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24 June 2019

Mr Paul O'Connor
Panel Member
Anti-Dumping Review Panel
Department of Industry, Innovation and Science
Industry House
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Australian Capital Territory 2601

By email

Dear Member

Mondi SCP a.s. – application for review concerning A4 copy paper Interested party submission

We refer to the Anti-Dumping Review Panel ("Review Panel") review *A4 Copy Paper exported from Austria, Finland, the Republic of Korea, the Russian Federation and the Slovak Republic* as presently underway.

By way of notice under Section 269ZZI of the *Customs Act 1901* ("the Act") published on 23 May 2019 the Review Panel invited interested parties to provide the Review Panel with submissions within 30 days from the date of publication of that notice.

This interested party submission is lodged on behalf of our client Mondi SCP a.s. ("Mondi SCP"), who is also an applicant in the review.¹

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¹ Mondi's application for review in this matter dated 10 May 2019 is hereinafter referred to as "the Application".

A Not correct or preferable to find that Mondi SCP's exports may be dumped in the future

1 Interpretation and application of the "may be" dumped requirement

Section 269TG(2) provides, in relevant part, that in order to publish a dumping notice the Minister must be satisfied that:

...the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods...

We will refer to this as the "future dumping requirement".

This is not the only condition that must be satisfied, but it is an essential condition. The question we have raised on behalf of our client Mondi SCP for the consideration of the Review Panel is whether it was correct or preferable for the Commission to recommend to the Minister that the condition was met in the case of Mondi SCP's exports. We submit that it was not.

Neither Article VI of the *General Agreement on Tariffs and Trade 1947* nor the treaty which sets out the agreed manner of its implementation, namely the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("the Anti-Dumping Agreement"), comprise a provision that directly reflects the words of the future dumping requirement as they appear in the Act.

Article VI provides, in part:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

With respect to this Article, what can be said is that the requisite dumping finding is worded in a present and continuing manner.² The words "*are introduced*" have a positive and contemporary nature, which could explain the insistence in Australian law on a positive finding of dumping in the past (in the investigation period)³ and a positive expectation of dumping in the future.

In turn, Article 1 of the Anti-Dumping Agreement mandates that:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. [underlining supplied] [footnote omitted]

Also relevant here may be Article 11.1 of the Anti-Dumping Agreement, which provides in part that:

An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

² This notion of contemporaneity is supported by the WTO panel report, *Mexico – Anti-dumping duties on steel pipes and tubes from Guatemala* (WT/DS331/R) at para 7.227.

³ This positive requirement is conveyed by the words in Section 269TG(2)(a) "*the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods*" [underlining supplied].

Satisfying the future dumping requirement at the time of the decision to impose duties could be seen as a way of ensuring that it is not susceptible to challenge the moment after the decision is made, as it would be if dumping could not be reliably forecast.

Whatever may be the relevance of those international law provisions, and we think they are relevant, we are still left with the task of understanding what is meant by the words of the future dumping requirement in Section 269TG(2), and how they can be legitimately satisfied, especially as they describe a situation at a future time for which there are no facts.

WTO jurisprudence is relevant and helpful in this regard too.

Article 11.3 uses the concept of likelihood (*“whether the injury would be likely to continue or recur if the duty were removed or varied”*) in the context of requests for the continued imposition of duties. In this respect a WTO panel has vouched that such continued imposition must have *“a foundation of positive evidence”* and that the need for continuation *“must be demonstrable on the basis of the evidence adduced”*.⁴ In a general interpretive sense we consider this to be instructive, because the word “may” in the future dumping requirement must of necessity refer to a likelihood, otherwise it could not be distinguished from “may not”. The importance of this observation is that an “anything could happen” test could never be regarded as the correct test.

Further with respect to Article 11.3, we find this clarification with respect to the “likelihood” standard in the dispute settlement jurisprudence:

*The requirement to make a “determination” concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.*⁵

Underlying these pronouncements, and indeed all of the findings that an investigating authority must make and is permitted to make in an investigation, is the requirement for positive evidence. This applies even in the context of decisions about matters which may or may not eventuate in the future:

The requirements of “positive evidence” must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a “forward-looking analysis”. Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences

⁴ See WTO panel report, *United States – Anti-dumping duty on dynamic random access memory semiconductors (DRAMs) of one megabit or above from Korea* (WT/DS99/R) at para 6.42.

⁵ See WTO panel report, *United States – Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan* (WT/DS244/R) at para 7.271.

drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on "positive evidence".⁶

In the same WTO report, the Appellate Body spoke of the need for a forward-looking finding to "rest on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions'".⁷

Lastly, we would note that the likelihood required under Article 11.3 has been equated with "probability":

We also note that "likelihood" or "likely" carries with it the ordinary meaning of "probable".⁸

In summary then, we maintain that the "may be" standard incorporated in the future dumping requirement under Section 269TG(2) of the Act:

- cannot be met by way of mere assumption, but rather must be based on positive evidence;
- must be given a meaning greater than that of mere chance or possibility, in order for it to be distinguished in meaning from its opposite expression "may not be";
- in referring to a likelihood, should be taken to refer to a probability, or at least to a likelihood stronger than the opposite proposition.

2 Administrative precedent for the Review Panel to draw upon

We refer the Review Panel to a 1998 report of the Anti-Dumping Authority ("the Authority"), *Coated paper from Austria, Belgium, Finland, France, Germany, Italy, Japan, the Republic of Korea, the Netherlands, Switzerland and Thailand*.⁹

In that case the Authority recommended to the Minister for Customs and Consumer Affairs, the Hon Warren Truss MP, that he not take action against exports of the subject goods from Italy and from Korea. In both cases this recommendation, which was accepted by the Minister, was based on the finding that the satisfaction necessary to make a finding that future exports of coated paper from those countries may be dumped could not be reached.

We summarise the reasoning in that regard as follows.

- (a) The investigation period for dumping was a two year period, 1996 and 1997.
- (b) With respect to Italy, the Authority determined that coated paper had been dumped in 1996, but not in 1997, and that the export prices rose throughout 1997. The absence of dumping in 1997 was reason enough for the Authority to recommend that it could not be satisfied of the likelihood of dumping in the future. Therefore, the future dumping condition was not met.
- (c) With respect to Korea:

⁶ See WTO Appellate Body Report, *United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina* (WT/DS268/AB/R) at para 341.

⁷ *Ibid*, at para. 284.

⁸ See WTO panel report, *United States – Anti-dumping duty on dynamic random access memory semiconductors (DRAMs) of one megabit or above from Korea* (WT/DS99/R) at footnote 494.

⁹ Anti-Dumping Authority Report No 185, March 1998. See Attachment 1 for relevant extracts.

- There had been significant dumping in 1996, but there was a marked trend away from dumping in 1997. This was found to be due to a combination of changes in the value of the relevant currencies and the price behaviour of the exporters at the time of those currency changes. Export prices were denominated in USD, and remained relatively stable over the two year investigation period. However the Korean won had been devaluing gradually against the United States dollar from say mid-1996, and then at the end of 1997 there was a significant acceleration in this devaluation.
- The Report reflects differing views amongst interested parties as to the impact of the devaluation and the Korean exporters' response to that devaluation in price terms. Those parties seeking the imposition of dumping duties with respect to Korean exports (i.e. that they not be excluded by reason of the non-satisfaction of the future dumping requirement) suggested that raw materials denominated in USD that needed to be imported into Korea would be more expensive, thereby increasing the KRW-denominated production cost and likely also the normal value of the coated paper. It was also said against the Korean exporters that they would be enticed to increase their international sales volume by reducing export prices denominated in USD, a strategy which would make the exporters more competitive in international markets but still allow them to cover their costs.
- The opposing view was that the Korean exporters would behave in accordance with basic economic theory and would seek to maximise their profit. For the Authority, this profit-seeking behaviour was not only a more-than-likely response, it was also one that was borne out by the evidence of what had happened in the investigation period. As the devaluation had been taking place, and the Korean exporters had been earning more money in KRW terms, their export prices had remained stable.

Thus, in its consideration of the future dumping requirement, the Authority can be seen to have adopted a textbook style evaluation. It used the positive evidence available to it in order to inform its view about what was more likely to occur in the future. For Italy, the facts of a clear and concerted trend away from dumping, and of no dumping at all over a 12 month period, was cause enough to make the likelihood of future dumping less evident than the likelihood that there would not be dumping. For Korea, the exporters concerned had the opportunity to increase their sales volume by lowering their prices, but did not do so. This was considered to be significant evidence with respect to what they would be likely to do in the future.

In both cases the exporter's behaviour in the light of the surrounding circumstances was fundamental in arriving at a justifiable and objective inference about what was more likely to happen at the future time.

We recommend the approach taken by the Australian investigating authority in the coated paper inquiry to the Review Panel. The relevant law has not changed, nor have the evidentiary standards that must be applied in resolving such an issue. Those standards are a given and immutable norm. They are derived from both administrative law and principle, and from the jurisprudence of the WTO dispute settlement system in its explanation of those provisions of the Anti-Dumping Agreement to which the anti-dumping provisions of the Act are necessarily related.

3 The “positive evidence” and inferences to be drawn in the case of Mondi SCP

The Application lists the facts and assumptions underlying the recommendation by the Commission to the effect that there may be dumping in the future, and our rebuttal with respect to the inferences arrived at by the Commission with respect to each.

For the Review Panel's convenience, we reproduce that part of the Application below:

Para.	Consideration	Submissions
(a)	Mondi can export the goods to Australia from a number of its mills globally.	This does not go to the proposition that Mondi SCP might dump A4 paper in the future. It is nothing more than a finding that the Mondi group of companies exists.
(b)	The emergence of exports from Russia and Slovakia are directly related to the securities and measures imposed as a result of Investigation 341.	This does not go to the proposition that Mondi SCP might dump A4 paper in the future. It only goes to the proposition that because dumping measures imposed on certain exporters caused the risk and cost of purchasing those exports to increase, other exporters were called upon by Australian importers to meet the resultant demand for alternative suppliers.
(c)	The previous 2017 prices are indicative of export prices from Mondi SCP.	The context for this finding is that Mondi SCP's prices were lower in AUD terms in the first half of the investigation period, than they were in the second half of the investigation period. It is not apparent to us why prices in the first half of the investigation are not indicative of prices in the first half of the period, and why prices in the second half of the investigation period are not indicative of prices in the second half of the investigation period. ¹⁴ Mondi SCP's prices in the second half of the investigation period are facts that cannot be ignored.
(d)	Mondi SCP may return to exporting the goods to Australia where market conditions were suitable.	This does not go to the proposition that Mondi SCP might dump A4 paper in the future. It only goes to the proposition that Mondi SCP might export A4 paper to Australia in the future.
(e)	Mondi SCP's Australian export price in 2014 was higher than its 2017 export price, at a time when pulp prices were considerably lower in 2014 than in 2017.	This does not go to the proposition that Mondi SCP might dump A4 paper in the future. It only goes to the proposition that economic conditions in world markets are different at different times, such that sales may be more profitable at one time than at another time.
(f)	Slovakia has increased production capacity and will continue to do so over the next five years.	The Commission seeks to draw conclusions from an FAO Survey with respect to Slovakia, when the evidence with respect to Mondi SCP was of capacity utilisation of [CONFIDENTIAL TEXT DELETED - number] % in 2016 and [CONFIDENTIAL TEXT DELETED - number] % in the investigation period of 2017, and where the only future project proposed by Mondi SCP is for investment in a kraft top white machine which is for container board production, not A4 paper production.
(g)	Slovakia is now an established supply source and was exporting at the lowest prices in 2017 and 2018.	These statements are untrue: <ul style="list-style-type: none"> Mondi SCP exported A4 paper to Australia in 2014 and then in 2017. This means that Mondi SCP has been a supplier to the Australian market. Although we do not think that adding the word "established" makes any difference, Mondi SCP is certainly less "established"

Para.	Consideration	Submissions
		<p>than longer term suppliers who have more continuously supplied the Australian market.</p> <ul style="list-style-type: none"> Mondi SCP was not “exporting at the lowest prices in 2017 and 2018”. Figure 14 in Report 463 disproves this. Indeed, in 2017 Mondi SCP exported at the highest prices. Moreover Mondi SCP had no exports in 2018,¹⁵ which is also as stated in Report 463.
(h)	Mondi SCP has historically exported at similar prices to its Russian mill.	This does not go to the proposition that Mondi SCP might dump A4 paper in the future. Mondi SCP and Mondi Group's Russia paper mill, Joint Stock Company Mondi Syktyvkar, are in the same world region, so the similarity of their prices would not appear to us to be noteworthy, and certainly not indicative of the proposition that the amount of the export price of Mondi SCP's A4 paper that may be exported to Australia in the future may be less than the normal value of that A4 paper. Further, in so far as the Commission thinks that similarity might have some relevance to the exercise, Joint Stock Company Mondi Syktyvkar did not export during the investigation period, a fact which does not suggest similarity.
(i)	Mondi SCP has not entered into annual or multiple year contracts with any Australian customers, such as is typically required by Officeworks and other larger entities.	With respect, relating this fact to the proposition that Mondi SCP may engage in dumping in the future makes no sense at all. We submit that it is more sensible to conclude that the avoidance of annual or multiple year contracts is testament to the fact that Mondi SCP does not want to be locked into long term arrangements, pursuant to which it might inadvertently engage in dumping, if and when market conditions were to change in either Europe or Australia or there were to be currency fluctuations affecting export prices?
(j)	Mondi SCP trades with Australian customers via forward orders and is not limited by contractual arrangements.	We repeat our previous comments with respect to Consideration (i).
(k)	Mondi SCP has increased domestic prices significantly since 2017 such that given its export price history, is still likely to be less than its normal value.	A finding that Mondi's avoidance of exportation to Australia at a time when its domestic prices are high is evidence that it may dump in the future is counterintuitive in the extreme. Would a reasonable person not conclude that this indicated the awareness of an exporter of the importance of seeking profit in its most profitable markets, and to not engage in discriminatory pricing in lower priced foreign markets?

¹⁴ In this regard we note our submissions below regarding Figure 14 in Report 463, which we submit gives a misleading impression of Mondi SCP's export prices and their timing in the investigation period.

¹⁵ Please refer to previous footnote.

[Footnotes from original]

We request the Review Panel's careful consideration of our submissions with respect to each of the factors cited by the Commission as set out above. Truly, we see nothing in those factors that are indicative of the likelihood of the prospect that Mondi SCP may dump A4 copy paper into Australia in the future, as a necessary prerequisite for the imposition of dumping measures against it.

With respect, we submit that the factors are a random collection of observations. The implications that are attributed to them by the Commission lack credibility or reason. Every observation selected by the Commission was inevitably then related to the prospect of future dumping, when the observations did not point in that direction at all. For the Commission, it seems that merely being an exporter of A4 paper that was found to have dumped the product concerned is enough. However, that circumstance cannot be enough, not least for the reason that the question of whether there may be dumping in the future is not even reached unless a finding of dumping has already been made against the exporter concerned. In passing Section 269TG(2) into law as it has done, the legislature must be taken to have required there to be something in addition to that dumping, or conceivably something about the nature of that dumping, such that the future dumping requirement could be satisfied. The fact of dumping in the investigation period, on its own, only satisfies the requirement that there was dumping in the investigation period.

In addition to our rebuttal of the factors cited by the Commission, we would like to take the Review Panel to the positive evidence that supports the proposition that the future dumping requirement cannot be satisfied with respect to Mondi SCP.

- (a) Mondi SCP reported its overall profitability for the period of investigation (2017) as required by the Exporter Questionnaire. Its overall profitability for all products (net profit on net sales of all products, not just A4 paper, to all markets) was **[CONFIDENTIAL TEXT DELETED - number]**%.¹⁰
- (b) The Commission has also calculated Mondi SCP profitability with respect to its domestic sales of like goods to the goods under consideration for the same period. Its domestic profitability on the particular products exported to Australia, being "**[CONFIDENTIAL TEXT DELETED – model type]**" and "**[CONFIDENTIAL TEXT DELETED – model type]**" was **[CONFIDENTIAL TEXT DELETED – number]**%.¹¹ All of Mondi SCP's domestic sales were profitable and in the ordinary course of trade, as shown in the below summary table:

Grade	2017 Q1	2017 Q2	2017 Q3	2017 Q4	2017
[CONFIDENTIAL TEXT DELETED – model types and numbers]					

- (c) Mondi SCP reported its capacity utilisation in the Exporter Questionnaire as follows:

	Previous financial year	Most recent financial year	Investigation period 1 January 2017 to 31 December 2017

¹⁰ See Mondi SCP Exporter Questionnaire, Annex A-5.2.

¹¹ See Commission margin calculations, Appendix 3 – OCOT (e) profit.

Production capacity* (eg. units, kg, tonnes) [A]	[CONFIDENTIAL TEXT DELETED – numbers]
Actual production in volume (eg. units, kg, tonnes) [B]	
Capacity utilisation (%) (B/A x 100)	

- (d) Paragraphs (a), (b) and (c) above present the picture of a highly profitable company enjoying very high capacity utilisation. Thus, the better view, based on the positive evidence available to the Commission at the time, was that Mondi SCP had no incentive to accept lower prices in one or other market when it could enjoy such highly profitable prices in its home market. “Dumping” in the sense of profitable but discriminatory pricing as between the domestic market and Australian exports was neither required nor even necessary, and would make no economic sense, when higher profits were available to Mondi SCP in the domestic market. “Dumping” in the sense of below cost sales was entirely improbable and could not even be suggested.
- (e) The following graph and table are presented for the purposes of the observations we make about them in the following paragraphs:
- the graph shows a comparison of Mondi SCP’s domestic and export prices, based on the company’s net invoice prices of its domestic sales compared with its FOB invoice prices of Australian sales; and
 - the table shows the volumes of the export shipments and the months in which they occurred.

[CONFIDENTIAL GRAPH DELETED – graph showing model types and prices]

[CONFIDENTIAL TABLE DELETED – table showing model types and volumes on monthly basis]

- (f) As shown by the chart in paragraph (e) above, at the time that Mondi SCP commenced accepting orders for A4 paper sales to its one and only Australian customer, the domestic and export prices (on a grade by grade basis) were similar. Two phenomena then occurred during the period, leading to a disparity between the domestic and export prices and the cessation of Mondi SCP’s exports to Australia:
- Mondi SCP’s domestic prices increased, due to favourable market conditions in Europe in general, which extended also to the Slovakian domestic market; and
 - there was a pronounced strengthening of the Euro against the Australian dollar, commencing in February, as shown below.¹²

¹²

Source - <https://www.xe.com/currencycharts/?from=EUR&to=AUD&view=1Y>



(g) The behavioural effect of these changes, as indicated by the chart and also by the table shown in paragraph 4, were that:

- Mondi SCP ceased exporting **[CONFIDENTIAL TEXT DELETED – model type]** altogether, with the last orders being fulfilled by way of exports from Slovakia in April 2017;
- Mondi SCP sought higher prices for **[CONFIDENTIAL TEXT DELETED – model type]**, consistent with the upwards trend in pricing in the Slovakian domestic market;
- the higher prices sought by Mondi SCP for that grade were requested of its Australian customer at a time when the Australian dollar was depreciating against the Euro;
- as a result of the above, Mondi SCP's prices were unacceptable to its Australian customer, leading to a shutdown of exports of that grade as well, in July 2017, apart from a final shipment in October arising from an order made in June (of only **[CONFIDENTIAL TEXT DELETED – number]MT**).

In summary, Mondi SCP entered the Australian market at the same price as its domestic market prices, then saw domestic market prices rise, stopped exporting one of the two grades it had only started exporting in January almost immediately (last shipment in April), sought and introduced increased prices, saw its domestic market price for the other grade it exported continue to rise, and received its last order for that grade in June. This was a transient experience for a company that on the evidence had every intention not to sell at dumped prices and carried out that intention by increasing its prices and then departing from the market.

(h) May we also draw the attention of the Review Panel to the fact that the dumping margin assessed for Mondi SCP over the period of investigation was 5.8%. In this regard the Attachments to *Verification note – Mondi's exemplary sales behaviour* ("the Verification Note") to which we have referred in the Application, are instructive.

- First, we quote from the email from [CONFIDENTIAL TEXT DELETED – customer name] to Mondi's Australian agent dated [CONFIDENTIAL TEXT DELETED – specific date].¹³

[CONFIDENTIAL TEXT DELETED – message containing market information and price indications]

At EUR[CONFIDENTIAL TEXT DELETED – number] per MT, CIF for initial orders of [CONFIDENTIAL TEXT DELETED – model type] shipped in January, the EUR[CONFIDENTIAL TEXT DELETED – number] referred to in the email amounted to a [CONFIDENTIAL TEXT DELETED – number]% price increase. We remind – the dumping margin assessed for Mondi SCP was 5.8%. This is positive evidence of Mondi SCP's intention *not to engage in dumping*.

- Second, we note the open letter from Mondi Paper Sales GmbH to customers dated 21 August 2017, which advised in part as follows:

We would like to announce a price increase of 4-7% for all our uncoated fine paper products which we invoice in Euro currency. Products invoiced in other currencies will see price increases of up to 8% as a result of the strengthening EURO versus other currencies during the past 3 months.

To comment on this, here we see an announcement of price increases applicable to Mondi SCP's exports to all markets. With respect to the Australian market, this announcement was made at a time when no orders were being received for Mondi SCP's products because the prices were already considered by Australian customers to be too high.¹⁴ And, again we remind that the dumping margin assessed for Mondi SCP was 5.8%. This is further positive evidence of Mondi SCP's intention *not to engage in dumping*.

- Third, we take issue with the prejudicial way in which Report 463 views and has interpreted Mondi SCP's October shipment of [CONFIDENTIAL TEXT DELETED – number]MT of grade [CONFIDENTIAL TEXT DELETED – model type]. Report 463 says the following:

*Despite the sudden export price increase in 2017 from Slovakia (which was the result of a considerably smaller shipment by volume and therefore less favourable pricing) the Commission considers that the previous 2017 prices are indicative of export prices from Mondi SVK.*¹⁵

The premise that this shipment involved "*less favourable pricing*" because it was a "*considerably smaller shipment*" has no basis in any evidence of which we are aware. Indeed the order was placed by [CONFIDENTIAL TEXT DELETED – customer name] on [CONFIDENTIAL TEXT DELETED – specific date] with a per MT CIF price which was the same

¹³ Verification Note, Attachment 1.

¹⁴ The last order had been placed in June 2017, for [CONFIDENTIAL TEXT DELETED – number]MT, ultimately shipped in October 2017.

¹⁵ Report 463, Section 9.3.2.3.

as Mondi SCP's Australian sale shipped in July 2017. Mondi SCP did not accept any order after June 2017, as it had *"priced itself out of the market"*.¹⁶

Further, Report 463 appears to use the fact of this "outlier" exportation against Mondi SCP to extend out the period of Mondi SCP's involvement in the market, presumably to make it appear that Mondi SCP had the requisite "responsibility" for injury to the Australian industry and to improve the prospects of satisfying the future dumping requirement as against Mondi SCP. For example, the Commission states:

*The volumes of the goods exported by Mondi SVK ceased at the end of 2017.*¹⁷

We repeat that the October shipment of **[CONFIDENTIAL TEXT DELETED – number]**MT was ordered by **[CONFIDENTIAL TEXT DELETED – customer name]** on **[CONFIDENTIAL TEXT DELETED – specific date]**. That was the last order Mondi SCP accepted for Australia. This is further positive evidence of Mondi SCP's intention *not to engage in dumping*.

- (k) By reason of the above facts and circumstances, it is evident that Mondi SCP used its domestic prices as a reference point for its sales to Australia, had no qualms about increasing export prices, and was unconcerned about an inability to make export sales to Australia because its prices were too high. Indeed, according to **[CONFIDENTIAL TEXT DELETED – customer name]**, Mondi SCP *"pric[ed] [itself] out of the market"*. Mondi SCP's exports of its two grades were shut down in April 2017 and July 2017 respectively, apart from a final outstanding shipment of only **[CONFIDENTIAL TEXT DELETED – number]**MT that had been ordered on **[CONFIDENTIAL TEXT DELETED – specific date]** but was not shipped until October that year. Mondi SCP can be seen to have been increasing its prices in EUR terms when the sliding value of the Australian dollar made its prices more expensive for Australian buyers without them being increased at all.
- (l) At all times Mondi SCP was taking action to increase its export prices to a level that could not be considered to be dumped. The increases referred to in the evidence, of **"[CONFIDENTIAL TEXT DELETED – number]%"** and from "4% to 7%", are larger than the dumping margin assessed against Mondi SCP. Had these prices been accepted by the market, and had sales volumes been maintained, the dumping picture over a full 12 month period would have been quite different. And, all of this took place at a time when there was no anti-dumping investigation underway. There was nothing contrived or opportunistic about Mondi SCP's price behaviour.¹⁸ Mondi SCP's behaviour was considered, real and disciplined. Exports ceased because Mondi SCP had no incentive to offer prices to Australia or even supply Australian customers at prices that were less than its European prices, where it enjoyed conditions of high profitability, high demand and high capacity utilisation.
- (m) A contrarian's view – and the view often used as an explanation for dumping behaviour – is that an exporter that has already recovered its fixed and variable costs in its domestic sales revenue only has to recover its variable costs in making export sales, thereby allowing it to undercut its competitors in the export market concerned. Whether or not any company thinks that way, it is at least clear that Mondi SCP does not. The evidence – "positive evidence" in WTO terms – is

¹⁶ See above at 13.

¹⁷ *Ibid.*

¹⁸ This is to be contrasted with the Commission's finding regarding imports from Finland, Russia and Korea. The Report states that exports from those countries *"ceased in 2018, following the imposition of securities"*. Mondi SCP's exports had already ceased, long before then, not in response to coercive action by the Commission but because it simply did not wish to supply Australian markets at lower rates of profitability than were available to it in the Slovakian market.

that Mondi SCP was making a lot of money on its domestic sales, could “dump” A4 paper into Australia if it wanted to, *but expressly chose not to do so*. It increased its prices, thereby rendering its exports non-competitive. Its orders ceased in the first six months of what turned out to be a 24 month period of inquiry by the Commission, while all other exporters under investigation continued to export throughout the whole of 2017 and in 2018, and only ceased, according to Report 463 “*following the imposition of securities*”.

We submit that the inferences to be drawn from the above facts are that it was not correct or preferable to conclude that the future dumping requirement was satisfied in the case of our client Mondi SCP. In the exercise of judgement called for by the words of Section 269TG(2), the proposition that Mondi SCP’s future exports may not be dumped had and still has a much higher likelihood than the contrary proposition. That contrary proposition, if applied against Mondi SCP, could only be based on the biased apprehension that any exporter may dump goods into Australia, and that every exporter does.

In our respectful opinion, that is not a basis that the law would recognise.

B Mondi SCP’s exports did not cause material injury

This claim constitutes the second ground of our client’s Application in this review.

We feel that the grounds are fully-formed and well-articulated in the Application, to the extent that the Review Panel should need no further elaboration. Notwithstanding that, we do wish to add the following submissions thereto.

On pages 10, 11 and 12 of the Application we set out the factual findings made by the Commission with respect to Mondi SCP’s fairly short engagement with the Australian market in 2017. That is by way of background to the two specific points that we have argued on our client’s behalf, namely:

- that the injury and causation finding is not based on facts, instead it is based on assumptions and remote possibilities; and
- that Mondi SCP’s are not appropriately cumulated with other exports, in the circumstances of this case.

We wish to add to each of these points as now follows.

1 That the injury and causation finding is not based on facts, instead it is based on assumptions and remote possibilities

A finding that dumping in a period that was thoroughly investigated, and in which no material injury was found to have been caused by imports, nonetheless caused material injury in a later period, being a period that was not thoroughly investigated, causes surprise. When it is also disclosed that the Australian industry’s net sale revenue in the earlier period (the investigated period) was assessed to have been lessened by only 0.5% by the dumping, but by 2.0% in the later, uninvestigated period, that surprise turns into alarm.

We do not deny that injury in a period subsequent to the actual investigation period in which dumping was found to have occurred can be a legitimate basis for a finding that injury was caused by dumping in that later period, and can lead to the imposition of dumping duties on that basis.¹⁹ However that does

¹⁹ See WTO panel report, *Argentina – Definitive anti-dumping duties on poultry from Brazil* (WT/DS241/R) at para 7.287.

not displace both the express terms of Section 269TAE(2AA) of the Act, nor the legal philosophy that underpins that Section. It provides as follows:

A determination for the purposes of subsection (1) or (2) must be based on facts and not merely on allegations, conjecture or remote possibilities.

The suggestion that “dumped” prices had a 0.5% effect on revenue in one period but then continued on to have a much greater effect on revenues in a later period readily attracts the accusation that it cannot be sufficient enough evidence of the causation of injury in that later period, and that it is conjectural in nature. This is because dumped imports cannot have an effect forever, and because the challenge of finding a much later effect that is not conjectural or remote becomes greater and greater as time goes by. The passage of time introduces many variables. The factors that impacted upon the market in the later period do not form part of the verified body of evidence. Linking one stimulus, namely dumping in the 2017 market, with injury in the market at a later time, is difficult and, we say in this case, impossible.

What is clear on the face of Report 463 is that the main and we would think most important indications of injury point away from the conclusion that the Australian industry was injured in 2018, at all or by the goods from the countries under investigation:

- the Australian market size increased in 2018, as did Australia Paper’s share of that market;
- Australian Paper’s sales volume increased significantly in 2018 as compared to 2017, to the tune of 18%;
- there was a massive decrease in the volume of imports from the countries against which dumping duties had already been imposed, and from the countries under investigation (and, of course, no imports at all from Slovakia since July and October 2017);
- there was an increase in imports from other countries in 2018, the total volume of which exceeded the volume of the goods from the countries under investigation;
- Australian Paper’s revenue increased in 2018 as compared to 2017; and
- Australian Paper’s profitability increased.

All of these things would ordinarily signal that things were going very well for the Australian industry, and that it was actually doing better in 2018 than it was in 2017. Instead, Report 463 has interpreted them in an opposite way, or has found something else that countermands those indications of good financial health. The root cause of this appears to be a “counterfactual” analysis which maintains that Australian Paper lost 2% in revenue in 2018 because of dumping in 2017.

We submit that that conclusion is tenuous, and conjectural in the terms of Section 269TAE(2AA), when these things are considered:

- it appears that Australian Paper’s costs data from 2018 was not verified, indeed it is not clear whether it was even obtained;²⁰

²⁰ Report 463, Section 8.6.1, third dot point.

- “sales data” was used to work out the “cost of goods sold” in 2018, apparently by way of simply applying a percentage increase to the “cost of goods sold”;²¹
- the Commission approaches the task on the basis that because Australian Paper does not claim volume injury, the appropriate counterfactual, and therefore the only basis for determining whether or not Australian Paper was injured by dumped imports, is one that assesses the purported impact of the dumped imports on revenue;²²
- no account was taken of the prices of imports in 2018 from the countries not under investigation.²³

With respect, we submit that the injury and causation findings in Report 463 present as being tenuous and contrived. They lack substance. They were formed by omitting important detail. They stretch the imagination. We expect the Review Panel will inquire of the Commission as to whether there is any better justification than that set out in Report 463. How that could be achieved is not clear. If better justification cannot be provided, the decision that dumped imports caused material injury cannot be the correct or preferable decision, and the measures should be revoked.

2 That Mondi SCP’s are not appropriately cumulated with other exports, in the circumstances of this case.

Section 269TAE(2C) of the Act provides that the Minister should only consider the cumulative effect of the exportations under investigation if certain criteria are met. One of these is that:

...it is appropriate to consider the cumulative effect of those exportations, having regard to:

- (i) the conditions of competition between those goods; and*
- (ii) the conditions of competition between those goods and like goods that are domestically produced.*

We reiterate the matters set out in our client’s Application with respect to this ground in support of the proposition that its exports should not be cumulated with those of the other countries under investigation. Mondi SCP did not compete in the market in the same way as the other exporters. Its participation was transient. It lifted its prices. It was no longer competitive with the prices in the market, and did not intend to be competitive with those prices, very soon after it commenced exporting. It accepted its last order on [CONFIDENTIAL TEXT DELETED – specific date]. In contrast, the other exporters seem to have been a permanent fixture in the market, selling at prices that were competitive with the Australian industry over the full 24 months investigated by the Commission.²⁴

²¹ *Ibid*, Section 8.6.2, third paragraph.

²² *Ibid*, Section 8.6.3, second paragraph.

²³ *Ibid*. See the headings Section 8.8.1, Figure 10, and the headings in Section 8.13, none of which mention other import sources.

²⁴ *Ibid*, see Figure 10.

Please do not hesitate to contact us should the Review Panel require any further information or clarification of these submissions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daniel Moulis', with a long horizontal flourish extending to the right.

Daniel Moulis
Partner Director

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Anti-Dumping Authority

**Coated paper
from
Austria, Belgium,
Finland, France, Germany,
Italy, Japan, the Republic of Korea,
the Netherlands, Switzerland
and Taiwan**

Report no. 185

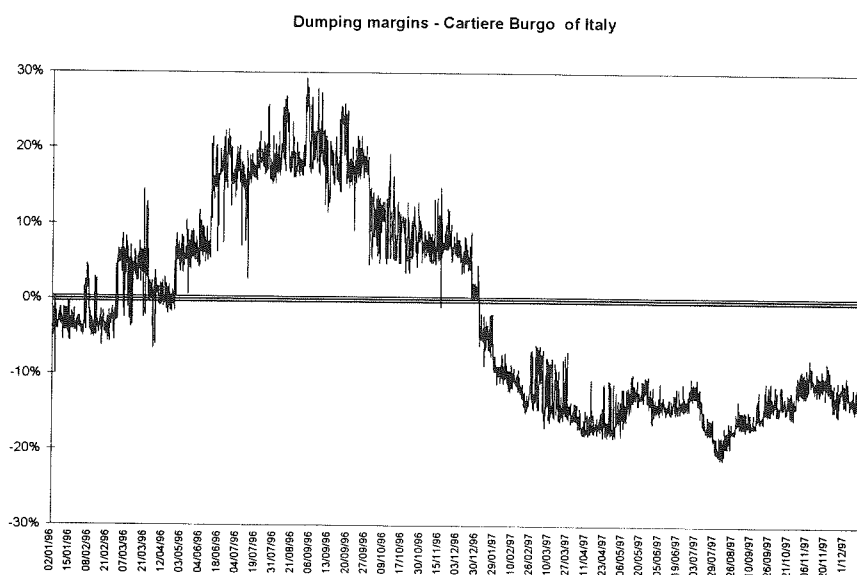
March 1998

The Authority is satisfied that in the absence of anti-dumping action future exports from these three companies in Germany may be dumped.

Italy

Approximately 80 per cent of exports of coated paper to Australia from Italy in 1996 were dumped. In 1997, however, no exports of coated paper from Cartiere Burgo of Italy were dumped, see Figure 1. The export prices of coated paper from Italy rose throughout 1997. There is no evidence that export prices may fall in the foreseeable future. The Authority is not satisfied that future exports of coated paper from Italy may be dumped.

Figure 1



Japan

Throughout 1996 and 1997 coated paper was exported to Australia from Japan at high dumping margins. There is no evidence to suggest that dumping from this country will cease in the foreseeable future.

The Authority is satisfied that future exports from Japan may be dumped.

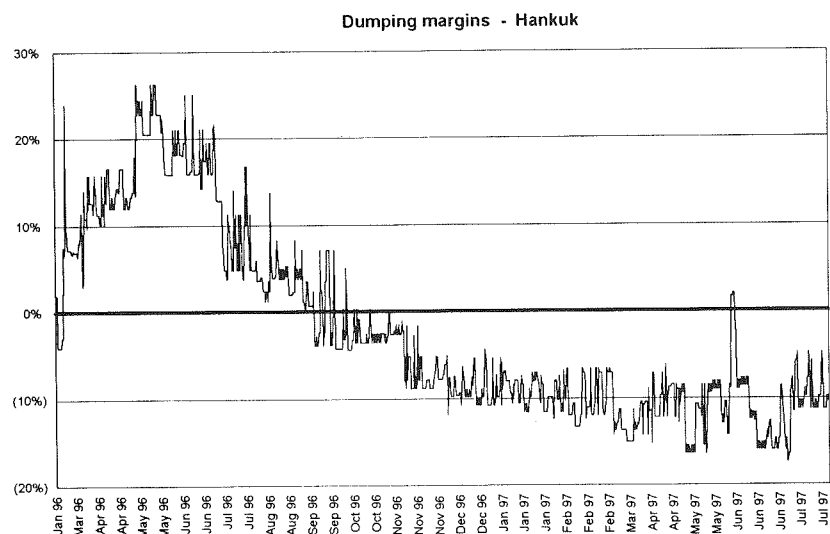
Korea

In 1996 most imports from Korea from Hankuk, Hansol, Kye Sung and Shinmoorim were dumped at significant margins.

Normal values for Hankuk, when expressed in Korean won, fell significantly in the June quarter 1996 and have remained relatively low. Normal values when expressed in

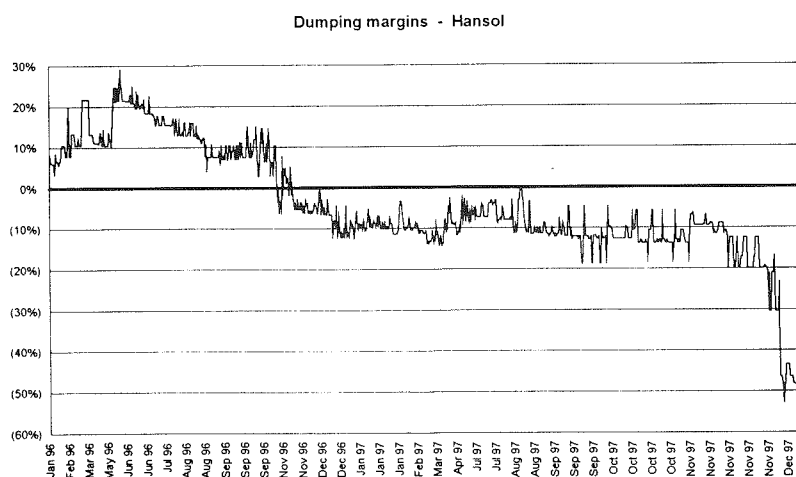
United States dollars (the currency in which export prices are denominated) have tended to fall steadily over the inquiry period. In contrast export prices in 1997, expressed in United States dollars, were stable. Consequently in 1997 only a very small volume of exports by Hankuk were dumped, see Figure 2.

Figure 2



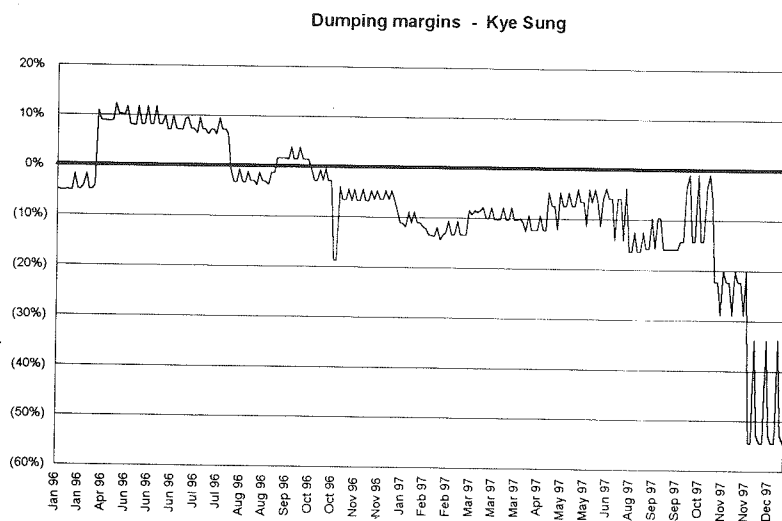
No exports by Hansol in 1997 were dumped, see Figure 3. While normal values when expressed in Korean won rose slightly in the December quarter 1997, normal values when expressed in United States dollars fell significantly. Export prices, expressed in United States dollars, were stable.

Figure 3



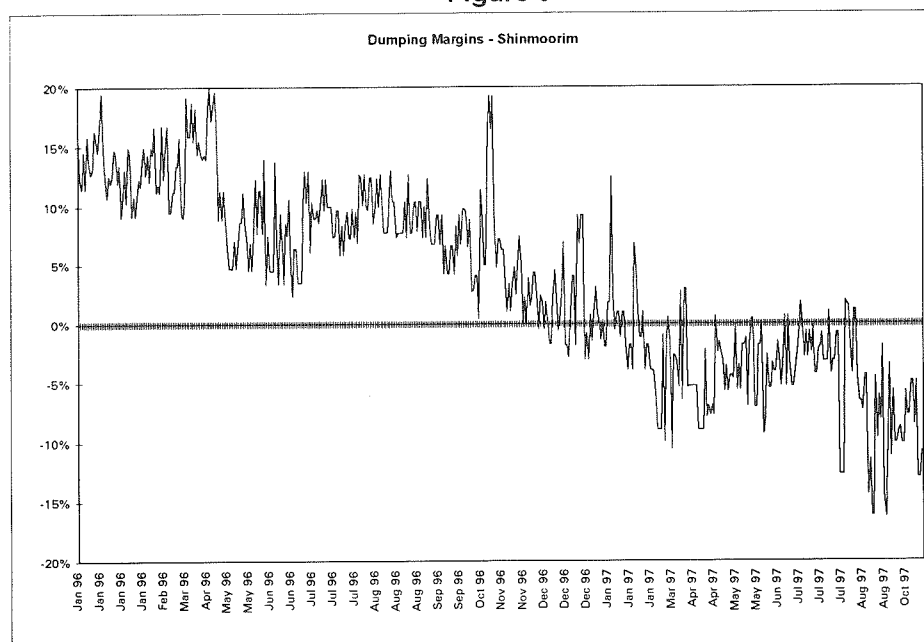
Exports from Kye Sung in 1997 were not dumped. Normal values, expressed as either Korean won or United States dollars, have tended to fall while export prices have been stable. As a result there has been a trend away from dumping, see Figure 4.

Figure 4



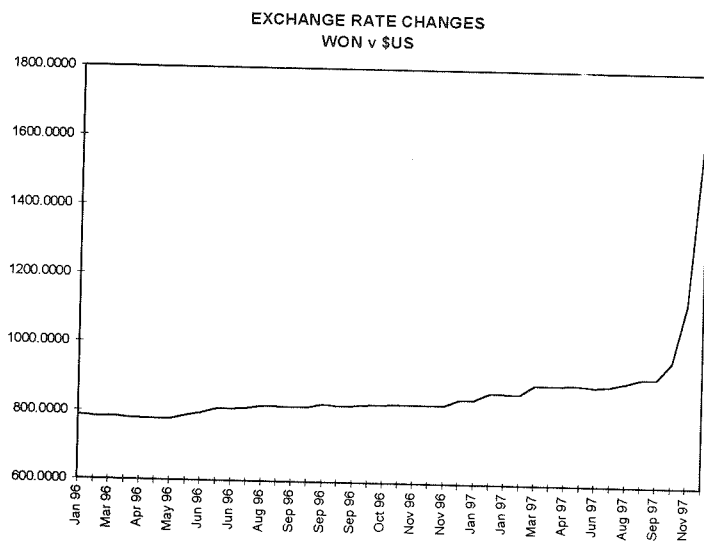
In 1997 almost no exports by Shinmoorim were dumped. As can be seen in Figure 5, which details dumping margins for exports by Shinmoorim over the inquiry period, there has been a trend away from dumping. This reflects a decline in normal values (expressed in United States dollars—the currency in which export prices are denominated) while export prices have been relatively stable.

Figure 5



In the latter part of 1997, the value of the Korean won fell significantly relative to the United States dollar, as illustrated in Figure 6 below. The graph indicates that the devaluation of the Korean won was gradual throughout 1997 until November. It then moved very abruptly against the United States dollar and by the end of December its value had almost halved compared to earlier months.

Figure 6



The Authority was able to obtain information on the costs to make and sell coated paper in Korea for the 11 months ended November 1997. As the rapid change in the value of the won did not occur until November its effect is not reflected in the information on costs available to the Authority. The Authority understands that many of the raw materials used in the production of coated paper in the latter part of 1997 and early 1998 were purchased at prices established before the rapid devaluation in November. This would tend to delay any impact from the devaluation on costs and domestic prices.

Parties to the inquiry put opposing views to the Authority on the possible impact of the devaluation on future exports of coated paper from Korea.

On the one hand some argued that it would increase the potential for dumping in the future as companies would be in a better position to dump. They argued that the devaluation of the won may have increased the cost of some imports, such as pulp which is a major cost item and which must be imported by the Korean manufacturers, and that this increase in costs may have caused domestic prices (and in turn normal values) to rise. The Authority understands that at least one Korean paper manufacturer purchased substantial quantities of pulp prior to the devaluation. This is likely to delay the impact of the devaluation on that company's costs.

At the same time, it was argued, exporters may lower the price of exports denominated in, say, US dollars to capture a greater share of the international market and to earn the foreign currency necessary to pay for imported inputs.

The alternative view was that the devaluation would mean that companies would not dump in the future. Export prices would not change or would be increased to earn foreign currency. For example it was reported in the media that a large Korean conglomerate has increased its export prices of motor vehicles because of the devaluation of the won.

In examining export prices and normal values for the four Korean companies in the latter part of 1997, the Authority found a common thread. Export prices, in United States dollars (the currency in which export prices are denominated) essentially did not change throughout 1997, whereas normal values, expressed in United States dollars declined—particularly in November and December when they declined substantially.

Looking at developments in terms of the Korean currency, the won, while normal values (expressed in won) rose slightly during 1997, export prices (expressed in won) rose substantially. This suggests that while, as a result of the devaluation of the won, the costs incurred to date by Korean exporters have increased, this increase has been significantly less than the increase in export prices.

Information on the prices of Korean exports since the devaluation indicate that prices, expressed in Australian dollars, rose slightly in the December quarter 1997.

While the full effect of the devaluation on domestic and export prices of coated paper are yet to be realised there is no evidence that compels the Authority to believe that future dumping will occur.

The Authority is not satisfied that future exports by Hansol, Hankuk, Kye Sung and Shinmoorim may be dumped.

Conclusion

The Authority is satisfied that coated paper will continue to be exported at dumped prices from a number of sources and that it is likely that the Australian industry's selling prices will be suppressed and depressed and that it will continue to record substantial losses. It is therefore satisfied that there is a threat of material injury from future dumped exports.

The Authority will therefore recommend that the Minister take anti-dumping action against future imports from Austria (Leykam and SCA); Finland (Enso and Metsa-Serla); Germany (Hannover, Nordland and Stora) and Japan.

It will also recommend that he not take action against exports from Italy and Korea.