

MinterEllison

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Anti-Dumping Review Panel Secretariat
GPO Box 2013
Canberra City ACT 2601

Dear Sir/Madam

Review No, 153 - A4 Copy Paper in the nominal basis weight range of 70 to 100 gsm (subject goods) exported from China by UPM-AP.

We represent UPM Asia Pacific Pte Ltd and associated UPM entities (collectively **UPM**) in relation to the current inquiry into whether the anti-dumping measures applying to any exports by UPM of the subject goods on and after 19 April 2022 should have been allowed to expire or continue for a further five years. For the purposes of s269ZZJ of the *Customs Act 1901(Act)* our client is an interested party in relation to the reviewable decision.

We refer the Panel to our earlier submissions to the Commission to be found in Items 4, 6, 24 and 34 in Electronic Record [**EPR**] 588 and Attachment C to our application to the Panel for a review of the decision of the Minister to accept the recommendation of the Commissioner in REP 588 to continue to apply those measures to UPM. In our view having regard to all relevant evidence and the strongly expressed presumption set out in both s269ZHF(2) of the Act and Article 11 of the *Anti-Dumping Agreement*¹ [Agreement] in favour of the expiry of measures after five years, the decision of the Minister, was not the correct or preferable decision.

The unequivocal presumption in the statutory test governing the issue of the expiry or continuation of anti-dumping measures after five years of operation mirrors the qualified prohibition against continuing anti-dumping measures contained in Article 11.1 of the Agreement, while the Appellate Body has stated that Article 11.3 of the Agreement establishes a "*mandatory rule*"² 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 injury. In effect the rebuttable presumption requires an administering authority to be satisfied that there is *positive evidence*³ that in the event of the expiry of anti-dumping measures it must be ...*more probable than not*⁴ ...that a continuation or recurrence of both dumping and material injury would occur.

The primary issue before the Panel concerning our client is whether the expiry of the anti-dumping measure applying to UPM would probably result in the continuation or recurrence of the material injury that the measure is intended to prevent. We submit that the question of continuation of dumping and related material injury does not arise in the present matter because UPM's exports of the subject goods ceased in October 2021, six months prior to the expiry of measures on 19 April 2022. Thus the construction of the hypothesis required by the statutory

¹ *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*

² Appellate Body Report: *US – Corrosion Resistant Steel Sunset Review* para.104

³ Appellate Body Report: *US - Oil Country Tubular Goods Sunset Reviews* para.341; *Agreement* – Article 3.1

⁴ *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 @ [49]



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test detailed in s269ZHF(2) is limited to consideration of the recurrence of dumping and consequential material injury.

Although, for the purposes of review or continuation inquiries there is no requirement for the specification of an inquiry period in Division 6A of the Customs Act 1901 (Act), in Form B600 nor in the Guidelines for Preparing an Application for Continuation of Measures, the Commissioner purported to specify the period of analysis as 1 July 2020 to 30 June 2021 in REP 588. To the extent that this temporal limitation has been applied, we submit that it is an impediment to the assembly of relevant evidence necessary to support the construction of a robust statutory hypothesis. In our view, in the case of an administrative decision reliant on presently available evidence informing the prediction of likely future events, the principle of having regard to the latest available evidence is critical.

As Mason J observed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45 ...*that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision, an implication that the decision is to be made on the basis of the most current material available to the decision-maker. This conclusion is all the more compelling when the decision in question is one which may adversely affect a party's interests or legitimate expectations by exposing him to new hazard or new jeopardy.*

This observation was followed by Kirby J in *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [41] when expressing the general principle that ...*[W]hen making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration.*

If the measures expired, the most current evidence relevant to a consideration of the likely course of events in this matter will relate, at least in part, to the period occurring after the conclusion of the Commissioner's specified inquiry period on 30 June 2021. We submit that both Division 6A of Part XVB and good public administration require events occurring as close as practical to the expiry date to be the major focus in constructing the statutory hypothesis.

Applying that principle the most relevant events are:

- UPM's notice of 10 March 2021 to Officeworks of a proposed price increase;
- Officeworks' s notice of termination of 15 April 2021 citing ... *recent increased cost and shipping prices* revealed by an investigation and review of ... *alternative pricing and supply options*;
- The Shanghai Shipping Exchange Index price records the very substantial increases in freight rates from China to Australia commencing in July 2020 and continuing through to the present time⁵;
- Increases in pulp prices of over 50% occurred between 2019 and 2021⁶

While the Commission acknowledges the occurrence of those events, it fails to engage in any meaningful analysis of their significance in a proper, objective consideration of their likely impact on the future economic performance of the Australian industry in the absence of anti-dumping measures. On the other hand UPM points to the incontrovertible evidence of the trends prevailing up to the specified time of expiry that support a reasonable hypothesis that there is a strong probability that Australian Paper's dominant market position will be maintained in a reasonably foreseeable timeframe.

⁵ Confidential Attachment D to UPM's Application for Review.

⁶ REP 588 – p.77 - Table 26

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The likelihood of a recurrence of dumping cannot be established unless there are reasonable grounds for a decision maker to be satisfied that it is probable that UPM would resume exports of the subject goods within a reasonably foreseeable timeframe. The only ground that would sustain such satisfaction would be evidence that the dramatic upward trend in the cost elements associated with UPM's sales of the subject goods to Australia would probably be reversed to a degree sufficient to restore the competitiveness of the imported product. The Commission has not produced any such evidence and has instead chosen to rely on bland assertions by Australian Paper⁷ that shipping rates will fall "precipitately" without reference to any projections prepared by experts or to the inevitable impact of the Ukraine situation on international trade, including the likely long term impact of oil prices on bunkering costs. The Commission also claims that in the absence of measures ...*higher shipping costs could be offset through lower export prices*⁸ ... without presenting any evidence in support of that possibility or demonstrating by analysis the likelihood of export price reductions of at least 30%⁹ to neutralise shipping cost increases and also countering pulp cost increases.¹⁰

The central finding relied on by the Commissioner to justify his recommendation to the Minister is...*that customers appear to have the ability to switch suppliers with relative ease*¹¹ and the decision of Officeworks to switch suppliers effective October 2021 is cited in support of the finding. However "relative ease" is a totally inappropriate characterisation of the process. Officeworks had been profoundly impacted by seismic global events resulting in substantial and continuing increases in shipping costs beginning in April 2020. Eighteen months elapsed before the switch was implemented.

While UPM is not claiming that shipping or other external cost factors are permanent or indefinite and acknowledges that the Officeworks contract may not mandate exclusivity or minimum quantity purchases, we submit that the Commission's assertion that repudiation by Officeworks of their two year contract is likely, is totally implausible. No explanation is offered as to why the customer after undertaking a recent major change in sourcing would choose not to place any orders on its new supplier 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 are not, as implied by the Commission, likely to abandon such security capriciously.

We submit that any objective, considered analysis of all relevant material would conclude that there is no likelihood of Officeworks changing its choice of supplier to an overseas vendor in the "*reasonably foreseeable timeframe*", a temporal construct designed by the US Congress to provide a necessary parameter for the application of a forward looking hypothesis that has been endorsed by the Appellate Body in *US - Oil Country Tubular Goods Sunset Reviews* para.360. Without reasons, the Commission dismisses the relevance of that case but fails to propose any alternative temporal limitation. While expressing the parameter in precise terms will be influenced by the prevailing facts in a given case, UPM has concluded that, in the present matter, any resumption of exports of the subject goods is extremely unlikely within at least the next two years. We would also point out that in the most unlikely event of a resumption of injurious exports in the future, Part XVB places no impediment in the way of Australian Paper applying for a new dumping duty notice.

On the issue of the Commission's failure to have sufficient regard to the key events informing the future copy paper market, we draw the Panel's attention to section 8.4.3 of REP 588 in

⁷ REP 588 – p.92

⁸ id.

⁹ EPR 588/24 - p.6

¹⁰ REP 588 – p92.

¹¹ id. p.66

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which the Commission poses the question - are exports from China likely to continue or recur? – and responds as follows:

To assess the likelihood of exports from China continuing, the commission has considered the condition of the Australian market observed in the original investigation period, i.e. 2015 and the current period (2020 to 2021). This includes an analysis of the customer base in each of these periods and prices of goods in the market. These factors inform the potential level of demand for the goods and, therefore, whether exports from China are likely to continue.¹²

We submit that the many findings in REP 588 that are not correct or preferable are the result of this undue concentration on events occurring prior to July 2020, a focus that is incompatible with the essential requirement to conduct a forward looking Division 6A review that primarily draws on the most recent information available. We are also concerned at the threat to the integrity of many of the findings that is posed by the Commission's apparent misconception of the significance of the presumption embodied in the statutory test. For example in the following passage the Commission indicates that, completely contrary to the terms of s269ZHF(2), it is incumbent on an exporter to establish that future dumping and injury are unlikely.

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 unlikely¹³.

The consequence of basing a recommendation to the Minister in a Division 6A review on a report that adopts a largely rear view perspective is that it distorts the analysis of the likely future economic performance of the Australian industry if anti-dumping measures are allowed to expire. Central to such an analysis undertaken as close as possible to 19 April 2022 are the following facts and likelihoods:

- The performance of the Australian industry relative to exports is at an all-time high with a near monopoly market share in excess of 90%.
- The competitiveness of the local industry has been enhanced by the degree to which it is insulated from the impact of recent pulp price increases that are not projected to diminish significantly in a reasonably foreseeable timeframe.
- Similarly, shipping costs which already constitute a formidable barrier to exporters will be aggravated by oil price shocks caused by the current geopolitical chaos that is predicted by many to last for years.

These factors support the view that there is every likelihood that the dominant competitive position already achieved by Australian Paper would be sustained into the foreseeable future in the event of the expiry of measures

Yours faithfully
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¹²REP 588. p.64

¹³ id. p.92