Australian Government
Anti-Dumping Review Panel

# ADRP Report No. 138

## A4 Copy Paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia (except by PT. Indah Kiat Pulp & Paper Tbk, PT. Pabrik Kertas Tjiwi Kimia Tbk and PT. Pindo Deli Pulp & Paper Mills) and the Kingdom of Thailand

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# Abbreviations

| Term | Meaning |
|---|---|
| Act | *Customs Act 1901* |
| ADA | World Trade Organization (WTO) Anti-Dumping Agreement (Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994) |
| ADC | Anti-Dumping Commission |
| ADN | Anti-Dumping Notice |
| AFEM | APRIL Far East (Malaysia) Sdn Bhd |
| APRIL | Collectively AFEM and RAK, the applicants |
| AUD | Australian Dollar |
| C & F | Cost and freight |
| CIF | Cost, Insurance and Freight |
| CTM | Cost to Make |
| CTMS | Cost to Make and Sell |
| Commissioner | Commissioner of the Anti-Dumping Commission |
| Dumping Duty Act | *Customs Tariff (Anti-Dumping) Act 1975* |
| FOB | Free on board |
| GAAP | Generally accepted accounting principles |
| GOI | Government of Indonesia |
| Goods | the goods described in the report, referred to as A4 copy paper |
| IDD | Interim dumping duty |

| | |
|---|---|
| Manual | Dumping and Subsidy Manual, November 2018 |
| The Minister | Minister for Industry, Science and Technology |
| NIP | Non-injurious price |
| Original investigation period | 1 January 2015 to 31 December 2015 |
| RAK | PT Riau Andalan Kertas |
| REI | Response to Importer Questionnaire |
| REQ | Response to Exporter Questionnaire |
| REP 341 | Anti-Dumping Commission Report No 341: original investigation |
| REP 551 | The ADC report titled Review of Anti-Dumping Measures applying to A4 Copy Paper exported to Australia from the Federative Republic of Brazil, The People's Republic of China, the Republic of Indonesia (except by PT Indah Kiat Pulp and Paper TBK, PT Pabrik Kertas Tjiwi Kimia TBK and PT Indo Deli Pulp and Paper Mills) and the Republic of Thailand dated 7 June 2021 |
| Review Panel | Anti-Dumping Review Panel |
| Reviewable Decision | The decision of the Minister for Industry, Science and Technology made on 7 July 2021 |
| Review Period | 1 January 2019 to 31 December 2019 |
| SEF 551 | Statement of Essential Facts Report No 551 |
| SG&A | Selling, general and administration expenses |
| USP | Unsuppressed selling price |
| Variable factors | The variable factors relevant to a review under Division 5 of the anti-dumping measures (as defined in s269T(4E) of the *Customs Act 1901)* are the normal value, export price and non-injurious price of the goods as ascertained, or last ascertained, by the Minister |

# Summary

1. This is a review of the decision of the then Minister for Industry, Science and Technology (the Minister) following a review of anti-dumping measures in respect of A4 copy paper exported to Australia from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia (except by PT Indah Kiat Pulp and Paper TBK, PT Pabrik Kertas Tjiwi Kimia TBK and PT Indo Deli Pulp and Paper Mills) and the Republic of Thailand (the Reviewable Decision). The joint applicants are April Far East (Malaysia) Sdn. Bhd (AFEM) and PT Riau Andalan Kertas (RAK). They are referred to as APRIL in this review.

2. The Anti-Dumping Review Panel (Review Panel) accepted three grounds of review relating to the variable factors.

3. For the reasons set out in this report, I recommend that the Minister revoke the Reviewable Decision and substitute a new decision that has a different variable factor for the normal value applying to exports by RAK from the Republic of Indonesia. The variable factors of the export price and the non-injurious price (NIP) for RAK's exports remain unchanged. This leads to a decrease in the dumping margin from 14.7 per cent to 13.8 per cent.

# Introduction

4. APRIL (the applicant) applied under s.269ZZC of the *Customs Act 1901* (the Act) for a review of the Reviewable Decision. The Minister determined to modify the dumping duty notice applying to the above-mentioned exports to fix different variable factors for the determination of dumping duty.

5. The application was accepted and notice of the proposed review, as required by s.269ZZI, was published on 2 September 2021.

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, unless a reinvestigation report is required (pursuant to s.269ZZL of the Act).[1]

[1] Pursuant to s.269ZZK(3) of the Act.

7. The Senior Member of the Anti-Dumping Review Panel (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 initially imposed by public notice on 19 April 2017 by the relevant Minister following consideration of ADC Report 341. Report 551 (REP 551) outlines the history of matters regarding A4 copy paper since that report.[2]

9. On 16 April 2020, the Anti-Dumping Commission (ADC) initiated a review of anti-dumping measures in relation to A4 copy paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia (except by PT Indah Kiat Pulp and Paper TBK, PT Pabrik Kertas Tjiwi Kimia TBK and PT Indo Deli Pulp and Paper Mills) and the Republic of Thailand. The review period was stated as 1 January 2019 to 31 December 2019 (review period).

10. On 26 March 2021, the ADC published the Statement of Essential Facts No. 551 (SEF 551) and presented its final report REP 551 to the Minister on 7 June 2021. The Minister's decision was announced in Anti-Dumping Notice No 2021/075 dated 7 July 2021.

11. The goods to which this application relates are:

> *Uncoated white paper of a type used for writing, printing or other graphic purposes, in the nominal basis weight range of 70 to 100 gsm (grams per square metre) and cut to sheets of metric size A4(201mm x 297mm) (also commonly referred to as cut sheet paper, copy paper, office paper of laser paper).*

[2] REP 551 Review of Anti-Dumping Measures applying to A4 Copy Paper exported to Australia from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia (except by PT Indah Kiat Pulp and Paper TBK, PT Pabrik Kertas Tjiwi Kimia TBK and PT Indo Deli Pulp and Paper Mills) and the Republic of Thailand dated 7 June 2021, section 2.2, pages 8 to 9.

# 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, 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, and 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,[3] 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 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. The following conferences were held:

| Date | Participants | Purpose |
|---|---|---|
| 22 September 2021 | APRIL and ADC | Further information in relation to export price information and normal value adjustments |
| 8 October 2021 | ADC | Further information regarding the calculation of the export price. |

[3] See s.269ZZK(4) of the Act.

| | | |
|---|---|---|
| 12 October 2021 | ADC | Further information regarding the revised calculations of the export price, normal value and dumping margin |
| 20 October 2021 | APRIL and ADC | Further information regarding the revised calculations of the export price, normal value and dumping margin |

A non-confidential summary of the information obtained at the conferences was made publicly available in accordance with s.269ZZX(1) of the Act.

16. 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 551, and its confidential attachments, and information referenced in the report, including the Response to the Exporter Questionnaire (REQ) and the Response to the Importer Questionnaires (REI), and information created during the investigation, such as verification reports and submissions to Review 551;
- information from REP 341; and
- relevant information obtained at conferences.

17. The Review Panel issued a Notice under s.269ZZG(1)[4] of the Act requesting further information in relation to the grounds in the application. APRIL provided the requested further information in a response dated 31 August 2021. A copy of the non-confidential version of the response was placed on the public file.

[4] Section 269ZZG(1) of the Act provides that the Review Panel may in certain circumstances seek further information regarding an application prior to initiation of a review.

# Grounds of Review

18. The grounds of review relied upon by APRIL and accepted by the Review Panel are as follows:

    APRIL believes that the Reviewable Decision is not the correct or preferable decision in so far as it fixed different variable factors for exports of the goods under consideration by the applicant because:

    a. in relation to the 'ascertained export price', it was incorrectly based on the 'exporter' of the goods under consideration being RAK, not AFEM, and in any event, regardless of which entity was determined to be the 'exporter', the 'ascertained export price' was incorrectly determined to be the price paid by AFEM to RAK for the goods under consideration as opposed to the price paid for the goods under consideration by Australian importer(s) to AFEM (Ground 1).

    b. in relation to the 'ascertained normal value', if the 'ascertained export price' is determined to be price paid by AFEM to RAK for the goods under consideration during the review period notwithstanding the Applicants' contentions, then adjustments to domestic selling prices of like goods in Indonesia by RAK in the determination of the normal value ought to have been undertaken by the Minister pursuant to section 269TAC(8)(c) of the Customs Act 1901, however, such adjustments were not so made (Ground 2).

    c. in relation to the 'ascertained non-injurious price', it was wrongly determined by the Minister. The 'non-injurious price' determined by the Minister on the recommendation of the Commissioner was not the '*minimum price necessary to prevent the injury, or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TG(1)(b) or (2)(b) of the Act*' (refer section 269TACA of the Act) (Ground 3).

19. There was certain information included in the application relating to 'Miscellaneous – method of working out any interim dumping duty payable'. The Review Panel advised the applicant by letter that the Review Panel's jurisdiction is concerned with

the Reviewable Decision.[5] In a review of measures, the decision of the Minister pursuant to s.269ZDB of the Act is the Reviewable Decision.[6] The method of working out any interim dumping duty (IDD) payable is a decision made pursuant to the *Customs Tariff (Anti-Dumping) Act 1975 (Dumping Duty Act)* and relevant regulations. Such decisions are outside the jurisdiction of the Review Panel and have not been considered in this report.

# Consideration of Grounds

## Ground 1

In relation to the 'ascertained export price', it was incorrectly based on the 'exporter' of the goods under consideration being RAK, not AFEM, and in any event, regardless of which entity was determined to be the 'exporter', the 'ascertained export price' was incorrectly determined to be the price paid by AFEM to RAK for the goods under consideration as opposed to the price paid for the goods under consideration by Australian importer(s) to AFEM.

### Claims

20. APRIL claims that the ADC (and Minister) incorrectly determined the export price for the following reasons:

    - RAK is the manufacturer of the goods but AFEM should be considered the 'exporter' of the A4 copy paper and the transactions between AFEM and its Australian customers should be the basis of the export price;
    - AFEM is the principal in the transaction, has title of the goods in Indonesia and arranged shipment of the goods from Indonesia; and
    - AFEM organises all details of the sale and receives payment from the Australian customers.

[5] Letter to April dated 2 September 2021.
[6] Section 269ZZA(1)(c) of the Act refers.

21. APRIL states that it considers that the export price should be determined pursuant to s.269TAB(1)(a) rather than s.269TAB(1)(c) of the Act. However, regardless of which section the export price is determined under, it should be based on the price between AFEM and the Australian customers and not between RAK and AFEM. It suggests that the export price should be based on the 'price the goods under consideration are introduced into the commerce of Australia' and states this is consistent with Article 2.1 of the World Trade Organization (WTO) Anti-Dumping Agreement (ADA): the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and referred to as the ADA.

22. APRIL proposes that the functions performed by AFEM is consistent with the judgment outlined in *Companhia Votorantim De Cellulose E Papel v Anti-Dumping Authority, Christopher Cleland Schacht in his capacity as Minister of Science and Small Business and Australian Paper Limited (1996) FCA 1399* that an intermediate party may in certain circumstances be characterised as the exporter.

## ADC findings in REP 551

23. The ADC found that RAK is the manufacturer of the goods exported from Indonesia to Australia and is in Indonesia. It sold the goods to AFEM (a company located in Malaysia) who on-sold the goods to Australian customers. It noted that the invoice raised by AFEM for the sales to Australian customers was raised on the same day as the invoice from RAK to AFEM. It further commented that RAK is aware that the goods are exported to Australia and has relevant sales details of locations of the Australian customers and final port destinations listed in its sales records. Revenue amounts in RAK's audited accounts are separated by domestic and export sales. RAK is also identified as the consignor of the goods on the relevant country of origin certificates.

24. The ADC considered that RAK is the 'exporter' of the goods to Australian customers in terms of s.269TAB of the Act, though not the seller of these goods to the Australian importers.

25. The ADC also considered the provisions of s.269TAB(2A) of the Act,[7] dealing with 'low volume exporters' and decided they did not apply to RAK.

26. The ADC stated that as RAK (the exporter) did not sell to the Australian importers that the export price could not be determined pursuant to s.269TAB(1)(a) nor s.269TAB(1)(b) of the Act. It recommended that the Minister determine the export price pursuant to s.269TAB(1)(c) of the Act, having regard to all the circumstances of the exportation. The export price was determined using the sale between RAK and AFEM.

27. In its report to the Minister (REP 551), the ADC noted that APRIL had made a number of submissions following the publication of SEF 551 disagreeing with the determination of the export price being based on the transactions between RAK and AFEM. (Similar arguments presented to the ADC are expressed in APRIL's review application.)

28. The ADC provided its reasons as to why it considered RAK to be the exporter stating;

> *The exporter will generally be found in the country where the goods commenced their journey to Australia, but situations may arise where goods pass in transit through another country. In this case the Commission will normally consider the exporter to be located in the country of manufacture, being the person or entity responsible for sending the goods to Australia. Typically, the manufacturer, as a principal, and who knowingly sent the goods for export to any destination, will be the exporter, and the export price will be the price received by that exporter*.[8]

29. The ADC also noted that this finding is consistent with its finding in the original investigation (REP 341), where RAK was found to be the exporter, noting that the

[7] Section 269TAB(2B) of the Act must be considered in Division 5 Reviews of Measures.
[8] REP 551 Section 4.6.1.2, page 40.

transaction involved a different related trader (April Fine Paper Trading Pte Ltd, based in Singapore).[9]

30. The ADC stated in REP 551 that it considered the role of AFEM was a vendor that 'facilitated or managed the sales and marketing (via an Australian agent) of RAK's paper to Australian customers. The ADC did not consider AFEM's role met the '… requirements of truly being the exporter'.[10]

## Submissions

31. The ADC provided additional analysis of its finding that RAK is capable of being considered the exporter referring to the *Companhia Votorantum de Celluse e Papel v Anti-Dumping Authority*[11] and the *Australian Trade Commission v Goodman Fielder Industries Ltd*[12] judgments.

32. In relation to the determination of the export price, it indicated that s.269TAB(1)(c) of the Act provides that the Minister may have regard to all the circumstances of the exportation. In this matter, given the sales between RAK and AFEM were considered to be arms length and profitable it used these sales for export price determination.

33. APRIL in its submission re-states its claims as outlined in its review application.[13]

## Relevant Legislation and Case Law

33. Section 269TAB Export price:

*(1) For the purposes of this Part, the export price of any goods exported to*

[9] REP 341: Anti-Dumping Commission Report No 341 A4 Copy Paper exported from Australia from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Republic of Thailand.
[10] REP 551 page 41, reference to *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority (1996), 141 ALR 297 at [308*].
[11] *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority (1996), 141 ALR 297.*
[12] *Australian Trade Commission v Goodman Fielder Industries Ltd* [1992] FCA 462 at 517
[13] APRIL submission dated 5 October 2021.

*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*

*(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 the 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.*

s.269T of the Act, definition of country of export:

*'"country of export", in relation to goods exported to Australia, means a country outside Australia from which those goods are exported to Australia, whether or not it is the country where those goods are produced or manufactured.'*

34. Neither 'exporter' nor 'export' is defined in the Act. The Macquarie Dictionary defines export as 'to send (commodities) to other countries or places for sale, exchange etc'.

35. Relevant case law regarding s.269TAB and the methodology that may apply in relation to s.269TAB(1)(c) is outlined below.

36. In *Companhia Votorantium de Celluse e Papel* (CelPav), the majority judgment stated:[14]

> *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 the whom the importer has purchased…*
>
> *… in determining the identity of an "exporter" for the purpose of s.269TAB, the test is not whether the person caused the goods to be sent to Australia. This test is too broad. Nor does the passing of property identify the exporter. Rather, it is necessary to identify the party who satisfies the requirements of truly being an exporter.*
>
> *and*
>
> *Under those subsections it is still necessary to determine the identity of the country of export of goods – that country is the true place of export. … .It is the place of export, and hence the identity of the exporter, that are*

[14] *Companhia Votorantium de Celluse e Paper v Anti-Dumping Authority* [1996] 141 ALR 297.

*fundamental to the achieving of the purpose of the anti-dumping provisions of the Act. (my emphasis)*

This judgment examined several factors regarding the circumstances of the exportation in reaching its finding that CelPav, the manufacturer in Brazil, was capable of being considered the exporter. It did, however, refer to comments made by Lee, J. in the *Pilkington* judgment[15] as follows:

> … *as suggested by Lee J in Pilkington (Australia) Ltd v Anti-Dumping Authority [1995] 56 FCR 424 at 431-2, there may be circumstances under which an entity that carries on business as a supplier of goods to an importer and, for that purpose, contracts for a manufacturer to export its goods direct to an Australian importer, is the relevant "exporter" for the purposes of s.269TAB(1)(a).*

It concluded that this was not the situation in the CelPav case, as the orders from Australia were placed through a third party that was more akin to being a distributor.

There was also consideration given to the argument as to whether the focus should be placed on the price paid by the importer or the amount received by the exporter. Reference was made to the 1958/59 GATT Group of Experts Report as referenced in Anti-Dumping and Anti-Subsidy Law, the European Communities (Beseler and Williams):

> *The Group took the view that the word "exported" in Article VI provided the guide for establishing the dumped price and this factor, together with the requirements to make due allowance for differences affecting price comparability, led it to conclude that the essential aim was to compare the normal domestic price in the exporting country with the price at which the merchandise left that country and not the price at which it was imported.*

37. In the *Expo-Trade*[16] judgment, Moore, J. stated:

[15] *Pilkington (Australia) Ltd v Anti-Dumping Authority* [1995] 56 FCR 424 at 431–2.
[16] *Expo-Trade Pty Ltd v Minister of State for Justice and Customs* [2003] FCA 1421, [23].

*The notion of the country of export is not an abstract notion determined by looking simply at contractual arrangements between a person who might thought to be the exporter and an importer and the country in which, physically, the goods were immediately before importation into Australia. The country of export would usually be a country in which like goods were sold in a domestic market or the goods in question were produced or manufactured.*

Moore, J. proceeded to refer to the majority decision in *Companhia Votorantium de Celluse e Papel*, (see previous paragraph) which found that the exporter was the Brazilian manufacturer, CelPav, even though another company had caused the paper to be sent out of Brazil.

38. In the *Pilkington* judgment,[17] the Full Court held:

*The primary Judge held that once it was accepted that s 269TAB(1)(c) applied, it was a question of fact for the Anti-Dumping Authority to determine what items or charges were to be taken into account in the calculation of export price.'*

*and*

*' … as was found by the trial judge, once s.269TAB(1)(c) applied, the Minister has a broad discretion.*

39. In the *Powerlift* judgment,[18] Lee, J. stated:

*However, whether the Minister acts under s 269TAB(1)(c) or s 269TAB(3), his task remains the same, namely to arrive at the best approximation he can of the price that would have be paid by the importer to the exporter for the goods in an arm's length sale, less the costs of export and any cost relevant to post export transactions. In making that calculation, the Minister will take into account all the circumstances of the actual exportation, subject to that information being unreliable or there being insufficient information supplied about it. However the calculation is made, it will be an attempt to construct, so*

[17] *Pilkington (Australia) Ltd v The Anti-Dumping Authority & Anor* FCA [1995], [11] – [13].
[18] *Powerlift (Nissan) Pty Ltd and Another v Minister for Small Business, Construction and Customs and Others, FCA, 113 ALR 339 [1993],* page 358.

*far as is possible, an arm's length price between the importer and the exporter at the time of the actual exportation* (my emphasis).

## Analysis

40. APRIL raises two issues. Firstly, that as RAK is not the 'exporter' the export price should be determined pursuant to s.269TAB(1)(a) of the Act. Secondly, if RAK is considered to be the exporter, and the export price determined pursuant to s.269TAB(1)(c), it should have been based on the sale price by AFEM to Australian importers (with appropriate cost deductions to the FOB level from Indonesia).

Exporter

41. The ADC outlines in REP 551 the functions performed by RAK in the sale of A4 copy paper exported to Australia (see paragraph 23 above).

42. 'Exporter' is not defined in the Act. As referred to in paragraphs 33 to 37 there have been a number of judgments that have considered the issue of 'who is the exporter' in anti-dumping matters.

43. In the *CelPav* judgment, the circumstances concerned paper manufactured and sent by CelPav (a Brazilian paper manufacturer), through a third party located in another country, to Australian importers. The majority judgment held that CelPav was capable of being considered the exporter.[19]

44. In this review, RAK (the Indonesian paper manufacturer) sells to AFEM (a related entity based in Malaysia, with a role of marketing and selling paper products) who on-sells to Australian importers. In my view, these circumstances are similar to the facts found in the CelPav matter. The ADC in its submission highlighted the similarity of circumstances regarding RAK exports to those in the CelPav matter.

45. There are minor differences in the circumstances between the two matters. The first difference relates to RAK and AFEM being related parties. AFEM's role outlined by

[19] *Companhia Votorantium de Celluse e Paper v Anti-Dumping Authority* [1996] 141 ALR 297, page 305.

the ADC is as '… that of a vendor, located in a country other than the country of export, that facilitated or managed the sales and marketing (via an Australian agent) of RAK's paper to Australian customers in the review period.'[20] Whereas in the CelPav matter, the third party selling to Australian importers had distribution rights. The other difference relates to sales from CelPav were on a cost and freight (C & F) level, whereas the sales by RAK were on a [redacted]. (Confidential export sales information)

46. In this matter, both the ADC and APRIL agree that the country of export is Indonesia. There only difference is whether RAK, the manufacturer and seller in the domestic Indonesian market, is the exporter.

47. In this review, RAK:

    - is the manufacturer and sells on the Indonesian market;
    - is aware that the goods invoiced to AFEM are being exported to Australian customers;
    - moves these goods to the port for export; and
    - records these sales in its financial records as exports.

    I agree with the ADC that RAK is capable of being considered the exporter. The circumstances in the CelPav judgment are sufficiently like those applying to RAK's situation to apply the same rationale.

48. Accordingly, I agree with the ADC's finding that RAK is the exporter for the purposes of s.269TAB of the Act. Therefore, the export price cannot be determined under either s.269TAB(1)(a) or 1(b) of the Act and it is necessary to consider s.269TAB(1)(c) which states *'the price that the Minister determines having regard to all the circumstances of the exportation'.*

[20] REP 551 page 41.

Export Price pursuant to s.269TAB(1)(c) of the Act: all the circumstances of the exportation

49. REP 551 indicates RAK sells to AFEM, a sales and marketing arm of the APRIL group. Both AFEM and RAK are part of the APRIL group. AFEM sells (via an Australian agent) to Australian importers who are distributors. There are potentially two sales[21] available for consideration of the export price. RAK's sales to AFEM or AFEM's sales to Australian customers (importers). APRIL considers the latter sales are the relevant transactions for the determination of the export price under s.269TAB(1)(c) of the Act. Whereas the ADC considered the export price should be determined on the sales between RAK to AFEM.

50. In REP 551, the ADC considered the transactions between RAK and AFEM to be arms length, notwithstanding the relationship between RAK and AFEM. It also considered the use of these sales consistent with Dumping policy: that the export price will be the price received by the exporter.[22]

51. The relevant case law suggests that all the circumstances of the exportation should be considered as referred to in paragraphs 38 and 39 above. The *Powerlift* judgment suggests that in determining the export price under s.269TAB(1)(c) the intent is '… *arrive at the best approximation he can of the price that would have been paid by the importer to the exporter for the goods in an arm's length sale, less the costs of export and any cost relevant to post export transactions*. … *However the calculation is made, it will be an attempt to construct, so far as is possible, an arm's length price between the importer and the exporter at the time of the actual exportation'.* (my emphasis)

52. The intent is to ensure that the Minister in determining an export price, constructs an arms length 'price' that would have been paid by an importer to the exporter at the time of the exportation. APRIL submits that the export price should be based on the price the goods enters the commerce of Australia. I note that the majority

[21] I note that there is a third sale that could be considered, that of sales by Australian importers to downstream customers. However, as there is no evidence that the sale by AFEM to Australian importers is other than arms length, it is unnecessary to further consider these downstream sales.
[22] Dumping and Subsidy Manual, November 2018, page 31.

decision in the *CelPav* judgment referred to an argument of whether an export price should be based on the value on export or on import. It observed that a GATT Expert Group had considered this issue and concluded the relevant price was '… the price at which the merchandise left that country and not the price at which it was imported' that was the relevant price. I do not disagree with this view as it is consistent with the policy that dumping is considered to be a practice of exporters, not importers and so should be based on the price to the exporter.

53. To establish whether dumping is occurring it is necessary to compare the normal value with the export price. In assessing the normal value, it is preferable to match to the greatest extent possible the domestic transactions to the export sales. Provision is made vide s.269TAC(8) of the Act to enable adjustments to be applied to the domestic selling prices to ensure that differences between the export price and normal value are minimised to enable such a comparison.

54. APRIL's ground two relates to whether the correct adjustments have been applied to the domestic selling prices to determine the normal value. I will deal with that separately: however, it is critical to the assessment of whether dumping has occurred to ensure that both the domestic and export transactions are considered and 'matched' to the greatest extent possible to make a 'fair comparison'. In assessing the normal value, reference is first made to the goods exported to Australia when considering which domestic sales are appropriate.

55. Section 269TAC(1) provides that 'the normal value of any goods exported to Australia…', so it is clear that reference is first made to the goods exported to Australia in examining the sales on the domestic market to be used for normal value purposes. The ADC has based the normal value on Indonesian domestic sales of the like goods by RAK to distributors. The Australian export sales are also destined for distributors, through AFEM.

56. Given that the intent is to enable a fair comparison between the normal value and export price, it is preferable in my view to consider the sales by AFEM to Australian distributors and make appropriate deductions to arrive at the price the exporter would have received at the FOB level. This minimises the need to consider adjustments pursuant to s.269TAC(8) of the Act for differences in the level of trade.

57. The wide discretion provided in s.269TAB(1)(c) of the Act enables all the circumstances of the exportation to be taken into account. In this case, this allows the sales by AFEM to non-related importers to be used with deductions to the FOB level to a 'price' the exporter would have received.

58. Following the request to provide additional information regarding why an adjustment pursuant to s.269TAC(8) of the Act was being claimed, APRIL provided details of how the domestic selling prices and the export price were modified differently by the terms and circumstances of their respective sales. It stated that

> *These are the same adjustments made to the price payable by the Australian customers of AFEM to derive the 'export price' payable by AFEM to RAK on a 'transfer pricing' basis.*[23]

59. At conference, APRIL outlined that the price from RAK to AFEM is [redacted]. The [redacted] is a deduction for the functions performed by AFEM in making sales to Australian customers.[24] (confidential pricing information)

60. APRIL advised that the [redacted]' includes [redacted] (confidential export pricing information). It states that this enables the price to be considered a 'market based' price for accounting and taxation purposes.[25] There did not appear to be any [redacted] but rather covers a range of costs associated with functions performed by AFEM. (confidential pricing information)

[23] Letter from APRIL dated 31 August 2021, page 2.
[24] Non-confidential conference summary, APRIL and ADC dated 22 September 2021.
[25] Non-confidential conference summary, APRIL and ADC dated 22 September 2021.

61. In terms of determining the export price as the '*price that would have been paid by the importer to the exporter less the costs of export and any cost relevant to post export transactions'* (*Powerlift* judgment) I consider the [redacted] are 'export costs' and costs relevant to the 'post export transactions'. These amounts are to be deducted from the price paid by the Australian importers to AFEM to arrive at an Indonesian FOB level. (Confidential export pricing information)

62. At conference, I requested the ADC to undertake the necessary calculations to determine an export price pursuant to s.269TAB(1)(c) of the Act based on the methodology described above.[26] This information was provided to APRIL at a conference held on 20 October 2021.[27] The recalculated export price remains at the same amount as that determined by the Minister in the Reviewable Decision. However, as a result of the changed methodology, the ADC advised that a modification to the adjustment for [redacted] would be required to the normal value to align the export sales and domestic sales.

63. I agree with the ADC that RAK is capable of being considered the exporter in relation to the exports of A4 copy paper from Indonesia and that the export price should be determined pursuant to s.269TAB(1)(c) of the Act. However, having considered all the circumstances surrounding the actual exportation, as referred to in paragraph 49 above, I do not agree that the export price should be based on the sales between RAK and AFEM. Rather it is preferable to base the export price on the sales by AFEM to Australian importers with deductions necessary to remove 'any costs of export or any other cost relevant to post export transactions'.

64. Therefore, the recommended export price is based on the price proposed by APRIL, which differs to the extent that it includes deductions of all amounts, including [redacted] and the [redacted] provided by APRIL (regarding AFEM costs). I note that APRIL in its submission to the ADC (15 April 2021) also referred to these as [redacted] This enables the price to be determined at the Indonesian FOB level, in other words, what RAK, would have

[26] Non-confidential conference summary, ADC, dated 8 and 12 October 2021.
[27] Non-confidential conference summary APRIL and ADC dated 20 October 2021.

received if the transaction had been between the 'importer' and the 'exporter'. (Calculation is at Confidential Attachment Two Confidential Spreadsheet titled 1 ADRP – RAK – Export price.)

## Conclusion

65. I agree with the ADC's finding that RAK should be considered the exporter of A4 copy paper from Indonesia and therefore reject APRIL's ground in this respect. I consider that it is preferable to determine the export price on the sales by AFEM with the deductions of '*the costs of export and any cost relevant to post export transactions'.*[28] The export price remains the same export price determined by the Minister in the Reviewable Decision.

66. I recommend that the Minister, having regard to all the circumstances of the exportation, determine the export price in accordance with s.269TAB(1)(c) by deducting from the selling price of AFEM to Australian importers all the costs associated with export and any costs relevant to the post export transactions. The calculation of the re-determined export price is at Confidential Attachment Two Confidential Spreadsheet titled 1 ADRP – RAK – Export price.

# Ground 2

In relation to the 'ascertained normal value', if the 'ascertained export price' is determined to be price paid by AFEM to RAK for the goods under consideration during the review period notwithstanding the Applicants' contentions, then adjustments to domestic selling prices of like goods in Indonesia by RAK in the determination of the normal value ought to have been undertaken by the Minister pursuant to s.269TAC(8)(c) of the Customs Act 1901, however, such adjustments were not so made.

[28] *Powerlift (Nissan) Pty Ltd and Another v Minister for Small Business, Construction and Customs and Others, FCA, 113 ALR 339 [1993],* page 358.

## Claims

67. APRIL submits that if the export price remains unchanged there is a need '… to take into account the extent by which the domestic prices of like goods to the goods under consideration (GUC) sold by RAK and the ADC EXP (export price recommended by the ADC) are modified, in different ways by the terms and circumstances of their respective sales.'[29] It suggests that the '… price payable by AFEM to RAK for its purchases of GUC from RAK is influenced by the independently negotiated price for GUC between AFEM and its Australian customer(s), which price is worked back to the price payable by AFEM to RAK for the GUC, ensuring at the same time that such purchases are profitable to both AFEM and RAK.'

68. There was limited detail in APRIL's review application as to the nature and quantum of the adjustments required to make the domestic selling prices comparable to the export prices. For this reason, a s.269ZZG(1) Notice was issued to APRIL seeking further information on the adjustments claimed in relation to s.269TAC(8) of the Act.[30]

69. In its response to the s.269ZZG(1) Notice, APRIL claims that the adjustment to the domestic selling price should be on the basis of the difference between:

> *(i) the price payable by AFEM's Australian customers to AFEM for the A4 copy paper supplied by AFEM; and*
>
> *(ii) the price payable by AFEM to RAK for the same A4 copy paper supplied to AFEM by RAK that AFEM then on-sold to its Australian customers*.[31]

70. APRIL stated that RAK's domestic sales used for normal value purposes are to distributors. Whereas the sale to AFEM is a price arrived at between related bodies

[29] APRIL application page 18.
[30] The Review Panel issued a notice pursuant to s.269ZZG(1) of the Act on 25 August 2021.
[31] APRIL letter dated 31 August 2021, page two.

corporate based on ‘transfer pricing’ principles. It claims that ‘a price arrived at based on transfer pricing principles is required to reflect a “market price”’.

71. APRIL proposes that the methodology by which the price between RAK and AFEM is determined is a difference in the terms and circumstances of the sales when compared with the sales to the Indonesian domestic distributors. It also suggests there is a difference in the level of trade. This is on the basis that the sale by RAK to AFEM is used to determine the export price.

72. APRIL’s claimed s.269TAC(8) adjustment to the domestic selling prices is the amount of the [redacted] between RAK and AFEM. This amount was provided at the conference held on the 22 September 2021.[32]

73. APRIL refers to the comments by the ADC in REP 551 that as the domestic and export sales are directly by RAK there is ‘… no basis for making an adjustment for a trader’s margin, or any other “terms or conditions of trade” referred to by APRIL in its submission of 19 April 2021’ as misconceived. It claims that it is necessary to consider the level of trade as this impacts pricing as well as the difference between how the price between RAK and AFEM is determined.

## ADC findings in REP 551

74. The ADC found that the normal value for RAK could be determined pursuant to s.269TAC(1) of the Act based on domestic selling prices. It considered what adjustments were required pursuant to s.269TAC(8) to enable these prices to be compared to the export price. The export price had been determined using the price between RAK and AFEM pursuant to s.269TAB(1)(c) of the Act.

75. A series of adjustments were made to the domestic selling prices to calculate a normal value at a FOB level, none of which related to the claimed level of trade or terms and circumstances difference, referred to above.

76. The ADC noted that APRIL made a submission on 19 April 2021 regarding the dumping margin being incorrect. It referred to both the export price being incorrect

[32] Non-confidential conference summary held with APRIL and ADC on 22 September 2021.

and that the normal value did not have the correct adjustments as required under s.269TAC(8) of the Act.

77. The ADC made the following comment: '… considers that APRIL's claim for an adjustment to the normal value under section 269TAC(8) is vague and is not supported by any detail nor evidence.' The ADC indicated that APRIL was provided with the calculations of the normal value and export price at the time of the SEF. It further stated '…APRIL has not put forward a comprehensible claim for adjustment and therefore, the Commission cannot assess APRIL's ambiguous claim.

78. The ADC further commented that it did not observe any differences in the terms and circumstances of the export sales and domestic sales which would warrant an adjustment. It says both prices were sales made by RAK and there were no intermediaries involved. On this basis the ADC indicated adjustments had been made to enable comparability between the domestic selling prices and the export selling prices (to AFEM).

## Submissions

79. The ADC indicated it relied on its findings in REP 551 and indicated that the APRIL review application supplied no further evidence than had been available in its report. In terms of the APRIL's letter of 31 August 2021, the ADC stated that it was '… not clear to the ADC if the method of [redacted]. The ADC did not receive any evidence or substantiation from APRIL for the [redacted]".[33] Confidential export price information)

80. In REP 551, the ADC also provided commentary on scenarios surrounding when a 'traders margin' adjustment might apply. For example, if the exporter had been found to be AFEM.

81. The ADC referred to the statement made by APRIL in its submission to the ADC dated 15 April 2021 regarding the [redacted]

[33] ADC submission dated 1 October 2021, page 10.

[redacted].[34] (Confidential export pricing information). It further stated that it considered the transactions between RAK and AFEM to be arms length, notwithstanding that it had not verified the [redacted].

82. The ADC further stated that there was no basis to make an adjustment for price setting methodologies given the export price and normal value had been based on sales by RAK and neither involved an intermediary.

83. APRIL in its submission re-states its claims regarding the requirement for an adjustment due to the differences in the 'terms and circumstances of the sales to which they relate'.

## Relevant legislation

84. Section 269TAC(8) of the Act states:

> *Where the normal value of goods exported to Australia is the price paid or payable for like goods and that price and the export price of the goods exported:*
>
> *(a) relate to sales occurring at different times; or*
>
> *(b) are not in respect of identical goods; or*
>
> *(c) are modified in different ways by taxes or <u>the terms or circumstances of the sales</u> to which they relate;*
>
> *that price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price.* (my emphasis)

[34] Submission to the ADC from APRIL dated 15 April 2021 page 8.

## Analysis

85. APRIL claims that an adjustment is required due to differences in the 'terms and circumstances' between the domestic sales by RAK to distributors and the sale by RAK to AFEM. It claims that there is a level of trade difference as well as a terms and circumstances difference. The normal value was based on the domestic Indonesian sales between RAK and distributor, whereas the export price was based on the sale from RAK to AFEM, a related corporate entity.

86. In the approach adopted by the ADC in REP 551, there appeared to be a difference in the level of trade between the export (from RAK to AFEM) and domestic sales (from RAK to distributors). The ADC did not consider an adjustment was warranted due to both sales being made by RAK and no intermediary being involved in either sale. It also commented that APRIL had not provided clear evidence as to whether the claimed level of trade difference impacted the prices between the two sales. The ADC considered APRIL focused on the methodology of setting the price to AFEM rather than whether this constituted a difference in the level of trade.

87. Two issues arise in relation to APRIL's claim. Firstly, is the method of setting the price to achieve a 'market price' between related parties a 'term or circumstance of the sale' or merely the price setting mechanism for a sale. Secondly whether sufficient evidence has been provided to establish and quantify the difference, if any, that exists in the terms and circumstances of the sale.

Terms and Circumstances of the Sales

88. The Manual does not specifically deal with what is meant by the 'terms and circumstances of the sale' in s.269TAC(8) of the Act. Neither 'terms' or 'circumstances' are defined in the legislation. General usage suggests that 'terms' relate to the payment terms and the 'circumstances' to the conditions provided for in the contract of sale. Regardless there is a clear requirement that an adjustment for terms and circumstances is required only when selling prices are impacted.

89. Section 269TAC(8) of the Act enacts one of Australia's obligations under the ADA, namely Article 2.4 of the ADA.[35] Panel reports may assist in understanding and interpreting particular provisions of the ADA. The Panel in US – Stainless Steel (Korea)[36] considered what 'differences in conditions and terms of sale' meant in Article 2.4 of the ADA:

> *In this respect, we note that Article 2.4 refers to the 'terms and conditions of sale'. Although of course both words – 'term' and 'condition' – have many meanings, both are commonly used in relation to contracts and agreements. Thus 'term' is defined, inter alia, to mean 'conditions with regard to payment for goods or services', while 'condition' is defined, inter alia, as 'a provision in a will, contract, etc., on which the force or effect of the document depends.' Thus, we consider that, read as a whole, the phrase 'conditions and terms of sale' refers to the bundle of rights and obligations created by the sales agreement, and 'differences in conditions and terms of sale' refers to differences in that bundle of contractual rights and obligations. Thus, to the extent that there are, for example, differences in payment terms in the two markets, a difference in the terms and conditions of sale exists*.
>
> and
>
> *In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing*. (my emphasis)

90. The first issue to be considered is whether the process of creating a market-based price between related entities is a circumstance of the sale.

91. There is no particular 'circumstance' in the Manual that suggests that the method of price setting is a circumstance of sale. The above-mentioned Panel report focuses on whether a particular difference would be part of the 'bundle of rights and

[35] Article 2.4 of the ADA deals the need to make adjustments for differences that affect price comparability to enable a fair comparison between the normal value and export price.
[36] WTO Panel Report , US – Stainless Steel (Korea), DS 179 paragraph 6.75.

obligations' established in the sales agreement[37]. It also suggests that making a due allowance adjustment is to 'neutralise differences in a transaction' that may have impacted the different prices set for exports and domestic sales.

92. The process of establishing a 'market-based price' in sales between related corporate entities is designed to replicate what would happen in 'normal' market-place price setting. There are clear rules established in most jurisdictions, generally for taxation purposes, to enable businesses in related party international dealings to price in a manner that would be expected from independent parties in the same situation.[38]

93. In my view, the price setting methodology is not of itself a circumstance of the sale that creates a difference in the selling price. Its intention appears only to ensure that a transaction between related parties can be considered arms length. It is the elements established within those selling prices, that may be considered the circumstances of the sales. These elements of the price are the 'bundles of rights and obligations in the sales agreements' as referred to in the above-mentioned Panel report (paragraph 89).

94. Accordingly, in my opinion, it is necessary for an applicant to identify what are the different elements that have been reflected in the prices and provide the appropriate evidence to justify that an adjustment may be necessary.

95. The ADC in REP 551 indicated that APRIL's claim was vague and not supported by any detail nor evidence (see paragraph 77).

96. At the conference held on 22 September 2021, further information was sought from APRIL regarding the exact nature and amounts being sought as an adjustment pursuant to s.269TAC(8) of the Act.

97. APRIL advised that it considered that 'adjustments relate to the difference between the [redacted]

[37] It is noted that ADA Article 2.4 uses the word conditions whereas Australian legislation refers to circumstances. The difference in language is not considered significant as the analysis in this report refers to the language used in the Australian legislation.
[38] Australian Taxation Office International Transfer Pricing – Concepts and Risk Assessment.

[redacted] from RAK to AFEM' – it refers to this amount as the [redacted]. (Confidential export price information) APRIL proposed that the adjustment is the '[redacted] and provided the calculation of the amount being claimed.[39]

98. As referred to above, I do not consider that the price setting methodology of itself constitutes a term and circumstance of the export sale. Given the lack of information regarding the elements of the [redacted] and how this differs between the domestic and export sales makes it difficult to ascertain if an adjustment to an enable a fair comparison is required. On this basis, I do not support APRIL's claim in this regard.

Level of Trade

99. APRIL's other claim regarding the level of trade difference relies on the selling price from RAK to AFEM being used for export price determination. While there may have been a level of trade difference between the export sales used by the ADC and the RAK sales to distributors, there was insufficient evidence provided by APRIL to the ADC to quantify what this amount would have been. The Manual also makes clear that an adjustment for a level of trade difference requires evidence of the different selling activities carried out at the different marketing stages.[40] This evidence is not apparent in the information presented to the Review Panel.

100. Given my recommendation to the Minister relies on a different price being used as a base to calculate the export price and this price is to a distributor level, the level of trade difference is nullified. Accordingly, it is unnecessary to further consider this adjustment.

Sufficient Evidence

101. I turn to the question of evidence provided as it apparent that the ADC did attempt to obtain information from APRIL regarding the different pricing arrangements as

[39] Non-confidential conference summary dated 22 September 2021, pages 4 – 5.
[40] Dumping and Subsidy Manual November 2018, section 15.3, pages 70 to 71.

outlined in the verification report. RAK made two submissions to the ADC following the SEF 551 raising a number of issues including whether the correct s.269TAC(8) adjustments had been applied to the domestic selling prices.[41]

102. These submissions indicate that APRIL understood that the ADC had determined the normal value and export price in a particular manner. In one of these submissions, APRIL indicated 'The scope and manner in which the relevant prices are modified differently by their respective terms and conditions of trade are confidential to RAK and AFEM, the disclosure of which would adversely affect their respective businesses'.

103. At conference, APRIL described the elements included in the [redacted] in general terms as outlined in paragraph 60 above.[42] Certain aspects of the [redacted] were also described in APRIL's submissions to the ADC. However, the ADC, considered there was insufficient information provided and it was unable to verify the claims made by APRIL regarding its claim. The ADC in REP 551 stated that insufficient evidence had been provided by APRIL regarding the need for an adjustment and how it should be calculated.

104. Section 269TAC(8) does not prescribe how adjustments should be calculated. There is clear policy outlined in the Manual regarding the need for an applicant to provide sufficient evidence on the need for the adjustment and its calculation. It is clear to exporters that in circumstances where adjustments are to be claimed to enable comparability between the export and domestic sales that an applicant must provide sufficient evidence to demonstrate how the prices were impacted. It is also clear that such evidence must be provided in a timely manner.[43]

105. This is supported by approaches adopted by the World Trade Organization (WTO) Anti-Dumping Panels. For example, in Report in US – Softwood Lumber V[44]:

[41] APRIL submissions dated 15 and 19 April 2021 on EPR 551.
[42] Non-confidential conference summary dated 22 September 2021.
[43] Dumping and Subsidy Manual November 2018, section 15.3, page 65.
[44] WTO Panel Report, US -Softwood Lumber V, WT/DS264/R, paragraph 7.165.

*Article 2.4 does not require an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the cast – <u>that difference is demonstrated</u> to affect price comparability….* (my emphasis)

and in EC -Fasteners (China)[45]:

*… the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited. If no adjustment is requested or if an adjustment is requested with respect to a difference that is not demonstrated to affect price comparability, or the authority determines that an adjustment is not merited, no adjustment is to be made*.

106. I agree with the ADC's finding that insufficient evidence was provided by APRIL to enable the ADC to ascertain if there were any 'terms and circumstances of the sales' that would have necessitated an adjustment.

## Conclusion

107. APRIL has not established that the [redacted] is a term and circumstance of the export sales that creates a price difference when compared with the domestic sales. Accordingly, an adjustment pursuant to s.269TAC(8) of the Act is not warranted. Furthermore, there is insufficient evidence to ascertain if there are differences in the 'circumstances' between the domestic sales and export sales. The claim that a level of trade adjustment is required has been dealt with by the recommended re-determination of an export price based on sales to distributors. Accordingly, the need for this adjustment has been removed.

108. The change of methodology in determining the export price, as outlined in paragraph 64 has however led to the need to modify the adjustment used in the normal value to have the same terms as those used in the export price. I

[45] WTO Panel Report, EC-Fasteners (China) WT/DS397/R, paragraph 7.298.

recommend that the Minister determine the normal value for RAK based on the price paid or payable pursuant to s.269TAC(1) of the Act with directions made for necessary adjustments under s.269TAC(8) of the Act. I recommend that the Minister establish a different ascertained normal value as detailed at Confidential Attachment Three: Confidential spreadsheet titled 3 ADRP – RAK- Normal Value.

109. There is an impact on the dumping margin resulting from this change to the normal value. The dumping margin decreases from 14.7% to 13.8%. The consequential calculations of the dumping margin are detailed in Confidential Attachment Four: Confidential spreadsheet titled 4 ADRP – RAK – Dumping Margin.

# Ground 3

In relation to the 'ascertained non-injurious price', it was wrongly determined by the Minister. The 'non-injurious price' determined by the Minister on the recommendation of the Commissioner was not the '*minimum price necessary to prevent the injury, or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TG(1)(b) or (2)(b) of the Act*' (refer section 269TACA of the Act)

## Claims

110. In its review application, APRIL raised a number of issues with its claim regarding the unsuppressed selling price (USP) and the non-injurious price (NIP), such as price undercutting and injury analysis, and prices of other market participants. As referred to in paragraph 17 above, a notice was issued to APRIL under s.269ZZG(1) of the Act seeking further information in relation to the precise error in this ground relating to the Reviewable Decision. APRIL advised in its letter dated 31 August 2021 that the NIP was not correct. At Attachment One is a summary of the other claims made by APRIL and why these have not been dealt with by the Review Panel.

111. The three claims by APRIL relevant to the Reviewable Decision are:

(a) That the calculation of the NIP was incorrect. It should not have been based on the Australian industry's CTMS A4 copy paper. APRIL suggests it could have been based on:

- the weighted average price of like goods sold by the Australian industry with appropriate deductions to arrive at a FOB level; or
- the 'undumped price of the applicant'; or
- the ascertained normal value determined by the Minister following REP 341; or
- the weighted average domestic selling prices in Indonesia found in the review period in REP 551.

(b) That the USP calculated by the ADC based on the Australian industry's cost to make and sell (CTMS) plus profit is not a price but an artificial construct that has not been tested in the market. For this reason, it has not been tested as a price that the Australian industry could reasonably expect to obtain in the market. It is speculative and unsupported by evidence that this is a price the Australian industry could expect to obtain in market unaffected by dumping. APRIL claims that there was a failure to take into account relevant considerations and its findings were not supported by evidence.

(c) That the minimum price necessary to prevent injury must be zero, as it claims that it was not selling at dumped prices into the Australian market.

## ADC findings in REP 551

112. The ADC indicated that generally in a review of measures it follows the same approach adopted in the original investigation unless there has been a change of circumstances. In the original investigation, as outlined in REP 341, the ADC used the Australian industry's selling prices sold in the period 1 July 2012 to 30 June 2013. The ADC considered in this review:

- that this information was now dated;

- since that period the market had been impacted by dumping from a number of sources; and

- during the review period, goods from the nominated countries had been sold at dumped prices, suggesting that the Australian industry's selling prices would have been impacted by the dumped prices.

For these reasons, it considered it was not preferable to use the Australian industry's selling prices to establish the USP.

113. The ADC noted that interested parties had suggested that the USP could be based on the selling price of Australian Paper's imports of A4 copy paper from South Africa or imported paper from Brazil. While both alternatives were considered by the ADC, they were not seen as preferable alternatives. The ADC also noted that APRIL had suggested the NIP be 'zero' but did not consider this a serious contention, as the NIP is a minimum price necessary to prevent injury. A 'zero price' would suggest the 'Australian industry is giving away goods for free.' The ADC states this would not be effective in preventing injury caused by dumping.

114. The ADC considered that the constructed selling price would be the most appropriate method to establish the USP. The ADC constructed the USP based on the weighted average CTMS of A4 copy paper during the review period and added a percentage for profit based on the mark-up achieved by Australian Paper in the period 1 July 2012 to 30 June 2013: this was the last period the market was unaffected by dumping. A NIP was then calculated for each exporter by deducting the importer's selling expenses and profit as well as post-FOB costs.

## Submissions

115. The ADC referred to the calculations of the USP and NIP in REP 551.

116. APRIL re-stated its claims made in its review application.

## Analysis

117. The intent of imposing anti-dumping measures is to remove the injury caused by dumping. Australia's legislation (reflecting the ADA) provides that a lesser duty (than the full margin of dumping) may be applied if it is sufficient to remove the injury caused by dumping. 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.

118. There is limited case law dealing with the NIP or the USP. The two judgments outlined below focused on the calculation methodology rather than the definition of either the NIP or USP. In both matters though, the concepts of the NIP and USP were accepted. Furthermore, the principle of establishing a 'price' unaffected by dumping was acknowledged as the starting point to determine a NIP.

119. In *Expo Trade*[46] the main issue was whether the sale that the USP was based on was at the correct level of trade and what deductions should have been made. Justice Moore observed:

> *The task being undertaken was to create a price which the importer (in this case Whitford and Mirco) would have to pay if the goods were sourced from an Australian producer. ……This process was undertaken, as a mathematical exercise, by taking the unsuppressed selling price and deducting the costs associated with transporting the ammonium nitrate to Australia. The difference between the notional price and the actual price (the export price) became the duty payable. Having regard to the objective being sought to be achieved, this approach is, in my opinion, unexceptional*. (my emphasis)

120. In the *Companhia Vidraria Santa Maria* judgment, Beaumont and Foster JJ. stated:

> *This notion of the "unsuppressed selling price" to ascertain the "non-injurious" price is not one recognised, at least by that description, in the legislation, but*

[46] *Expo-Trade Pty Ltd v Minister of State for Justice and Customs, Moore, J. 5 December 2003 N 1256 of 2002*, paragraphs 34 to 51.

*is basic to the calculation of the "non-injurious" price. The "unsuppressed" selling price is the price for the relevant item unaffected by dumping*.[47]

121. There are three issues raised by APRIL:

(a) whether the methodology and calculation used by the ADC to determine the NIP is incorrect;

(b) whether the USP should have been determined on a different basis; and

(c) whether the NIP should be set at zero.

122. APRIL correctly points out that the Act does not specify how the NIP nor the USP 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.[48] Deductions are made to the USP to bring it to a level that enables its comparison with the export price, usually at the FOB 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 CTMS plus profit. 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.

123. 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. None of the case law considered suggests that the approach as outlined in the Manual is incorrect. The challenges have mainly dealt with what has been included in the deductions or whether the correct level of trade has been used to assess the prices suitable for consideration of the USP.

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[47] *Minister for Small Business and Consumer Affairs and Companhia Vidraria Santa Marina, Beaumont, Foster and Tamerlin JJ. 29 October 1997* NG 355 of 1997, page 7.
[48] Dumping and Subsidy Manual, November 2018, pages 137 to 140.

124. In the original A4 copy paper inquiry (REP 341), the ADC based the USP on Australian Paper's selling prices in the period 1 July 2021 to 30 June 2013 with relevant deductions to calculate a NIP for each export source.

125. In REP 551, the ADC has provided an outline of the approach adopted in the review of measures and why it changed its approach from the original investigation.

126. The ADC presented evidence that dumping had continued from the countries subject to the original measures (imposed by the Minister's notice on 18 April 2017) during the review period. Furthermore, on 10 April 2019, the Minister imposed anti-dumping duty duties on five additional export sources. Accordingly, it is a reasonable conclusion that the prices and market were impacted by dumped imports during the review period, thus precluding the use of the Australian industry's prices as the USP. I agree with the ADC in this regard.

127. When market prices cannot be used, the use of the CTMS (plus profit) is indicated as the second preferred method of calculating the USP. I have examined the reasons given by the ADC and agree that this is an appropriate methodology. I find no error in this approach. Accordingly, I do not agree with APRIL that the methodology to calculate the USP, or the NIP was incorrect.

128. I considered each of the options proposed by APRIL as a preferred USP. Each had flaws that would preclude their consideration as a basis of the USP. Accordingly, I agree with the approach adopted by the ADC and do not consider any of the options proposed by APRIL are suitable or preferable.

129. In relation to APRIL's second claim regarding whether the USP established by the ADC could be considered a price given it is an 'artificial construct' and untested in the market. It is true to say that it is an artificial construct as it is not an actual market price. However, there is no legislative requirement that the USP be an actual price in the market. It is a notional amount termed as an USP and established to enable the calculation of the NIP, another derived amount. As observed by Moore, J. in *Expo-Trade* the task is to create a price that the importer would have paid to the Australian producer.

130. I agree with the ADC's findings (in paragraph 112) that the market during the review period was impacted by dumped products and this precluded the use of market prices for the establishment of the USP. Furthermore, the approach adopted of 'creating' a notional amount of what the Australian industry price would have set a price based on the CTMS and profit is a reasonable approach.

131. I do not agree with APRIL that the USP as an 'artificial construct', is speculative and unsupported by evidence. It is based on verified CTMS data together with a profit rate taken from a period when the market was not impacted by dumped goods. It is an amount that the Australian industry would look to set its price at in a market unaffected by dumping. Accordingly, I consider the use of an USP based on CTMS (and profit rate) a reasonable methodology to establish the NIP.

132. I find no evidence that the ADC has failed to take into account relevant considerations or had insufficient evidence to reach the findings outlined in relation to the USP or NIP.

133. In relation to the third issue regarding whether the NIP should be set at zero. In REP 551, the ADC explained that if a NIP is 'set at zero', it would suggest the Australian industry is giving away goods for free. The ADC stated '… this proposition is unreasonable. A NIP 'set at zero' may exacerbate injury to the Australian industry and provide no remedy for the injurious effects of dumping. No exporter, including APRIL, is exporting, or giving away, goods for free'.[49]

134. I agree with the ADC that this claim has no substance as there must be a price as the legislation requires 'a minimum price to prevent injury'. It is illogical to consider that a price set at zero would prevent injury to the Australian industry.

## Conclusion

135. I reject this ground of review. None of the claims proposed by APRIL suggest that the Minister has erred in the calculation of the USP or the NIP. Accordingly, I accept and adopt the findings of the ADC with respect to the NIP. APRIL has not established that the USP was invalid as it was not a 'price' nor that the methodology

[49] REP 551, page 69.

or calculations of the USP and NIP were incorrect. On this basis, this ground fails to establish that the Reviewable Decision was not correct or preferable in relation to the NIP.

# Conclusions and Recommendations

136. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I consider that the Reviewable Decision was not the correct or preferable decision in relation to the variable factors as follows. While the export price remained unchanged in terms of its value, the recommended export price had different terms applied. This necessitated a change to the normal value as a different adjustment pursuant to s.269TAC(8) of the Act was applied.

137. I am, therefore, satisfied that the Reviewable Decision was not the correct or preferable decision.

138. I recommend that:

- the normal value for exports from Indonesia by RAK be changed but the export price and the NIP remain unchanged. The dumping margin decreases from 14.7 per cent to 13.8 per cent. The calculation of the dumping margin is at Confidential Attachment Four: Confidential Spreadsheet titled 4 ADRP – RAK Dumping Margin.

- the Minister determine the normal value for RAK based on the price paid or payable pursuant to s.269TAC(1) of the Act with directions made for necessary adjustments under s.269TAC(8) of the Act as referred to in paragraph 109. The calculation of the normal value is at Confidential Attachment Three: Confidential Spreadsheet titled 3 ADRP – RAK Normal Value.

- the Minister, having regard to all the circumstances of the exportation, determine the export price in accordance with s.269TAB(1)(c) by deducting from the selling price of AFEM to Australian importers all the costs associated with export and any costs relevant to the post export

transactions. Its value remains unchanged. The calculation of the export price is at Confidential Attachment Two: Confidential Spreadsheet titled 1 ADRP – RAK – Export Price.

139. As required by s.269ZZK(1A) of the Act, consideration must be given as to whether the new decision is materially different to the Reviewable Decision. The variable factors of the export price and the NIP remain unchanged. However, the normal value is changed. This leads to the fixing of a different variable factor pursuant to s.269ZDB(1)(iii) of the Act and impacts the dumping margin which decreases from 14.7 per cent to 13.8 per cent. This, while a relatively small decrease it would impact the dumping duty imposed and is therefore a materially different decision.

140. For the reasons set out in this report, I recommend that the Minister revoke the Reviewable Decision and substitute a new decision that has a different variable factor for the normal value for exports by RAK from Indonesia but that the variable factors of the export price and NIP remain unchanged.

Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
1 November 2021

# Attachment One: Other claims made by APRIL

For transparency purposes, outlined below are the other claims made by APRIL in its review application that have not been dealt with by the Review Panel given such claims were not in relation to the Reviewable Decision.

(a) That there was no evidence in REP 551 that prices were affected by dumping during the review period, noting the existence of anti-dumping measures;

(b) APRIL proposes that its prices were un-dumped, not causing injury and hence there is no justification for anti-dumping measures;

(c) APRIL suggests that insufficient focus was addressed in the REP 551 on injury and price undercutting.

(d) APRIL claims that the actual export price was higher than the ascertained normal value, the sales were un dumped and hence could not be causing injury.

The Reviewable Decision in this matter is the decision of the Minister following a review of anti-dumping measures pursuant to s.269ZDB(1) of the Act to fix different variable factors. The variable factors, as defined in s.269T(4E) of the Act are the export price, the normal value, and the NIP. The Minister is not required to consider whether the measures are still needed to prevent material injury (through price, volume or economic analysis) to an Australian industry in a review of measures, unless a revocation review notice[50] has been published. A revocation review notice was not published in relation to this matter. Accordingly, the claims regarding injury and price undercutting are not relevant in the Minister's Reviewable Decision.

I note that this approach is consistent with the approach adopted by the Panel Report in the appeal of EU – Footwear (China)[51] as to whether it was necessary to consider material injury when considering the 'lesser duty rule':

[50] Pursuant to s.269ZDB(1AA) of the Act.
[51] Panel Report, EU – Footwear (China) DS 405/R, paragraph 7.927

'… *Even assuming that, as in this case, an investigating authority's stated basis for application of a lesser duty is to impose a duty at a level adequate to 'eliminate the material injury to the … industry caused by the dumped imports without exceeding the dumping margins' this does not, in our view, establish that Article 3.1 (Determination of injury) is relevant to the establishment of the level of lesser duty to be applied. There is, in our view, no basis in the text of Article 3.1 for the conclusion that it requires any particular approach to the calculation of a level of duty that will be sufficient to remove the injury determined to exist.' (my emphasis)*

(e) APRIL contends that the NIP was 'factually and legally incorrect'. It proposes that '… if an anti-dumping measure is set at a price equal to the 'ascertained normal value' (the so-called 'floor price'), then by definition any actual export price at or above that price will be an 'un-dumped' export price attracting no liability for interim dumping duty (IDD).

As referred to in paragraph 19 the Review Panel advised the applicant by letter that the Review Panel's jurisdiction is concerned with the Reviewable Decision. In a review of measures, the decision of the Minister pursuant to s.269ZDB of the Act is the Reviewable Decision.[52] The method of working out any interim dumping duty (IDD) payable is a decision made pursuant to the *Customs Tariff (Anti-Dumping) Act 1975 (Dumping Duty Act)* and relevant regulations. Such decisions are outside the jurisdiction of the Review Panel and have not been considered in this report.

This includes whether an anti-dumping measure is set at a floor price and the calculation of any IDD. Accordingly, any claims in the application related to the calculation of the IDD or floor prices have not been considered.

[52] Section 269ZZA(1)(c) of the Act refers.

## Confidential Attachment Two: Confidential Spreadsheet: Export Price

## Confidential Attachment Three: Confidential Spreadsheet: Normal Value

## Confidential Attachment Four: Confidential Spreadsheet: Dumping Margin