Australian Government
Anti-Dumping Review Panel

ADRP Report No. 124

Deep Drawn Stainless Steel Sinks exported from the People's Republic of China

June 2020

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Appellate Body	Appellate Body of the World Trade Organisation
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
FOB	Free on board
GAAP	Generally accepted accounting principles
Goods	Deep drawn stainless steel sinks
GUC	Goods under consideration
Inquiry period	1 July 2018 to 30 June 2019
Manual	Dumping and Subsidy Manual November 2018
Minister	Minister for Industry, Science and Technology
OCOT	Ordinary course of trade
CIO Regulation	*Customs (International Obligations) Regulation 2015*
REP 517	The report published by the Commission in relation to Deep Drawn Stainless Steel Sinks exported from the People's Republic of China, dated February 2020
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister made on 27 February 2020

SEF 517	Statement of Essential Facts
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (Minister) to secure the continuation of anti-dumping measures in respect of Deep Drawn Stainless Steel Sinks (the goods under consideration or GUC) exported from the People's Republic of China (China). The applicants for the review are two Chinese manufacturers and exporters of the GUC, Primy Corporation Limited (Primy) and Zhuhai Grand Kitchenware Co., Ltd (Zhuhai Grand).

2. For the reasons set out in this report, I recommend that the decision of the Minister to continue the measures against the applicants be affirmed.

Introduction

3. Primy and Zhuhai Grand, hereinafter referred to as the Applicants, applied under section 269ZZC of the *Customs Act 1901*[1] (the Act) for a review of the decision of the Minister relating to the continuation of anti-dumping measures pursuant to section 269ZHG(1) of the Act in respect of the GUC exported from China.

4. The application was accepted and notice of the proposed review, as required by section 269ZZI, was published on 6 April 2020.

5. The Senior Member of the Anti-Dumping Review Panel (Review Panel) directed in writing that the Review Panel be constituted by me in accordance with section 269ZYA of the Act.

Background

6. Anti-dumping measures were first imposed on the GUC on 26 March 2015.[2] The measures were due to expire on 26 March 2020. On 3 July 2019, the Anti-Dumping Commission (Commission) initiated an inquiry with a nominated inquiry period of 1 July 2018 to 30 June 2019.[3]

[1] Unless otherwise stated, all legislative references are to the *Customs Act 1901*.
[2] *Anti-Dumping Notice No. 2015/41*.
[3] *Anti-Dumping Notice No. 2019/86* refers.

7. Recommendations resulting from that inquiry, reasons for the recommendations, and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 517* (REP 517).

8. On 27 February 2020, the Minister accepted the Commissioner's recommendations contained within REP 517 and, under section 269ZHG(1)(b) of the Act, declared that the measures would continue after 26 March 2020 (the Reviewable Decision).[4]

9. The Minister went on to determine that, after that date, the measures would take effect as if different specified variable factors had been fixed in relation to all exporters generally relevant to the determination of duty as specified in REP 517. As a result, Primy's dumping margin was increased from 5% to 9.8% and Zhuhai Grand's margin increased from 9.2% to 13.4%.

Conduct of the Review

10. In accordance with section 269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision, if they are satisfied that the decision is the correct or preferable one, or revoke it and substitute a new specified decision. In undertaking the review, section 269ZZ(1) of the Act requires the Review Panel to determine any matter ordinarily required to be determined by the Minister in like manner as if it were the Minister, having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

11. This review concerned the Commission's, and through it the Minister's, identification, comparison and analysis of the GUC which fell within 18 separate Model Control Codes (MCCs), many of which were sold both on the Chinese domestic market and exported to Australia. In some instances, the Commission identified that there were insufficient sales in the ordinary course of trade (OCOT) on the Chinese domestic market of the GUC within the MCCs of goods exported to Australia. This in turn required the Commission to consider adjustments to address the physical differences between the exported MCC and the domestically sold surrogate MCCs. Following publication of the Statement of Essential Facts (SEF), the Commission, responding to submissions from Primy and Zhuhai Grand,

[4] *Anti-Dumping Notice 2020/003*.

accepted that in some instances there were physical differences between like goods sold on the domestic market and the GUC exported to Australia even though all such goods fell within the same MCC. Accordingly, the Commission calculated an additional adjustment to address such differences.

12. The Commission's analysis was further complicated by the fact that the GUC were described as stainless steel sinks "whether or not including accessories".[5] The Commission's analysis revealed that on both the domestic and export markets, sinks and accessories were sold and priced as a single product with the range of accessories included in export transactions being less than the range included in domestic sales.

13. In undertaking this review, I was reminded of the comments of the former Senior Member of the Review Panel, the Hon. Michael Moore, who noted that the Act does not set out in a comprehensive way what the task of the Review Panel is in conducting a review. He noted, in relation to the review of a Ministerial decision (which is the case in this review), it has been proceeded "by what is likely to have been an extensive process of investigation" under a statutory scheme which may be described as a "detailed prescriptive regime." He observed, "the Panel does not undertake its own investigation in the sense of gathering fresh information, and is confined, as a broad generalisation, to the information that had been before the Commissioner".

14. The Review Panel is to complete its task within the 60 day timeframe, of which the Panel will only have the benefit of submissions from interested parties for 30 of those 60 days. Given this context, the former Senior Member went on to observe:

> *the Panel's role in a review does not entail full reinvestigation of matters considered by the Commissioner and raised by interested parties in the application for review. The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgement. I do not see the Panel's role as involving this type of evaluation afresh. Rather the Panel's role includes, by way of illustration, assessing whether there has been*

[5] Notice of Initiation, ADN No. 2019/89, published on 3 July 2019.

inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations.[6]

15. Further, in the conduct of their review and subject to certain exceptions,[7] the Review Panel is not to have regard to any information other than relevant information pursuant to section 269ZZK relevant information is information to which the Commission had regard or ought to have had regard when making its findings and recommendations to the Minister.

16. If a conference is held under section 269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, or to conclusions reached at the conference based on that relevant information.

17. Conferences were held with representatives of the Commission and Zhuhai Grand respectively. Conferences were convened with the Commission on 15 April, 18 May and 25 May 2020. These conferences were to clarify information contained within REP 517 and within confidential documents provided by the Commission to the Review Panel which formed part of the record of the inquiry. Conferences were convened with Zhuhai Grand's representatives on 16 April and 19 May 2020, to clarify aspects of its application and submission in support. Non-confidential summaries of the information obtained at the conferences were made publicly available in accordance with section 269ZZX(1) of the Act.

18. In conducting this review, I have had regard to REP 517, confidential information contained within that report and within other documentation supplied by the Commission, the applications for review, the submissions received on 6 May 2020 from Primy and Zhuhai Grand and the information obtained in and conclusions drawn from the conferences.

[6] ADRP Report No. 24 *Power Transformers*, September 2015, at pages 4-5.
[7] See s.269ZZK(4).

Grounds of Review

19. The Grounds of Review relied upon by the Applicants, which the Review Panel accepted in its Notice of Intention to Conduct a Review, are as follows:

Primy Corporation Limited

1. The adjustment by the ADC for the differences in accessories in the domestic sales price of like product and the export price failed to include the profit margin realised on domestic sales of like goods in the ordinary course of trade, and thus was not in line with the requirements under s.269TAC(8) of the Act to ensure a fair comparison between normal value and export price.

Zhuhai Grand Kitchenware Co., Ltd

1. The dumping margin for Zhuhai Grand stated in ADN 2020/003 is incorrectly stated as being 13.4% when in fact the margin is 13.2%, as stated in the ADC's recommendations to the Minister as contained in Report 517.

2. Adjustments made under section 269TAC(8) of the Act, to account for the physical differences between like goods and the goods exported to Australia, incorrectly relied on 'surrogate domestic sales products' rather than domestic sales of like goods, resulting in an artificial inflation of the dumping margin; and

3. In determining normal value, the ADC incorrectly rejected Zhuhai Grand's cost of a major raw material import, stainless steel, and substituted a "benchmark SBB European and North American average prices, on delivered terms, for grade 304 stainless steel CRC [cold rolled coil]". This substituted cost artificially increased Zhuhai Grand's cost of stainless steel and had adverse consequential impacts upon the application of the ordinary course of trade test, the determination of the dumping margin and ultimately upon the decision to continue the measures against Zhuhai Grand.

Consideration of Grounds

Primy Corporation Limited

Ground 1

The adjustment by the ADC for the differences in accessories in the domestic sales price of like product and the export price failed to include the profit margin[8] realised on domestic sales of like goods in the ordinary course of trade, and thus was not in line with the requirements under section 269TAC(8) of the Act to ensure a fair comparison between normal value and export price.

20. Primy was one of five Chinese exporters selected by the Commission to complete an Exporter Questionnaire. Primy duly responded to the questionnaire and was subject to a verification visit by Commission officers. The Commission's verification report stated, "the product information provided by Primy in its costs and sales worksheets was accurate".[9]

21. Primy's sales of the GUC, both in its domestic market and in its export sales to Australia, were always sold together with a range of varying accessories as one single product and priced together. REP 517 noted,

> *the kinds of accessories offered with sinks was also found to be a priced determinant, … the range of accessories sold with sinks on the domestic market in China was considerably larger than the range of accessories sold with sinks exported to Australia.*[10]

22. Accordingly, the Commission undertook to compare the prices of sinks and accessories exported to Australia with the same sink and accessories sold on the domestic market. The first step in this process was to determine whether the exported MCC was also sold on the domestic market in sufficient volumes to meet the OCOT test. For those MCCs which did not meet this test, the Commission

[8] The profit to which Primy refers was expressed as being *"each exporter's profit margin (as a percentage of costs) realized on domestic sales of like goods on OCOT"*, REP 517 at page 59; refer pages 2 and 6 of Primy's Application.
[9] Primy Exporter Verification Report at section 2.4.
[10] REP 517 at page 20.

moved to a 'surrogate' MCC with a sufficient level of sales and which had the closest physical characteristics under the MCC structure to the MCC exported to Australia.

23. Having identified comparable domestic sales prices of sinks, the Commission then excluded the 'cost' of the accessories included in the domestic sales. The Commission then added back in to the domestic selling prices the 'cost' of the accessories included in the relevant or corresponding export sale to Australia.

24. It is important to appreciate the meaning the Commission ascribed to its use of the term 'cost' when applied to the accessories included in the domestic and export transactions. The Commission accepted that Primy produced some of the included accessories internally but for others Primy sourced them from external suppliers, in completed form. There is a dispute as to the proportion of the accessories produced internally in comparison to those sourced externally.

25. For those accessories which the Commission had identified as being produced "internally" it added a profit margin to Primy's cost of production. This margin, expressed as a percentage of costs, was what Primy had achieved on its domestic sales of like goods which were sold in the ordinary course of trade (OCOT). For those accessories which Primy sourced from external suppliers, a profit margin was not added. The reason for this differentiation was because the Commission regarded Primy's internal production of accessories as,

> *arising from [Primy's] own production activities where a specification adjustment occurs due to features that relate to items which are sold with sinks, but are however sourced from third-party suppliers, such as accessories, the adjustments do not recognise OCOT.*[11]

Stated differently, the reason the Commission gave for not including a profit margin in the calculation of the value of the adjustment for accessories was because the accessories were *"sourced from third-party suppliers"*. The purchase price of such accessories was regarded as reflective of the market value of the item.

26. At this point, the Commission created a hypothetical 'price' based upon the cost of production of a sink with the same characteristics of a comparable sink exported to

[11] REP 517 at page 59.

Australia, a cost which included the cost of accessories included in the relevant export transaction. This hypothetical domestic 'price' could then be compared to the price of the relevant export transaction on a like for like basis.

27. Primy argues that if the Commission had correctly included an amount of profit, being Primy's profit margin (as a percentage of costs) realized on domestic sales of like goods in the OCOT, in relation to **all** the accessories (as opposed to only those which it produced internally), its dumping margin would be reduced from 9.8% to [redacted]%.

28. Primy submits,

> *the non-addition of a profit margin by the Commission to the accessories cost to account for the differences in prices of like products and exported products caused by the differences in accessories is not in line with the requirements of section 269TAC(8) and a practice reflected in section 15.3 of the Dumping and Subsidy Manual [Manual], and does not reflect the facts in relation to Primy.*[12]

29. Section 15.3 of the Manual provides:

> *there may be situations where direct evidence of price differences cannot be provided (e.g. models sold domestically and exported to Australia are different). In these situations, adjustments for differences in physical characteristics or quality, where it reasonably affects price comparability, may be based on production cost differences plus the addition of the gross margin (i.e. the administrative, selling and general costs and profit) to the production cost difference. This is a means for calculating an adjustment* ***that reflects the market value*** *of the production cost difference. (emphasis added)*

30. Section 269TAC(8) relevantly provides that:

[12] Annex A, Primy Application at page 3.

> *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: …*
>
> *(b) 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)*

31. Primy challenges the Commission's factual finding as to the quantum of accessories sourced from third parties. Primy points to the Commission's *Verification Report* which lends support to its argument as that Report expressly refers to two categories of accessories, namely "purchased accessories" and "partially produced accessories".[13] In relation to both categories, the Report confirmed that "the actual accessories are purchase costs" and the "accessories cost sheet" for those partially produced, had been verified.

32. Further, Primy in its submission received on 6 May 2020, attached *Confidential Exhibit 3*, derived from data contained within what it referred to as "Verification Exhibits". The Exhibit covered a three month period from July to September 2018 and suggests what it describes as *"self-produced accessories"* amounted to [redacted]% of total accessory value, with the remainder being purchased and sourced from external suppliers.

33. Primy also notes the *Verification Report* also confirmed that "accessories" is a verified cost area appearing in company accounts and forming part of Primy's total production costs. Primy argues,

> *sinks and accessories are actually also treated as one single product in the cost accounting, and the cost of production is calculated together as a single product.*[14]

[13] Verification Report, Table 8 at section 6.1.
[14] Primy's comments on SEF at page 16.

34. In conclusion, Primy argues by making no adjustment for profit on accessories the Commission appears to be proceeding on

> *a presumption that for the sale of a single product containing sinks and accessories, all profits on the sale comes from sinks, and no profit markup comes with accessories. There is no record evidence for such presumption by the Commission.*[15]

35. The starting point of the analysis is the Commission's finding that "the kinds of accessories offered with sinks was found to be a price determinant."[16] Stated differently, the Commission appears to have acknowledged the inclusion of an accessory could reasonably be expected to impact upon the combined price of the accessory and the sink. A sink with an accessory, included in a combined price, would present a greater value proposition to the buyer than a sink offered singularly. The issue is how the Commission went about calculating the price impact of the inclusion of accessories.

36. Section 269TAC(8) seeks to implement an obligation under the World Trade Organization (WTO) *Anti-Dumping Agreement* (ADA) to ensure that normal value and export price are fairly compared. This requires adjustments to be made to the normal value to account for differences between the exported goods and the like goods sold on the domestic market, where such differences can be shown to impact upon price.

37. Section 269TAC(8) confers a broad discretion upon the Minister as to the manner in which he or she directs how an acknowledged impact upon price may be adjusted to account for the physical differences between the domestically sold like goods and the goods exported to Australia.

38. In the present case the Minister directed that the quantum of an adjustment (i.e. whether a profit would be included), would be dependent upon whether an accessory was produced internally or sourced from external suppliers. If produced internally, a profit would form part of the adjustment, if an accessory was sourced

[15] Primy's Application at page 5.
[16] REP 517 at page 20.

externally, a profit would not be added. This differentiation for the reasons stated is within the broad discretionary power conferred upon the Minister.

39. Primy is critical that this approach reflects nothing more than the application of "a presumption that Primy is selling all the accessories at its costs without any markups"[17]. This criticism is ill-founded. The Commission acknowledged that faucets were sold with sinks as an accessory and that these were produced internally by Primy. The Commission's Work Program for Primy, produced as part of the verification process, records Primy has "two production factories one for sinks and a one for faucets."[18] In a conference convened on 15 April 2020, Commission representatives noted "in some instances the cost of production of those faucets exceeded the cost to make the sink itself."[19] Accordingly, the Commission included a profit margin in the adjustment.[20] I am therefore satisfied that wherever the Commission had evidence that an accessory was substantively produced internally a profit margin was included as part of the adjustment.

40. Accordingly, Primy's criticism of the Commission's application of a presumption to accessories must be limited to its application only to those accessories sourced externally. The presumption being that Primy did not include in the price of a sink sold with an accessory an amount of profit calculated by reference to the purchase cost of the accessory. Primy argues "there is nothing on the record supporting this presumption that only sinks are sold with markup, not accessories."[21]

41. In the conference convened on 15 April 2020, Commission representatives responded by noting the Commission

> *had not been presented with any evidence in the course of the inquiry … to suggest that Primy's intention or practice was to include a markup on accessories sourced externally.*[22]

[17] Ibid. at page 4.
[18] Primy's Work Program at page 16.
[19] Conference Summary at page 7.
[20] This is reflected in Confidential Attachment 17 to REP 517 headed "Primy Normal Value", at the worksheet headed "(a) OCOT".
[21] Application at page 4.
[22] Conference Summary at page 7.

42. Whilst it may be reasonable to question the Commission's expectation that normal business practice would necessitate such evidence; it is fair to conclude that the appropriateness of a markup on externally sourced accessories remained an open question. The task before the Commission, and ultimately the Minister, was to quantify the adjustment to be made under section 269TAC(8) to the hypothetical domestic selling price of a sink and accessory having the same characteristics as a sink and accessory exported to Australia. As noted above the power to adjust prices is a broad one. The Commission acknowledged that the inclusion of an accessory would have an impact upon the combined selling price of a sink and accessory. The Commission had not seen any evidence to support the practice of pricing in a markup on the inclusion of externally sourced accessories. The Commission proceeded on the basis that the combined price of a sink and accessory would seek to recover the cost of the accessory i.e. that the accessory would not be sold at a loss. However, where an accessory, such as faucet, was the result of Primy's internal production it was reasonable that a profit margin be included in any adjustment to reflect that production activity.

43. Primy argues the Commission ought to have adopted its method of including a profit for all accessories. Such an approach was also open to the Commission and would have produced a different outcome. However, I am not satisfied that Primy's approach would produce the correct and preferable decision based upon the information before the Commission. Primy's approach, in the absence of evidence to the contrary, itself relies upon the adoption of a presumption, namely that all accessories were sold with a profit component. In such circumstances, in making adjustments to reflect the inclusion of accessories in domestic sales, it was open to the Minister to differentiate between the adjustment to be made with respect to internally produced and externally sourced accessories.

44. Primy places considerable reliance upon the extract from the Manual quoted above, noting that the Commission *"has misconstrued the concept of 'market value' in the Manual".*[23] The Manual's status is such that that it cannot constrain the broad statutory power of the Minister to determine the nature and composition of adjustments to be made under section 269TAC(8). The Manual provides that where direct evidence of price differences cannot be provided but price comparability is

[23] Primy Submission dated 6 May 2020.

affected, one option may be the adoption or inclusion of a profit. This still leaves it within the broad power of the Minister to limit such an inclusion to the accessories which were produced internally.

45. As noted above, the proportion of accessories produced internally by Primy is in dispute. *Confidential Exhibit 3* to Primy's submission of 6 May 2020 suggests the majority of accessories were produced internally. However, in the conference convened on 15 April 2020, the Commission's representatives noted the Commission had *"identified that the majority of accessories included in both domestic and export sales were purchased from external third parties", a*nd that Primy only manufactured two accessories: faucets and a wastebasket *"made up of a hybrid of stainless steel scrap and components sourced from external suppliers."* Although the adjustment with respect to the faucets did include a profit component, this was not done with respect to the wastebasket, due to the complexity arising from the internal use of scrap and the external purchasing of several components.

46. In a second conference convened on 18 May 2020, Commission representatives were again asked to comment on the proportion of accessories internally produced by Primy, in light of *Confidential Exhibit 3* to Primy's submission. The representatives stated the data in the Exhibit *"was not before the ADC in that"* form. They noted the Exhibit summarises and aggregates production costs data which the Commission had examined during the verification visit and recorded in the Work Program. The representatives acknowledged documentation provided at the verification was headed "accessory cost 1" and "accessory cost 2", with the former referring to "home-made accessories" and the latter referring to "purchased accessories". The Commission representatives noted this information was not produced to demonstrate the relativity between internally produced and externally sourced accessories but formed part of a cost report used for the purposes of the reconciliation of the overall accuracy of Primy's financial records. Stated differently, it was produced as part of an "upward verification" of Primy's financial records and not for the purpose of establishing the relativities between the volume of accessories produced internally and those sourced externally.

47. The representatives noted the relevance of the information, submitted to or reviewed as part of the verification process, to the proportion of accessories produced internally only became apparent when *Confidential Exhibit 3* was

reviewed during preparation for the conference. As noted in conference, the Commission's recent review of the Exhibit revealed the data referenced by Primy represents "the total production cost of deep drawn sinks activity for the domestic market, the Australian market and the exporters third country markets" such that it is not possible to identify the proportion of accessories produced internally for each of the respective markets.

48. The Commission's position, as stated in the conference, was that although a range of data relating to the internal production of accessories had been produced in the course of its inquiry, such data had been produced as part of the normal accounts verification processes and its relevance to the proportion of internally produced accessories had not been specifically drawn to the attention of, or reasonably discernible by, the Commission.

49. Given this context, the Commission's assessment was primarily informed by the contents of the Work Program produced by Commission offices following the verification visit. This document referenced comments of Primy's staff which appear inconsistent with what Primy now seeks to portray through *Confidential Exhibit 3*, regarding the proportion of internally produced accessories. In the conference convened on 18 May 2020, Commission representatives referenced the following extracts from the Work Program:

    - *there are two production facilities one for sinks and one for faucets. The company self produces deep drawn sinks, fabricated sink, cabinets and faucets. The company purchases most accessories domestically with the exception of the wastebasket which is partly produced and assembled by Primy;*[24]

    - *other than the partially produced and assembled wastebasket, Primy purchases all other accessories from unrelated domestic suppliers. For the wastebasket Primy only produces one part using some of the factory scrap and then assembles the wastebasket using other parts it sources from the domestic market;*[25] *and*

[24] Work Program at page 16.
[25] Ibid.at page 20.

- *Primy clarified that all accessories, except partial production and final assembly of wastebaskets, was completely outsourced.*[26]

50. I acknowledge some uncertainty remains as to the extent to which Primy sources accessories externally. This is not a case where the Commission ignored or refused to recognise the impact of internally produced accessories. The adjustments with respect to the internally produced faucets demonstrate that where the Commission identified evidence clearly supportive of internal production this circumstance was recognised and addressed.

51. The Commission's inquiry was completed within a tight statutory timeframe. The nature of the GUC gave rise to complexity. The Commission received sales data relating to 18 MCCs with each having multiple accessories. It was reasonable for the Commission to place reliance upon comments recorded in the Work Program as to the extent of the internal production of accessories. To the extent that these comments were inconsistent with material produced by Primy in response to the Exporter Questionnaire or in the context of the verification process, such inconsistencies were not drawn to the Commission's attention and were not reasonably discernible.

52. I note the comments of the former Senior Member of the Review Panel as to the scope of the Panel's review function, extracted at para 14 above. I am satisfied that it was open to the Commission, based upon the information before it and the manner in which such information was presented, to exercise judgement in placing reliance upon the matters reported in Primy's verification Work Program and to conclude, in the absence of evidence to the contrary, that the extent of Primy's internal production of accessories was such as to only warrant inclusion of an OCOT profit margin in relation to the sale of faucets.

53. For the reasons outlined above, I find that the Commission's differentiation of accessories based upon whether they were produced internally or sourced externally was appropriate. Accordingly, I reject this Ground of Review.

[26] Ibid. at page 72.

Zhuhai Grand Kitchenware Co., Ltd

Ground 1

The dumping margin for Zhuhai Grand stated in ADN 2020/003 is incorrectly stated as being 13.4% when in fact the margin is 13.2%, as stated in the ADC's recommendations to the Minister as contained in Report 517.

54. Zhuhai Grand argues there appears to be a clerical error in the dumping margin stated in REP 517. Zhuhai Grand relies upon a calculation provided by the Commission on 29 January 2020, which is different to the dumping margin recorded in REP 517. Zhuhai Grand asserts the dumping margin stated in the confidential attachment "*Confidential Appendix 5 – Dumping Margin*" ought to have been 13.2%, and not 13.4%.

55. This ground of review was one of the issues addressed in a conference convened with Commission representatives on 15 April 2020.

56. Commission representatives explained that the dumping margin calculations provided to Zhuhai Grand (which stated a margin of 13.2%) were in the form of a 'working draft' and that Zhuhai Grand was advised the calculations were to be subject to an internal quality assurance process. Accordingly, the calculations were not to be regarded as conclusive of the final determination of a dumping margin. The quality assurance process subsequently identified a minor change to the dumping margin, resulting in a 0.2% increase to 13.4%.

57. Commission representatives advised in the conference that Zhuhai Grand was not advised of this change as it was considered immaterial and that there was insufficient time remaining to complete the inquiry within which to provide a further opportunity to comment.

58. I relayed this explanation to Zhuhai Grand's legal representatives in a conference the following day, 16 April 2020. In that conference, Zhuhai Grand's representatives did not seek to challenge the Commission representatives' description of the manner and the context in which the original dumping margins had been provided. Zhuhai Grand's representatives requested provision of the final margin calculations to assist in their understanding of the final margin determination. The relevant

spreadsheets were provided by the Commission to Zhuhai Grand's representatives on the following day.

59. Zhuhai Grand's submission of 16 May 2020 did not seek to further advance its claim in relation to this Ground of Review.

60. I find that Zhuhai Grand's margin as stated in the reviewable decision is correct. Accordingly, this Ground of Review is rejected.

Ground 2

Adjustments made under section 269TAC(8) of the Act, to account for the physical differences between like goods and the goods exported to Australia, incorrectly relied on 'surrogate domestic sales products' rather than domestic sales of like goods, resulting in an artificial inflation of the dumping margin.

61. Anti-Dumping Notice No. 2019/86 (Notice), which initiated the continuation inquiry on 3 July 2019, drew interested parties' attention to the Commission's policy and practice regarding MCC structures outlined in the Commission's Manual.

62. Model matching is said to assist the Commission to assess whether dumping has occurred and is a useful way to ensure that normal value is properly comparable with export price.

63. The Notice indicated that, although the Commission had elected not to propose a MCC structure at the outset of the inquiry, information would be gathered from interested parties and examined to assess if an appropriate MCC structure could be developed. In this case the Commission considered it appropriate to first obtain data which would enable the development of a meaningful and relevant structure rather than rush out one at the outset that possibly was not fit for purpose. The Notice invited interested parties to submit any proposals relating to a MCC structure by 9 August 2019.

64. Following publication of the Notice, Zhuhai Grand was asked to respond to an Exporter Questionnaire which, inter alia, sought information to assist in the formulation of an MCC structure and included a further statement inviting submissions on the MCC structure. Zhuhai Grand duly responded to the questionnaire and was subject to a verification visit by Commission officers. The

Commission was satisfied that the information provided by Zhuhai Grand in its response to the questionnaire was "accurate and reliable for the purpose of ascertaining the variable factors applicable to its exports of the goods".[27] The Commission was therefore *"satisfied that there were sufficient domestic sales of like goods for the inquiry period such that normal value can be ascertained under section 269TAC(1)".*[28]

65. Zhuhai Grand's goods, both on its domestic market and on its export sales to Australia, were always sold together with a range of varying accessories as one single product and priced together. REP 517 noted,

> *the kinds of accessories offered with sinks was also found to be a price determinant, … the range of accessories sold with sinks on the domestic market in China were considerably larger than the range of accessories sold with sinks exported to Australia.*[29]

66. Accordingly, the Commission considered

> *to account for differences in prices that are driven by market specific product differences between equivalent domestic and Australian MCC's and to achieve a proper comparison between the price of like goods and exported goods, the Commission considers that an adjustment under section 269TAC(8) is warranted.*[30]

67. I will briefly describe the process the Commission adopted in relation to the MCC structure and the adjustments made under section 269TAC(8) to comply with the obligation to achieve a fair comparison between Zhuhai Grand's determined normal value and relevant export prices. The process is conveniently set out in "*Table 19: Summary of Zhuhai Grand's adjustments*" which is contained within REP 517.[31]

68. The process began with the comparison of the MCCs of goods sold on Zhuhai Grand's domestic market with those exported to Australia. The Commission identified that products falling within 13 MCCs were sold on Zhuhai Grand's

[27] REP 517 at page 67; *Exporter Verification Report* at section 2.4.
[28] Ibid.
[29] Ibid at page 20.
[30] Ibid at page 59.
[31] Ibid at page 74.

domestic market. The GUC exported to Australia fell within 10 of those MCCs, of which six were found to have sufficient domestic sales in the OCOT such that normal values could be determined under section 269TAC(1). With regard to the four exported MCCs which did not have a sufficient number of domestic sales in the OCOT, the Commission moved to or looked to a 'surrogate' MCC with a sufficient level of domestic sales and which had the closest physical characteristics under the MCC structure to the MCC exported to Australia.

69. The specification adjustments addressed differences between the exported MCC and the surrogate MCC for differences such as the number of drainer boards, number of bowls and differences in capacity. The cost of production of the exported MCC was then compared to the cost of production of the surrogate MCC, which was also one of the 10 MCCs exported to Australia. An exporter's profit margin realised on all domestic sales of like goods sold in the OCOT was then added to the difference in production costs between the exported MCC and the exported surrogate MCC.

70. Zhuhai Grand argues,

> *REP 517 openly concedes that the MCC matching the GUC is itself insufficient to reflect the great variances and differences in physical characteristics between different models of products falling into any particular domestic MCC on the one hand and its 'matching' export MCC on the other hand.*[32]

71. Zhuhai Grand does not disagree with the Commission's rationale for applying the adjustments noted above but challenges the "mathematical formulae" used to calculate such adjustment as being logically flawed. In particular, it challenges adjustments made with respect to the four adopted surrogate MCCs.

72. Zhuhai Grand argues the Commission's "focus on only the cost of exported goods for such calculation is incorrect".[33] It notes the normal value is to be based upon domestic sales of like goods and that an adjustment is required to account for

[32] Zhuhai Grand's application at page 3.
[33] Application at page 4.

differences between the products sold on the domestic market. Zhuhai Grand claims,

> *the adjustments should reflect the differences between the surrogate* ***domestic sales*** *products and the cost of production of the exported goods, and not between the cost of production of two* ***export models****.*[34]

73. In its submission dated 6 May 2020, Zhuhai Grand argues,

> *the Commission calculated the difference between the 'Export CTM' (being the cost to make the exported models) of the MCC model and the 'Export CTM' of the surrogate MCC model to calculate the adjustment relating to differences between MCCs.*

74. Zhuhai Grand argues the calculation error on behalf of the Commission caused the normal value to be overstated and inflated the dumping margin for Zhuhai Grand's exports by about 3%.

75. To add some context to Zhuhai Grand's argument I will refer to an example. MCC "1BWL-2BD-A" was one of the four MCCs for which there were an insufficient number of suitable domestic sales in the OCOT, and a surrogate MCC, "1BWL-1DB-A", was adopted as having suitable domestic sales of like goods. The difference in the two being that the exported model, for which a normal value had to be determined, had two "draining boards", whereas the surrogate MCC, also sold on the domestic market and also exported to Australia, had only one "draining board".

76. Zhuhai Grand had, in its response to the Exporter Questionnaire, provided full sales and cost of production data for all domestic and export sales. Although Zhuhai Grand's domestic sales of the sink with two draining boards did not meet the OCOT test, the Commission was nevertheless able to have regard to its production cost data as the accuracy of this data was accepted during the verification process. This data enabled the Commission to compare the production costs of an exported MCC, having two draining boards, with the production cost of an exported surrogate MCC, having only one draining board, which was to be used as the basis of a comparable normal value. The difference between the two would then form the

[34] Ibid.

basis of the adjustment to be made to the domestic selling prices of the surrogate MCC having only one draining board.

77. The Commission was therefore able to quantify, by reference to the exporter's production cost data, the incremental cost of the additional draining board. This cost differential, to which a profit adjustment was then added, was then carried over by way of an adjustment to the domestic selling prices of the sink with a single draining board (the surrogate) so as to ensure a fair comparison with the export price for the sink with two draining boards. The approach to the adjustment is reasonable as it is reliant on the exporter's cost of production data.

78. Zhuhai Grand argues the Commission ought to have adjusted for the difference between the cost of production of the exported MCC, with two draining boards, and the cost of production of the surrogate MCC sold on the domestic market, with one draining board, and not a comparison between the cost of production of an exported sink with two draining boards and the cost of production of an exported sink with one draining board.

79. I do not see the resultant reduction in Zhuhai Grand's dumping margin, were its arguments with regard to the adjustments implemented, to be determinative. This is not an instance of the Commission either failing to identify the need for, or refusing to make, an adjustment. The Commission recognised an adjustment was warranted in light of identified physical differences. The Commission exercised judgement in the choice of a method that would reflect the need for this adjustment. Other options for the comparison, including that argued for by Zhuhai Grand, were also available. The Commission had available to it verified production cost data for exported MCCs which did not meet the OCOT test and for surrogate MCCs which had also been exported, this data provided a common basis for comparison to identify the impact of the physical differences for which an adjustment was necessary. The focus of the Commission was on determining an appropriate adjustment to the domestic selling prices of the surrogate sink with a single draining board to account for the incremental increase in the cost of production to account for the inclusion of an additional draining board.

80. In a conference with the Commission representatives on 18 May 2020, the Commission representatives confirmed Zhuhai Grand's understanding was correct,

and that the cost difference, which forms the basis of this adjustment, does not rely on the difference in the production costs of domestic MCCs. The Commission relied upon the production cost differences of the exported MCCs. The Commission representatives conceded

> *we could have used domestic costs as well; that was open to us. However, since we were ultimately targeting to get a normal value that was comparable to the exported MCC … using the export costs to make is already in a way achieving that outcome.*[35]

81. Like the former Senior Member, I do not see the Review Panel's role as involving a re-examination of the Commission's subsidiary conclusions or decisions which have involved assessment and judgement in the context of an extensive process of investigation and reporting. It is not the Panel's role to involve itself in such an evaluation afresh. In this instance, the Commission exercised judgement on the information before it, in the exercise of a broad statutory power to effect adjustments to prices. The Commission's choice was reasonably open to it and is not weakened by the availability of other choices, which may have had a different impact upon the margin analysis. I am not satisfied that the adjustment method argued for by Zhuhai Grand is the correct or preferable method.

82. Accordingly, for the reasons stated above I reject this Ground of Review.

Ground 3

In determining normal value, the ADC incorrectly rejected Zhuhai Grand's cost of a major raw material import, stainless steel, and substituted a *"benchmark SBB European and North American average prices, on delivered terms, for grade 304 stainless steel CRC* [cold rolled coil]*."* This substituted cost artificially increased Zhuhai Grand's cost of stainless steel and had adverse consequential impacts upon the application of the ordinary course of trade test, the determination of the dumping margin and ultimately upon the decision to continue the measures against Zhuhai Grand.

83. REP 517 confirmed the Commission was satisfied that as there were sufficient domestic sales by Zhuhai Grand of like goods for the inquiry period and, in the

[35] Conference Summary.

absence of *"a particular market situation"* in the country of export, Zhuhai Grand's normal value could be ascertained under section 269TAC(1) of the Act. That section relevantly provides as follows:

> *269TAC Normal value of goods*
>
> *(1) … 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 … transactions by the exporter …*[36] *[emphasis added]*

84. Section 269TAC(2) relevantly provides that when confronted by the absence, or low volume, of relevant sales (i.e. sales in the ordinary course of trade) normal value cannot be determined under section 269TAC(1). In such circumstances, the normal value is the sum of such amount as the Minister determines to be the cost of production of the goods in the country of export and such further amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale.

85. Section 269TAC(5A) relevantly provides that amounts determined to be the cost of production, administrative, selling and general costs, referred to in section 269TAC(2), must be worked out in such manner, and taking into account such factors, as the regulations provide for the respective purposes of paragraphs 269TAAD(4)(a) and (b).

86. A normal value determined under section 269TAC(2) is commonly referred to as being "constructed".

87. However, as in this case, Zhuhai Grand's normal value was determined by the Minister under section 269TAC(1), the starting point of the analysis is consideration of whether its domestic sales were *"in the ordinary course of trade"* (OCOT). That

[36] It is not in dispute that the sales used to determine normal value were made *"in sales that are arms length transactions."*

phrase is not exhaustively defined in the Act nor in the World Trade Organization (WTO) *Anti-Dumping Agreement* (the ADA).[37]

88. Zhuhai Grand supports this Ground of Review by reference to the ADA and to a recent WTO Dispute Panels, including the Appellate Body report in *Ukraine – Ammonium Nitrate*[38] and the Panel Report in *Australia – Anti-Dumping Measures on A4 Copy Paper*.[39] As it is accepted that Part XVB of the Act seeks to implement Australia's obligations under the ADA[40], the references to that Agreement and to the cited Reports are relevant to the Review.

89. Turning first to the Act, although section 269TAAD is headed *"Ordinary course of trade"* it does not purport to define which type of domestic sales may be considered to be in the OCOT, its focus is upon expressly excluding sales of like goods which are at prices less than the cost of such goods. Section 269TAAD(1) provides:

> *If the Minister is satisfied, in relation to goods exported to Australia:*
>
> *(a) that like goods are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period:*
>
> *(i) for home consumption in the country of export; or*
>
> *(ii) for exportation to a third country; at a price that is less than the cost of such goods; and*
>
> *(b) that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period;*

[37] *"The Anti-Dumping Agreement does not define the term 'in the ordinary course of trade'.* Appellate Body Report, *US - Hot Rolled Steel*, at para. 139.
[38] WT/DS493/AB, 12 September 2019.
[39] WT/DS529, 4 December 2019.
[40] *"Part XVB of the Customs Act embodies legislative amendments arising from Australia's obligations under the General Agreement on Tariffs and Trade 1994 (GATT) including the Agreement on Implementation of Article VI of GATT," Guardian Industries Corp. Ltd v Attorney General of the Commonwealth of Australia* [2013] FCA 780 at [7].

the price paid for the goods referred to in paragraph (a) is taken not to have been paid in the ordinary course of trade.

90. Although section 269TAAD(1)(a)(i) and (ii) prescribes two circumstances in which sales will not be regarded as having been made in the ordinary course of trade, it does not provide an exhaustive list of factors as to when sales will or will not be so considered.

91. Section 269TAAD(4) then details the method by which an exporter's costs are to be determined to enable such costs to be compared with the exporter's domestic sales under section 269TAAD(1), thereby identifying the pool of the exporter's domestic sales which can be said to have been made in the OCOT. Section 269TAAD(4) provides;

The cost of goods is worked out by adding:

*(a) the amount determined by the Minister to be the cost of production of those goods **in the country of export**; and*

(b) be the amount determined by the Minister to be the administrative, selling and general costs associated with the sale of those goods" [emphasis added].

92. Further, in determining the cost of the goods in the country of export the Minister must have regard to those factors specified in the *Customs (International Obligations) Regulation 2015* (Regulations).[41]

93. Section 43 of the Regulations prescribes the method to be used to determine the cost of production of like goods in the country of export for the purposes of section 269TAAD. Section 43(2)(b) requires the Minister to work out the amount by reference to the exporter's records, or accounts, relating to the like goods provided two conditions are met: namely, that the records:

(i) are in accordance with generally accepted accounting principles in the country of export; and

[41] Section 269TAAD(5).

(ii) ***reasonably reflect competitive market costs*** *associated with the production or manufacture of like goods* [emphasis added].

94. It is the Minister's determination of the Zhuhai Grand's costs of production which is at the heart of this Ground of Review.

95. Not surprisingly, Article 2 of the ADA is structured in a similar way to section 269TAAD and section 43 of the Regulations. Article 2.1 provides,

> *a product is to be considered as being dumped … if the export price of the product exported from one country to another is less than the comparable price,* **in the ordinary course of trade***, for the like product when destined for consumption in the exporting country* [emphasis added].

96. Article 2.2.1 prescribes conditions mirroring those in section 269TAAD(1) in which the exporter's domestic sales of the like product may be treated as not being in the OCOT, and disregarded in determining normal value.

97. Where the normal value needs to be constructed, as it cannot be ascertained under Article 2.1, due to the absence of a sufficient volume of domestic sales made in the OCOT, Article 2.2 provides that,

> *the margin of dumping shall be determined by comparison with … the cost of production* ***in the country of origin*** *plus a reasonable amount of administrative, selling and general costs and for profits.*

98. Similar to section 269TAC(2), Article 2.2.1.1 prescribes how a normal value is to be constructed by reference to costs and, like section 43 of the Regulations, it imposes two conditions. Article 2.2.1.1 provides,

> *For the purpose of paragraph 2 [i.e. Article 2.2], costs shall* ***normally*** *be calculated on the basis of 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 sale of the product under consideration.* [emphasis added]

99. There is therefore a divergence in the language of the Regulations and the ADA where each prescribes the circumstances in which reliance must be placed upon an exporter's records. Whereas Article 2.2.1.1 requires satisfaction that such records *"reasonably reflect the costs associated with the production and sale of the product under consideration"*, section 43(2) of the Regulations requires satisfaction that such records *"reasonably reflect competitive market costs."* I note the term *"competitive market costs"* is not defined in either the Act or the Regulations. Given the divergence of the language the focus of the Review will be upon the meaning to be attributed to the language of the Regulations in preference to that of the ADA.

100. Zhuhai Grand was one of five exporters selected to have their responses to the Exporter Questionnaire verified by Commission officers. The Commission's Verification Report concludes *"the CTMS data in the exporter questionnaire response by Zhuhai Grand … is accurate."*[42]

101. REP 517 stated,

> *the Commission is satisfied that the production records of the selected exporter (sic) complied with section 43 … of the Regulation insofar that they were kept in accordance with generally accepted accounting principles in the country of export.*[43]

and

> *through the verification of each exporter's production data, the Commission found that the stainless steel production costs in each exporter's production records were a reasonable reflection of the price paid to their stainless steel suppliers. To this extent, the Commission is satisfied that the costs of production reasonably reflect the cost associated with the production of like goods.*[44]

102. However, REP 517 then went on to consider the second condition of section 43 of the Regulations, the requirement that the exporter's records *"reasonably reflect competitive market costs".*

[42] Verification Report, EPR517-21 at pages 11 to 15.
[43] REP 517 at page 50.
[44] Ibid.

103. In this context, REP 517 recalled an earlier Commission report, REP 238 of February 2015, by which the anti-dumping measures were first imposed on the goods. In the earlier report, the Commission "considered that the stainless steel costs incurred by deep drawn stainless steel sink manufacturers in China did not reasonably reflect competitive market costs."[45] Accordingly, in that report, the Commission replaced the stainless steel costs in the exporter's records "with what was considered a competitive market cost substitute,"[46] more commonly referred to as a 'benchmark'.

104. REP 517 also referred to a more recent report, REP 466, March 2019, which it described as,

> *the Commission's most recent assessment of GOC [Government of China] influence on the Chinese steel market and relates to an investigation period which was six months prior to the period relied on for the assessment of variable factors in this inquiry.*[47]

105. Accordingly, REP 517 concluded,

> *the Commission is satisfied that the GOC has distorted conditions within the Chinese steel industry such that the costs incurred by producers of stainless steel sinks in the inquiry period, cannot be said to have been determined in a competitive market in relation to their purchases of stainless steel cold rolled coils.*[48]

106. In light of this conclusion, the Commission adopted the same methodology adopted in REP 238, and had regard to prices of stainless steel cold rolled coil in markets outside of China, namely prices in the North American and European markets as published by *Steel Business Briefing Ltd* (SBB) during the inquiry period. The Commission was confident in the veracity of the published figures for the North American and European markets,

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[45] REP 517 at page 49.
[46] Ibid at page 50.
[47] Ibid.
[48] Ibid. at page 52.

> *as comparing the SBB prices published for China to the verified price of stainless steel purchases reported by the selected exporters in this inquiry, the Commission found that the prices as reported by the exporters were comparable to the Chinese stainless steel pricing data published by SBB.*[49]

107. The Commission adopted the SBB published North American and European prices for stainless steel cold rolled coil as a benchmark which it then substituted for the stainless steel cold rolled coil purchased by Zhuhai Grand from its Chinese suppliers.

108. Zhuhai Grand argues the application of the benchmark, based upon European and North American average prices,

> *resulted in an artificial increase in Zhuhai Grand's cost of stainless steel of more than 30%. This artificial distortion of Zhuhai Grand's costs in turn affected the correctness of the Commission's identification of the universe of Zhuhai Grand's domestic sales in the (OCOT) for normal value determination purposes … because those sales did not pass the OCOT test under section 269TAAD, Zhuhai Grand's normal value and dumping margin were overstated.*[50]

109. Zhuhai Grand argues the Commission's acceptance that Zhuhai Grand's records were kept in accordance with generally accepted accounting principles and that its records reasonably reflect the cost associated with the production of like goods constitutes an acknowledgement that Zhuhai Grand's records met the conditions prescribed by Article 2.2.1.1. Therefore, they argue the Commission was obligated by Article 2.2 to use costs in the country of export.

110. In support of this argument Zhuhai Grand relies upon the recent Appellant Body Report, *Ukraine - Ammonium Nitrate* as support for the proposition that an investigating authority in constructing normal value must rely upon the costs in the country of export and that the obligation also governs, or carries over to govern, the costs used for conducting the OCOT test, as prescribed under Article 2.2.1.

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[49] Ibid.

[50] Zhuhai Grand's Application at page 6.

111. I question the reliance upon the Appellant Body report in support of this argument. As acknowledged above, there is divergence in the language between Article 2 and that of the Regulation. The Appellant Body was focused upon the investigating authority's obligation under the ADA in the context of constructing a normal value. There was no need for the Appellant Body to opine as to the nature of the obligations pertaining to the application of the OCOT test. I accept that OCOT has not been exhaustively defined, leaving open the possibility for an investigating authority to determine that records which do not reflect *"competitive market costs"* could be excluded from consideration in the context of the determination of normal value.

112. Zhuhai Grand also seeks to rely upon the recent WTO Panel Report in *Australia - Anti-Dumping Measures on A4 Copy Paper*,[51] noting that the WTO Panel was critical of the application of third country export prices of pulp as a proxy or benchmark for the costs of pulp reflected in the exporter's records. The Report is not directly on point with the issues arising in the current Review as the WTO Panel's focus was upon the finding, under Article 2.2, that a *"particular market situation"* was in existence.

113. The WTO Panel did however examine "whether the term 'normally' in the first sentence of Article 2.2.1.1 provides a separate basis to disregard an exporter's records."[52] The WTO Panel noted that the term 'normally' suggests that the obligation to use the records kept by the exporter to calculate the costs allows for derogation under certain circumstances. The Panel expressed the view that even where an exporter's records satisfy the two explicit conditions in Article 2.2.1.1, there are circumstances in which the investigating authority may depart from its obligation to use those records.[53]

114. The WTO Panel indicated that where an investigating authority wishes to rely upon a derogation the investigating authority should examine whether the records satisfy the two explicit conditions and provide a satisfactory explanation as to why, nonetheless it finds compelling reasons to disregard them. The WTO Panel found

[51] WT/DS529, 4 December 2019.
[52] Ibid. at para. 7.109.
[53] Ibid. at para 7.115.

the Commission had not met the two conditions antecedent to recourse to a derogation, in that the Commission's report did not establish that the exporters' records were GAAP-consistent and reasonably reflected costs associated with the production of sale of A4 copy paper[54], and that the Commission had rejected the pulp costs component of their records for other reasons i.e. the existence of a "particular market situation". Thus, the WTO Panel found the Commission did not give effect to the whole of the obligation in Article 2.2.1.1, including the two explicit conditions.

115. The circumstances of the A4 copy paper decision differ from those which pertain to this review. Here the Commission did make a finding to the effect that Zhuhai Grand's records met the two conditions prescribed in section 43 of the Regulations[55], mirroring those stipulated in Article 2.2.1.1 of the ADA. However, REP 517 then went on to provide reasoning, following that which had been accepted in earlier reports, why it was appropriate to depart from Zhuhai Grand's records and look elsewhere for a benchmark of stainless steel coil prices. Unlike the determination in A4 copy paper, in this review, it cannot be said that the Commission failed to give effect to the whole of the obligations in Article 2.2.1.1.

116. I am therefore satisfied that the WTO jurisprudence to which Zhuhai Grand referred does not lend support to this Ground of Review.

117. Zhuhai Grand presents an alternative argument:

> *assuming arguendo that the Commission is correct to recommend that the Minister's obligation to use Zhuhai Grand's costs record under regulation 43(2) does not apply, the Minister is not precluded from using the costs recorded therein … the Minister is still obliged to work out an amount to be the cost of production in the country of export, and not simply surrogate a foreign cost.*[56]

118. In support of this argument, Zhuhai Grand referred to the recent Federal Court decision in *Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to*

[54] Panel Report at para 7.124.
[55] REP 517 at page 50.
[56] Application at page 7.

the Minister for Industry, Innovation and Science.[57] That case involved the construction of a normal value under section 269TAC(2)(c)(i) and in the process it discussed the determination of *"the cost of production … in the country of export"*. Being satisfied as to the existence of *"market situation"* regarding the costs of billet steel bar in China, the Minister determined the cost of production by substituting for the actual cost in the exporter's records an amount determined by reference to a benchmark derived from the Latin American export billet price. Although the case was argued on the basis that the Minister was permitted to use foreign pricing information in order to determine the cost of production,

> *[t]he dispute was whether the Minister was bound to consider, and had considered as mandatory relevant considerations, the comparative advantages and disadvantages of domestic producers which might be seen as probative of the question whether an adjustment should be made to the foreign pricing information*[58]

to reflect the cost of production in the country of export. The Full Court held that if the decision-maker uses pricing information from some other country or market to determine the cost of production in the country of export, the decision-maker must either, turn his or her mind to the question whether that foreign pricing information was relevant and appropriate to the determination of *"the cost of production … in the country of export",* or give *"genuine consideration"* to that issue.[59]

119. Zhuhai Grand argues,

> *the Full Court's finding that the cost of production so determined must relate to and represent the relevant and appropriate cost in the country of export under section 269TAC(2)(c)(i) is equally applicable, via section 269TAC(5A) of the Act, to the determination of cost in the context of section 269TAAD.*[60]

120. Zhuhai Grand further argues the Commission could not have complied with the Full Court's expectation that "genuine consideration" be given to whether the North

[57] [2019] FCAFC 122, 25 July 2019.
[58] Ibid at para 82.
[59] Ibid at para 93(4).
[60] Application at pages 9-10.

American and European market prices were “relevant and appropriate” to the determination of the cost of production of the goods in China as those markets were “unlike and unrelatable to China” as they are “highly dissimilar in terms of their economic development and economic interactions”.[61] Further, Zhuhai Grand argues the Commission excluded consideration of the adoption of prices in other Asian markets as it was assumed that such markets do not themselves reasonably reflect competitive market costs given the influence of Chinese pricing over those markets. Zhuhai Grand notes this assumption is inconsistent with “*report after report issued by the Commission which happily conclude the opposite*”.[62]

121. There is evidence within REP 517 to demonstrate that the Commission gave *‘genuine consideration’* to the adoption of the external pricing benchmark and to its application in determining the cost of production of the GUC in China. That said, I accept the reference to that evidence is oblique. A reader of the report would have been assisted by a more fulsome reference to, and description of, the consideration of that evidence. Instead the reader is left to distil the significance of the Commission’s repeated references to earlier reports as the source of the relevant evidence.

122. As noted above, REP 517 referenced the Commission’s earlier report, REP 238, which first imposed the anti-dumping duties on the GUC in February 2015. Initially reference was made to that report in the context of the extent of the GOC’s influence over domestic selling prices. That report recommended the adoption and application of an external benchmark for stainless steel based upon published prices in the North American and European markets. In coming to this recommendation REP 238 addressed seven benchmark options, one of which included the adoption of an Asian benchmark.[63]

123. Having settled upon the external benchmark, REP 238 went on to consider what further adjustments to that benchmark were needed to give effect to the Chinese exporters’ *“comparative advantage”,* delivery terms and slitting costs. The report recommended the use of the verified annual weighted-average delivery cost of stainless steel from one of the selected exporters to arrive at a delivered cost in

[61] Ibid. at page 10.
[62] Ibid at page 10.
[63] REP 238, Part VI at pages 208-219.

China. A further adjustment was made by the Commission in that report to reflect the Chinese exporters' preference for pre-slit stainless steel rather than for the supply of coil. These latter two adjustments clearly reflected a desire to ensure that relevant factors impacting upon the cost of stainless steel in the Chinese market were reflected in the adopted benchmark.

124. In the conference convened on 15 April 2020, Commission representatives

> *indicated that the seven options for the appropriate benchmark traversed in REP 238 were revisited and reconsidered in the course of the inquiry and it was decided to continue with the adoption of the North American and European benchmark, with appropriate adjustments for differences in delivery and slitting costs.*[64]

125. I acknowledge that the comments made in the conference could be dismissed as an *ex post* rationalisation. However, REP 517 also referenced a further six Commission reports, which were published after REP 238, and which all adopted the North American and European market benchmark prices. REP 517 then declared the assessment of the steel industry in China was made on the basis of the following available information:

- other cases conducted by the Commission;
- the original investigation findings [i.e. REP 238];
- analysis of the market prices of stainless steel relevant to the inquiry; and
- cost and purchasing data reported by exporters in questionnaire response.[65]

REP 517 then declared,

> *the Commission does not propose to depart from the approach adopted in the original investigation which applied a benchmark price … the Commission*

[64] Conference Summary, 15 April 2020, at para.25.
[65] REP 517 at page 53.

considers that the factors taken into account in selecting the benchmark in the original investigation remain applicable in this inquiry".[66]

126. The Commission, and ultimately the Minister, were obligated to determine Zhuhai Grand's cost of production by reference to the factors specified in section 43 of the Regulations, particularly that such costs reasonably reflected competitive market costs. The Commission reviewed, reassessed and ultimately endorsed the findings of earlier Commission reports to the effect that Zhuhai Grand's records did not reasonably reflect competitive market costs due to the influence of the Government of China on the relevant sector of the steel market. Accordingly, the Commission looked to and adopted an external benchmark to substitute for the purchase prices of stainless steel coil reflected in Zhuhai Grand's records. However, the Commission then considered, consistent with the approach adopted in earlier reports, whether it was possible to adjust benchmark to reflect Zhuhai Grand's "competitive advantage" and differences in the terms of trade and business practices relating to the supply of stainless steel.

127. I find the Commission has provided a reasoned and adequate explanation of the finding that Zhuhai Grand's records did not *"reasonably reflect competitive market costs"* such that it was appropriate to adopt an external benchmark, suitably adjusted to reflect costs in the country of export. Accordingly, I reject this Ground of Review.

Recommendations

128. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I rejected each of the Grounds of Review and I consider that the Reviewable Decision was the correct and preferable decision.

129. I recommend that the Minister affirm the Reviewable Decision.

[66] Ibid.

Paul O'Connor
Panel Member
Anti-Dumping Review Panel
5 June 2020 [67]

[67] This Report was updated on 11 June 2020 to correct two typographical errors contained in the body of the Report at paragraphs 106 and 107.