Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal, Audit & Assurance

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By EMAIL

Mr Dale Seymour
The Commissioner of the Anti-Dumping Commission
Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3000

Dear Commissioner,

ADRP Review No. 71: Certain Wire Rope Exported to Australia from the Republic of South Africa

The Anti-Dumping Review Panel ("Review Panel") is currently conducting a review of the decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science to publish a dumping duty notice in relation to Certain Wire Rope from the Republic of South Africa ("South Africa"). The Review Panel accepted an application for review from Scaw South Africa (Pty) Ltd ("Scaw") and Haggie Reid Pty Limited ("Haggie Reid") acting jointly ("the Applicants").

As you are aware, I am conducting the review.

Pursuant to s.269ZZL of the *Customs Act 1901* ("the Act"), I require that the following findings arising from the Applicants' grounds of review be reinvestigated:

1. **Finding 1: Finding relating to the establishment of corresponding normal values for comparison with the export prices of the goods**

   The Applicants claim that the Minister failed to establish corresponding normal values for comparison with the export prices of the goods, in accordance with s.269TACB(1), s.269TAB and s.269TAC(1) of the Act. According to the Applicants, the ADC instead, created "groups" (or PCNs) of exported models defined by their broad features, and

compared each of those groups with a "group" of models sold on the domestic market having the same broad features. The Applicants considered that the ADC's normal value determination was based on incorrect model grouping and model matching exercises, resulting in the use of domestic sales prices of goods that did not correspond to the goods exported to Australia, and without proper adjustment.

In its application for review and throughout the investigation (including detailed comments in respect of SEF 401), the Applicants challenged the ADC's model groupings as being, "*too broad, distortive, inconsistent, and defied the comparative realities of the goods concerned".* Further, it was submitted that the groupings resulted in the treatment, by way of grouping, of a range of goods with substantial physical and cost differences as essentially the same goods, when they were not the same. (emphasis added)

The Applicants had also claimed that the PCN method had created a very pronounced mismatch in the comparison of domestic models and Australian models, demonstrated by a "cost to make and sell" ("CTMS") comparison between the models, which showed substantial differences between the domestic PCNs and their "matching" Australian PCNs. The Applicants submission on SEF 401 provided a further chart showing the cost variances within a single PCN with the percentages representing the difference between the cost of six models within the ADC's PCN and the weighted average cost of all the export models in the PCN.

The ADC in REP 401 explained its model matching methodology and addressed a number of the concerns raised by the Applicant, including the cost differential between Scaw's domestic and export CTMS values in the same PCN, which it analysed and concluded that that the cost differential between the domestic CTMS and export CTMS is explainable in the most part due to the export rebate. However, REP 401 did not address the issue of "cost differences within the models in export PCNs" as was raised by the Applicants in its comment on SEF 401. According to the Applicants, the export rebate would have had a very limited impact on this comparison, and cannot explain the significant cost variances between the models in the same PCN.

Nowhere in REP 401 does the ADC challenge the Applicants' data or methodology relating to the contention on the cost variance within the PCN. The Applicants specifically stated that Scaw's cost system was able to capture the detailed production cost for every product code. According to the Applicants, Scaw reported the CTMS for each and every Scaw product code, and those "*detailed product code-based CTMS*

*were verified, accepted and used by the ADC in its margin calculation – such as for the purpose of conducting the "ordinary course of trade" ("*OCOT*") analysis on domestic sales of like goods."* The ADC did not challenge or contradict this statement. Indeed, the ADC's analysis of CTMS variance between export and domestic products in the same PCN was based on the same CTMS data, without the ADC questioning the validity (other than the reference to the export rebate).

The ADC's failure to address this relevant issue, being the Applicants' contentions that the models within the PCNs have substantially different costs of production, forms the basis of this reinvestigation of the ADC's methodology. The Applicants contend that in allocating products with a wide range of costs into one PCN does not provide a safe or fair point of comparison between the Australian and domestic prices.

The ADC is therefore requested to reinvestigate this finding taking into consideration the Applicants' contentions relating to CTMS variance between models in the same PCN and assess if the comparison methodology adopted is still appropriate, particularly for those PCNs that may be exhibiting substantial cost variances between models within the PCN, taking into consideration s.269TACB(1) and the fair comparison requirement in Article 2.4 of the ADA.[1]

In reinvestigating this issue, the ADC should also take into consideration all parties' submissions to both the ADC and the Review Panel, as well as all other relevant information and documents. In conducting the reinvestigation, if a particular approach or methodology is adopted (or rejected) the reasons therefor and any analysis relating thereto should be clearly set out.

If the reinvestigation results in a different finding, the Review Panel should be provided with the relevant calculations, and also consequential amendments to the dumping margin should be made.

[1] Of some interest is that some authorities, such as the Import Administration of the US Department of Commerce have issued a statement of when to make and how to quantify adjustments for differences in merchandise with a 20% limit on adjustment, the so-called Diffmer rule. The allowance will normally be based on differences in cost of production and when the variable cost difference exceeds 20%, it is considered that the probable differences in values of the items to be compared is so large that they cannot reasonably be compared. The 20% guideline is just that, a guideline and not an inflexible rule and there may be instances in which comparisons may be reasonable even if the diffmer is in excess of 20% of the cost of manufacture.

2. Finding 2: Finding relating to the "specification adjustment" for certain of the goods

For the purpose of calculating the normal value for three of the ADC's designated PCNs, where there was a lack of domestic sales of identical or matching PCNs, the ADC applied a "*specification adjustment"* to a "*surrogate"* PCN based on the difference between weighted average deductive export prices of the two relevant PCNs. The ADC states in REP 401:

> *"As the export price of the goods are not in respect of identical goods (as per subsection 269TAC(8)(b)), the Commission has applied specification adjustments to the normal values, to ensure any differences to between the model exported to Australian and the surrogate model do not affect comparison with export prices. These adjustments make allowances for number of strands and compacting, as appropriate, based on verified differences between FOB export prices for different models.*" (emphasis added)

The submission of the Applicants that there is no sound basis for the ADC to calculate the specification adjustment based on export price difference, would appear to have some merit.

Section 269TAC(8)(b) of the Act provides that where the normal value of goods exported to Australia is the price paid or payable for like goods and that price and the export price of the goods exported are not in respect of identical goods, "*that price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price."* (emphasis added) It is not clear from REP 401 why the ADC used the deductive export price as the basis for the adjustment, since export price is itself the subject of the comparison with the normal value. There would appear to be no explanation in REP 401 and no reasoning link or logical connection as to how the difference in FOB export prices, *"make allowances for number of strands and compacting, as appropriate",* particularly since the export prices themselves can be affected by dumping.

The ADC Dumping and Subsidy Manual (2017) ("The Manual") provides that in most cases adjustments for differences in physical characteristics, or for quality, are based

on production cost differences.[2] REP 401 does not provide any reasons for the ADC's deviation from its usual policy in this regard, particularly in view of the fact that the Applicants made detailed submissions on this issue in response to SEF 401, and provided the ADC with examples for using differences in costs (based on its model-specific CTMS) as a basis for the adjustment. This resulted in very different results. The ADC did not address this aspect of the Applicants' submissions in REP 401.

It is noted that the Applicants claimed that given the lack of domestic sales of like goods, the more appropriate method to determine the corresponding normal value would be on the basis of s.269TAC(2)(c) of the Act, and indicated that the information (the detailed cost of production) is available to the ADC, in the form of the Australian CTMS for every product code. According to the Applicants, Scaw reported the CTMS for each and every Scaw product code, and those detailed product code-based CTMS were verified, accepted and used by the ADC in its margin calculation – such as for the purpose of conducting the "ordinary course of trade" ("OCOT") analysis on domestic sales of like goods. The ADC does not appear to dispute this anywhere in REP 401 or explain why it was not appropriate to use s.269TAC(2)(c), in respect of those product groupings where there appeared to be no comparable domestic market sales.[3]

In reinvestigating this issue, the ADC should also take into consideration all parties' submissions to both the ADC and the Review Panel, as well as other relevant information and documents. If a particular approach is adopted (or rejected) the reasons therefor should be clearly set out, and if any assumptions are made they should be tested or have some sound basis in fact. *In Mexico — Anti-Dumping Duties on Rice*[4], the Appellate Body observed that assumptions by an investigating authority should be based on positive evidence:

> *"Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts and should be sufficiently explained so that their objectivity and credibility can be verified."*

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[2] The Manual, page 63.

[3] It should be noted that it has previously been stated that in applying the model matching criteria, there may be circumstances where the ADC determines that there are no comparable goods in the exporter's domestic market to determine normal value. In such a situation the ADC may apply a constructive normal value under s.269TAC(2)(c). See Issues Paper 2015/01.

[4] *Mexico-Definitive Anti-Dumping Measures on Beef and Rice, Complaint with respect to Rice* (WT/DS295/R).

If the reinvestigation results in a different finding in relation to normal value the ADC should provide the Review Panel with the relevant calculations and also make any consequential amendments to the dumping margin.

3. **Finding 3: Finding in relation to adjustment concerning reel returns**

The ADC is also requested to reinvestigate its finding in relation to the adjustment concerning reel returns. It appears from the correspondence on record, internal documents and submissions (to both the ADC and the Review Panel), to be a complex issue. However, there appears to be some lack of clarity and little explanation of the complexities of this issue in REP 401.

In the reinvestigation the ADC should take into consideration the various detailed submissions by the Applicants, as well as those of other parties, including:

- The Applicants' treatment of reel returns and costs associated therewith in their actual books of account (both Scaw and Haggie Reid);
- The designation by the Applicant of the reel return and buy-back as a separate commercial transaction;
- The fact that not all reels are returned by customers and Scaw has to buy new reels from other sources;
- Whether the amount spent for reel buy backs is necessarily connected to the wire rope sales or to the full cost of reels used in the wire rope produced and sold during the investigation period;
- Whether the amount of the expenses incurred for such buy backs are expenses incurred in relation to the sales of the wire rope itself and only relevant in so far as reflecting purchases of raw material, which are fully captured in the cost of production.

The ADC should also examine the reel buy back in so far as the export price is determined on a deductive export price basis, based on Haggie Reid's sales of wire rope to its customers in Australia and should consider whether the amount of reel credits provided by Scaw to Haggie Reid can be considered as a factor affecting the comparability of the export price and the normal value. Also, if considered to be an "expense", whether it should be recognised as a negative expense after exportation, rather than as an upward adjustment to the normal value, as proposed by the Applicants.

In reinvestigating this issue, the ADC should also take into consideration all parties' submissions to both the ADC and the Review Panel, as well as other relevant information and documents. If the reinvestigation results in a different finding the relevant calculations should be provided to the Review Panel and also any consequential amendments to the dumping margin should be made.

4. **Finding 4: Finding in relation to the inclusion of the "settlement amount" in Haggie Reid's SG&A expenses, as a deduction adopted in the work-back export price**

The ADC is requested to reinvestigate this finding taking into consideration the following:

- Whether, on a proper reading of s.269TAB(2), the settlement amount can be considered to be an expense *"… arising in relation to the goods after exportation*" bearing in mind:
    - these amounts were incurred in relation to Haggie Reid's sales activities in 2015 (before the investigation period) and were in respect of an Intellectual Property dispute relating to a steel attachment to the goods (not the goods themselves), which is attached to the goods in Australia by Haggie Reid before selling the product;
    - It was always accounted for as an abnormal expense in Haggie Reid's accounts and was not considered to be in the general course of business.
- Whether on a proper reading of s.269TAA(3)(b), the settlement amount can be considered to be "*costs necessarily incurred in the importation and sale of the goods",* under Section 269TAA(3)(b).

In reinvestigating this issue, the ADC should also take into consideration details of the dispute and the settlement agreement as well as other parties' submissions to the ADC and the Review Panel, and other relevant information and documents.

If the reinvestigation results in a different finding the relevant calculations should be provided to the Review Panel and consequential amendments to the dumping margin should be made.

If you have any issues in relation to the reinvestigation or if you consider that a conference under s 269ZZHA of the Act would assist in obtaining the further information the subject of the reinvestigation, please contact the Secretariat.

Please could you report the result of the reinvestigation within 55 days, that is, by 31 May 2018.

Thank you for your assistance.

Yours faithfully,

Leora Blumberg
Panel Member
Anti-Dumping Review Panel
6 April 2018