exporter and importer of the goods the subject of the reviewable decision.

4. Is the applicant represented?

Yes No

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

****It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.****

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

Subsection 269TK(1) or (2) – decision of the Minister to publish a third country countervailing duty notice

Subsection 269TL(1) – decision of the Minister not to publish duty notice

Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed.**

6. Provide a full description of the goods which were the subject of the reviewable decision:

The goods the subject of the reviewable decision are A4 copy paper exported from China that has a weight of 68gsm but otherwise meets the description of the goods the subject of the original notice.

7. Provide the tariff classifications/statistical codes of the imported goods:

The alleged circumvention goods are imported into Australia under tariff subheading 4802.56.10, statistical code 03, of Schedule 3 to the Customs Tariff Act 1995

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number:
2021/024

Date ADN was published:
19 March 2021

****Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application****

Please see Attachment A

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so:

9. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

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 s48(3), and consequently the Minister's decision was not the correct or preferable decision and the original notice must remain unaltered.

2. Even if the Regulation 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.

10. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

The correct or preferable decision ought to be a declaration by the Minister under s.269ZDBH(1) of the Customs Act 1901 (**Act**) that the original notice is to remain unaltered.

11. Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

A submission in support of the grounds set out in the above response to question 9 is at Appendix B

NON-CONFIDENTIAL

12. Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:

Do not answer question 11 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

The proposed decision would result in UPM's exports of 68gsm copy paper not falling within the goods description set out in the dumping duty notice

13. Please list all attachments provided in support of this application:

Attachment A	ADN 2021/024
Attachment B	Letter of Authority
Attachment C-1	Supporting Statement - Confidential
Attachment C-2	Supporting Statement – Non-Confidential

PART D: DECLARATION

The applicant/~~the applicant's~~ authorised representative [*delete inapplicable*] declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.



Signature:

Name: John Cosgrave

NON-CONFIDENTIAL

Position: Director, Trade Measures

Organisation: Minter Ellison Lawyers

Date: 19/ 04/ 2021

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative:

Full name of representative: John Patrick Cosgrave
Organisation: Minter Ellison Lawyers
Address: Constitution Place, 1 Constitution Avenue Canberra City ACT 2601
Email address: john.cosgrave@minterellison.com
Telephone number: 0419 254 974

Representative's authority to act

****A separate letter of authority may be attached in lieu of the applicant signing this section****

[Please see Attachment B](#)

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date:

Attachment A



Australian Government
Department of Industry, Science,
Energy and Resources

Anti-Dumping
Commission

Anti-Dumping Notice No. 2021/024

Customs Act 1901 – Part XVB

Findings in relation to an anti-circumvention inquiry into the slight modification of goods exported to Australia (Anti-Circumvention Inquiry No. 552)

A4 copy paper Exported from the People's Republic of China

Notice under section 269ZDBH(1) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission has completed his anti-circumvention inquiry in relation to the anti-dumping measures applying to A4 copy paper (the goods) exported to Australia from the People's Republic of China (China).

Recommendations resulting from that inquiry, reasons for the recommendations and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 552 (REP 552)*.

The goods the subject of the anti-dumping measures

The goods exported from the Federative Republic of Brazil (Brazil), China, the Republic of Indonesia (Indonesia) and the Kingdom of Thailand (Thailand) are subject to a dumping duty notice published under section 269TG(2) the *Customs Act 1901* (the Act).¹ The goods exported from China are also subject to a countervailing duty notice published under section 269TJ(2) of the Act.²

The goods the subject of the original notices (the dumping duty notice and the countervailing duty notice) are described as:

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 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.

¹ Anti-Dumping Notice No. 2017/39.

² Anti-Dumping Notice No. 2017/40.

NON-CONFIDENTIAL

Minister's declaration and alteration to original notices

I, KAREN LESLEY ANDREWS, the Minister for Industry, Science and Technology, have considered REP 552 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of fact and law set out in REP 552.

Under section 269ZDBH(1)(b) of the Act, I declare, for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975*, that 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 are 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).

In respect of the goods exported to Australia from Brazil, Indonesia and Thailand, the description of the goods the subject of the notice under section 269TG(2) will remain unaltered.

As a result of my declaration under section 269ZDBH(1) of the Act, imports of the goods from China in the nominal basis weight range of 67 to 69 gsm that are entered for home consumption in Australia on and after 28 April 2020 will be subject to interim dumping duty and interim countervailing duty, unless the exporter of the goods is not subject to the original notices published under section 269TG(2) or 269TJ(2).

Public record

REP 552 has been placed on the public record and is available on the Anti-Dumping Commission website (www.adcommission.gov.au).

Further information

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel (www.adreviewpanel.gov.au) in accordance with the requirements in Division 9 of Part XVB of the Act within 30 days of the publication this notice.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2424 or email investigations2@adcommission.gov.au.

Dated this 17th day of March



KAREN ANDREWS
Minister for Industry, Science and Technology

Attachment B



UPM Asia Pacific Pte Ltd

13 April 2021



To the Anti-Dumping Review Panel

Application to the ADRP for Review of a Decision to alter the description of goods in a dumping duty notice applying to exports of A4 Copy Paper from China.

UPM Asia Pacific Pte Ltd appoints Minter Ellison Lawyers (contact John Cosgrave) to act on its behalf in relation to a review by the Review Panel of a decision by the Minister based on recommendations in Report 552.

Yours Faithfully

A handwritten signature in black ink, appearing to read "Wendy Weng".

Wendy Weng
Group Legal Counsel, APAC

NON-CONFIDENTIAL

NON-CONFIDENTIAL

Attachment C-2

MinterEllison

Submission in support of the grounds set out in the response to question 9 on behalf of UPM Asia Pacific Pte Ltd (UPM) relating to a decision of the Minister on 17 March 2021 under s.269ZDBH(1) to alter a dumping duty notice published on 19 April 2017 that applies to A4 Copy Paper exported from China.

Introduction

The above decision is based on a finding of the Commissioner in Report 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 Regulation 48 (**Regulation**) of the *Customs (International Obligations) Regulation 2015* and known as the slight modification of goods.

The circumvention activity alleged by the Australian industry was the export to Complete Office Supplies Pty Ltd (**COS**) by UPM of 68gsm copy paper.

Facts

UPM began production of 68gsm copy paper in China in 2005 and prior to June 2019 all such production was exported by UPM-AP to [**Confidential Export Customer Information**] for sale in that market where the predominant demand is for sub-70 gsm copy paper. Annual metric tonnes of copy paper exports by UPM-AP to that market for the period 2014 – 2020 are:

[**Confidential Export Sales Information**]

On 19 April 2017 the Minister published a dumping duty notice (**notice**) imposing anti-dumping measures on exports from China of A-4 copy paper weighing between 70 and 100 gsm and due to the imposition of a penal rate of dumping duty (later rescinded following an application to the Federal Court) UPM ceased exports of 80gsm product from China in [**Confidential shipment details**].

UPM-AP had supplied 80 gsm A4 copy paper ex China to Complete Office Supplies (COS) in the period prior to when the customer terminated the contract. Supply to COS resumed in with UPM-AP supplying tonnes of 80 gsm A4 copy paper produced in Germany in

[**Confidential sales history information**]

NON-CONFIDENTIAL

In May 2019 supply by UPM-AP of 68gsm copy paper to COS ex China was substituted for shipments from Germany and in [**Confidential Sales Information**]

COS continued and continues to import 80gsm A4 copy paper from other exporters.

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% to zero.

UPM commenced exports from China of A4 80gsm copy paper in [**Confidential Sales Information**] to a new Australian customer.

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

Legislation

Section 42 of *Customs (International Obligations) Regulation 2015* reads as follows:

(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;

NON-CONFIDENTIAL

- (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.

The Regulation poses interpretative challenges and the Review Panel itself in Report 38 sought counsel opinion on one of those challenges. Others may be illuminated by explanations of the object and purpose of the Regulation and the suite of anti-circumvention measures of which it forms a part. The Explanatory Statement to the Regulation 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.

In similar vein Counsel, commissioned for an advice by the Review Panel, observed that, based on provisions in Division 5 of Part XVB of the Act and extrinsic materials, the purpose of the 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*¹.

The 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. The Division was added to the Act by Schedule 2 to the *Customs Amendment (Antidumping Improvements) Act (No 3) 2012* (No 196, 2012). 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.*

The Review Panel itself has observed 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.*²

These statements establish that the target of the 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 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. 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. This approach is supported by the terms of almost all³ of the comparative factors listed in s 48(3) that require specific, not general, comparisons of "each good".

¹ ADRP Report No. 38: Attachment 2; p. 11; footnote 7

² ADRP Report No. 37, para 42

³ s 48(3)(f) does not require a comparison. It requires an assessment of the incremental cost of any modification to the alleged circumvention goods and may inform an evaluation of whether any such modification is slight.

NON-CONFIDENTIAL

Until the current inquiry the Commission's policy and practice in relation to the Regulation also reflected a specific approach. The conduct examined and the comparisons undertaken by the Commission in all five previous 'slight modification' investigations⁴ 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*⁵. the relevant comparisons undertaken in those inquiries have all been in relation to sales to particular customers. In REP 552 the Commission has failed to identify how in practical terms the regulatory comparisons can be made otherwise than in relation to sales to particular customers. We submit that the Commission's claim in section 4.3.2.2 of the SEF that the broad category of "goods the subject of the original notice" are the relevant goods for the purposes of the comparison with the alleged circumvention goods is untenable. The copy paper that is the subject of the original notice ranges in weight between 70 and 100 gsm and includes a variety of cost and price points. The 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.

The Commission'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 those transactions involved a different importer and did not commence until six months after the first shipment of the alleged circumvention goods. Consequently data relating to those exports cannot be used in section 48(3) comparisons.

Prior to commencing exports of 68 gsm copy paper to Australia in [**Confidential Sales History Information**] the last export from China by UPM of 80 gsm product subject to the notice occurred over [**Confidential Sales History Information**]. UPM's only other exports from China to Australia of goods the subject of the notice did not commence until [**Confidential Sales History Information**].and our client had not previously supplied the customer with the goods the subject of the notice. 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, it confirms that in relation to the alleged circumvention goods there are simply no corresponding goods the subject of the notice that can be used for the purposes of the regulatory comparisons.

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

Modification

We contend on two grounds that 68 gsm copy paper exported to Australia by UPM, the alleged circumvention good, has not been modified. The first ground is based on the fact that the alleged circumvention goods are a pre-existing product, a factor that 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 s48(3).

The second ground is that the comparisons undertaken by the Commissioner in relation to the factors set out in s48(3) do not provide evidence sufficient to justify a conclusion that the

⁴ Investigations 291, 290/298, 479 and 483.

⁵ REP 552. p.14

NON-CONFIDENTIAL

circumvention goods have been slightly modified. In particular in his consideration of the key factor of patterns of trade the Commissioner concedes that the goods displaced by the alleged circumvention goods were not goods subject to the notice.

Unlike previous cases dealing with the application of the Regulation, there has not been an alteration to the manufacturing process used to produce 80gsm product. Since commencing production in China in 1998 UPM has produced 80 gsm copy paper and a variety of other grammages including, since 2005, 68 gsm paper. The chapeau to s48(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. Leaving aside the absence of such a product in the current matter, it appears, as noted above, that the Commission has unlawfully conducted at least some of its s 48(3) comparisons by reference to UPM's resumed 80 gsm exports to Australia⁶. 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. The Commission also acknowledges that apart from weight (in gsm) they share the same general physical characteristics [s48(3)(a)] before claiming, paradoxically, that this indicates that the circumvention goods are slightly modified⁷. No explanation is provided as to how a transition from 80gsm to 68gsm is a slight modification.

The production process for copy paper is essentially the same automated dial a recipe undertaking irrespective of the primary and secondary characteristics of the output and the Commission has determined, correctly, ... *that there are no significant differences in the processes used to produce the circumvention goods and the goods the subject of the notice* ...before concluding, again paradoxically, that the absence of differences ... *indicates that the circumvention goods are slightly modified*⁸. The significance of the absence of differences in production processes has been commented on by Counsel in the following terms:

*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*⁹.

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, we submit that the circumvention goods have not been modified and the 'necessary criterion' for the application of s 48 has not been met.

In Report 552 the Commission has 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. No questions have been raised in relation to that history and there are no

⁶REP 552, Table 3, p.15

⁷ REP 552, p.16

⁸ 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.

⁹ ADRP Report No. 38: Attachment 2; p.14, para 32

NON-CONFIDENTIAL

allegations that the pre-existing product has been the subject of any modification activities. UPM 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'.

A number of the observations cited above explicating the purpose and object of the Regulation focus on such considerations as avoidance, responsiveness to notices, artificial conduct and arrangements lacking commercial justification. Supplying a pre-existing product is the antithesis of artificial commercial conduct and the absence of responsiveness to notices by our client¹⁰ 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. Any suggestion of duty avoidance or arrangements lacking commercial justification are rebutted by both the already identified advantages to COS of sourcing from China and the fact that the evidence before the Commission demonstrates that the company could have sourced 80gsm product from China at a landed into store cost not greater than the cost for the alleged circumvention goods. 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.

Patterns of Trade

Concepts such as circumvention and avoidance identified in extraneous material discussed above clearly imply 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. The type of arrangement or activity addressed by the Regulation is the substitution 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. Consideration of the issues of displacement and substitution has played a major role in determining whether a circumvention activity has occurred in the Commission's conduct of the five inquiries completed to date into allegations of slight modification of goods. That consideration has formed part of the patterns of trade analysis referred to in s.48(3)(j).

In those cases the Commissioner has recommended the alteration of original notices in respect of all exporters found by the Commissioner to have 'switched' to supplying circumvention goods while in cases in which the Commission has concluded that there is 'no discernible switch' no finding of circumvention activity has been made. Similarly, in Consideration Report 291, the Commissioner based his rejection of an application for an anti-circumvention inquiry in respect of a particular country on the absence of evidence of any displacement of the good the subject of the dumping duty notice.

In the present matter, at page 25 of REP 552, the Commissioner acknowledges that:

¹⁰ UPM's rebuttal to the Commission's earlier false implication that there was a connection between the temporary application of a penal rate of dumping duty and the conclusion of the sales agreement between UPM and COS can be found at EPR 552/13, pp.7-8

NON-CONFIDENTIAL

...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).

However this acknowledgement is overturned on the next page of the Report by the following claim:

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.

This claim is without merit. Firstly, the reference to supporting patterns of trade is a reference to certain exports by UPM from countries other than China that were neither goods subject to the notice or alleged circumvention goods. Therefore the Commissioner's consideration of these exports cannot be part of a comparative assessment under s48(3)(j) because that paragraph is limited to comparisons of "each good". The Commission argues that pursuant to s48(3) the Commissioner may have regard to any factor that he considers relevant but his consideration of any additional factors is still limited by the terms of the subsection to the alleged circumvention goods and goods the subject of the notice. We repeat our submission in response to the SEF that the Commissioner's second conclusion on the issue of displacement must be set aside because it is based on irrelevant considerations. A further ground for rejecting that conclusion is the assertion that displacement occurred at the time of the negotiations between UPM and COS in 2018. This is patently wrong because at that time there were no alleged circumvention goods and UPM was not exporting copy paper that was the subject of the notice.

It is common ground that UPM's exportation to Australia of the alleged circumvention goods commenced in April 2019. At that time UPM was not exporting to Australia the goods the subject of the original notice and had not done so since before the publication of that notice on 19 April 2017. There were no goods the subject of the notice to displace. This statement of the obvious draws further support from the correct observation of the Commission itself at page 10 of Confidential Attachment 2 to REP 552 that exports of the circumvention goods displaced earlier exports of 80gsm copy paper from Germany. A quantity of goods may displace a similar quantity of similar goods but it can only do so once.

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 we submit that the Commissioner must recommend to the Minister that the original notice remain unaltered.

Other Factors

Because for the reasons set out above we do not consider that the Regulation applies to the circumstances of this matter or alternatively that the alleged circumvention goods have not been modified, we believe it is unnecessary to examine the application of the factors set out in s48(3). Nevertheless some comment on the approach of the Commission is called for.

The subsection requires consideration of a variety of factors that may or may not cast light on whether the alleged circumvention goods have been modified and whether any modification is slight. At section 4.3.2.3 of the Report the Commission finds that there are no

NON-CONFIDENTIAL

differences or no significant differences in the application of eight of the factors to each good and concludes, without positing the nature of any causal connection, that therefore the circumvention good has been slightly modified.

A typical example is the Commission's consideration of differences in production costs. The Commission observes, accurately, that *...generally, the cost to produce the circumvention goods is not significantly different to the goods the subject of the original notice at the lower end of the gsm range (i.e. less than 80gsm) and within the same or similar paper whiteness category, albeit there is some variation across the products ...*but then concludes without explanation that *[B]ased on this, the Commission considers that the circumvention goods are slightly modified.*

The error in the Commission's approach to the mandatory comparative exercise is that it equates the sameness or near sameness of each good as evidence of slight modification. However the primary goal is to determine whether a circumvention activity involving the slight modification of the alleged circumvention goods has occurred. In a particular case consideration of a particular regulatory factor may or may not assist in that task. For example a small difference in the production cost of each good may suggest a slight modification has occurred but the sameness of the general physical characteristics of each good may support a contrary conclusion.

Ultimately the mischief that the 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. The present case does not involve any such circumvention activity by UPM.



John Cosgrave
Director, Trade Measures

Contact: John Cosgrave: +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