ADRP Report No. 113

Resealable Can End Closures exported from the Republic of the Philippines

December 2019

https://www.adreviewpanel.gov.au
## Abbreviations

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act</td>
<td><em>Customs Act 1901</em></td>
</tr>
<tr>
<td>ABF</td>
<td>Australian Border Force</td>
</tr>
<tr>
<td>ADA</td>
<td>Anti-Dumping Agreement</td>
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<tr>
<td>ADC</td>
<td>Anti-Dumping Commission</td>
</tr>
<tr>
<td>ADN</td>
<td>Anti-Dumping Notice</td>
</tr>
<tr>
<td>Applicant</td>
<td>Irwin Packaging Pty Ltd</td>
</tr>
<tr>
<td>AUD</td>
<td>Australian Dollar</td>
</tr>
<tr>
<td>CTMS</td>
<td>Cost to Make and Sell</td>
</tr>
<tr>
<td>Commissioner</td>
<td>The Commissioner of the Anti-Dumping Commission</td>
</tr>
<tr>
<td>Dumping Duty</td>
<td><em>Customs Tariff (Anti-Dumping) Act 1975</em></td>
</tr>
<tr>
<td>FOB</td>
<td>Free on board</td>
</tr>
<tr>
<td>Genpacco</td>
<td>Genpacco Inc. (the exporter)</td>
</tr>
<tr>
<td>Goods</td>
<td>the goods the subject of the review application - see TRFs</td>
</tr>
<tr>
<td>IDD</td>
<td>Interim dumping duty</td>
</tr>
<tr>
<td>Irwin</td>
<td>Irwin Packaging Pty Ltd (the applicant for this review)</td>
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<tr>
<td>Manual</td>
<td>Dumping and Subsidy Manual November 2018</td>
</tr>
<tr>
<td>Marpac</td>
<td>Marpac Pty Ltd (the original applicant for anti-dumping measures)</td>
</tr>
<tr>
<td>Minister</td>
<td>Minister for Industry, Science and Technology</td>
</tr>
<tr>
<td>NIP</td>
<td>Non-injurious price</td>
</tr>
<tr>
<td>Philippines</td>
<td>The Republic of the Philippines</td>
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<td><strong>Rep</strong></td>
<td><strong>Description</strong></td>
</tr>
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</tr>
<tr>
<td>REP 350</td>
<td>Anti-Dumping Commission Report 350 also referred to as the original report</td>
</tr>
<tr>
<td>REP 496</td>
<td>The report published by the ADC: Review of anti-dumping measures applying to Resealable Can End Closures exported to Australia from the Republic of Philippines by Genpacco Inc.</td>
</tr>
<tr>
<td>REQ</td>
<td>Response to exporter questionnaire</td>
</tr>
<tr>
<td>REI</td>
<td>Response to importer questionnaire</td>
</tr>
<tr>
<td>Review Panel</td>
<td>Anti-Dumping Review Panel</td>
</tr>
<tr>
<td>Reviewable Decision</td>
<td>The decision of the Minister published on 12 September 2019</td>
</tr>
<tr>
<td>Review period</td>
<td>1 October 2017 to 30 September 2018</td>
</tr>
<tr>
<td>SEF 496</td>
<td>Statement of Essential Facts Report No 496</td>
</tr>
<tr>
<td>SG and A</td>
<td>Selling, General and Administration expenses</td>
</tr>
<tr>
<td>TRFs</td>
<td>Resealable Can End Closures also referred to as Tagger, Ring and Foil ends (TRFs)</td>
</tr>
<tr>
<td>USP</td>
<td>Unsuppressed Selling Price</td>
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<td>WTO</td>
<td>The World Trade Organization</td>
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</tbody>
</table>
Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (Minister) following a review of anti-dumping measures to fix different variable factors in respect of the dumping duty notice relating to Resealable Can End Closures (TRFs) exported from Republic of Philippines (the Reviewable Decision). The applicant for the review is Irwin Packaging Pty Ltd (Irwin).

2. The Anti-Dumping Review Panel (Review Panel) accepted three grounds for this review, two relating to the export price and one relating to the non-injurious price (NIP). None of these grounds succeed in establishing that the Reviewable Decision was not correct or preferable.

3. For the reasons set out in this report, I recommend that the Reviewable Decision be affirmed.

Introduction

4. Irwin applied under s.269ZZC of the *Customs Act 1901* (the Act) for a review of the decision of the Minister following a review of anti-dumping measures pursuant to s.269ZDB(1) of the Act in respect of TRFs exported from the Republic of the Philippines (Philippines) by Genpacco Inc. (Genpacco). The Minister determined to modify the dumping duty notice applying to the above-mentioned exports to fix different variable factors for the determination of the dumping duty.

5. The application was accepted and notice of the proposed review, as required by s.269ZZI, was published on 18 October 2019.

6. Pursuant to s.269ZZK of the Act, a report must be provided no later than 60 days following the publication of the notice of review (17 December 2019), unless a reinvestigation report is required (under s.269ZZL(1) of the Act).¹

¹ Pursuant to s.269ZZK(3) of the Act.
7. The Senior Member of the Review Panel directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

Background

8. The original anti-dumping measures were imposed by public notice on the 24 March 2017 following the Minister’s consideration of ADC Report No 350 (REP 350). Exports of TRFs from the Philippines were found to have a dumping margin of 17.4% with the lesser duty rule being applied and an ad valorem rate of interim dumping duty (IDD) of 12.8% imposed.

9. On 27 November 2018, the Anti-Dumping Commission (ADC) initiated a review of anti-dumping measures in relation to exports of TRFs exported from the Philippines by Genpacco. The review period was stated as 1 October 2017 to 30 September 2018.

10. On 1 July 2019, the ADC published the Statement of Essential Facts No 496 (SEF 496) noting that an extension of time had been granted to publish the SEF and the final report. The final report (REP 496) was published in September 2019. Following the review of measures, the Minister fixed the effective rate of IDD at 17.6% as from 12 September 2019.

11. The goods to which this application relates are:

Resealable can end closures (TRFs) comprising:
- a tinplate outer ring with or without compound;
- an aluminium foil membrane for attachment to the outer ring; and
- a plug or tagger, which fits into the outer ring.

Further details regarding the goods are as follows:
TRFs are commonly manufactured by the TRF industry in the following nominal sizes (diameters):
- 73mm;
- 99mm;
- 127mm; and
The goods may be coated or uncoated and/or embossed or not embossed. The goods are referred to locally as TRF ends (Tagger, Ring and Foil ends, or TRFs) and can also be known as RLTs (Ring, Lid, Tagger), RLFs (Ring, Lid, Foil) or Penny Lever Ends.

Exclusions:
Goods specifically excluded from the description of the goods are TRFs of nominal size:
- 52mm;
- 65mm;
- 189mm; and
- 198mm.

Conduct of the Review

12. 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 addition, s.269ZZK(1A) of the Act requires that, if the Review Panel is recommending a new specified decision, it must be materially different from the Reviewable Decision.

13. 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.

14. Subject to certain exceptions, 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 ADC had regard or ought to have had regard when making its findings and recommendations to the Minister. In addition, to relevant information, the

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2 See s.269ZZK(4) of the Act.
Review Panel may have regard to conclusions based on relevant information contained in the application for review and submissions received under s.269ZZJ of the Act.

15. If a conference is held under s.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.

16. A conference was held pursuant to s.269ZZHA of the Act for the purpose of obtaining further information in relation to the transactions relating to export price and the NIP. The conference was held with Irwin and the ADC on 14 November 2019. A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act.

17. In conducting this review, I have had regard to:

- the review application and documents submitted with the application;
- submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information;
- REP 496, and its confidential attachments, and information referenced in the report including the Response to the Exporter Questionnaire (REQ) and Response to the Importer Questionnaire (RIQ), information created during the investigation, such as verification reports, and submissions to investigation 496;
- Information from REP 350, including confidential attachments; and
- relevant information obtained at the conference.
18. In the Power Transformers review, the then Senior Panel Member, discussed the scope of the Review Panel.\(^3\) I have adopted this approach in this review.

*It seems to me that having regard to the fact that the Panel will ordinarily have to undertake a review in a comparatively short time frame against a background where the Commissioner will have ordinarily undertaken an extensive process of investigation and reporting, and also having regard to the fact that the Panel can require the Commissioner to reinvestigate, the Panel's role in a review does not entail full reinvestigation of matters considered by the Commissioner and raised by interested parties in the application for review. The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgment. I do not see the Panel's role as involving this type of evaluation afresh. Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations.*

The Panel's powers to revoke or recommend the revocation of a number of types of reviewable decisions only arises if the reviewable decision was either not the correct decision (when there has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). It is tolerably clear this is the statutory test having regard to the obligation (at various points in Division 9 of Part XVB) on an applicant for review to identify in the application reasons for believing that the decision was not the correct or preferable decision and the power of the Panel to reject an application if this is not done. [emphasis added]

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\(^3\) Extract from ADRP Report No. 24: Power Transformers.
Grounds of Review

19. The grounds of review relied upon by Irwin (the applicant), which the Review Panel accepted, are as follows:

Ground 1. The Commission erred by including returned exports which were owned by Irwin in determining the export price for the Philippine exporter, Genpacco.

Ground 2. If it was correct to include the returned exports in determining export price, the Commission erred by ignoring the full price paid by Irwin and full amount received by Genpacco for those returned goods.

Ground 3. The Commission erred in determining a NIP which did not consistently apply its own hierarchy for establishing an unsuppressed selling price (USSP) for the goods exported by Genpacco.

Consideration of Grounds

Ground 1

Claims

20. As background, Irwin advised that there were certain consignments imported to Australia during the original investigation between 1 April 2015 to 31 March 2016 (REP 350) that were subsequently returned to Genpacco by Irwin in 2017. These goods were imported and ownership retained by Irwin, even though returned to Genpacco. Subsequently, Genpacco returned the goods in shipments with newly manufactured TRFs in the review period (during October 2017 to September 2018). These are referred to by Irwin as the “returned exports”. I will adopt the terminology of ‘returned TRFs’ for the purposes of this report.

21. Irwin (and Genpacco) contends that the ‘returned exports’ are not a sale of the goods (transfer of property), nor an ‘additional sale’ during the review period. It claims that the ADC should have excluded these exports from the determination of the export price for the goods exported during the review period.

22. Irwin provided information from its broker, based on advice provided by Australian Border Force (ABF), as to the correct treatment of the goods on re-importation into Australia. This included that the goods:

- could not be valued at zero for Customs valuation purposes on the importation declaration;
- could not be valued on the basis of any reworked activities undertaken by Genpacco;
- must be fairly valued for making the declaration; and
- would be subject to interim dumping duties (IDD) if entered for home consumption after 24 March 2017.

23. Irwin provided confidential information as to how Genpacco dealt with these ‘returned goods’ for accounting purposes and advised that:

[Confidential information relating to transactions between Genpacco and Irwin]

24. Irwin submits that the returned TRFs should not have been included in the ascertainment of the export price in the review of measures.
ADC Findings

25. The ADC found that during the review period, there were shipments of TRFs from Genpacco to Irwin that included both new TRFs and returned TRFs. It concluded that the export price of all TRFs (both the new ones and the returned ones), were exported by Genpacco to Australia, and should be based on s.269TAB(1)(a) of the Act.

26. It stated the following:

‘Based on information obtained as part of the verification visit, as well as information obtained from Irwin’s importer verification visit, the Commission considers that Genpacco is the exporter and that the:

- Goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

- The purchase of the goods by the importer were arms length transactions.”

27. The ADC acknowledged that Genpacco had advised that the returned TRFs remained the property of Irwin whilst subject to inspection by Genpacco. The ADC noted that Genpacco advised that it considered there was no change in ownership (or transfer of property) and the ‘returned TRFs’ should not be considered as an export sale during the review period. The ADC stated that it ‘is satisfied that the re-exported TRFs and the new TRFs can be identified in Genpacco’s data’. The ADC’s finding included these transactions in its assessment of export price.

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5 REP 496 section 4.4 pages 14 to 15.
6 REP 496, section 4.3, page 14.
Submissions

28. The ADC in its submission referred the Review Panel to its findings on export price in Section 4.4 of REP 496. The Commissioner indicated the concepts of ‘export’ and ‘sale’ should not be confused in considering s.269TAB(1). The ADC considers that s.269TAB(1) of the Act requires the consideration of the export price for any goods exported to Australia during the review period and therefore included the returned TRFs.

29. The Commissioner acknowledged that while ‘the circumstances surrounding the re-export of these goods is unusual’, this did not mean that Genpacco could not be classed as the exporter of the returned TRFs, notwithstanding that Irwin retained ownership of the goods.

30. The comments by the Commissioner in the submission are as follows:

> While I remain satisfied that the approach in REP 496 was both correct and preferable, should you consider the price paid or payable was, as Irwin has argued, “not a purchase in the conventional sense”, and consider that price unsuitable, then I draw your attention to potential alternatives for determining a price for these re-exported goods.

> As Irwin did not sell the goods in the same condition they were imported, an export price in accordance with section 269TAB(1)(b) of the Act is not available. As such, an export price would need to be determined in accordance with section 269TAC(1)(c) of the Act, having regard to all circumstances of the exportation. I would note that this provision relates to the circumstances of the exportation, and not the circumstances of the sale. Given the information available to me during the review in relation to the circumstances of the exportation, I consider that an export price calculated

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7 Submission by the ADC dated 12 November 2019, pages 2 to 4.
8 Submission by the ADC dated 12 November 2019, page 3.
under section 269TAB(1)(c) of the Act would be the same as the export price I recommended to the Minister under section 269TAB(1)(a) of the Act.\textsuperscript{9}

31. Irwin in its submission, refers to its claims in its review application.\textsuperscript{10} It also proposed that the ‘exclusion of the re-exported TRFs from the export price calculations would not alter the weighted average export price calculated by the Commission. However, as highlighted in this submission, their exclusion from the calculations would substantially impact on the constructed normal values and the corresponding weighting process which is driven by the respective export volumes reflected in the export sales listing’. It claims that there would have been a lower normal value if only the ‘new’ TRFs had been considered for the purposes of the dumping margin.

Commentary

32. The export price is one of the variable factors that may be varied in a review of anti-dumping measures under Division 5.\textsuperscript{11}

33. Export Price is determined under s.269TAB of the Act. An extract of the relevant provision is outlined below:

\textbf{269TAB Export price}

(1) \textit{For the purposes of this Part, the export price of any goods exported to Australia is:}

(a) where:

(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

\textsuperscript{9} Submission by the ADC dated 12 November 2019, page 5.
\textsuperscript{10} Submission by Irwin dated 17 November 2019.
\textsuperscript{11} Section 269T(4E) of the Act.
(ii) the purchase of the goods by the importer was an arms length transaction;

the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation; or

(b) where:

(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was not an arms length transaction; and

(iii) the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer;

the price at which the goods were so sold by the importer to that person less the prescribed deductions; or

(c) in any other case—the price that the Minister determines having regard to all the circumstances of the exportation.

(3) Where the Minister is satisfied that sufficient information has not been furnished, or is not available, to enable the export price of goods to be ascertained under the preceding subsections, the export price of those goods shall be such amount as is determined by the Minister having regard to all relevant information.
(4) For the purposes of this section, the Minister may disregard any information that he or she considers to be unreliable.

34. For the export price to be determined under s.269TAB(1)(a) the transaction must be based on a purchase of the goods by the importer from the exporter (before or after the exportation of the goods) and must be an arms length transaction. Certain transactions may not be considered arms length transactions if they meet any of the elements provided in s.269TAA of the Act as follows:

269TAA Arms length transactions

(1) For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:

(a) there is any consideration payable for or in respect of the goods other than their price; or

(b) the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or

(c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

(1A) For the purposes of paragraph (1)(c), the Minister must not hold the opinion referred to in that paragraph because of a reimbursement in respect of the purchase or sale if the Minister is of the opinion that the purchase or sale will remain an arms length transaction in spite of the payment of that reimbursement, having regard to any or all of the following matters:

(a) any agreement, or established trading practices, in relation to the seller and the buyer, in respect of the reimbursement;
(b) the period for which such an agreement or practice has been in force;

(c) whether or not the amount of the reimbursement is quantifiable at the time of the purchase or sale.

35. In its submission to the Review Panel, the Commissioner indicates that s.269TAB(1) states: ‘[f]or the purposes of this Part, the export price of any goods exported to Australia is...’ and concludes that it is appropriate to include all goods that were exported by Genpacco during the review period.\(^{12}\) (emphasis added)

36. The ADC, at the conference, provided an explanation of the confidential information used to determine the export price on the returned TRFs and its use in the calculation of the ascertained export price. It was noted that the export price of the returned TRFs is the same as for the ‘new’ TRFs exported from the Philippines. Irwin maintained its position that as the returned TRFs were not sold during the review period these transactions should not be included in the analysis.\(^{13}\)

37. Section 269TAB(1) enables export price to be determined in a variety of circumstances. It contemplates different situations including whether there may be related transactions between the importer and exporter that would prevent such transactions being used to determine the export price and whether the importer is the exporter. All goods exported are to be considered for export price purposes though the way in which the export price is assessed may differ. Section 269TAB(3) of the Act enables the Minister to have regard to all relevant information to determine an export price in circumstances where sufficient information has not been furnished or is not available.

38. The key issue claimed by Irwin is whether the exports of the returned TRFs should have been included in the calculation of the ascertained export price. Irwin did not present any authority (in the Act or in any other case) to support its approach.

\(^{12}\) Submission by the ADC dated 12 November 2019 pages 2 to 3.

\(^{13}\) Conference Summary held on 14 November 2019.
39. I could find no legislative provision that would allow goods shipped to Australia during the review period to be excluded from consideration in a review of measures. It is apparent from the language in s.269TAB(1) of the Act that all goods should be included in the assessment of export price. There does not necessarily need to be a sale or a change of ownership as proposed by Irwin, merely the exportation of goods to Australia triggers the need to consider export price.

40. In these circumstances, I agree with the ADC that s.269TAB(1) is clear that the legislation focuses on any goods exported to Australia and there is no ability to exclude particular exports as proposed by Irwin. On this basis I do not agree with Irwin’s claim.

41. I also considered the assessment of export price given the implications for ground two, if ground one failed. I did not find the explanation in REP 496 entirely clear as to whether the export price for the returned TRFs is based on the original sale between Genpacco and Irwin or the transactions in the review period: the report refers to it being assessed pursuant to s.269TAB(1)(a).

42. As referred to earlier, s.269TAB(1)(a) of the Act does not require the exporter to be the owner at the time of export. The ADC findings indicate that Genpacco is the exporter and Irwin the importer of the returned TRFs in the review period. The Commissioner also stated that ‘a transaction between Genpacco and Irwin took place in relation to the exchange of money (a purchase) for the re-exported goods in Genpacco’s possession in the review period’.

43. I have considered relevant case law that deals with the ‘exporter’ and ‘importer’:

The use of the concept of purchase does not mean that the identity of the exporter is to be determined by identifying the vendor under the contract of purchase with the importer. The question is the other way around; it is necessary to identify the “exporter” and then to examine whether that is the party from whom the importer has purchased. It is not the passing of property which identifies the exporter (although it may be critical to identification of the importer) but rather the identification of which party satisfies the requirements...
of truly being the exporter. This view is reinforced by the presence of s.269TAB(1)(c) which contains no description of purchase.\textsuperscript{14}

It is apparent that the ADC has identified the exporter and importer in these transactions consistent with this case law.

44. The original investigation (REP 350) found that the purchases of the goods by Irwin were found to be arms length transactions. Assuming the ADC relied on these transactions for the purposes of determining the export prices, I agree with its finding.

45. Irwin’s claim is that the ADC’s calculation of the export price does not reflect the full price paid for the returned TRFs as it does not \textsuperscript{(confidential invoice information)} Irwin also indicates in its review application that \textsuperscript{(Confidential selling and invoicing details)}

46. The ADC in its submission indicates that it considered the price payable for the goods as required under s.269TAB(1)(a) of the Act. It does not consider the amount claimed by Irwin to be the ‘price payable’.\textsuperscript{15} The ADC noted that it considered the invoicing and accounting arrangements relating to the returned TRFs and \textsuperscript{(Confidential accounting and payment arrangement)} in the price payable for the returned TRFs.

47. The approach taken by the ADC, on the returned TRFs exports in relation to payments and the export price being based on the amount payable for the goods pursuant to s.269TAB(1)(a) of the Act \textsuperscript{16} is consistent with the judgment in Nordland. This states that the ‘price to which s.269TAA(1)(c) refers is to be ascertained in

\textsuperscript{14} Companhia Votorantim de Cellulse e Papel v Anti-Dumping Authority and Others, FCA, 141 ALR 297, pages 307 to 310.

\textsuperscript{15} Submission by the ADC dated 12 November 2019, page 4.

\textsuperscript{16} Submission by the ADC dated 12 November 2019, page 4.
accordance with the principles considered and applied in Colgate Palmolive…. the “price for which the goods were sold” was to be ascertained taking account of a number of rebates and allowances …”.¹⁷

48. Given the intent of a review of measures, under Division 5 of Part XVB, is to consider contemporary prices to update variable factors, it may be considered arguable as to the appropriateness of using the original transactions for the determination of the export price. For this reason, I also considered whether the export price should be based on the values of the returned TRF in the review period.

49. In my view, the returned TRF transactions between Genpacco and Irwin would not be considered arms length pursuant to s.269TAA(1) of the Act. This is on the basis that while there were payments made to Genpacco by Irwin, there is information submitted that indicates that (confidential accounting information) – see also paragraphs 23 and 45. In these circumstances, such transactions could not be considered arms length. This would preclude the use of s.269TAB(1)(a) for export price determination. Section 269TAB(1)(b) is not available due to the non-sale of the goods in Australia.

50. Information provided at the conference indicated that the returned TRFs had the same export price as the “new” TRFs.¹⁸ In such circumstances, the export price if determined under s.269TAB(1)(c), noting the comments of the Commissioner at paragraph 30,¹⁹ the export price would be the same as that determined under s.269TAB(1)(a) of the Act.

51. Accordingly, Irwin’s claim that the returned TRFs should be excluded in the determination of the export price fails. As identified above, the relevant transactions in my view are the transactions in the original investigation period. These were determined correctly pursuant to s.269TAB(1)(a) of the Act.

¹⁸ Non-confidential Conference summary dated 14 November 2019, question four.
¹⁹ Submission by the ADC dated 12 November 2019, page 5.
52. Irwin also referred to the impact of the inclusion of the returned TRFs on the normal value during the review period. Given my findings in relation to the calculation of the export price, I have not considered the impact of the normal value further.

Ground 2
Claims

53. Irwin proposes that, if the Review Panel does not agree with its position in Ground One, the export price of the ‘returned TRFs’ should be based on the full price paid by Irwin. (Confidential export sales value information). It is noted that the ‘returned TRFs’ represents % (Confidential export sales volume information) of the volume of goods shipped by Genpacco during the review period. Irwin suggests that the ADC’s calculations of export price do not accurately reflect the price paid for the returned TRFs.

ADC Findings

54. As referred to in paragraphs 25 to 27 above, the ADC determined the export price pursuant to s.269TAB(1)(a) based on the ex-works invoice price of all exports of TRFs.

Submissions

55. The ADC in its submission, indicates that while Irwin did make payments for the returned TRFs, it did not consider given the (confidential accounting information) that it was appropriate to include the total amount claimed by Irwin in the ‘price payable for the goods’ for the purposes of s.269TAB(1)(a) of the Act. The ADC also noted that the unit invoice
prices for the goods exported during the original investigation period and the returned TRFs 20 (Confidential pricing information).

56. As referred to in paragraph 30 above, the ADC proposed that should the Review Panel not consider the ‘price payable suitable’ due to the nature of the export transactions, it outlined its assessment of alternative methods to determine the export price under s.269TAB(1) of the Act. It suggested that the export price calculated under s.269TAB(1)(c) of the Act would be the same as the export price recommended to the Minister under section 269TAB(1)(a) of the Act.’

Commentary

57. As outlined in paragraph 33 above, the export price determined under s.269TAB(1)(a) requires the transactions to be:

- an export of goods to Australia other than by the importer;
- a purchase by the importer from the exporter (before or after exportation); and
- the purchase to be arms length.

58. Section 269TAA outlines what transactions shall not be considered as arms length transactions. This provision is shown at paragraph 34 above.

59. As discussed in paragraphs 45 to 49 above, the full price paid by Irwin would not be considered arms length due to the (confidential accounting information)

60. It is apparent from the approach adopted by the Commissioner (and as recommended to the Minister in REP 496), the export price is the price payable for

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the goods. It should not include the full amount received by Genpacco as claimed by Irwin.

61. On this basis, Ground Two fails to establish that the export price was not correct or preferable.

Ground 3

Claims

62. Irwin contends that the method by which the ADC has established the unsuppressed selling price (USP) which is used to calculate the NIP is flawed as it:

- does not align with the hierarchy of methodology outlined in the Dumping and Subsidy Manual; and

- incorrectly dismisses the use of non-dumped imports as a basis for the USP.

63. Irwin states that the ADC has used, as the USP, the selling price by the Australian industry in the quarter preceding the original investigation period (1 April 2015 to 31 March 2016) on the basis that this period was one unaffected by dumping. Irwin considers this approach incorrect as it claims that the ADC’s finding in the original investigation was that the establishment of the industry was hindered. It states that if the industry was being hindered during the original investigation period, then it was in all probability hindered in the quarter immediately preceding the commencement of the investigation period. It proposes that dumping may have been occurring in this earlier period. On this basis, Irwin claims it was inappropriate to use an USP from this earlier period to establish the NIP in the review of measures.

64. Irwin accepts that the constructed value could not be used as the Australian producer did not have available production costs for the TRF sizes comparable with the Genpacco goods. Irwin proposes that the use of Indian non-dumped import prices should be used as these have previously found to be non-injurious. It claims it would also be consistent with the hierarchical approach outlined in the Manual.
65. Irwin states that the three reasons outlined by the ADC to preclude the use of the non-dumped imports are not valid as follows:

- *that the ADC could not determine the price of these imports of TRFs in sales in the Australian market.* Irwin states that the use of the actual purchase import prices (adjusted to arrive at a free on board (FOB) price) have been used previously;

- *that exportation costs of goods from India are significantly different and so the export price of such goods would not be comparable for the use as a NIP for the Philippines.* Irwin states that non-dumped imports from India would be available at FOB prices; and

- *the ADC is not confident that the exports from India are not dumped.* Irwin states that the original investigation (REP 350) had terminated its investigation into Indian exports on the basis that they were not dumped. On this basis these prices should be able to be used.

66. Irwin also proposes that as the sole Australian industry member had imported TRFs from a country not subject to measures, these may also be available for consideration as an USP.

**ADC Findings**

67. The ADC advised that in the original investigation (REP 350) it had used the Australian industry’s actual sales to external customers of 73 mm TRFs, as well as offers to external customers for other TRF sizes, to calculate the USP and subsequent NIP. The ADC considered it important for the USP (and hence NIP) to comprise a range of TRF sizes sold in the Australian market to ensure a proper comparison with the normal value and export price.

68. The ADC notes that as there has been an increased dumping margin in the review period, it cannot use prices in the review period as they may be affected by dumping.
69. The ADC considered the USP from the original investigation period remained a reasonable price of the Australian industry in a period unaffected by dumping. It noted that the USP is less than five years old and includes a range of TRF sizes. The ADC concluded the existing USP from the original investigation was valid and deducted Irwin’s actual importation costs during the review period to determine the NIP.

70. REP 496 noted that Irwin had disagreed with this approach and proposed that imports from India should have been used as the basis of the USP. The ADC indicated it could not be confident of whether imports from India during the review period, were non-dumped. It also noted that as these goods are not on-sold in Australia (they are used in production), there is not a USP for these imports of these goods in Australia. It also commented that the exportation costs from India would be different to those from the Philippines. It considered there were a number of reasons that the Indian exports could not be used as the NIP.

71. In relation to the proposal to use imports of TRFs by Marpac, the ADC advised that it could not use such imports due to their sizing as well as the fact that they are used in sales of manufactured goods. It commented that it ‘would not be appropriate to include one imported product as part of the USP calculation’.

Submissions

72. The ADC in its submission indicated that Section 4.7.2 of REP 496 outlined the consideration of the NIP. This included an assessment of the hierarchy (outlined in the Manual), noting that Irwin had claimed that the methodology used was inconsistent with the hierarchy.

73. The ADC also commented that the Commission’s usual practice when establishing a NIP in a review of measures, is to ‘not depart from the approach in the original investigation, unless there has been a change in circumstances that makes the earlier USP approach unreasonable, or less preferred.’

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21 Submission from the ADC dated 12 November 2019, page 5.
Commentary

74. Section 269TACA provides that the NIP is the minimum price necessary to prevent the injury, or recurrence of injury or hindrance to the establishment of an Australian industry.

75. The Act does not specify how the NIP is to be calculated. However, the Manual outlines the policy regarding the methods (using the hierarchy) by which the NIP may be calculated. It indicates it is usually derived from an USP, which is based on a selling price in Australia that the Australian industry could expect to achieve in a market unaffected by dumped exports. Deductions are made to the USP to bring it to a level that enables its comparison with the export price. The NIP will generally be established at a free on board level. When it is not possible to find such a selling price in Australia then a price may be constructed based on the Australian industry’s cost to make and sell (CTMS) plus a profit.

76. In circumstances where neither of the above two methods are considered appropriate, the selling prices of un-dumped imports in the Australian market may be used.

77. The Manual indicates that ‘the appropriate approach will be considered on a case-by-case basis’. It suggests that care must be taken when using the Australian selling price data for goods from other countries, as the prices may have been affected by dumping or may not be in volumes that would influence the market price.

78. I have referred to the reasoning adopted by the ADC in REP 350 for its finding in relation to the USP given it is adopted as the USP in REP 496:

> the Commission considers that Marpac’s weighted average price of direct market sales of 73 mm TRFs for the quarter immediately preceding the investigation period is a selling price that the Australian industry could reasonably achieve in the market in the absence of dumped imports. The

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22 Dumping and Subsidy Manual, November 2018, pages 137 to 140.
Commission also estimated a USP of other common TRF sizes not currently manufactured by Marpac based on a written quote from Marpac to a potential customer. The USP was uplifted by a factor difference between the USP for the 73mm sold in the direct market and the price quoted to the potential customer.

79. REP 350 indicates that Marpac commenced manufacture of TRFs in January 2014. There does not appear to be any submissions referenced in REP 350 that suggested that the USP was impacted by dumped imports. REP 350 was subject to review by the Review Panel, however none of the grounds related to the methodology used to establish the USP and NIP. I note the Review Panel affirmed the Minister’s decision.

80. Irwin questions the use of the USP from the original investigation (REP 350) on the basis that the USP could have been impacted by dumping. There has been no evidence supplied by Irwin supporting its statement. Given there is no evidence available that suggests the USP (and NIP) was incorrectly assessed in REP 350, this aspect has not been further considered. There is also no evidence supplied by Irwin suggesting that the circumstances have changed since the original investigation (REP 350) that would preclude the use of the USP.

81. The Manual indicates that the ADC will not generally change its approach from the original investigation unless there has been a change of circumstances. There has been no such evidence presented in Irwin’s review application.

82. The ADC has employed the hierarchy outlined in its Manual and provided its rationale for doing so. The ADC also outlined in REP 496 why it did not consider other assessment methods appropriate for the assessment of the USP and NIP. The arguments presented by Irwin regarding the use of the prices of imports from India for the NIP were considered by the ADC in REP 496. The ADC suggests that given the time period since the original investigation (over two years), ‘it could not

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23 REP 350 page 30.
be confident that the export price of TRFs from India in the review period is an undumped price’.25

83. I have considered the approach adopted in REP 496 in its finding in relation to the NIP and do not consider the ADC’s approach unreasonable nor that it has ignored relevant information.

84. Accordingly, I do not agree with Irwin’s claims. Given the reasons outlined above, I do not consider that Irwin has established that the Minister erred in relation to the determination of the NIP. This ground also fails.

Recommendations

85. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I consider that the reviewable decision was the correct or preferable decision.

86. I recommend that the Minister affirm the Reviewable Decision.

Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
17 December 2019

25 REP 496 Section 4.7.2, page 23.