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Australian Government
Anti-Dumping Review Panel

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 6 July 2021 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 (s 269ZZG(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*.

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PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: UPM Asia Pacific Pte Ltd (UPM)
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: Weng Hairong
Position: Group Legal Officer
Email address: hairong.weng@upm.com
Telephone number: 86-21-6448 5560

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

The applicant is a person who has been directly concerned with the exportation into Australia of the goods the subject of the reviewable decision.
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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.****

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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:

A4 Copy Paper further 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 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). **[goods]**

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

4802.56.10, statistical code 03;
4802.56.10, statistical code 09.

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number:

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ADN 2022/023 adopting *Anti-Dumping Commission Report 588 [REP 588]* of 4 March 2022

Date ADN was published:

31/03/2022

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

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 **highlighted in yellow**, and the document 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:

The reviewable decision is not the correct or preferable decision because:

The Commissioner's consideration of the statutory test for the continuation of anti-dumping measures set out in s269ZHF(2) of the Customs Act 1901 (Act) fails to establish that in the event of the expiry of measures UPM's exports of the subject goods are more likely than not to continue or recur and are more likely than not to be at dumped prices causing material injury to AP.

The failure to properly apply the statutory test is evidenced by the errors and omissions in the Commissioner's consideration of the historical record and the inadequate and dismissive treatment in REP 588 of relevant transformative material relating to events occurring between July 2020 and 4 March 2022

REP 588 does not contain any credible forward looking hypothesis supporting a claim that injurious dumped exports by UPM are likely to recur in the foreseeable future.

The Commissioner fails to identify a future time frame in which to consider the hypothesis;

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The Commissioner's finding that UPM will "continue" to export the goods at dumped prices causing injury to AP is clearly inconsistent with the undisputed fact that UPM ceased exports of the subject goods in October 2021

Submissions in support of these grounds are contained in Attachment C

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 by the Minister ought to be a determination under s269ZHG(4)(a)(ii) of the Customs Act 1901 (**Act**) that the notice ceases to apply to exports of the goods from China by the applicant.

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

Please see Attachment C.

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 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

The decision proposed in response to question 10 would exclude the application of the current dumping duty notice to exports of the goods from China by the applicant.

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

Attachment A	ADN 2022/023
Attachment B	Letter of Authority
Attachment C	Supporting Submission
Confidential Attachment D.....	Container Freight Rate (Changshu to Australia)

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

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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 Patrick Cosgrave](#)

Position: [Director](#)

Organisation: [Minter Ellison](#)

Date: [02/05/2022](#)

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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
Address: Constitution Place, 1 Constitution Avenue, Canberra City, ACT 2601
Email address: john.cosgrave@minterellison.com
Telephone number: 61 419 254 974

Representative's authority to act

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

[A Letter of Authority is included at 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: / /

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ATTACHMENT A



Australian Government
Department of Industry, Science,
Energy and Resources

Anti-Dumping Commission

ANTI-DUMPING NOTICE NO. 2022/023

Customs Act 1901 – Part XVB

A4 copy paper

Exported to Australia from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand.

Findings of Continuation Inquiry No. 588 into Anti-Dumping Measures

Public Notice under section 269ZHG(1) of the Customs Act 1901 and section 8 of the Customs Tariff (Anti-Dumping) Act 1975

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry, which commenced on 2 July 2021, into whether the continuation of the anti-dumping measures in the form of a dumping duty notice and countervailing duty notice applying to A4 copy paper exported to Australia from the Republic of Brazil (Brazil), the People's Republic of China (China), the Republic of Indonesia (Indonesia) and the Kingdom of Thailand (Thailand) is justified.

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. 588 (REP 588)*.

I, ANGUS TAYLOR, the Minister for Industry, Energy and Emissions Reduction, have considered REP 588 and have decided to accept the recommendation and reasons for the recommendation, including all the material findings of fact and law set out in REP 588.

Under section 269ZHG(1)(b) of the *Customs Act 1901* (the Act), I declare that I have decided to secure the continuation of the anti-dumping measures:

- in the form of a dumping duty notice applying to A4 copy paper exported to Australia from Brazil, China, Indonesia and Thailand; and
- in the form of a countervailing duty notice applying to A4 copy paper exported to Australia from China.

I determine that pursuant to section 269ZHG(4)(a)(i) of the Act, the dumping notice and countervailing duty notices continue in force after 19 April 2022 (the specified expiry date) in relation to exports from Brazil, China and Thailand.

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I determine that pursuant to section 269ZH(4)(a)(iii) of the Act, the dumping notice continues in force after 19 April 2022 (the specified expiry date), but that after this day, the notice has effect as if different specified variable factors had been fixed in relation to all exporters from Indonesia generally relevant to the determination of duty as specified in REP 588.

Indonesia

I determine that in accordance with section 8(5) of the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act), and the *Customs Tariff (Anti-Dumping) Regulation 2013* (the Regulation), the amount of interim dumping duty payable on goods, the subject of the dumping duty notice, is an amount worked out in accordance with the combination of fixed and variable duty method as specified in section 5(2) of the Regulation.

Pursuant to section 8(5B) of the Dumping Duty Act, I have had regard to the desirability of fixing a lesser amount of duty for the goods of all exporters from Indonesia. However, the non-injurious price of the goods for the purpose of the dumping notice is greater than the normal value of the goods. Therefore, a lesser amount of duty has not been applied to the goods of these exporters.

Dumping and subsidy margins

Particulars of the dumping and subsidy margins established for each of the exporters and the effective rates of duty are also set out in the following table.

Country	Exporter	IDD Method	Fixed Rate of IDD	ICD Method	Effective ICD rate
Brazil	Sylvamo Exports Ltda	Combination of fixed and variable	8.1%	Not applicable	Not applicable
	All other exporters		8.1%		
China	UPM Asia Pacific Pte Ltd	Combination of fixed and variable	3.2%	Not applicable	Not applicable
	Greenpoint Global Trading (Macao Commercial Offshore) Ltd		10.0%		
	All other exporters		3.0%	Proportion of export price	7.0% ¹
Indonesia	PT Riau Andalan Kertas	Combination of fixed and variable	59.7%	Not applicable	Not applicable
	All other exporters ²		59.7%		
Thailand	Double A (1991) Public Company Ltd	Combination of fixed and variable	0.9%	Not applicable	Not applicable
	All other exporters		0.9%		

¹ Exports from China by Greenpoint and UPM Asia Pacific Pte Ltd are not subject to the subsidy notice.

² Except for exports from Indonesia by PT Indah Kiat Pulp & Paper Tbk, PT Pindo Deli Pulp & Paper and PT Kertas Tjiwi Kimia Tbk, which earlier reviews of these Indonesian exporters either revoked measures (ADN No. 2020/090) or found dumping was not occurring (ADN No. 2017/34).

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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 of this notice.

REP 588 has been placed on the public record, available at www.adcommission.gov.au

Enquiries about this notice may be directed to the Case Manager on telephone number +61 3 8539 2418, fax number +61 3 8539 2499 or email investigations1@adcommission.gov.au

Dated this 30th day of March 2022.



ANGUS TAYLOR
Minister for Industry, Energy and Emissions Reduction

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ATTACHMENT B



UPM Asia Pacific Pte Ltd

27 April 2022

To the Anti-Dumping Review Panel

Application to the ADRP for Review of a Decision to secure the continuation of anti-dumping measures applying to exports of A4 copy paper from China by UPM-AP.

UPM Asia Pacific Pte Ltd appoints Minter Ellison (contact John Cosgrave) to act on its behalf in relation to a review by the Review Panel of a decision of the Minister based on recommendations by the Commissioner of the ADC in Report 588 published on 31 March 2022.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Hairong Weng', written over a light blue horizontal line.

Hairong Weng (Director)

On behalf of

UPM Asia Pacific Pte Ltd

456 Alexandra Road
#05-08 Fragrance Empire Building
Singapore 119962

Tel: +65 6962 7387
Fax: +65 6735 9503

Company Reg. No: 199407488Z

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ATTACHMENT C

MinterEllison

Submission in support of the grounds on which UPM considers that the reviewable decision is not the correct or preferable decision.

Introduction

On 19 April 2017 the Minister published ADN 2017/39 in which he accepted the recommendations of the Commissioner in REP 341 and applied anti-dumping measures on exports of A4 Copy Paper from a number of sources including exports of the goods from China by UPM. Pursuant to s269TM(1) of the Act those measures were due to expire on 19 April 2022 but, based on the recommendations of the Commissioner in REP 588, following his inquiry under s269ZHD(4) as to whether continuation of the measures was justified under the terms of s269ZHF(2) (**statutory test**), the Minister published ADN 2022/023 on 30 March 2022 declaring that he had decided to secure the continuation of the anti-dumping measures specified in ADN 2017/39.

We contend on a number of grounds that the decision to continue the measures applying to UPM is contrary to the requirements of the statutory test and therefore is not the correct or preferable decision.

Background

12 April 2016	Paper Australia Pty Ltd (AP), the sole Australian producer of A4 copy paper, applied for anti-dumping measures to be imposed on exports of copy paper from a number of countries including China
29 September 2016	Preliminary Affirmative Determination (PAD) No.1 applying dumping securities of 4% to UPM
4 November 2016	PAD No. 2 raising dumping securities applying to UPM to 34.4%
March 2017:	UPM ceases exporting the goods from China
19 April 2017	Based on REP 341 the Minister imposes dumping duties of 34.4% on exports by UPM

NON-CONFIDENTIAL

19 May 2017	UPM applies to the ADRP seeking a reduction in the dumping margin applying to its exports of the goods from China
9 March 2018	In ADRP Report No. 55 the Panel rejected UPM's requested reduction in the dumping margin.
10 April 2018	UPM applies to Federal Court for review of the decisions of the Commissioner, Minister and ADRP.
8 October 2018	Federal Court orders that the matter be remitted to the Review Panel for reconsideration in accordance with law.
18 March 2019	Based on ADRP Report No 55A, the Review Panel recommends that the Minister revoke the reviewable decision and substitute a new decision reducing UPM's dumping margin to 4%.
18 March 2019	The Minister adopts the recommendation of the ADRP
October 2019	UPM commences fob exports from China to Officeworks of the subject goods.
July 2020	Increases in freight rates from China to Australia commence.
10 March 2021	UPM advises Officeworks of FOB price increases with effect from June 2021
April 2021	Freight rate increases from China to Australia are 200% greater than those applying in June 2021
15 April 2021	Officeworks notifies UPM that it is terminating purchases from UPM with effect from later in the year
9 July 2021	Based on REP 551 the Minister varies UPM's dumping margin to 3.2%
October 2021	UPM ceases exports of the subject goods to Officeworks

Grounds

The Commissioner's application of the statutory test fails to establish that in the event of the expiry of anti-dumping measures UPM's exports of the subject goods are more likely than not to continue or recur and are more likely than not to be at dumped prices causing material injury to AP.

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

The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to

NON-CONFIDENTIAL

lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.

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

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

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

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

The Appellate Body has stated that Article 11.3 creates a mandatory rule that applies unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and material injury³. In effect the statutory test establishes a rebuttable presumption. Rebutting that presumption requires an administering authority to be satisfied that there is *positive evidence*⁴ that in the event of the expiry of anti-dumping measures it must be *...more probable than not*⁵ ...that a continuation or recurrence of both dumping and material injury would occur.

The Federal Court has remarked that *...[T]he scenarios adverted to in s269ZHF(2) involve a consideration of future events based on an evaluation of the present position.*⁶ In the present matter we submit that the Commissioner has focused on past history to the exclusion of any serious evaluation of contemporaneous positive evidence of the present position that is clearly relevant to any assessment of the likelihood of a recurrence of material injury in the event of the expiry of anti-dumping measures.

In the significant absence of any prescription of an investigation period in Division 6A, the 'present position' to which the Federal Court referred above includes all

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

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

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

⁶ *ibid.* @ [46]

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relevant materials and information reasonably available to the Commissioner at or about the time of the formulation of his recommendation of 4 March 2022⁷. It is incumbent on the Commissioner when constructing the robust future hypothesis required by the statutory test to not only have regard to the very latest available factual material but to consider the likelihood of certain factors specified in the test continuing or recurring by reference to the specified expiry day which in the current matter was 19 April 2022. However it is clear from REP 588 that much of the data most heavily relied upon by the Commissioner relates to the period from 2010 to 2019 or 2020 and relevant information arising after that time and its significance has been either ignored or given insufficient weight in the application of the statutory test.

That relevant material includes the dramatic rise in freight rates since March 2020 and the related decision of Officeworks in April 2021 to cease sourcing the subject goods from UPM and to enter a supply agreement with Paper Australia (AP) with effect from late 2021.

Freight rates from Shanghai to Australia (see Confidential Attachment D) in the period from January 2020 to April 2021 when Officeworks advised of its resourcing decision had risen by 120% and by February 2022 had risen by over 380%. As a percentage of the unchanged UPM FOB price to Officeworks in the first period the overseas freight component rose from 8.5% to 18.5% and by February 2022 based on UPM's revised offer prices of March 2021 the freight component constituted the equivalent of a tariff of over 38%. By contrast dumping duties attributable to UPM's exports from China were a mere 3.2%.

Largely ignoring these seismic events, REP 588 does not contain any credible forward looking hypothesis supporting a claim that injurious dumped exports by UPM are likely to recur in the foreseeable future. Instead, the Commissioner focusses primarily on historical material dating back as far as 2010 in a report that is characterised by errors, omissions and misleading statements.

⁷ Anti Dumping Authority v Degussa 124 ALR 623 @ 638

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The commission raised the matter of UPM-AP's submission with Paper Australia during verification of its economic condition. After ascertaining the agreement is relevant information, it has been relied upon to formulate the recommendations to the Minister outlined in this report. The commission therefore considers that its investigative processes have addressed the matters raised by these submissions. [REP p.12]

The agreement between Officeworks and AP reflects a profound improvement in the competitive position of the Australian industry but the factors underlying that improvement have been essentially ignored by the Commissioner. Instead of focussing on the Agreement to formulate his recommendation the Commissioner has ignored its implications and focussed primarily on historical data of very limited relevance to the formulation of an hypothesis that is likely to reflect the market after 17 April 2022.

Paper Australia's Maryvale site produces the majority of pulp used in the production process and supplemented by up to 10% imported pulp. [REP p.20]

The Commissioner fails to observe that AP's access to captive production of pulp compared to the external sourcing from overseas sources undertaken by many exporters, including UPM, is an additional factor in enhancing the competitive position of the local industry.

Paper Australia stated in its submission of 23 August 2021 that it provided the commission with evidence of competitive price offers. ...However the Commission found that ... [T]he price offer data relied on in REP 463 does not relate to the exporters from the countries examined in this inquiry, nor is it contemporaneous to the current inquiry period. The relevance of this information may therefore be limited. [REP. p.24]

The information from REP 463 is not limited; it is worthless. The only price offer data contemporaneous to the current inquiry period and relevant to consideration of whether ant-dumping measures should apply to UPM after 17 April 2022 is the data contained in UPM's price offer of 10 March 2021 to Officeworks.

Paper Australia's price offer evidence was useful to understand the conduct of negotiations with potential customers and to assess the outcomes that negatively affect Paper Australia's sales volumes and revenue. However, the evidence provided did not relate to the exporters who are the subject of this inquiry. [REP. p.26]

NON-CONFIDENTIAL

This statement by the Commissioner acknowledges that the only available relevant contemporaneous evidence of price offers is the data contained in UPM's price offer letter of 10 March 2021

The commission finds that the economic condition of the Australian industry exhibited mixed results in the period from 1 January 2015 to 31 December 2020. [REP. p.28]

This is not a finding that illuminates in any way the Commissioner's task of formulating a forward looking hypothesis covering the future Australian market for A4 copy paper in the event of the expiry of measures applying to UPM

Paper Australia secured higher sales volumes following imposition of measures on the subject countries by way of two Preliminary Affirmative Determinations (PADs) in September and November of 2016 and the final measure imposed in April 2017. [REP. p.29]

This observation falls well short of a transparent acknowledgement of the detail of one of the seismic shifts occurring during the currency of investigations into A4 copy paper. The second of the two PAD's referred to unlawfully raised the dumping security margin from 4% to 34.4% overnight and this illegitimate recommendation was maintained by the Commissioner when final measures were imposed in April 2017. UPM's sales to a major customer, not Officeworks, ceased immediately and AP seized the new supply opportunity. After protracted administrative review procedures and an application to the Federal Court of Australia, an order from the Court to the Review Panel to reconsider the reviewable decision was made. After receiving the results of the Panel's review in REP 55A. the Minister on 18 March 2019 revoked the reviewable decision and substituted a new decision reducing UPM's dumping margin to 4%.

...the subject exporters collectively achieved higher sales compared to 2019. [REP p.30]

This statement, as it relates to UPM, is misleading as the company only exported the subject goods to Australia in the final quarter of 2019

The commission notes that its assessment of the likelihood of certain events occurring and their anticipated effect, as is required in a continuation inquiry, necessarily requires an assessment of a hypothetical situation. The Anti-Dumping Review Panel, which supports this view, noted that the commission must consider what will happen in the future should a certain event, being the expiry of the measures, occur. However, the Commissioner must nevertheless base conclusions and recommendation on the facts. [REP. p.60]

NON-CONFIDENTIAL

Before the last sentence of the above quotation the Commissioner accurately summarises his obligations under Division 6A but then proceeds to undermine those obligations with the qualifying 'nevertheless'. Division 6A requires conjecture about the future and the fashioning of a probable scenario. Facts in the period leading up to the 'future' may inform and shape the conjecture but the recommendation expresses a conjecture concerning a future scenario that is more likely than not.

The commission has had regard to the following factors to determine whether exports of the goods are likely to continue or recur should the measures expire:

- *import volumes*
- *maintenance of distribution links*
- *excess production capacity of the subject exporters.* [REP. p.61]

The Commissioner acknowledges that, by omission, he has not had regard to the fact that UPM ceased exports of the subject goods to Australia in October 2021 or to the fact that UPM has clearly stated that in view of the dramatic cost increases impacting its export trade it considers that in the foreseeable future any recurrence of sales to Australia is most unlikely.

Following the publication of the PAD and SEF in the September quarter of 2016 and the imposition of measures in the June quarter of 2017, volumes decreased significantly.[REP. p.64]

As noted previously this observation relates to the unlawful recommendations made by the Commissioner in REP 341 that were ultimately reversed following orders from the Federal Court of Australia.

Figure 11 illustrates the reduction in volumes from China in the period 1 April 2017 to 30 September 2019. The trend in the Australian industry's sales volume shown in Figure 3 indicates a corresponding increase during the same period. [REP p.65]

This is not an example of switching as claimed in the Report. The reduction referred to in Figure 11 relates to UPM's loss of all sales to a customer other than Officeworks following the introduction of the unlawful 34.4% trade barrier. The increased sales in Figure 3 are sales by AP to Officeworks.

Paper Australia has represented to the commission that it won the Officeworks business after agreeing to offer prices comparable to those offered by exporters. The commission confirmed that Paper Australia's statement is accurate by comparing the price in its successful offer to Officeworks and the prevailing price of the goods from China. [REP p.67]

"The prevailing price of the goods from China" used in the Commissioner's flawed comparison was the price prevailing since 2019; it was not the price

NON-CONFIDENTIAL

detailed in UPM's price offer of 10 March 2021 to Officeworks. Our client's understanding is that the price offered by UPM and, to ensure a fair comparison, adjusted for post exportation expenses and expressed in Australian dollars, was greater than the successful offer by AP to Officeworks

The commission considers that agreements between parties in the Australian market provide customers with the ability to exit the relationship when suppliers offer goods at more attractive prices. [REP. p.67]

The Commission attempts to portray an industry in which contract law plays no part and the complex sales agreements can be discontinued or varied at the whim of a party. This picture does not accord with the facts surrounding the major examples of termination of contracts for the supply of A4 copy paper in the past five years. The termination in 2016 of UPM's contract to supply a major Australian customer was the inevitable consequence of the overnight unlawful imposition by the Minister of a 30% increase in duties on UPM's exports of the subject goods. This seismic but unwarranted event in the market was no mere more attractive price offer.

Similarly, the decision of Officeworks in April 2021 to withdraw from its supply agreement with UPM resulted from external forces over which neither party had any control. As a purchaser on an FOB basis, Officeworks had been facing rapidly increasing shipping costs since July 2020 and by the time of their notice of termination in April 2021 those costs had increased by 120% and that increase had stretched to over 380% in February 2022. To a lesser degree the cost pressures facing Officeworks was exacerbated by the price increases sought by UPM in March 2021 due to the escalating cost of pulp. Again, inevitably, Officeworks had no option but to eliminate exposure to overseas shipping and source from local industry. Measured in LDPI SC⁸ terms and contrary to AP's claims elsewhere, it was AP that was offering goods "at more attractive prices." Nevertheless even with these growing cost pressures UPM estimates that at least nine months elapsed between the commencement of the internal review by Officeworks of its sourcing options and the delivery of OAP product and over fifteen months since the commencement of the rise in shipping costs.

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

⁸ Landed duty paid into store cost.

NON-CONFIDENTIAL

periods specified in an agreement. The constraints that can stretch timelines beyond those set out in a commercial agreement include the settling of the terms of an Agreement, developing new artwork and packaging, visits to production facilities and the introduction of new packaging and delivery configurations. In addition, in a case where a new agreement has only been entered into very recently, there is a natural commercial reluctance to embark on further sourcing changes in the short to medium term.

The Agreement between AP and Officeworks mirrors the common commercial practice between a vendor and purchaser of adopting the law of contract to establish agreed terms and conditions applying to their proposed transactions that protect their respective interests and provide a degree of confidence that the joint trading aspirations of the parties will be realised. Those terms and conditions may apply in absolute terms to any transactions that are consummated such as warranty provisions or they may be expressed in permissive terms such as a purchasers' right not to purchase goods while at the same time in accordance with the terms of the contract being obliged to accept delivery of goods after having placed a specific order with the vendor and received notice of acceptance of that order.

The Commissioner's task in the present matter is to make an informed, objective judgement on the likelihood of Officeworks changing its choice of supplier to an overseas vendor in the reasonably foreseeable future. Although Officeworks could legally refrain from purchasing the subject goods from AP, no explanation is offered as to why the purchaser after undertaking a major change in sourcing would choose not to place any orders on AP or as to where else it could source its copy paper requirements at competitive prices. Purchasers enter into agreements to ensure security of supply and do not, as implied by AP, abandon such security capriciously.

In the context of the statutory test set out in *s269ZHF(2) of the Customs Act 1901* requiring the Commissioner to be positively satisfied that within a reasonably foreseeable future Officeworks was likely to revert to sourcing from overseas, we submit that it is clear from any reasonable analysis of the evidence that there is no likelihood of such a reversion occurring within the next two years.

The commission's price undercutting analysis in chapter 8.6.1 shows that the fully landed and anti-dumping duty inclusive price of the goods imported from China undercut Paper Australia's prices in 2021. Further information outlined in chapter 8.6.1 about a 2021 price offer by UPM-AP indicated that the price in this offer also undercut the Australian industry's prices. [REP p.67]

The undercutting analysis has not been published but we consider that any disinterested review utilising a robust methodology comparing prices to

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compare prices at the LDPIISC level will reveal that the Commissioner's claimed conclusions are false.

The commission considers the low price of the goods from China would likely be a key purchasing consideration and incentivise Australian customers to seek out the cheapest supplier. [REP p.67]

There is no low price of goods from China and no prospect of such a price. After payment of shipping costs amounting to almost 40% of FOB prices the LDPIISC of any subject goods exported from China by UPM would be totally uncompetitive.

The commission's analysis of export prices at FOB terms found that prices since 2019 have reduced in the case of all subject exporters. [REP p.75]

This statement and Table 23 are incorrect. UPM's FOB prices have remained constant since 2019

Table 23 revealed UPM's export price in 2021 was a reduction on the price that its current dumping margin is determined. [REP p.77]

Again this statement is false as the Commissioner acknowledges in the underlined section of the next extract from REP 588.

In UPM-AP's submission at EPR 024 (page 5) it contends there was no decline in price for its exports from China. UPM-AP provided sales data for 2019 to 2021 in support. The commission observed that UPM-AP's sales data was denominated in USD. This information confirmed that prices had not changed. However, when converted to AUD, UPM-AP's price was found to have reduced.

To assess whether dumping of the goods from China may continue the commission has similarly considered the factors relied on to assess exports from Brazil. The commission's price undercutting analysis in chapter 8.6.1 revealed that the fully landed import price for goods exported by UPM-AP in 2021 undercut the Australian industry but were comparable to the price payable on imports from the other subject countries.

*Noting the long-term trend in the prevailing price of copy paper in Australia, the commission considers an increase in export price **sufficient** to eliminate dumping of UPM goods would likely render the price of those exports uncompetitive in the Australian market. [REP p 77]*

The Commissioner's claim that price cutting analyses based on LDPIISC can be used to assess whether dumping may continue reveals a fundamental misunderstanding of the requirements of Australia's anti-dumping regime. Dumping occurs when the FOB export price is less than the price of comparable sales in the country of export. LDPIISC comparisons are not relevant to the issue of whether dumping exists and while such comparisons

NON-CONFIDENTIAL

may reveal whether the Australian industry is being injured it is again not relevant to the question of whether it is dumping that is causing injury to a material degree.

We agree with the Commission's observation that UPM's exports would be uncompetitive because of shipping costs, not because of the existence of a relatively insignificant dumping margin of 3.2%.

The commission also observed in Review 551 that UPM's domestic sales of A4 copy paper is one of its key markets. The commission considers it unlikely that UPM would sacrifice profits in a key market by reducing domestic prices [REP p.78]

From previous inquiries the Commission is aware that UPM is a highly profitable business with a substantial capacity to absorb additional costs of manageable proportions. This capacity is available to accommodate recent variations in pulp costs but of course shipping costs of over 40% make it impossible for now and the foreseeable future for UPM to offer competitive CIF prices in international markets.

The commission considers an elimination of dumping on goods from China would require a change in either export price or domestic prices. However, the commission has assessed the necessary changes in either price is unlikely to be sufficient to eliminate dumping. The commission considers it likely that dumping of the goods from China will continue. [REP. p78]

This is pure speculation on the part of the Commissioner. UPM's dumping margin is 3.2% so minor variations to domestic or FOB export prices, or a combination of both, may eliminate the margin. The Report fails to appreciate that assessment of continuation issues and the existence and causes of any material injury is dominated by the current and prospective level of post exportation charges and not the level of FOB prices.

In considering the circumstances of each case, the commission must consider whether an industry that at one point in time is healthy and could shrug off the effects of the presence of dumped or subsidised products in the market, could at another time, be weakened by other events, suffer material injury from the same amount and degree of dumping or subsidisation [REP p.87]

The corollary of this undisputed policy is that a local industry that is at one point in time uncompetitive could at another time be strengthened to such a degree by external events that it becomes impervious to the presence of dumped imports in the market. In the current matter, as AP progresses towards monopoly status, this policy requires the expiry of anti-dumping measures applying to UPM's exports from China.

NON-CONFIDENTIAL

*To assess the likely effect on prices if measures were to expire the commission has had regard to the observed change in the price of goods using a price undercutting and other relevant information. The commission considers this evidence informs the **likely** effect of dumping on Australian industry's prices. [REP p.87]*

It is not clear what, if anything, this statement means. In UPM's case there has been no observed change in the price of its goods other than a proposed but rejected substantial increase in the FOB price. In addition price undercutting information assessed at the LDPIISC level has two major components – FOB prices and post exportation charges. The Commissioner simply assumes, without reference to evidence, that it is the first component that informs the likely effect of dumping on future market prices. In a situation in which the dumping margin is a mere 3.2% and one element of the post exportation charges currently amounts to almost 40% of the FOB price, the Commissioner's reliance on the price cutting analysis is untenable.

The landed price of exports is relevant because this reflects the total cost an importer would incur to have those goods delivered to its destination from the port of arrival in Australia. [REP p.88]

This proposition is unremarkable in terms of benchmarking the competitive position but any attribution of the causes of material injury must focus on the comparison between the FOB price converted to the currency of the country of export and the comparable domestic market price of those goods. Injury caused to the local industry by changes in post exportation charges or by the measurement of the LDPIISC in Australian dollars is not ...*material injury that the anti-dumping measure is intended to prevent.*

UPM-AP argued in its submission at EPR 024 that charges arising past the FOB point are not within its control and therefore the landed export prices for China cannot be used in the undercutting analysis. The FOB level export price is a component of the landed price as with other components. It is irrelevant as to who is responsible for which cost. [REP p.89]

There is no dispute as to what are the components of an LDPIISC. UPM's argument is that there is only one component – the FOB price – that is relevant to the assessment of dumping and that it is that component which is the essential element in any analysis of the causes of material injury. Attribution of changes in post exportation charges and exchange rate movements that impact LDPIISC calculations are not relevant to the identification of material injury due to dumping.

NON-CONFIDENTIAL

The landed price for exports from the subject exporters in each subject country has been determined as follows:

- ...
- *CIF values of verified export sales examined in Review 551 [REP p.89]*

UPM's sales covered by Review 551 were on FOB terms, so presumably the Commission sourced post exportation charges, including shipping costs, from Officeworks.

Figure 15 illustrates that duty free fully landed export prices for goods from all subject countries would have undercut Australian industry's prices in 2021. This provides an insight into the likely effect on prices if measures were to expire and dumping and subsidisation of the goods continued. The commission further notes that Australian industry's prices in the above periods were not sufficient to recover its CTMS (Figure 6) refers). [REP p.90]

Figure 15, which is expressed in Australian dollars does not provide the claimed insight. In UPM's case the FOB price remained constant and Officeworks would have been paying dumping duty at 4% or 3.2%. Any price undercutting would be primarily attributable to post exportation charges and possible exchange rate movements. In terms of the massive increases in shipping costs from July 2020 these do not appear to be reflected in the data contained in the Figure and consequently we seriously question its accuracy.

Of relevance to the consideration of the effect of the expiry of measures, we note that the Officeworks LDPI SC used by the Commission would have been based on actual FOB prices, not the higher FOB prices notified on 10 March 2021

The reducing FOB prices shown in Figure 16 further supports that dumping and the likely effect on prices continues [REP p.90]

In relation to UPM Figure 16 does not provide the claimed support. UPM's FOB prices, expressed in the currency of the transaction, did not reduce so that the claimed reduction merely reflects the application of an AUD conversion which may impact a price cutting assessment but is of no relevance to the question of dumping or causally related material injury.

As a further example of the price competition faced by the Australian industry, the commission refers to the supply of paper to Officeworks that initially discussed at chapter 8.4.3 regarding a likelihood of exports from China. Paper Australia informed the commission it once again secured the supply to Officeworks from late 2021 onwards after agreeing to offer prices that were lower than the UPM-AP price offer in 2021 [REP p.91]

NON-CONFIDENTIAL

The Commission appears to have accepted AP's assertion without question. The only proper comparison of price offers is at the LDPIISC level involving AP's actual price and a price to Officeworks composed of the UPM price offer of March 2021 plus post exportation charges incurred by Officeworks. In view of the rapidly accelerating increases in shipping costs it is implausible that by late 2021 the notional price so constructed was not well in excess of AP's price.

Notwithstanding that Paper Australia lowered its price to win the Officeworks business, the commission identified that this price was undercut by the fully landed price of UPM-AP's imports before Paper Australia was due to commence its supply to Officeworks. The commission further found that the price in Paper Australia's successful offer to Officeworks was comparable to the dumped prices in UPM-AP's unsuccessful offer.[REP p.92]

As already stated the only meaningful calculation of the "fully landed price of UPM-AP's imports" is to sum the FOB price advised on 10 March 2021 and post exportation charges faced by Officeworks in the event that they continued to source from UPM and, as necessary, convert any elements of that sum to Australian dollars. So calculated we repeat that it is implausible that by late 2021 the notional LDPIISC price was not well in excess of AP's price.

We also note that the second sentence of the above quotation seems to suggest that the Commission was comparing UPM's revised FOB price with AP's LDPIISC price.

In its submission (at EPR 024) UPM-AP asserts its unsuccessful 2021 price offer to Officeworks represented a substantial price increase due to underlying increases in pulp costs. The commission compared UPM-AP's prevailing price in 2021 to the price in the offer. It is alleged price increase was materially lower than the 45% increase in pulp costs shown in Table 26. The commission also established that UPM-AP's unsuccessful 2021 offer to Officeworks reflected dumped prices. The commission considers UPM-AP offer of dumped goods supports the view that a continuation of dumping is likely. [REP p.92]

These observations by the Commissioner are not evidenced based and they do not support a claim that a continuation of dumping is likely. We have already pointed out UPM's capacity to absorb cost increases and the fob price increase proposed by UPM in 2021 would have eliminated the 3.2% dumping margin.

UPM-AP's submission relies on the concept of events happening in a reasonably foreseeable future. It does not establish that continued dumping and injury caused by it is necessarily unlikely. Rather, it continues with the theme put forward in its prior submission at EPR 024. [REP p.92]

There is no dispute that the application of the statutory test requires the formulation of a forward looking hypothesis concerning the likelihood of certain events continuing or recurring in the future. To provide a context for that task it

NON-CONFIDENTIAL

is necessary to consider the temporal limits of the hypothesis. Nobody is suggesting that the likelihood of those events is to be determined by reference to the next ten years or limited to the next three months although the Commission's silence on the issue suggests that it may consider a 'never ever' test appropriate in UPM's case. While neither the WTO Anti-Dumping Agreement nor Division 6A prescribes a particular time frame, the Appellate Body has observed that *...an assessment regarding whether injury is likely to recur that focuses too far in the future would be highly speculative and that it might be very difficult to justify such an assessment.*⁹ The Appellate Body went on to observe that it had no reason to believe that the standard of a "reasonably foreseeable time" set out in the United States statute was inconsistent with the requirements of Article 11.3.

The Commission has not made any contribution to the scope of the future for the purpose of the statutory test, other than to dismiss, hubristically, the considered view of the apex authority in the international anti-dumping space.

In the absence of any alternative we adopt the standard endorsed by the Appellate Body and contend that there is no evidence to suggest that the severe competitive disadvantages now impacting exporters of the subject goods such as shipping and pulp costs are likely to be alleviated in the reasonably foreseeable future. Consequently, if anti-dumping measures were to expire there is no reasonably foreseeable concurrence of events that would restore UPM-AP's competitive position in the Australian market. On the contrary, current global uncertainties impacting negatively on international trade flows are most unlikely to be reversed in the foreseeable future and consequently the probability of UPM-AP, within that period, being able to resume exports of the subject goods at prices resulting in material injury to the Australian industry is fanciful. In UPM's view such a resumption is extremely unlikely within at least the next two years.

The ADRP has commented that a report under s.269ZHF of the Act requires the ADC to consider what is likely to occur in the future on the happening of a certain event, namely the expiry of the measures.¹⁰ In the current matter the measures have expired, OAP is continuing to supply Officeworks and there are no grounds to suggest that those supply arrangements will not be maintained for the reasonably foreseeable future.

⁹ Appellate Body Report: *US - Oil Country Tubular Goods Sunset Reviews* para.360;

¹⁰ ADRP Report No.44 @ [61]

NON-CONFIDENTIAL

None of the submissions provided evidence that exports from the subject countries would not continue or if they did, the dumping of those goods would not continue. [REP p.95]

In addition to the point already made that in the absence of exports since September 2021 there cannot be any "continuation" of exports by UPM after 17 April 2022, UPM has consistently contended, citing evidence of the rapid acceleration of major costs associated with its export sales, particularly to distant markets, and that its sales to Australia are most unlikely to recur within any reasonably foreseeable timeframe.

UPM-AP's submission seeks to introduce the concept of 'within a reasonably foreseeable timeframe' into the determination of dumping and injury under the statutory test in section 269ZHF(2).

In support of its contention, UPM-AP claims the circumstances surrounding the loss of its Officeworks arrangement prevents it from restoring its position in the Australian market within a reasonably foreseeable future. The 'future' referred to by UPM-AP is the period of time following expiration of measures on 19 April 2022.

UPM-AP have used the 'within a reasonably foreseeable timeframe' concept to promote their claims that the expiry of the measures will not likely lead to a continuation or recurrence of dumping and material injury

UPM-AP's sole reliance for its proposition are comments made by the WTO Appellate body in a case not involving Australia [REP p.102-3]

We agree with these statements by the Commissioner and note that he does not propose any alternative standard for the "timeframe" to govern the assessment of the likelihood of certain future events.

The commission is satisfied that there is no statutory requirement in section 269ZHF(2) to specify a timeframe regarding its determination of the likely continuation or recurrence of dumping and injury [REP p.103]

The terms of s269ZHF may not require a 'specification' applicable in every continuation inquiry but in particular inquiries it does require the adoption of a temporal standard appropriate to the circumstances of the particular inquiry. Adoption of the Commission's position would mean open ended speculation extending into an indefinite future,

In addition to the commission's response in the above, UPM-AP's contention that there is no possibility it will export in the future is not accepted. As discussed in chapter 8.6.1, the operation of the measures was of relevance in the Officeworks decision. The commission considers this disclosure supports the expiry of the measures will likely lead to a resumption of exports by UPM-AP. [REP p.103]

NON-CONFIDENTIAL

Contrary to the Commission's false claim, UPM's actual contention is that it is more likely than not that it will not export the subject goods to Australia in the reasonably foreseeable future.

The statement in the termination letter from Officeworks reads as follows:

However, in response to the recent increased cost and shipping prices in the market, combined with the ongoing challenges we face around the applicable duty and floor pricing, we have investigated and reviewed alternative pricing and supply options.

The primary concern of Officeworks was the proposed increase in UPM's FOB price and the dramatic and continuing increase that it was facing in shipping costs. By comparison the anti-dumping measures were insignificant and not a determinative issue in the decision of Officeworks to terminate its agreement with UPM.

UPM-AP's submission on material injury relies on accepting it is prevented from exporting to the Australian market in a reasonably foreseeable future. The commission interprets this as indicating UPM-AP will continue to export, however it is delayed in doing so until ocean freight expenses return to lower levels or there are no longer anti-dumping measure to contend with. UPM-AP is silent on whether it will stop dumping or undercutting the Australian industry's prices. [REP p.103]

These mischievous and loaded presumptive assertions totally misrepresent UPM's position. Whether or not anti-dumping measures are in place, UPM since March 2021, has not offered, is not offering and is most unlikely, in the reasonably foreseeable future, to offer the subject goods for sale in Australia.

The Minister's decision is contaminated by the inadequate, inaccurate and dismissive treatment in REP 588 of relevant material relating to events occurring between July 2020 and 4 March 2022

The Federal Court has remarked that ...[T]he scenarios adverted to in s269ZHF(2) involve a consideration of future events based on an evaluation of the present position.¹¹ In the present matter we submit that the Commissioner has focused on past history to the exclusion of any serious evaluation of contemporaneous positive evidence of the 'present position' that is clearly relevant to any assessment of the likelihood of a recurrence of material injury in the event of the expiry of anti-dumping measures.

In the significant absence of any prescription of an investigation period in Division 6A, the 'present position' to which the Federal Court referred above includes all relevant materials and information reasonably available to the Commissioner at or about the time of the formulation of his recommendation of 4 March 2022¹². It is incumbent on the Commissioner when constructing the robust future hypothesis

¹¹ *ibid.* @ [46]

¹² *Anti Dumping Authority v Degussa* 124 ALR 623 @ 638

NON-CONFIDENTIAL

required by the statutory test to not only have regard to the very latest available factual material but to consider the likelihood of certain factors specified in the test continuing or recurring by reference to the specified expiry day which in the current matter is 19 April 2022. However it is clear from REP 588 that much of the data most heavily relied upon by the Commissioner relates to the period from 2010 to 2019 or 2020 and relevant information arising after that time has been either ignored or given insufficient weight in the application of the statutory test.

That relevant material includes the dramatic rise in freight rates since March 2020 that we have quantified above and the related decision of Officeworks in April 2021 to cease sourcing the subject goods from UPM and to enter a supply agreement with Australian Paper (AP) with effect from late 2021.

The Commissioner's finding that UPM would continue to export the goods at dumped prices causing injury to AP is clearly inconsistent with the undisputed fact that UPM ceased exports of the subject goods in October 2021

The Commissioner acknowledges that exports of the goods by UPM ceased in late 2021¹³ but then claims that such exports are likely to 'continue' after 19 April 2022. However the term 'continuation' in the statutory test bears its ordinary meaning of the maintenance without interruption of a series of events or actions and is specifically contrasted with the notion of recurrence. Consequently, the finding that exports by UPM are likely to continue is clearly contrary to the terms of the statutory test and, in the absence of such exports, there are obviously no grounds to support the Commissioner's further findings that dumping or consequential material injury will continue in the event of the expiry of measures.

Minter Ellison

2 May 2022

¹³ REP588. p.66