



Australian Government
Anti-Dumping Review Panel

ADRP Report No. 102

Review of A4 Copy Paper exported from Austria, Finland, the Republic of Korea, the Russian Federation and the Slovak Republic.

July 2019

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Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADA	Anti-Dumping Agreement
ADN	Anti-Dumping Notice
ADRP	Anti-Dumping Review Panel
Appellate Body	Appellate Body of the World Trade Organization
Australian Paper	Paper Australia Pty Ltd
COGS	Cost of goods sold
The Commission	the Anti-Dumping Commission
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act, 1975</i>
the goods	The goods the subject of the application (also referred to as the goods under consideration (GUC))
Hankuk	Hankuk Paper Mfg. Co., Ltd
Injury period	From 1 January 2014
Investigation period	1 January 2017 to 31 December 2017
Minister	Minister for Industry, Science and Technology
Mondi SVK	Mondi SCP a.s.
The Review Panel	The Anti-Dumping Review Panel
REP 463	The report published by the Commission in relation to the Alleged Dumping in the Czech Republic

Reviewable Decision	The decision of the Minister made on 2 April 2019
SEF	Statement of Essential Facts
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the Minister to publish a dumping duty notice in respect of A4 copy paper exported from the Republic of Korea (Korea) and the Slovak Republic (Slovakia). The Applicants for the review were Hankuk Paper Mfg. Co., Ltd (Hankuk) and Mondi SCP a.s. (Mondi SVK).

1. For the reasons below, I consider that:
 - a) with respect to Hankuk, the reviewable decision was the correct and preferable decision; and
 - b) with respect to Mondi SVK the reviewable decision was the not correct and preferable decision.

2. I recommend that the Minister:
 - a) Revoke the reviewable decision, and

 - b) Substitute it with a new decision in the same terms, except that with respect to Mondi SVK, the Minister does not declare that section 8 of the Anti-Dumping Act is to apply and publishes a notice under section 269TL of the Act accordingly.

Introduction

2. Hankuk, a Korean manufacturer and exporter of A4 copy paper, and Mondi SVK, a Slovakian manufacturer and exporter of A4 copy paper, hereinafter collectively referred to as the Applicants, applied under s 269ZZC of the *Customs Act 1901* (the Act)¹ for a review of the decision of the Minister for Industry, Science and Technology (the Minister), made on 2 April 2019, to publish a dumping duty notice pursuant to s 269TG(1) and (2) of the Act in respect of A4 Copy Paper exported from Austria, Finland, the Republic of Korea, the Russian Federation and the Slovak Republic (the specified countries).

¹ Unless otherwise stated, all legislative references are to the *Customs Act 1901*.

3. The applications were accepted and notice of the proposed review, as required by s 269ZZI, was published on 23 May 2019.
4. The Senior Member of the Anti-Dumping Review Panel directed in writing that the Review Panel be constituted by me in accordance with s 269ZYA of the Act.

Background

5. An application was lodged with the Anti-Dumping Commission (Commission), in February 2018, by Paper Australia Pty Ltd (Australian Paper) requesting that the Minister publish a dumping duty notice in respect of A4 copy paper exported to Australia from the specified countries.
6. On 19 March 2018, the Commissioner of the Anti-Dumping Commission (the Commissioner) initiated an investigation into the alleged dumping of A4 copy paper exported from the specified countries. The period of investigation was nominated as from 1 January to 31 December 2017 and the injury analysis period, for the purposes of determining whether material injury to the Australian industry had been caused by exports of A4 copy paper, was stated as being from 1 January 2014 and continuing into 2018.
7. On 10 April 2019, the Minister published Australian Dumping Notice (ADN) 2019/37 announcing that the Commissioner's findings and recommendations in the Commissioner's Report 463 (REP 463) had been accepted. The Minister then declared that anti-dumping duties were to apply to imports of A4 copy paper exported to Australia by Mondi SVK and Hankuk (the reviewable decision) and by other exporters from the specified countries.
8. On 10 May 2019, Mondi SVK and Hankuk each lodged an application with the Anti-Dumping Review Panel (Review Panel) seeking a review of the reviewable decision as they applied to each entity.

Conduct of the Review

9. In accordance with s 269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision, if satisfied that the decision is the correct or preferable one, or revoke it and substitute a new specified decision. In undertaking the review s 269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.
10. Subject to certain exceptions,² the Review Panel is not to have regard to any information other than relevant information pursuant to s 269ZZK, i.e. information to which the Commissioner had regard or ought to have had regard when making its findings and recommendations to the Minister.
11. If a conference is held under section 269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information. A conference was held for the purpose of clarifying issues within REP 463 held with Commission officers on 4 June 2019 pursuant to s 269ZZHA of the Act. A further conference was held with the Commission on 11 July 2019. Non-confidential summaries of the information obtained at the conferences were made publicly available in accordance with s 269ZZX(1) of the Act.
12. Pursuant to section 269ZZJ submissions were received by the Review Panel from Australian Paper on 18 and 21 June 2019. The Commissioner lodged a submission with the Review Panel on 24 June 2019 (the Commissioner's Submission). Hankuk and Mondi SVK also provided submissions on 24 June 2019 (respectively, Hankuk's Submission and Mondi SVK's Submission).
13. I have had regard to the Applications, together with documents submitted with the Applications, and to the submissions received, insofar as they contained conclusions based on relevant information. I have also had regard to REP 463, relevant information obtained at the conferences and to confidential documentation

² See s 269ZZK(4) of the Act

supplied by the Commissioner, such documentation being before the Commissioner at the time of the reviewable decisions.

14. The reviewable decisions involved the exercise of Ministerial discretion: i.e. the decision to declare, by a public notice issued under section 269TG, that section 8 of the Dumping Duty Act applied to Hankuk's and Mondi SVK's exports of A4 copy paper. The role of the Review Panel is to determine whether the reviewable decisions were each the correct or preferable decision, having regard to the material before the Commissioner and to the matters raised in the Applicants' Grounds of review. The Applicants each bear the onus of showing, in the circumstances, the reviewable decision was not correct or preferable. If the Applicants meet that onus, the Review Panel is to recommend to the Minister that revoke the reviewable decisions and substitute a specified new decision.³
15. To identify whether the reviewable decision was the preferable decision the Review Panel:⁴
 - ascertains the law that is applicable and the relevant issues;
 - considers the material that is relevant to resolving the issues; and
 - makes findings of fact that are based on that material and relevant to the issues.
16. Having done so, the Review Panel will ascertain the range of decisions that can correctly be made in light of the law and the facts.
17. If more than one decision can correctly be made, the Review Panel should then choose the decision that is the preferable decision. The preferable decision is the decision that is the best decision, taking into account all the relevant information.
18. The Review Panel's review function is broader than that which is available by means of judicial review, such review requiring identification of jurisdictional error or other error of law. The Review Panel is not so constrained, and in determining what is the preferable decision the Review Panel is able to stand in the shoes of the

³ Section 269ZZK(1).

⁴ See ADRP Report No. 24: Power Transformers – Former Senior Panel Member of the Anti-Dumping Review Panel, the Hon Michael Moore.

decision-maker, and in doing so, it is able to exercise its own judgement and substitute its own decision. In taking such action Review Panel does not need to be satisfied the Commissioner's decision was unreasonable in the *Wednesbury* sense, i.e. so unreasonable that no reasonable decision-maker could have so decided.⁵ The Commissioner's decision may have been one of several decisions or options reasonably open to the Commissioner. Nevertheless, in such circumstances the Review Panel can prefer one of the other options or outcomes, if it considers such to be preferable to that adopted by the Commissioner.

19. REP 463 was preceded by an extensive process of investigation, communication with interested parties and reporting by the Commissioner under the statutory scheme encompassed within Part XVB the Act, such a scheme having been described as "a detailed prescriptive regime."⁶
20. The Review Panel must complete its review function within a 60 day statutory time frame which invariably places limitations upon its consideration of the matters considered by the Commissioner and raised by parties. Having undertaken a thorough investigation, the Commissioner may have come to a decision which was open to it on the material forming part of the investigation record. Nevertheless, the Review Panel is obligated to identify the preferable decision based upon the same record, the applications before it, submissions received and limited other information as permitted by the Act. If the Review Panel is satisfied that the preferable decision is different to that reached by the Commissioner, the Review Panel is able to recommend to the Minister revocation of the decision and the substitution of the preferable decision. For the reasons stated above, such an outcome would not be lightly recommended by the Review Panel.
21. There have been examples where the Review Panel has disagreed with the Commissioner's recommendations regarding the imposition of measures and recommended investigations be terminated with respect to a particular exporter or exporters.

⁵ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

⁶ *Pilkington (Australia) v Minister of State for Justice and Customs* [2002] FCAFC 423 at [123].

22. Mondi SVK's submission referred the Review Panel to a 1988 report of the Anti-Dumping Authority, *Coated paper from Austria, Belgium, Finland, France, Germany, Italy, Japan, the Republic of Korea, the Netherlands, Switzerland and Thailand.*⁷ There the Authority recommended that no measures be put in place against an Italian and a Korean exporter notwithstanding that both had dumped during a part of the investigation period. With respect to the Korean exporter, the Authority noted a marked trend away from dumping during the latter part of the investigation period due to a combination of exchange rate fluctuations and changed pricing behaviour on the part of the exporter. In the circumstances, the Authority was not satisfied that the exporter's future exports may be at dumped prices.

Context: Features of the Australian Market

23. Prior to examining the Applicants' Grounds for Review, I will briefly outline relevant aspects of the A4 copy paper market within Australia.
24. On 12 April 2016, the Commissioner initiated an investigation into the alleged dumping of A4 copy paper from a number of countries including Brazil, China, Indonesia and Thailand. In late 2016, the Commissioner made Preliminary Affirmative Determinations which resulted in the imposition of securities upon the importation of A4 copy paper from those countries. On 19 April 2017, the Minister published a notice imposing dumping duties upon those exports. This followed the Minister's acceptance of the Commissioner's findings and recommendations, as detailed in REP 341.
25. REP 341 found that in 2015, 52% of the Australian market was supplied by dumped imports. Following the imposition of measures, in late 2016, the Commissioner observed a decline in imports from exporters subject to those measures and an increase in import volumes from producers in Slovakia and Russia.⁸ In REP 463 the Commissioner observed that some importers changed suppliers in response to the outcomes of Investigation 341.

⁷ *Anti-Dumping Authority Report No. 185*, March 1998.

⁸ REP 463 at page 27.

26. In its application to the Commissioner seeking the imposition of measures, Australian Paper stated A4 copy paper supply channels are concentrated through a limited number of national resellers and retailers and that such concentration “places the balance of power firmly with the hands of the resellers.”⁹
27. In a submission to the Commissioner dated 30 May 2018, Australian Paper stated, “given the large volume of imported products (over 34%), and the well-documented ease with which importers are able to source alternative supply, Australian Paper is effectively constrained by material import competition”. The submission also stated, “there is a high degree of competition in the Australian A4 copy paper market ... across multiple sales channels, and amongst various products and brands.”
28. Australian Paper, Mondi SVK and Hankuk do not sell direct to retail customers or to end-users. All their sales are to resellers, in what is referred to as a primary market. These resellers then on sell the product to downstream consumers. In REP 463, the Commissioner noted “both Australian Paper’s goods and imported A4 copy paper products are purchased by the same primary market segments and sold to the same downstream consumers, via the same supply channels, resulting in direct competition in the primary market.”¹⁰
29. A feature of Australian Paper’s sales to resellers is that they take place under supply contracts or agreements, “where commercial terms such as brand/grade, volume, price and distribution are agreed for a period of one to 3 years.”¹¹
30. The Commissioner noted Australian Paper does not typically sell or undertake short-term supply of less than one year. Supply contracts are often the result of a tender process. However, price reviews are set periodically over the life of the contract and offer a mechanism to increase or decrease the contract price of goods. Prices can be reviewed with reference to a range of factors including, price, import volumes, delivery terms and Australian Paper’s cost of production. The Commissioner found, typically reviews occur annually or biannually. As price is a

⁹ Ibid at page 20.

¹⁰ Ibid at page 21.

¹¹ Ibid at page 21.

key driver of sales it is a relevant consideration when entering into supply contracts and when undertaking any review of such contracts.

31. In REP 463 the Commissioner noted, “there is significant pricing transparency of A4 copy paper, such that customers in various channels and segments of the market are aware of competitive prices and use these prices to negotiate with existing suppliers”.¹²
32. Exporters however are not tied to such arrangements and sell to Australian resellers on a forward order basis with no ongoing contractual obligation. Exporters are therefore at liberty to set prices on an individual consignment basis.
33. The significance of such arrangements is that Australia Paper is locked into price and volumes for the duration of the agreements, or unless otherwise reviewed. Exporters on the other hand retain the freedom to vary pricing on a shipment to shipment basis.
34. In REP 463, the Commissioner found the base prices for a significant portion of Australian Paper’s business by volume were contractually fixed prior to 2017 (i.e. before the commencement of the investigation period). As the Australian market is transparent as to pricing, the dumped imports identified in REP 341 had a negative impact on the price negotiations between Australian Paper and its customers.
35. Australian Paper entered into contractually scheduled price reviews in 2017 under its various price agreements for the supply of A4 copy paper in 2018. Throughout 2017, Australian Paper also negotiated new price supply agreements with some customers which were to govern the delivery of A4 copy paper in 2018 and beyond. The negotiation of the scheduled reviews and new contracts or agreements occurred in a transparent market in which low-priced imports of goods from the subject countries were present. They also occurred at a time when, following the imposition of measures the exporters identified in REP 341 left the market and their exports were substituted by exports from the subject countries.
36. Although Australian Paper’s supply contracts make provision for a review mechanism, the evidence suggests that attempts at price variation are not always

¹² Ibid at page 23.

successful. In a submission to the Commissioner dated 30 May 2018 Australian Paper made reference to a number of examples provided to the Commissioner where it “had attempted to pass on necessary price increases to its customers. The verification process of data submitted by Australian Paper confirmed the price increases achieved were not sufficient enough to prevent material injury, or the price increases sought were not successful due to competitive forces.”

37. The Commissioner had found that all exports from the subject countries during the investigation period (2017) had been dumped “as a result of Australian Paper setting contracted base prices prior to 2017 and the subsequent timing and operation of price increases (as part of price review mechanism) occurring either prior to 2017 or in the second half of that year, the dumped prices in the market in 2017 was not influential enough as to cause a material change in Australian Paper’s pricing behaviour in 2017.”¹³
38. However, with regard to 2018, the Commissioner found, through the application of its counterfactual methodology, in the absence of dumped imports from the subject countries in 2017, Australian Paper would have experienced less of an impact upon its revenue in 2018. This was due to the price review mechanisms set with reference to suppressed market prices from imports in 2017 which carried forward and suppressed Australian Paper’s prices that came into effect in 2018.
39. The Commissioner also found that price undercutting by the dumped imports in 2017 was material and that it negatively impacted upon prices agreed by Australian Paper in 2017 for the supply of goods in 2018. The result was that in 2018 Australian Paper was only able to achieve prices which were 2% lower than would have been achieved in the absence of dumped imports during the price negotiations conducted throughout 2017. The level of this price suppression, impacting 35% of Australian Paper’s business in 2018, was found by the Commissioner to be material.
40. Therefore, the Commissioner was satisfied that the Applicant’s exports to Australia had caused material injury to the Australian industry during 2018 in the form of:

¹³ Ibid at page 75.

- price suppression;
- price depression;
- decreased profits and profitability; and
- reduced return on investment.¹⁴

Grounds of Review

41. The grounds of review relied upon by the Applicants, which the Review Panel accepted, are as follows:

Mondi SVK:

Ground 1: There is nothing in the Commissioner's analysis contained within REP 463 which substantiates the Minister's opinion that Mondi SVK would engage in dumping as required by the stipulation in section 269TG(2)(a) that "*the amount of the export price of like a good that may be exported to Australia in the future may be less than the normal value of like goods*"; and

Ground 2: The Minister's finding that although dumping found to have occurred in 2017 did not cause material injury to the Australian industry in 2017, nevertheless it did cause material injury to the Australian industry in 2018 is not supported by the Commissioner's analysis contained within REP 463.

Hankuk:

Ground 1: The injury to the Australian Industry referenced in REP 463 has not been caused because of Hankuk's exports;

Ground 2: The evidence referenced in REP 463 does not support the causation finding; and

¹⁴ The Australian industry made no claim in relation to a volume injury.

Ground 3: There is insufficient evidence contained within REP 463 to support the finding that the Australian industry sustained material injury.

Consideration of Grounds

Mondi SVK: Ground 1

There is nothing in the Commissioner’s analysis contained within REP 463 which substantiates the Minister’s opinion that Mondi SVK would engage in dumping as required by the stipulation in section 269TG(2)(a) that *“the amount of the export price of like a good that may be exported to Australia in the future may be less than the normal value of like goods.”*

42. Before dealing with this ground review I will provide a brief chronology of Mondi’s exports to Australia:

- Mondi SVK entered the Australian market in 2014 “but did not commence again until December 2016”¹⁵;
- the Commissioner considers Mondi SVK’s re-entry into the Australian market in late 2016 was directly related to securities and measures imposed as a result of Investigation 341¹⁶;
- in 2017 Mondi SVK’ exports comprised two brands or products; export grade [REDACTED] and export grade [REDACTED];¹⁷
- .” there was a pronounced strengthening of the euro against the Australian dollar;
- April 2017, Mondi SVK’s last export of grade [REDACTED];

¹⁵ REP 463 at page 89.

¹⁶ Ibid.

¹⁷ Mondi SVK’ Submission at page 11.

- Mondi SVK sought to increase its prices for [REDACTED] as its domestic prices experienced an upward trend;
 - 9 May 2017, Mondi SVK's customer comments on the price rise of [REDACTED] saying it was "basically pricing themselves out of the market";
 - in July 2017, apart from final shipment in October 2017 arising from an order made in June 2017 (only [REDACTED] MT), Mondi SVK ceases exports to Australia; and
 - August 2017 Mondi SVK's selling entity advises all customers worldwide of further price increase in all markets.
43. Mondi SVK contends, there is nothing in the Commissioner's analysis contained within REP 463 which substantiates the Minister's opinion that Mondi SVK would engage in dumping as required by the stipulation in section 269TG(2)(a) that *"the amount of the export price of like a good that may be exported to Australia in the future may be less than the normal value of the goods."*
44. In terms of the reviewable decision, the Minister accepted the Commissioner's finding that "in the absence of measures, Mondi is **likely** to resume dumping the goods into Australia in the future."¹⁸ [emphasis added]. It is accepted that during the investigation period Mondi SVK's exports to Australia had been dumped.
45. The finding that Mondi SVK was likely to resume dumped exports needs to be viewed in the following context. The Commissioner had found that Mondi SVK's exports, predominantly in the first half of 2017, had been dumped. The presence of Mondi SVK's dumped exports together with those from exporters in the remaining subject countries in 2017 had a depressing impact on the price negotiations between Australian Paper and its customers throughout 2017 for product which was to be delivered in 2018. The resultant price suppression, impacting on the Australian Paper sales in 2018, was the cause of material injury such that were Mondi SVK to resume dumped exports, such exports would further contribute to the pre-existing material injury.

¹⁸ REP 463 at page 91.

46. In dealing with this Ground it is important to restate the threshold which is required of the Commissioner's satisfaction as to the occurrence, if any, of future dumped imports. In REP 463 the Commissioner found that future dumped imports from Mondi SVK were "likely" to be resumed. This exceeds what is required by the legislation. So far as is relevant for this Ground of Review, the Commissioner need only be satisfied that dumped goods "may be exported to Australia in the future."
47. The Commissioner's Submission noted the term "may" is not defined in the Act and argues, in the absence of a legislative intention to the contrary, that it should be given its ordinary meaning, which is "to be possible". The term "possible" is in turn defined as "capable of existing, happening, being done, being used." Therefore, the Commissioner submits that the term "may" necessitates something that is capable of happening.
48. The Commissioner and Mondi SVK, in their respective submissions, contrast the Parliament's use of "may" in section 269TG(2)(a) with the satisfaction threshold of "likely" required in the consideration of the revocation of measures under either Parts 5 or 6A of Part XVB of the Act. Both Parts contain specific provisions which prescribe the level of satisfaction required to warrant the continuation of measures. In that context, Parliament requires a level of satisfaction that the expiration of the measures "would be likely to lead, to a continuation or recurrence of dumping." In that context, Mondi SVK and the Commissioner agree, the term "likely" means more probable than not, an interpretation with which I agree.
49. The Commissioner and Mondi SVK diverge as to the meaning to be attributed to "may" in the context of section 269TG(2)(a). The Commissioner's Submission argues that continuation inquiries require a higher evidentiary threshold and that the preferable interpretation of the term "may" in section 269TG(2)(a) is that future dumped imports would be "possible." Mondi SVK, on the other hand, argues the word "may" must of necessity refer to a likelihood, otherwise it could not be distinguished from "may not," as an "anything could happen" test could never be regarded as the correct test.¹⁹

¹⁹ Mondi's Submission at page 3.

50. Effect must be given to the adoption of different terms in the context of a continuation inquiry compared to that of an investigation as to whether measures ought to be imposed. Whilst I agree, in the continuation context, “likely” means probable, in an investigation context, concerning the imposition of measures, “may” must require a lesser level of satisfaction.
51. Requiring the Commissioner to be **satisfied** as to future dumped imports causing material injury in the context of section 269TG(2)(a) is informative. It suggests that satisfaction can only be reached after a consideration of information gathered in the course of an investigation and that satisfaction cannot be met by way of mere assumption. Further, the level of satisfaction must be derived from the consideration of positive evidence.
52. Notwithstanding the applicable threshold “may” export like goods at dumped prices, the Commissioner’s Submission suggests, the evidence before it was such that the threshold had been exceeded and, that future imports at dumped prices causing material injury were not only possible but “likely” or probable. It was for this reason that REP 463 described future dumped imports from Mondi SVK as being “likely”.
53. The Commissioner’s Submission states, “in forming a judgement as to whether like goods may be exported at dumped prices in the future, the Commissioner considers prior evidence to be a relevant consideration.”²⁰ The Submission went on to reference earlier comments by the Senior Member of the Review Panel to the effect that “past conduct is probably the most reliable indicator of future conduct”²¹ and acknowledged “while untested assumptions cannot be made, prior evidence of dumping is directly relevant to whether Mondi SVK may export at dumped prices in the future. That is, whether it is possible.”²² The Commissioner argues it is necessary to consider all available evidence, including prior dumping, and draw informed inferences.²³
54. Mondi SVK’s Application²⁴ listed 11 “facts or assumptions” (factors) detailed in REP 463 and asserts each of those factors underlies the Commissioner’s satisfaction

²⁰ Commissions’ Submission, para. 21 at page 5.

²¹ ADRP Report No. 44 at para. 38.

²² Commission’s Submission, para. 24 at page 6.

²³ Refer Commission’s Submission, para. 24 at page 6.

²⁴ Mondi’s Application at pages 3-6.

regarding the occurrence of future dumped imports causing material injury to the Australian industry. The Application included, by way of rebuttal, a short submission in relation to each factor. In turn the Commissioner's Submission at Appendix II, replicated the factors together with Mondi SVK's submission with respect to each factor and went on to provide counter arguments.

55. Mondi SVK argued that the Commissioner's analysis of the factors does not substantiate the opinion that Mondi SVK may engage in future dumping thereby causing material injury. Mondi SVK asserts some of the factors were "simply incorrect"²⁵ and focused, not upon whether there may be dumping of goods in the future by Mondi SVK, but upon whether there may be exports from Mondi SVK present in the market at some future time. Mondi SVK also challenged the significance which the Commissioner attached to Mondi SVK's past behaviour i.e. that it had been found to have "dumped" throughout the investigation period and that such was determinative of its future conduct with regard to future exports.

Analysis of the Factors

56. I set out below:

- each of the 11 factors;
- Mondi SVK's comments in its Application regarding each factor;
- the Commissioner's rebuttal submissions in relation to each factor (taken from Appendix II); and
- my analysis of each of the factors.

(a) "Mondi SVK can export the goods to Australia from a number of its mills globally."

Mondi SVK's Application:

"This does not go to the proposition that Mondi SVK might dump A4 paper in the future. It is nothing more than a finding that the Mondi SVK group of companies exists."

²⁵ Ibid at page 7.

Commissioner's Submission:

“Mondi SVK ceased exporting like goods to Australia during the investigation period. As a result, the Commission assessed whether Mondi SVK may begin resuming exports of like goods to Australia in the future.

The Commission considers the fact Mondi SVK has maintained its production facilities demonstrates an ability to shift distribution of exports to Australia should the conditions in the market suit. Mondi SVK's prior conduct of increasing exports to Australia following the imposition securities on exports from other countries in Investigation 341, supports this finding.”

Analysis:

57. Mondi SVK is part of an international conglomerate with production facilities for A4 copy paper located in Austria, Russia and Slovakia. This factor infers that were measures to be imposed upon exports from Mondi SVK, future exports could be sourced from other members of the conglomerate. This proposition does not go to the resumption of future exports from Mondi SVK. Rather, it suggests that were measures to be imposed on Mondi SVK, exports from Slovakia would cease and another member of the conglomerate would enter the market. This proposition is irrelevant to the consideration of Mondi SVK's propensity to re-enter the Australian market at dumped prices.
58. The Commissioner's Submission confirmed that by maintaining its production facilities in Slovakia, Mondi SVK had retained the capability to export to Australia at dumped prices in the future. The Commissioner went on to note, had Mondi SVK shut down mills in Slovakia “an alternative view could be open.”²⁶
59. In my view the maintenance of production facilities in Slovakia does not support an inference as to future intent, perhaps other than the maintenance of the status quo. In its submission Mondi SVK describes the status quo as one dominated by a highly profitable domestic and international business with a high capacity utilisation of its

²⁶ Commissioner's Submission para. 30 at page 7.

production facilities in Slovakia, facts which mitigate against future interest in exporting to Australia, and especially at dumped prices.

60. In REP 463 the Commissioner noted, the production of A4 copy paper is capital intensive. I doubt the significance of the Australian market is such as would influence the conglomerate's capital allocation, particularly with respect to decisions regarding the maintenance or otherwise of production facilities and capacity in Slovakia, or for that matter elsewhere.

(b) “The emergence of exports from Russia and Slovakia are directly related to the securities and measures imposed as a result of Investigation 341.”

Mondi SVK's Application:

“This does not go to the proposition that Mondi SVK might dump A4 paper in the future. It only goes to the proposition that because dumping measures imposed on certain exporters caused the risk and cost of purchasing those exports to increase, other exporters were called upon by Australian importers to meet the resultant demand for alternative suppliers.”

Commissioner's Submission:

“Please see the Commissioner's response for paragraph (a).”

Analysis:

61. Australian Paper's Submission took issue with Mondi SVK's claims to be a profit orientated exporter with common pricing approach to all markets. It contrasted Mondi SVK's claims as to its “exemplary sales behaviour” and its “premium price position” with its supply of goods to the Australian market from 2016, describing it as the opportunistic “supply A4 copy paper to displace exports the subject of measures in INV 341 at dumped prices.”²⁷
62. Mondi SVK's Submission argues that the emergence of exports from Russia and Slovakia as being directly related to the imposition of measures following REP 341

²⁷ Australian Paper's Submission dated 20 June 2019 at page 2.

is not relevant to Mondi SVK's intent regarding the resumption of exports to Australia at dumped prices. Rather, those developments merely reflected a desire on the part of importers to secure alternate suppliers and for the exporters to sell like goods at a price they viewed as favourable at that time.

63. The emergence of Russian and Slovakian exporters (of which Mondi SVK is one) following the imposition of measures as a result of REP 341 is only indicative that at that time Russian and Slovakian exporters considered the export prices to Australia which they had negotiated to be favourable. In the absence of a detailed examination by the Commissioner of Mondi SVK's motivation to increase its sales revenue, following the imposition of measures following REP 341, I am unable to place reliance upon this factor as supporting the proposition that were Mondi SVK to re-enter the Australian market such future exports may be at dumped prices. This is especially because Mondi SVK's exports were not sold under long term contractual arrangements such that it was able to assess the attractiveness, or otherwise, of offers from Australian importers on a consignment by consignment basis in conformity with its pricing policy.

(c) “The previous 2017 [dumped] prices are indicative of export prices from Mondi SVK.”

Mondi SVK's Application:

“The context of this finding is that Mondi SVK's prices were lower in AUD terms in the first half of the investigation period, than they were in the second half of the investigation period. It is not apparent to us why prices in the first half of the investigation are not indicative of prices in the first half of the period, and why prices the second half of the investigation period are not indicative of prices in the second half of the investigation period. Mondi SVK's prices in the second half of the investigation period are facts that cannot be ignored.”

Commissioner's Submission:

“The Commission accepts that Mondi SVK disagrees with the Commission's view.”

In any case, absent this factor, the Commissioner is still satisfied that Mondi SVK may export like goods at dumped prices in the future for the reasons outlined in the Commissioner's submission."

Analysis:

64. I infer this factor reflects the significance with which the Commissioner ascribes to "prior evidence to be a relevant consideration" and the presumption that having dumped in the past (at varying prices) Mondi SVK will do so in the future. For the reasons outlined in the Analysis of factor (d) I am of the view that the Commissioner has ascribed undue influence to past dumping without an adequate regard to the circumstances in which Mondi SVK's exports were agreed and the reason for the cessation of its exports.

(d) "Mondi SVK may return to exporting the goods to Australia where market conditions were suitable."

Mondi SVK's Application:

"This does not go to the proposition that Mondi SVK might dump A4 paper in the future. It only goes to the proposition that Mondi SVK may export A4 paper to Australia in the future."

Commissioner's Submission:

"Please see the Commissioner's response to for paragraph (a)."

Analysis:

65. I agree with Mondi SVK's Submission in relation to this factor.
66. Mondi SVK's Application placed reliance on its price increases throughout the investigation period and that it had ceased exporting at the point when prevailing market prices were less than its pricing policy. Mondi SVK argued these factors support an inference that it would not again enter the Australian market at dumped prices.

67. This factor does not support the inference that Mondi SVK may export at dumped prices in the future, it suggests that Mondi SVK may re-enter the Australian market because it considers the market conditions to be favourable. To enable any adverse inference to be drawn, the Commissioner would need to have assessed why Mondi SVK would consider it to be advantageous to price differentiate between its highly profitable domestic market and the prices and returns offered in the competitive Australian market. In my view, the relevant information before the Commissioner suggests there would be no incentive for Mondi SVK to so discriminate.
68. Mondi SVK's Application argued that future dumping cannot be assumed because of a past finding of dumping and that something additional was required. Mondi SVK suggests the additional requirement would involve an examination of the exporter's financial circumstances, and of the circumstances in which any future exports may occur. Mondi SVK infers the Commissioner placed little weight on such matters, in preference to the reliance placed upon Mondi SVK's past dumping.
69. During the investigation Mondi SVK had placed before the Commissioner evidence of cost increases, exchange rate movements and its pricing policies as factors impacting on its sales to Australia, both past and future. It argued it had ceased exporting to Australia at the point at which market prices were less than required to satisfy its pricing policy.
70. Mondi SVK also made reference to its earlier submission to the Commissioner dated 28 May 2018, which provided evidence of its attempts to impose price increases upon its Australian customer throughout the period of investigation, such increases being based upon movement in objective criteria affecting its costs and revenue (including currency fluctuations) and not on Australian market competition or customer demands. The submission also stressed:
- the significant overall profitability of Mondi SVK group as a whole;
 - Mondi SVK's near full capacity utilisation;
 - the price equality across all markets generated by Mondi SVK's sales policy resulting in uniform profitability targets across all markets, resulting in no price discrimination between its European and Australian markets;
 - and

- Mondi SVK's prices to Australia were set without reference to a perceived need to compete against either Australian Paper or other exports.

71. Mondi SVK's Submission referred to evidence drawn from its response to its Exporter Questionnaire which demonstrated the relativity between export prices and normal values, the dates upon which it ceased exporting each of its two grades to its Australian customer and the reason for such cessation. Mondi SVK notes when it commenced accepting orders for exports to Australia, domestic and export prices were "similar." Thereafter, domestic prices increased, and the Euro strengthened against the Australian dollar. As a result, Mondi SVK ceased exports of one of its two grades of A4 copy paper in April 2017. In May 2017 Mondi SVK sought a price increase from its only Australian customer of its remaining grade paper. Mondi SVK ceased exporting its remaining grade to Australia in June 2017, following its customer's acknowledgement that Mondi SVK was pricing itself out of the market.

72. Mondi SVK's Submission drew attention to the letter dated 21 August 2017, from the conglomerate's sales entity to all customers announcing a price increase across all markets. This announcement post-dated Mondi SVK's decision, in June 2017, to withdraw from the Australian market. This Mondi SVK suggests, provides further evidence of its ongoing adherence to its pricing policy such that should it re-enter the Australian market future export prices would not be at dumped levels.

73. Mondi SVK's Submission summarised the above facts as follows:

Mondi SVK entered the Australian market at the same price as its domestic market prices, then sought domestic market prices rise, stopped exporting one of the two grades it had only started exporting in January almost immediately (last shipment in April), sought and introduced price increases, saw its domestic market price for the other grade it exported continue to rise, and received its last order for that grade in June ... exports ceased because [Mondi SVK] had no incentive to offer prices to Australia or even supply Australian customers at prices that were less than European prices, where it

*enjoys conditions of high profitability, high demand and high capacity utilisation.*²⁸

74. Mondi SVK's behaviour in withdrawing from the Australian market as prices did not satisfy its pricing policy, coupled with high, profitable domestic sales and near full capacity suggest any return to the Australian market would only be upon favourable or suitable conditions which would not reflect any price discrimination between its domestic sale and sales to Australia. The evidence submitted by Mondi SVK ought to have caused Commissioner to reflect upon the weight ascribed to Mondi SVK's past dumping as an indicator of future intent.

(e) "Mondi SVK's Australian export price in 2014 was higher than its 2017 export price, at a time when pulp prices were considerably lower in 2014 than in 2017."

Mondi SVK's Application:

"This does not go to the proposition that Mondi SVK might dump A4 paper in the future. It only goes to the proposition that economic conditions in world markets are different at different times, such that sales may be more profitable at one time than at another time."

Commissioner's Submission:

"The Commissioner accepts that Mondi SVK disagrees with the Commission's view.

In any case, absent this factor, the Commissioner is still satisfied that Mondi SVK may export like goods to Australia at dumped prices in the future for the reasons outlined in the Commissioner's submission."

²⁸ Mondi submission at pages 11 and 13.

Analysis:

75. I share Mondi SVK's view that this factor is indicative only of changing economic conditions over time such that any comparison between two periods may not be meaningful.
76. The Commissioner's Submission urged the Review Panel not to lose sight of the fact that any determination of future dumping must consider the relativities between possible future export prices and corresponding normal values. The Commissioner's Submission notes, "Mondi SVK does not address the corresponding normal value in any detail."²⁹ The significance of the Commissioner's reference to Mondi SVK's 2014 export price, in the absence of any similar reference to prevailing normal values, is not apparent.
77. This factor appears to draw upon the Commissioner's analysis of pulp price increases in 2017 and 2018. Whilst REP 463 acknowledged the Commissioner had not verified exporter data for 2018, nor presumably corresponding normal values as 2018 was outside the investigation, nevertheless the Commissioner said "it is likely" imports from Finland, Korea and Russia will continued to be dumped in 2018.³⁰ The Commissioner based this conclusion upon the relativities between 2018 export prices from those countries and increasing European pulp prices (8% increases in each quarter of 2018).
78. In the context of increasing pulp prices in 2018, and the likely continuation of dumping from Finland, Korea and Russia, REP 463 merely acknowledged that "Slovakia did not export to Australia in 2018".³¹ The Commissioner did not consider whether the relativity of 2017 pulp prices to Australian market prices was a contributing factor in relation to Mondi SVK's decision to withdraw from the Australian market 2017.

²⁹ Commission's Submission para. 39 at page 8.

³⁰ REP 463 at page 83.

³¹ REP 463 at page 84.

(f) “Slovakia has increased production capacity and will continue to do so over the next five years.”

Mondi SVK’s Application:

“The Commission seeks to draw conclusions from an FAO survey with respect to Slovakia, when the evidence with respect to Mondi SVK was capacity utilisation of ██████% in 2016 and ██████% in the investigation period of 2017, and where the only future project proposed by Mondi SVK is for investment in a kraft top white machine which is for container board production, not A4 paper production.”

Commissioner’s Submission:

“Please see the Commissioner’s response for paragraph (a).”

Analysis:

79. The Commissioner’s reliance upon the answer to paragraph (a) does not address Mondi SVK’s claim which calls into question the relevance of the increased production capacity. As such, the nature of the increased capacity, derived from sources external to Mondi SVK, and upon which the Commissioner relies, does not support an inference that an increase in the production of container board would impact upon, or otherwise facilitate, Mondi SVK’s resumption of dumped A4 copy paper into the Australian market.

(g) “Slovakia is now an established supply source and was exporting at the lowest prices in 2017 and 2018.”

Mondi SVK’s Application:

“These statements are untrue:

- *Mondi SVK exported A4 paper to Australia in 2014 and then in 2017. This means that Mondi SVK has been a supplier to the Australian market. Although we do not think that adding the word ‘established’ makes any difference, Mondi SVK is certainly less ‘established’ than longer term suppliers who have more continuously supplied the Australian market.*

- *Mondi SVK was not ‘exporting at the lowest prices in 2017 and 2018’. Figure 14 in Report 463 disproves this. Indeed, in 2017 Mondi SVK exported at the highest prices. Moreover Mondi SVK had no exports in 2018, which is also as stated in Report 463.*³²

Commissioner’s Submission:

“The Commissioner agrees that the comments in this sentence are partially incorrect. The reference to 2018 is an error. As acknowledged elsewhere in Report 463, Mondi SVK ceased exporting to Australia in late 2017.

The Commissioner’s analysis shows that Mondi SVK’s export prices to Australia were the lowest for the first quarter of 2017 and not the remaining quarters of 2017.

The Commissioner remained satisfied that, based on Mondi SVK’s export history, it has an ability to export like goods to Australia should conditions suit. This factor supports the Commissioner’s position that Mondi SVK may begin resuming exports of like goods to Australia in the future.”

Analysis:

80. The Commissioner acknowledged the error in its assertion that Mondi SVK had been exporting at the lowest prices in 2018. Mondi SVK did not export in 2018. The Commissioner’s submission clarified Mondi SVK’s export prices 2017 were the lowest only in the first quarter of the year. Such conduct is consistent with Mondi SVK’s pricing reaction to increased domestic prices and adverse exchange rate movements and does not infer a propensity to export at dumped prices.

³² The Commission’s Submission included Table 1 which detailed Mondi’s weighted average export price, normal value and dumping margin for each of the four Quarters of the investigation period (2017). The Commission noted, for each Quarter, and on a weighted average basis, Mondi’s export price was below its normal value.

81. I agree with Mondi SVK's submission, with regard to the Commissioner's description of it as an 'established' supplier. I note Mondi SVK had only one customer in Australia and that customer ended the relationship as it felt that Mondi SVK had priced itself out of the market. Mondi SVK is part of a multinational conglomerate and I accept it would have the capability to re-enter the Australian market at some future time, if it considered market conditions to be suitable. However, such capability does not infer that any such re-entry would only be at dumped prices.

(h) "Mondi SVK has historically exported at similar prices to its Russian mill."

Mondi SVK's Submission:

"This does not go to the proposition that Mondi SVK might dump A4 paper in the future. Mondi SVK and Mondi SVK Group's Russian paper mill... are in the same world region, so the similarity of their prices would not appear to us to be noteworthy, and certainly not indicative of the proposition that the amount of the export price of Mondi SVK's A4 paper that may be exported to Australia in the future may be less than the normal value of that A4 paper. Further, insofar as the Commission thinks that similarity might have some relevance to the exercise [the Russian mill] did not export during investigation period, a fact which does not suggest similarity."

Commissioner's Submission:

"The Commission agrees that Mondi SVK Group's Russian mill(s) did not export like goods to Australia during 2018. However, like goods from its Russian mill(s) were exported in December 2016, arriving in Australia during February 2017. The Commission notes that the export prices of these goods from Russia were ■■■% lower than Mondi SVK's export prices for the same month.

The Commissioner considers that the fact that Mondi SVK has a global presence, it has an ability to export like goods Australia should conditions suit. This factor supports the Commissioner's position that Mondi SVK may begin resuming exports of like goods to Australia in the future."

Analysis:

82. I do not place the same significance as the Commissioner upon the export practices of Mondi SVK's sister company situated in Russia.
 83. The Commissioner acknowledges the Russian company did not export to Australia in 2018. The Commissioner then refers to one Russian consignment, exported in December 2016, presumably ordered some weeks/months prior, and which arrived in the second month of the investigation period, February 2017. The Commissioner then compared the Russian export price with Mondi SVK's prices in February 2017, noting the Russian prices were lower.
 84. I do not see that the past pricing behaviour of Mondi SVK's sister company in Russia, with respect to the export pricing of one consignment, shipped prior to the investigation period, portends or is in any way capable of influencing Mondi SVK's future export pricing to Australia.
 85. The Commissioner also relied upon the conglomerate's global presence, the significance of which I have commented on above.
- (i) "Mondi SVK has not entered into annual or multiple year contracts with any Australian customers, such as is typically required by Officeworks and other large entities."**

Mondi SVK's Application:

"With respect, relating this fact to the proposition that Mondi SVK may engage in dumping in the future makes no sense at all. We will submit that it is more sensible to conclude that the avoidance of annual or multiple year contracts is testament to the fact that Mondi SVK does not want to be locked into long-term arrangements, pursuant to which it might inadvertently engage dumping, if and when market conditions were to change in either Europe or Australia or there were to be currency fluctuations affecting export prices?"

Commissioner's Submission:

"The Commissioner considers that due to the fact that Mondi SVK is not locked into prices into the future, it has at the option of exporting like goods Australia at dumped prices.

In any case, absent this factor, the Commissioner is still satisfied that Mondi SVK may export like goods at dumped prices in the future for the reasons outlined in the Commissioner's submission."

Analysis:

86. The Commissioner seeks to rely upon the different supply arrangements between Australian Paper and Mondi SVK, with Australian Paper reliant upon long-term supply contracts covering price, quantities, packaging and delivery terms. Mondi SVK on the other hand negotiates on a consignment basis and, as stated by the Commissioner, is therefore not locked into prices for future periods.
87. The Commissioner does not suggest that Mondi SVK is different to other exporters of the goods to Australia, and that other exporters commonly have long-term arrangements in place. Nevertheless, the Commissioner suggests that the differing selling practices of Mondi SVK and Australian Paper are relevant to the prices at which Mondi SVK may re-enter the Australian market. I do not place the same significance as the Commissioner upon the differing selling arrangements such that the difference can give rise to an adverse inference against Mondi SVK.
- (j) "Mondi SVK trades with Australian customers by forward orders and is not limited by contractual arrangements."**

Mondi SVK's Application:

"We repeat our previous comments with respect to consideration (i)."

Commissioner Submission:

"Please see the Commissioner's response for paragraph (i)."

Analysis:

88. Please refer to comments above.

(k) “Mondi SVK has increased domestic prices significantly since 2017 such that given its export price history, is still likely to be less than its normal value.”

Mondi SVK’s Application:

“A finding that Mondi SVK’s avoidance of exportation to Australia at a time when its domestic prices are high is evidence that it may dump in the future is counterintuitive in the extreme. Would a reasonable person not conclude that this indicated the awareness of an exporter of the importance of seeking profit in its most profitable markets, and to not engage in discriminatory pricing in lower-priced foreign markets?”

Commissioner’s Submission:

“The Commissioner accepts that Mondi SVK disagrees with the Commission’s view.

In any case, absent this factor, the Commissioner is still satisfied that Mondi SVK may like Australia at dumped prices in the future for the reasons outlined in the Commissioner’s submission.”

Analysis:

89. I do not accept that the Commissioner’s comparison between Mondi SVK’s price reaction to a buoyant domestic market and its historic dumping prices to Australia gives rise to an inference that Mondi SVK would again enter the Australian market at dumped prices. As Mondi SVK points out, in light of the information it had provided to the Commissioner, there would be little incentive for it to divert product from its profitable domestic market to sell at lower prices in Australia, especially given capacity constraints.

Conclusion:

90. In undertaking the analysis of the 11 factors, I acknowledge that section 269TG(2)(a) requires a prospective analysis which cannot generate a high degree of certainty.
91. I also acknowledge the Commissioner's caution that any consideration of the factors in isolation should be avoided and that any decision ought to have regard to all of the factors taken as a whole with reference to all available evidence. Similarly, Mondi SVK suggests that in order to arrive at a justifiable and objective inference about what is more likely to happen at a future time, an exporter's behaviour must be assessed in the light of all its surrounding circumstances.
92. The Commissioner's submission rightly points out that any consideration of dumping, past or in the future, requires an appreciation of both export prices and normal values. The Commissioner notes Mondi SVK's reliance upon its adherence to its pricing policy is relevant only to export prices, further, the Commissioner "considers that Mondi SVK failed to provide sufficient evidence to refute the possibility that it may export dumped prices in the future." The Commissioner went on to state "Mondi SVK's verified prior conduct of exporting like goods to Australia at dumped prices, in the investigation period, in the absence of persuasive evidence otherwise, is sufficient to satisfy the legislative test (i.e. 'may') under section 269TG(2)(a)."³³
93. Mondi SVK does not bear the onus of refuting the possibility of future dumped imports. It is for the Commissioner to demonstrate, by reference to positive evidence, that it attained the requisite level of satisfaction as required by section 269TG(2)(a).
94. This is not a case in which an exporter seeks to introduce an argument in a review process which was not pressed before the decision maker. Throughout the investigation, Mondi SVK pressed the Commissioner to recognise the importance of domestic market factors and their influence on its decisions regarding pricing, both for domestic sales and for exports to Australia. This material was before the

³³ Commission's Submission at pages 6 and 7.

Commissioner, but the Commissioner placed greater weight on the occurrences of past dumping as an indicator of future intent.

95. Based upon the above analysis, it would appear the Commissioner placed reliance upon historical “verified prior conduct of exporting like goods to Australia at dumped prices, in the investigation period”,³⁴ in preference to other past behaviour as an indicator of future behaviour. Such other past behaviour included the reasons why Mondi SVK ceased exporting one of its products early in the investigation and that it sought to implement a price increase with its sole Australian customer in relation to its remaining product with the knowledge that it may price itself out of the Australian market. The circumstances pertaining to Mondi SVK’s domestic market were also of relevance as were their possible impact on any future pricing decisions with respect to Australian exports.
96. Whilst I accept that it was open to the Commissioner to come to the view that Mondi SVK may re-enter the Australian market at dumped prices, there was nevertheless evidence before it suggesting that it would not. While it would be open to the Minister to publish a notice under section 269TG(2), I recommend that the preferable decision is to not declare that section 8 of the Dumping Duty Act applies because of the prevailing conditions in Mondi SVK’s domestic market and Mondi SVK’s demonstrated adherence to its sales pricing policy.
97. I therefore recommend that the Minister revoke the reviewable decision with respect to Mondi SVK and that the Minister substitute a new decision, to not declare that section 8 of the Dumping Duty Act is to apply to like goods exported to Australia by Mondi SVK, and to publish a notice under section 269TL of the Act accordingly, with such decision to take effect from the date of the reviewable decision, 2 April 2019.

Mondi SVK: Ground 2

The Minister’s finding that although dumping found to have occurred in 2017 did not cause material injury to the Australian industry in 2017, nevertheless it

³⁴ Ibid para. 29 at page 6.

did cause material injury to the Australian industry in 2018 is not supported by the Commissioner's analysis contained within REP 463.

98. Notwithstanding my recommendation in relation to Ground 1 to terminate the investigation with respect to Mondi SVK, I will deal with Ground 2 of Mondi SVK's Application. I do so on the basis that if the Minister does not accept my recommendation in relation to Ground 1, a recommendation from the Review Panel would be required with respect to Ground 2.
99. Ground 2 of Mondi SVK's Application is supported by two arguments:
- a) the injury and causation finding was not based on facts, instead it was based on assumptions and remote possibility.; and
 - b) Mondi SVK's exports were not appropriately accumulated with other exports, in the circumstances of this case.
100. The Commissioner found although Mondi SVK's exports had been dumped in 2017, they had not caused material injury to the Australian industry. However, the Commissioner found that dumped imports nevertheless caused material injury to the Australian industry in 2018. The Commissioner's findings in relation to material injury were briefly summarised in paragraph 41 above. The Commissioner's main focus, regarding material injury, was upon price suppression and its effects on profits. Mondi SVK argues the Commissioner's findings in relation to material injury, based upon a counterfactual analysis and the absence of Australian Paper's CTMS data for 2018, are not supported by the facts and that the Commissioner's analysis was based upon assumptions and remote possibilities.
101. Mondi SVK's Application questions the Commissioner's injury finding with respect to "the proposition that although dumping found to have occurred in 2017 did not cause material injury to the Australian industry 2017, it did cause material injury to the Australian industry in 2018."³⁵ Especially, as Mondi SVK's last exports to Australia were shipped in July and October 2017 and those consignments were of a lower volume, and therefore consequently had a higher unit price than its consignments exported earlier in 2017. Accordingly, Mondi SVK questions the

³⁵ Refer to Mondi SVK's Application at page 11.

finding that its exports were the cause of material injury to Australian Paper in 2018, a time when Mondi SVK had no presence in the Australian market and could not be said to have sold goods “in opposition to” Australian Paper in 2018.³⁶

102. The injury analysis period for the purposes of determining whether material injury to the Australian industry had been caused by dumped exports of A4 copy paper was from 1 January 2014 and continued into 2018. No issue arises from the injury period commencing before and continuing beyond the investigation.³⁷

103. The Commissioner’s Submission argues that while the assessment of past injury appears confined, by the language of the Act, to the investigation period, the assessment of future dumping is not so confined. In support, the Commissioner refers to *Pilkington (Australia) Ltd v Minister of State for Justice and Customs*³⁸ where the Federal Court found that while an assessment of past dumping was confined to the investigation period, threatened dumping was not so confined.

104. Accordingly, there is no issue with the Commissioner basing its material injury finding upon events which occurred beyond the investigation period.

105. The Commissioner’s injury determination was governed by the provisions of section 269TAE. Relevantly, subsection 269TAE(2AA) requires that such a determination “be based on facts and not merely on allegations, conjecture or remote possibilities.” The Act does not define or provide express guidance as to the scope of that phrase.

106. Article 3.1 of the ADA relevantly requires that an Investigating Authority’s material injury determination be based upon positive evidence and involve an objective examination of the effect of dumped imports.³⁹ The Appellate Body has stated, “the

³⁶ Mondi SVK’s Application at page 11.

³⁷ WTO Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala* (WT/DS331/R). In *Mexico-Steel Pipes and Tubes*, the Panel noted the Anti-Dumping Agreement does not set forth any express requirements regarding choice of period of investigation for the purposes of conducting an injury analysis.

³⁸ [2002] FCA 770 at [55].

³⁹ Part XVB of the Act, purports to give effect to Australia’s obligations arising from the World Trade Organization’s (WTO) Anti-Dumping Agreement (ADA): see “Part XVB of the Customs Act embodies legislative amendments arising from Australia’s obligations under the General Agreement on Tariffs and Trade 1994 (GATT) including the Agreement on Implementation of Article VI of GATT,” *Guardian Industries Corp. Ltd v Attorney General of the Commonwealth of Australia* [2013] FCA 780 at [7].

word 'positive' means ... that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."⁴⁰

107. Neither the Act, nor Article 3.1 of the ADA, prescribes any particular methodology as to how the injury analysis is to be undertaken.⁴¹ The Commissioner's Submission notes, "the Act does not prescribe a mandatory or indicative methodology for conducting assessments of injury and causation."⁴² The Panel in the *Morocco - Hot-Rolled Steel (Turkey)* confirmed that "when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified."⁴³

108. I will now examine the methodology employed by the Commissioner in its material injury finding to determine whether inferences were drawn from a credible basis of fact and were sufficiently explained.

109. The Commissioner based its conclusions, regarding material injury to the Australian industry in 2018, on the application of what it referred to as a counterfactual analysis of prices. Having regard to the particular circumstances of the case, the Commissioner's Submission noted its counterfactual assessment was the most appropriate and was consistent with its publication, the *Economic Framework for Injury and Causation Analysis*. The Submission also referred to the *Dumping and Subsidy Manual* which notes that under a 'but for' (counterfactual) analytical method it may be possible to compare the current state of the industry to the state the industry would likely have been in if there had been no dumping. The counterfactual analysis required the determination and then comparison of two prices.

110. The first price was the actual price which Australian Paper had been able to achieve in selling its products into the Australian market in 2017 and 2018. The Commissioner referred to such prices as the "factual price".

⁴⁰ WTO Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (WT/DS184/AB/R), para. 192.

⁴¹ WTO Panel Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey* (WT/DS513/R) at para 7.155.

⁴² Commissioner's Submission at page 10.

⁴³ Above n. 40 at para 7.155.

111. The second price was a price or prices Australian Paper could reasonably have achieved, via its price negotiations in 2017, for supply in 2017 and 2018, on the assumption that such prices were not impacted by the presence of dumped imports in the Australian market during the investigation period. This price was referred to by the Commissioner as “the counterfactual price”. The Commissioner stated the counterfactual price “is the lowest price that Australian Paper should have been able to achieve in the absence of dumping.”⁴⁴
112. As noted above, the ADA and the Act afford investigating authorities a certain discretion in adopting a methodology to guide a material injury analysis. The discretion is limited by the need for reliance to be based on reasonable assumptions based upon positive evidence. In this instance the Commissioner opted for the adoption of a counterfactual methodology. This choice, per se, was reasonable and as such no objection can be taken to it.
113. As only two importers cooperated with the Commissioner’s investigation, and as only one of these participated in a verification visit, the Commissioner lacked verified selling prices of all imported product sold in the Australian market during the investigation period. The Commissioner therefore sought to rely upon the best information available, which in its view was to focus upon the Free into Store (FIS) invoice price of the imported product during 2017 and 2018.⁴⁵ In order to ensure a fair comparison, as no “premium” grade paper was imported, the Commissioner removed Australian Paper’s Reflex brand from the price undercutting analysis.
114. The difference between the factual price and the counterfactual price determined the level of price injury (suppression) caused by dumping.⁴⁶ The Commission found that “had the material level of price suppression caused by the dumped imports in 2017 not occurred, the additional amount of revenue that could have been achieved by Australian Paper in 2018 was 2% greater than what it actually achieved.”⁴⁷ The

⁴⁴ REP 463 at page 59.

⁴⁵ “The Commission calculated the weighted average, or quarterly landed price (AUD/MT) of the goods using data from the [Australian Border Force] import data base... The Commission considers these values to be the best available data for the purposes of calculating selling prices in Australia from [Slovakia],” REP 463 at page 68.

⁴⁶ REP 463 at page 63.

⁴⁷ REP 463 at page 78.

Commissioner considered the amount of revenue forgone constituted price suppression.⁴⁸

115. Having identified what prices would have been achieved in the absence of dumped product, the Commissioner then proceeded to consider what impact such higher prices would have had on Australian Paper's profitability in 2018. In particular, the Commissioner wanted to establish "whether the dumping in 2017 hindered or prevented Australia Paper's recovery from dumping in 2015 [refer REP 341] by causing its profitability in 2017 and 2018 to have been lower than it otherwise would have been."⁴⁹

116. To do this the Commissioner needed to know both Australian Paper's sales volume and its CTMS for 2018. Mondi SVK argues the derivation of the 2018 CTMS only supports an assumption of reduced revenue, an assumption which gives no consideration to, or allowance for, important cost factors, such as the CTMS of different types or grades of A4 copy paper nor the differences in the volume mix supplied.

117. Mondi SVK's Submission suggests, "it appears that Australian Paper's costs data from 2018 was not verified, indeed it is not clear whether it was even obtained."⁵⁰ Whilst the Commissioner acknowledges that the 2018 CTMS data was not verified, the Commissioner's Submission noted "detailed sales data and cost of goods sold (COGS) data was obtained from Australian Paper for the 2018 period. The 2018 data was reviewed for accuracy determined to be reliable for the purposes of the investigation, as the data was consistent with other verified data and information provided by Australian Paper during Investigation 341 and this investigation."⁵¹

118. The Commissioner then calculated a percentage increase in volume,⁵² net revenue and COGS from 2017 to 2018 and applied the percentage difference to Australian Paper's verified 2017 CTMS to derive a 2018 CTMS. The Commissioner found the effect of the dumped imports on Australian Paper's performance recovery caused

⁴⁸ Calculated as a weighted average of all brand segments and grades, refer REP 463 at page 75.

⁴⁹ REP 463 at page 44.

⁵⁰ Mondi SVK's Submission dated 24 June 2019 at page 15.

⁵¹ Commission's Submission at page 11.

⁵² Australian Paper achieved approximately 18% sales volume growth in 2018 as compared to 2017, reflecting the imposition of provisional and interim measures as a result of REP 341.

Australian Paper's profitability to be approximately 3% lower in 2018 than it would otherwise have been.⁵³ The Commissioner considered this profit and profitability shortfall to be material to Australian Paper⁵⁴ and it negatively impacted upon Australian Paper's ability to attract investment, reinvestment or financing in 2018.

119. I am satisfied it was appropriate for the Commissioner to rely upon the data obtained from Australian Paper relating to its 2018 costs. I do not place significance upon the absence of 'verified' CTMS. Australian Paper was a cooperative party in this, and in earlier investigations. The data submitted was consistent with that previously submitted and it was appropriate, in the circumstances, for the Commissioner to accept its accuracy. There is no legislative prohibition limiting the Commissioner's consideration of data, or of information generally, only to that which has been verified. Neither does the legislation preclude the Commissioner from coming to a determination based upon information derived from other reliable or credible sources or methods. In doing so the Commissioner must provide a reasoned explanation for reliance upon alternative sources and how such data is to be applied. In light of the above, I am satisfied the Commissioner met this obligation in this instance. I reject Mondi SVK's assertion that insofar as the derivation of the 2018 CTMS are concerned, the Commissioner had failed to provide an "extremely well articulated" explanation in order to overcome the "remote possibility" test in section 269TAE(2AA).

120. Mondi SVK's Submission listed the following indicators of injury which in its view;

point away from the conclusions that the Australian industry was injured in 2018, at all or by the goods from the countries under investigation:

- *the Australian market size increased in 2018, as did Australian Paper's share of the market;*
- *Australian Paper's sales volume increased medically in 2018 as compared to 2017, to the tune of 18%;*

⁵³ REP 463 at page 80.

⁵⁴ Ibid at page 78 quantified the extent of the actual impact to be "in the millions of Australian dollars."

- *there was a massive decrease in the volume of imports from countries against dumping duties had already been imposed, and from the countries under investigation ... ;*
- *there was an increase in imports from other countries in 2018, the total volume of which exceeded the volume of the goods from the countries under investigation;*
- *Australian Paper's revenue increased in 2018 as compared to 2017; and*
- *Australian Paper's profitability increased.*⁵⁵

121. REP 463, containing the Commissioner's findings and recommendations, needs to be read in context. A crucial feature of such context is the Commissioner's earlier report, REP 341. There, the then Minister accepted that report's findings and recommendations and imposed measures on a number of countries. In doing so it was accepted that Australian Paper had suffered material injury due to the dumped imports from those countries.

122. Following the imposition of measures, as a result of REP 341, it was the expectation that the extent of Australian Paper's material injury would lessen. However, the Commissioner in REP 463 stated "Australian Paper did not obtain the full market share (in 2017) of lost sales by exporters and countries subject to measures from Investigation 341, as imports from Finland, Korea, Russia and Slovakia increased and replaced a portion of those dumped imports after Investigation 341 measures were imposed."⁵⁶

123. Later in REP 463, the Commissioner makes reference to "unrealised revenue gains as a result of [Australian Paper's] ability to rise selling prices after the conclusion of investigation 341⁵⁷". Further, the Commissioner also noted, and the 2018 counterfactual scenario demonstrates, even if there was no price suppression in 2017, "Australian Paper would not reach its fully recovered position".⁵⁸ By this the Commissioner meant that its counterfactual analysis demonstrated that even in the absence of dumped imports Australian Paper was unlikely to have been able to

⁵⁵ Mondi SVK's Submission at page 14.

⁵⁶ REP 436 at page 66.

⁵⁷ Ibid at page 77.

⁵⁸ Ibid at page 79.

recover to the financial position it had enjoyed prior to the commencement of the material injury identified in REP 341.

124. In summary REP 463 was compiled at a time when Australian Paper had been materially injured by dumped imports identified in REP 341. Despite the imposition of measures, Australian Paper had been unable to fully recover from that position due to the presence of dumped imports identified in REP 463. The Commissioner's methodology suggested the quantum of the revenue Australian Paper was unable to recover was "in the millions of Australian dollars".⁵⁹

125. Mondi SVK's final argument in relation to this Ground of Review was that its exports should not have been cumulated with those of other exporters as it did not compete in the market in the same way as other exporters given the short duration of its presence within the Australian market. It accepted its last order on 2 June 2017, less than halfway through the investigation period.

126. The Commissioner's Submission detailed its consideration of the competition between A4 copy paper supplied by Australian Paper, Mondi SVK and the other exporters, the subject of REP 463. Briefly, the Commissioner found that exports from Mondi SVK and the other exporters were physically, functionally and commercially like and in direct competition with each other and with Australian Paper in the Australian market. The Commissioner was also satisfied that the Australian market is price sensitive with price being a key driver of sales. I am satisfied it was appropriate to accumulate Mondi SVK's exports with the exports from other specified countries.

127. Accordingly, I dismiss this Ground of Review.

⁵⁹ Ibid at page 78.

Hankuk

Ground 1: The injury to the Australian Industry referenced in REP 463 has not been caused because of Hankuk's exports.

128. The reviewable decision subjected Hankuk to interim dumping duty of 3.8%, which Hankuk describes as a "small margin."

129. Hankuk argues the Commissioner's finding with respect to causation "overstates the prevalence of import prices in price review mechanisms."⁶⁰

130. I will set out a brief chronology of the relevant negotiations between Australian Paper and Officeworks. The parties entered into a three-year supply agreement in October 2015 which was to terminate in December 2017. As pointed out by Hankuk, that agreement predated the investigation period. The agreement provided for a pricing review in 2016, which was duly undertaken, and which governed the supply of A4 copy paper throughout 2017. As noted above a separate negotiation process was undertaken by the parties in mid-2017 in relation to the terms of an interim or bridging agreement pending negotiation of a new three year agreement in 2018 for product to be supplied commencing in 2019.

131. The Commissioner found that the Australian industry had not sustained material injury during the investigation period (2017). Hankuk notes the Commissioner looked beyond the period of investigation and found the Australian industry had sustained material injury in 2018 from exports from the specified countries "as price review mechanisms set with reference to suppressed market prices from imports in 2017, suppressed Australian Paper's prices that came into effect in 2018."⁶¹ Hankuk argues this approach is erroneous. The injury analysis period for the purposes of determining whether material injury to the Australian industry had been caused by dumped exports of A4 copy paper was from 1 January 2014 and continued into

⁶⁰ Hankuk's Submission at page 4.

⁶¹ REP 436 at page 82.

2018. No issue arises from the injury period commencing before and continuing beyond the investigation period.⁶²

132. Hankuk challenges the evidentiary basis of the Commissioner's material injury finding, particularly as it relates to Officeworks. Officeworks is one of Australian Paper's major customers, consequently Hankuk considers the Commissioner's view of Officeworks' negotiations with Australian Paper was influential, if not determinative, in the finding with respect to material injury caused in 2018. Consequently, Officeworks was a focus of the Commissioner in its assessment of the impact of import prices. The Commissioner established that Officeworks' price negotiations, in 2017, were impacted by import prices and these sales accounted for ■% of the 35% of Australian Paper's sales found have been suppressed by dumped prices.⁶³

133. Hankuk's Submission points to the fact that in REP 463 the Commissioner's analysis of Australian Paper's price negotiation with Officeworks appeared to focus almost exclusively on negotiations conducted in late 2018, for the supply of goods in 2019. It questions the relevance of the outcome of such negotiations to the financial position of Australian Paper in 2018, upon which the material injury finding was based. Hankuk's Submission argued, "the outcome of the negotiation of this new supply agreement [August 2018] does not form part of the injury rationale that the imposition of the measures is based upon".⁶⁴

134. I shared Hankuk's concern as the Commissioner went into considerable detail outlining the chronology pertaining to its 2018 negotiations with Officeworks for supply of goods in 2019.⁶⁵ Accordingly, on 11 July 2019 a further conference was convened with the Commissioner to clarify the nature of the negotiations undertaken by Australian Paper with Officeworks in both 2017 and 2018.

⁶² In *EC – Tube or Pipe Fittings* the Panel noted; the Anti-Dumping Agreement does not set forth any express requirements regarding the choice of the period of investigation for the purposes of conducting an injury analysis. The Panel went on to state, at para 7.276, in "the absence of a specific provision concerning time periods in the Agreement; an importing Member may investigate price effects of imports in an injury investigation which may be different to the IP for dumping."

⁶³ Refer Commission's Submission, para. 95 at page 20.

⁶⁴ Hankuk's Submission at page 3.

⁶⁵ See REP 463 at pages 50-52.

135. The details of the supply agreement between Australian Paper and Officeworks are outlined at pages 50 to 52 in REP 463. The parties entered into a supply agreement in October 2015 for supply of A4 copy paper. That agreement was to terminate on 31 December 2017 and not 2018, as stated in REP 463.
136. In mid-2017 the parties agree to enter into a bridging or interim agreement to settle on prices to be delivered through to 31 December 2018 and in addition to commence further negotiations in mid-2018 for a new supply agreement to take effect in late 2018, governing the product to be delivered from 2019.
137. Therefore, the negotiations undertaken in 2017, for product to be delivered throughout 2018, were not undertaken under the pricing review mechanism provided for in the 2015 supply agreement. This meant that any negotiated price movement was not constrained or limited by any price cap specified in the 2015 agreement. There was therefore no constraint on the amount of price movement in the 2017 negotiations. The 2017 negotiations were regarded as a one-off interim or bridging arrangement.⁶⁶ These details were confirmed in a submission dated 10 September 2018 from Australian Paper to the Commissioner.
138. Hankuk's Submission notes that REP 463 states "Australian Paper did not provide evidence of new supply agreements being negotiated in 2017."⁶⁷ In conference on 11 July 2019, the Commission confirmed this was the case with the interim or bridging agreement entered into in 2017. Although full details of the agreement were not disclosed, Australian Paper did provide the Commissioner with details of the new prices agreed to in 2017 for 2018 supply.
139. In May 2017, Australian Paper submitted pricing to Officeworks for a January to December 2018 contract which proposed a price increase from the 2017 prices.⁶⁸ The parties eventually settled upon a price increase which was less than that offered in May 2017. Australian Paper attributed the lower price increase (price suppression) to import competition e.g. because new entrants from the subject countries entered the market, suppressing market prices.

⁶⁶ REP 463 at page 22 notes, "for more complex customers, bridging or interim agreements may be established while new contractual terms are negotiated."

⁶⁷ REP 463 at page 61.

⁶⁸ Australian Paper' submission to the Commission dated 10 September 2018 at page 6.

140. The Commissioner's Submission references the 2018 negotiations with Officeworks for supply in 2019 and concludes "this evidence forms part of the Commissioner's counterfactual assessment."⁶⁹ In conference I sought clarification as to the relationship between the 2018 negotiations and the counterfactual assessment.

141. The Commissioner advised the conduct of the parties in the 2018 negotiations helped inform the counterfactual analysis. As Officeworks had provided the Commissioner with evidence (an exchange of email) of the price of dumped imports in the market, the Commissioner considered it probable that Officeworks was likely to have utilised the same strategy in its 2017 negotiations for the interim or bridging agreement. This inference was strengthened by the provision by Officeworks of data related to its purchases of imported paper from the specified countries in 2017.⁷⁰ The Commissioner therefore had evidence before it confirming Officeworks' knowledge of the prevailing prices of imported product at the time it was undertaking the negotiations for the 2017 bridging agreement. This evidence, together with the Commissioner's awareness of the market's historical sensitivity to price,⁷¹ support the inference that import pricing had been an influential factor upon the 2017 negotiations.

142. Appendix 3 to REP 463 provides details of the application of the 2017 counterfactual analysis to 2018 prices. In relation to Officeworks it states,

Officeworks purchase the goods imported from [the subject countries] in 2017 and had used its knowledge of these prices in its new supply agreement negotiations with Australian Paper in 2018 ... the Commission considers that these prices also have been used by Officeworks in its price review negotiations in 2017.

⁶⁹ Commission's Submission at para 87.

⁷⁰ I note the Commission had obtained similar evidence from an importer of A4 copy paper. REP 463, at page 52, states the Commission had obtained invoices from an importer of goods from the specified countries who had supplied Officeworks with A4 copy paper in 2017. The Report also notes Officeworks have not disputed that it already had knowledge of prices from countries found for dumping 2017.

⁷¹ The Commission's Submission at page 11 confirmed Investigation 341 "established that the like goods were price sensitive and that price was a key driver for sales. No submissions asserting otherwise were made."

143. Appendix 3 of the Report also provides details, expressed as a percentage of volume, of Australian Paper's customers' offtake whose 2018 prices were suppressed by dumped imports. Officeworks' offtake together with that of the other customers whose prices were suppressed amount to over 35% of Australian Paper's sales. The materiality of this impact, in the context of material injury, is self-evident.

144. Hankuk's Submission attempts to limit the scope of the contracted price review undertaken in 2017. It argues that review occurred under an agreement which predated the investigation period "and the Act does not permit any determination that dumping has occurred prior to the start of the investigation period."⁷² As the 2015 agreement set a base or commencement price, Hankuk argues, this in some way, which it does not explain, renders irrelevant considerations which impacted upon the price review undertaken in 2017. There is no evidence to sustain Hankuk's claim that the price review undertaken in 2017 was limited in its scope and undertaken pursuant to the terms of the 2015 agreement. I am satisfied the negotiations which occurred in 2017 for the supply of product throughout 2018 took place under the auspices of a separate negotiation process for an interim or bridging agreement. As such the price negotiations were not constrained by the base price negotiated years previously under the 2015 agreement.

145. When REP 463 is read in context, it is apparent the Commissioner had before it, and had considered, sufficient evidence upon which to found its conclusions with respect to Australian Paper's 2017 negotiations with Officeworks, for supply in 2018, and for its broader finding of material injury.

146. As noted above, there is a high degree of competition in the A4 copy paper market, Australian Paper and the imported goods are in direct competition in the primary market. Within that market there is significant pricing transparency such that buyers are aware of competitive prices and use those prices as leverage in their negotiations with their suppliers. Indeed, the level of transparency was demonstrated by Officeworks' recourse to import prices in the negotiations with

⁷² Hankuk's Submission at page 5.

Australian Paper referenced by the Commissioner, albeit in the context of the 2018 negotiations.

147. Further, REP 463 noted Office works “did not dispute the Commission’s conclusion in SEF 463 that it already had knowledge of prices from the countries found to be dumping in 2017.”⁷³

148. I therefore accept that although available or competing prices within the market are but one factor impacting upon price negotiations between Australian Paper and its customers, they are nevertheless highly influential. In the context of the negotiations with Officeworks it is apparent both parties placed considerable reliance upon them.

149. The report also states the Commissioner had obtained invoices from an importer of goods from the specified countries who have supplied Officeworks with A4 copy paper in 2017. The report also notes Officeworks had not disputed that “it already had knowledge of prices from the countries found to be dumping in 2017.”⁷⁴ It is therefore reasonable to conclude Officeworks would have utilised such knowledge in the price review negotiations conducted in 2017 for goods to be supplied in 2018 under the interim or bridging supply agreement.

150. The Commissioner’s Submission referred to its analysis of the price reviews which Australian Paper undertook with its three largest customers. This analysis;

*included reviewing relevant documents, submissions received and, in some cases, meeting with the relevant parties to those negotiations. Ultimately, the Commission found the evidence supported, of the three largest customers, Officeworks’s price negotiations were impacted by dumped import prices.*⁷⁵

151. I find that a bridging or interim agreement was negotiated between Australian Paper and Officeworks in 2017 governing the supply of goods in 2018. Separate negotiations occurred in 2018 in relation to the terms of a new supply agreement. Given the transparency of the market, Officeworks was aware of the prices at which

⁷³ REP 463 at page 52.

⁷⁴ REP 463 at page 52.

⁷⁵ Commission’s Submission, para. 89 at page 19.

imports from the subject countries were available,⁷⁶ and this knowledge was a relevant factor in the negotiations, such that if those imports had not been present in the market Australian Paper would have been able to achieve higher prices for the goods to be delivered in 2018.

152. Hankuk's Submission also questioned its inclusion in the material injury finding, the focus of which was upon the contractual arrangements Australian Paper had with its customers. Hankuk pointed out it was not a party to those agreements and was not a direct competitor with Australian Paper for its customers. The Commissioner's Submission acknowledged these arguments but stated;

the competition between the Australian industry and exporters such as Hankuk occurs further down the supply chain. It is necessary for the Commission to analyse competition at the level at which this occurs. In relation to Hankuk, competition with Australian Paper predominantly occurs in the reseller and retailer segments ... Australian Paper directly competed with other suppliers in the reseller and retail segments into which [Hankuk's] exports were supplied.⁷⁷

153. I therefore dismiss this Ground of Review.

Ground 2: The evidence referenced in REP 463 does not support the causation finding.

154. Hankuk's Application noted the Commissioner's causation finding was based on two findings;

- price review mechanisms set with reference to suppressed market prices from imports in 2017, suppressed Australian Paper's prices that came into effect in 2018; and
- the price reviews conducted in 2017 and 2018 for effect in 2018, impacted 35% of Australian Paper's business in 2018. I note there is some overlap with

⁷⁶ It will be recalled the Commission had evidence that Officeworks had imported A4 copy from these countries during 2017.

⁷⁷ Ibid at page 18.

Ground 2 and with Ground 3. Ground 3 substantively addresses the argument relating to the alleged impact on 35% of Australian Paper's business.

155. Hankuk asserts "the proposition that all pricing mechanisms referred to imports is not supported by the findings" in REP 463.⁷⁸ Hankuk then cites section 5.2.5 of the Report. In that section Commissioner stated, "Investigation 341 identified that A4 copy paper is price sensitive and that price is a key driver of sales",⁷⁹ this claim was supported by one of Australian Paper's major customers. The Commissioner then went on to say the price of imported A4 copy paper is "a relevant consideration when Australian Paper enters into supply contracts and when it undertakes price reviews during the course of a contract."⁸⁰

156. Section 5.2.5 of the Report went on to state that the price setting methodologies can be dependent upon a range of inputs which include, inter-alia, grade, volume and delivery terms. Read in context, the Commissioner is not assuming that in any and all price negotiations import pricing will be determinative of the outcome. That said, as noted above, the A4 copy paper market is highly competitive and transparent such that customers have a high level of awareness of the comparison between Australian Paper's prices and the price of imported goods. The awareness of input pricing levels would appear to be pervasive within this market.

157. Hankuk's Submission refers to Australian Paper's supply agreement with OPANZ, one of Australian Paper's three largest customers. Hankuk notes OPANZ's supply agreement limited price reviews to changes in Australian Paper's cost of production, limited by an overriding cap. The agreement made no reference to import pricing as a factor to be taken into consideration in the review negotiations. This was acknowledged by the Commissioner as OPANZ was excluded from the Commissioner's counterfactual price analysis as it had concluded OPANZ's 2018 prices had not been impacted by dumped prices.

158. The Commissioner's submission stated, "it appropriately focused its assessment of the impact of import prices on Australian Paper's three largest customers

⁷⁸ Hankuk Application at page 6.

⁷⁹ REP 463 at page 22.

⁸⁰ Ibid at page 22.

[Officeworks, OPANZ and Customer B] given the significant value and volume of those customers purchases.”⁸¹ However, Hankuk’s Application notes, REP 463 only refers to one instance [Officeworks] “where import prices were an input in a previously agreed pricing mechanism, one instance where prices were varied on the basis of costs [OPANZ] and one instance [Customer B] where no evidence or information has been provided that prices were set with regard to imports.”⁸²

159. The Commissioner’s Submission confirmed it had established:

- market prices were used as an input for the negotiation of prices with other customers (Customers X, Y and Z) or that price was the primary driver of sales;⁸³
- Officeworks’ price negotiations were impacted by import prices and these sales accounted for █% of the 35% of Australian Paper’s sales found to have been stressed by dumped prices;⁸⁴ and
- the price of imported like goods is a relevant consideration when Australian Paper enters into supply contracts and when it undertakes price reviews.⁸⁵

160. Notwithstanding that of Australian Paper’s three largest customers the Commissioner only found one, Officeworks, where import prices were an influential factor in price negotiations, I am satisfied there was sufficient evidence before the Commissioner such that its findings with respect to material injury and causation were the preferable decisions. These decisions ought to be reviewed in context.

161. REP 341 established Australian Paper’s financial condition had sustained a sharp decline in 2016 due to dumped imports, such that it suffered a loss on A4 copy paper in that year. Following the imposition of measures in 2016, Australian Paper had anticipated a recovery. However, the subject imports replaced those impacted by the measures imposed following REP 341, such that Australian Paper was unable to raise prices in 2017, for delivery in 2018, so as to fully recover from the previous injury, thus adversely impacting its profit and profitability.

⁸¹ Commission’s Submission at page 20.

⁸² Hankuk’s Submission at page 8.

⁸³ Refer Commission’s Submission para. 96 at page 20 and Appendix 2 and 3 to REP 463.

⁸⁴ Ibid at para. 95 at page 20.

⁸⁵ Ibid at para. 95 at page 20.

162. As noted in my analysis of Ground 3 below, Officeworks' purchases, together with those other customers identified in Appendix 3 as having had their 2018 prices impacted by 2017 dumped prices, accounted for approximately 35% of Australian Paper's sales. Price suppression of such magnitude, given the particular circumstances of this case, is a reasonable basis upon which to conclude that material injury had been sustained by Australian Paper.

163. Even if Hankuk's argument is accepted and the impact of the subject imports was limited to Australian Paper's selling prices to Officeworks, which is not the case, Officeworks represented █% of Australian Paper's sales revenue and volume in 2017⁸⁶. Australian Paper's inability to negotiate the 2017 price review with Officeworks for product to be delivered in 2018 at prices unaffected by dumped prices had a resultant adverse impact upon Australian Paper's profit and profitability in 2018 such as to constitute material injury by preventing recovery from its weakened state.

164. Accordingly, I reject this ground of review.

Ground 3: There is insufficient evidence contained within REP 463 to support the finding that the Australian industry sustained material injury.

165. Hankuk's Submission, notes that the Commissioner's finding is based on the proposition that 35% of Australian Paper's business in 2018 was impacted by some form of price review impacted by dumping which resulted in Australian Paper's weighted average per unit price being 2% lower than it otherwise would have been. It argues this is pure conjecture on the part of the Commissioner and is not consistent with the findings of fact in REP 463. The Report "finds that each supply agreement states a base price that 'can be dependent on a range of imports'".⁸⁷

166. This proposition in turn flows from the application of what the Commissioner referred to as its counterfactual methodology to determine the impact of dumping from the subject countries. Hankuk argues the methodology is questionable as it relies upon value judgements about prices Australian Paper should have received in 2018 in the absence of dumped goods. Specifically, Hankuk takes issue with the

⁸⁶ Hankuk's Submission at page 8.

⁸⁷ Hankuk's Application at page 13.

assumption, on the Commissioner's part, that dumping was, in all instances, the cause of selling prices realised at less than the counterfactual prices. This argument is flawed.

167. It is acknowledged that import pricing is only one of several factors that may be considered in the context of price negotiations. Indeed, there were two instances where import pricing was excluded. In Appendix 3 to REP 463 the Commissioner excluded OPANZ's as "price increases contractually capped and maximum contracted percentage price increase achieved." It will be recalled that the determinative factor in OPANZ's price increase was the increase in Australian Paper's costs. Further, in relation to Customer B, Appendix B states "there was no evidence or information provided that Australian Paper set prices with respect to imports."⁸⁸
168. The percentage of Australian Paper's business in 2018 impacted by dumped imports from the subject countries excluded sales to Customer B and OPANZ, these being two of Australian Paper's three largest customers. The two customers were excluded as the Commissioner was not satisfied that the presence of dumped imports had materially impacted on their respective price negotiations.⁸⁹ The exclusion of the two customers demonstrates that the Commissioner did not overstate the prevalence of import prices in price review mechanisms and recognises, contrary to Hankuk's argument, the Commissioner had not assumed that dumping was the sole influence upon selling prices realised at less than the counterfactual prices.
169. Having excluded OPANZ and Customer B's purchases from the counterfactual analysis, this left Officeworks and the other customers identified in Appendix 3 as having Australian Paper's sale prices to them being affected by dumped imports. Officeworks' purchases, together with those other purchases identified in Appendix 3 accounted for approximately 35% of Australian Paper's sales. Price suppression of such magnitude is a reasonable basis upon which to conclude that material injury had been sustained by Australian Paper.

⁸⁸ Appendix 3 at page 105 of REP 463.

⁸⁹ Refer Commission's Submission at para. 90, page 19 and Commission's answer to Question 26 at page 10.

170. I therefore reject this Ground of Review.


Recommendations and Conclusions

171. Pursuant to s 269ZZK(1) of the Act, and for the reasons given above, I consider that:

- a) with respect to Hankuk, the reviewable decision was the correct and preferable decision; and
- b) with respect to Mondi SVK the reviewable decision was the not correct and preferable decision.

172. I recommend that the Minister:

- a) revoke the reviewable decision, and
- b) substitute it with a new decision in the same terms, except that with respect to Mondi SVK, the Minister does not declare that section 8 of the Dumping Duty Act is to apply and publishes a notice under section 269TL of the Act accordingly.



Paul O'Connor
Panel Member
Anti-Dumping Review Panel
22 July 2019