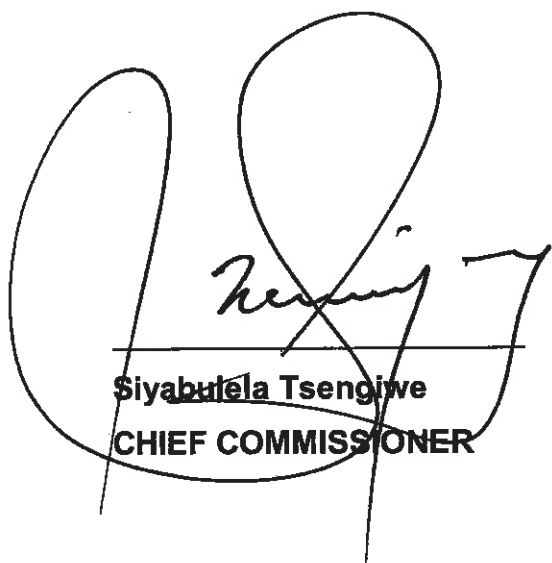


**Report No. 512**

**INVESTIGATION INTO THE ALLEGED DUMPING OF PORTLAND  
CEMENT ORIGINATING IN OR IMPORTED FROM PAKISTAN: FINAL  
DETERMINATION**

The International Trade Administration Commission of South Africa herewith presents  
its **Report No. 512: INVESTIGATION INTO THE ALLEGED DUMPING OF  
PORTLAND CEMENT ORIGINATING IN OR IMPORTED FROM PAKISTAN: FINAL  
DETERMINATION**



**Siyabulela Tsengiwe**  
**CHIEF COMMISSIONER**

**PRETORIA**  
**24/11/2015**

# INTERNATIONAL TRADE ADMINISTRATION COMMISSION OF SOUTH AFRICA

## INVESTIGATION INTO THE ALLEGED DUMPING OF PORTLAND CEMENT ORIGINATING IN OR IMPORTED FROM PAKISTAN: FINAL DETERMINATION

### SYNOPSIS

On 12 August 2014, International Trade Administration Commission of South Africa (the Commission) initiated the investigation into the alleged dumping of Portland cement originating in or imported from Pakistan. Notice of initiation of the investigation was published in Notice No. 675 in *Government Gazette* No. 37915 dated 22 August 2014.

The application was lodged by Afrisam (South Africa) (Proprietary) Limited, Lafarge Industries South Africa (Proprietary) Limited, NPC Cimpor (RF) (Proprietary) Limited and PPC Limited on behalf of the SACU industry.

The investigation was initiated after the Commission considered that there was *prima facie* evidence to show that the subject product was being imported into the SACU at dumped prices, causing material injury to the SACU industry.

On initiation of the investigation, the known manufacturers/exporters of the subject product in Pakistan and the trade representative of Pakistan were sent foreign manufacturers/exporters questionnaires to complete. Importers of the subject product were also sent questionnaires to complete.

After considering all interested parties' comments and taking the verified exporters' and importers' information into account, the Commission made a preliminary determination that the subject product, originating in or imported from Pakistan, was being dumped on the SACU market, causing material injury to the SACU industry.

As the Commission considered that the SACU industry would continue to suffer material injury during the course of the investigation if provisional payments were not imposed, it decided to request the Commissioner for South African Revenue Service (SARS) to impose provisional measures on imports of the subject product for a period of 6 months.

Provisional measures were imposed on the subject product originating in or imported from Pakistan through Notice No. R.391 published in *Government Gazette* No. 38783 on 15 May 2015.

The Commission's reasons for its preliminary determination are contained in its Preliminary Report No. 495. The report was made available to interested parties who were invited to comment on the report.

Based on the details as contained in the Commission's preliminary report and the comments received, the Commission made a final determination before "essential facts" that it was considering that the subject product was being dumped on the SACU market and that, as a result, the SACU industry was suffering material injury.

Essential facts letters were sent out to all interested parties, informing them of the "essential facts" which were being considered by the Commission, and inviting interested parties to comment.

After considering all parties' comments on the essential facts letter, the Commission made a final determination that Portland cement originating in or imported from Pakistan was dumped onto the SACU market, causing material injury to the SACU industry, and decided to recommend to the Minister of Trade and Industry that the following definitive anti-dumping duties be imposed on the imports of the subject product originating in or imported from Pakistan:

<b>Tariff subheading</b>	<b>Product</b>	<b>Manufacturer</b>	<b>Amount of duty</b>
2523.29	Portland Cement	Lucky Cement Limited	14.29%
		Bestway Cement Limited	77.15%
		D.G Khan Cement Limited	68.87%
		Attock Pakistan Cement Limited	63.53%
		All other exporters (excluding Lucky Cement Limited, Bestway Cement Limited, D.G Khan Cement Limited and Attock Pakistan Cement Limited)	62.69%

# **1. APPLICATION AND PROCEDURE**

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## **1.1 LEGAL FRAMEWORK**

This investigation has been conducted in accordance with the International Trade Administration Act, 2002, and the International Trade Administration Commission of South Africa Anti-Dumping Regulations (ADR), having due regard to the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the Anti-Dumping Agreement).

## **1.2 APPLICANT**

The application was lodged by Afrisam (South Africa) (Proprietary) Limited (Afrisam), Lafarge Industries South Africa (Proprietary) Limited (Lafarge), NPC Cimpor (RF) (Proprietary) Limited (NPC) and PPC Limited (PPC), (the Applicant) on behalf of the SACU industry.

Letters of support were received from the following interested parties:

- Safika Cement Holdings (Pty) Ltd;
- AfriPack (Pty) Ltd;
- Nampak Sacks;
- Kwikbuild Cement;
- Sephaku Cement; and
- Taurus Packaging (Pty) Ltd.

## **1.3 DATE OF ACCEPTANCE OF APPLICATION**

The Applicant, through its representative, submitted a consolidated confidential application as well as individually completed confidential applications for each of the 4 manufacturers, in order to enable the Commission to verify the information. In accordance with the provisions of the ITA Act, the Applicant provided non-confidential version of the consolidated application, including indexed figures where information was susceptible to summary, to be distributed to interested parties. Each individual manufacturer

also provided a non-confidential version of its individual confidential applications. The Applicant however indicated that it could not provide indexed figures in the individual non-confidential versions as well, since the small number of applicants who furnished information, would cause confidential information to be disclosed.

After evaluation and consideration, the application was accepted by the Commission as being properly documented in accordance with ADR 21 on 19 August 2014.

#### **1.4 ALLEGATIONS BY THE APPLICANT**

The Applicant alleged that imports of the subject product, originating in or imported from Pakistan were being dumped on the SACU market, thereby causing material injury and a threat of material injury to the SACU industry. The basis of the alleged dumping was that the goods were being exported to SACU at prices less than the normal value in the country of origin.

The Applicants further alleged that as a result of the dumping of the subject product from Pakistan they are suffering material injury in the form of:

- (a) Price undercutting;
- (b) Price suppression;
- (c) Decline in gross and net profit;
- (d) Decline in market share;
- (e) Decline in output;
- (f) Decline in productivity;
- (g) Decline in return on investment;
- (h) Decline in capacity utilisation;
- (i) Decline in cash flow;
- (j) Loss of employment; and
- (k) Decline in growth.

#### **1.5 INVESTIGATION PROCESS**

The application was submitted on 15 May 2014. The information submitted by

PPC was verified on 02 June 2014, Lafarge on 03 June 2014, Afrisam on 04 June 2014 and NPC on 10 June 2014.

The trade representative of the country concerned was notified of the Commission's receipt of a properly documented application on 19 August 2014, in terms of ADR 21.

The Commission initiated an investigation into the alleged dumping of Portland cement originating in or imported from Pakistan pursuant to Notice No. 675 which was published in *Government Gazette* No. 37915 on 22 August 2014.

All known interested parties were informed of the initiation of the investigation and provided with the relevant questionnaires and the non-confidential version of the application.

## **1.6 INVESTIGATION PERIOD**

The investigation period for dumping was from 1 January 2013 to 31 December 2013. The injury investigation involved evaluation of data for the period 1 January 2010 to 31 December 2013.

### ***Comments by the exporters on the period of investigation for injury***

*The exporters indicated that they have noticed that the investigation period is 4 years, as opposed to the normal 3 years. They requested that the Commission provide reasons for deviating from the normal 3 year period. The exporters further indicated that if the period used for injury assessment is 2010, 2011, 2012 and 2013, the year 2010 is problematic as in 2010 South Africa hosted the soccer world Cup and construction took place before and until 2010. Due to the construction there was a huge demand for cement. The exporters also indicated that using 2010 as a base year for injury assessment purposes results in seriously distorted figures when assessing injury. This is because after 2010 the demand for cement declined as the 2010 soccer world cup infrastructure projects had been mostly completed and the market returned to normal. This creates the impression that the domestic industry suffered significant injury as a result of alleged dumped imports. If 2010 is*



*excluded from the injury assessment by restating the figures beginning in the year 2011-2013, there is no significant injury.*

***Comments by the Applicant***

*The Applicant indicated that the injury investigation period as presented in the application complies with the Anti-Dumping Regulations. The assertion that there is a deviation is incorrect.*

***Commission's consideration***

The Commission considered that with regard to the investigation period, the ADR provides as follows: "Investigation period for injury is the period for which it is assessed whether the SACU industry experienced material injury. This period shall **normally** cover a period of three years plus information available on the current financial year at the date the application was submitted, but may be determined by the Commission as a different period provided that the period is sufficient to allow for fair investigation..."

This is therefore clearly an issue where the Commission has discretion.

The exporters' argument that the use of 2010 year as a base year is problematic does not hold water. The exporters correctly stated that the demand for the subject product increased as a result of the Fifa world cup which was hosted in 2010. The construction work which could have led to increased cement imports took place between 2007 and 2009, with the last of the stadiums being completed by January 2010.

The Commission considered the claim that if the year 2010 is excluded as a base year, then the injury won't be as prominent. The Commission however found that if 2011 is used as a base year, there would still be sufficient evidence of material injury. As indicated in the tables below, there's still a decline in cash flow, employment, market share, output and capacity utilisation. There is also an increase in inventory. Therefore, the notion that there is no material injury to the SACU industry is baseless. Using 2011 as a base year for the purpose of the trend injury analysis, the SACU industry

would still experience material injury with regard to price suppression, a decline in cash flow and employment, increase in inventories, and the inability to increase its market share in light of the growth of the SACU market during the period of investigation.

**Price effects of Subject Imports (bagged cement) using 2011 as base year**

		2011	2012	2013
Average dumped import price (fob): Pakistan	R/tonne	100	113	125
Average price of domestic product (ex-factory) (Price depression)	R/tonne	100	102	103
<b>Price undercutting</b>	<b>Percentage</b>	<b>100</b>	<b>72</b>	<b>179</b>
<b>Cost as a % of selling price (Suppression)</b>	<b>Percentage</b>	<b>100</b>	<b>103</b>	<b>101</b>

**Examination under Article 3.4 (bagged cement) using 2011 as base year**

Variable	Unit of measurement	2011	2012	2013
Sales value	R'000	100	100	105
Sales volume	Tonnes	100	98	102
<b>Inventories</b>	<b>Tonnes</b>	<b>100</b>	<b>132</b>	<b>134</b>
<b>Output</b>	<b>Tonnes</b>	<b>100</b>	<b>98</b>	<b>99</b>
<b>Market share of the Applicant</b>	<b>Percentage</b>	<b>100</b>	<b>95</b>	<b>91</b>
Market share of dumped imports: Pakistan	Percentage	100	200	269
Market share of other imports	Percentage	100	17	17
<b>Capacity utilisation</b>	<b>Percentage</b>	<b>100</b>	<b>98</b>	<b>98</b>
<b>Employment</b>	<b>Number of employees</b>	<b>100</b>	<b>97</b>	<b>90</b>
Wages	R/employee	100	105	105
Productivity	Units/employee	100	101	111
Profit	Gross profit/tonne	100	96	112
<b>Cash flow</b>	<b>R'000</b>	<b>100</b>	<b>77</b>	<b>91</b>
Return on investment	Percentage	100	112	119
Total capital investment in subject product	R'000	100	101	103
Growth in SACU market	Tonnes	100	103	112
Growth of the applicant	Tonnes	100	98	101

### **Comments by exporters on the essential facts letter**

*The exporters indicated that extensive comments were made on the fact that the Commission accepted a four year period for injury assessment and indicated that they requested the Commission to provide them with reasons for deviating from a 3 year period.*

*They further indicated that when one considers the period of investigation for injury using the normal 3 year period, injury is significantly reduced. They also stated that the Commission has stated repeatedly that injury still remains for the 3 year period but refused to provide them with re-stated injury information for the 3 year period, despite numerous requests. The exporters also stated that the statement of injury present in the essential facts letter, when looking at a 3 year period appears to show that the Commission is calculating the injury incorrectly; when re-stating the injury the Commission has put no argument forward to show why the exporters' calculations are wrong. The exporters indicated that they are still faced with the simple assertion that injury still prevails even when re-stating the injury. The exporters further stated that they are unable to ascertain how the Commission arrived at the conclusion without the re-stated injury indicators.*

### **Commission's consideration**

*The exporters provided their own indexed figures using 2011 as the base year and the Commission responded, indicating that this indexing, with the exception of price suppression and cash flow, confirmed the Commission's statement that the SACU industry would still experience material injury with regard to price suppression; a decline in cash flow and employment; and increase in inventories and the inability to increase its market share in light of the growth of the SACU market during the period of investigation should 2011 be used as the base year. Since the Commission's indexed information differed from that provided by the exporters with regard to price suppression and cash flow, the Commission provided the exporters with the indexed information for these two injury factors, using 2011 as the base year.*

### **Comments by Applicant on essential facts letter**

*The Applicant stated that Anti-Dumping Regulation 1 grants the Commission an express discretion to choose a different injury investigation period as apparent from the statement "but [the injury investigation period] may be determined by the Commission as a different period....." It further indicated that the granting of such discretion is consistent with the World Trade Organisation agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the Anti-Dumping Agreement ) which does not prescribe the period over which injury should be assessed.*

*The Applicant stated that Regulation 1 contains a proviso on setting the injury investigation period, namely that the chosen period should be "sufficient to allow for fair investigation". The Applicant submitted that a longer period of investigation makes fair investigation as it provides longer term information to an investigation authority, which minimises the risk of basing decisions on short term anomalies.*

### **Commission's consideration**

The Commission noted that the WTO Committee on Anti-dumping Practice, in a document titled "RECOMMENDATION CONCERNING THE PERIODS OF DATA COLLECTION FOR ANTI-DUMPING INVESTIGATIONS" dated 16 May 2000 provided the following guidance:

"Although the Agreement on Implementation of Article VI of GATT 1994 refers to the period of data collection for dumping investigations when it refers to the "period of investigation", it does not establish any specific period of investigation, nor does it establish guidelines for determining an appropriate period of investigation, for the examination of either dumping or injury."

It is therefore clear that the Anti-Dumping Agreement does not prescribe what the period of investigation should be or how it should be determined.

The recommendation further provides as follows:

“The Committee considers that guidelines for determining what period or periods of data collection may be appropriate for the examination of dumping and of injury would be useful. The Committee also recognizes, however, that such guidelines do not preclude investigating authorities from taking account of the particular circumstances of a given investigation in setting the periods of data collection for both dumping and injury, to ensure that they are appropriate in each case.

In light of the foregoing considerations, the Committee recommends that with respect to original investigations to determine the existence of dumping and consequent injury

1. As a general rule:

(a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months,<sup>1</sup> ending as close to the date of initiation as is practicable;

(b) the period of data collection for investigating sales below cost<sup>1</sup>, and the period of data collection for dumping investigations, normally should coincide in a particular investigation;

*(c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation; (own underlining)*

(d) In all cases the investigating authorities should set and make known in advance to interested parties the periods of time covered by the data collection, and may also set dates certain for completing collection and/or submission of data. If such dates are set, they should be made known to interested parties.”

It is therefore clear that the WTO guidance places emphasis on the importance of a period not being too short rather than being too long.

With regard to the investigation period, the ADR provides that: “Investigation period for injury is the period for which it is assessed whether the SACU industry experienced material injury. This period shall **normally** cover a period of three years plus information available on the current financial year at the date the application was submitted, but may be determined by the Commission as a different period provided that the period is sufficient to allow

for fair investigation...”

This is therefore clearly an issue where the Commission has discretion. The ADR further already provides that in normal circumstances the POI could be longer than 3 years, depending on when the application is submitted and also on the financial year of the applicant. The ADR further emphasizes that the importance is that the period must be sufficient to allow for fair investigation. The Commission further noted that in a number of investigations conducted in recent years, the POI was more than 3 years.

***Comments by exporters on essential facts letter***

*On 28 September 2015 the Commission received comments from exporters stating that the Commission’s essential facts letter failed to meet the necessary requirements and the standards set out by the WTO. They stated that the information in the essential facts letter appears to only contain information in support of the Commission’s decision and does not include information provided that contradicts the position being put forward by the Commission. The exporters also stated the essential facts letter ignores many of the most important facts raised in the course of the investigation.*

***Commission’s consideration***

The Commission considered the comments by the exporters but is of the opinion that its essential facts letter fully meets the WTO standards.

The Commission noted that as indicated in the Argentina — Ceramic Tiles panel, Article 6.9 of the Anti-Dumping Agreement does not prescribe the manner in which the investigating authority is to comply with the disclosure obligation. Furthermore, the ADR 37 merely provides that all interested parties will be informed of the essential facts to be considered by the Commission, that interested parties will receive 7 days to comment on the essential facts and that the Commission will take all relevant comments on the essential facts into consideration in its final finding.

The purpose of the essential facts letter is therefore (a) to inform interested

parties of the essential facts under consideration; and (b) to invite interested parties to comment in order to defend their interests. Furthermore, the Panel in Argentina — Poultry clearly found that what should be included in the disclosure are facts and not the reasoning of the Commission.

It should be noted that it was specifically stated in the Commission's essential facts letter that "in addition to the information contained in the Commission's preliminary determination report, the Commission noted the comments by the exporters as well as the response by the Applicant." The approach followed by the Commission was not to repeat those essential facts that are substantially the same as those contained in its Preliminary Report. The Commission dealt extensively with some of the factors which were raised by the exporters in its Preliminary Report and through various stages of the investigation. Therefore the exporters' notion that the essential facts letter appears to only contain information in support of the Commission's decision and does not include information provided that contradicts the position being put forward by the Commission, is incorrect and baseless.

## **1.7 COMMENTS**

The Commission considered all comments received from interested parties with regard to the application and procedure. Non-confidential versions of these comments are available in the public file.

## **1.8 PARTIES CONCERNED**

### **1.8.1 SACU industry**

The SACU industry consists of four manufacturers of the subject product, Afrisam, Lafarge, NPC and PPC that provided the material injury information included in this report.

Letters of support were received from the following interested parties:

- Safika Cement Holdings (Pty) Ltd;
- AfriPack (Pty) Ltd;

- Nampak Sacks;
- Kwikbuild Cement;
- Sephaku Cement; and
- Taurus Packaging (Pty) Ltd.

### **1.8.2 Foreign Manufacturers/Exporters**

Four exporters responded to the exporter's questionnaire, namely Lucky Cement Limited (Lucky Cement), D.G Khan Cement Limited (D.G Khan Cement), Attock Pakistan Cement Limited (Attock Cement) and Bestway Cement Limited (Bestway Cement).

On 17 October 2014, Lucky Cement submitted its response to the Commission's exporter's questionnaire. A deficiency letter was sent on 06 November 2014. A response was received on 13 November 2014 and the response was subsequently accepted as properly documented. Verification of Lucky Cement's information was done on 12 – 14 January 2015. A verification report was sent to Lucky Cement on 30 January 2015. Comments on the verification report were received on 06 February 2015. Lucky Cement made a request for an oral hearing on 05 February 2015. On 10 March 2015 Lucky Cement made a presentation to the Commission.

On 17 October 2014, Attock Cement submitted its response to the Commission's exporter's questionnaire. A deficiency letter was sent on 06 November 2014. A response was received on 13 November 2014 and the response was subsequently accepted as properly documented. Verification of Attock Cement's information was done on 15 – 16 January 2015. A verification report was sent to Attock Cement on 30 January 2015. Comments on the verification report were received on 06 February 2015. Attock Cement made a request for an oral hearing on 12 February 2015. On 10 March 2015 Attock Cement made a presentation to the Commission.

On 17 October 2014, D.G Khan Cement submitted its response to the Commission's exporter's questionnaire. A deficiency letter was sent on 06



November 2014. A response was received on 13 November 2014 and the response was subsequently accepted as properly documented. Verification of D.G Khan Cement's information was done on 19 - 20 January 2015. A verification report was sent to D.G Khan Cement on 30 January 2015. Comments on the verification report were received on 06 February 2015. D.G Khan made a request for an oral hearing on 23 February 2015. On 10 March 2015 D.G Khan made a presentation to the Commission.

On 17 October 2014, Bestway Cement submitted its response to the Commission's exporter's questionnaire. A deficiency letter was sent on 06 November 2014. A response was received on 13 November 2014 and the response was subsequently accepted as properly documented. Verification of Bestway Cement's information was done on 22 - 23 January 2015. A verification report was sent to Bestway Cement on 30 January 2015. Comments on the verification report were received on 06 February 2015. Bestway Cement made a request for an oral hearing on 19 February 2015. On 10 March 2015 Bestway Cement made a presentation to the Commission.

### **1.8.3 Importers**

Five importers responded to the importers' questionnaire, namely Elephant Cement (Pty) Ltd (Elephant Cement), Ezamvelo Trading CC (Ezamvelo), Newcastle Steel Works (Pty) Ltd (Newcastle), Picronamix Investment CC (Picronamix) and Anchor Africa Holdings (Pty) Ltd (Anchor).

On 14 October 2014, Elephant Cement submitted its response to the Commission's importers questionnaire. A deficiency letter was sent on 22 October 2014. A response to the deficiency letter was received on 29 October 2014 and the response was subsequently accepted as properly documented. Verification of Elephant Cement's information was done on 27 November 2014.

On 14 October 2014 Ezamvelo submitted its information and a deficiency letter was sent on 22 October 2014. A response was received on 29 October 2014 and the response was subsequently accepted as properly documented.

Verification of Ezamvelo's information was done on 27 November 2014.

On 14 October 2014, Newcastle submitted its information and a deficiency letter was sent on 22 October 2014. A response was received on 29 October 2014 and the response was subsequently accepted as properly documented. Verification of Newcastle's information was done on 25 November 2014.

On 21 October 2014, Picronamix submitted its information and a deficiency letter was sent on 22 October 2014. A response was received on 29 October 2014 and the response was subsequently accepted as properly documented. Verification of Picronamix information was done on 26 November 2014.

On 17 October 2014, Anchor submitted its response to the Commission's importer questionnaire. A deficiency letter was sent on 22 October 2014. On 29 October 2014 Anchor responded to the Commission's deficiency letter. On 12 November 2014 a pre-verification letter was sent to Anchor informing them that on 24 November 2014 the Commission would be conducting verification. Anchor was not available for verification on that day. It was decided that a desk verification be conducted. On 02 December 2014 supporting documents were requested from Anchor in order for the Commission to conduct a desk verification. Anchor failed to submit the requested source documents by the closing date of 05 December 2014. The Commission therefore decided not to take the information submitted by Anchor into account for purposes of its final determination.

## **1.9 PRELIMINARY DETERMINATION**

After considering all the properly documented responses and comments by interested parties, the Commission made a preliminary determination that Portland cement originating in or imported from Pakistan was being imported to the SACU market at dumped prices, thereby causing material injury to the SACU industry.

As the Commission considered that the SACU industry would continue to suffer material injury during the course of the investigation if provisional

payments were not imposed, the Commission decided to request the Commissioner of SARS to impose provisional measures on imports of the subject product from Pakistan for a period of 6 months. Provisional payments were imposed on 15 May 2015 through Notice No. R. 391 published in Government Gazette No. 38783

The Commission's reasons for its preliminary determination are contained in Report No. 495 which was sent to interested parties for comment. Comments received from the Applicant, importers, and exporters were taken into account by the Commission in making its final determination.

Essential facts letters were sent out to all interested parties, informing them of the "essential facts" which were being considered by the Commission. Comments to the essential facts were received from the Applicant, exporters, importers and the Pakistan High Commission.

All responses and comments received from interested parties are contained in the Commission's public file for this investigation and are available for perusal. It should be noted that this report does not purport to present all comments received and considered by the Commission. However, some of the salient comments received from interested parties and the Commission's consideration of these comments are specifically included in this report.

#### **1.10 FINAL DETERMINATION**

After considering all the comments received on the Commission's "essential facts" letter, the Commission made a final determination that the subject product originating in or imported from Pakistan was being dumped into the SACU market causing material injury to the SACU industry.

The Commission therefore decided to recommend to the Minister of Trade and Industry that definitive anti-dumping duties on Portland cement originating in or imported from Pakistan be imposed as follows:

<b>Tariff subheading</b>	<b>Manufacturer</b>	<b>Final duties</b>
2523.29	Lucky Cement Limited	14.29%
	Bestway Cement Limited	77.15%
	D.G Khan Cement Limited	68.87%
	Attock Pakistan Cement Limited	63.53%
	All other exporters (excluding Lucky Cement Limited, Bestway Cement Limited, D.G Khan Cement Limited and Attock Pakistan Cement Limited)	62.69%

## 2. PRODUCTS, TARIFF CLASSIFICATION AND DUTIES

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### 2.1 IMPORTED PRODUCT

#### 2.1.1 Description

The imported product is described as "Portland cement" classifiable under tariff heading 2523.29 with strength of 42.5MPa that is imported from Pakistan. This strength is substitutable with the strengths of 32.5MPa and 52.5MPa. It is distributed in 50kg polypropylene bags.

#### 2.1.2 Tariff classification

The subject product is currently classifiable as follows:

**Table 2.1.4: Tariff classification**

Heading	Tariff subheading	Description	Statistical Unit	Rate of customs duty			
				General	EU	EFTA	SADC
25.23	2523.2	PORTLAND CEMENT,ALUMINOUS CEMENT, SLAG CEMENT,SUPERSULPHATE CEMENTS AND SIMILAR HYDRAULIC CEMENTS,WHETHER OR NOT COLOURED OR IN THE FORM OF CLINKERS:	kg	free	free	free	free
	2523.29	-Portland cement: -Other					

#### 2.1.3 Possible tariff loopholes

The Applicant stated that it is not aware of any other tariff code under which the product could be lawfully imported

## 2.1.4 Negligibility test

The volume of dumped imports into SACU shall be considered negligible if it accounts for less than 3% of total imports of the subject product during the period of investigation for dumping. The following table shows the dumped imports as a percentage of the total imports:

**Table 2.1.4: Import volumes as % of dumped imports**

Tons	2013	%
Dumped imports: Pakistan	1 091 235	98 %
Other Imports	17 798	2 %
Total imports	1 109 033	100%

The Commission made a final determination that the imports from Pakistan are above the negligibility level.

## 2.1.5 Country of export

The subject product originates in and is exported from Pakistan.

## 2.2 SACU PRODUCT

### 2.2.1 Description

The SACU product is described as Portland cement complying with the SANS 50197 requirements of various CEM classifications in 52.5MPa, 42.5MPa and 32.5MPa strength classes, these strengths are substitutable. These are the strengths manufactured by the Applicant and reflects the material injury suffered by it.

#### ***Comments by exporters***

*The exporters stated that the Government Gazette defined the subject product as "Portland cement", but paragraph A7 of the application indicates the product being dumped as "Ordinary Portland cement classifiable under 2523.29 distributed in bags". The exporters also indicated that in paragraph B1.1 of the*

*application, it specifically indicated 'there are no bulk cement imports from Pakistan'. The exporters requested that the Commission confirms that the investigation is limited to bagged cement and thus excludes bulk product.*

### **Commission's consideration**

The Commission noted that the *Government Gazette* Notice clearly indicated that the product allegedly being dumped is Portland cement - whether in "bulk" or "bagged cement", classifiable under tariff subheading 2523.29 and that although the Applicant provided injury information for the subject product, being "Portland cement", it requested the Commission to focus the analysis of injury on "bagged cement" due to the following reasons:

- The product, Portland cement classifiable under tariff heading 2523.29 originating from Pakistan, is imported in bag form only. There are no bulk cement imports from Pakistan. This is because it would be prohibitively expensive to import the product in any form other than in bagged form.
- There are two separate and distinct markets for ordinary Portland cement, namely, the market for bagged cement and the market for bulk cement. The bagged cement market comprises the major portion of the combined bag and bulk cement market (comprising the SACU industry). The purpose for which bagged cement and bulk cement are used differs. Bulk cement is used in large construction projects and sold to concrete product manufacturers, ready mix producers and blenders while bagged cement is mainly used in small construction projects. Bagged customers are mainly retailers which on-sell to customers for small projects. It is therefore in the bagged cement market where Pakistani imports compete with the domestic industry and where the domestic industry is suffering material injury as clearly demonstrated in the injury information furnished. The injury information also demonstrates that injury in the bagged cement market is even higher in the areas close to the Ports of entry for Pakistan imports, particularly in KwaZulu-Natal, the Eastern and the Western Cape because of transportation costs.

- Because the dumped imports of bagged Pakistani cement do not compete in the bulk cement market, the bulk cement market is not as severely affected by those imports. Whilst the material injury reflected in the combined bulk and bag market is accordingly diluted, the material injury caused to the SACU Industry is nevertheless significant. The loss of market share of bagged cement both volume and value, has impacted negatively on the profitability of the SACU Industry, plant utilization and economies of scale.

***Comment by exporters***

*The exporters stated that their understanding is that a substantial portion of the bulk cement is sold to blenders, who take the bulk cement, blend it with products such as fly ash and then bag the resulting blended cement. Given that importers only import bagged cement, it becomes important to understand how much of the bulk actually enters the market as bagged products. The exporters requested that they be provided with volume of bulk cement that is sold to cement blenders.*

***Response by the Applicant***

*The Applicant stated that there is no merit to this argument and the Commission should reject it. The Applicant further stated that the exporters' approach to determine the volume of blended bagged cement using bulk cement is fatally flawed. The cement producers sell cement to the blenders. They do not have control over what the blenders do with such cement.*

***Consideration by Commission***

The Commission noted that not all the volume of bulk cement sold by the cement manufacturers to the blenders, is blended. A portion of it is used in producing other concrete products. The Commission also noted that neither the exporters nor the Applicant has information on the volume of blended bagged cement sold by the blenders. The issue with regard to blenders is discussed fully under the causal link section of this report.



## 2.3 LIKE PRODUCTS ANALYSIS

### 2.3.1 General

In order to establish the existence and extent of injury to the SACU industry, it is necessary to determine at the outset whether the products produced by the SACU industry are like products to those originating in or imported from Pakistan.

### 2.3.2 Analysis

In determining the likeness of products, the Commission uses the following criteria:

**Table 2.3.2: Like product determination**

	<b>Imported product</b>	<b>SACU product</b>
Raw materials	Calcium carbonate or limestone, iron ore, granulated blast furnace slag, shale (clay), alumina, magnetite, pozzsand, fly ash and gypsum. Other inputs used in the production of cement are coal and electricity.	Calcium carbonate or limestone, iron ore, granulated blast furnace slag, shale (clay), alumina, magnetite, pozzsand, fly ash and gypsum. Other inputs used in the production of cement are coal and electricity.
Physical appearance	Grey, fine, dry powdered substance.	Grey, fine, dry powdered substance.
Tariff classification	2523.29	2523.29
Production process	<p>The cement production process is fundamentally the same across the world. The description that follows therefore is that of a typical cement production process. The production process followed in producing ordinary Portland Cement begins with the mining of the raw materials. The mining of the raw materials starts with the removal of the overburden from the calcium carbonate or limestone deposit.</p> <p>Once removed, the rock is blasted, loaded into trucks and transported to the crusher. A multistage crushing process reduces the rock to stone less than 25 mm in diameter. The crushed rock is stored in stockpiles where, by a carefully controlled process of stacking and reclaiming across the stockpile, blending</p>	<p>The cement production process is fundamentally the same across the world. The description that follows therefore is that of a typical cement production process. The production process followed in producing ordinary Portland Cement begins with the mining of the raw materials. The mining of the raw materials starts with the removal of the overburden from the calcium carbonate or limestone deposit.</p> <p>Once removed, the rock is blasted, loaded into trucks and transported to the crusher. A multistage crushing process reduces the rock to stone less than 25 mm in diameter. The crushed rock is stored in stockpiles where, by a carefully controlled process of stacking and reclaiming across the stockpile,</p>

	<p>takes place and a uniform quality of raw material is achieved. Systematic sampling and laboratory testing monitor this process.</p> <p>The other raw materials, normally shale, iron ore and sand, are also stored in stockpiles. Thereafter carefully measured quantities of the various raw materials are fed, via raw mill feed silos, to mills where steel balls grind the material to a fine powder called raw meal. Homogenising silos are used to store the raw meal where it is mixed thoroughly to ensure that the kiln feed is uniform.</p> <p>The most critical step in the manufacturing process takes place in the rotary kilns. Raw meal is fed into one end of the kiln, either directly or via a preheater system, and pulverised coal, gas or oil is burnt at the other end. The raw meal slowly cascades down the inclined kiln towards the heat and reaches a temperature of about 1 450°C in the burning zone where a process called clinkering occurs.</p> <p>The clinkering process takes place in the burning/kiln section. The cylindrical steel rotary kiln is mounted with the axis inclined slightly from the horizontal and can be 3.5 - 4 metres wide, 110-120 metres long and rotates at 3 revolutions per minute. Short kilns are favoured over long kilns due to improved energy efficiencies and heat distribution - long kilns (over 130 metres in length) are normally on standby during shut downs and maintenance.</p> <p>Finely ground coal is burnt at one end of the kiln - the hot gases pass through the kiln and then upwards through a number of cyclones into an 'induced draught fan'. The cold kiln-feed/raw mix is dropped into the top of the preheater. Centrifugal forces throw the meal against the walls of the cyclones and the meal slides down by gravity into ducts below. The hot gases pick up the feed and sweep it into the next cyclone, once again exchanging heat. This semi-counter-current heat exchanger significantly reduces the total heat consumption in the burning process.</p> <p>The temperature of the feed is between 900 - 1 000°C as it enters the kiln. At</p>	<p>blending takes place and a uniform quality of raw material is achieved. Systematic sampling and laboratory testing monitor this process.</p> <p>The other raw materials, normally shale, iron ore and sand, are also stored in stockpiles. Thereafter carefully measured quantities of the various raw materials are fed, via raw mill feed silos, to mills where steel balls grind the material to a fine powder called raw meal. Homogenising silos are used to store the raw meal where it is mixed thoroughly to ensure that the kiln feed is uniform.</p> <p>The most critical step in the manufacturing process takes place in the rotary kilns. Raw meal is fed into one end of the kiln, either directly or via a preheater system, and pulverised coal, gas or oil is burnt at the other end. The raw meal slowly cascades down the inclined kiln towards the heat and reaches a temperature of about 1 450°C in the burning zone where a process called clinkering occurs.</p> <p>The clinkering process takes place in the burning/kiln section. The cylindrical steel rotary kiln is mounted with the axis inclined slightly from the horizontal and can be 3.5 - 4 metres wide, 110-120 metres long and rotates at 3 revolutions per minute. Short kilns are favoured over long kilns due to improved energy efficiencies and heat distribution - long kilns (over 130 metres in length) are normally on standby during shut downs and maintenance.</p> <p>Finely ground coal is burnt at one end of the kiln - the hot gases pass through the kiln and then upwards through a number of cyclones into an 'induced draught fan'. The cold kiln-feed/raw mix is dropped into the top of the preheater. Centrifugal forces throw the meal against the walls of the cyclones and the meal slides down by gravity into ducts below. The hot gases pick up the feed and sweep it into the next cyclone, once again exchanging heat. This semi-counter-current heat exchanger significantly reduces the total heat consumption in the burning</p>
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	<p>this point, the compounds have split into their individual constituents (CaO, MgO, SiO<sub>2</sub>, Al<sub>2</sub>O<sub>3</sub>) and chemical reactions take place. New compounds (calcium aluminosilicate and alumina ferrite) form as the material approaches the lower end of the kiln. Aluminosilicate clinker is formed at temperatures of 1 450 - 1 500°C. The material leaving the burning zone is now called clinker.</p> <p>The nodules of clinker drop into coolers and are conveyed to clinker storage silos. The clinker, along with a small quantity of gypsum and optionally, and if suitable, supplementary cementitious materials (fly ash, slag, limestone or other), are milled in a vertical roller mill or a horizontal ball mill to a fine powder which is then called cement.</p>	<p>process.</p> <p>The temperature of the feed is between 900 - 1 000°C as it enters the kiln. At this point, the compounds have split into their individual constituents (CaO, MgO, SiO<sub>2</sub>, Al<sub>2</sub>O<sub>3</sub>) and chemical reactions take place. New compounds (calcium aluminosilicate and alumina ferrite) form as the material approaches the lower end of the kiln. Aluminosilicate clinker is formed at temperatures of 1 450 -1 500°C. The material leaving the burning zone is now called clinker.</p> <p>The nodules of clinker drop into coolers and are conveyed to clinker storage silos. The clinker, along with a small quantity of gypsum and optionally, and if suitable, supplementary cementitious materials (fly ash, slag, limestone or other), are milled in a vertical roller mill or a horizontal ball mill to a fine powder which is then called cement.</p>
Application or end use	The application and end-use of the product is the production of mortar and concrete for the bonding of natural or artificial aggregates to form a strong building material which is durable in the face of normal environmental effects in the construction of infrastructure, buildings and housing.	The application and end-use of the product is the production of mortar and concrete for the bonding of natural or artificial aggregates to form a strong building material which is durable in the face of normal environmental effects in the construction of infrastructure, buildings and housing.
Substitutability	The SACU product is fully substitutable with the imported product.	The SACU product is fully substitutable with the imported product.

A request was received from Maple Leaf Cement Factory Limited (Maple), an exporter of Portland cement from Pakistan for the exclusion of 42.5R and white cement from the investigation. As reasons for its request Maple stated the following:

- They are the only manufacture in Pakistan that manufactures the entire range of cement products namely Portland cement of 42.5R and 42.5N strength, White Cement, Sulphite Resistant Cement (SRC), and Low Alkali Cement;
- The scope of the investigation covers 42.5N not 42.5R and white

cement;

- There is a difference between 42.5R, 42.5N and white cement. The production, characteristics, usage, markets and pricing of these products are distinctly different; and
- They produce 42.5R only for export to SACU. They do not sell the same product in Pakistan, they sell 42.5N cement.

### ***Applicant's comments***

*The Applicant indicated that firstly, Maple Leaf is not an interested party as it did not respond to the Commission's exporter's questionnaire within the stipulated period after initiation. Secondly, there is no distinction between 42.5N and 42.5R Portland cement – these strengths are like products within the meaning of Regulation 1 of the ADR due to the following:*

- *Raw materials and other inputs used in producing the products are substantially the same;*
- *Production process is the same;*
- *Physical characteristics and appearances of the products are the same;*
- *Products are directly substitutable; and*
- *Products fall under the same tariff classification.*

*The Applicant further indicated that 42.5R Portland cement doesn't fall outside the ambit of the current anti-dumping investigation. It indicated that the product is clearly covered in the anti-dumping investigation.*

### ***Commission's consideration***

The Commission noted the comments but is of the view that the subject product is defined as "Portland cement", therefore including the product referred to by Maple.

After considering the above, the Commission made a final determination that the SACU product and the imported product are “like products”, for purposes of comparison in this investigation, in terms of the ADR.

### 3. INDUSTRY STANDING

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The application was lodged by Afrisam, Lafarge, NPC and PPC (the Applicant) on behalf of SACU manufacturers and represents more than 90 per cent of the total SACU production.

Letters of support were received from the following interested parties:

- Safika Cement Holdings (Pty) Ltd;
- Sephaku Cement; and
- Kwikbuild Cement.

#### ***Comments by exporters***

*The exporters indicated that new SACU producers entered the market during the investigation period, but were not part of the consortium that brought the application. The exporters requested the Commission to explain how the impact of these new producers was assessed with regards to injury as well as causal link.*

#### ***Response by the Applicant***

*The Applicant stated that the allegation that there were new producers which entered the market during the investigation period is unsubstantiated and factually incorrect. The Applicant further indicated that to the best of its knowledge, the new entrants entered the market in 2014, which falls outside the injury investigation period. According to the Applicant, Sephaku Cement (Pty) Ltd, is supporting this investigation.*

#### ***Commission's consideration***

The Commission noted that there is a new SACU producer of the subject product Sephaku (Pty) Ltd who is supporting the investigation. The producer stated in its letter of support that it only started production in January 2014, which is outside the period of investigation.

### ***Comments by exporters on the Commission's essential facts letter***

*The exporters stated that it was well known that blenders were not part of the consortium that brought the anti-dumping application and none of the blenders responded to the investigation. Blenders are part of the SACU industry and their information is therefore crucial in determining the alleged material injury correctly.*

*The exporters further indicated that there are eleven active cement blenders that they know, namely Pharaoh Cement, BB Cement, Value Cement, Icon Brick East Rand, Aman Cement, AP Cement (African Power Cement), IDM Cement (Isando, Meyerton and Pretoria) Kwikbuild Cement, MP Cement (Multi-Purpose Cement) Castle Cement and Urban Cement. This is a significant number of cement blenders and the volumes likely significant.*

*They stated that they have already indicated on numerous occasions that a single blender produces 20 million bags of cement, which equate to one million tons of cement, equal to the total imports of cement from Pakistan during the period of investigation. These essential facts are not contained in ITAC's letter.*

*It further indicated that the investigation was initiated on all cement, yet the Commission has chosen to focus on injury on bagged cement. This focus leaves out the blending industry, which are huge bagged cement producers. The matter could have been brought on bagged cement only, but the decision was taken by the Commission to initiate on all cement. The Commission does not deal with the important facts raised regarding blenders, yet has chosen to focus on injury on bagged cement. When a single blender's production volume equates to the total volume of imports from Pakistan, then the blenders position is really important. The Commission's consideration around blenders need to form part of the essential facts letter.*

### ***Commission's consideration***

*After considering the comments received, the Commission is of the view that blenders are not cement manufactures as they process or blend the cement*

that is produced by the SACU manufactures to produce lower grade cement. It is therefore incorrect to allege that the blenders are manufacturers of cement as defined by the ADR. The application was brought by manufacturers of cement representing 90 per cent of production of cement in SACU, which satisfies the requirements of the ADR for standing.

The issue with regard to blenders is discussed fully under the causal link section of this report.

Taking all the comments received into account, the Commission made a final determination that the application can be regarded as being made “by or on behalf of the domestic industry”.



## **4. DUMPING**

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The margin of dumping is calculated by subtracting the export price from the normal value of the product (after all adjustments have been made). The margin is then expressed as a percentage of the f.o.b. export price. If the margin is less than two per cent, it is regarded as *de minimis* in terms of the Anti-Dumping Agreement and no anti-dumping duty will be imposed.

The margin of dumping is calculated in the currency of the country of export.

### **Adjustments**

Adjustments shall be made in each case, on its merits, for differences which affected price comparability at the time of setting prices.

## **4.1 METHODOLOGY IN THIS INVESTIGATION FOR LUCKY CEMENT**

### **Sales in the ordinary course of trade**

The Commission found that no sales were made below cost and sales were therefore made in the ordinary course of trade.

#### **4.1.1 Calculation of normal value**

Lucky Cement produced Portland cement and sold it on the domestic market in Pakistan during the period of investigation. The actual invoiced sales were used to calculate the normal value.

Lucky Cement sells the subject product to dealers and institutions. Institutions in this case refer to schools, universities, government and other large projects. During verification it was found that there was no significant price difference in the price charged to dealers and institutions for the same volume of products.

The Commission made a preliminary determination that the subject product originating in or imported from Pakistan and manufactured by Lucky Cement was being dumped onto the SACU market during the period of investigation.

***Comments by Applicant on the Commission's preliminary determination***

*The Applicant indicated that the analysis of the information done by Genesis obtained from Lucky Cement's financial report indicated that 3 845 682 tonnes of cement with a value of PKR 31 152 701 000 (including sales tax and excise duty) were sold in the domestic market, giving an average price of PKR8 101/tonne.*

***Commission's consideration***

The Commission noted that sales volume and value figures contained in Lucky Cement's published financial statements did not differentiate between the sales of the subject product and the sales of other products (Sulphate Resistant Cement (SRC)) which are not the subject of this investigation. The information used by Genesis therefore differs from the information used by the Commission to calculate the normal value. Furthermore, the analysis done by Genesis did not exclude sales tax and excise duty for purposes of determining the normal value, as is required. The Commission found that this explains the difference in the normal value calculated by the Commission and that used by the Applicant in alleging that the Commission's calculations are erroneous.

***Applicants' comments on the essential facts letter***

*The Applicant justified their calculations by indicating that it did not have access to the confidential information on which the Commission based its calculations. In addition, they indicated that replicating the Commission's results is possible only with access to verified information.*

**Adjustments to the normal value**

***Comments by Lucky Cement on the essential facts letter regarding normal value adjustments***

*Lucky Cement repeated the same comments they made previously. They stated that the Commission did not allow their adjustments even when they have provided factual information pertaining to the adjustments in detail. Lucky Cement also stated that although the essential facts letter stipulates which adjustments the Commission is intending to disregard, the essential facts letter does not provide any detailed factual basis for the decision nor what facts will be considered.*

**Commission's consideration**

The Commission noted that Lucky Cement did not bring any additional information from what was considered in the preliminary determination. The Commission is of the view that there is no need to deal with the adjustments in detail in the essential facts letter as they were dealt with in detail in the preliminary report.

The following adjustments to the normal value were claimed by Lucky Cement:

**(i) Transport costs**

Lucky Cement owns a few trucks that are used to deliver cement to customers. However, most of the deliveries are made using external transporters. Lucky Cement has contracts with these transporters to deliver cement to its customers. Lucky Cement pays the delivery charges on a monthly basis.

As Lucky Cement does not have the delivery charges for each transaction, it calculated the average unit delivery charge by dividing the total delivery cost for the investigation period by the total domestic sales quantity for the investigation period. Lucky Cement requested that such amount be deducted from the total invoice price for the period of investigation.

Taking all comments received into account, the Commission made a preliminary determination to allow the transport costs adjustment.

***Comments by the Applicant on the Commission's preliminary determination***

*The Applicant stated that the calculations for Lucky Cement's transport costs do not take into account backhauling. It indicated that the preliminary report states that Lucky Cement "calculated the average unit delivery charges by dividing the total delivery cost for the investigation period by the total domestic sales quantity for the investigation period". "The total delivery cost for the investigation" include transport costs incurred in transporting goods other than cement. The Applicant further stated that it is common practice for the third party transportation party to transport bagged cement from a producer's premises to a customer and on the return leg of the journey to bring materials (say packaging) from a supplier to the producer's premises. Industry practice is that transportation companies charge for delivery costs from the point of origin to the destination point (the "Out-Bound Leg") and the return trip to the point of origin ("Backhauling).*

***Comments by Lucky Cement on the Commission's preliminary report***

*Lucky Cement stated that their transporters do not bring any other materials back to Lucky Cement as they are engaged for a one-way journey from Lucky Cement's premises to the customer's doorstep. There is therefore no backhauling as alleged. There is therefore no factual basis for the allegation. Lucky Cement stated that the Commission has always granted adjustments where the expenses are not available on a transaction-to-transaction basis. The ADR do not prohibit this, as it would be unreasonable to do so because companies' record and track cost differently. The Commission has allowed adjustments in many investigations, calculated and allocated in a similar manner as done with Lucky Cement's transport adjustment.*

***Commission's consideration***

The Commission considered that transport costs were reconciled to the transporters invoices as well as delivery notes. All documents were verified and indicated that the transport adjustment was in line with the payment to the mentioned service providers. Lucky Cement managed to provide

substantiating documents to indicate that the delivery costs are directly related to the sales of the subject product during the period of investigation.

In the instance where Lucky Cement delivers to its customers it was proven through the sales invoices that the amounts incurred reconcile to the monthly total amount spent on transport for the delivery of the subject product. Supporting documents that were verified demonstrated that the transport cost was that of the subject product.

***Comments by the Applicant***

*The Applicant stated that the Genesis report used total distribution costs to determine the transport cost for both domestic and export sales.*

***Commission's consideration***

The calculation by Genesis did not take into consideration the significant difference between the transport cost of domestic and export sales. The Commission used actual delivery costs. The Genesis findings were based on assumption, whilst the Commission based its calculation on verified information.

***Comments by Applicant on the essential facts letter***

*The Applicant indicated that it noted the Commission's comments that it did not take into consideration the possibility that there was a considerable difference between the transport cost of domestic and export sales into consideration. The Applicant referred the Commission to the potential differences between total transport sales and total export sales, since the overland per kilometre transport cost for Lucky Cement must be very similar as between domestic and export deliveries. The Applicant indicated that it is not the case that Genesis did not consider the possibility that total transport costs differ between domestic and export sales. It further indicated that they are very likely to differ as long as domestic and export sales tonnages differ, and the magnitude of differences between export and domestic sales volume is very likely to be the primary driver of the difference between total transport costs for domestic and export sales.*

*The Genesis report allocated the total distribution cost reported in Lucky Cement's financials to domestic sales and export sales on pro-rata volume basis. This implicitly assumes the same transport cost per tonne for export and domestic sales and also, therefore a difference between total transport costs for export sales and for domestic sales that corresponds to the difference in export and domestic volume.*

*The major reason why this allocation method might be inaccurate is if the ratio of the total distance travelled for export sales to total distance travelled for domestic sales differs from the ratio of export sales volume to domestic sales volume in the relevant period. This obviously cannot be discovered from any publicly available information but the differences are likely to be small.*

#### **Commission's consideration**

The Commission noted that the Applicant reiterated that the calculation by Genesis did not take into consideration that there is a considerable difference between the transport cost of domestic and export sales. The Commission based its calculations on the actual verified transport costs for domestic and export sales respectively and the Genesis's findings were based on assumptions.

Taking all comments received into account, the Commission made a final determination to allow the transport costs adjustment.

#### **(ii) Discount and rebates**

Lucky Cement gives discounts and rebates to certain customers based on volume purchased during the month. The customer only gets to know the amount of discount given at the end of the month. Lucky Cement allocated the discount allowed on the basis of domestic sales volume.

The discount allowed to Lucky Cement's customers based on the purchase of certain volume gets calculated at the end of the month after the customer met the requirements to qualify for such discount. The discount therefore did not

affect price comparability at the time of setting the price it was not known if the customer would meet the requirements to qualify for such discount.

The Commission made a preliminary determination not to allow the discount and rebates adjustment as it was not demonstrated to have affected the price comparability at the time of setting the price.

***Lucky Cement's comments on the Commission's preliminary determination***

*Lucky Cement stated that it believes the context of this adjustment was not properly understood. Lucky Cement also stated that discount and rebates are provided in order to achieve economic scale. Lucky Cement provided discount and rebates based on volume at the end of the month. Lucky Cement further indicated that it has been dealing with its customer for a very long time and knows who likely qualifies for the rebate looking at the pattern of sales. Therefore, at the time of setting prices it has a fair idea whether a customer could potentially qualify for the discounts and rebates and is therefore taken into consideration at the time of setting the prices.*

***Commission's consideration***

The discount claimed by Lucky Cement to its customers is based on the purchase of a certain volume purchased and it gets calculated at the end of the month after the customer met the requirements to qualify for such discount. The discount therefore did not affect the setting of the price as it is not known at the time of setting the price, if the customer will meet the requirements to qualify for such discount.

Lucky Cement is correct in highlighting that the Commission verified the existence and application of discount and rebate policies. It is further understood that the discounts are a real cost to the company. However, it is the timing that is of the essence. The discounts must have affected the setting of the price at the time of setting the price, in order to qualify as an adjustment.

The Commission made a final determination not to allow the discount and rebates adjustment as it was not demonstrated to have affected the price comparability at the time of the setting of the prices.

**(iii) Packaging cost**

The packaging for the domestic and export market was confirmed to be different. Domestic sales are made in Kraft paper bags which are purchased from several vendors.

***Commission's consideration***

The Commission made a final determination to allow the packaging costs adjustment as it affected price comparability at the time of setting the price.

**(iv) Cost of payment terms**

The interest rate applied in the calculation of the cost of payment terms was determined with reference to the month end bank discount rate from January 2013 to December 2013 plus a margin added to arrive at the rate at which the bank advanced loans. The margin added by the bank varies from xx% to xx%. The company added xx% to the bank discount rate for the calculation of the cost of payment terms adjustment. Cost of payment terms on domestic sales was established at the number of days of the average credit period allowed to the customers.

***Commission's consideration***

The payment terms used by Lucky Cement to calculate this adjustment were not displayed on the invoices. In instances where the number of days is not reflected on the invoice, the Commission requests other confirmation such as a contract between the exporter and the customer indicating the number of days it will take before the customer makes a payment. No such information was provided by the exporter.

The Commission made a final determination not to allow the cost of payments terms adjustment as no information was provided to indicate that the exporter, at the time of setting the price, took into account how long it would take to



receive payment.

**(v) Selling, general and administration costs**

Lucky Cement has a large work force to support its domestic sales operations, which are spread over the entire country. It has different offices at geographically dispersed locations where human resources relating to sales, administration and support services are deployed.

Due to the number of employees involved in the domestic sales as compared to export sales, Lucky Cement claimed an adjustment for the selling, general and administration expenses based on employee headcount. The selling, general and administrative cost has been allocated to export sales and domestic sales on the basis of head count of sales force.

***Commission's consideration***

Lucky Cement submitted a cost build-up of the average cost of production of the subject product during the period of investigation, based on total production during that period. The cost build-up was verified and it was found that costs were not allocated according to whether the goods would be sold domestically or on the export market.

In any business environment, selling, general and administration expenses are incurred regardless of whether goods are to be sold on the domestic or export market.

The Commission made a preliminary determination not to allow the selling, general and administration costs adjustment as it was not demonstrated to have affected the price comparability at the time of the setting of the prices.

***Comments by Lucky Cement on the Commission's preliminary determination***

Lucky Cement stated that the Panel in US –softwood Lumber V was of the view that amounts for general and administrative expenses “pertain to” the production and the sale of the like product unless it can be demonstrated that

*the product under investigation did not benefit from a particular General and Administrative (G&A) cost item.*

*The panel stated that "Thus, it would appear to us that, unless the particular G&A cost can be tied to a particular product manufactured by the company, G&A costs- because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods -pertain or relate to all of those goods. Canada's argument that G&A costs 'benefits all product that a company (or division within a company) may produce rather than specific products' support our view. If G&A benefits the production and sale of all goods that a company may produce, they must certainly relate to or pertain to those goods, including in part to the product under investigation".*

*In ITAC's report 210, Tyres (China), adjustments were made for domestic selling expenses, warranties, advertising, volume rebates, discount made on the basis of dividing the figure shown on the income statement by total domestic sales, rather than on transaction by transaction basis. There is therefore no reason the same cannot be accepted for Lucky Cement. Importantly, there is a significant difference between the SG&A costs incurred for the domestic and export markets. The difference in costs arises because Lucky Cement has a large work force to support its domestic sales operations, which are spread over the entire country. It has different area offices at geographically dispersed locations where human resources relating to sales, administration and support service are deployed.*

*The exporter stated that they do not agree with ITAC's conclusion that SG&A expenses were not demonstrated to affect price comparability. It has been sufficiently demonstrated that SG&A costs affect price comparability, at the time of setting prices it is known that more resources and expenses are incurred in making a domestic sale compared to an export sales. This is taken into consideration at the time of setting the prices. Furthermore it can be traced accurately whether a sale was made to a domestic or export customer. The SG&A allocation was found to be correct as stated in the verification*

*report, there is no doubt as to the accuracy of the allocated values, the exporter requested ITAC to allow this adjustment as it clearly affect price comparability and meets all requirements of Regulation 11.2.*

### **Commission's consideration**

The Commission considered that Lucky Cement submitted a cost build-up of the average cost of production of the subject product during the period of investigation, based on total production during that period. The cost build-up was verified and it was found that costs were not allocated according to whether the goods would be sold domestically or on the export market.

In any business environment selling, general and administration expenses are incurred regardless of whether goods are to be sold in the domestic or export market.

The Commission made a final determination not to allow the selling, general and administration costs adjustment as it was not demonstrated to have affected the price comparability at the time of the setting of the prices.

### **(vi) Production cost (Coal)**

Lucky Cement has two plants, one in the Southern region (Karachi plant) and the other in the Northern region (Pezu plant). Lucky Cement claimed that the Karachi plant produces for the export market whilst the Pezu plant produces for the domestic market in Pakistan. Coal is imported into Pakistan via Karachi (southern part of Pakistan) and there is an approximate distance of 1 100 km between the Karachi and Pezu plant. The company claimed an adjustment on the transportation of coal from Karachi to Pezu. This is informed by the fact that coal is a primary input in cement production and as such it costs more to transport coal to Pezu which caters mostly for the production of cement sold in the domestic market. This is based on the fact that the vast majority of cement produced for the domestic market need to recover a higher production cost than the cement produced for the export market.

### ***Commission's consideration***

The Commission noted that, in addition to manufacturing for the export market, the Karachi plant also manufactures a portion of the subject product for domestic sales. It is not known what amount of the subject product is to be sold to the domestic market at the time of setting the price.

It is the Commission's practice to allow adjustments for production cost if there is a difference in the raw material used in the production of the subject product, sold on the domestic and export markets respectively, in order to account for differences in the two products, which could affect comparability. The adjustment claimed is with regard to the cost of the transport of raw material and there is no difference with regard to the raw material used in the production of the subject product for the two markets. The fact that it costs more to transport coal does not make it an allowable adjustment as the coal for the manufacturing of the domestically sold product is the same as the coal for SACU sales.

In addition, as the Karachi plant does not solely produce for the export market, the Commission is of the view that the exporter did not know what production would be sold on the domestic market and therefore could not have taken this into account at the time of setting its prices.

In the Penicillin (India) investigation the Board, the predecessor of the Commission, was faced with the situation that the exporter used domestically sourced raw material to manufacture for and supply the domestic market, while it used imported raw material to manufacture for and supply the South African and other export markets. The imported raw material was significantly cheaper than domestically sourced raw material owing to high tariff barriers in India. The Board did not allow an adjustment to the normal value to account for the difference in raw material prices, arguing that there was no difference between the raw materials used for domestic and export production. The Board's finding in this regard was taken on review in *Ranbaxy v Chairman of the Board*, and the Supreme Court confirmed that the Board was correct in its assessment.

Taking all comments into account, the Commission made a final determination not to allow the production cost adjustment as there is no difference between the raw materials used for domestic and export production which affected the price comparability at the time of the setting of the prices.

**(vii) Tax adjustment**

The exporter indicated that in Pakistan, domestic operations fall within the ambit of National Tax /Bottom-line tax regime whereby profit before tax under the domestic operations is considered as income and corporate tax rate applicable for the year is applied. Domestic sales were taxed at a rate of 35% (applicable January 2013 to June 2013) and 34% (July 2013 to December 2013). The exporter used an average of 34.5% to calculate the corporate tax for the period 1 January 2013 to 31 December 2013.

***Comments by the Applicant***

*The Applicant stated that these adjustments are not allowable adjustments and accordingly the claim of exporters for such adjustments should not be allowed. The Applicant provided the following with regard the tax regime in Pakistan:*

*Income from businesses or profession is taxed under the following regimes:*

- *Normal tax regime ("NTR");*
- *Final tax regime ("FTR").*

**1. Normal Tax Regime ("NTR")**

*Under the NTR, taxable income of the tax payer is determined after reducing related allowable expenses, out of which some of the important allowable expenses are:*

- *depreciation allowance;*

- *an initial allowance of 25% in respect of an asset which has been placed into service in Pakistan for the first time in the tax year;*
- *first year allowance of 90% of cost in lieu of the initial allowance is allowed on plant, machinery and equipment installed and used by an industrial undertaking set up in specified rural underdeveloped areas or installed for generation of alternative energy by an industrial undertaking set up anywhere in Pakistan;*
- *an amortisation deduction is allowed for the cost of intangibles having a useful life of more than one year used wholly or partly for deriving income from business;*
- *The standard tax rate liability for companies is 34% whereas a small company as defined in the Income Tax Ordinance, 2001, ("the Ordinance") is taxed at 25%;*
- *Tax credits in the range of 10% to 20% have been provided to existing companies for investment and expansion, extension and Balancing Modernisation and Replacement of plant and machinery. 100% tax credit is provided to existing companies and new companies for investment in plant and machinery through new equity;*
- *Exemption for tax for up to 10 years is given for investments in special zones;*
- *The Ordinance makes provision for a set-off of assessed losses. So for example, if a business has an assessed loss, it may not pay any tax until the assessed loss is exhausted. Subsidiary companies may surrender its assessed loss to its holding company as the Ordinance provides for group relief; and*

- *The position is also more complicated because the Ordinance provides for group taxation whereby a company and its subsidiaries may elect to be taxed as one fiscal unit.*

## **2. Final Tax Regime ("FTR")**

*Under the FTR, the tax deducted or collected at source is deemed to be a final tax in respect of income from sources chargeable under FTR. The amount chargeable to tax on gross receipt basis cannot be reduced by any deductible allowance or set-off of any loss or any tax credit available.*

*The Ordinance provides that tax shall be deducted or collected at 1% as final tax on the income arising from export or sale to an exporter.*

### **Direct and Indirect Taxes**

*The Applicant stated that the Organisation for Economic Co-Operation and Development ("OECD") defines indirect tax as "tax imposed on certain transactions, goods or events. Examples include VAT, sales tax, excise duties, stamp duty, services tax, registration duty and transaction tax."*

*The Applicant also stated that the OECD defines a direct tax as "direct taxes are taxes imposed on income, capital gains and net worth."*

*The Applicant further stated that the NTR is a direct tax as it is determined on the taxable income of a tax payer. The FTR, however, is an indirect tax as it is deducted at source and is accordingly not levied on the taxable income of the tax payer.*

### **The law relating to adjustments for taxation**

*The Applicant stated that in terms of the WTO Anti-Dumping Agreement and Anti-Dumping Regulations, its adjustments for tax may only be claimed in respect of indirect tax and not direct taxes.*

The Applicant stated that Article 2.4 of the WTO Anti-Dumping Agreement provides as follows: "*{a} fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex- factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.*"

The Applicant also stated that Article 2.4 of the WTO Anti-Dumping Agreement must be read with Article VI:4 of the GATT which provides as follows: "*[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to antidumping or countervailing duties by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.*"

The WTO Panel in *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, para 7.165 held that "duties or taxes" in question must be 'borne by the like product when destined for consumption in the country of origin or exportation". In this case the WTO panel found that the European Commission was correct in not allowing tax adjustments, because Brazil could not prove that the tax in question was borne by the like product when destined for domestic consumption.



*The European Union and US legislation also provide that an adjustment can only be claimed for indirect taxes and not direct taxes.*

*Article 2(10) (b) of the European Union Basic Regulation provides that "[a]n adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country and not collected or refunded in respect of the product exported to the Community."*

*Section 773(a) (6) of the Tariff Act of 1930 ("American Tariff Act") provides as follows:*

*"(a) Determination. In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:*

*(1) Determination of normal value.*

*(6) Adjustments. The price described in paragraph (1)(8) shall be*

*(b) reduced by*

*(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product'*

*In terms of the International Trade Commission of United States' Manual on Anti-Dumping Duties (the "Manual"), the American Tariff Act "requires the deduction from normal value of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise. However, such taxes are to*

*be deducted only to the extent that such taxes are added to or included in the price of the foreign like product.*

*The Applicant stated that the reason why direct taxes are not allowable deductions is that direct taxes such as the NTR do not directly relate to the product in question and are not "borne by the product" but are levied on the taxable income after taking into account allowable expenses, tax credits and exemptions. The taxable income, for example, of a corporation may include income from several different types of products, interest, set off of assessed losses and many other factors and variables. Indirect taxes on the other hand are directly related to the product in question and are "borne by the like product".*

#### **Commission's consideration**

The Commission considered that ADR 11.2 (c) states that "Adjustments should be requested in interested parties' original response to the relevant questionnaire and must be –

- (a) Substantiated;
- (b) Verifiable;
- (c) Directly related to the sale under consideration; and
- (d) Clearly demonstrated to have affected price comparability at the time of setting prices"

An indirect tax is a tax collected by an intermediary (such as a retail store) from person who bears the ultimate economic burden of the tax (such as the consumer) e.g. sales tax, value added tax and excise duty. Direct tax is a tax that is paid directly by an individual or organisation on which it is imposed e.g. income tax or taxes on assets.

#### **Treatment of direct and indirect taxes by investigating authorities:**

The EU and Australia AD regulations provide for adjustments to normal value for import charges and indirect taxes. Under section 773(a)(6)(B) of the Tariff Act of 1930, the US Commerce Department adjusts normal value for the

amount of any indirect tax imposed on the foreign like product, but only to the extent such taxes are included in the price.

In the reference book by Clive Stanbrook and Philip Bentley, “[d]irect taxes are not a matter for adjustment in anti-dumping proceedings ...” (see para. 3.3.2).

The corporate tax claimed by Lucky cement is a direct tax levied on the overall performance of the company. ADR 11.2 (c) directs the Commission to allow an adjustment only if it relates to the sale at issue. Therefore this tax does not warrant an adjustment as it is not directly related to any specific transaction and at the time of setting the price the manufacturer does not take this taxation into account.

Taking all comments received into account, the Commission made a preliminary determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sales under consideration.

***Comments by Lucky Cement on the Commission’s preliminary determination***

*Lucky Cement stated that the Commission accepted the tax adjustment claimed on the exports and yet disregarded the tax adjustment claimed on the normal value. Although this type of an adjustment is not common, the exporter stated that they made extensive written submissions detailing the unique tax regime in Pakistan and further explained the taxation regime to the Commission.*

*The exporter stated that the Commission erred in its evaluation of this adjustment and disregarded it. It reiterated that the tax adjustment is directly related to the sale under consideration and has clearly been demonstrated to affect price comparability at the time of setting prices. When Lucky Cement sets its price, it is aware of the applicable tax rate and it is therefore taken into account at the time of setting domestic and export prices. The applicable tax rate is taken into account on each and every sale. It is therefore directly*

*related to the sale under consideration. Importantly the taxation adjustment on normal value was verified and found to be correct.*

*It further reminded the Commission of the requirements of the ITA Act, the ADR and the AD Agreement which prescribe that adjustment shall be made for all differences that affect prices, including differences in taxes. Although ITAC appears to have accepted the Applicants idea of distinguishing between direct and indirect taxes, it reiterated that there is no distinction in the ITA Act, ADR nor the AD Agreement. By disregarding the tax adjustment on the normal value ITAC has failed to make "a fair comparison " between the normal value and the export price this has had a devastating impact on Lucky Cement, as their SACU export sales have been rendered uncompetitive.*

#### **Commission's consideration**

It is important to note that the Commission conducts a verification to check the validity and the accuracy of the information provided, but that verification of information does not equate to adjustments being accepted and allowed by the Commission.

Taking all comments into account, the Commission made a final determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sale under consideration.

#### **(viii) Level of trade adjustment**

Lucky Cement indicated that it sells the subject product to wholesalers as well as end users (also referred to as institutions) in its domestic market. Exports are mostly done to wholesalers.

Lucky Cement also indicated that a further level of trade has been identified relevant to the cement market, and that would be bulk cargo orders, or very large sales orders, where a single order may be for as much as xxx tons.

According to Lucky Cement, commercial and product risk accepted by clients placing orders of such a size justifies a pricing level different to that of regular

wholesale orders that are typically for shipments ranging between xxx and xxx tons.

For comparison, the average invoice price for domestic sales, inclusive of GST and excise duty per ton is approximately PKR xxx. Large orders in the region of xxx tons currently attract prices of PKR xxx. Comparing regular volume price levels with large order prices result in a PKR xxx difference, or if expressed at a % of regular prices, xxx%.

### ***Commission's consideration***

The exporter pointed out that it sells the subject product to wholesalers as well as end users. However, from there, it goes on to give a description of the level of trade that does not support the claim for the adjustment. The description given by the exporter refers to a large extent to a bulk rebate adjustment.

An example of a difference in the level of trade is where an exporter sells on its domestic market to levels A (a distributor) and B (a retailer). The export sales to SACU are at level A. In this circumstance the Commission will examine whether it is possible to assess a selective normal value using domestic sales to level A, in other words a normal value that is not based upon the total population of sales but on those sales that are at the same level as the export sales. If this were possible then no level adjustment would be required.

In considering whether the sales are at different levels, the Commission would examine the sales activities carried out at the different marketing stages (i.e. who is buying from whom and who they are selling to). The titles attached to these functions (e.g. distributor or retailer) are considered in this regard. It would also consider the pricing structure at these levels. For example, the producer may state that it sells to three levels of trade (A, B and C). There should be consistent and distinct differences in sale prices in order to establish a real difference in level of sales, again emphasising that it is price comparability that we are concerned with.

The exporter, however, did not provide information to substantiate a level of trade adjustment.

The Commission made a final determination not to allow the level of trade adjustment as no substantiation for this adjustment had been provided.

#### **4.1.2 Export price**

Export price is defined in section 32(2)(a) of the ITA Act as the price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to the sale under consideration.

To enable a proper comparison with the normal value, the export price should be at the ex-factory level and at the same level of trade.

It was found that Lucky Cement sold more than five per cent (5%) of the subject product in the domestic market. Lucky Cement is responsible for its own exports to the SACU. The Commission used the actual export sales to SACU during the POI to calculate the export price.

#### **Adjustments to the export price**

The Commission made a preliminary determination to allow the following adjustments as it was demonstrated that they affected price comparability at the time of setting the price:

##### **(i) Transport costs**

Lucky Cement incurs transportation costs from factory to port, handling and other costs related to transport of goods.

##### **(ii) Packaging**

The packaging for the domestic and export market was confirmed to be different. Export sales are made in polypropylene bags which are purchased from several vendors. However, the exporter also claimed an adjustment for a duty drawback for bagged sales. This was verified and found to be correct.

The exporter calculated the net amount after deducting the duty draw back calculated.

*Adjustment for Sling bags on exports*

The exporter stated that, in addition to the above packaging for exports, some customers require further bulk packaging in the shape of sling bags. Sling bags are purchased from several vendors at varying prices based on the load they handle. Average cost of xxx ton sling bags is PKR xxx whereas average cost of xxx ton sling bags is PKR xxx. These have been charged against consignments, where there were specific requirements for this bulk packaging.

**(iii) Taxation**

The exporter stated that taxation on export sales is levied at 1% of the invoice value. This amount is withheld by the bank and paid to the Pakistani Receiver of Revenue for every transaction. This adjustment was verified and it was found that 1% of the invoice value is indeed withheld by the bank. The exporter therefore knows at the time of setting its prices that 1% of the invoice price will be deducted as export tax.

***Applicant's comments on the preliminary determination***

*The Applicant stated that according to the Commission's preliminary report and the letter sent to it on 17 June 2015 it appears that ITAC did not deduct ocean freight in the calculation of the transportation cost adjustment applicable to Lucky Cement's export price. The Applicant requested ITAC to investigate this and confirm if that was indeed the case.*

***Commission's consideration***

Lucky Cement's delivery terms for SACU exports are a combination of free on board (f.o.b) and cost net freight (CNF) based transactions. The verification report correctly stated that Lucky Cement incurred freight costs during the period of investigation. The costs include inland freight, ocean freight and port handling costs. The adjustments were made in each instance for actual transport costs to arrive at the ex-factory price.

### ***Comments by the Applicant***

*The Applicant contested the provisional dumping margin calculated for Lucky Cement stating that the transport cost used by the Commission for purposes of the adjustment, was incorrect. It recalculated Luck Cement's dumping margin using the services of Genesis Analytics (Genesis). The Genesis report used information obtained from Lucky Cement's published financials with regard to total distribution costs to determine the transport cost for both domestic and export sales.*

### ***Commission's consideration***

The Commission noted that the calculation by Genesis did not take the substantial difference between the transport cost of domestic and export sales into account. Further, the Commission used actual delivery costs in determining the amount of the adjustment.

### ***Comments by Applicant on the essential facts letter***

*The Applicant referred the Commission to the potential differences between total transport sales and total export sales, since the overland per kilometre transport cost for Lucky Cement is estimated to be very similar between domestic and export deliveries. The Applicant indicated that it is not the case that Genesis did not consider the possibility that total transport costs differ as between domestic and export sales and indicated that they are very likely to differ as long as domestic and export sales tonnages differ, and the magnitude of differences between export and domestic sales volume is very likely to be the primary driver of the difference between total transport costs for domestic and export sales.*

*The Genesis report allocated the total distribution cost reported in Lucky Cement's financials to domestic sales and export sales on a pro-rata volume basis. This implicitly assumes the same transport cost per tonne for export and domestic sales and also, therefore a difference between total transport costs for export sales and for domestic sales that corresponds to the difference in export and domestic volume.*



*The major reason why this allocation method might be inaccurate is if the ratio of the total distance travelled for export sales to total distance travelled for domestic sales differs from the ratio of export sales volume to domestic sales volume in the relevant period. This obviously cannot be discovered from any publicly available information but the differences are likely to be small.*

#### **Commission's consideration**

The Commission reiterated that the calculation by Genesis did not take into consideration that there is a considerable difference between the transport cost of domestic and export sales. Further the Commission based its calculations on the actual verified transport costs for domestic and export sales respectively whilst Genesis findings were based on assumptions.

The Commission made a final determination to allow the transport costs adjustment.

The following adjustments to the export price were claimed by Lucky Cement:

#### **(i) Cost of payment terms**

The interest rate applied in the calculation of the cost of payment terms was determined with reference to the month end bank discount rate from January 2013 to December 2013 plus a margin added to arrive at the rate at which the bank advanced loans. The margin added by the bank varies from xxx% to xxx%. The company added xxx% to the bank discount rate for the calculation of the cost of payment terms adjustment.

The above rates apply also to export sales where the payment term was cash against documents (CAD), based on the voyage time period including clearance days.

Where export consignments were based on Letters of Credit ("LCs") (issuance LCs) the same rates were applied to arrive at the cost of payment terms based on the issuance period / number of days of the LC.

### ***Commission's consideration***

It is the Commission's practice to consider adjustments to the export price only if the adjustments affected price comparability at the time of setting prices. The payment days used by Lucky Cement to calculate the cost of payment terms were not displayed on the invoices and as such it is not known what the cost would be to Lucky Cement at the time of setting its prices. If the number of days is not reflected on the invoice, the Commission at least required a contract between the exporter and the customer indicating the number of days it would take before the customer makes a payment. No such information was provided by the exporter.

The Commission made a final determination not to allow the cost of payment terms adjustment as no information was provided to indicate that the exporter, at the time of setting the price, took into account how long it would take to receive payment.

### **(ii) Discounts and rebates**

Lucky Cement gives discounts and rebates to certain customers based on volume purchased during the month. The customer only gets to know the amount of discount given at the end of the month. Lucky Cement allocated the discount allowed on the basis of domestic sales volume.

The discount allowed to Lucky Cement's customers is based on the purchase of a certain volume which gets calculated at the end of the month after the customer met the requirements to qualify for such discount. The discount therefore does not affect the setting of the price as at the time of setting the price it is not known if the customer will meet the requirements to qualify for such discount.

The Commission made a final determination not to allow the discount and rebates adjustment as it was not demonstrated to have affected the price comparability at the time of the setting of the prices.

**(iii) Selling, general and administration costs**

Lucky Cement has a large work force to support its domestic sales operations, which are spread over the entire country. It has different offices at geographically dispersed locations where human resources relating to sales, administration and support services are deployed.

Due to the number of employees involved in the domestic sales as compared to export sales, Lucky Cement claimed an adjustment for the selling, general and administration expenses based on employee headcount. The selling, general and administrative cost was allocated to export sales and domestic sales on the basis of head count of sales force.

***Commission's consideration***

Lucky Cement submitted a cost build-up of the average cost of production of the subject product during the period of investigation, based on total production during that period. The cost build-up was verified and it was found that costs were not allocated according to whether the goods would be sold domestically or on the export market.

In any business environment, selling, general and administration expenses are incurred regardless of whether goods are to be sold on the domestic or export market.

The Commission made a preliminary determination not to allow the selling, general and administration costs adjustment as it was not demonstrated to have affected the price comparability at the time of the setting of the prices.

***Comments by Lucky Cement on the Commission's preliminary determination***

Lucky Cement stated that the Panel in US –softwood Lumber V *was of the view that amounts for general and administrative expenses “pertain to” the production and the sale of the like product unless it can be demonstrated that the product under investigation did not benefit from a particular General and Administrative (G&A) cost item.*

*The panel stated that "Thus, it would appear to us that, unless the particular G&A cost can be tied to a particular product manufactured by the company, G&A costs- because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods -pertain or relate to all of those goods. Canada's argument that G&A costs 'benefits all product that a company (or division within a company) may produce rather than specific products' support our view. If G&A benefits the production and sale of all goods that a company may produce, they must certainly relate to or pertain to those goods, including in part to the product under investigation".*

*In ITAC's report 210, Tyres (China), adjustments were made for domestic selling expenses, warranties, advertising, volume rebates, discount made on the basis of dividing the figure shown on the income statement by total domestic sales, rather than on transaction by transaction basis. There is therefore no reason the same cannot be accepted for Lucky Cement. Importantly, there is a significant difference between the SG&A costs incurred for the domestic and export markets. The difference in costs arises because Lucky Cement has a large work force to support its domestic sales operations, which are spread over the entire country. It has different area offices at geographically dispersed locations where human resources relating to sales, administration and support service are deployed.*

*The exporter stated that it does not agree with ITAC's conclusion that SG&A expenses were not demonstrated to affect price comparability. It has been sufficiently demonstrated that SG&A costs affect price comparability, at the time of setting prices it is known that more resources and expenses are incurred in making a domestic sale compared to an export sales. This is taken into consideration at the time of setting the prices. Furthermore it can be traced accurately whether a sale was made to a domestic or export customer. The SG&A allocation was found to be correct as stated in the verification report, there is no doubt as to the accuracy of the allocated values. The exporter requested ITAC to allow this adjustment as it clearly affect price*

*comparability and meets all requirements of Regulation 11.2.*

**Commission's consideration**

The Commission considered that Lucky Cement submitted a cost build-up of the average cost of production of the subject product during the period of investigation, based on total production during that period. The cost build-up was verified and it was found that costs were not allocated according to whether the goods would be sold domestically or on the export market.

In any business environment selling, general and administration expenses are incurred regardless of whether goods are to be sold in the domestic or export market.

The Commission made a final determination not to allow the selling, general and administration costs adjustment as it was not demonstrated to have affected the price comparability at the time of the setting of the prices.

**(iv) Production cost (Coal)**

Lucky Cement has two plants, one in the Southern region (Karachi plant) and the other in the Northern region (Pezu plant). Lucky Cement claimed that the Karachi plant produces for the export market whilst the Pezu plant produces for the domestic market in Pakistan. Coal is imported into Pakistan via Karachi (southern part of Pakistan) and there is an approximate distance of 1 100 km between the Karachi and Pezu plant. The company claimed an adjustment on the transportation of coal from Karachi to Pezu. This is informed by the fact that coal is a primary input in cement production and as such it costs more to transport coal to Pezu which caters mostly for the production of cement sold in the domestic market. This is based on the fact that the vast majority of cement produced for the domestic market need to recover a higher production cost than the cement produced for the export market.

**Commission's consideration**

The Commission noted that, in addition to manufacturing for the export market, the Karachi plant also manufactures a portion of the subject product

for domestic sales. It is not known what amount of the subject product is to be sold to the domestic market at the time of setting the price.

It is the Commission's practice to allow adjustments for production cost if there is a difference in the raw material used in the production of the subject product, sold on the domestic and export markets respectively, in order to account for differences in the two products, which could affect comparability. The adjustment claimed is with regard to the cost of the transport of raw material and there is no difference with regard to the raw material used in the production of the subject product for the two markets. The fact that it costs more to transport coal does not make it an allowable adjustment as the coal for the manufacturing of the domestically sold product is the same as the coal for SACU sales.

In addition, as the Karachi plant does not solely produce for the export market, the Commission is of the view that the exporter did not know what production would be sold on the domestic market and therefore could not have taken this into account at the time of setting its prices.

In the Penicillin (India) investigation the Board, the predecessor of the Commission, was faced with the situation that the exporter used domestically sourced raw material to manufacture for and supply the domestic market, while it used imported raw material to manufacture for and supply the South African and other export markets. The imported raw material was significantly cheaper than domestically sourced raw material owing to high tariff barriers in India. The Board did not allow an adjustment to the normal value to account for the difference in raw material prices, arguing that there was no difference between the raw materials used for domestic and export production. The Board's finding in this regard was taken on review in *Ranbaxy v Chairman of the Board*, and the Supreme Court confirmed that the Board was correct in its assessment.

### ***Lucky Cement's comments on the essential facts letter***

*Lucky Cement repeated the same comments made in response to the Commission's preliminary determination. It stated that the Commission did not allow their adjustments even when it had provided factual information pertaining to the adjustments in detail. Lucky Cement also stated that although the essential facts letter stipulates which adjustments the Commission is intending to disregard, the essential facts letter does not provide any detailed factual basis for the decision nor what facts will be considered.*

### ***Commission's consideration***

The Commission noted that Lucky Cement did not submit any additional information from that considered during the preliminary determination. The Commission is of the view that there is no need for it to deal in detail with the adjustments in its essential facts letter as they were dealt with in detail in the preliminary report.

The Commission noted comments by Lucky Cement on the essential facts letter and emphasized that in considering this adjustment, it is important to note that there is no difference in the raw material used in the production of the domestically sold product and the exported product.

The Commission made a final determination not to allow the production cost adjustment as there is no difference between the raw materials used for domestic and export production which affected the price comparability at the time of the setting of the prices.

### **4.1.3 Dumping margin**

The dumping margin for purposes of the preliminary determination for Lucky Cement was calculated to be 14.29 %.

### ***Comments by Applicant to the Commission's preliminary determination***

*The Applicant stated that it is of the view that ITAC incorrectly calculated the dumping margin. The Applicant further indicated that according to a*

*publication, International News, the APCMA, of which the Pakistan exporters are members, are demanding a ban of imports from Iran. In this news report APCMA states that Iranian cement is produced at a significant lower cost than the Pakistan Cement, the reason being that “the cost of furnace oil, gas and other fuels for [the Iranian producers] is one-third of the cost borne by [the Pakistan producers]. APCMA also complained that Iran cement is undercutting the price of the Pakistan producers. According to APCMA about half million tonnes of cement are imported from Iran. The Applicant stated that the demand for a ban on Iranian cement shows the severity with which the Pakistan producers believe foreign competitors which undercut their prices should be dealt with. This reaction is even more significant if regard is had of the fact that the share of Iranian imports referred to in this article relative to the total cement sales in Pakistan was only 2 percent.*

*The Applicant also stated that according to the article Iranian cement is sold in the Pakistan Baluchistan’s market at a maximum price of PKR450 (R52.38) per bag “while the minimum rate of Pakistan cement is PKR500 (58.20) per bag”. For the period of March 2015, the average FOB prices for Pakistan cement in SACU were between R32.54 (PKR277.58) and R34.98 (PK 299.47) per bag. Using the lower Pakistan (Baluchistan market) price of R52.38 per bag of cement and highest average FOB price of R34.98 to the SACU market, the dumping margin of Pakistan cement imports into SACU is 50%.The Applicant stated that this is a substantial dumping margin and is consistent with the dumping margin which ITAC.*

*The Applicant further stated that a dumping margin of at least 50% should apply to Lucky Cement as Lucky Cement’s domestic selling price is in line with that mentioned in this article. In support of this, the Applicant also refers to a Pakistan news article published on 17 December 2014 in “The Express Tribune which lists the bagged cement price of Bestway Cement, Cherat Cement, Dewan Cement and Lucky Cement.*

*The Applicant stated that it believed that although the dumping period of investigation is January 2013 – December 2013, Lucky Cement’s domestic*



*pricing approach in 2014 was not materially different to 2013, particularly because Lucky Cement's financial year commences in the middle of one year and ends in the middle of the following year (i.e. 1 July to 30 June). The applicant calculated Lucky Cement's domestic and export selling price for the financial year ended June 2014 using Lucky cement's published audited annual report and stated that:*

*"From the calculations Lucky Cement's export sales were made at substantially dumped prices (43.7%). The evidence shows that the dumping margin of 14.29% is incorrect and will not stop Lucky Cement from dumping its product to SACU. The injury in the SACU market will continue particularly as Lucky cement accounts for the majority 55% of the dumped imports from Pakistan".*

#### **Comments by Lucky Cement**

*The exporter stated that it disagrees with ITAC's finding of a 14.29% dumping margin as well as the Applicant's allegation that the dumping margin should be in excess of 50%. The exporter also stated that the presentation by the Applicant is oversimplified and misleading. According to the exporter the Applicant does not take into account the current figures and in particular the correct deductions to normal value. The exporter further stated that the reference to imports into Pakistan from Iran is irrelevant. The exporter stated that it is not known whether the Applicant is comparing like products. Nevertheless, the figures are irrelevant for the purpose of determining Lucky Cement's dumping margin.*

*The exporter stated that the Commission has to use the facts available. The ADR defines facts available "...information that is available to the Commission at the time of making a determination, whether preliminary or final, and which has been verified or is verifiable". Article 2.2.1.1 of the ADR states that "for the purpose of paragraph 2, costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated*

with the production and the sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer”.

The exporter stated that all figures in Lucky Cement’s submission were sufficiently supported by records which were verified by ITAC. None of the figures in Applicants calculation were verified and they are therefore of no relevance.

#### **Comments by the Applicant**

On 11 August 2015 the Applicant made an oral presentation to the Commission. The Applicant’s oral presentation addressed the provisional measures imposed by the Commission on imports from Lucky Cement. The Applicant expressed its dissatisfaction with the methodology the Commission used to calculate the dumping margin for Lucky Cement. The Applicant sourced expertise from Genesis to calculate the dumping margin and it found that the margin for Lucky Cement should be 31%.

#### **Commission’s consideration**

The Commission considered that the information Genesis used to calculate the dumping margin was based on Lucky Cement’s published financial statements. The provisional measure imposed by the Commission was calculated using the actual verified financial information from Lucky Cement. Therefore, the information available to Genesis was limited to that contained in Lucky Cement’s published financial statements, whilst the Commission used more detailed and accurate information from Lucky Cement’s management accounts, which Genesis did not have access to.

On closer inspection, it was established that the big difference between the Commission’s information and that used by Genesis was in the calculation of the normal value before adjustments and the adjustment for transport costs for both domestic and export sales.

The verified information used by the Commission indicates that xxx tonnes of cement with a value excluding sales tax and excise duty were sold in the domestic market.

It is important to note that sales in Lucky Cement's published financial statements did not differentiate between the sales of the subject product and the sales of other products also produced by it. Lucky Cement also sells Sulfate Resistant Cement (SRC) that is not the subject of this investigation. The information the Commission used to calculate the provisional dumping margin excluded this product whilst the Genesis analysis included this product. Furthermore, the Genesis calculation did not exclude sales tax and excise duty as is required.

The Genesis analysis used the total distribution costs to determine the transport cost for both domestic and export sales. This calculation did not take into consideration the substantial difference between the transport cost of domestic and export sales.

The Commission used actual delivery costs in determining the adjustments to the normal value and export price.

It is evident from the above that the reason the provisional dumping margin calculated by the Commission and that calculated by Genesis is different is due to the fact that Genesis analysis was based on assumptions and averaged information whilst the Commission's calculation was based on actual verified financial information.

The dumping margin for purposes of the final determination for Lucky Cement was calculated to be 14.29 %.

## **4.2 METHODOLOGY IN THIS INVESTIGATION FOR BESTWAY CEMENT**

### **Sales in the ordinary course of trade**

The Commission, for purposes of its final determination, considered sales of Bestway Cement to be in the ordinary course of trade.

#### **4.2.1 Calculation of normal value**

Bestway Cement produces Portland cement and sold it on the domestic market in Pakistan during the period of investigation. The actual invoiced sales were used to calculate the normal value.

Bestway Cement sells the subject product to dealers and institutions. Institutions in this case refer to schools, universities, government and other large projects. During verification it was found that there is no significant price difference in the price charged to dealers and institutions for the same volume of products.

### **Adjustments to the normal value**

The following adjustments to the normal value were claimed by Bestway Cement:

#### **(i) Discounts**

The exporter indicated that discount is calculated on a monthly basis and gets allocated at the end of the month according to specific invoices. There are two categories of discounts:

- **Price Match**

Price matches occur when the company needs to revise its prices in view of the competitors and the marketing situation. Price match is recommended by the respective head at each location which is further recommended by the D.G.M and then by the G.M Marketing for final approval by the Director Marketing. For the purpose of preparing the price match sheet, appropriate information will be gathered by the Marketing Managers at the Lahore,

Peshawar and the Marketing Head Office. All the information gathered is properly documented and recorded into the system on daily basis and all price matches are processed in the system with reference to invoices of that day, based on the approved price match.

### ***Commission's consideration***

The Commission considered that price match discounts are only given after Bestway Cement's prices are compared with those of other competitors and if it is found that Bestway Cement's prices are more than that of competitors. This does therefore not affect prices at the time of setting the price.

### **• Trade Discounts**

The discounts in case of institutions, whether in the shape of price reductions or payments to middlemen, are allowed and authorized by the marketing department. The authorization level discounts in case of institutions are approved by the Director Marketing with notification to the Chief Executive Officer. The institutions/contractors are offered a price net of discount while if there is any commission involved, it is paid through crossed cheque.

The maximum discount is allowed on achieving a certain performance level and is available to all the dealers. The finance department is responsible for checking all dealer's discounts, rebates, price match and incentives, maintaining proper records and perform reconciliations on a monthly basis.

Discounts are shown on invoice while PKR xxx is paid based on performance quantity at each month end for the respective dealer.

### ***Commission's consideration***

The discounts allowed are performance based and therefore, at the time of setting the price, it is not known if the dealer will perform in such a way that it will qualify for the said discount.

The Commission made a final determination not to allow the discount adjustments as these did not affect the price comparability at the time of setting the price.

**(ii) Cost of payment terms**

The exporter stated that all payments are on revolving credit terms. Bestway Cement uses the interest charged by commercial banks to calculate the interest charged to its customers. The average period for the revolving credit terms was xxx days.

***Commission's consideration***

The payment terms used by Bestway Cement to calculate this adjustment were not displayed on the invoices. In instances where the number of days is not reflected on the invoice, the Commission requires other confirmation such as a contract between the exporter and the customer indicating the number of days it will take before the customer makes a payment. Bestway Cement provided substantiation that it was aware at the time of setting the price that the turnaround time for its customers to pay, is seven days.

The Commission made a final determination to allow the cost of payment terms adjustment as information was provided to indicate that the exporter, at the time of setting the price, took into account how long it would take to receive payment, and it therefore affected the setting of the price.

**(iii) Bulk order rebate**

Bestway Cement has a bulk order discount policy to review the pricing for exports and local bulk sales to its clients. The rebate for bulk orders is at xxx% for single orders exceeding xxx tons.

***Commission's consideration***

The Commission noted that Bestway Cement confirmed during verification that there were no single orders that exceeded xxx tons on the domestic market. This rebate therefore only benefited importers. This adjustment is therefore applicable to the export price not domestic price.

The Commission made a final determination not to allow the adjustment as it was not demonstrated to have affected the price comparability at the time of setting the price.

**(iv) Tax adjustment**

The exporter indicated that in Pakistan, domestic operations fall within the ambit of National Tax /Bottom-line tax regime whereby profit before tax under the domestic operations is considered as income and corporate tax rate applicable for the year is applied. Domestic sales were taxed at a rate of 35% (applicable January 2013 to June 2013) and 34% (July 2013 to December 2013). The exporter used an average of 34.5% to calculate the corporate tax for the period 1 January 2013 to 31 December 2013.

***Comments by the Applicant***

*The Applicant stated that these adjustments are not allowable adjustments and accordingly the claim of exporters for such adjustments should not be allowed. The Applicant provided the following with regard the tax regime in Pakistan:*

*Income from businesses or profession is taxed under the following regimes:*

- *Normal tax regime ("NTR");*
- *Final tax regime ("FTR").*

**3. Normal Tax Regime ("NTR")**

*Under the NTR, taxable income of the tax payer is determined after reducing related allowable expenses, out of which some of the important allowable expenses are:*

- *depreciation allowance;*

- *an initial allowance of 25% in respect of an asset which has been placed into service in Pakistan for the first time in the tax year;*
- *first year allowance of 90% of cost in lieu of the initial allowance is allowed on plant, machinery and equipment installed and used by an industrial undertaking set up in specified rural underdeveloped areas or installed for generation of alternative energy by an industrial undertaking set up anywhere in Pakistan;*
- *an amortisation deduction is allowed for the cost of intangibles having a useful life of more than one year used wholly or partly for deriving income from business;*
- *The standard tax rate liability for companies is 34% whereas a small company as defined in the Income Tax Ordinance, 2001, ("the Ordinance") is taxed at 25%;*
- *Tax credits in the range of 10% to 20% have been provided to existing companies for investment and expansion, extension and Balancing Modernisation and Replacement of plant and machinery. 100% tax credit is provided to existing companies and new companies for investment in plant and machinery through new equity;*
- *Exemption for tax for up to 10 years is given for investments in special zones;*
- *The Ordinance makes provision for a set-off of assessed losses. So for example, if a business has an assessed loss, it may not pay any tax until the assessed loss is exhausted. Subsidiary companies may surrender its assessed loss to its holding company as the Ordinance provides for group relief; and*



- *The position is also more complicated because the Ordinance provides for group taxation whereby a company and its subsidiaries may elect to be taxed as one fiscal unit.*

#### **4. Final Tax Regime ("FTR")**

*Under the FTR, the tax deducted or collected at source is deemed to be a final tax in respect of income from sources chargeable under FTR. The amount chargeable to tax on gross receipt basis cannot be reduced by any deductible allowance or set-off of any loss or any tax credit available.*

*The Ordinance provides that tax shall be deducted or collected at 1% as final tax on the income arising from export or sale to an exporter.*

#### **Direct and Indirect Taxes**

*The Applicant stated that the Organisation for Economic Co-Operation and Development ("OECD") defines indirect tax as "tax imposed on certain transactions, goods or events. Examples include VAT, sales tax, excise duties, stamp duty, services tax, registration duty and transaction tax."*

*The Applicant also stated that the OECD defines a direct tax as "direct taxes are taxes imposed on income, capital gains and net worth."*

*The Applicant further stated that the NTR is a direct tax as it is determined on the taxable income of a tax payer. The FTR, however, is an indirect tax as it is deducted at source and is accordingly not levied on the taxable income of the tax payer.*

#### **The law relating to adjustments for taxation**

*The Applicant stated that in terms of the WTO Anti-Dumping Agreement and Anti-Dumping Regulations, its adjustments for tax may only be claimed in respect of indirect tax and not direct taxes.*

The Applicant stated that Article 2.4 of the WTO Anti-Dumping Agreement provides as follows: "*{a} fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex- factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.*"

The Applicant also stated that Article 2.4 of the WTO Anti-Dumping Agreement must be read with Article VI:4 of the GATT which provides as follows: "*[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to antidumping or countervailing duties by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.*"

The WTO Panel in *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, para 7.165 held that "*duties or taxes*" in question must be "*borne by the like product when destined for consumption in the country of origin or exportation*". In this case the WTO panel found that the European Commission was correct in not allowing tax adjustments, because Brazil could not prove that the tax in question was borne by the like product when destined for domestic consumption.

*The European Union and US legislation also provide that an adjustment can only be claimed for indirect taxes and not direct taxes.*

*Article 2(10) (b) of the European Union Basic Regulation provides that "[a]n adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country and not collected or refunded in respect of the product exported to the Community."*

*Section 773(a) (6) of the Tariff Act of 1930 ("American Tariff Act") provides as follows:*

*"(a) Determination. In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:*

*(1) Determination of normal value.*

*(6) Adjustments. The price described in paragraph (1)(8) shall be*

*(b) reduced by*

*(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product'*

*In terms of the International Trade Commission of United States' Manual on Anti-Dumping Duties (the "Manual"), the American Tariff Act "requires the deduction from normal value of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise. However, such taxes are to*

*be deducted only to the extent that such taxes are added to or included in the price of the foreign like product.*

*The Applicant stated that the reason why direct taxes are not allowable deductions is that direct taxes such as the NTR do not directly relate to the product in question and are not "borne by the product" but are levied on the taxable income after taking into account allowable expenses, tax credits and exemptions. The taxable income, for example, of a corporation may include income from several different types of products, interest, set off of assessed losses and many other factors and variables. Indirect taxes on the other hand are directly related to the product in question and are "borne by the like product".*

#### **Commission's consideration**

The Commission considered that ADR 11.2 (c) states that "Adjustments should be requested in interested parties' original response to the relevant questionnaire and must be –

- (e) Substantiated;
- (f) Verifiable;
- (g) Directly related to the sale under consideration; and
- (h) Clearly demonstrated to have affected price comparability at the time of setting prices"

An indirect tax is a tax collected by an intermediary (such as a retail store) from person who bears the ultimate economic burden of the tax (such as the consumer) e.g. sales tax, value added tax and excise duty. Direct tax is a tax that is paid directly by an individual or organisation on which it is imposed e.g income tax or taxes on assets.

#### **Treatment of direct and indirect taxes by investigating authorities:**

The EU and Australia AD regulations provide for adjustments to normal value for import charges and indirect taxes. Under section 773(a)(6)(B) of the Tariff Act of 1930, the US Commerce Department adjusts normal value for the

amount of any indirect tax imposed on the foreign like product, but only to the extent such taxes are included in the price.

In the reference book by Clive Stanbrook and Philip Bentley, “[d]irect taxes are not a matter for adjustment in anti-dumping proceedings ...” (see para. 3.3.2).

The corporate tax claimed by Lucky cement is a direct tax levied on the overall performance of the company. ADR 11.2 (c) directs the Commission to allow an adjustment only if it relates to the sale at issue. Therefore this tax does not warrant an adjustment as it is not directly related to any specific transaction and at the time of setting the price the manufacturer does not take this taxation into account.

Taking all comments received into account, the Commission made a preliminary determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sales under consideration.

***Comments by Bestway Cement on the Commission’s preliminary determination***

*Bestway Cement stated that the Commission accepted the tax adjustment claimed on the exports and yet disregarded the tax adjustment claimed on the normal value. Although this type of an adjustment is not common, the exporter stated that they made extensive written submissions detailing the unique tax regime in Pakistan and further explained the taxation regime to the Commission.*

*The exporter stated that the Commission erred in its evaluation of this adjustment and disregarded it. It reiterated that the tax adjustment is directly related to the sale under consideration and has clearly been demonstrated to affect price comparability at the time of setting prices. When Bestway Cement sets its price, it is aware of the applicable tax rate and it is therefore taken into account at the time of setting domestic and export prices. The applicable tax rate is taken into account on each and every sale. It is therefore directly*

*related to the sale under consideration. Importantly the taxation adjustment on normal value was verified and found to be correct.*

*It further reminded the Commission of the requirements of the ITA Act, the ADR and the AD Agreement which prescribe that adjustment shall be made for all differences that affect prices, including differences in taxes. Although ITAC appears to have accepted the Applicants idea of distinguishing between direct and indirect taxes, it reiterated that there is no distinction in the ITA Act, ADR nor the AD Agreement. By disregarding the tax adjustment on the normal value ITAC has failed to make "a fair comparison " between the normal value and the export price this has had a devastating impact on Lucky Cement, as their SACU export sales have been rendered uncompetitive.*

***Commission's consideration***

It is important to note that the Commission conducts a verification to check the validity and the accuracy of the information provided, but that verification of information does not equate to adjustments being accepted and allowed by the Commission.

Taking all comments into account, the Commission made a final determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sale under consideration.

**(v) Freight value adjustment**

Bestway Cement claimed for the freight value adjustment without providing any substantiation.

***Commission's consideration***

Bestway Cement did not provide any substantiation for the freight value adjustment claimed.

The Commission made a final determination not to allow the freight value adjustment as no substantiation was provided for this adjustment.

#### **4.2.2 Export price**

It was found that Bestway Cement has sold more than five percent (5%) of the subject product in the domestic market.

##### **Adjustments to the export price**

The following adjustments to the export price were claimed Bestway Cement:

##### **(i) Local freight and delivery charges**

According to the exporter, it incurred delivery costs for the transportation of goods from factory to port as well as the handling and clearing costs at the harbor.

##### ***Commission's consideration***

The Commission made a final determination to allow this adjustment to the export price in order to arrive at the ex-factory export price.

##### **(ii) Packaging**

According to the exporter, it incurred an additional packaging cost for export sales to SACU with regard to the sling bags used to assist handling.

##### ***Commission's consideration***

The Commission made a final determination to allow the additional packaging adjustment as it affected price comparability at the time of setting the price.

##### **(iii) Tax adjustment**

According to the exporter, taxation on export sales is levied at 1% of the invoice value. This amount is withheld by the bank and paid to the Pakistani Receiver of Revenue for every transaction.

### ***Commission's consideration***

This adjustment was verified and it was found that 1% of the invoice value is indeed withheld by the bank. The exporter therefore knows at the time of price setting that 1% of the invoice price will be deducted as export tax. The Commission made a final determination to allow the taxation adjustment as it was demonstrated to have affected the selling price at the time of setting of the price.

### **4.2.3 Dumping margin**

The dumping margin for Bestway Cement was calculated to be 77.15%.

## **4.3 METHODOLOGY IN THIS INVESTIGATION FOR ATTOCK CEMENT**

### **Sales in the ordinary course of trade**

The Commission found that no sales were made below cost and sales were therefore made in the ordinary course of trade

### **4.3.1 Calculation of normal value**

Actual invoiced sales transactions were used to calculate the normal value.

### **Adjustments to the normal value**

#### ***Comments by Attock Cement on the essential facts letter regarding normal value adjustments***

*Attock Cement repeated the comments made previously. They stated that the Commission did not allow their adjustments even when they have provided factual information pertaining to the adjustments in detail. Attock Cement also stated that although the essential facts letter stipulates which adjustments the Commission is intending to disregard, the essential facts letter does not*



*provide any detailed factual basis for the decision nor what facts will be considered.*

***Commission's consideration***

The Commission noted that Attock Cement did not submit any additional information from that already considered during the preliminary determination. The Commission is further of the view that there is no need to deal with the adjustments in detail in its essential facts letter as they were dealt with in detail in the preliminary report.

The following adjustments to the normal value were claimed by Attock Cement:

**(i) Packaging costs**

According to the exporter, the cost of packaging is different for the domestic and export markets. The product exported to SACU is packed in polypropylene bags while the domestic product is packaged in paper bags. The packaging was calculated and allocated based on the number of bags. A ton consists of 20 bags. The average packaging cost was calculated for the period of investigation.

***Commission's consideration***

Taking all comments received into account, the Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(ii) Commission**

According to the exporter, commission is paid to agents in the domestic market and importers in the export markets. It is paid on a monthly basis based on quantities despatched for the month. Attock Cement indicated that due to limitation of its system, it could not identify the commission against each sales invoice and therefore commission paid for the full year January to December was allocated to individual transactions. This was verified against ledger and bank payments to the agents.

***Commission's consideration***

Taking all comments received into account, the Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(iii) Cost of payment terms**

The exporter established the cost of payment terms for domestic sales at a certain period of days. It used the prevailing bank rates for the credit month to determine the adjustment.

***Commission's consideration***

It is the Commission's practice to consider adjustments to the normal value only if the adjustments affected price comparability at the time of setting prices. The payment days used by Attock Cement to calculate the cost of payment terms were not displayed on the invoices. In instances where the number of days is not reflected on the invoice, the Commission requires confirmation such as a contract between the exporter and the customer indicating the number of days it will take before the customer makes a payment. No such information was provided.

Taking all comments received into account, the Commission made a final determination not to allow the cost of payments terms adjustment as no substantiation was provided that this affected price comparability at the time of setting the price.

**(iv) Tax adjustment**

The exporter indicated that in Pakistan, domestic operations fall within the ambit of National Tax /Bottom-line tax regime whereby profit before tax under the domestic operations is considered as income and corporate tax rate applicable for the year is applied. Domestic sales were taxed at a rate of 35% (applicable January 2013 to June 2013) and 34% (July 2013 to December 2013). The exporter used an average of 34.5% to calculate the corporate tax for the period 1 January 2013 to 31 December 2013.

### **Comments by the Applicant**

*The Applicant stated that these adjustments are not allowable adjustments and accordingly the claim of exporters for such adjustments should not be allowed. The Applicant provided the following with regard the tax regime in Pakistan:*

*Income from businesses or profession is taxed under the following regimes:*

- *Normal tax regime ("NTR");*
- *Final tax regime ("FTR").*

#### **5. Normal Tax Regime ("NTR")**

*Under the NTR, taxable income of the tax payer is determined after reducing related allowable expenses, out of which some of the important allowable expenses are:*

- *depreciation allowance;*
- *an initial allowance of 25% in respect of an asset which has been placed into service in Pakistan for the first time in the tax year;*
- *first year allowance of 90% of cost in lieu of the initial allowance is allowed on plant, machinery and equipment installed and used by an industrial undertaking set up in specified rural underdeveloped areas or installed for generation of alternative energy by an industrial undertaking set up anywhere in Pakistan;*
- *an amortisation deduction is allowed for the cost of intangibles having a useful life of more than one year used wholly or partly for deriving income from business;*

- *The standard tax rate liability for companies is 34% whereas a small company as defined in the Income Tax Ordinance, 2001, ("the Ordinance") is taxed at 25%;*
- *Tax credits in the range of 10% to 20% have been provided to existing companies for investment and expansion, extension and Balancing Modernisation and Replacement of plant and machinery. 100% tax credit is provided to existing companies and new companies for investment in plant and machinery through new equity;*
- *Exemption for tax for up to 10 years is given for investments in special zones;*
- *The Ordinance makes provision for a set-off of assessed losses. So for example, if a business has an assessed loss, it may not pay any tax until the assessed loss is exhausted. Subsidiary companies may surrender its assessed loss to its holding company as the Ordinance provides for group relief; and*
- *The position is also more complicated because the Ordinance provides for group taxation whereby a company and its subsidiaries may elect to be taxed as one fiscal unit.*

## **6. Final Tax Regime ("FTR")**

*Under the FTR, the tax deducted or collected at source is deemed to be a final tax in respect of income from sources chargeable under FTR. The amount chargeable to tax on gross receipt basis cannot be reduced by any deductible allowance or set-off of any loss or any tax credit available.*

*The Ordinance provides that tax shall be deducted or collected at 1% as final tax on the income arising from export or sale to an exporter.*

## **Direct and Indirect Taxes**

*The Applicant stated that the Organisation for Economic Co-Operation and Development ("OECD") defines indirect tax as "tax imposed on certain transactions, goods or events. Examples include VAT, sales tax, excise duties, stamp duty, services tax, registration duty and transaction tax."*

*The Applicant also stated that the OECD defines a direct tax as "direct taxes are taxes imposed on income, capital gains and net worth."*

*The Applicant further stated that the NTR is a direct tax as it is determined on the taxable income of a tax payer. The FTR, however, is an indirect tax as it is deducted at source and is accordingly not levied on the taxable income of the tax payer.*

### **The law relating to adjustments for taxation**

*The Applicant stated that in terms of the WTO Anti-Dumping Agreement and Anti-Dumping Regulations, its adjustments for tax may only be claimed in respect of indirect tax and not direct taxes.*

*The Applicant stated that Article 2.4 of the WTO Anti-Dumping Agreement provides as follows: "{a} fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex- factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under*

*this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."*

*The Applicant also stated that Article 2.4 of the WTO Anti-Dumping Agreement must be read with Article VI:4 of the GATT which provides as follows: "[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to antidumping or countervailing duties by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."*

*The WTO Panel in *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, para 7.165 held that "duties or taxes" in question must be "borne by the like product when destined for consumption in the country of origin or exportation". In this case the WTO panel found that the European Commission was correct in not allowing tax adjustments, because Brazil could not prove that the tax in question was borne by the like product when destined for domestic consumption.*

*The European Union and US legislation also provide that an adjustment can only be claimed for indirect taxes and not direct taxes.*

*Article 2(10) (b) of the European Union Basic Regulation provides that "[a]n adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country and not collected or refunded in respect of the product exported to the Community."*

*Section 773(a) (6) of the Tariff Act of 1930 ("American Tariff Act") provides as follows:*

*"(a) Determination. In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:*

*(1) Determination of normal value.*

*(6) Adjustments. The price described in paragraph (1)(8) shall be*

*(b) reduced by*

*(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product'*

*In terms of the International Trade Commission of United States' Manual on Anti-Dumping Duties (the "Manual"), the American Tariff Act "requires the deduction from normal value of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise. However, such taxes are to be deducted only to the extent that such taxes are added to or included in the price of the foreign like product.*

*The Applicant stated that the reason why direct taxes are not allowable deductions is that direct taxes such as the NTR do not directly relate to the product in question and are not "borne by the product" but are levied on the taxable income after taking into account allowable expenses, tax credits and exemptions. The taxable income, for example, of a corporation may include income from several different types of products, interest, set off of assessed losses and many other factors and variables. Indirect taxes on the other hand are directly related to the product in question and are "borne by the like product".*

### ***Commission's consideration***

The Commission considered that ADR 11.2 (c) states that "Adjustments should be requested in interested parties' original response to the relevant questionnaire and must be –

- (a) Substantiated;
- (b) Verifiable;
- (c) Directly related to the sale under consideration; and
- (d) Clearly demonstrated to have affected price comparability at the time of setting prices"

An indirect tax is a tax collected by an intermediary (such as a retail store) from person who bears the ultimate economic burden of the tax (such as the consumer) e.g. sales tax, value added tax and excise duty. Direct tax is a tax that is paid directly by an individual or organisation on which it is imposed e.g. income tax or taxes on assets.

### **Treatment of direct and indirect taxes by investigating authorities:**

The EU and Australia AD regulations provide for adjustments to normal value for import charges and indirect taxes. Under section 773(a)(6)(B) of the Tariff Act of 1930, the US Commerce Department adjusts normal value for the amount of any indirect tax imposed on the foreign like product, but only to the extent such taxes are included in the price.

In the reference book by Clive Stanbrook and Philip Bentley, "[d]irect taxes are not a matter for adjustment in anti-dumping proceedings ..." (see para. 3.3.2).

The corporate tax claimed by Attock Cement is a direct tax levied on the overall performance of the company. ADR 11.2 (c) directs the Commission to allow an adjustment only if it relates to the sale at issue. Therefore this tax does not warrant an adjustment as it is not directly related to any specific transaction and at the time of setting the price the manufacturer does not take this taxation into account.



Taking all comments received into account, the Commission made a preliminary determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sales under consideration.

***Comments by Attock Cement on the Commission's preliminary determination***

*Attock Cement stated that the Commission accepted the tax adjustment claimed on the exports and yet disregarded the tax adjustment claimed on the normal value. Although this type of an adjustment is not common, the exporter stated that they made extensive written submissions detailing the unique tax regime in Pakistan and further explained the taxation regime to the Commission.*

*The exporter stated that the Commission erred in its evaluation of this adjustment and disregarded it. It reiterated that the tax adjustment is directly related to the sale under consideration and has clearly been demonstrated to affect price comparability at the time of setting prices. When Attock Cement sets its price, it is aware of the applicable tax rate and it is therefore taken into account at the time of setting domestic and export prices. The applicable tax rate is taken into account on each and every sale. It is therefore directly related to the sale under consideration. Importantly the taxation adjustment on normal value was verified and found to be correct.*

*It further reminded the Commission of the requirements of the ITA Act, the ADR and the AD Agreement which prescribe that adjustment shall be made for all differences that affect prices, including differences in taxes. Although ITAC appears to have accepted the Applicants idea of distinguishing between direct and indirect taxes, it reiterated that there is no distinction in the ITA Act, ADR nor the AD Agreement. By disregarding the tax adjustment on the normal value ITAC has failed to make "a fair comparison " between the normal value and the export price this has had a devastating impact on Attock Cement, as their SACU export sales have been rendered uncompetitive.*

### ***Commission's consideration***

ADR 11.2 clearly states the requirements for adjustments to be allowed, amongst which only adjustments for cost that is directly related to the sale under consideration will be allowed. The tax adjustments are on the overall performance and therefore not directly related to the sale under consideration. It is important to note that the Commission conducts a verification to check the validity and the accuracy of the information provided, but that verification of information does not equate to adjustments being accepted and allowed by the Commission.

Taking all comments into account, the Commission made a final determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sale under consideration.

### **(v) Worker's welfare fund tax (WWF)**

According to the exporter, the worker's welfare fund tax is levied at 2% of taxable total income. This is levied on companies with a revenue that exceeds PKR 500 000 per annum. The worker's welfare fund tax is levied on the overall company performance.

### ***Commission's consideration***

For an adjustment to be allowed it must be directly levied on a transaction not on the overall performance of the company.

Taking all comments received into account, the Commission made a final determination not to allow the WWF tax adjustment as it did not affect the comparability of the price at the time of setting the price and it is not specific to a transaction.

## **4.3.2 Export price**

It was found that Attock Cement sold more than five percent (5%) of the subject product in the domestic market.

## **Adjustments to the export price**

### ***Attock Cement's comments on the essential facts letter regarding export price adjustments***

*Attock Cement repeated the comments made previously. They stated that the Commission did not allow their adjustments even when they have provided factual information pertaining to the adjustments in detail. Attock Cement also stated that although the essential facts letter stipulates which adjustments the Commission is intending to disregard, the essential facts letter does not provide any detailed factual basis for the decision nor what facts will be considered.*

### ***Commission's consideration***

The Commission noted that Attock Cement did not submit any additional information from that already considered during the preliminary determination. The Commission is further of the view that there is no need to deal with the adjustments in detail in its essential facts letter as they were dealt with in detail in the preliminary report.

The following adjustments to the export price were claimed by Attock Cement:

#### **(i) Commissions**

According to the exporter, commissions were paid on export sales. It calculated the adjustment based on the actual commission expenditure incurred in respect of each shipment.

### ***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices

**(ii) Transport costs**

According to the exporter, it incurred costs for transportation of export sales from factory to port. It calculated the adjustment based on the actual costs incurred.

***Commission's consideration***

The Commission made a final determination to allow the transport costs adjustment as it affected price comparability at the time of setting the price.

**(iii) Packaging costs**

The exporter claimed an adjustment for the difference in packaging costs between domestic and export sales. The adjustment was determined on the average packing material cost per ton apportioned to quantities.

***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(iv) Port and handling charges**

The exporter claimed an adjustment for port and handling charges based on actual costs incurred.

***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(v) Volume deficiency price correlation adjustment**

According to the exporter, an agreement exists between it and Picronamix (a SACU importer) that stipulates that Picronamix had to commit to buying a certain volume of tons of cement during the period January to December 2013. It further stipulates that, in case Picronamix failed to buy the minimum contract quantity during the said period, the selling price would be increased

and Picronamix would have to pay an additional price on the entire quantity bought during the afore-said period.

Attock Cement stated that Picronamix was penalised as it failed to buy the required volume of tons of cement during the period January – December 2013. Attock Cement therefore claimed an adjustment to the export price by adding back the price of the entire quantity bought by Picronamix during the said period.

***Commission's consideration***

The adjustment claimed by Attock Cement is conditional that certain volume is bought by the importer. In this case, the importer could not reach the volume agreed upon and as such the second leg of the agreement came into force in that the importer's price was increased. This adjustment therefore did not affect the comparability of the price at the time of setting the price. It affects the price at the time when the importer is unable to perform.

The Commission therefore made a preliminary determination not to allow the adjustment.

***Comments by Attock Cement on the Commission's preliminary determination***

*Attock Cement repeated the explanation it initially provided and indicated that the Commission did not understand the rationale behind this adjustment.*

***Commission's consideration***

The Commission noted that Attock Cement did not provide any new information that enabled the Commission to reconsider its preliminary determination. The Commission is therefore of the view that this adjustment does not affect the comparability of the price at the time of setting the price. It affects the price at a later stage when the importer is unable to perform.

The Commission made a final determination not to allow the adjustment for purpose of final determination as it was not proven to have affected the price comparability at the time of setting of the prices.

**(vi) Bulk cargo price adjustment**

According to Attock Cement, it has a bulk cargo policy with the main objective to achieve the economies of scale through maximum production without interruptions. Since cement production is a continuous process where operational efficiency is only achieved if cement plant continues operations at all times with limited interruption for necessary maintenance. It recognises the importance of producing 100% of its production capacity and sells 100% of its capacity in order to achieve maximum operational efficiency. In order to sell the maximum quantities, Attock Cement offers bulk discount to attract bulk orders. Domestic and international buyers having sufficient liquidity and exposure in cement business are encouraged to commit to annual bulk quantities.

**Methodology** – The policy states that for the purpose of determining the special price for large volumes, the base price is the Karachi general market price, net of sales tax and excise duty. It further states that the special price may be reduced by between 10% to 20% as compared to base price subject to approval of Management Committee.

***Commission's consideration***

Based on the information provided, the discount claimed by Attock Cement is only given once an importer buys in bulk quantities. This adjustment does not affect the comparability of the price at the time of setting the price. It affects the price at a later stage when the importer meets the set criterion which is subject to approval by Management Committee.

The Commission made a preliminary determination not to allow the adjustment as it was not demonstrated to have affected the price comparability at the time of setting of the prices.

***Comments by Attock Cement on the Commission's preliminary determination***

*Attock cement reiterated the explanation initially provided and indicated that since the Commission disregarded the bulk cargo price adjustment, it lead to a deeply flawed conclusion.*

*Attock Cement stated that the massive differences in quantities sold in the domestic market and SACU exports were ignored despite its big impact on pricing. Attock Cement further stated that the conclusion that the Commission made is incorrect and it requested that the adjustment be accepted.*

***Commission's consideration***

The Commission is of the view that this adjustment does not affect the comparability of the price at the time of setting the price. It affects the price at a later stage when the importer meets the set criterion which is subject to approval by Management Committee.

The Commission made a final determination not to allow the adjustment as it was not demonstrated to have affected the price comparability at the time of setting of the prices.

**(vii) Tax adjustment**

According to the exporter proceeds from export sales are taxed at 1% on the gross value of sales as per section 154 Division IV of the Income Tax Ordinance 2001 of the Islamic Republic of Pakistan.

***Commission's consideration***

This adjustment was verified and it was found that 1% of the invoice value is indeed withheld by the bank. The exporter therefore knows at the time of setting the price that 1% of the invoice price will be deducted as export tax.

The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

### **4.3.3 Dumping margin**

The dumping margin for Attock Cement was calculated to be 63.53%.

## **4.4 METHODOLOGY IN THIS INVESTIGATION FOR D.G KHAN CEMENT**

### **Sales in the ordinary course of trade**

The Commission, for purposes of its final determination, considered sales of D.G Khan Cement to be in the ordinary course of trade.

### **4.4.1 Calculation of normal value**

#### ***Comments by D.G Khan Cement on the essential facts letter regarding normal value adjustments***

*D.G Khan Cement repeated the comments made previously. It stated that the Commission did not allow their adjustments even when they have provided factual information pertaining to the adjustments in detail. D.G Khan Cement also stated that although the essential facts letter stipulates which adjustments the Commission is intending to disregard, the essential facts letter does not provide any detailed factual basis for the decision nor what facts will be considered.*

#### ***Commission's consideration***

The Commission noted that D.G Khan Cement did not submit any additional information from that already considered during the preliminary determination. The Commission is further of the view that there is no need to deal with the adjustments in detail in its essential facts letter as they were dealt with in detail in the preliminary report.

#### **Adjustments to the normal value**

The following adjustments to the normal value were claimed by D.G Khan Cement:



**(i) Packaging Costs**

According to the exporter, the cost of packing is different for domestic and export markets. The product exported to SACU is packed in polypropylene bags while domestic product is packaged in paper sacks.

***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(ii) Commission**

According to the exporter, commission is paid to middlemen in both domestic and export markets. In the export market commission is normally paid at a rate of xxx % – xxx % while in the domestic market it is paid at a rate of xxx Rupees/ton. It was substantiated by proving contracts between D.G Khan Cement and the agents.

***Commission's consideration***

Taking all comments received into account, the Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(iii) Tax adjustment**

The exporter indicated that in Pakistan, domestic operations fall within the ambit of National Tax /Bottom-line tax regime whereby profit before tax under the domestic operations is considered as income and corporate tax rate applicable for the year is applied. Domestic sales were taxed at a rate of 35% (applicable January 2013 to June 2013) and 34% (July 2013 to December 2013). The exporter used an average of 34.5% to calculate the corporate tax for the period 1 January 2013 to 31 December 2013.

### **Comments by the Applicant**

*The Applicant stated that these adjustments are not allowable adjustments and accordingly the claim of exporters for such adjustments should not be allowed. The Applicant provided the following with regard the tax regime in Pakistan:*

*Income from businesses or profession is taxed under the following regimes:*

- *Normal tax regime ("NTR");*
- *Final tax regime ("FTR").*

#### **7. Normal Tax Regime ("NTR")**

*Under the NTR, taxable income of the tax payer is determined after reducing related allowable expenses, out of which some of the important allowable expenses are:*

- *depreciation allowance;*
- *an initial allowance of 25% in respect of an asset which has been placed into service in Pakistan for the first time in the tax year;*
- *first year allowance of 90% of cost in lieu of the initial allowance is allowed on plant, machinery and equipment installed and used by an industrial undertaking set up in specified rural underdeveloped areas or installed for generation of alternative energy by an industrial undertaking set up anywhere in Pakistan;*
- *an amortisation deduction is allowed for the cost of intangibles having a useful life of more than one year used wholly or partly for deriving income from business;*

- *The standard tax rate liability for companies is 34% whereas a small company as defined in the Income Tax Ordinance, 2001, ("the Ordinance") is taxed at 25%;*
- *Tax credits in the range of 10% to 20% have been provided to existing companies for investment and expansion, extension and Balancing Modernisation and Replacement of plant and machinery. 100% tax credit is provided to existing companies and new companies for investment in plant and machinery through new equity;*
- *Exemption for tax for up to 10 years is given for investments in special zones;*
- *The Ordinance makes provision for a set-off of assessed losses. So for example, if a business has an assessed loss, it may not pay any tax until the assessed loss is exhausted. Subsidiary companies may surrender its assessed loss to its holding company as the Ordinance provides for group relief; and*
- *The position is also more complicated because the Ordinance provides for group taxation whereby a company and its subsidiaries may elect to be taxed as one fiscal unit.*

#### **8. Final Tax Regime ("FTR")**

*Under the FTR, the tax deducted or collected at source is deemed to be a final tax in respect of income from sources chargeable under FTR. The amount chargeable to tax on gross receipt basis cannot be reduced by any deductible allowance or set-off of any loss or any tax credit available.*

*The Ordinance provides that tax shall be deducted or collected at 1% as final tax on the income arising from export or sale to an exporter.*

## **Direct and Indirect Taxes**

*The Applicant stated that the Organisation for Economic Co-Operation and Development ("OECD") defines indirect tax as "tax imposed on certain transactions, goods or events. Examples include VAT, sales tax, excise duties, stamp duty, services tax, registration duty and transaction tax."*

*The Applicant also stated that the OECD defines a direct tax as "direct taxes are taxes imposed on income, capital gains and net worth."*

*The Applicant further stated that the NTR is a direct tax as it is determined on the taxable income of a tax payer. The FTR, however, is an indirect tax as it is deducted at source and is accordingly not levied on the taxable income of the tax payer.*

### **The law relating to adjustments for taxation**

*The Applicant stated that in terms of the WTO Anti-Dumping Agreement and Anti-Dumping Regulations, its adjustments for tax may only be claimed in respect of indirect tax and not direct taxes.*

*The Applicant stated that Article 2.4 of the WTO Anti-Dumping Agreement provides as follows: "{a} fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex- factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under*

*this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."*

*The Applicant also stated that Article 2.4 of the WTO Anti-Dumping Agreement must be read with Article VI:4 of the GATT which provides as follows: "[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to antidumping or countervailing duties by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."*

*The WTO Panel in European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, para 7.165 held that "duties or taxes" in question must be 'borne by the like product when destined for consumption in the country of origin or exportation". In this case the WTO panel found that the European Commission was correct in not allowing tax adjustments, because Brazil could not prove that the tax in question was borne by the like product when destined for domestic consumption.*

*The European Union and US legislation also provide that an adjustment can only be claimed for indirect taxes and not direct taxes.*

*Article 2(10) (b) of the European Union Basic Regulation provides that "[a]n adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country and not collected or refunded in respect of the product exported to the Community."*

*Section 773(a) (6) of the Tariff Act of 1930 ("American Tariff Act") provides as follows:*

*"(a) Determination. In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:*

*(1) Determination of normal value.*

*(6) Adjustments. The price described in paragraph (1)(8) shall be*

*(b) reduced by*

*(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product'*

*In terms of the International Trade Commission of United States' Manual on Anti-Dumping Duties (the "Manual"), the American Tariff Act "requires the deduction from normal value of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise. However, such taxes are to be deducted only to the extent that such taxes are added to or included in the price of the foreign like product.*

*The Applicant stated that the reason why direct taxes are not allowable deductions is that direct taxes such as the NTR do not directly relate to the product in question and are not "borne by the product" but are levied on the taxable income after taking into account allowable expenses, tax credits and exemptions. The taxable income, for example, of a corporation may include income from several different types of products, interest, set off of assessed losses and many other factors and variables. Indirect taxes on the other hand are directly related to the product in question and are "borne by the like product".*

### ***Commission's consideration***

The Commission considered that ADR 11.2 (c) states that "Adjustments should be requested in interested parties' original response to the relevant questionnaire and must be –

- (a) Substantiated;
- (b) Verifiable;
- (c) Directly related to the sale under consideration; and
- (d) Clearly demonstrated to have affected price comparability at the time of setting prices"

An indirect tax is a tax collected by an intermediary (such as a retail store) from person who bears the ultimate economic burden of the tax (such as the consumer) e.g. sales tax, value added tax and excise duty. Direct tax is a tax that is paid directly by an individual or organisation on which it is imposed e.g. income tax or taxes on assets.

### **Treatment of direct and indirect taxes by investigating authorities:**

The EU and Australia AD regulations provide for adjustments to normal value for import charges and indirect taxes. Under section 773(a)(6)(B) of the Tariff Act of 1930, the US Commerce Department adjusts normal value for the amount of any indirect tax imposed on the foreign like product, but only to the extent such taxes are included in the price.

In the reference book by Clive Stanbrook and Philip Bentley, "[d]irect taxes are not a matter for adjustment in anti-dumping proceedings ..." (see para. 3.3.2).

The corporate tax claimed by D.G.Khan Cement is a direct tax levied on the overall performance of the company. ADR 11.2 (c) directs the Commission to allow an adjustment only if it relates to the sale at issue. Therefore this tax does not warrant an adjustment as it is not directly related to any specific transaction and at the time of setting the price the manufacturer does not take this taxation into account.

Taking all comments received into account, the Commission made a preliminary determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sales under consideration.

***Comments by D.G Khan Cement on the Commission's preliminary determination***

*D.G Khan Cement stated that the Commission accepted the tax adjustment claimed on the exports and yet disregarded the tax adjustment claimed on the normal value. The result is a staggering 68.87% dumping margin instead of 42.96% dumping margin had the tax adjustment on the normal value been accepted. This would have further declined had the bulk discount adjustment been allowed. Disregarding the tax adjustment, which clearly impact prices of domestic and export sales can only result in an unfair comparison. Although this type of an adjustment is not common, the exporter stated that they made extensive written submissions detailing the unique tax regime in Pakistan and further explained the taxation regime to the Commission.*

*The exporter stated that ITAC erred in its evaluation of this adjustment and disregarded it. It reiterated that the tax adjustment is directly related to the sale under consideration and has clearly been demonstrated to affect price comparability at the time of setting prices. When DG Khan Cement sets its price, it is aware of the applicable tax rate and it is therefore taken into account at the time of setting domestic and export prices. The applicable tax rate is taken into account on each and every sale. It is therefore directly related to the sale under consideration. It also reminded the Commission that the taxation adjustment on normal value was verified and found to be correct.*

*It further reminded ITAC about the requirements of the ITA Act, the ADR and the AD Agreement which both prescribe that adjustment shall be made for all differences that affect prices, including differences in taxes. Although ITAC appears to have accepted the Applicants idea of distinguishing between direct and indirect taxes, they reiterate that there is not distinction in the ITA Act, ADR nor the AD Agreement. By disregarding the tax adjustment on the normal value ITAC has failed to make "a fair comparison " between the normal value*



*and the export price .this has had a devastating impact on DG Khan Cement as a huge preliminary duty has been imposed, this will shut DG Khan Cement out of the market.*

***Commission's consideration***

ADR 11.2 clearly state the requirements for adjustments to be allowed, amongst which only the adjustments for must be of the cost that is directly related to the sale under consideration will be allowed. The tax adjustment is on the overall company performance and is therefore not directly related to the sale under consideration.

It is important to note that the Commission conducts a verification to check the validity and the accuracy of the information provided, but that verification of information does not equate to adjustments being accepted and allowed by the Commission.

Taking all comments into account, the Commission made a final determination not to allow the taxation adjustment as it was not demonstrated to be directly related to the sale under consideration.

**(iv) Worker's welfare fund tax (WWF)**

According to the exporter the worker's welfare fund tax is levied at 2% of taxable total income. This is levied on companies with a revenue that exceeds PKR 500 000 per annum.

***Comments by the Applicant***

The Applicant stated that the WWF tax is levied in terms of the Islamic State of Pakistan Workers' Welfare Ordinance 1971. This tax is levied on businesses whose total income exceeds 500 000 PKR per annum at 2% of taxable total income. The Applicant further stated that the WWF tax is like the NTR, a direct tax and accordingly the adjustment for this tax should be disallowed

### ***Commission's consideration***

The WWF tax is levied on the overall company performance. For an adjustment to be allowed it must be directly levied on a transaction and not on the overall performance of the company. This adjustment therefore did not affect the comparability of the price at the time of setting the price.

The Commission made a final determination not to allow the WWF tax adjustment as it did not affect the comparability of the price at the time of setting the price and it is not specific to a transaction.

#### **4.4.2 Export price**

It was found that D.G Khan Cement has sold more than five per cent (5%) of the subject product in the domestic market.

D.G. Khan Cement is responsible for its own exports to the SACU. The Commission used the actual export sales to SACU during the POI to calculate the export price.

#### **Adjustments to the export price**

##### ***Comments by D.G Khan Cement on the essential facts letter regarding export price adjustments***

*D.G Khan Cement reiterated its comments made previously. It stated that the Commission did not allow their adjustments even when it has provided factual information pertaining to the adjustments in detail. It also stated that although the essential facts letter stipulates which adjustments the Commission is intending to disregard, the essential facts letter does not provide any detailed factual basis for the decision nor what facts will be considered.*

##### ***Commission's consideration***

*The Commission noted that D.G Khan Cement did not submit any additional information from that already considered during the preliminary determination. The Commission is further of the view that there is no need to address the*

*adjustments in detail in its essential facts letter as they were dealt with in detail in the preliminary report.*

The following adjustments to the export price were claimed by D.G Khan Cement:

**(i) Cost of payment terms**

According to the exporter, its terms of sales to SACU customers are a letter of credit/ cash against documents (LC/CAD). The turnaround time for the letter of credit to be cashed is seven days.

***Commission's consideration***

It is the Commission's practice to consider adjustments to the export price only if the adjustments affected price comparability at the time of setting prices. The payment days used by D.G Khan Cement to calculate the cost of payment terms were not displayed on the invoices and it is not known what the cost would be to D.G Khan Cement at the time of setting its prices. In instances where the number of days is not reflected on the invoice, the Commission requests other confirmation such as a contract between the exporter and the customer indicating the number of days it will take before the customer make a payment. No such information was provided by the exporter.

The Commission made a final determination not to allow the adjustment as it was not proven to have affected the price comparability at the time of setting of the prices.

**(ii) Transport charges**

According to the exporter, it incurred freight costs during the period of investigation. These are inland freight costs and ocean freight costs depending on the incoterms. Export shipments are made with different delivery terms depending on the customer. Shipping costs are charged on a transaction-by-transaction basis. Ocean freight also includes handling charges. The

adjustment claimed was based on actual invoiced amount incurred on every shipment.

***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was proven to have affected the price comparability at the time of setting of the prices.

**(iii) Packaging Costs**

According to the exporter, the cost of packing is different for domestic and export markets. The product exported to SACU is packed in polypropylene bags while domestic product is packaged in paper sacks.

***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(iv) Port and handling charges**

According to the exporter it incurred costs for port handling the export sales.

***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was proven to have affected the price comparability at the time of setting of the prices.

**(v) Commission**

According to the exporter, commission is paid to middlemen in both the domestic and export markets. In the export market, commission is normally paid at a rate of xxx % – xxx % while in the domestic market is paid at a rate of xxx Rupees/ton. In substantiation, copies of contracts between D.G Khan Cement and the agents were provided

***Commission's consideration***

The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**(vi) Bulk discount adjustment**

D.G Khan Cement indicated that its main goal is to achieve the economies of scale through maximum production without interruptions. Since cement production is a continuous process, plant achieves operational efficiency only if it remains in full production at all times without interruptions.

In order to sell the maximum quantities it offer bulk discount to attract bulk orders. Domestic and international buyers with a good financial record and market share are encouraged to commit to annual bulk quantities. According to the exporter during the POI domestic customers did not benefit from this policy, as they were unable to buy or order large volumes. However, foreign customers did benefit from this discount.

***Commission's consideration***

The adjustment claimed by D.G Khan Cement is given once an importer buys in bulk quantities. This adjustment does not affect the comparability of the price at the time of setting the price. It affects the price at a later stage when the importer meets the set criterion which is subject to approval by Management Committee.

The Commission made a preliminary determination not to allow the adjustment as it was not demonstrated to have affected the price comparability at the time of setting of the prices.

***Comments by D.G Khan Cement on the Commission's preliminary determination***

*D.G Khan Cement reiterated the explanation initially provided and further stated that since the Commission disregarded the bulk cargo price adjustment, it lead to a deeply flawed conclusion.*

*D.G Khan Cement stated that the massive differences in quantities sold in the domestic market and SACU exports were ignored despite its big impact on pricing. D.G Khan Cement stated that the conclusion that the Commission made is incorrect.*

***Commission's consideration***

The Commission is of the view that this cost does not affect the comparability of the price at the time of setting the price. It affects the price at a later stage when the importer meets the set criterion which is subject to approval by Management Committee.

The Commission made a final determination not to allow the adjustment as it was not demonstrated to have affected the price comparability at the time of setting of the prices.

**(vii) Tax adjustment**

According to the exporter taxation on export sales is levied at 1% of the invoice value. This amount is withheld by the bank and paid to the Pakistani Receiver of Revenue for every transaction.

***Commission's consideration***

The Commission noted that this adjustment was verified and it was found that 1% of the invoice value is indeed withheld by the bank. The exporter therefore knows at the time of setting the price 1% of the invoice price will be deducted as export tax. The Commission made a final determination to allow the adjustment as it was demonstrated to have affected the price comparability at the time of setting of the prices.

**4.4.3 Dumping margin**

The dumping margin for D.G Khan Cement was calculated to be 68.87%.

## **4.5 METHODOLOGY IN THIS INVESTIGATION FOR ALL OTHER MANUFACTURERS/EXPORTERS FROM PAKISTAN (RESIDUAL DUMPING MARGIN)**

### **4.5.1 Normal Value**

The Commission made a final determination to use the weighted average normal value of all verified exporters to calculate the normal value for purposes of the residual dumping margin.

#### **Adjustment**

In order to obtain the ex-factory price, the Commission made a final determination to make an adjustment for delivery costs to the normal value, based on the information submitted by Lucky Cement, as it was regarded as the best information available.

### **4.5.2 Export price**

The Commission made a final determination to use the weighted average export price of all verified exporters to calculate the residual dumping margin.

#### **Adjustment**

The Commission made a final determination to make an adjustment for delivery costs to the normal value, based on the information submitted by Bestway Cement, as it was regarded as the best information available

### **4.5.3 Dumping margin**

The residual dumping margin was calculated to be 62.69%.

## **4.6 CONCLUSION - DUMPING**

The Commission took all comments from interested parties into account. The Commission made a final determination that the subject product originating in or imported from Pakistan was being dumped into the SACU market with the following margins:

<b>Producer</b>	<b>Dumping margin %</b>
Lucky Cement Limited	14.29%
Bestway Cement Limited	77.15%
D.G Khan Cement Limited	68.87%
Attock Pakistan Cement Limited	63.53 %
All other exporters (excluding Lucky Cement Limited, Bestway Cement Limited, D.G Khan Cement Limited and Attock Pakistan Cement Limited)	62.69%



## **5. MATERIAL INJURY**

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### **5.1 The Applicant submitted the following justification for the methodology used to present the material injury:**

*There are two separate and distinct markets for ordinary Portland cement classifiable under tariff sub-heading 2523.29, namely:*

- (i) the market for bagged cement; and*
- (ii) the market for bulk cement.*

*It is important to note that bagged cement constitutes 55% of the total cement production.*

*The Applicant stated that the purposes for which bagged cement and bulk cement are used differ. Bulk cement is used in large construction projects and sold to concrete product manufacturers, ready mix producers and blenders while bagged cement is usually used in small construction projects. Bagged customers are usually retailers which on-sell to customers for small projects.*

*The Applicant also stated that Portland cement classifiable under tariff sub-heading 2523.29 is imported from Pakistan only in bagged form and it is only in the bagged cement market where Pakistan imports compete with the domestic industry and where the domestic industry is suffering material injury. The applicant also indicated that its bagged data is, to the extent possible, presented separately from the industry data as a whole and for the sake of completeness, bulk cement data is also separately provided. The injury data furnished demonstrates material injury, not only in respect of the bagged cement market, but also material injury to the SACU industry as a whole (i.e. the combined bulk and bagged cement markets).*

*This anti-dumping application covers the entire SACU region. The cement imports from Pakistan enter SACU mainly through the following ports: Durban, Cape Town, Port Elizabeth and East London. More than 70% of the dumped*

*Pakistani cement imports enter the SACU market through the Durban port. As transportation costs for cement are very high, the imported cement is sold closer to the port of entry. Although the material injury is suffered by the domestic industry in the whole of SACU, it is more pronounced in the regions next to the ports of entry. KZN accounts for the highest import volumes, followed by the Coastal Region outside KZN. As such the injury is more pronounced in KZN and the Coastal Region outside KZN. The Coastal Region outside KZN is made up of the Eastern Cape and the Western Cape. Information is provided separately for the KZN and the Coastal Region.*

### **Commission's consideration**

In terms of the Anti-Dumping Agreement, the "domestic industry" is not defined based on the "imported product". Once the "imported product" is defined, the Commission must find the "domestic industry of the like product" which is being injured by these imports. In this case, there is no doubt that the "like product" is "cement". Therefore, the analysis of the injury which the "cement industry" is experiencing was analysed.

The Commission noted the Panel finding in the Hot Rolled Steel Products case:

"We have already stated that it may be highly pertinent for investigating authorities to examine domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the Anti-Dumping Agreement requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry." (our underlining)

It appears from this finding judgment that an investigating authority may, in the alternative, provide a satisfactory explanation as to why it is not necessary to

examine directly or specifically the other parts of the domestic industry. In other words, it opened the door to allow authorities not to investigate other parts of the industry and only one part of the industry, if there was a satisfactory explanation. However, this is not an easy onus to discharge.

The Commission further noted that finding in paragraph 7.154 of the Mexico - High Fructose Corn Syrup Panel:

"It is important to differentiate the consideration of factors relevant to the injury analysis on a sectoral basis, so as to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry, from the determination of injury or threat of injury on the basis of information regarding only production sold in one specific market sector, to the exclusion of the remainder of the domestic industry's production. There is certainly nothing in the AD Agreement which precludes a sectoral analysis of the industry and/or market. Indeed, in many cases, such an analysis can yield a better understanding of the effects of imports, and more thoroughly reasoned analysis and conclusion. However, this does not mean that an analysis limited to that portion of the domestic industry's production sold in one market sector is sufficient for establishing injury or threat of injury to the domestic industry, consistently with the AD Agreement. It is undisputed in this case that SECOFI defined the domestic industry as consisting of all sugar producers. What SECOFI failed to do, however, was assess the question of injury to those producers on the basis of their production of the like product, sugar. Instead, it assessed the question of threat of injury only with reference to that portion of sugar producers' production that was sold in the industrial market, and took no account of the fact that almost half of production was sold in the household market."

The Commission noted that there were no Pakistani bulk cement imports during the period of investigation, as it is prohibitively expensive to import cement in anything other than bags. There are several reasons why this is so:

**a) Retrofitting Carriers**

In order to handle cement in bulk for transportation across the oceans it is necessary to retrofit or customise bulk ship carriers. It is however expensive to retrofit or customise carriers for such bulk cement

transportation and for the loading and off-loading thereof at the harbour. Cement at these volumes will have to be transferred with compressed air (pneumatic systems) from bulk silos, situated at the port, or via road tankers (typically with 35 tons capacity) into the carrier hold. Aerated cement is less bulky and will settle into a more solid mass over time unless it is kept aerated to ensure a fluidised bed for off-loading by pneumatic equipment (extraction). So whilst it is possible to transport large bulk volumes, ships will have to be equipped for flexible route changes and different loading facilities and unloading terminals. Retrofitting ships for once-off or ad-hoc movement will be prohibitively expensive.

**b) Portside Off-loading Infrastructure**

- i. Offloading bulk cement from a carrier hold will also be impractical, unless the infrastructure exists at the destination harbour to transfer the cement directly from the ship's hold to the quayside silos. However, this requires the ship to be specially converted as well as having a dedicated receiving system on-shore. Bulk silos will have to be available to ensure offloading within a reasonable amount of time. Usually the unloading of the cement in the hold will be carried out with a stationary or trailer-mounted extraction system, which pumps cement from the hold via pipeline to bulk silos onshore. The infrastructure will have to include the necessary pipelines and pumping systems on a semi-permanent or permanent basis.
- ii. The bulk depot (silos, materials handling, filters etc.) will have to be fitted with dust-control equipment to ensure compliance with environmental regulations. Cement is a very dusty bulk material and spillage prevention during loading and unloading operations usually poses a major challenge. The facility will then have to be equipped with road-outloading equipment, and/or a packing plant to move the cement out either in 50kg pre-packed bags or road tankers over time. A bulk depot to handle an operation like this can be constructed for an estimated R250 million. The applicants are not aware of any of these

facilities currently existing at a South African port that could handle the off-loading of cement carried in bulk carriers.

**c) Cement is Hygroscopic**

Cement is hygroscopic and is susceptible to transport across water. The carrier will have to be 100% watertight with air-drying equipment to ensure the cement is still usable upon arrival at the destination port.

Based on the above information, the Commission made a preliminary determination that although it would have regard to the injury analysis for cement as a whole, its focus with regard to the injury analysis, would be on bagged cement.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that ITAC's assessment of material injury is fatally flawed. The domestic industry provided injury information for the subject product, being "Portland cement". The domestic industry requested ITAC to focus the analysis of injury on "bagged cement" and not bulk cement because there are no bulk cement imports from Pakistan and there are distinct markets for bagged and bulk cement. The 4-year injury information provided by the domestic manufacturer's shows that injury in the bagged cement market is particularly focused on areas close to the ports of entry for Pakistani imports, particularly in Kwazulu-Natal, Eastern and the Western Cape.*

*The injury information was categorized into 3 sets: KZN, Coastal regions and SACU. In other words injury is shown by geographic location as well as for SACU as a whole.*

***Commission's consideration***

The Commission's preliminary report clearly indicates that the material injury was not assessed on categorized regions but with regard to the SACU market as a whole, with special focus on bagged cement.

Taking the comments into account, the Commission made a final determination to consider the material injury for the total cement industry, with specific focus on bagged cement.

## 5.2 DOMESTIC INDUSTRY – MAJOR PROPORTION OF PRODUCTION

The following injury analysis relates to Afrisam, Lafarge, NPC and PPC that constitute more than 90 per cent of the total domestic production of the subject product.

The Commission made a final determination that the total domestic production constitutes “a major proportion” of the total domestic production, in accordance with the Anti-Dumping Regulations.

## 5.3 IMPORT VOLUMES AND EFFECT ON PRICES

### 5.3.1 Import volumes

The following table shows the volumes of imports in tons during the period of investigation (It should be borne in mind that only bagged cement was imported during the period of investigation):

**Table 5.3.1: Import volumes**

Tons	2010	2011	2012	2013
Pakistan	142 806	362 345	746 875	1 091 235
Other Imports	40 734	80 916	16 044	17 798
<b>Total imports</b>	<b>183 540</b>	<b>443 261</b>	<b>762 919</b>	<b>1 109 033</b>

The information in the table above indicates that the volume of the dumped imports from Pakistan increased significantly over the investigation period, while imports from other countries decreased over the same period.

## 5.3.2 Effect on Domestic Prices

### 5.3.2.1 Price depression

Price depression takes place when the SACU industry's ex-factory selling price decreases during the investigation period.

The table below shows the SACU industry's ex-factory selling price per ton:

**Table 5.3.2.1: Price depression**

	2010	2011	2012	2013
Ex-factory price per unit R/Ton ( <b>Bagged cement</b> )	100	101	104	105
Ex-factory price per unit R/Ton ( <b>Bulk cement</b> )	100	103	106	111
Ex-factory price per unit R/Ton ( <b>Bagged and bulk cement</b> )	100	102	105	107

This table was indexed due to confidentiality using 2010 as the base year.

The Applicant's average selling price for cement has been increasing throughout the investigation period. The Applicant therefore did not experience price depression during the period of investigation.

#### ***Comments by exporters on the Commission's preliminary report***

*The exporters stated that a table showing figures without any commentary being provided by ITAC does not constitute an evaluation. The exporters request the Commission to properly provide its comments and conclusions on price depression. The exporters further stated that it is important to note that ADR 13.1 requires that significant price depression be evaluated as one of the factors indicative of material injury. This is also in line with the requirement of Article 3.2 of the AD agreement. The figures provided clearly show that the applicants did not suffer any price depression. Rather, their ex-factory selling price per ton increased for not only bagged cement but bulk cement as well. The combined bagged and bulk figures still shows no price depression. This does not support a finding of material injury.*

### ***Commission's consideration***

The Panel on EC — Bed Linen (Article 21.5 — India) underlined that “there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury”. The Panel concluded that:

“[...] an analysis of injury does not rest on the evaluation of the Article 3.4 factors individually, or in isolation. Nor is it necessary that all factors show negative trends or declines. Rather, the analysis and conclusions must consider each factor, determine the relevance of each factor, or lack thereof, to the analysis, and consider the relevant factors together, in the context of the particular industry at issue, to make a reasoned conclusion as to the state of the domestic industry.”

“Accordingly, because Articles 3.1 and 3.4 do not regulate the manner in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel's conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. Having said this, we believe that, under the particular facts of this case, it was reasonable for the Panel to have concluded that the European Commission addressed and evaluated the factor ‘growth’.

Taking the above into account the Commission is of the view that the argument by the exporters that it should analyse and make a conclusion on each individual injury indicator, is incorrect.

#### **5.3.2.2 Price undercutting**

Price undercutting is the extent to which the price of the imported product is lower than the price of the like product produced by the SACU industry. The landed cost for the period of investigation was based on the verified



importers' information (f.o.b value of dumped imports plus the landing and clearing costs and internal transport costs (from plant to harbour). The landed cost is based on the average of all the imports from Pakistan of the four importers that responded to the questionnaire.

The Commission made a preliminary determination that the imported bagged cement from Pakistan undercut the Applicant's selling price of bagged cement during the period of investigation.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that price undercutting does not contain any figures to support the Commission's conclusion of price undercutting. They stated that it is not clear on which figures this finding is based on.*

***Commission's consideration***

The Commission's findings are based on the Applicant's selling price information for bagged cement which was provided and verified. The Applicant's selling price for bagged cement is confidential and cannot be provided to interested parties. A non-confidential version was however provided as part of the non-confidential application. The landed cost for the period of investigation was based on the verified importers' information (f.o.b value of dumped imports plus the landing and clearing costs and internal transport costs (from plant to harbour). The landed cost is based on the average of all the imports from Pakistan of the four importers that responded to the questionnaire.

Although price undercutting was determined for the period of investigation for dumping, the Commission decided to provide the following indexed figures for purposes of clarification of its finding:

**Table 5.3.2.2: Price undercutting**

R/ Ton	2010	2011	2012	2013
SACU's selling price (Bagged cement)	100	101	104	105
Landed Cost of imports from Pakistan	100	106	115	101
FOB price	100	112	126	140
Undercutting per unit	100	82	61	119
Undercutting %	100	81	59	146

The Commission is of a view that the imported bagged cement from Pakistan undercut the Applicant's selling price for bagged cement during the period of investigation.

### 5.3.2.3 Price suppression

Price suppression is the extent to which increases in the cost of production of the product concerned, cannot be recovered in the selling prices.

The tables below show the SACU industry's average costs of production and actual average selling prices for the subject product:

**Table 5.3.2.3 (a): Price suppression-Bagged Cement**

	2010	2011	2012	2013
Applicant's ex-factory price	100	101	104	105
Applicant's cost of production	100	107	114	112
Cost as a % of selling price	100	106	109	107

This table was indexed due to confidentiality using 2010 as the base year.

The table above indicates that the Applicant's production cost increased from 2010 to 2013 but that the Applicant's price only slightly increased, indicating that it could not recover the full increase in cost by increasing its prices. The Applicant therefore experienced price suppression with regard to its bagged cement prices.

**Table 5.3.2.3 (b): Price Suppression SACU-Bulk Cement**

	2010	2011	2012	2013
Applicant's ex-factory price	100	103	106	111
Applicant's cost of production	100	110	114	125
Cost as a % of selling price	100	107	108	113

This table was indexed due to confidentiality using 2010 as the base year.

The table above indicates that production cost increased from 2010 to 2013 but that the Applicant's price only increased slightly, indicating that it could not recover the full increase in cost by increasing its prices. The Applicant therefore experienced price suppression with regard to its bulk cement prices.

**Table 5.3.2.3 (c): Price suppression-Bagged and Bulk Cement**

	2010	2011	2012	2013
Applicant's ex-factory average price	100	102	105	107
Applicant's cost of production	100	108	113	116
Cost as a % of selling price	100	106	108	108

This table was indexed due to confidentiality using 2010 as the base year.

The table above indicates that total production cost increased from 2010 to 2013 but that the Applicant's price only increased slightly, indicating that it could not recover the full increase in cost by increasing its prices. The Applicant therefore experienced price suppression with regard to its average cement prices.

### **5.3.3 Consequent impact of the dumped imports on the Industry**

#### **5.3.3.1 Actual and potential decline in sales**

The tables below show the Applicant's sales volumes for the subject product:

**Table 5.3.3.1 (a): SACU Industry Sales SACU-Bagged Cement**

	2010	2011	2012	2013
Sales volume (Tons)	100	92	90	94

This table was indexed due to confidentiality using 2010 as the base year.

**Table 5.3.3.1 (b): SACU Industry Sales SACU-Bulk Cement**

	2010	2011	2012	2013
Sales volume Tons	100	105	109	117

This table was indexed due to confidentiality using 2010 as the base year.

**Table 5.3.3.1 (c): SACU Industry Sales SACU-Bagged and Bulk Cement**

	2010	2011	2012	2013
Sales volume Tons	100	97	97	103

This table was indexed due to confidentiality using 2010 as the base year.

The above table shows that the Applicant's sales for bagged cement showed some recovery between 2012 and 2013, although not to the levels in 2010. The Applicant's sales for bagged cement declined over the period of investigation as the sales volume of bagged cement imports from Pakistan continued to grow in the SACU market.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that although the Applicant's sales volumes decreased over the period. It is important to note that the industry is on a path to recovery. Sales volumes increased by 4% in 2013 compared to 2012. The exporters stated that this is particularly important considering the findings in inter alia US-Lamb that more emphasis needs to be placed on the most recent data. It is clear that the combined bagged and bulk cement increased by almost 6% in 2013. The overall sales figures looking at the most recent information (year 2013) look positive. The exporters also stated that ITAC noted the findings of the Competition Commission in which it was found "that the market has generally become more*

*competitive as evidenced by firms penetrating into regions (provinces) that they were previously not active in". Competition between the applicants has significantly increased as a result of the intervention of the Competition authorities. Consequently, cement produced by the applicants can move into all parts of the country unrestricted. This includes coastal provinces. It is clear that the coastal provinces are not only competing against the alleged dumped imports. Rather a significant portion of declining sales volumes at coastal areas is emanating from the applicants themselves. This follows that a significant portion of injury suffered in the coastal areas is not only from alleged dumped imports. ITAC does not mention this anywhere in its report meaning this was not part of its evaluation. This is despite this being important.*

**Commission's consideration**

The Commission indicated that the investigation is not conducted on certain geographic areas within the SACU, but on SACU as a whole. The injury analysis was done for the SACU market as a whole. The analysis shows that the SACU sales of bagged cement have declined over the investigation period.

**5.3.3.2 Profit and Loss**

The tables below show the profit and loss information of the Applicant for the subject product:

**Table E5.3.3.2 (a): Profit and Loss SACU-Bagged Cement**

	2010	2011	2012	2013
Tons sold	100	92	90	94
Total gross profit	100	87	84	90
Total net profit	100	75	79	75

This table was indexed due to confidentiality using 2010 as the base year.

**Table E5.3.3.2 (b): Profit and Loss SACU- Bulk Cement**

	2010	2011	2012	2013
Tons sold	100	105	109	117
Total gross profit	100	102	109	116
Total net profit	100	90	106	112

This table was indexed due to confidentiality using 2010 as the base year.

**Table E5.3.3.2 (c): Profit and Loss SACU-Bagged and Bulk Cement**

	2010	2011	2012	2013
Tons sold	100	97	97	103
Total gross profit	100	93	94	100
Total net profit	100	80	88	88

This table was indexed due to confidentiality using 2010 as the base year.

The above table shows that the SACU industry's gross profits for bagged cement declined by 10 index points from 2010 to 2013. The Applicant stated that the decline has been as a result of the dumped imports from Pakistan which are undercutting the prices of the bagged and bulk cement.

***Comments by exporters***

*The exporters stated that very significant Competition Tribunal fines were imposed on the cement producers during the investigation period. The exporters also stated that given that the fines were imposed for cartel behaviour, it implies that the profits being made in the period preceding the imposition of the fines were not normal. Following a correction in the pricing behaviour after the Competition Tribunal intervention, it is expected that profits would drop.*

***Response by the Applicant***

*The Applicant stated that the competition issues are irrelevant to the present investigation. The Applicant further stated that the only issue that is*

*relevant is injurious dumping by Pakistani producers. The injury suffered by the SACU industry as reflected in the application, including the decline in profit, which was caused by dumped Pakistan imports and is not related to the competition issues.*

**Commission's consideration**

*The Commission found that the profits of the Applicant were not significantly affected by the fines imposed by the Competition tribunal. It is also important to note that the injury experienced by the SACU industry is more prominent not on the price but on volume i.e. sales, output and market share.*

**Comments by exporters on the Commission's preliminary report**

*The exporters stated that price collusion and market division in the cement industry from 2008 onwards would have had an impact on the applicants after hefty fines were imposed on them. The loss of profit as a result of the industry's past illegal trading methods cannot be attributed to the alleged dumped imports. However, it appears this is the case, as ITAC did not properly evaluate the impact of this heinous behaviour by the applicants.*

**Commission's consideration**

The Commission considered the matter and noted that although AfriSam agreed to pay a penalty representing 3% of its 2010 cement annual turnover in the SACU. It is apparent from its financial statements that it had an insignificant effect on its overall financial performance during the POI. The fine imposed on Lafarge was paid by its parent company and therefore had no effect on its financial performance. It is further important to bear in mind that these were the only two companies who paid fines and PPC, NPC and other SACU producers paid no fines.

**5.3.3.3 Output**

The following tables outline the SACU industry's domestic production volume of the subject product:

**Table 5.3.3.3 (a): Output SACU-Bagged Cement**

	2010	2011	2012	2013
Applicant's total production of the product concerned (Tons)	100	90	88	90

This table was indexed due to confidentiality using 2010 as the base year.

**Table 5.3.3.3 (b): Output SACU-Bulk Cement**

	2010	2011	2012	2013
Applicant's total production of the product concerned (Tons)	100	104	114	124

This table was indexed due to confidentiality using 2010 as the base year.

**Table 5.3.3 (c) Output SACU-Bagged and Bulk Cement**

	2010	2011	2012	2013
Applicant's total production of the product concerned (Tons)	100	95	98	103

This table was indexed due to confidentiality using 2010 as the base year

The SACU industry is losing sales to the dumped Pakistani imports, resulting in declining production. Between 2010 and 2013, the Applicants' total SACU production of bagged cement declined by 10 index points. The Commission noted that the decline in production of bagged cement was minimal in KZN. In the coastal region outside KZN, the total production for bagged cement declined by a significant amount. In an effort to mitigate the losses caused by the dumped Pakistani imports, the SACU Industry had to decrease its bagged production and increase its bulk cement production.

The Applicant stated that unless anti-dumping duties are imposed, the dumped Pakistani imports would continue to increase and the SACU Industry would be forced to decrease production volumes further, which will result in job losses.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that Applicant's output is increasing looking at table provided in the preliminary report which indicates increasing output at the end of the injury assessment period (2013). Nonetheless, no evaluation of*



*the data in the tables is provided in the report. ITAC merely stated the applicant's interpretation of the figures without providing its own evaluation. This is contrary to the ADA. This is clearly documented in many Panel reports. In WTO Mexico – HFCS (par 7.128) the panel held that “the mere recitation of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements of Article 12.2 of the AD Agreement.*

#### **Commission's consideration**

As previously stated, the Commission is of the view that there is no jurisprudence that requires authorities to make conclusion on each individual injury indicator. It is within the Commission's right to analyse the trend in injury indicators and not make a conclusion on each individual indicator.

#### **5.3.3.4 Market share**

The following tables below show the SACU market share for the subject product:

**Table 5.3.3.4 (a): Market Share by Volume SACU-Bagged Cement**

**This table was indexed due to confidentiality using 2010 as the base year.**

	2010	2011	2012	2013
Market share				
Applicants	100	92	90	94
Dumped imports (Pakistan)	100	254	523	764
Other imports	100	199	39	44
Total SACU market	100	98	100	109
Percentage share held by:				
Applicants	100	94	89	86
Dumped imports (Pakistan)	100	260	520	700
Other imports	100	200	33	33

**Table 5.3.3.4 (b): Market Share by Volume SACU-Bulk Cement**

**This table was indexed due to confidentiality using 2010 as the base year.**

	2010	2011	2012	2013
Market share				
Applicants	100	105	109	117
Total SACU market	100	108	113	122
Percentage share held by:				
Applicants	100	97	97	96

**Table 5.3.3.4 (c): Market Share by Volume SACU-Bagged and Bulk Cement**

	2010	2011	2012	2013
Market share				
Applicants	100	105	109	117
Dumped imports (Pakistan)	100	254	523	764
Other imports	100	199	39	44
Total SACU market	100	101	104	112
Percentage share held by:				
Applicants	100	97	94	91
Dumped imports (Pakistan)	100	246	492	662
Other imports	100	175	25	25

This table was indexed due to confidentiality using 2010 as the base year.

The information in the above table shows that SACU's share of the market declined considerably over the investigation period, with a corresponding increase in the market share of the dumped imports.

The Applicant stated that it is losing market share to the dumped Pakistani imports. The loss is increasing each year and such losses would continue unless anti-dumping duties are imposed.

The Commission noted that the market grew by 12 index points over the period of investigation and that the Applicant lost market share during this period, while the importers were able to increase their share in a growing market.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that it is significant that ITAC's failure to properly take into account the impact of blenders understates the domestic industry's market share especially considering that blenders produce almost the same quantities of bagged cement exported by the Pakistanis. The exporters also stated that without proper investigation and evaluation of blenders it is certain that the size of the domestic market and market share is misleading.*

*The exporters also stated that the Commission's statement in paragraph 7.2 of the preliminary report clearly shows it simply relied on the figures provided by the applicant without properly evaluating them. Importantly,*

*ITAC failed to conduct any assessment of the volumes produced by blenders. The exporters made a request to the Commission to properly investigate and determine the market share of the domestic producers taking into account the market share of blenders, which is not insignificant.*

**Commission's consideration**

It should be noted that the market grew by 12 index points over the period of investigation and that the Applicant lost market share during this period, while the exporters were able to increase their share in a growing market.

The Commission is of the opinion that the blenders are not cement manufactures as they process or blend the cement that is produced by the SACU manufacturers. Therefore, the blender's sales information was not included in the SACU market share analysis. The allegation with regard to the impact of sales by blenders is discussed in detail under the causal link section.

**5.3.3.5 Productivity**

Using the production and employment figures sourced from the Applicant, its productivity in respect of the subject product is as follows:

**Table 5.3.3.5: Productivity**

	2010	2011	2012	2013
Total production volume (tonnes)	100	95	98	103
Number of employees (manufacturing only)	100	93	90	84
Units per employee	100	102	108	122

**This table was indexed due to confidentiality using 2010 as the base year.**

Productivity increased during the period of investigation. The Applicant indicated that the apparent increase in productivity in 2013 is a consequence of a severe and regrettable reduction in the number of employees employed by the SACU Industry.

**Comments by exporters on the Commission's preliminary report**

*The exporters stated that productivity increased in 2011, 2012 and 2013. They indicated that this significant increase rather than reduction during the investigation period is not indicative of an industry suffering significant material injury. It appears that the industry is making inroads in running more efficiently every year. This is indicative of an industry recovering from partly self-inflicted injury. Accordingly no injury has been proven in respect of productivity.*

*Nevertheless any continued imposition of anti-dumping duties in such a globally competitive industry will create disincentives to continually increase productivity. This will cost consumers in the long run.*

**Commission's consideration**

The Commission is of the view that increase in productivity does not mean that the industry is not suffering material injury. The industry put measures into place, such as retrenchment, in an attempt to compete with dumped imports.

**5.3.3.6 Return on investment**

Return on investment is normally regarded by the Commission as being the profit before interest and tax as a percentage of the net value of assets. The tables below provide the Applicant's profit after interest and tax expressed as a percentage of its net asset value:

**Table 5.3.3.6: Return on investment**

	2010	2011	2012	2013
Total net profit (all products) Bag and Bulk	100	80	88	88
Total net assets (total)	100	99	97	92
Return on net assets (total)	100	80	90	95

**This table was indexed due to confidentiality using 2010 as the base year.**

It is noted that although there was some recovery from 2011 to 2012, the net profit on cement declined over the period of investigation. The value of total net assets also declined over the same period. Although the return on net assets declined in 2011, it recovered in 2013 to almost the same level as in 2010.

**Comments by exporters on the Commission’s preliminary report**

*The exporters stated that they reiterate that ITAC has an obligation to properly evaluate and draw conclusions on figures in the table. They further stated that the comment contained in the report does not provide them with a proper understanding of ITAC’s conclusions regarding return on investment. It noted that the figures on net assets (total) increased by 19% between the period 2011 and to 2013. The total net profit (all products) bag and bulk increased by 10% during the same period.*

**Commission’s consideration**

As previously stated, the Commission is of the view that there is no jurisprudence that requires authorities to make conclusion on each individual injury indicator. It is within the Commission’s right to analyse the trend in injury indicators and not make a conclusion on each individual indicator.

**5.3.3.7 Utilisation of production capacity**

The following table provides the Applicant’s capacity and production of the subject product:

**Table 5.3.3.7 (a): Utilization of production capacity (Bagged)**

	2010	2011	2012	2013
Capacity (units)	100	100	100	100
Actual production	100	90	88	90
Capacity utilisation	100	90	88	90

**This table was indexed due to confidentiality using 2010 as the base year.**

**Table 5.3.3.7 (b): Utilization of production capacity (Bulk)**

	2010	2011	2012	2013
Capacity (units)	100	100	100	100
Actual production	100	104	114	124
Capacity utilisation	100	104	114	124

This table was indexed due to confidentiality using 2010 as the base year.

**Table 5.3.3.7 (c): Utilization of production capacity (Bagged and Bulk)**

	2010	2011	2012	2013
Capacity (units)	100	100	100	100
Actual production	100	95	98	103
Capacity utilisation	100	95	98	103

This table was indexed due to confidentiality using 2010 as the base year.

Capacity utilisation for bagged cement decreased between 2010 and 2012 and increased slightly in 2013 as a result of measures that were put into place to compete with the dumped imports from Pakistan.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that although the actual production of bagged cement fluctuated in comparison to the installed capacity, overall the plant's capacity utilisation has increased. Given that both bulk and bagged cement are manufactured in one plant, it is submitted that the total capacity utilisation of the applicants did not decline.*

***Commission's consideration***

The Commission noted that the capacity utilisation fluctuated during the period of investigation. The Applicant put in place measures in place that enabled it to continue manufacturing even after it suffered injury as a result of the dumped imports.

**5.3.4 Factors affecting domestic prices**

The Commission noted the following comments by exporters:

*The exporters stated that ITAC makes a bald statement that "there are no other known factors, which could affect the domestic prices negatively".*

*This is despite proven price collusion activity by the applicants. Price collusion impacts prices during and after collusion. Exporters further stated that collusive behaviour undoubtedly impacted prices during the period assessed for material injury. Some of the price injury suffered by the applicants is self-inflicted. The exporters called on ITAC to determine the extent to which the applicant's behaviour inflicted injury.*

**Commission's consideration**

The Applicant's average selling price for cement increased during the POI. The Applicant managed to increase its prices although not at the same rate as the increase in its input cost. This is despite the price undercutting experienced by the Applicant. It is also important to note that the injury experienced by the SACU industry is more prominent not on the price but on volume i.e. sales, output and market share.

**5.3.5 The magnitude of the margin of dumping**

The magnitude of the margin of dumping can be a useful indicator of the extent to which injury can be attributed to dumping, particularly when it is compared with the level of price undercutting. All manufacturers that participated with the investigation have been found to be dumping.

The following margins of dumping were calculated:

<b>Producer</b>	<b>Dumping margin</b>
Lucky Cement Limited	14.29%
Bestway Cement Limited	77.15%
D.G Khan Cement Limited	68.87%
Attock Pakistan Cement Limited	63.53%
All other exporters (excluding Lucky Cement Limited, Bestway Cement Limited, D.G Khan Cement Limited and Attock Pakistan Cement Limited)	62.69%

In evaluating the magnitude of the margin of dumping, the dumping margins and undercutting margins can be directly compared. The dumping margins are generally substantially higher than the price undercutting calculated, indicating that all of the undercutting can be attributed to dumping.

**Comments by exporters on the Commission's preliminary report**

*The exporters stated that although the magnitude of the dumping margin is provided in the preliminary report. ITAC simply listed the margins of dumping found. This does not constitute a proper evaluation of the factor. ITAC is therefore in breach of Article 3.4 of the ADA.*

*In China – HP-SSST the panel stated (para 7.160) that “MFCOM’s Final Determination merely lists the margins at issue, but does not assess in any way the relevance of the margins of dumping in the determination, or indicate what weight it attributed to the margins of dumping in the injury assessment. We agree with the panel in China-X-ray Equipment that a merely paid lip service by referring to the margins determined.”(own underlining)*

*In China – X-rays China had merely stated the margins of dumping found. The panel, in par 7.183 of its report, stated that; in the view of the panel, the simple listing of the dumping margins is not sufficient evidence that the magnitude of the margin of dumping was evaluated in the context examining the state of the domestic industry. In our view, an investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment. In our view, MOFCOM did not do this, but rather was silent on the relevance or irrelevance of the magnitude of the margin of dumping in relation to the impact of the dumped imports on the domestic industry.*

**Commission's consideration**

As previously stated, the Commission is of the view that there is no jurisprudence that requires authorities to make conclusion on each individual injury indicator. It is within the Commission's right to analyse the trend in injury indicators and not make a conclusion on each individual indicator.



### 5.3.6 Actual and potential negative effects on cash flow

The tables below reflect the Applicant's cash flow situation with regard to the product under investigation:

**Table 5.3.6: Cash flow**

	2010	2011	2012	2013
<b>Company</b>				
Net cash flow	100	107	83	97

This table was indexed due to confidentiality using 2010 as the base year.

The information in the above table shows that SACU's net cash flow decreased from 2010 to 2013.

#### ***Comments by exporters on the Commission's preliminary report***

*The exporters stated that the cash flow figures indicated are not for the subject product only. Rather these are for all products manufactured by the applicants. There are therefore other factors not related to the subject product that would have possibly impacted on cash flow. Nevertheless, cash flow only declined by 3% during the period 2010 to 2013. However, the average ex-factory prices of bagged cement increased by 5% while average ex-factory prices of combined bagged and bulk increased 7%.*

*The volumes of bagged cement decreased by 6% while overall sales (combined bagged and bulk) increased by 3%. This is not indicative of an industry with restricted cash flows. In a nutshell, the small decline in cash flow is insufficient to make a finding of material injury.*

#### ***Commission's consideration***

The Applicants cash flow decreased during the period of investigation. As indicated the Applicant's ex-factory average selling price for cement increased during the POI, the increase was not at the same rate as the increase in its input cost. It is also important to note that the injury suffered by the SACU industry is more prominent not on the price but on volume i.e. sales, output and market share.

### 5.3.7 Inventories

The Applicant provided its inventory level figures listed in the table below:

**Table 5.3.7: Inventories**

	2010	2011	2012	2013
Volume	100	73	97	99
Value	100	79	101	113

This table was indexed due to confidentiality using 2010 as the base year.

The information in the above table reflects that inventory volumes decreased minimally during the period of investigation but can be regarded as relatively stable over the period.

#### ***Comments by exporters on the Commission's preliminary report***

*The exporters stated that ITAC acknowledged that inventories as indicated decreased minimally. Nevertheless ITAC's comment does not shed more light on what its conclusion is.*

#### ***Commission's consideration***

As previously stated, the Commission is of the view that there is no jurisprudence that requires authorities to make conclusion on each individual injury indicator. It is within the Commission's right to analyse the trend in injury indicators and not make a conclusion on each individual indicator.

### 5.3.8 Employment

The table below provides the Applicant's employment figures for the subject product:

**Table 5.3.8: Employment**

	2010	2011	2012	2013
Direct labour units: production	100	90	91	87
Indirect labour units: production	100	100	90	76
Total labour units: production	100	93	90	84

This table was indexed due to confidentiality using 2010 as the base year.

There has been a decrease in employment levels of the SACU industry during the period under investigation. The Applicant stated that the main cause of the loss of employment is the loss of sales to dumped imports from Pakistan.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that employment decreased. However, it is important to note that output remained stable for bagged cement, increased by 24% for bulk and increased by 3% for combined bagged and bulk. Productivity increased. In fact total production increased during the injury assessment period. It is therefore clear that employment is not linked to production and that the loss in employment particularly in 2013 is not related to the alleged dumping, but to other factors. It is denied that the loss of employment is as a result of the alleged dumped imports.*

**5.3.9 Wages and salaries**

The following table provides the Applicant's wages and salaries paid:

**Table 5.3.9: Wages and salaries**

	2010	2011	2012	2013
Total wages: Production (R'000s)	100	102	104	97
Wages per employee (Rands)	100	110	115	115

**This table was indexed due to confidentiality using 2010 as the base year.**

The Applicant stated that despite declining sales, wages have continued to increase. The dumped Pakistani cement imports have undermined the profitability of the SACU Industry. Such a situation is unsustainable and will lead to further job losses in the future unless anti-dumping duties are imposed against the dumped Pakistani imports.

***Comments by exporters on the Commission's preliminary report***

*Exporters stated that wages and salaries have increased due to market and economic forces and not as a result of the alleged dumped imports. The*

*resulting reduced profitability as a result of increasing labour costs is not unique to the cement industry. Importers as well as any other industry in South Africa has the same challenge. It is interesting to note that wages per employee indicated increased by 15% over the period. This is way above the inflation rate and is indicative of an industry not suffering significant material injury. If, indeed, the applicants were suffering significant injury or running at a loss they would have been able to negotiate significantly lower wage increase. Anti-dumping duties will not stop labour demands for higher wages.*

**Commission's consideration**

Wages and salaries which indicates an increasing trend that results in increasing production costs, making it even more difficult for the SACU industry to compete with dumped imports.

**5.3.10 Growth**

The following tables indicate the growth of the SACU market as provided by the Applicant:

**Table 5.3.10 (a): Actual and Potential effect on Growth SACU-Bags Cement**

	2010	2011	2012	2013
Size of the SACU market	100	98	101	109
Applicant's sales volume	100	92	90	94
Dumped imports	142,806	362,345	746,875	1,091,235
Dumped imports growth %	-	153.7%	106.1%	46.1%
Other imports	40,734	80,916	16,044	17,798
Other imports growth %	-	98.6%	-80.2%	10.9%

This table was indexed due to confidentiality using 2010 as the base year.

**Table 5.3.10 (b): Actual and Potential Effect on Growth SACU-Bulk Cement**

	2010	2011	2012	2013
Size of the SACU market	100	108	113	122
Applicant's sales volume	100	105	109	117

This table was indexed due to confidentiality using 2010 as the base year.

**Table 5.3.10 (c): Actual and Potential Effect on Growth SACU-Bag and Bulk Cement**

	2010	2011	2012	2013
Size of the SACU market	100	101	104	112
Applicant's sales volume	100	97	97	103
Dumped imports	142,806	362,345	746,875	1,091,235
Dumped imports growth %	-	153.7%	106.1%	46.1%
Other imports	40,734	80,916	16,044	17,798
Other imports growth %	-	98.6%	-80.2%	10.9%

This table was indexed due to confidentiality using 2010 as the base year.

The Applicant stated that its sales volumes for bagged cement have declined over the period 2010 to 2013 despite growth in the size of the SACU market over the same period. This trend is also seen in KZN and in the coastal region outside KZN it is more severe. By contrast, the volume of sales of dumped Pakistani imports has grown at a significant rate between 2010 and 2013. The current trend is that the volume of the dumped imports from Pakistan continues to grow at significant levels, indicating that the SACU industry would continue to suffer injury unless anti-dumping duties are imposed.

### 5.3.11 Ability to raise capital or investments

The Applicant provided the following information with regard to the SACU industry's ability to raise capital or investments:

**Table 5.3.11: Ability to raise capital or investments**

	2010	2011	2012	2013
Total capital/investment in subject product (R'000)	100	102	104	106

This table was indexed due to confidentiality using 2010 as the base year.

The Applicant stated that some of its members source capital internally either from their holding or sister companies. Some of the members face difficulties in raising capital as access to capital is dependent on being able to demonstrate benchmark returns, which returns are negatively impacted by the on-going injurious effect of the dumped Pakistani cement imports.

### ***Comments by exporters on the Commission's preliminary report***

*The exporters stated that there is nothing suggesting that the applicants faced difficulties in raising capital given that capital invested in the subject product grew consistently every year. Some of the applicants made huge acquisitions. It also referred to very significant investment that resulted in Sephaku. The exporters stated that the acquisitions only came into operation in 2014 and thus after the investigation period, but the investment occurred in the investigation period and their production has been significant. Their primary shareholders invested R1.1bn in the company, which indicates ability to not only raise capital, but find it attractive to enter the market knowing full well that Pakistan is exporting to SACU. Clearly this does not reflect an industry under financial strain. There is absolutely no injury suffered in respect of this factor.*

#### **5.4 SUMMARY - MATERIAL INJURY**

From the information above, the following is evident:

- Dumped imports from Pakistan increased by 664 per cent during the POI;
- The industry is experiencing significant price undercutting with regard to bagged cement;
- The industry is experiencing price suppression with regard to bagged cement as well as the overall cement production;
- Sales of bagged cement declined over the POI;
- The industry experienced losses with regard to its bagged cement sales;
- The industry's output declined over the POI;
- The industry's market share of the total cement market as well as in particular the bagged cement market, declined over the POI, whilst the market grew by 12 per cent over this period; and
- The industry's production utilisation for bagged cement declined over the POI.

The Commission is of the view that although there are price effects, the injury experienced by the SACU industry is more evident on volume and more prominent with regard to bagged cement. The overall increase in sales and output of cement (bagged and bulk) should be seen in the context of a market that grew by 12 during the period of investigation. In other words, the Applicant was able to produce and sell more because the market was growing, but most of the growth was captured by Pakistani imports.

The Commission is therefore of the view that the SACU industry is suffering volume injury, given its sales volume and output figures as well as price injury, if considering price undercutting and price suppression, decline in profits and cash flow. The Commission further noted that the Applicant lost market share in a growing market over the period of investigation, whilst the dumped imports were able to increase its share of the growing market.

The Commission therefore made a final determination that the SACU industry is experiencing material injury.

## **6. THREAT OF MATERIAL INJURY**

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### **6.1 Freely disposable capacity of the exporters**

The Applicant provided the following information in substantiating the above:

- The Pakistan cement industry has a large freely disposable capacity. There is also an imminent substantial increase in capacity, as a number of large Pakistani cement producers have recently either expanded or announced plans to expand their manufacturing operations as more fully explained below.
- In its latest annual report for the year ended 30 June 2013, Lucky Cement Limited, a large Pakistani cement producer, announced that two vertical grinding mills at its Karachi cement plant are scheduled to become operational in the last quarter of the 2013 – 2014 financial year and in September 2014 respectively. DG Khan Cement, another large Pakistani cement manufacturer, is also expanding its production facilities as it would appear from its recent announcement that it would start its 2.6 million tonnes per annum plant in Hub, Balochistan.
- The Pakistani cement producers production capacity increased by 2.3 million tonnes in the period 2010 to 2013, from 42.5 million tonnes in 2010 to 44.8 million tonnes in 2013. This demonstrates an increase in the production capacity over the same period.
- According to BMA Capital Management, the Pakistani cement industry will likely add an additional 8.9 million tonnes to its current annual capacity of 45 million tonnes by the end of 2017. The Pakistani cement industry therefore has a large and increasing production capacity.
- According to the All Pakistan Cement Manufacturers Association ("APCMA"), capacity utilisation in the Pakistan cement industry fell to 68.3% in the first two months of the 2013 financial year. The figure is apparently the lowest since 2002.
- Pakistan's cement exports to Afghanistan have fallen in recent years



according to figures from the APCMA. Such fall is significant as Afghanistan currently purchases 50% of Pakistan's cement exports. Pakistan's Exports to India are reportedly also decreasing. This decline in exports has been attributed to competition from Iranian exports in Afghanistan and weakening demand in India. The departure of US armed forces from Afghanistan in 2014 will also reduce demand for cement in that country, and consequently, Pakistani exports to Afghanistan.

- This excess volume of cement would have to be exported to other markets which in all probability would be the SACU market.

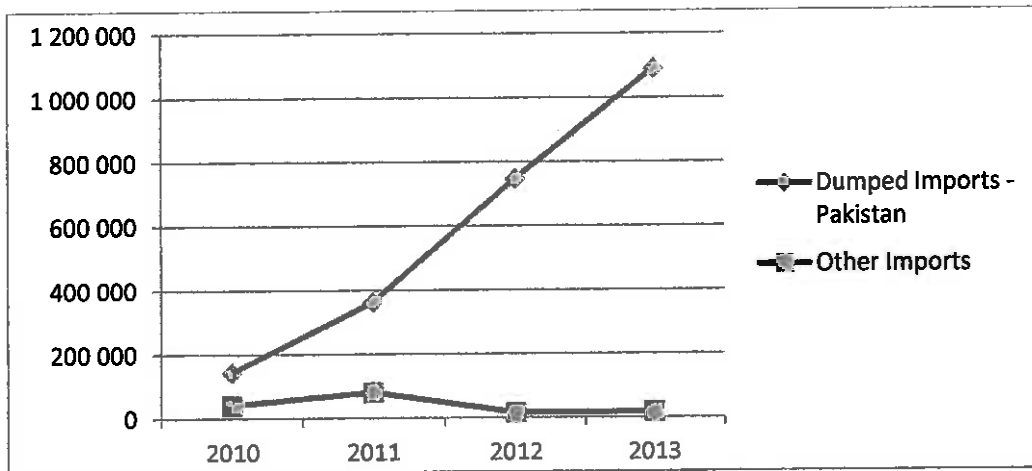
It is clear from the above that Pakistan has a large excess capacity. Significantly, such excess is expected to grow with reported plans to increase production capacity by some of the Pakistani cement producers.

## **6.2 Significant increase of dumped imports**

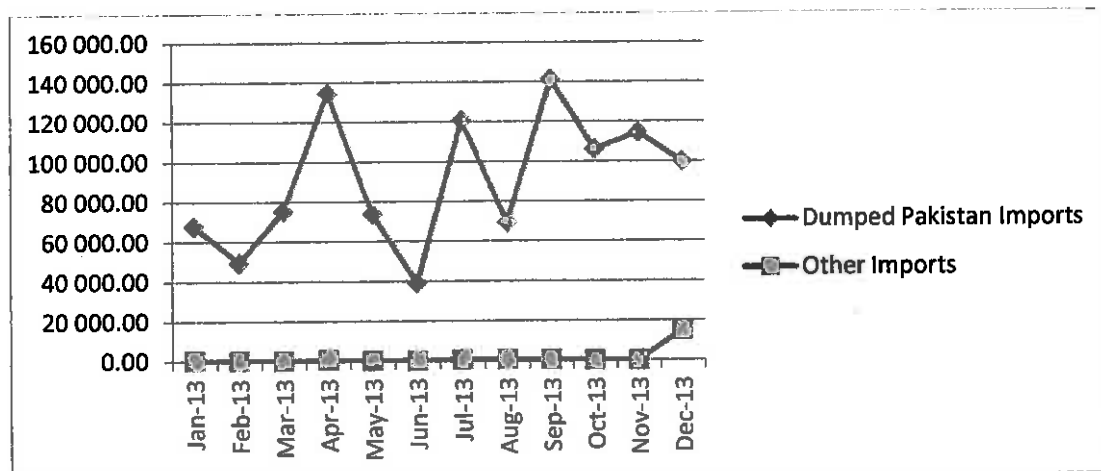
The Applicant stated that Pakistan has a large production capacity and substantial excess capacity. Pakistan's exports to its traditional markets such as India and Afghanistan are declining and accordingly, Pakistan will have to export these volumes to other markets. Due to the fact that South Africa is Pakistan's second largest exporting market after Afghanistan, this would likely result in a significant increase of dumped imports into SACU. The Applicant further stated that the increasing production capacity of the Pakistani producers means that more cement will be produced, a large portion of which will have to be sold on the export market.

Figure F2a below shows the rapid growth of imports during the period 1 January 2010 to 31 December 2013. Figure F2c shows that this trend continued in 2014.

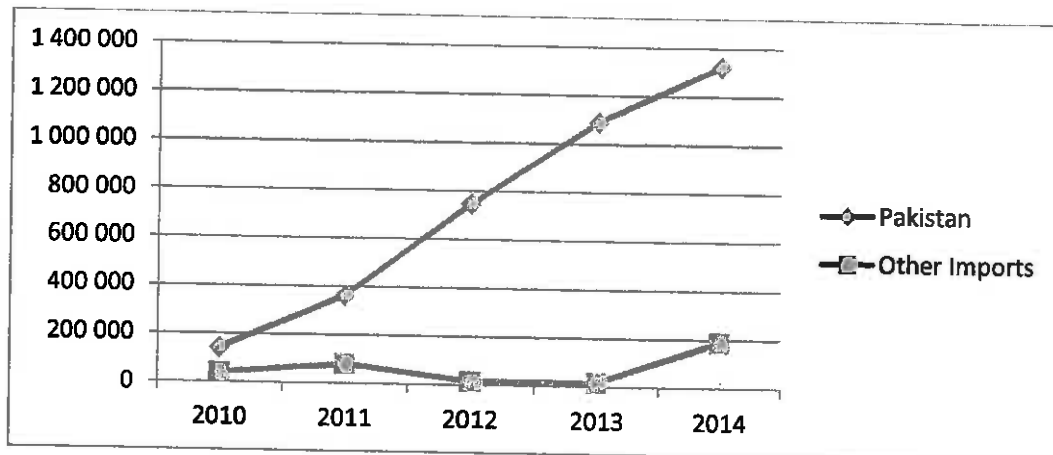
**Figure F2a: Import Volumes (Tonnes) into SACU Per Annum - Dumped Pakistan Imports v Other Imports**



**Figure F2b: Import Volumes (Tonnes) into SACU on a Monthly Basis - Dumped Pakistan Imports v Other Imports**



**Figure F2c: Import Volumes (Tonnes) into SACU per annum - Dumped Pakistan Imports v Other Imports**



***Commission's consideration***

The Commission considered that there has been a significant increase in the dumped imports as imports from Pakistan increased by 664% over the investigation period, while imports from other countries decreased by 56.31% over the same period.

Furthermore, subsequent information shows that between 2013 and 2014 Pakistan imports increased from 1 1091 235 to 1 324 245 tonnes, increasing by more than 10%. This is an indication that the threat of imports from Pakistan does exist.

**6.3 Inventories of subject product**

The Applicant indicated that the exporters' inventories are not known, but it is known that the exporters can supply substantial orders on short notice. During verification, the Commission found that the exporters keep inventory at a normal stock levels, as cement cannot be stored for longer periods.

**6.4 State of the economy of the country of origin**

According to the Applicant, growth in gross domestic product (GDP) in Pakistan slowed in the fiscal year 2013 (ended 30 June 2013) compared to a year earlier. However, although the Pakistani economy may not be performing at its optimum at present, this has not stopped the cement

industry's growth. By the end of 2013, the Pakistan cement industry was reported as one of the best performing sectors on the Karachi Stock Exchange. The cement industry is considered to be one of the key drivers of Pakistan's economy. In order to remain viable in an economy that is slowing down, Pakistani cement producers will have to export more.

#### **6.5 SUMMARY ON THREAT OF MATERIAL INJURY**

The Commission considered the available information and noted the following:

- Pakistan has increased its freely disposable capacity;
- Pakistan's exports to its/other traditional markets are declining;
- imports from Pakistan increased by over 600 % from 2010 to 2013; and
- subsequent information shows that between 2013 and 2014 imports from Pakistan increased by 10 %.

The Commission is of the view that this indicates that a threat of material injury exists. The Commission therefore made a final determination that there is sufficient information to indicate that a threat of material injury to the SACU industry exists.

## 7. CAUSAL LINK

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### 7.1 GENERAL

In order for the Commission to impose final measures, it must be satisfied that there is sufficient evidence to indicate that there is a causal link between the material injury experienced by the SACU industry and the dumping of the subject product from Pakistan. This however does not preclude other factors also being a cause of material injury, as provided for in the Anti-Dumping Agreement.

In assessing causality, the Commission accepts that where it has found that dumping is taking place and material injury occurs, there is an inference that the material injury is caused by dumping. The Commission will then examine whether there are any known factors apart from the dumped imports that are also materially injuring the industry. If other factors are identified, it must be established whether the material injury caused by other factors breaks the inferred causal link established. If there is no manifest cause of material injury apart from the dumped goods, then the inferred causal link is confirmed.

### 7.2 VOLUME OF IMPORTS AND MARKET SHARE

An indication of causality is the extent to which the market share of the SACU industry has decreased with a corresponding increase in the market share of the dumped product.

**Table 7.2**

	2010	2011	2012	2013
Applicant's market share (%)	100	94	89	86
Dumped imports (Pakistan)	100	260	520	700
Other imports	100	200	33	33

This table was indexed due to confidentiality using 2010 as the base year.

The information provided by the Applicant shows that the Applicant's market share decreased between 2011 and 2013, while the market share of the dumped imports increased during the same period. The significant increase in the market share by the dumped imports was therefore not only at the

expense of the Applicant, but also that of imports from other countries at un-dumped prices.

### 7.3 EFFECT OF DUMPED IMPORTS ON PRICES

Table 7.3 (a)

R/ Ton	2010	2011	2012	2013
SACU's selling price (Bagged cement)	100	101	104	105
Landed Cost of imports from Pakistan	100	106	115	101
FOB price	100	112	126	140
Cost as a % of selling price	100	106	109	107
Undercutting per unit	100	82	61	119
Undercutting %	100	81	59	146

This table was indexed due to confidentiality using 2010 as the base year.

The above table indicates that the dumped imports of bagged cement from Pakistan are undercutting the SACU industry bagged cement selling prices. The prices increased by five (5) index points during the period of investigation whilst production cost increased by seven (7) index points indicating that the Applicant is experiencing price suppression.

#### ***Comments by exporters on the Commission's preliminary report***

*The exporters stated that they dispute that all price suppression alleged to be suffered by the domestic industry is as a result of the alleged dumped imports as concluded by ITAC.*

*The exporters further stated that it is critical to note that consumers saving can happen either because prices declined or prices did not increase, as they should have. The intervention of the Competition authorities in the cement industry resulted in the applicants losing estimated R5.8 billion in revenue compared to the alleged dumped imports worth R1.24 billion.*

*The exporters stated that the total value of imports from Pakistan for the whole period from 2010 to 2013 is only R1.24bn, which is only 25.5% of the total price suppression that would have occurred due to breaking the cartel, yet ITAC attributes 100% of the injury to Pakistani exports.*

*The applicants lost almost six times more revenue as a result of the market price adjustments that took place after the cement cartel was broken. This is significant, yet ITAC attributes the price suppression to alleged dumped imports.*

*It further stated that it is clear that the price suppression has been mainly a consequence of the applicants moving from their uncompetitive price fixing and market allocation practices to a free market whose prices are determined by market forces. In light of the above any price suppression that might have been caused by imports would be insignificant.*

*Exporters submit that ITAC did not properly evaluate the impact of the applicants past uncompetitive and illegal behaviour. Accordingly its finding of price suppression is flawed as it is only attributed to alleged dumped imports. Whilst the exporters have no way of calculating the unsuppressed selling price of the domestic industry, it estimated that this unsuppressed selling price would be more than a 45% price premium over the landed cost of cement from Pakistan. The only way that the market could support a price premium such as this would be if the cement industry once again behaved as a cartel.*

#### **Commission's consideration**

The Commission is of the view that the Applicant experienced price suppression, as it has not been able to increase its prices in order to absorb the increases in production cost over the period under review.

The fines imposed by the Competition Tribunal did not have a material impact on the SACU industry's prices. The prices increased during the period of investigation whilst production cost increased at a much higher percentage compared to the selling price. In addition, the Applicant is experiencing price

undercutting as indicated above. The reason the prices increased below production cost is the increase in dumped imports from Pakistan.

#### 7.4 CONSEQUENT IMPACT OF DUMPED IMPORTS

The following is a summary of the analysis done in the material injury section of this report:

Table 7.4

Material injury indicator	Bagged cement analysis (Jan 2010 – Dec 2013)	Bulk cement analysis (Jan 2010 – Dec 2013)	Bag and bulk analysis (Jan 2010 – Dec 2013)
Sales volume	Decrease	Increase	Increase
Profit and loss	Decrease	Increase	Decrease
Output	Decrease	Increase	Increase
Market share	Decrease	Increase	Decrease
Productivity	Increase	Increase	Increase
Utilisation of capacity	Decrease	Increase	Increase
Cash flow	Decrease	Decrease	Decrease
Return on investment	Decrease	Increase	Decrease
Employment	Decrease	Increase	Decrease
Wages	Increase	Increase	Increase
Growth	Decrease	Increase	Increase
Capital investment	Increase	Increase	Increase

Dumped imports from Pakistan increased by 664 per cent during the POI.

The Commission is of the view that although there are price effects, the injury experienced by the SACU industry is more evident on volume and more prominent with regard to bagged cement. The overall increase in sales and output of cement (bagged and bulk) should be seen in the context of a market that grew by 12 during the period of investigation. In other words, the Applicant was able to produce and sell more because the market was growing, but most of the growth was captured by Pakistani imports.

The Commission is therefore of the view that the SACU industry is suffering volume injury, given its sales volume and output figures as well as price injury, if



considering price undercutting and price suppression, decline in profits and cash flow. The Commission further noted that the Applicant lost market share in a growing market over the period of investigation, whilst the dumped imports were able to increase its share of the growing market.

## 7.5 FACTORS OTHER THAN THE DUMPING CAUSING INJURY

### 7.5.1 The volume and price of imports not sold at dumping prices

The following table shows the volume and value of the dumped imports and imports from other countries:

### 7.5.2 Examination of causality under Article 3.5

Variable	Year				Change (%)
	2010	2011	2012	2013	
Price of imports not sold at dumped prices (fob price) (R/tonne)	1,192.48	971.42	1,414.59	1,878.66	57.54
Volume of imports not sold at dumped prices (ton)	40,734	80,916	16,044	17,798	(56.31)
Growth rate for the subject product industry (tonne)	100	98	101	109	9.42%

The volume of imports not sold at dumped prices declined significantly over the POI and only represents a very small share of the market. These imports therefore not claiming market share from the SACU industry, but are rather also losing market share to dumped imports from Pakistan. It is further important to note that the SACU industry is losing market share in a growing market.

The average price of the imported subject product not sold at dumped prices in 2013 was R1 878.66/tonne. This should be compared to the average price of the dumped imports of R575.73/tonne and the average price of the SACU industry during this period. From this comparison it is clear that the imports from other countries did not cause injury to the SACU industry.

Changes in the patterns of consumption	The Commission did not have any information indicating changes in the patterns of consumption occurred during the period of investigation. The Commission is therefore of the view that this factor did not detract from the material injury experienced by the SACU industry during the period of investigation.
Trade-restrictive practices of foreign and domestic producers	The Commission noted comments by the Applicant who indicated that there were no restrictive trade practices in the SACU market during the period of investigation. The SACU member states do not differentiate between foreign and SACU producers. With the exception of Pakistan producers who are dumping in the SACU market, there is normal competition between SACU producers and other foreign producers. The Commission noted that Ohorongo Cement in Namibia began production in December 2010 and in 2012 Namibia implemented a protective duty on imports to that country. The Commission is of the view that this factor did not detract from the material injury experienced by the SACU industry during the period of investigation.
Competition between foreign and domestic producers	The Commission considered the effect of the fines imposed by the Competition Tribunal on the profits of the SACU industry as it relates to material injury during the period of investigation. See below.
Developments in technology	There were no significant developments in technology. The Commission is therefore of the view that this factor did not detract from the material injury experienced by the SACU industry during the period of investigation.
Export performance of the domestic industry	The Commission noted the Applicant's comment that it has limited opportunities to export to other African countries as most countries have implemented cement import tariffs. The Commission is therefore of the view that this factor did not detract from the material injury experienced by the SACU industry during the period of investigation.
Productivity of the domestic industry	The Commission noted the Applicant's comment that its productivity is on par with other major cement producing countries: The following measures will be similar: (i) energy consumption (KJ per ton produced), (ii) labour efficiency (employees per ton produced), and (iii) overall equipment efficiencies. This is evident when looking at the Pakistan cement industry's capacity utilisation for the last 3 full reporting years (July - June) which was 73.95%, 72.63% and 74.68%. This level of utilisation is inclusive of export volumes. The Commission is therefore of the view that this factor did not detract from the material injury experienced by the SACU industry during the period of investigation.

### 7.5.3 Competition Tribunal Fines

Following the initiation of the investigation, the exporters raised the findings of the Competition Tribunal fines which were imposed on the cement producers following an investigation by the Competition Commission as a factor other than dumping causing injury.

#### *Comments by exporters*

*The exporters stated that very significant Competition Tribunal fines were*

*imposed on the cement producers during the investigation period. The exporters also stated that given that the fines were imposed for cartel behaviour it implies that the profits being made in the period preceding the imposition of the fines were not normal. Following a correction in the pricing behavior after the Competition Tribunal intervention, it is expected that profits would drop. The exporters request the Commission to confirm if the competition issues were considered as part of the assessment of injury and causal link.*

#### **Comments by the Applicant**

*The Applicant stated that the competition issues are irrelevant to the present investigation. The Applicant further stated that the only issue that is relevant is injurious dumping by Pakistani producers. The injury suffered by the SACU industry as reflected in the application, including the decline in profit was caused by dumped Pakistan imports and is not related to the competition issues.*

#### **Comments by the exporters**

*The exporters responded indicating that the assertion by the Applicant that “The only issue that is relevant is injurious dumping by Pakistani producers” is incorrect. In order for an anti-dumping duty to be imposed, there needs to be not only dumping, but also material injury to the domestic industry (ADR 13) and causal link (ADR 16). The question of the Competition Tribunal findings is thus extremely important. The application simply asserts that the decline in profit was caused by Pakistani imports, but this clearly is not correct.*

- *The Competition Commission investigated price collusion and market division in the cement industry from 2008 onwards and made recommendations to the Competition Tribunal, which handed down its verdict in 2012, which is during the anti-dumping investigation period.*
- *The Competition Tribunal clearly indicated that there had been a lawful cartel in the cement industry since the 1940's and until September 1996 which:*
  - *agreed market shares based on the producers' capacity,*

- *divided South Africa into two main regions, being North and south,*
- *had a centralised sales and distribution system, with a quota balancing system to distribute the proceeds of cement sales; and*
- *there was a unitary pricing model ( see par 2.2 of Competition Commission v Lafarge Case 23/CR/Mar12).*
- *In 1998, cement producers again reached an agreement on market shares, pricing parameters, the scaling back of marketing and distribution activities and the non-granting of special discounts on certain products.*
- *In March 2012, Lafarge admitted that:*
  - *It had "entered into agreements and arrangements with PPC and Afrisam... which had the effect of indirectly fixing cement prices... in contravention of... the [Competition] Act".*
  - *It had "entered into agreements and arrangements with PPC and Afrisam... which had the effect of dividing the cement market through the allocation of market share in in contravention of... the [Competition] Act".*
- *Accordingly, Lafarge, in 2012, undertook to refrain from price fixing and market division and to implement a compliance programme.*
- *As a result of its conduct, it was fined, in 2012, the amount of R124 724 400, equivalent of its total cement turnover in 2010, which is also part of the POI.*
- *In October 2011 Afrisam admitted that:*
  - *It had "entered into agreements and arrangements with PPC and Lafarge... which had the effect of indirectly fixing cement prices... in contravention of... the [Competition] Act".*
  - *It had "entered into agreements and arrangements with PPC and Afrisam... which had the effect of dividing the cement market through the allocation of market share in in contravention of... the [Competition] Act".*
- *Accordingly, Afrisam, in October 2011, undertook to refrain from price fixing and market division and to implement a compliance programme.*

- *As a result of its conduct, it was fined, in 2012, the amount of R124 878 870 equivalent to of its total cement turnover in 2010, which is also part of the POI.*
- *Both Afrisam and Lafarge also implicated PPC, while the Competition Tribunal also found that NPC was affected by, and party to, the collusion.*
- *This confirms that all four applicants were involved in price fixing and market division even at the start of the current anti-dumping investigation. With price fixing and market division, this indicates that there was a certain lack of competition in the market and that the parties could charge higher prices than would have been normal in a fully competitive market. Market division also decreased costs, as less marketing costs were required.*
- *With the Competition Commission's investigation and the Competition Tribunal's rulings in November 2011 and March 2012, this cartel behaviour was effectively ended. The direct result would be, as the previous Competition Tribunal also found in respect of what happened after the previous such arrangement lapsed in 1996, that price competition became much sharper.*
- *The Competition Commission was quoted as indicating that "the problem with competitors dividing markets between themselves is that they successfully shield themselves from competition and can thus price above competitive levels with no opposition or alternative from a competitor".*
- *The fines imposed would have directly led to decreased profit margins. The fact that the industry's profit decreased significantly in 2011, but has increased in 2012 and increased further in 2013, clearly supports this. These decreased margins (price suppression) and decreased total profit in 2011 cannot be attributed to the alleged dumped imports. We specifically request ITAC to determine the impact of moving from a cartel in 2010 to a market with fair competition from 2011 to 2012 onward and not to attribute any of these costs and loss of profit to the alleged dumped imports.*

### ***Comments by the Applicant***

*The Applicant stated that the injury period in the present investigation commenced in January 2010. The Applicant indicated this period therefore clearly falls outside the period during which price collusion and market division allegedly took place. The Applicant further stated that according to the Competition Tribunal, the alleged information exchange between the cement industry producers ended in 2009. The Applicant reiterated that the competition issues have no bearing on the anti-dumping application and the submissions by the exporters should be rejected in their entirety.*

### ***Commission's consideration***

The Commission considered the comments submitted by the exporters and the Applicant and noted that the Competition Commission of South Africa recently conducted a study on assessing the economic impact of its intervention in the cement cartel, but that this study focused on consumer saving.

The study found that the total savings to South African consumers due to its intervention between 2010 and 2013 are in the range of R4.5 to R5.8 billion. In addition to these financial benefits, it found that the market has generally become more competitive, as evidenced by firms penetrating into regions (provinces) that they were previously not active in. Based on the above study, it can therefore be deduced that the cement cartel has ended and the market is gradually becoming more competitive.

The Commission noted that the response by the Applicant to the concerns raised by the exporters seems to be focusing on the time when the price collusion and market division allegedly took place, and disregards the exporters' concerns raised with regard to the fines which were imposed during the period of investigation. The Commission considered the matter and found that "AfriSam agreed to pay a penalty of R124 million representing 3% of its 2010 cement annual turnover in the SACU." Lafarge agreed to a settlement of R149-million, which represents 6% of 2010 cement turnover." It was however noted that the profits of the Applicant did not decrease significantly in 2011 as

alleged by the exporters.

The Commission therefore made a preliminary determination that although the fines imposed by the Competition Tribunal had an effect on the SACU industry, it does not sufficiently detract from the impact of the dumped imports from Pakistan that increased by 664 per cent over the investigation period.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that despite numerous requests ITAC failed to conduct an assessment to determine and take into account the impact on the industry of moving from cartel operation in 2010, as found by the Competition Commission and Tribunal, to a market with fair competition from 2011 or 2012 onwards. The price collusion, market division and its resultant consequences and impact on the applicant's prices and consequently injury has not been undertaken. The conclusion on the effects of the alleged dumped imports on prices is therefore fundamentally flawed.*

*The exporters stated that they dispute that all price suppression alleged to be suffered by the domestic industry is as a result of the alleged dumped imports as concluded by ITAC.*

*The exporters further stated that it is critical to note that consumers saving can happen either because prices declined or prices did not increase, as they should have. The intervention of the Competition authorities in the cement industry resulted in the applicants losing estimated R5.8 billion in revenue compared to the alleged dumped imports worth R1.24 billion.*

*The exporters stated that the total value of imports from Pakistan for the whole period from 2010 to 2013 is only R1.24bn, which is only 25.5% of the total price suppression that would have occurred due to breaking the cartel, yet ITAC attributes 100% of the injury to Pakistani exports.*

*The applicants lost almost six times more revenue as a result of the market price adjustments that took place after the cement cartel was broken. This is*

*significant, yet ITAC attributes the price suppression to alleged dumped imports.*

*It further stated that it is clear that the price suppression has been mainly a consequence of the applicants moving from their uncompetitive price fixing and market allocation practices to a free market whose prices are determined by market forces. In light of the above any price suppression that might have been caused by imports would be insignificant.*

*Exporters submit that ITAC did not properly evaluate the impact of the applicants past uncompetitive and illegal behaviour. Accordingly its finding of price suppression is flawed as it is only attributed to alleged dumped imports. Whilst the exporters have no way of calculating the unsuppressed selling price of the domestic industry, Exporters do know that this unsuppressed selling price more than a 45% price premium over the landed cost of cement from Pakistan. The only way that the market could support a price premium such as this would be if the cement industry once again behaved as a cartel.*

#### ***Comments by exporters on essential facts letter***

*The Applicant indicated that “the Commission correctly acknowledges that there are factors other than dumping that could have contributed to the injury. One of the stated factors is the fines imposed by the Competition Commissions. However the Commission ignored the R4.5 to R5.8 billion in savings by the consumers due to intervention by the Competition Commission between 2010 and 2013. They indicated that this is essential because the R4.5 to 5.8 billion in savings by consumers happened because consumers either received a price reduction of the subject product, or did not receive increase that would have occurred. Any such benefit means that the cement producers would have either received less for the cement they sold or maintained prices, but had absorbed the cost increases they faced without being able to pass these along to the consumer (price depression and price suppression).*



***Comments by the Applicant on the Commission's essential facts letter***

*The Applicant stated that the statements that the fines imposed by the Competition Tribunal contributed to the Applicants' injury are incorrect based on the following reasons:*

*"The injury analysis in anti-dumping investigations is conducted with respect to the SACU Industry as a whole. The only SACU companies which paid fines were Lafarge and Afrisam. It is apparent from the annual financial statements of Afrisam that the fine had an insignificant impact on its financial performance during the period of investigation. The fine imposed on Lafarge was paid by its parent company, Lafarge South Africa Holdings (Pty) Ltd, and therefore had no impact on its financial performance. PPC Ltd, NPC Cimpor and other SACU producers paid no fines. It is accordingly clear that Competition Tribunal fines had no material impact on the Applicants and the SACU industry.*

*The Applicant also stated that the Commission correctly observed in the preliminary report that "the profits of the Applicant did not decrease significantly as alleged by the exporters." The Applicants contend therefore that the fines imposed by the Competition Tribunal did not contribute to the Applicants' injury. It has been clearly demonstrated that the dumped imports are, through the effects of dumping, causing injury to the SACU industry".*

***Commission's consideration***

The Commission is of the view that the fines imposed by the Competition Tribunal did not have a material impact on the SACU industry's prices and the profits of the Applicant did not decrease significantly as alleged by the exporters. The Commission also noted that the only SACU companies which paid fines were Lafarge and Afrisam. It is apparent from the annual financial statements of Afrisam that the fine had an insignificant impact on its financial performance during the period of investigation. The fine imposed on Lafarge was paid by its parent company, Lafarge South Africa Holdings (Pty) Ltd, and therefore had no impact on its financial performance. PPC, NPC and other SACU producers paid no fines.

With regard to the comments made by exporters regarding the effect of the breaking up of the cartel on the prices and profits of the Applicant, the Commission noted that it did not make a finding that the Applicant was experiencing injury with regard to price depression, since the Applicant increased its prices during the period of investigation. With regard to price suppression, the Commission noted that the cost of production of the Applicant increased by more than 15 per cent during the period of investigation. Although the Applicant was able to increase their prices, it could not increase the prices to recover the cost of production, as it had to compete with dumped imports. This is clear from the price undercutting experienced by the Applicant during the same period.

#### **7.5.4 Blenders**

During the investigation, the exporters stated that the Applicant sells the subject product to blenders who then mix it with fly-ash to create a lower grade of cement and that the Commission should investigate to what extent this contributed to any injury the Applicant might claim to experience.

Information was requested from the Applicant in order to determine if the blenders could also have had an impact on the injury suffered by the Applicant. The Applicant indicated that it is not in possession of such information, as the blenders are independent companies. It was found that blenders do buy bulk cement from the Applicant, add fly ash and package it in bags and sell it as bagged cement and also as concrete products.

The Applicant however provided the following information with regard to the impact of blenders:

##### **1. Background on Blenders**

*The Applicant indicated that Blenders purchase high grade cement from them and either combine this with fly-ash or slag to produce lower grade bagged cement ("Bagged Blended Cement") or use it to manufacture various concrete products. Accordingly, not all the bulk cement sold to the Blenders is converted to Bagged Blended Cement.*

*The Applicant stated that it is not privy to the Blenders' sales information and do not provide the same here.*

*The Applicant stated that the Blenders have been part of the South African cement industry for a long time and, certainly for longer than the period 1 January 2010 to 31 December 2013 (the Injury Investigation Period). Blended Bagged Cement competes with dumped bagged cement from Pakistan and like the Applicant; Blenders are adversely affected by dumped Pakistani cement as more fully explained in paragraph 4 below. The Applicant further indicated that Blenders' production facilities are located inland (mainly Gauteng) and their sales in KwaZulu Natal ("KZN") and the Eastern Cape and Western Cape (the "Coastal Region"), are not significant. This is mainly because of limited availability of slag or fly-ash in KZN or the Coastal Region.*

**2. Volume of bulk cement sold to blenders during the injury investigation period**

*Table 1 below shows the Applicant's bulk cement sales to Blenders. The Applicant stated that the increase in bulk sales to Blenders in part reflects the decision by some of them to prioritise bulk sales in order to mitigate the adverse impact which dumped Pakistani cement has on their bagged cement sales. This much was stated in the application in respect of Lafarge. It is important to note the Applicant sold bulk cement to the Blenders during the injury investigation period. In fact NPC Cimpor did not sell any cement to the Blenders during the Injury Investigation Period and Lafarge sold very small quantities only in 2012 and 2013.*

*Table 1 - Annual sales of bulk cement to Blenders, annual sales of bagged cement by the Applicants and annual imports of cement from Pakistan in tonnes during the Injury Investigation Period*

	2010	2011	2012	2013
<b>Bulk Sales to the Blenders</b>	100	152	180	165
<b>Bagged Sales by Applicants</b>	100	92	90	94
<b>Dumped Imports from Pakistan</b>	100	254	523	773
<b>Dumped Imports from Pakistan (tonnes)</b>	142,822	362,345	746,875	1,103,955

This table was indexed due to confidentiality using 2010 as the base year.

**3. The impact that bagged cement produced by Blenders had on the bagged cement market during the injury investigation period**

The Applicant stated that the impact of Blended bagged cement on the local cement market during the injury investigation period was analysed on the basis of the total sales of bulk cement to the Blenders, the total sales of bagged cement by the Applicant and the total imports from Pakistan during the injury investigation period; and geographic area in which the Blenders are active.

**4. Dumped cement sales comparison**

The Applicant indicated that the Blenders did not have a material impact on the Applicant over the injury investigation period. Table 1 above shows the total annual volumes of bulk cement which the Applicant sold to the Blenders during the injury investigation period. This table shows that sales to Blenders increased from 100 index points in 2010 to 180 index points in 2012 before falling to 165 index points in 2013. As previously stated in paragraph 2, not all the bulk cement sold to the Blenders is converted to Bagged Blended Cement. The Applicant however indicated that it is not privy to the Blenders' sales information regarding bagged blended cement as Blenders are independent companies. It further indicated that it is therefore not able to quantify

*what portion of the bulk cement sold to the Blenders was utilised in the production of Blended cement or the manufacture of concrete products. Increased sales of bulk cement have assisted the Applicant to mitigate the loss of sales they suffered in the bagged cement segment of the market because of dumped Pakistani cement.*

*The Applicant further stated that over the injury investigation period, its total annual sales of bagged cement decreased from 100 index points in 2010 to 94 index points in 2013, having reached a low of 90 index points in 2012. Over the same period, imports from Pakistan increased from 142,822 tonnes in 2010 to 1,103,955 tonnes in 2013, which amounts to a 673% increase. Assuming that the full amount of bulk cement which the Blenders purchased from the Applicant was converted to bagged cement (which is definitely not the case), sales of blended cement would increase by at most 65% over the injury investigation period. This is well below the increase of 673% in dumped imports. It is therefore clear that any effect which the sale of blended cement may have had on the Applicant would be negligible when compared to the significant increase in dumped imports from Pakistan.*

*The Applicant indicated that like the Applicant, Blenders are adversely affected by dumped Pakistani cement. As a result, some Blenders, such as Cemlock Cement (Pty) Ltd have been forced into liquidation, and others are operating at a loss. This is why they support the anti-dumping application as evident from Industry Dry Milling (Pty) Ltd's (IDM) letter of support which was previously furnished to ITAC. Kwikbuild Cement is another blender which has also provided a letter of support.*

## **5. Geographical Analysis**

*The Applicant indicated that as explained above in paragraph 1 above, the production facilities of the Blenders are located inland. Likewise, the sales of Blended bagged cement produced by the Blenders are concentrated inland with a limited (insignificant) presence in KZN and*

*the Coastal Region. As explained previously, land transportation of cement is expensive. Only IDM has distribution facilities in the Coastal Area. In light of limited sales in KZN and the Coastal Region, bagged cement produced by the Blenders had an insignificant impact on the Applicant during the injury investigation period. By contrast, dumped Pakistani cement sales are concentrated in KZN and the Coastal Region and as explained in application, the Applicant experienced the most of the injury during the injury investigation period in these regions. The Applicant also stated that the injury it suffered in these regions is not attributable to Blenders but to Pakistani dumped imports. NPC Cimpor, whose operations are in KZN only, experienced the most severe injury, significantly not from Blenders, but from dumped Pakistani cement.*

*The Applicant indicated that it is clear from the above that there is no basis for the proposition that the Applicant's sales declined as a result of the subject product being sold to Blenders.*

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that it is significant that ITAC's failure to properly take into account the impact of blenders understates the domestic industry's market share especially considering that blenders produce almost the same quantities of bagged cement exported by the Pakistanis. The exporters also stated that without proper investigation and evaluation of blenders it is certain that the size of the domestic market and market share is misleading.*

*The exporters also stated that the Commission's statement in paragraph 7.2 of the preliminary report clearly shows it simply relied on the figures provided by the applicant without properly evaluating them. Importantly, ITAC failed to conduct any assessment of the volumes produced by blenders, which we requested numerous times. The exporters made a request to the Commission to properly investigate and determine the market share of the domestic producers taking into account the market share of blenders, which is not insignificant.*

*The exporters stated that although the alleged dumped imports increased, the Commission has not sufficiently demonstrated that they are the cause of material injury.*

***Comments by exporters on essential facts letter***

*The exporters stated that in its essential facts letter the Commission quoted a report titled "The South African Building Industry". It is further stated that the Commission analysed information in this report, reaching the conclusion that blenders did not have a significant impact on the market share analysis. They stated that they have no idea what factual information is contained in this report nor do they know any essential facts that are being considered in this regard, as the report was never provided to them or made available on the public file. By referencing to this report and not making the report available to interested parties, the Commission has introduced new essential facts that they will include when arriving at a decision, but the exporters have no idea what is neither in the report nor given an opportunity to comment.*

*The exporters also stated that given that the Commission made an important conclusion having a material bearing on the outcome of this investigation based on the above-mentioned report, the report ought to be provided. They request the Commission to urgently provide them with a copy. Consequentially upon the report being provided, they requested to be afforded time to respond to the contents of the report prior to the Commission proceeding to reach any conclusion which may lead to the final imposition of the relevant duty.*

*They further indicated that the Commission should set out the facts it took into account from the above-mentioned report and its evaluation of those facts.*

*The exporters also stated that the Commission stated that a number of blenders have expressed support for the anti-dumping application. However, the application submitted by the domestic industry does not contain letters of support from the "number of blenders supporting the application" nor is there any document to substantiate this statement. In fact on page 19 of the*

*domestic industry application, two blenders are named but are said to be not part of the SACU industry. Blenders are clearly part of the SACU industry and produce a significant amount of bagged cement. Again, these facts are not in ITAC's essential facts letter.*

*The matter was initiated on all cement, yet the Commission has chosen to "focus" on injury for bagged cement. This focus however leaves out the blending industry, which are huge bagged cement producers. The matter could have been brought on bagged cement only, but the decision was taken by the Commission to initiate on all cement. ITAC does not deal with the important facts raised regarding blenders, yet has chosen to "focus" on injury on bagged. When a single blender's production volume equates to the total volume of imports from Pakistan, then the blenders' position is really important. ITAC's considerations around blenders need to form part of the essential facts letter.*

*The Commission's decision to "focus" on bagged cement whilst formally defining the scope of the investigation is presumably based on a set of facts. These facts have never been disclosed but presumably will be a consideration in the final decision. None of these facts are included in the essential facts letter. The Commission explains its reasons to "focus" on bagged cement yet never explains why bagged cement is not the official focus of the investigation.*

#### **Commission's consideration**

The essential facts letter was issued on 14 September 2015 and allowed interested parties 14 days to submit comments. On 28 September 2015, the last day for comments, the exporters wrote a letter to ITAC criticising the essential facts letter of 14 September 2015 and requesting that it be re-issued and a period of seven days be afforded to comment on the revised letter. On 2 October 2015, the exporters wrote an email to ITAC saying that they had inspected the public file and found the "report on blenders" that had been referenced in the essential facts letter which had been placed into the public file the previous day. They stated that the document was not available at the time they prepared the original response and requested an extension of 14



days to consider and comment on that report. The Commission pointed out in a response on 2 October 2015 that the report referred to was a public document which was obtained from the internet, and therefore available. It also pointed out that since the exporters viewed the public file on 16 September 2015, they had ample opportunity to request a copy of the report but elected to wait until 28 September to do so. The Commission nevertheless gave the exporters a copy of the report and provided an additional extension until the close of business on 9 October 2015 to comment on the report.

***Exporter's comments on the BMI report***

*The exporters indicated that the BMI report provides little insight into the blender's issue. Importantly, the absence of commentary in the report makes it difficult to make any meaningful conclusions on the matter. They further indicated that the only reasonable conclusion that can be reached if they combine the BMI report with the indexing provided by the Applicants is that sales to blenders for the injury investigation is only 11% less than total imports from Pakistan for the period and if blenders are considered insignificant then imports from Pakistan must also be considered insignificant.*

***Commission's consideration***

The Commission took note of the arguments by the exporters with regard to the effect of the blenders on the size of the SACU market. The Commission is of the opinion that the blenders are not cement manufactures. They merely process the cement that has been produced by the SACU manufactures. Therefore, the blender's sales information was not included in the SACU market share analysis.

The Commission took note of the comments raised by the exporters regarding the impact of the blenders on the injury suffered by the Applicant. The Commission noted that Safika Cement Holdings (Pty) Ltd and Kwikbuild Cement, being two major blenders, expressed support for this application and indicated that they were also injured by dumped imports from Pakistan.

It is important to note that neither the Commission nor the Applicant is in possession of the exact information on sales by blenders during the period of

investigation and no such information has been made available for the Commission's consideration by any other party.

The Commission obtained sales information of bulk cement to blenders for 2012 and 2013 from the Business & Marketing Intelligence (Pty) Ltd (BMI) study titled "The South African Building Industry". According BMI report, sales quantity of cement by SACU manufactures to blenders for the period 2012 and 2013 range between 550 863 to 580 285 tons.

The Commission used this information pertaining to sales information to blenders as indicative of sales by blenders, since this was the best information available. When adding the sales of blenders to that of "other SACU producers", the market share of "other SACU producers" amounts to xx%, which is less than the market share of dumped imports of xx%. The market share of the "other SACU producers" showed a slight decline from 2012 to 2013, while the market share of Pakistan imports continued to increase. In analysing this information, the Commission is of the view that sales by blenders did not have a significant impact on the overall market share analysis. It was further noted that the SACU market grew by 12 index points over the period of investigation and the Applicant's market share decreased, whilst the alleged dumped import's market share increased during the period 01 January 2010 to 31 December 2013. Further, the market share of imports from other countries also decreased. The Commission is of the view that the significant increase in the market share of the dumped imports was at the expense of not only the SACU industry, but also of imports from other countries at un-dumped prices.

## **7.6 SUMMARY ON CAUSAL LINK**

The Commission made a preliminary determination that although there are factors other than the dumping that could have contributed to the injury, such as the fines imposed by the Competition Tribunal, this did not sufficiently detract from the causal link between the dumping of the subject products and the material injury experienced by the SACU industry.

***Comments by exporters on the Commission's preliminary report***

*The exporters stated that although imports from Pakistan have increased, ITAC and the applicants have not sufficiently demonstrated evidence to indicate that the material injury experienced by the domestic industry is as a result of the alleged dumping.*

***Commission's consideration***

In US — Hot-Rolled Steel panel, the Panel interpreted the non-attribution language in Article 3.5 of the Anti-Dumping Agreement to mean that:

“... the authority is to examine and ensure that these other factors do not break the causal link that appeared to exist between dumped imports and material injury on the basis of an examination of the volume and effects of the dumped imports under Articles 3.2 and 3.4 of the AD Agreement.”

Furthermore, the Appellate Body in US — Hot-Rolled Steel delimited the situations where the non-attribution language of Article 3.5 plays a role. In this regard, the Appellate Body specified that this language applies “solely [to] situations where dumped imports and other known factors are causing injury to the domestic industry at the same time”.

It was noted in the panel in US — Countervailing Duty Investigation on DRAMs, citing the Appellate Body's statement on the non-attribution requirement in paragraphs 188–189 of EC — Pipe Fittings, determined whether the ITC complied with Article 15.5 by examining whether the ITC properly separated and distinguished the injurious effects of other known factors from those of the alleged subsidized imports:

“Neither party has suggested that we should not be guided by the Appellate Body's interpretation of the non-attribution requirement set forth in Article 3.5 of the AD Agreement. We shall therefore determine whether the ITC's Final Injury Determination complied with the requirements of Article 15.5 of the SCM Agreement by examining whether the ITC properly separated and distinguished the injurious effects of other known factors from those of the alleged subsidized imports. We note that the Appellate Body has clarified that the ITC was “free to choose the methodology it [would] use” to separate and distinguish the injurious effects of other factors from those of the alleged subsidized imports. We also note that Korea

has acknowledged that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports.”

From the above it can be deduced that the investigation authorities need not to quantify the injury caused by other factors, in this case the fines by the Competition Tribunal, in order to separate and distinguish it from the injurious effects of the alleged dumped imports.

***Comments by the Applicant on the Commission’s preliminary report***

*The Applicant stated that it agrees with ITAC’s findings that the cause of injury suffered by the SACU industry is attributable to dumped Pakistani imports. The Applicant also stated that the Pakistani exporters’ argument that “following a correction in the pricing behavior after the Competition Tribunal intervention, it is expected that profits would drop” is flawed and should be dismissed. The alleged drop in profit would, in any event, have affected both bagged and bulk cement profitability. Bulk cement was not affected. The Applicants further stated that they have demonstrated that the injury they have suffered and continue to suffer is concentrated in bagged cement. The Applicant stated that it is evident that the cause of the SACU Industry’s injury is dumped Pakistani imports. According to the Applicants the Commission has made a preliminary determination that although there are factors other than dumping that could have contributed to the injury, such as the fines imposed by the Competition Tribunal, this did not sufficiently detract from the causal link between the dumping of the subject products and the material injury experienced by the SACU industry. The Applicants agree with the Commission that there is a causal link between the injury and the dumping by the Pakistani exporters. The Applicants contend that there was no other cause of the injury suffered by the SACU industry.*

*The Applicant stated that they reiterate their submissions that the alleged information exchange between the Applicants terminated before the injury investigation period and is accordingly irrelevant to the present investigation. The Applicants stated that they have demonstrated that the SACU industry,*

*which includes parties other than the Applicants are suffering material injury, face a threat of further and continuing injury, from dumped Pakistani imports if anti-dumping duties are not imposed and this is what ITAC's preliminary determination correctly states in respect of injury. The Applicants stated that they point out that new SACU cement producers such as Sephaku Cement (Pty) Ltd, blenders such as Safika Cement Holdings (Pty) Ltd and packaging suppliers such as Afripak (Pty) Ltd and Nampak Sacks have expressed support for the Anti-Dumping Application.*

#### **Commission's consideration**

The market share of the dumped imports increased by 600 index points from 2010 to 2013 whilst the Applicant's market share declined by 14 index points and the market share of imports from other countries declined by 67 index points. The significant increase in the market share by the dumped imports was therefore not only at the expense of the Applicant, but also that of imports from other countries at un-dumped prices

Dumped imports from Pakistan accounted for 98 per cent of total imports during the period of investigation.

The average price of non-dumped imports in 2013 was R1 878.66/tonne. In comparing this to the average price of the dumped imports of R575.73/tonne, it is clear that the imports from other countries did not cause injury to the SACU industry.

The SACU industry experienced price undercutting with regard to the dumped bagged imports from Pakistan. It further experienced price suppression during the period of investigation which can be directly linked to the reduced gross profits of the SACU industry as it was unable to recover the cost increases in price increases.

The Commission made a final determination that the factors other than the dumping that could have contributed to the injury, such as the fines imposed by the Competition Tribunal, did not sufficiently detract from the causal link

between the dumping of the subject products and the material injury experienced by the SACU industry. The Commission therefore made a final determination that there is a causal link between the dumping of the subject product and the material injury experienced by the SACU industry.

## 8. SUMMARY OF FINDINGS

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### 8.1 Dumping

The Commission made a final determination that the subject product originating in or manufactured by Lucky Cement, Bestway Cement, D.G Khan, and Attock Cement in Pakistan, was exported at dumped prices to the SACU during the period of investigation. The following dumping margins were calculated:

<b>Tariff subheading</b>	<b>Producer</b>	<b>Dumping margins</b>
2523.29	Lucky Cement Limited	14.29%
	Bestway Cement Limited	77.15%
	D.G Khan Cement Limited	68.87%
	Attock Pakistan Cement Limited	63.53%
	All other exporters (excluding Lucky Cement Limited, Bestway Cement Limited, D.G Khan Cement Limited and Attock Pakistan Cement Limited)	62.69%

### 8.2 Material Injury

The Commission made a final determination that the SACU industry is experiencing material injury in the form of:

- Price undercutting;
- Price suppression;
- Decrease in sales;
- Decrease in gross profit;
- Decrease in output;
- Decrease in market share;
- Decrease utilization of capacity;
- Decrease in cash flow;
- Decrease in return on investment;
- Decrease in employment; and
- Decrease in growth.

### **8.3 Threat of material injury**

The Commission noted that the Pakistani cement industry has increased its freely disposable capacity while domestic demand in Pakistan decreased and export to other countries decreased. Given this, the fact that imports from Pakistan have continued to increase, indicates that a threat of material injury to the SACU industry exists.

The Commission therefore made a final determination that a threat of material injury to the SACU industry exists.

### **8.4 Causal link**

The Commission made a final determination that although there are factors other than the dumping that could have contributed to the injury, such as the fines imposed by the Competition Tribunal, this did not sufficiently detract from the causal link between the dumping of the subject products and the material injury experienced by the SACU industry. The Commission therefore made a final determination that the material injury experienced by the SACU industry was causally linked to the dumped imports from Pakistan.



## **9. FINAL DUTIES**

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### **9.1 Price disadvantage**

The price disadvantage is the extent to which the price of the imported product (landed cost) is lower than the unsuppressed and undepressed ex-factory selling of the SACU product. It is the Commission's practice that the price disadvantage is only applied with both the exporter and the importer responded in the investigation.

The price disadvantage for Lucky Cement was calculated based on weighted average landed cost of Lucky Cement's cooperating importers, namely Ezamvelo and Newcastle Steel Works.

The price disadvantage for D.G Khan Cement was calculated based on weighted average landed cost of D.G Khan Cement's cooperating importer, namely Elephant Cement.

The SACU unsuppressed price is based on an estimate by the Applicant in the absence of dumped imports. The Applicant based this price taking the profit margins for the subject product before the entry of the dumped imports into account.

### **Amount of duty**

The "lesser duty" is the anti-dumping duty to be imposed at the lesser of the margin of injury which is deemed to be sufficient to remove the injury caused by the dumped imports.

The Commission always considers the lesser duty rule but only applies it in instances where both the exporter and importer responded fully. Therefore, for residual, the Commission will not apply the lesser duty rule.

The rates of duty to be imposed were concluded to be the following, being the lesser of the price disadvantage or the dumping margin expressed as a percentage of the fob export price:

<b>Tariff subheading</b>	<b>Producer</b>	<b>Rate of duty</b>
2523.29	Lucky Cement Limited	14.29%
	Bestway Cement Limited	77.15%
	D.G Khan Cement Limited	68.87%
	Attock Pakistan Cement Limited	63.53%
	All other exporters (excluding Lucky, Bestway, D.G Khan and Attock)	62.69%

## 10. FINAL DETERMINATION

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Based on the information available and taking all comments into account, the Commission made a final determination that:

- dumping of the subject product originating in or imported from Pakistan is taking place;
- the SACU industry is experiencing material injury and a threat of material injury; and
- the injury suffered by the SACU industry is causally linked to the dumping of the subject product.

The Commission therefore made a final determination to recommend to the Minister of Trade and Industry to impose the following final duties on Portland cement classifiable under tariff subheading 2523.29 originating in or imported from Pakistan:

Tariff subheading	Product	Producer	Rate of duty
2523.29	Portland Cement	Lucky Cement Limited	14.29%
		Bestway Cement Limited	77.15%
		D.G Khan Cement Limited	68.87%
		Attock Pakistan Cement Limited	63.53%
		All other exporters (excluding Lucky Cement Limited, Bestway Cement Limited, D.G Khan Cement Limited and Attock Pakistan Cement Limited)	62.69%

The Commission further decided to recommend that these duties not be rebated unless a specific recommendation in this regard is made to the Minister in future.

