PUBLIC RECORD

Australian Government
Department of Industry, Science, Energy and Resources

Anti-Dumping Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

Member Jaclyne Fisher
Anti-Dumping Review Panel
c/o- ADRP Secretariat

By e-mail: ADRP@industry.gov.au

Dear Member Fisher,

ADRP Review 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

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (Cth) (the **Customs Act**) published on 2 September 2021. This notice advised of your intention to review the decision of the Minister for Industry, Science and Technology (the Minister) under section 269ZDB(1)(a)(iii) of the Customs Act (the **Reviewable Decision**):

- To fix different variable factors in respect of 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.

I have considered the application submitted by APRIL Far East (Malaysia) Sdn. Bhd. and PT Riau Andalan Kertas for a review of the Reviewable Decision and make submissions, pursuant to section 269ZZJ(aa) of the Customs Act, at **Attachment A** (public version).

The Anti-Dumping Commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely

Dr Bradley Armstrong PSM
Commissioner, Anti-Dumping Commission
1 October 2021

Attachment A

COMMISSIONER, ANTI-DUMPING COMMISSION SUBMISSIONS

Introduction[1]

1. I make these submissions in response to a joint application by APRIL Far East (Malaysia) Sdn. Bhd. (**AFEM**) and PT Riau Andalan Kertas (**RAK**) (**AFEM/RAK Application**) to the Anti-Dumping Review Panel (the **ADRP**) for review (the **Review**).[2]

2. On 27 March 2020, the then Commissioner of the Anti-Dumping Commission (Mr Dale Seymour) received an application from Paper Australia Pty Ltd (ACN 061 583 533) (**Australian Paper**) to carry out a review of the anti-dumping measures in respect of certain A4 copy paper exported from:[3]

   (a) the Federative Republic of Brazil (**Brazil**);
   (b) the People's Republic of China (**China**);
   (c) 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) (**Indonesia**); and
   (d) the Kingdom of Thailand (**Thailand**).

3. Anti-dumping measures (through a dumping duty notice[4] and countervailing duty notice[5]) were first imposed by the relevant Minister on 19 April 2017 (the **Original Notices**).[6] The goods, the subject of the Original Notices are described as (the **goods**):

   > 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 and cut to sheets of metric size A4 (210mm x 297mm) (also commonly referred to as cut sheet paper, copy paper, office paper or laser paper).

4. The Commissioner did not reject Australian Paper's application. A review of measures was carried out.[7]

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[1] All legislative references in this submission are to the *Customs Act 1901* (Cth) ('the Act') unless otherwise indicated. APRIL Far East (Malaysia) Sdn. Bhd. and PT Riau Andalan Kertas for the purpose of this review are also collectively referred to as APRIL.

[2] ADRP Review 138 – *Anti-Dumping Review Panel,* Application – AFEM and RAK, published 2 September 2021.

[3] EPR No. 1 of Case 551.

[4] The dumping duty notice applies to all exporters of A4 copy paper from the subject countries except PT. Pabrik Kertas Tjiwi Kimia Tbk.

[5] The countervailing duty notice applies to all exporters of A4 copy paper from China except Asia Symbol (Guangdong) Paper Co., Ltd, Greenpoint Global Trading (Macao Commercial Offshore) Ltd, UPM (China) Co., Ltd and UPM Asia Pacific Pte Ltd.

[6] Anti-dumping measures were imposed after consideration of Anti-Dumping Commission Report No. 341 (REP341). Refer to Anti-Dumping Notice (ADN) Nos. 2017/39 and 2017/40. REP341 and ADN Nos. 2017/39 and 2017/40 are available on the commission's website. There was a history of litigation however I do not make submissions on the history of Federal Court proceedings and the ADRP reconsideration.

[7] EPR Nos. 2 and 3 of Case 551.

5. The result of the review of measures was that on 7 July 2021, the Minister for Industry, Science and Technology (the **Minister**), under section 269ZDB(1)(a)(iii) of the *Customs Act 1901* (Cth) (the **Act**) declared:[8]

   (a) that for the purposes the Act and the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (**Dumping Duty Act**), the Original Notices applying to the goods are taken to have effect as if different variable factors had been fixed in respect of exporters generally, relevant to the determination of duty.

   (b) in respect of the goods exported to Australia by Double A (1991) Public Company Ltd, Greenpoint Global Trading (Macao Commercial Offshore) Ltd, International Paper Exportadora Ltd and by uncooperative and all other exporters from Brazil, China, Indonesia and Thailand, the non-injurious price of those goods is less than the normal value.

   (c) In accordance with sections 8(5B), 8(5BA) and 10(3D) of the Dumping Duty Act, the interim duty for Double A (1991) Public Company Ltd, Greenpoint Global Trading (Macao Commercial Offshore) Ltd, International Paper Exportadora Ltda, and uncooperative and all other exporters from Brazil, China, Indonesia and Thailand be fixed such that the sum of:

      (i) the export price; and
      (ii) that lesser duty,

      does not exceed the non-injurious price of goods of that kind as ascertained.

   (d) For RAK and UPM Asia Pacific Pte Ltd, the non-injurious price of goods for the purposes of the dumping duty notice is greater than the normal value of the goods. Therefore, a lesser amount of duty has not been applied.

The Review

6. The Review concerns itself with 3 grounds (which I repeat for ease of reference to the submissions below):

   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 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 (the **ascertained export price**).

[8] Refer to ADN 2021/075, EPR No. 56 of Case 551.

Ground 2 in relation to the 'ascertained normal value', if the 'ascertained export price' is determined to be the 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 Act, however, such adjustments were not so made (the **ascertained normal value**).

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) (the **ascertained non-injurious price**).

7. Anti-Dumping Commission (**commission**) staff are available to attend any conferences the ADRP wishes to hold under section 269ZZRA to answer any questions about these submissions and review of measures 551 more broadly.

GROUNDS OF REVIEW

Ground 1 The 'ascertained export price'

8. I submit the 'ascertained export price' was correctly 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.

9. It is however necessary to first address my finding that RAK was the exporter of the goods.

RAK – exporter of the goods

10. There is no definition of 'exporter' under the Act or the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. As a practice and consistent with the Dumping and Subsidy Manual – November 2018 (the **Manual**), the commission will identify an exporter as:[9]

    (a) a principal in the transaction located in the country of export from where the goods were shipped and who knowingly placed the goods in the hands of a carrier, courier, forwarding company, or their own vehicle for delivery to Australia; or

[9] The Manual, p 29. See also REP551, p 40.

(b) a principal will be a person in the country of export who owns, or who has previously owned, the goods but need not be the owner at the time the goods were shipped.

11. When identifying the exporter, the commission applies the following:[10]

> *Typically the manufacturer, as a principal, and who knowingly sent the goods for export to any destination, will be the exporter. The export price will be the price received by that producer/exporter i.e. the manufacturer. Where an intermediary is involved the export price, for the purposes of calculating a dumping or subsidy margin, will be the price received by that exporter when selling to the intermediary (even if the intermediary is in the same country of export)…*
>
> *…the Commission considers that only in rare circumstances would an intermediary be found to be the exporter. Typically this will only occur where the intermediary has purchased the goods from the manufacturer, the manufacturer has no knowledge at all that the goods are destined for export to any country; and the essential role of the intermediary is that of a distributor rather than a trader and because it is acting more like a distributor than the intermediary would usually have its own inventory for export sales*.

12. I am satisfied the commission did not depart from this practice. It is further relevant to consider the ordinary meaning of 'export'.

13. The definition of 'export' in the Macquarie Dictionary is:

> *to send (goods) to other countries or places for sale, exchange, etc.*

This definition turns on the sending of goods.

14. Justices Beaumont, Gummow and Einfeld considered the term 'export' (on the concept of 'sending of goods') in *Australian Trade Commission v Goodman Fielder Industries Ltd*.[11] Their Honours held (this was in the context of the *Development Grants Act 1974* (Cth)) the ordinary meaning of 'export' '… *is to send commodities from one country to another using the verb "send" as indicating that which occasioned or brought about the carriage of the commodity from one country to another*'.

15. In the Full Federal Court case of *Companhia Votorantum de Celluse e Papel v Anti-Dumping Authority*[12] (the **Celpav case**) the question was whether Brazilian manufacturer, Celpav or a Japanese trading company, Dai Ei that was involved in the transaction should be considered the exporter of goods by the Anti Dumping Authority (as it then was). The facts were Edwards Dunlop (an Australian company) imported Celpav paper. It placed orders with Dai Ei,

[10] The Manual, page 30.
[11] (1992) 36 FCR at 517.
[12] (1996) 141 ALR 297.

with which Celpav had an arrangement. Dai Ei ordered the paper from Celpav which shipped the paper to Australia. Celpav invoiced Dai Ei and Dai Ei paid Celpav for the paper. Dai Ei in turn invoiced Edwards Dunlop and Edwards Dunlop paid Dai Ei. Edwards Dunlop did not deal directly with Celpav.

16. The Full Federal Court in the Celpav case found Celpav was the exporter.

17. The Celpav case supports my submission that the term 'exporter' is not defined in the Act.[13]

18. Evidence before the commission showed [redacted].

19. Further, when considering the circumstances of exportation, the evidence before the commission during the review demonstrated RAK:[14]

    (a) manufactured the goods exported to Australia.
    (b) was located in Indonesia being the country of export.
    (c) sold the finished goods to AFEM (an entity incorporated and based in Malaysia), which on-sold the goods to the Australian importer.
    (d) was aware that AFEM on-sells the goods to Australia.
    (e) listed in sales documents (including commercial invoices) the Australian customer's name and location, as well as the final port destination.
    (f) through its audited financial statements for 2019, separated revenue amounts by export and local markets.
    (g) was responsible for delivering the goods to the port of export in Indonesia at FOB terms.
    (h) was responsible for all port handling charges.
    (i) was identified as the consignor of the goods on the relevant country of origin certificates.

20. Based on the above, I submit inferences can be drawn that RAK was aware the goods were for export and AFEM does not have an inventory of the goods from which it fulfils orders from Australian customers. I maintain the finding that RAK is the exporter and AFEM an intermediary is consistent with our longstanding practice as outlined in the Manual.

[13] The Celpav case referred to *Henty v Bainbridge-Walker* (1963) 36 ALJR 354 which held at 356: "Another general submission was made that neither the defendant nor the companies which he directed and managed could be found to have been the exporter of prohibited exports because whatever goods were in fact exported were sold f.o.b. Sydney to an overseas buyer. The seller's obligations therefore ceased when the goods were placed on board the ship at the Port of Sydney and it was the overseas buyer who thereupon became the exporter of them. For the purposes of this case it is sufficient to say that if, in the case of an f.o.b. contract with an overseas buyer, the seller places the goods sold on board a ship bound for foreign parts and engages with the shipowner to carry them to the overseas buyer and the goods are carried overseas, the seller has, in my opinion, exported the goods within the meaning of the Customs Act". (underlined for emphasis)

[14] EPR No. 36 of Case 551, Verification report of RAK and AFEM. See also SEF 4.6.1, chapter 4.6.1 and REP551, chapter 4.6.1.

21. There was no evidence before the commission that AFEM took physical possession of the goods nor did it have its own inventory of the goods for distribution and export.[15]

22. Celpav was found to be the exporter. The evidence in this review, set out above, demonstrates a much closer connection. RAK was, during the review period, the manufacturer and sent those goods for export to Australia.[16]

23. I now address the export price.

Determination of the export price

24. The AFEM/RAK Application at page 14 says the correct and preferable decision is that '… *the 'export price' is the actual price payable and paid by the Australian customer(s) (i.e., Australian importer(s)) to the exporter of the* [goods]*, AFEM, in arm's length transactions between those parties, that is, the actual export price. Accordingly, the 'export price' ought to have been determined under section 269TAB(1)(a) as the price payable and paid by the Australian 'importer(s)' to AFEM for the* [goods].

25. Section 269TAB(1) provides:

CUSTOMS ACT 1901 - SECT 269TAB

Export price

(1) 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

(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

[15] REP551, chapter 4.6.1.
[16] REP551, page 34.

(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.

26. The commission calculated the export price as the price paid by AFEM to the exporter, RAK, under section 269TAB(1)(c), having regard to all circumstances of exportation. The commission found that this price was at 'arms length' for the following reasons:

a. AFEM was profitable on its sale of the goods to Australian importer(s).
b. No consideration payable for the goods other than the price was identified.
c. No reimbursement or compensation other than the price for the goods was identified.

27. The AFEM/RAK Application at pages 11, 17, 23, 24 and 27 arrived at a revised dumping margin calculation of -10.3%.

28. The revised dumping margin calculation of -10.3% is not based on the price paid or payable to RAK (in its capacity as the exporter) and does not incorporate an adjustment to the normal value to account for a trader margin relating to AFEM's margin and expenses. A trader margin adjustment would be required given there is an intermediary (AFEM) involved in export sales but not involved in domestic sales. This is because AFEM's margin and expenses would affect price comparability between the normal value and export price.[17]

29. If the normal value had not been based on RAK's sales, but rather AFEM being considered the exporter (as proposed by APRIL), the normal value would have been based on 'other sellers of like goods'. This would have necessitated an adjustment to reflect differences in the terms and circumstances of the sales.[18]

30. The ascertained export price was determined [redacted] Interim duties under the combination method are calculated using:

[17] REP 551, Page 56.
[18] REP 551, Page 56. The commission considered whether an adjustment would be required for price comparability as referred to by APRIL in its review application concerning level of trade differences resulting from sales to distributors in the domestic market and whether one would have been made for the trader's margin. The reason for that was 551 to demonstrate what adjustments might have been applicable if the exporter was considered to be AFEM.
[19] Refer to Appendix 1 within 'Attachment 3.1 - RAK's dumping margin'.

(a) the fixed component would be calculated as the *ad valorem* rate applied to [redacted]; and

(b) the variable component would be calculated as the amount, [redacted] is lower than the ascertained export price.

31. The commission determined the export price between RAK and AFEM. That resulted in a floor price that is lower than would have been the case if the export price was determined between AFEM and the Australian importer. The commission's approach in calculating the export price between RAK and AFEM is favourable to the applicant in this review.[20]

32. I submit the export price is the price between RAK and AFEM, therefore no change to the normal value is required.[21]

Ground 2 The 'ascertained normal value'

33. The commission calculated the normal value under section 269TAC(1) as the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in 'arms length' transactions.[22]

34. The commission made adjustments in accordance with section 269TAC(8).[23] That was so a comparison could be made between the normal value and export price.

35. The AFEM/RAK Application argues for an adjustment to the normal value under section 269TAC(8)(c). There is not anything further I can submit in response because there is no further evidence to support its claims. I rely on my findings on the ascertained normal value in REP551.

36. In a letter to the ADRP dated 31 August 2021, APRIL's legal representatives referred to normal value adjustments pursuant to section 269TAC(8) and a method of price calculation. [redacted].

37. APRIL was given the calculations of the dumping margin including the calculation of the export price and normal value, on the date the statement of essential facts was published. It was open to RAK and/or AFEM to submit to the commission supporting evidence for an adjustment to the normal value.

[20] Refer to Appendix 1 within 'Attachment 3.1 - RAK's dumping margin'.
[21] From this point on in these submissions, where the name 'APRIL' is referred, that should be taken to mean the collective identity for RAK and AFEM.
[22] Refer to Appendix 1 within 'Attachment 3.1 - RAK's dumping margin'.
[23] REP 551, page 52.

APRIL did not give the commission received supporting evidence for adjustment.

38. The commission requested that APRIL give [redacted]

39. APRIL previously submitted that if the export price is based on the price between AFEM and Australian customers, then no such adjustment under section 269TAC(8) would be required. That is because there is no evidence or reason that the prices in such sales would be modified differently by the terms of the sale.

40. In response, I submit APRIL considers the 'trading margin' to have influenced RAK's price but not AFEM's price. I submit that an adjustment to the normal value for AFEM's margin, including its expenses, would be warranted if the export price for the goods was determined as the price between AFEM and the Australian importer(s). This is because AFEM's margin and expenses would affect the price comparability between the normal value and the export price if it was determined as the price between AFEM and the Australian importer.

41. During the verification of APRIL, they provided [redacted]

42. The commission found that RAK's sales to AFEM, and AFEM's sales to Australian importer(s), were profitable. Further, in relation to the price between RAK and AFEM, the commission did not find:

    there was consideration payable for the goods other than the price was identified; and

    any reimbursements or compensation made other than the price for the goods.

    On this basis, the commission considered the transactions between RAK and AFEM to be 'arms length', despite not having been able to verify the [redacted] price.

[24] On 16 September 2021, the commission gave the ADRP the following two attachments that related to APRIL's response to our requests, which included this request about the calculation of the price and evidence: '551 - APRIL - Response to 3rd info request'; and '551 - APRIL - Response to 4th info request'.

43. As the commission found that the goods were not purchased by the importer from RAK (in its capacity as exporter), the commission calculated the export price for RAK under section 269TAB(1)(c) as the price paid or payable by AFEM to RAK at FOB terms.[25]

44. In Investigation 341, similar circumstances existed in which RAK sold to a related intermediary (being April Fine Trading PTE Ltd), which then on-sold the goods to Australian customers. The ADRP affirmed the commission's identification that RAK was the exporter. [26]

45. Based on my submissions above, I do not consider there is a basis to make an adjustment to the normal value for differences in price setting methodology when the export price and normal value have both been determined as RAK's price given there is no intermediary. I submit there is no basis to concede the adjustment proposed by APRIL so no changes have been made to the calculation of the normal value.

46. To conclude these submissions on normal value, the export price should be determined in accordance with section 269TAB(1)(c), using the price between RAK and AFEM. This price can be compared to RAK's domestic selling prices (used in determining the normal value) without making adjustments to the normal value for AFEM's margin and expenses (including the expenses incurred by its marketing agent in Australia) in order to ensure that the export price and normal value are comparable.[27]

Ground 3 The 'ascertained non-injurious price'

47. The AFEM/RAK Application asserts the 'non-injurious price' determined by the Minister 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'.

48. Relevantly, section 269TACA provides:

CUSTOMS ACT 1901 - SECT 269TACA

Non-injurious price

The non-injurious price of goods exported to Australia is the minimum price necessary:

(a) if the goods are the subject of, or of an application for, a dumping duty notice under subsection 269TG(1) or (2)--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); or

[25] EPR No. 36 of Case 551. Refer to section 7.4.
[26] ADRP Report No. 55, paragraph 4.7.6.
[27] REP551, page 42.

(b) if the goods are the subject of, or of an application for, a third country dumping duty notice under subsection 269TH(1) or (2)--to prevent the injury, or a recurrence of the injury, referred to in paragraph 269TH(1)(b) or (2)(b); or

(c) if the goods are the subject of, or of an application for, a countervailing duty notice under subsection 269TJ(1) or (2)--to prevent the injury, or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TJ(1)(b) or (2)(b); or

(d) if the goods are the subject of, or of an application for, a third country countervailing duty notice under subsection 269TK(1) or (2)--to prevent the injury, or a recurrence of the injury, referred to in paragraph 269TK(1)(b) or (2)(b).

49. There is no prescribed method in the Act for determining or calculating the non-injurious price of goods exported to Australia.

50. Section 269TACA(a) refers to the non-injurious price necessary to prevent the injury, or recurrence of the injury, referred to in s.269TG(1). In this case, it was the injury found to be caused by dumping in Investigation 341. The consideration in this review is determining a non-injurious price that would be effective in preventing the injury or recurrence of injury.

51. I am satisfied the commission followed the Manual as it relates to the non-injurious price.

52. Section 6 of REP551 outlines the calculation of the unsuppressed selling price and non-injurious price, and addresses submissions made in relation to those calculations.