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20 January 2020

The Director
Quality Assurance and Verification
Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Director

Shanghai Taisheng Wind Power Equipment Co., Ltd
Response to Second Preliminary Reinvestigation Report 487

As you know we act for the applicant, Shanghai Taisheng Wind Power Equipment Co., Ltd ("TSP"), in this Anti-Dumping Review Panel ("ADRP") review.

We refer to the abovementioned second preliminary reinvestigation report ("SPRR 487") published on 6 January 2020. We note that this second report follows the publication of the first preliminary reinvestigation report ("FPRR 487") on 3 September 2019. TSP provided its comments in response to the first report on 23 September 2019 ("TSP's First Submission").

We welcome this further opportunity to provide submissions concerning this reinvestigation.

A Continued illogicality and incoherence in the "like goods" finding

SPRR 487 notes the following context for the preparation of this second report:

> *The Commission published a preliminary reinvestigation report on the electronic public record on 6* [sic] *September 2019 and invited submissions to that preliminary reinvestigation report. The Commission received one submission by TSP in relation to the preliminary reinvestigation report, which is available on the public record.*
>
> *The ADRP clarified its views on the scope of the reinvestigation request in a letter to the Commission on 9* [sic] *September 2019. The Commission has considered the approach to normal value and the submission made by TSP in this second preliminary reinvestigation report. This second preliminary reinvestigation replaces the preliminary reinvestigation report published by the Commission on 6* [sic] *September 2019 and allows interested parties an opportunity to make submissions prior to a final reinvestigation report being provided to the ADRP on 4 February 2020 (unless extended).* [footnote omitted]

The ADRP's letter referred to above states:

> *As set out in my letter dated 4 July 2019, one of the reasons I required that there be a reinvestigation of the finding as to the normal value for TSP's exports was that I agreed with TSP that the approach by the Commission with respect to the determination of profit was inconsistent with the reason given by the Commission for using s.269TAC(2)(c) of the Act to construct the normal value. If there were no domestic sales of like goods by TSP in the ordinary course of trade (OCOT) then Regulation 45(2) was not available to be used. It follows that, if the reinvestigation finds that there are domestic sales of like goods in the OCOT, then there must be a reconsideration of the application of s.269TAC(2)(c) and whether the factual findings require that s.269TAC(1) (or possibly s.269TAC(6)) of the Act be used to ascertain the normal value.* [underlining supplied]

Therefore, the question of whether TSP's domestic sales of wind towers are "like goods" to the goods under consideration ("the GUC") that it exported to Australia during the period of inquiry ("POI") remains a fundamental issue to the determination of any dumping margin with respect to TSP's exports, and ultimately the decision to continue the dumping measure as against TSP. We note that SPRR 487 maintains the preliminary view from FPRR 487:[1]

> *The Commission maintains that while sizes and specifications of wind towers may vary from project to project, and the goods are not identical in all respects, the Commission considers that wind towers sold on the domestic market by TSP are like goods to those TSP exported to Australia.*

In light of this position, and to avoid repetition, we respectfully refer the Commission to Part A of TSP's First Submission, which identified the incorrectness and logical difficulties in this finding. We include TSP's First Submission as an attachment to this submission (see Attachment A **[CONFIDENTIAL ATTACMENT]**).

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[1] See SPRR 487, at page 14.

Further, we would like to address the new reasonings in SPRR 487, as well as its response to TSP's First Submission.

1 Misunderstanding of the meaning of "like goods"

SPRR 487 once again acknowledges the fact that each of TSP's wind tower projects involved "*different specifications based on the circumstances of a particular project, which makes no two wind tower projects directly comparable*".[2] However, the report then opines:

> *TSP's submission in relation to like goods concludes in requesting that the Commission find that "TSP's domestic sales of wind towers are not 'like goods' to the goods exported by TSP to Australia for the purpose of normal value calculation". TSP make the claim that the Commission's approach is what it termed a "hybrid reasoning", which it submits cannot be correct as a matter of law:*
>
> > *[where] goods sold domestically can have "likeness in characteristic" that do not disqualify them from being sales of like goods to those exported for the purpose of Section 269TAAD of the Act, but [] not "characteristics closely resembling" the exported goods for the purpose of Section 269TAC(1).*
>
> *The Commission found in REP 487 (and previously in REP 221) that Australian manufacturers produce goods that are like to the goods under consideration. The Commission considers that TSP's argument for why it considers the domestic sales are not like goods, raised in the submission, revolves primarily around the physical characteristics of the different towers. The Commission considers the goods description assists in understanding the physical nature of the goods.*
>
> *…*
>
> *The goods description reflects the reality that the wind towers, subject to the measures, are unlikely to be identical in all respects between different projects and applications. The Commission does not disagree that the wind towers sold domestically by TSP, exported by TSP and, those sold by Australian Industry members have physical differences. The goods description provided by the applicant for investigation clearly anticipated that differences would occur.*
>
> *The Manual outlines considerations required in situations where goods sold on the domestic market are found not to be identical. In these circumstances, it is necessary to determine whether the goods would still fall within the ambit of goods having characteristics closely resembling those of the goods under consideration. TSP claims that the differences between its domestic sales, and export sales are so great that they no longer have characteristics closely resembling each other.*
>
> *The assessment of physical differences (section 2.3.1) identifies that there are physical differences, but when taken holistically, the overall physical characteristics of those wind towers sold domestically have characteristics that are like to those exported. While TSP argue that this*

[2] SPRR 487, at page 12.

> *is a "highly generalised" approach to take, the Commission considers that the goods description requires that all wind towers that met the goods description were assessed*.
>
> *TSP argue that between wind tower projects, the wind towers themselves are not substitutable. The Commission considers that this is due to factors that do not relate to the physical characteristics of the tower, but to the requirements and preferences of the end user. The lack of direct substitutability of a product does not, in itself mean a good is not a like good nor does specification differences that are preferred by particular purchasers*.
>
> *As a result of the analysis of the physical, commercial, functional and production likeness conducted in section 2.3 (above) between domestic sales and export sales and the consideration of the submission made by TSP, the Commission remains of the view that wind towers sold on the domestic market by TSP have characteristics closely resembling those of the goods under consideration that were exported by TSP to Australia.* [footnote omitted, underlining supplied]

Firstly, we submit that it is incorrect and improper for SPRR 487 to characterise the clear physical differences as *"due to factors that do not relate to the physical characteristics of the tower, but to the requirements and preferences of the end user".* This observation is absurd and at odds with the Commission's consistent acknowledgement of the physical differences so far. The *"requirements and preferences of the end users"* mean that the design of a particular tower project is a unique specification. This extends to each section of that tower design. Such *"requirements and preferences"* are completely and squarely reflected by the specific engineering requirements that have to be complied with by TSP in order to manufacture tower sections with the correct physical characteristics. Such differences render wind towers having different specifications as not substitutable for each other – because they are designed for different projects, to reflect the particular geographical conditions and the specific wind farm requirements. The attempt to characterise these real physical and commercial differences as insubstantial and a matter of *"preference of end users"* is incorrect and inappropriate.

Secondly, SPRR 487's statements above appear to argue that TSP's domestic sales of wind towers are necessarily "like goods" to the wind towers subject to the measures exported by TSP to Australia during the POI, as "required" by the "goods description". This argument also must fail. The "goods description" provides the parameters for identifying the particular goods exported to Australia that are "goods under consideration". "goods description" is a distinct concept to and cannot replace the identification of the "like goods" to the GUC. Indeed, it is well established that the goods under consideration may cover a broad range of different goods, and that the goods covered by the description for GUC are not necessarily like goods with each other.[3] Contrary to SPRR 487's argument, the fact that a very broad goods description may have "anticipated" such differences does not entail that such goods description requires all goods within the description to be considered "like goods" to each other.

Thirdly, what are "like goods" is to be determined based on the definition of "like goods" under Section 269T of the Act and Article 2.6 of the WTO *Anti-Dumping Agreement* by reference to the allegedly dumped product *actually* exported to Australia, and not to a description of goods in a vacuum. In so far

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[3] See for example, WTO Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, para. 7.52.

as the determination of normal value is concerned, the relevant determination of "like goods" in the present context is a determination required under Section 269TAC(1) of the Act, which states:

> *Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.* [underlining supplied]

Section 269T provides the following definition of "like goods":

> *"like goods", in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.*

Therefore, for the purpose of normal value determination, the identification of "like goods" must be guided by the "goods exported to Australia". This requires the Minister to engage in an objective and evidence-based examination of the actual physical characteristics of the goods exported and of the goods sold in the domestic market by any particular exporter. Such requirement cannot be bypassed by simply stating that both the domestic sales and the Australian sales fall within the "goods description" and therefore must be "like" to each other.

2 The differences between "project" not fully appreciated

SPRR 487 states:

> *…the Commission noted that each project of wind towers may have different specifications based on the circumstances of a particular project, which makes no two wind tower projects directly comparable. The Commission considers each project to represent a model of wind towers. The Commission considers that while two models may not be directly comparable to each other, this does not detract from the view that the different models remain like goods.*
>
> *While REP 487 stated that it was "not possible to accurately adjust domestic prices to make them comparable with export prices", the reinvestigation has examined whether this was possible. This is discussed further in chapter 4 of this report.* [footnote omitted, underlining supplied]

We respectfully submit that this observation is incorrect and inappropriate for the purpose of like goods identification. Each "project" of TSP's domestic or Australian sales typically involves sales of multiple wind tower products. The precise nature and scope of each project varies greatly. The fact that the content of these projects were very different from each other necessarily infers that those different projects are not "like goods" with each other.

For instance, SPRR 487 identifies that TSP's Australian sales during the POI involved **[CONFIDENTIAL TEXT DELETED – number]** "projects":[4]

[4] SPRR 487, Confidential Appendices 4 and 5.

Model - ADC	Wind Farm project
CONFIDENTIAL TEXT DELETED	

We draw the Commission's attention to the fact that the so called "model" [CONFIDENTIAL TEXT DELETED – commercial project details].

In comparison, all of TSP's domestic sales during the POI were of "complete towers", meaning that each project involved the supply of whole sets of tower sections, rather than individual tower sections such as the Australian sales of [CONFIDENTIAL TEXT DELETED – commercial project details]. Some of these domestic projects involved one tower design for the project, and some involved multiple tower designs for the one project.

Not only do these "projects" concern physically different wind towers, with sections involved within a single project being different to each other, they also cannot be compared side by side as "products", as one project involved full sets of wind tower sections, and the others involved individual sections.

In our view the above circumstances highlight two things.

Firstly, to label each "project" as a "model" is inappropriate and incorrect, as it fails to recognise the significant differences between projects and within each project, in both commercial and physical terms.

Secondly, to treat each such "model"/"project" as a "unit" of goods for the purpose of any "averaging" or "quantity" related calculation is also incorrect and inappropriate. This is because such "units" lack the necessary commonality and uniformity for one unit to be comparable to another unit, or for a number of different units of tower sections or full towers to be "weight averaged". These features further support TSP's consistent submission – that TSP's domestic sales of wind tower "projects" are not like goods to the goods under consideration exported to Australia for normal value purposes.

On the other hand, if the Commission insists on treating TSP's domestic sales as "like goods", based on this highly generalised approach then such treatment must be applied consistently at each step in the normal value determination. Included amongst these steps are the application of the ordinary course of trade test, the determination of the full scope of the domestic sales of like goods, and compliance with the relevant "weighted averaging" requirements.

We explore these issues further below.

B Continued misapplication of Section 269TAAD

In this regard, and once again, we refer the Commission to the ADRP's reinvestigation request:

> *20. Another reason TSP gave for the non-application of Reg 45(2) is that it was not possible for the ADC to conduct an OCOT test on TSP's domestic sales. In the Exporter Verification Report for TSP it was stated:*
>
> > *"In the absence of weighted average CTMS data to conduct a recoverability test, sales at a loss are also considered not recoverable in this case."*

In the Final Report the ADC noted that it had conducted a recoverability test on TSP's domestic sales by comparing the net invoice revenue to the weighted average CTMS over the inquiry period. The Final Report then stated:

> *"However, due to the nature of wind towers being produced on a project by project basis, the CTMS, which in this case is calculated on a project by project basis, is equal to the weighted average CTMS over the inquiry period."*

21. The above comments caused me to raise the issue of the OCOT test with representatives of the ADC in a conference under s.269ZZHA of the Act. From information obtained at the conference and from a review of the spreadsheet "487-TSP-Appendix 3-Domestic Sales" it seems that what the ADC did is to include only those sales of the wind towers in projects which were profitable. If the projects were not profitable then those sales were not included for the purpose of applying Regulation 45(2).

23. Subsection 269TAAD(3) provides that the cost of goods "are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below cost at that time, the selling price is above the weighted average cost of such goods over the investigation period". The weighted average cost of the goods is required to be worked out in accordance with a formula set out in s.269T(5A). This formula essentially requires the sum of the cost per unit of the goods sold during the inquiry period to be divided by the sum of the number of units of the goods involved in those sales.

24. The approach taken by the ADC means that the sales included in the Regulation 45(2) calculation of profit were in the OCOT. However, it is possible that other sales of wind towers during the inquiry period may also have been sold in the OCOT but have not been included.

25. It is not clear that the legislation allows the ADC to include only those sales of wind towers in projects which were profitable in the calculation under Regulation 45(2) or for the purpose of s.269TAC(1). Subsection 269TAAD(3) would indicate to the contrary. There is also judicial comment which would indicate that sales which could come within Regulation 45(2) cannot be disregarded. [underlining supplied]

These comments and the request for reinvestigation remain applicable. This is because SPRR 487's newly adopted view that the normal value should be calculated under Section 269TAC(1) of the Act also requires the application of the OCOT test.

We feel that the ADRP made clear its view that the OCOT determination as applied by the Commission does not comply with the legislation. We are disappointed to note that neither FPRR 487 nor SPRR 487 follows the ADRP's direction in this regard. Accordingly, we respectfully request the Commission to refer to TSP's First Submission again, and to reconsider its approach. In particular we refer the Commission to the following:

PRR 487 perpetuates the same mistakes as were made before:

> *The Commission has adjusted Appendix 3 to follow the process described above to demonstrate that, as a result of the approach taken in this reinvestigation, there is no effect on the number of sales that would be excluded from the OCOT by reason of price. As such, the Commission finds that same sales that were deemed to be in the*

> *OCOT in REP 487 are the same as those that the reinvestigation has found to been in the OCOT. [underlining supplied]*

Notably, PRR 487 also suggests:

> *The Commission considers that the values requested in Q in the formula for calculating a weighted average can refer to each model. If each project is considered its own model, the example below outlines how the test, as defined in section 269T(5A) would apply to each model. In this example, n takes the value of 1, as there is only 1 transaction of any model over the inquiry period, therefore the formula is simplified as:*
>
> $$\frac{P_1 Q_1}{Q_1}$$

The explanation above indeed highlights the reality that, by way of conducting the OCOT test at a "model" level and by treating each project as a separate "model", the Commission has artificially by-passed the legislative requirement, and achieved the same effect of disqualifying each unprofitable sale from the universe of OCOT sales. The different explanation and presentation now adopted in PRR 487 does not change the fact that, according to the Commission's approach, each project shown as unprofitable is always automatically treated as a sale of "like goods… sold in the country of export in sales… in substantial quantities during an extended period… at a price that is less than the cost of such goods; and that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period". This is despite the fact that the approach adopted involves no consideration of the relevant elements of the OCOT test under Section 269TAAD(1) having to do with "substantial quantities", the "extended period", and "recoverability within a reasonable period".

TSP's business is the production and sale of wind towers. Each wind tower project is treated as one sale of wind towers by TSP. If the ADRP was to endorse the Commission's opinion that there are no sales of like goods for the purposes of Section 269TAC(1) but there are for the purposes of Regulation 45(2) – and putting to one side TSP's objection to that opinion - then the relevant question under Section 269TAAD(1) would have to relate to TSP's domestic sales of all wind towers that are like goods to the goods exported to Australia. This question cannot be addressed by limiting the exercise to TSP's domestic sale of a particular project or model, and by failing to have regard to whether TSP recovered any loss on a particular project over the extended period of time based on its overall domestic sales of wind towers. The Commission's approach as presently articulated renders the legislative test and language void. That approach simply reinforces the relevance of the ADRP's concern:

…

Rather than to continue to defend its decision not to conduct an OCOT test, PRR 487 now asks the ADRP to ignore that error by pretending that an OCOT test has now been done, when it still has not been done.

However, were it to be necessary, an OCOT test could be performed in relation to TSP's domestic sales of wind towers in a way that complies with the legislation and the legislative intent. In our view, ignoring the "like goods" obstacle, and assuming that the use of Regulation

45(2) is "reasonably practicable", then the OCOT determination under Section 269TAAD can be guided by the words of the legislation and their underlying purpose. Without suggesting that Regulation 45(2) can be used, we now hypothesise as to how it could be used.

The legislation requires the determination to be made in relation to all domestic sales of like goods, not a subset or model of like goods. Based on PRR 487's view of "like goods", each wind tower project TSP sold on the domestic market represented a unique model, different to the goods exported to Australia on a one-on-one basis. However, we see the cohort of domestically-sold wind towers as being "like goods" to the cohort of goods TSP sold to Australia, based on a broad interpretation of "likeness". That is, not one model of domestic sales is more "like" any wind towers exported to Australia than the other. Rather, if the Commission's utilisation of the OCOT test is to be persisted with, all domestic sales of wind towers should be considered to be of the same "like goods" category to the entirety of the goods exported to Australia. On this basis, for consistency, the OCOT test would therefore be conducted in relation to all domestic sales of like goods as a whole, and not at a per model level.

Looking at TSP's domestic sales of like goods during the POI as a whole, the Commission will find:

- *TSP's domestic sales were overall profitable, at a net profit margin of about [CONFIDENTIAL TEXT DELETED – number]% (or about [CONFIDENTIAL TEXT DELETED – number]% if all domestic sales are accounted for and not excluding the sales of wind towers that were toll-processed by unaffiliated parties), indicating also that the costs of those projects which were unprofitable were indeed all recoverable over the POI;*

- *based on the number of projects, [CONFIDENTIAL TEXT DELETED – number] out of [CONFIDENTIAL TEXT DELETED – number], or over [CONFIDENTIAL TEXT DELETED – number]% of TSP's domestic sales, were profitable;*

- *if sales of toll-processed projects are not excluded, the profitable sales ratio was [CONFIDENTIAL TEXT DELETED – number] out of [CONFIDENTIAL TEXT DELETED – number], which is still over 80% of all projects.*

This highlights two things. First, in accordance with Section 269TAAD(1)(b), the costs of all TSP's domestic sales were indeed recoverable within a reasonable period – being the POI. Second, the loss-making projects were not sold in substantial quantities over an extended period. Accordingly, all of TSP's domestic sales should be taken to have been in the "ordinary course of trade".

The mistake of adopting a segregated "by project" based "like goods" approach, as performed by the Commission, can also be demonstrated through the application of Section 269TAC(14), which assists with the determination of what constitutes a "low volume" of domestic sales of like goods. Adopting the Commission's approach, each project, being each "model", would then be treated as a separate "like goods" example, to be separately compared to the volume of goods exported to Australia to assess if the sales of those like goods are "less than 5%". Assuming that the goods exported to Australia consisted of 21 projects each with one tower, the total

volume of export sales would be 21. Assume also that there were 21 domestic sales projects, each also with one tower. Adopting the Commission's per project analysis, each of the domestic projects would be disqualified on the basis of its "low volume" (one compared to 21, meaning that each project would only be 4.7% of the total volume of exported goods). This would be the outcome despite the fact that the volume of the domestic sales of like goods as a whole was clearly the same volume as the Australian sales.

Lastly, we note PRR 487's comments:

> *Any comparison without reference to models would invariably cause all lower cost models to not be recoverable and higher cost models to always be recoverable.*[5]

We submit that this concern is irrelevant to the legislative task at hand. As the ADRP specifically stated:

> *sales which, because of s.269TAAD(3) would be in the OCOT, cannot be excluded from the calculations for the purpose of Regulation 45(2).*

If anything, such an outcome highlights the fact that each wind tower project is so different to one another that they cannot be considered to be "like goods" to each other. The more logical solution the Commission could have come to was that it was not reasonably practicable to work out the amount of profit under Regulation 45(2), because it is not reasonably practicable to conduct the OCOT test with respect to TSP's domestic sales of wind towers under Section 269TAAD, and that one of the methods under Regulation 45(3) should be applied. However the Commission did not do so, and continues not to do so despite what we perceive to be the ADRP's criticism and guidance.

Regrettably, we find that PRR 487 continues to subject TSP to unfavourable interpretations of the legislation, being interpretation that are neither correct nor preferable. [footnote omitted]

In light of SPRR 487's response to TSP's First Submission, we provide the following additional comments.

1 Continued failure to comply with Section 269TAAD and Section 269T(5A)

The ADRP's reinvestigation request specifically noted the failure of the reviewable decision to comply with Section 269T(5A) of the Act:[6]

> *23. Subsection 269TAAD(3) provides that the cost of goods "are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below cost at that time, the selling price is above the weighted average cost of such goods over the investigation period". The weighted average cost of the goods is required to be worked out in accordance with a formula set out in s.269T(5A). This formula essentially requires the sum of the cost per unit of the goods sold during the inquiry period to be divided by the sum of the number of units of the goods involved in those sales.*

---

5 See PRR 487, page 17.

6 ADRP reinvestigation request, at para 23.

In response, SPRR 487 continues to argue that Section 269T(5A) and the determination under Section 269TAAD should be conducted at "the model level", rather than in relation to "like goods". SPRR 487 argues that this interpretation should be preferred because the outcomes generated by the approach proposed by TSP is not desirable:[7]

> *If the Commission adopted the approach proposed by TSP and conducted the OCOT testing at the 'all like goods level', the resulting test would produce results that undermine the purpose of assessing whether each sale is in the OCOT and the objectives when comparing normal values with export prices. As described earlier, taking this non model based approach, would result in lower cost models being found to be unrecoverable and higher cost models being found to be recoverable. The Commission maintains that section 269TAAD(1) is used to determine which sales, of all like goods, are sold at a price which is less than the cost of such goods.*

The clear legal requirement for the Minister to consider the "recoverability" of a loss-making transaction as part of the OCOT determination under Section 269TAAD of the Act cannot be ignored. We disagree that undertaking such an analysis *"undermine[s] the purpose"*. Section 269TAAD(1) requires the Minister to conduct the OCOT test prescribed therein for the *"like goods*", *"in relation to goods exported to Australia*". Section 269TAAD(2) and (3) are to be applied in relation to the profitability and cost recoverability of *"such goods over the investigation period"*, namely the like goods. Section 269TAAD(3) in particular requires the determination to be conducted with respect to *"the weighted average cost of such goods over the investigation period"*. This particular weighted average cost, according to Section 269T(5A), must be conducted for all of the like goods, and taking into account the weight of higher costs and lower costs, and the costs for different products and different periods throughout the POI. Section 269T(5A) clearly provides that the formula is to be applied to all of the relevant goods *"over a particular period"*:

> *For the purposes of this Part, the weighted average of prices, values, costs or amounts in relation to goods over a particular period is to be worked out in accordance with the following formula:*
>
> $$\frac{P_1 Q_1 + P_2 Q_2 + \ldots + P_n Q_n}{Q_1 + Q_2 + \ldots + Q_n}$$
>
> *where:*
>
> *P 1 , P 2 ... P n means the price, value, cost or amount, per unit, in respect of the goods in the respective transactions during the period.*
>
> *Q 1 , Q 2 ... Q n means the number of units of the goods involved in each of the respective transactions.*

[7] SPRR 487, at page 22.

By contrast, PRR 487 argues that the formula should be performed with respect to *"a particular model"* (which is essentially with respect to each *transaction,* because the Commission treats each project transaction as one model) rather than "over a particular period":[8]

> *The Commission considers that the values requested in Q in the formula for calculating a weighted average can refer to each model. If each project is considered its own model, the example below outlines how the test, as defined in section 269T(5A) would apply to each model. In this example, n takes the value of 1, as there is only 1 transaction of any model over the inquiry period, therefore the formula is simplified as:*
>
> $$\frac{P_1 Q_1}{Q_1}$$
>
> [underlining supplied]

Therefore, SPRR 487 calculates **[CONFIDENTIAL TEXT DELETED – number]** "weighted average costs", one for each of TSP's domestic sales transactions/projects during the POI. This is the same per project/transaction cost used to determine the profitability at the time of the transaction. This is clearly contrary to the requirement under Section 269TAAD(3) and Section 269T(5A) for the calculation of *one* weighted average cost for the domestic sales of like goods over the investigation period. SPRR 487's approach ensures that the loss on any particular project that is unprofitable at the transactional level is *always* considered to be not recoverable. This does not amount to a consideration of whether such loss is recoverable within a reasonable period, with respect to the entire domestic sales of like goods over that period as a whole. This is the same error specifically identified by the ADRP in the first place.

2 Incorrect understanding of OCOT test and wrong analysis

We refer to the "simplistic example" provided in SPRR 487 which is said to support the Commission's view:[9]

> *3.7.1 Principles of TAAD(1): Worked Example*
>
> *A company sold two like goods, one of which was painted blue and one painted red. The cost of red paint is different to blue paint, with red paint costing more than blue paint. The company charged differently for each sale, with the red good being more expensive than the blue good. The sale of the blue good was profitable, making $1 profit on the sale. In terms of OCOT, the blue good would pass the first test as they have been sold at a price greater than the cost of such goods, and recoverability (or sufficiency) would not be required.*
>
> *However, the red good was sold at a $1 loss. In terms of OCOT, the sales of red goods at a loss would fail the first OCOT test and require a sufficiency test to be conducted. As there was only 1 sale of the red good, all the red goods were sold at a loss, so the sufficiency test also fails and the recoverability test is required. If the recoverability test is done using the weighted*

[8] SPRR 487, at page 20.

[9] SPRR 487, page 23.

average of all like goods, then the red good would be recoverable, but despite being profitable, the blue goods would not be recoverable.

Model	Quantity	Cost	Revenue	Profit	Total Cost	WA Cost	Recovered
Blue	1	10	11	1	10	12.50	No
Red	1	15	14	-1	15	12.50	Yes
Totals	*2*				*25*		

The nature of the tests in section 269TAAD(1) that examine individual profitability, substantial losses and, recoverability align with the Commission's position that section 269TAAD(1) aims to determine which sales (at an individual level) were made in the ordinary course of trade. As such, the Commission applies the tests to each individual transaction and within each subset (model) of the total of like goods where substantiality and recoverability are concerned. [underlining supplied]

The analysis and conclusion reached in this example are wrong.

Given that the only sale, which is the "total" sale, of the Blue model is entirely profitable, the sale would not be considered as being not in the ordinary course of trade under Section 269TAAD(1) of the Act. No recoverability test would be required for the sales of Blue model. On the other hand, whilst the only and total sale of the Red model was unprofitable, the cost of such sale was recoverable by comparison to the weighted average cost of all like goods, being both Blue and Red models. The result is that the OCOT test for both sales would have been passed according to Section 269TAAD of the Act. Such an outcome is unremarkable and cannot justify SPRR 487's proposed deviation from the Act.

If the Commission maintains its view that TSP's domestic sales of wind towers are "like goods" for normal value purposes based on its "holistic approach" towards like goods, then the recoverability test should also be performed "holistically" in relation to all of TSP's domestic sales of like goods during the POI, based on the weighted average cost of all those goods, despite the differences between each of the projects. As SPRR 487 admits:[10]

The Commission notes that, conceptually, sales of wind towers taken to have occurred in the OCOT is not as easy to understand when compared to sales of other commodity based products. Nonetheless, the Commission considers that the legislation as drafted, must be applied consistently to wind towers.

For commodity type products where hundreds or thousands of blue and red products are sold across an investigation period, the functions of substantiality and recoverability are easier to understand. In these cases, it is not out of the ordinary course of trade for small volumes of sales to be made at a loss, or for sales in some period within the investigation period to be made at a loss due to various factors. In these cases, the concepts of determining the materiality of the number of losses (substantial volumes) and comparing each selling price to a weighted average cost over the period (recoverability) are clear.

TSP argue that these principles should be ignored for wind towers. The Commission disagrees. The Commission does not consider that the Minister could reasonably be satisfied that different

[10] SPRR 487, at pages 23 and 24.

> *wind tower projects within like goods should subsidise the sale and profitability of projects of wind towers. TSP has extensively argued that each model of wind tower is so unique and different that they are not even comparable, yet also argues that it is reasonable to consider all wind towers together when determining which were sold in the OCOT. The Commission does not consider that this view is supported in the application of the OCOT test.*

To be abundantly clear, TSP has not argued that any of the legislative principles should be "ignored". Instead, TSP requests, should the Commission insist that TSP's domestic sales of wind tower projects are "like goods", that the mechanism prescribed by the legislation must be followed, on the basis that all domestic sales are "like goods" to the goods under consideration. The Commission's suggestion that TSP's suggested approach involves "subsidisation" is at once illogical and emotional. In an objective, legal sense "recoverability" *is* subsidisation – an entirely appropriate anti-dumping concept that allows unprofitable sales to be accepted for normal value purposes because "overall" the exporter made enough money to cover losses on one or other individual transactions that removes any loss-making related "ordinary course of trade" concerns. This is the circumstances that the Minister is obliged to recognise under Section 269TAAD(3) of the Act, in determining the recoverability of losses. There is nothing wrong with it.

It is also not TSP's position that the OCOT test must be applied despite the uniqueness of each wind tower project and the differences between them. If, for some reason, the OCOT test is not appropriate or cannot be performed for legal or practical reasons –then the conclusion should be that the OCOT test cannot be applied. This does not mean that the Commission should therefore conduct the OCOT test in breach of clear legal requirements – as was the case in Report 487, FPRR 487 and SPRR 487. As identified by TSP time and time again, in such circumstances, the normal value can still be calculated based on Section 269TAC(2)(c) of the Act, with the profit component worked out under Regulation 45(3)(a) of the *Customs (International Obligations) Regulation 2015*. This allows the calculation of normal value without the difficulties of undertaking an OCOT analysis as protested by the Commission.

3 Single project-based analysis is inconsistent with established jurisprudence

As noted above, SPRR 487 attempts to calculate multiple weighted average "costs" on a per model level by assigning the value of "n" in the weighted average cost calculation as "1".[11] We submit that the single cost of a project/transaction is not susceptible to being used as a "weighted average". The same applies when the calculation merely artificially slices or divides the "1" into divisional parts with the sole purpose of trying to maintain that a weighted averaging has been performed in relation to the "1". In this regard, we refer to the principle established in the context of calculating a weighted average profit based on the data from other exporters under Article 2.2.2(ii) of the Anti-Dumping Agreement, where the WTO Appellate Body has determined the following:[12]

> *To us, the use of the phrase 'weighted average' in Article 2.2.2(ii) makes it impossible to read 'other exporters or producers' as 'one exporter or producer'. First of all, and obviously, an 'average' of amounts for SG&A and profits cannot be calculated on the basis of data on SG&A and profits relating to only one exporter or producer. Moreover, the textual directive to 'weight' the average further supports this view because the 'average' which results from combining the*

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11 See above at footnote 5.

12 See, WTO Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, T/DS141/AB/R,* paras 74 and 75.

> *data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the 'weighted average' relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase 'weighted average' envisages a situation where there is more than one exporter or producer.*

In our view the same principle applies to the calculation of the weighted average cost of the domestic sales of like goods – at least where there is indeed more than one sale of such goods, as was the case for TSP.

Separately, as noted in TSP's First Submission:[13]

> *The mistake of adopting a segregated "by project" based "like goods" approach, as performed by the Commission, can also be demonstrated through the application of Section 269TAC(14), which assists with the determination of what constitutes a "low volume" of domestic sales of like goods. Adopting the Commission's approach, each project, being each "model", would then be treated as a separate "like goods" example, to be separately compared to the volume of goods exported to Australia to assess if the sales of those like goods are "less than 5%". Assuming that the goods exported to Australia consisted of 21 projects each with one tower, the total volume of export sales would be 21. Assume also that there were 21 domestic sales projects, each also with one tower. Adopting the Commission's per project analysis, each of the domestic projects would be disqualified on the basis of its "low volume" (one compared to 21, meaning that each project would only be 4.7% of the total volume of exported goods). This would be the outcome despite the fact that the volume of the domestic sales of like goods as a whole was clearly the same volume as the Australian sales.*

This view has been confirmed by the ADRP recently in Decision No. 110 ("ADRP Report 110"). In that report, the ADRP was requested to consider whether the Commission's adoption of a "model based" method in addition to the "all like goods" based method complied with the "sufficiency"/"low volume" test required under Section 269TAC(2)(a) and (14) of the Act, in light of the physical differences between each model. The ADRP considered that the Commission's model based approach is not supported by the language or context of the Act. The ADRP ruled that the determination is to be conducted at the "all like goods" level:

> *35. The second leg of the sufficiency test seeks to read into s.269TAC a requirement that domestic sales, which would otherwise be considered in the ascertainment of normal value, must meet an additional requirement in order to be relevant to the determination of normal value. This additional requirement is not evident by the express language of s.269TAC nor can one be inferred when that section is read in context.*

In our view, the analysis and reasoning in ADRP Report 110 is also applicable to any OCOT test that the Commission proposes to undertake in relation to TSP's domestic sales of like goods.

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[13] See TSP's First Submission, at page 9.

C Flaws in the revised normal value determination

We note SPRR 487's proposal that the normal value for TSP's exports of the goods under consideration to Australia should be calculated under Section 269TAC(1) of the Act, based on TSP's domestic sales of wind towers.

We make the following comments concerning SPRR 487's preliminary analysis and proposal in this regard.

1 All of TSP's domestic sales of "like goods" must be taken into account.

In this regard, we draw the Commission's attention to the issue concerning the full universe/scope of TSP's domestic sales of like goods. As noted in Report 487, certain of TSP's domestic sales were excluded from the determination of the amount of profit as part of the normal value construction under Section 269TAC(2)(c) of the Act.[14] This was on the basis that such sales involved TSP in outsourcing part or all of the production to an unaffiliated entity under toll-manufacturing arrangements.

In light of SPRR 487's proposal to determine normal value under Section 269TAC(1) of the Act, and in light of the ADRP's instruction that domestic sales of like goods must not be improperly disregarded, the Commission must ensure that the reinvestigation report correctly includes all domestic sales of like goods by TSP during the period of inquiry that fall within Section 269TAC(1). The fact that some sales involved toll manufacture by an entity unaffiliated with TSP is not a proper basis to exclude such sales. TSP submits that there is no basis for such sales to be disqualified or excluded from the universe of prices paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arm's length transactions by TSP.

2 Errors in the calculation of per "unit" cost and determination of physical differences

We note that, *"4.1.3.1 Option A"* of SPRR 487 observed a significant difference between the weighted average cost of the "domestic and export models", which led the Commission to consider Option A to be unsuitable:[15]

> *The Commission calculated the cost difference between the weighted average cost to make all domestic like goods and the weighted average cost to make all exported goods during the inquiry period…*
>
> *The Commission found that, in using this methodology, the resulting difference in cost between domestic and export models, was greater than twice the cost to make of the exported models. While such adjustments are not applied to the exported model, the Commission considers that the degree of the variance between exported and domestic models, in this case being larger than the cost to make of the export model, makes this method unsuitable in this instance. Given the objective of the specification adjustment is to remove physical differences that affect price, the Commission considers that the result of this calculation would not satisfactorily adjust for such differences as it would imply that, if sold to export, the model has a negative cost. The diagram below (Confidential Figure 3) illustrates the differences in cost and the magnitude of*

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14 Report 487, at page 30.

15 SPRR 487, at pages 30 and 31.

the cost to make differences between the export and domestic models on which this adjustment would be based.

Confidential Figure 3: Comparison of Weighted Average to Weighted Average CTM Adjustments

We observe that this weighted average cost analysis has been affected by a misunderstanding of the data pertaining to TSP's domestic sales of wind towers. As the Commission is aware, all of TSP's domestic sales projects are on a "complete tower" basis. The "quantity" data as reported in TSP's response to the Exporter Questionnaire during the continuation inquiry procedure related to the units under the relevant contract/project, regardless of type of "item" of the particular sales. For example, in relation to the Australian sales:

[CONFIDENTIAL TEXT DELETED – confidential table in exporter questionnaire response]

Similarly, in relation to the domestic sales:

[CONFIDENTIAL TEXT DELETED – confidential table in exporter questionnaire response]

During the verification stage, the Commission asked TSP to identify the number of tower sections, rather than the contract based "units" in relation to the Australian sales – given that Australian sales involved a mixture of full tower sales and individual section-based sales. The Commission then added the section-based quantity information to the Australian sales spreadsheet:

[CONFIDENTIAL TEXT DELETED – confidential table in exporter questionnaire response]

The same information was not requested in relation to each of TSP's domestic sales. Understandably, such information was not necessary given that all domestic sales were on a full tower basis; the costs were maintained at project level; and no recoverability test was conducted as part of OCOT determination. However, it now comes to our attention that this distinction in the quantity information between TSP's Australian and domestic sales has been neglected, and that the quantity data reported in the domestic sales spreadsheet has been treated as the data for the number of *sections*, rather than the number of *complete tower sets*.

Accordingly, in analysing the weighted average cost for TSP's domestic and Australian sales, SPRR 487 compares the domestic weighted average *per tower* cost, with the Australian weighted average *per section* cost.

This error also affects the following observation in SPRR 487:

> *In isolation, the findings outlined above would indicate that three requirements of section 269TAC(1) have been achieved and the conditions of section 269TAC(2) have not been found and therefore, a normal value under 269TAC(1) would be possible. The ADRP Senior Member also noted that it may be possible to determine a normal value under section 269TAC(1).66 The Commission has calculated a normal value under section 269TAC(1), <u>without adjustments for any specification differences that affect price, which resulted in a dumping margin of in excess of 150 per cent.</u>* [underlining supplied]

This is wrong. Based on the correct "sections" based weighted averaging, and based on the Commission's current approach towards OCOT, the weighted average per section domestic selling price is RMB **[CONFIDENTIAL TEXT DELETED – number]**. In comparison, the per section weighted average export price of the GUC is RMB **[CONFIDENTIAL TEXT DELETED – number]**. That is, without adjustment for any specification differences that may affect price, the dumping margin would be *negative* **[CONFIDENTIAL TEXT DELETED – number]**%, which is a considerable margin by which the export price exceeds the normal value.

Despite TSP's views (a) that its domestic sales are not "like goods" to towers and tower sections exported to Australia, and (b) that the Commission's "per section" cost comparison does not appropriately capture the significant differences in physical characteristics, we now provide the relevant information with respect to the number of tower *sections* pertaining to each of TSP's domestic sales during the POI.[16]

3 Cost based adjustment under Option A should be reconsidered

Based on the correct information concerning the total number of tower sections sold by TSP in the domestic market during the POI, being **[CONFIDENTIAL TEXT DELETED – number]** sections, the weighted average domestic CTM per section should read RMB **[CONFIDENTIAL TEXT DELETED – number]** per section, rather than RMB **[CONFIDENTIAL TEXT DELETED – number]** – which is per tower. Based on the Commission's current analysis of domestic sales in the OCOT, the weighted average per section CTM for TSP's domestic sales in the OCOT is RMB **[CONFIDENTIAL TEXT DELETED – number]**. This is compared to the weighted average CTM of RMB **[CONFIDENTIAL TEXT DELETED – number]** per section with respect to the **[CONFIDENTIAL TEXT DELETED – number]** sections exported to Australia during the POI. The cost differences and the implication of any adjustment to the normal value based on such differences do not appear problematic *per se*, as currently perceived in SPRR 487.

Accordingly, the Commission should revisit its view with respect to the cost of production based adjustment under Section 269TAC(8) under Option A. We note that such approach would also be consistent with the Commission's Dumping and Subsidy Manual.[17]

4 Adjustment under Options B and C have no basis

In light of the issue identified above in relation to Option A, the Commission should find that Option A provides the most suitable basis to quantify the adjustment with respect to the physical differences between the goods exported to Australia and the domestic sales of like goods.

We support SPRR 487's view that Option B is unsuitable, given the arbitrary distinction involved between TSP's domestic sales under such approach, despite the fact that not one domestic sales project can be considered to be more "like" to the Australian sales than any other.

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16 See Attachment B **[CONFIDENTIAL ATTACMENT]**, which is based on the "TAC(1) 487 - TSP - Appendix 3 - Domestic Sales" spreadsheet prepared by the Commission as part of SPRR 487.

17 See Dumping and Subsidy Manual, at page 67.

Further, we submit that the proposed adjustment under Option C is incorrect and inappropriate. Under Option C, the Commission has proposed to establish a benchmark for adjustment based on *"market price in the domestic market"* as follows:[18]

> *In establishing what the 'market price' in the domestic market would have been, the Commission based the price as the sum of the cost to make the goods sold on the export market (being the identical model), plus the profit achieved in the sales of all like goods made in OCOT, and the SG&A expenses for like goods sold on the domestic market.*
>
> *The Commission considers that this approach creates a reasonable estimate of the price for which the goods exported to Australia, would have been sold at if they were sold on the domestic market. This is based on the following factors:*
>
> - *Using the cost to make the goods on the export market accounts for cost based differences between the domestic and exported wind towers;*
> - *Using the OCOT profit allows a fair comparison between the actual prices achieved in the domestic market and the 'market price', noting that section 269TAC(1) requires domestic sales used to determine normal value to be in the OCOT. If a different profit was applied, the domestic prices would need to be further adjusted to account for the difference in profit achieved in the domestic OCOT sales and the 'market price'; and,*
> - *It is reasonable to assume that there is a cost to sell the goods on the domestic market which would be accounted for in the market price, and that this cost may be different to that of export sales.*
>
> *While it may be argued that this approach is using the methodology that would have occurred using section 269TAC(2)(c), the Commission considers that it is open to the Minister to take an approach of determining a 'market price' as part of the equation for determining price differences for physical difference within section 269TAC(8), if it achieves the objective of removing differences that affect price in relation to like goods that are not identical to the exported goods. The Commission considers that by using a 'market price' as part of the specification adjustment, this allows for a comparison between like goods as if they are identical to the goods exported, while still using sales of like goods as the basis for the comparison. This approach also eliminates the timing based issue raised in the previous option as the actual cost to make the goods is used as part of the equation.* [underlining supplied]

We observe that this approach effectively constructs the normal value, by establishing the "constructed market price". Therefore, in principle, Option C should reach the same outcome as Option A. Option C goes straight to the use of the cost of the goods exported to Australia to *"account[ ] for cost based differences between the domestic and exported wind towers",* plus the domestic profit. In comparison, Option A starts with the domestic price – which incorporates the domestic profit, and then adjusts such price by the cost difference between goods exported and the like goods. The result therefore should be basically the same.

Option A will show that there is no dumping, once the cost differences are correctly calculated on a per section basis, and the cost difference based adjustment is applied to the domestic price based normal value. It will be lower than the export price of the Australian sales. However, SPRR 487 claims that the

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[18] SPRR 487, at page 33.

normal value established pursuant to an adjustment under Option C will show that the dumping margin is maintained at the same level as in Report 487. How can this be? This is because, contrary to the explanation in SPRR487, the adjustment under Option C:

- does not show a comparison based on the *actual* cost to make the goods; and
- does not achieve the objective of removing differences between exported goods and the like goods related to their physical differences.

SPRR 487 claims in constructing the "market price", it has used the actual cost to make in relation to the goods exported to "accounts for cost based differences between the domestic and exported wind towers". This is not what was done under Option C.

The reality is that SPRR 487 used the "uplifted" cost to make for constructing such "market price", not actual cost to make. SPRR 487 claims that such "market price" is then used to compare with the domestic prices of like goods in OCOT to determine the price impact resulted in the physical differences between the GUC and the like goods. However, the same cost uplifting has not been applied in relation to:

- the determination of the cost to make for the like goods sold domestically;
- the determination of domestic sales of like goods in the ordinary course of trade; or
- the "OCOT profit" percentage derived from such domestic sales that has been used as part of the "market price" construction.

We submit that the use of such cost uplifting is not only unjustifiable by itself,[19] but even more unwarranted when applied on a discriminatory basis as SPRR 487 proposes and for the purpose of determining the physical differences between the goods exported and the like goods which affects price comparability.

The fact is, the amount of "adjustment" determined by the formula under Option C basically adjust for the difference between:

- the uplifted cost to make of the GUC; and
- the actual cost of the GUC

This adjustment is unrelated to the differences between the GUC and the *like goods.* Accordingly, the adjustment proposed by Option C is irrelevant to the issue of a physical differences based adjustment that SPRR 487 proposes to determine under Section 269TAC(8).

Based on the reasoning stated in SPRR 487, the correct calculation of the "constructed market price" and the adjustment should use:

- TSP's *actual* cost to make of the goods exported to Australia; plus

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[19] The cost uplift adopted in Report 487 is a separate ground for review being considered by the ADRP.

- associated domestic cost to sell; plus
- OCOT profit derived from domestic sales of like goods, with adjustments to FOB equivalence.

The result is that the "constructed market price" should be RMB [CONFIDENTIAL TEXT DELETED – number] per section or lower.[20] This will essentially form the basis of the normal value, and be compared to the weighted average per section price of RMB [CONFIDENTIAL TEXT DELETED – number] with respect to the GUC.

Both the normal value adjusted under Option A or a normal value derived from Option C (which, if calculated correctly, is principally the same as Option A) will result in a negative dumping margin, thereby this alleged the foundation for the Minister's decision that the dumping measure should be continued as against TSP.

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We respectfully ask that the Commission reconsider and revise SPRR 487 so that in its final reinvestigation report to the ADRP:

(a) determines the normal value under Section 269TAC(2)(c); and, either:

(1) agrees to work out the profit component based the actual amount realised by TSP on its domestic sales of the same general category of goods according to Regulation 45(3)(a) - in which case, TSP's exports were not dumped in the POI; or

(2) if the profit component is still calculated based on Regulation 45(2), agrees to conduct any OCOT test with respect to all domestic sales of like goods as a whole as required by Section 269TAAD - in which case, TSP's exports were not dumped in the POI; or

(b) determines the normal value under Section 269TAC(1), as adjusted in accordance with Section 269TAC(8) to account for the physical differences between the domestic sales of like goods and the goods exported to Australia, based on the real differences in the cost to make between those goods - in which case, TSP's exports were not dumped in the POI.

TSP remains ready to provide both the Commission and the ADRP whatever assistance and commentary is required, and as may be permitted, in the ongoing review process.

Yours sincerely

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[20] The OCOT profit percentage would be lower if all of TSP's domestic sales of like goods are considered, without improper exclusion of goods produced under toll-processing arrangements with unaffiliated parties, and/or with the correct OCOT determination as identified by TSP.