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By Email

Anti-Dumping Commissioner
Anti-Dumping Commission
Melbourne

Attention: Mr Adam Hourigan
Senior Officer, Investigation 2

Dear Adam,

RE: Review 551 – Anti-Dumping Commission’s Request for Review for Accuracy of an Incomplete Draft Verification Report for APRIL

I refer to the Anti-Dumping Commission’s (“**Commission**”) issuance of a draft verification report (“**Draft Report**”) in relation to this review for APRIL Far East (Malaysia) Sdn Bhd (“**AFEM**”) and PT Riau Andalan Kertas (“**RAK**”), collectively ‘**APRIL**’, for APRIL’s review for accuracy prior to the Draft Report being finalised and placed on the Commission’s public file.

APRIL has expressed concerns with the Draft Report and, in particular, the fact that it was incomplete and that it contained inaccuracies. APRIL has requested that it be provided with a complete verification report for its review or, alternatively, if the Commission wished to place the then existing draft verification report on the public file, that it delays doing so for a short period of a couple of days to enable APRIL to provide the Commission with a more fulsome submission on the shortcomings with the Draft Report.

Nevertheless, the Commission has elected to proceed with placing the Draft Report on the public file knowing that there are shortcomings with it, including that it is incomplete and that there are factual and legal inaccuracies, and notwithstanding APRIL’s request that it be provided with the complete draft verification report for review.

Because of this, the Draft Report does not provide an accurate or complete record of the information provided to the Commission regarding its exports of A4 Copy Paper from Australia, and APRIL has not commented fully on the Draft Report.

In view of the Commission’s election and the impending publication of the Statement of Essential Facts (“**SEF**”), APRIL considers it important to draw to the attention of the Commission the factual and legal inaccuracies in the Draft Report to ensure the factual summary and preliminary findings in the SEF relating to APRIL are factually and legally correct, at least to the extent that these have been

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disclosed to APRIL and keeping in mind that the Commission has yet to furnish the outstanding material parts of a verification report, as APRIL has requested. Hence, this submission.

Please note that no comment is made in this submission on those parts of the Draft Report that are incomplete because, until completed, they cannot usefully be commented upon.

Factual and legal inaccuracies of the Draft Report include the following:

- (i) **Section 1.1:** While AFEM and RAK are related parties, they are not both held by the same holding company. The Commission was advised of this in responses to the Exporter Questionnaire. Further, in the context of the Draft Report, 'APRIL' should be taken to refer to AFEM and RAK combined. Currently, the reference is incorrect.
- (ii) **Section 2.4:** Contrary to what is stated, RAK is not the 'exporter' of the goods to Australia. This statement is factually and legally incorrect. RAK is neither the exporter of the goods from Indonesia, nor the exporter of the goods to Australia. It does not cause the goods to be moved out of Indonesia, or to be transported to Australia. There is no evidence to this effect. Further, while the activity of exporting goods from one country to another may be undertaken by the same entity, this may not necessarily be the case, whether factually or legally and there are other trading models. The differences in possible trading models and their potential implications have not been addressed.
- (iii) **Section 4.1:** Free on Truck (FOT) is not a sales term or even a known Incoterm, nor used as such by RAK. There is no evidence that RAK sells the goods domestically on FOT terms because there is no such sales term and RAK does not do so. The Commission does not explain what an FOT term is in the report or how it applies to RAK's domestic sales. The Commission did not request during verification why this term may have been used by RAK. Consequently, the Commission's claim that it is a 'sales term' is mere speculation by it. For clarification, that term is used in connection with insurance – it is not a 'sales term'.
- (iv) **Section 4.1:** The Commission excluded some direct selling costs from domestic selling costs to ensure that sales reflected 'FOT' terms. Why this was done is not explained, especially when 'FOT' is not a sales term. In any event, if the costs were actually incurred, then there is no basis for their exclusion regardless of the sales terms. To do so artificially alters the sales costs. Also, it is unclear how the 'removal' of such costs were addressed. That is, as those costs were costs actually incurred, it is unclear how the Commission had accounted for them without artificially inflating other costs.
- (v) **Section 4.1:** The Commission concluded that domestic sales did not involve ocean freight and delivery and, consequently, removed container and port handling charges disregarding the facts that those costs were incurred in relation to those transactions and properly recorded in accordance with Indonesian Generally Accepted Accounting Principles. Again, artificially altering the sales costs. No explanation is given as to what the Commission did with the costs it had so removed. As those costs were costs actually incurred, it remains to be clarified by the Commission as to how the Commission had accounted for them without artificially inflating other costs.

- (vi) **Section 6.2:** Cost to make (“CTM”) data on both monthly and quarterly basis was provided several times to the Commission at the Commission’s request. RAK’s CTM data was properly recorded in its accounts and recorded in accordance with Indonesian Generally Accepted Accounting Principles. Variations to pulp prices during the review period had no effect on RAK’s CTM and were properly recorded in RAK’s accounts. In any event, RAK’s CTM are identical in the production of A4 Copy Paper for domestic sales and for export sales – there is no difference.¹ Therefore, any such variations, as there were, would apply equally to the CTM of A4 Copy Paper sold domestically and for export, and would not preclude or affect a proper comparison as determined in relevant WTO jurisprudence.
- (vii) **Section 7.2:** The criteria in the bullet points relied upon by the Commission as establishing RAK as the ‘exporter’ do not do so, whether factually or legally. Not one of these criteria establishes that RAK caused the removal of the goods from Indonesia, let alone caused them to be transported to Australia. At best, one of the criteria establishes that RAK may be responsible for arranging inland transport from the factory to the port in Indonesia, but that falls short of ‘exportation’. Further, country of origin certificates establish only the ‘country of origin’ of a product, not the ‘country of export’ and such a certificate is not a document of title nor a contract of carriage. Another pertinent point is that the commercial invoice is issued by RAK to AFEM and not to the Australian customer. RAK has no involvement with the Australian customers at all, and there is no basis for asserting otherwise whether factually or legally. If RAK has sold the goods to AFEM, then title would pass to AFEM including the property rights entailing exclusive possession of the goods and the exclusive right to dispose of the goods. RAK would cease to have any such property rights unless expressly retained for some reason and that did not occur. Consequently, RAK would have no legal right to ‘export’ the goods from Indonesia to Australia. For it to do so would be unlawful. We trust that the Commission is not alleging that RAK has acted unlawfully. In sum, there is no evidence on which the Commission could be factually and legally satisfied that RAK, and not AFEM, was the ‘exporter’.
- (viii) **Section 7.4:** Given the comments in paragraph (vii) above, the Commission’s findings in this Section of the Draft Report are necessarily incorrect. Further, the price paid by AFEM to RAK for the purchase of the goods by AFEM is not and cannot be the export price at which the goods entered the commerce of Australia: refer to Article 2.1 of the WTO Anti-Dumping Agreement. The price paid by AFEM to RAK is not the export price paid by the Australian importer(s), nor has RAK any legal or equitable interest in the price paid by the Australian importer(s). RAK has no right or legal basis to commence legal proceedings to compel the Australian importer(s) to pay that price or to pay it to RAK, nor to compel AFEM to commence legal proceedings to recover any portion of the purchase price payable by Australian importer(s). The Commission’s assertions in this

¹ See WTO cases: ‘Australia – Anti-Dumping Measures on A4 Copy Paper (Indonesia)’, WTO Doc WT/DS529/R (4 December 2019); ‘European Union – Anti-Dumping Measures on Biodiesel from Argentina’, WTO Doc WT/DS473/R (26 October 2016)

Section of the Draft Report are factually and legally incorrect. There is no factual or legal nexus between the price paid by AFEM to RAK and the export price at which the goods in question entered the commerce of Australia – they are independent of one another and separately negotiated.

Further, in this Section, the Commission states its view that AFEM is an ‘intermediary’. It is not explained why or on what basis AFEM can be unilaterally and arbitrarily deemed to be an ‘intermediary’. The Commission does state in a footnote in this Section that the Commission’s Dumping and Subsidy Manual (“**Manual**”) stipulates that where an ‘intermediary’ is involved, the ‘export price will be the price received by the exporter when selling to the intermediary’. No explanation is given as to why this is or should be the case or why it is the case between AFEM and RAK. This statement assumes that the entity in question is an ‘intermediary’ but provides no explanation as to what constitutes an ‘intermediary’, in what circumstances, with what legal authority, and for what purpose. Further, it provides no explanation as to why the price paid to an ‘intermediary’ is factually and legally the price paid to the party on whose behalf the ‘intermediary’ is acting or what legal interest that that entity has in such price, nor how the ‘intermediary’ is legally obliged to deal with that price.

No explanation is proffered as to why, in such circumstances, a price paid by, for example, a trading company to the manufacturer of the goods should be deemed to be the export price at which the goods entered the domestic commerce of the importing country.

The Manual is not a legal text or statutory legislation. It does not here set out the factual or legal basis for determining an entity to be an ‘intermediary’ of another or what is the legal relationship between the two entities. Nor does it provide grounds or the reasons for ‘deeming’ the existence of a state of affairs that does not exist. This would seem especially important in the context of government inquiries/investigations that have as their purposes the establishing of facts supported by evidence.

The evidence is clear that the price paid by AFEM to RAK is not the export price paid by Australian importer(s) and the price at which the goods entered the commerce of Australia. A policy or practice statement in a manual cannot alter that fact.

In this context, the Commission has provided no explanation for its departure from its acceptance of the relationships between the producing and trading entities within the APRIL group in the original investigation when there has been no material change in the nature of such relationships or the trading model.

Further, the reference here to the Manual, which is not the law, can lead to the inference that the Commission is unlawfully fettering a discretion and acting under

dictation. To do so would be contrary to administrative law principles and the *Administrative Decision (Judicial Review) Act 1974*. While the Commission may have regard to the policies and practices set out in the Manual, it may only do so to the extent that they accurately reflect the law. The Commission must exercise its statutorily endowed discretions in accordance with the law and not fetter them, or act under dictation.

- (ix) **Section 8.1.1:** The Commission here noted that prices between related parties were lower than those between unrelated parties and, without more, concluded that the prices between the related parties were influenced by their relationship and, therefore, excluded them from consideration. As was pointed out to the Commission in my letter dated 16 March 2021, the low prices between certain parties and those parties being related are at best coincidence. There needs to be evidence that the relationship actually influenced prices between those parties. There is no such evidence. Coincidence is not evidence. The reason why there is no evidence is that the relationship did not influence prices between those parties. Had the Commission asked this of APRIL during the six (6) months verification, the explanation would have been provided. The explanation is that the low prices were due to the small volumes of A4 Copy Paper sold in those transactions, which the Commission has recognised, and that paper was purchased for use internally by the purchaser. These were the two (2) factors that affected the prices, not the relationship between the parties.

In any event, given the volume of the transactions, it would have, or should have, no material effect on a determination of normal value. As the normal value has not been determined in the Draft Report, APRIL cannot comment further but reserves the right to do so when the missing draft normal value calculation is provided to APRIL prior to disclosure to interested parties.

- (x) **Sections 9 and 10:** Both sections are self-evidently incomplete and, therefore, it is not possible to comment on their accuracy other than that they are incomplete.

As the Commission has placed the Draft Report containing these errors and inaccuracies on the public file, we trust that the Commission will address these errors in or prior to the issuance of the SEF so as to not set out in the SEF matters knowing them to be inaccurate and materially misleading to interested parties. Should the Commission be minded to address these errors and inaccuracies in the SEF itself, instead of prior to the issuance of the SEF, it is incumbent on the Commission to mention each such error and inaccuracy in the section of the SEF setting out the Commission's determination of APRIL's export prices and how each such error and inaccuracy was addressed by the Commission in the SEF.

Further, because neither the Commission's draft normal value determination nor its dumping margin calculation for APRIL was included in the Draft Report, these should be provided to APRIL for review in accordance with the Commission's practice before disclosure to interested parties either in the SEF or otherwise. Because it may adversely affect APRIL, APRIL should be provided with the

opportunity to review these matters, including corrections to the export price determination, before public disclosure, as well as to ensure confidential information is not disclosed.

Pending review by APRIL for completeness and accuracy, the normal value and dumping margin determinations for APRIL's exports are confidential to APRIL and, in any event, should not be disclosed given the adverse consequences and loss and damage that may be incurred if incorrect determinations may have if disclosed, especially if known or likely to be incorrect. Furthermore, given the errors identified above, it is unlikely that export price and normal value determinations or dumping margin calculation that is published without input from APRIL will be correct.

Not including these matters in the SEF does not preclude the publication of the SEF on the due date. The position can be accurately and transparently disclosed in the SEF in the same manner that it was done with the Draft Report.

Finally, would the Commission please:

- (A) advise how it proposes to address and correct these errors and inaccuracies at its earliest convenience. My client is willing to assist the Commission in this regard; and
- (B) provide its draft normal value determination for APRIL and reasons therefor, together with its dumping margin calculation for my client's review as soon as possible and, in any event, before publication of the SEF.

Please contact me if you have any queries or concerns.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Andrew Percival', with a large, stylized initial 'A' at the start.

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