

PUBLIC



**Australian Government**  
**Anti-Dumping Review Panel**

# ADRP Decision No. 146-150

Copper Tube exported from the People's Republic of China and the Republic of Korea

June 2022

<https://www.adreviewpanel.gov.au>

# Contents

Abbreviations.....	4
Summary.....	7
Introduction and Background.....	8
Conduct of the Review .....	10
Grounds of Review .....	14
Review No.146: Reviewable Decision under s.269TDA(1)(b)(i).....	16
Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable .....	16
Ground 2: Determination of normal values under s.269TAC(1) is not correct or preferable decision.....	25
Ground 3: Decision concerning arms length sales between Hailiang HK and Hailiang Australia is not correct or preferable.....	67
Ground 4: The determination of material injury for all Chinese exporters is not correct or preferable.....	77
Review No.147: Reviewable Decision under s.269TDA(2)(b)(ii) .....	80
Ground 1: Incorrect decision that a particular market situation did not exist and that Chinese exporters did not benefit from a countervailable subsidy .....	80
Review No. 148: Reviewable Decision under s.269TDA(13) .....	83
Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable .....	84
Ground 3: The decision relating to material injury is not correct or preferable .....	93
Summary of Findings in respect of Review No. 148 .....	95
Review No. 149: Reviewable Decision under s.269TDA(1)(b)(ii) .....	96
Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable .....	96

Ground 2: Determination of normal values under s.269TAC(1) is not correct or preferable decision.....	97
Ground 3: The decision relating to material injury is not correct or preferable .....	102
Summary of Findings in respect of Review No: 149 .....	103
Review No. 150: Reviewable Decision under s.269TDA(3) .....	104
Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable .....	105
Ground 2: Determination of normal values under s.269TAC(1) is not correct or preferable.....	105
Ground 3: Decision concerning arms length sales between Hailiang HK and Hailiang Australia is not correct or preferable.....	111
Ground 4: The determination of material injury for all Chinese exporters is not correct or preferable.....	112
Summary of Findings in respect of Review No. 150: .....	113
Conclusions.....	114
Conferences.....	115

## Abbreviations

<b>Term</b>	<b>Meaning</b>
ACR	Air Conditioning and Refrigeration
Act	<i>Customs Act 1901</i>
ADA	WTO Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AUD	Australian Dollar
Appellate Body	Appellate Body of the World Trade Organisation
CBSA	Canadian Border Services Agency
China	People's Republic of China
CIO Regulation	<i>Customs (International Obligations) Regulation 2015</i>
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
COMEX	The Commodity Exchange Inc. (being the primary futures and options market for trading metals such as gold, silver, copper, and aluminum)
Daejin	Daejin Copper Pipe & Tube Manufacturing Co., Ltd
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
FOB	Free on board
GAAP	Generally accepted accounting principles
GOC	Government of China
Goods	The goods the subject of TER 557 (also referred to as the goods under consideration)

Hailiang Australia	Hailiang Australia Pty Ltd
Hailiang HK	Hong Kong Hailiang Metal Trading Limited
IDD	Interim dumping duty
Injury analysis period	from 1 July 2016
INV 557	Investigation No. 557
LME	London Metals Exchange
MCC	Model control code
MM Kembla	Metal Manufactures Pty Ltd trading as “MM Kembla”
Manual	Dumping and Subsidy Manual November 2018
Minister	Minister for Industry and Science
Naile	Zhejiang Naile Copper Co., Ltd
NIP	Non-injurious price
Nungwon	Nungwon Metal Ind. Co., Ltd
OD	Outside diameter
Original Investigation period	1 July 2019 to 30 June 2020
Review Panel	Anti-Dumping Review Panel
Reviewable Decisions	The decisions of the Commissioner of the Anti-Dumping Commission made on 12 November 2021 under sections 269TDA(1)(b)(i), 269TDA(1)(b)(ii), 269TDA(2), 269TDA(13) and 269TDA(3) of the <i>Customs Act 1901</i> in respect of Copper Tube exported from the People's Republic of China and the Republic of Korea
ROK	Republic of Korea
SCM	Agreement on Subsidies and Countervailing Measures

SEF 557	Statement of Essential Facts published on 14 September 2021
SHFE	Shanghai Metals Exchange
TER 557	The report published in relation to the termination of the alleged dumping investigation of copper tube exported from People's Republic of China and the Republic of Korea and the alleged subsidisation from the Republic of China, dated 12 November 2021
WA	Weighted average
WT	Wall thickness
WTO	The World Trade Organization
Zhejiang Hailiang	Zhejiang Hailiang Copper Co., Ltd

## Summary

1. This is a review of five termination decisions (“the Reviewable Decisions”) of the Commissioner of the Anti-Dumping Commission (“the Commissioner”) relating to Investigation No. 557 (“INV 557”) in respect of copper tube exported from the People’s Republic of China (“China”) and the Republic of Korea (“ROK”).
2. The Reviewable Decisions, the effect of which was to terminate INV 557 in its entirety, were made by the Commissioner under subsections 269TDA(1)(b)(i), 269TDA(2), 269TDA(13), 269TDA(1)(b)(ii) and 269TDA(3) of the *Customs Act 1901* (“the Act”), respectively.
3. The applicant for the reviews of each of the Reviewable Decisions was Metal Manufactures Pty Ltd trading as “MM Kembla” (“MM Kembla”).
4. For the reasons set out in this report, my decision in respect of each of the Reviewable Decisions is as follows:
  - Review No: 146: The decision to terminate the investigation under s.269TDA(1)(b)(i), is not considered to be the correct or preferable decision and is revoked.
  - Review No: 147: The decision to terminate the investigation under s.269TDA(2), is considered to be the correct or preferable decision and is affirmed.
  - Review No: 148: The decision to terminate the investigation under s.269TDA(13), is not considered to be the correct or preferable decision and is revoked.
  - Review No: 149: The decision to terminate the investigation under s.269TDA(1)(b)(ii), is not considered to be the correct or preferable decision and is revoked.
  - Review No: 150: The decision to terminate the investigation under s.269TDA(3), is not considered to be the correct or preferable decision and is revoked.

# Introduction and Background

5. On 29 May 2020, MM Kembla lodged an application alleging that the Australian industry had experienced material injury caused by copper tube exported to Australia from China at dumped and subsidised prices, and from the ROK at dumped prices. MM Kembla is the sole Australian manufacturer of copper tube (“the goods”) at its Port Kembla manufacturing facility.
6. Having considered the application and further information provided by MM Kembla, the then Commissioner decided not to reject the application. On 13 July 2020 the then Commissioner initiated INV 557 into the alleged dumping and subsidisation of copper tube from China, and alleged dumping of copper tube from the ROK.
7. The investigation period for INV 557 was 1 July 2019 to 30 June 2020 (“the original investigation period”). The injury analysis period was from 1 July 2016 (“the injury analysis period”).
8. The Commissioner must terminate an investigation if dumping margins or countervailable subsidisation are negligible; negligible volumes of dumping or countervailable subsidisation are found; or the export causes negligible injury.<sup>1</sup>
9. The Anti-Dumping Commission (“ADC”) published a statement of essential facts on 14 September 2021 (“SEF 557”).
10. The Commissioner published a notice terminating INV 557 on 12 November 2021.<sup>2</sup> It was stated in the notice that as a result of the ADC’s investigation, the Commissioner was satisfied that:
  - there has been no dumping from China of any of the goods and therefore, terminated the investigation in accordance with section 269TDA(1)(b)(i) of the Act ) (“Reviewable Decision 1”);
  - the total volume of goods that have been exported to Australia over a reasonable examination period from China that have been dumped is

---

<sup>1</sup> Section 269TDA of the Act.

<sup>2</sup> ADN No. 2021/144.



negligible and therefore, terminated the investigation in accordance with sections 269TDA(3) and (4) of the Act (“Reviewable Decision 2”);

- there has been a countervailable subsidy received in respect of some or all of the goods from China but it never, at any time during the investigation period, exceeded the negligible level of countervailable subsidy under section 269TDA(16) of the Act and therefore, terminated the investigation in accordance with section 269TDA(2)(b)(ii) of the Act (“Reviewable Decision 5”);
- there has been dumping by Nungwon Metal Ind. Co., Ltd (“Nungwon”) from the ROK of the goods but the dumping margin by that exporter is less than 2%, and therefore, terminated the investigation in accordance with section 269TDA(1)(b)(ii) of the Act, so far as it relates to that exporter (“Reviewable Decision 3”);
- there has been dumping by Daejin Copper Pipe & Tube Manufacturing Co., Ltd (“Daejin”), residual exporters and uncooperative exporters of the goods from the ROK but the injury, if any, to the Australian industry, that has been caused by those exporters is negligible and therefore, terminated the investigation so far as it relates to those exporters in accordance with section 269TDA(13) of the Act (“Reviewable Decision 4”).

11. The reasons for the Reviewable Decisions made by the Commissioner resulting in the termination of INV 557 in its entirety were set out in ADC Report No. 557 (“TER 557”) dated 11 November 2021.
12. MM Kembla made five separate applications under s.269ZZO of the *Act* for a review of the decisions of the Commissioner to terminate INV 557 pursuant to s.269TDA(1)(b)(i), s.269TDA(3), s.269TDA(1)(b)(ii), s.269TDA(13) and s.269TDA(2)(b)(ii) of the Act, respectively. The applications were made in accordance with the requirements set out in s.269ZZQ and within the relevant 30 day period required by the Act.<sup>3</sup>

---

<sup>3</sup> Section 269ZZP.

13. 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 s.269ZYA of the Act.

## Conduct of the Review

14. In accordance with s.269ZZT of the Act, if the application is not rejected under ss.269ZZQA, 269ZZR or 269ZZRA, the Review Panel must either affirm the reviewable decision or revoke it. If a decision is revoked, the Commissioner must publish a statement of essential facts as soon as practicable, after which the investigation of the application will resume pursuant to s.269ZZT. This decision takes effect as if it were a decision made by the Commissioner.<sup>4</sup>
15. In undertaking the review, s.269ZZT(4) of the Act requires the Review Panel to only take into account information that was before the Commissioner when the Commissioner made the reviewable decision, subject to certain exceptions.<sup>5</sup>
16. The Review Panel may also have regard to further information obtained at a conference held under section 269ZZRA or further information provided by the Commissioner upon request of the Review Panel pursuant to s.269ZZRB of the Act.
17. If a conference is held under s.269ZZRA 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 information that was before the Commissioner, and to conclusions based on that information.<sup>6</sup> A list of the conferences held during the course of these reviews is available at Appendix A.
18. A conference was held with MM Kembla on 11 January 2022 (“the First Conference”) pursuant to s.269ZZRA of the Act for the purpose of obtaining further information and clarification in relation to the five applications by MM Kembla and the respective grounds of review. A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act (“the First Conference Summary”).

---

<sup>4</sup> Section 269ZZV.

<sup>5</sup> See ss.269ZZRA(2) and ZZRB(2).

<sup>6</sup> Section 269ZZRB(2).

19. Notification of the proposed reviews, as required by s.269ZZRC(1), was published on the Review Panel's website on 4 February 2022.
20. Further information was requested from the Commissioner, pursuant to s.269ZZRB on 30 March 2022 ("the Notice"). The ADC subsequently provided the Review Panel with the further information requested on 13 April 2022 in respect Sections B to G of the Notice ("Sections B to G Notice Response") and on 21 April 2022 in respect of Section A ("Section A Notice Response"). Non-confidential versions of the s.269ZZRB Notice and the ADC's responses thereto were published on the Review Panel's website.
21. A conference was held with the ADC on 26 April 2022 ("the Second Conference") pursuant to s.269ZZRA of the Act for the purpose of obtaining further information and clarification in relation to information provided by ADC in response to the Notice and to obtain further related information and clarifications in relation to the reviews. A non-confidential summary of the information and clarifications obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Second Conference Summary").
22. A further conference was held with MM Kembla on 27 May 2022 ("the Third Conference") pursuant to s.269ZZRA of the Act for the purpose of providing MM Kembla with the opportunity to comment on the ADC's responses to the Notice and the further information and clarifications provided by ADC during the Second Conference. A non-confidential summary of the information and clarifications obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Third Conference Summary").<sup>7</sup>
23. A further conference was held with the ADC on 7 June 2022 ("the Fourth Conference") pursuant to s.269ZZRA of the Act for the purpose of obtaining further information and clarification from the ADC in relation to further information arising out of the Third Conference held with MM Kembla. A non-confidential summary of the information and clarifications obtained at the conference was made publicly in accordance with s.269ZZX(1) of the Act ("the Fourth Conference Summary").

---

<sup>7</sup> See the discussion below, "Preliminary issue relating to the Third Conference".

24. Subsection 269ZZT(5) of the Act requires the Review Panel to make its decision within 60 days after the publication of the notice under subsection 269ZZRC(3), or such longer period allowed by the Minister in writing because of special circumstances. On 4 April 2022, the Minister, pursuant to subsection 269ZZT(5) of the Act, allowed for a longer period for the Review Panel to make its decision, with the due date for the decision of the Review Panel extended to 29 April 2022. Notice of this extension of time was made publically available. On 22 April 2022, the Minister, pursuant to subsection 269ZZT(5) of the Act, allowed for a further period for the Review Panel to make its decision, with the due date for the decision of the Review Panel extended to 8 June 2022. Notice of these extensions of time was made publically available.
25. Following the publication of the Conference Summary of the Conference held on 7 June 2022, MM Kembla requested an opportunity to comment on the further information and clarifications provided by ADC during the Fourth Conference. Since I intended to rely on the further information and clarifications provided by the ADC during the Fourth conference, in making my decision, I decided to delay making the final decision in order to hold a further conference under s.269ZZRB of the Act, to provide MM Kembla with the opportunity to comment on the further information and clarifications provided by ADC during the Fourth Conference.
26. A further conference was therefore held with MM Kembla on 13 June 2022 (“the Fifth Conference”) pursuant to s.269ZZRA of the Act for the purpose of providing MM Kembla with the opportunity to comment on the further information and clarifications provided by ADC during the Fourth Conference. A non-confidential summary of the information and clarifications obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act (“the Fifth Conference Summary”).
27. In conducting these reviews I have had regard to the applications (including documents submitted with the applications). I have also had regard to TER 557 and documents and information relevant to the review which was referenced in TER 557, including SEF 557 and to documents referenced in SEF 557. I have also had regard to further information requested from the Commissioner and provided to the Review Panel pursuant to s.269ZZRB, as well as to relevant information obtained at conferences, and conclusions reached at the conferences based on information that

was before the Commissioner when the Commissioner made the reviewable decisions.

#### Preliminary Issue related to the Third Conference

28. It had been noted from MM Kembla's written comments submitted prior the Third Conference that MM Kembla was also submitting what it stated to be "new and relevant information" that was not before the ADC when the Commissioner made the reviewable decision. During the Third Conference I advised the participants that the Review Panel had not yet formed a view as to whether:

- The further information "relates to the information" that was before the Commissioner when the Commissioner made the reviewable decision" within the meaning of s.269ZZRA(2)(a) of the Act, and if so;
- Whether the Review Panel should exercise its discretion, within the statutory framework of its functions and powers, and "have regard to" that further information under s.269ZZRA(2)(a) of the Act, in making its decision on the review pursuant to s.269ZZT(4).

29. The "new" further information related to a recent preliminary affirmative determination by the Korean Trade Measures agency (KTC) on copper tube exported to Korea from China and Vietnam. MM Kembla stated that it was advised of this decision on 24 May 2022, being a few days prior to the Third Conference.

30. I carefully considered the request, but decided not have regard thereto and not to hold a conference under s.269ZZRA in relation thereto, for the following reasons:

- I considered that the "new information" (being details of a decision of an anti-dumping authority in another jurisdiction) did not relate directly to information that was before the Commissioner when the Commissioner made the reviewable decision, for the purposes of s.269ZZRA(2)(a). I considered that the relationship was somewhat remote.
- Significantly, I did not consider it reasonable to hold a further conference and accept new information at such a late stage in the review, bearing in mind:

(i) the strict statutory time period for providing a report, (ii) the Review Panel's publication obligations relating to conferences, (iii) the existing complexities in the review, which could result in the necessity to hold further conferences to clarify information already on the record, and (iv) the importance of procedural fairness requirements for all parties.

## Grounds of Review

31. The grounds of review relied upon by the applicant, which the Review Panel accepted in the s.269ZZRC notice, are as follows:
32. Review No. 146: In respect of Reviewable Decision 1 (under s.269TDA(1)(b)(i))
  1. The Commissioner's decision concerning the selection of invoice date for fair comparison purposes, for all Chinese exporters, is not the correct or preferable decision;
  2. The Commissioner's decision concerning the determination of normal values under s.269TAC(1), for all Chinese exporters, is not the correct or preferable decision;
  3. The Commissioner's decision concerning arms length sales between Hong Kong Hailiang Metal Trading Limited ("Hailiang HK") and Hailiang Australia Pty Ltd ("Hailiang Australia"), is not the correct or preferable decision;
  4. The Commissioner's decision involving the determination of material injury, for all Chinese exporters, is not the correct or preferable decision.
33. Review No. 147: In respect of Reviewable Decision 5 (under s.269TDA(2)(b)(ii))
  1. The Commissioner's decision that a particular market situation did not exist and that Chinese exporters did not benefit from a countervailable subsidy where the Government of China influences the selling price of copper in China, is not the correct or preferable decision.
34. Review No.148: In respect of Reviewable Decision 4 (under s.269TDA(13))

1. The Commissioner's decision concerning the selection of invoice date for fair comparison purposes, for Daejin, residual and uncooperative Korean exporters, is not the correct or preferable decision;
  2. The Commissioner's decision concerning the determination of normal values under s.269TAC(1), for Daejin, residual and uncooperative Korean exporters, is not the correct or preferable decision;
  3. The Commissioner's decision that dumping (and subsidisation) did not cause material injury to the Australian industry, is not the correct or preferable decision.
35. Review No. 149: In respect of Reviewable Decision 3 (under s.269TDA(1)(b)(ii))
1. The Commissioner's decision concerning the selection of invoice date for fair comparison purposes, for Nungwon, is not the correct or preferable decision;
  2. The Commissioner's decision concerning the determination of normal values under s.269TAC(1) for Nungwon, is not the correct or preferable decision;
  3. The Commissioner's decision that dumping (and subsidisation) did not cause material injury to the Australian industry, is not the correct or preferable decision.
36. Review No. 150: In respect of Reviewable Decision 2 (under s.269TDA(3))
1. The Commissioner's decision concerning the selection of invoice date for fair comparison purposes, for all Chinese exporters, is not the correct or preferable decision;
  2. The Commissioner's decision concerning the determination of normal values under s.269TAC(1), for all Chinese exporters, is not the correct or preferable decision;
  3. The Commissioner's decision concerning arms length sales between Hailiang HK and Hailiang Australia, is not the correct or preferable decision;
  4. The Commissioner's decision involving the determination of material injury, for all Chinese exporters, is not the correct or preferable decision.

# Review No.146: Reviewable Decision under s.269TDA(1)(b)(i)

37. In its application for review MM Kembla stated that its application relates to the Termination Decision in TER 557 under s.269TDA(1)(b)(i) of the Act in respect of the no dumping finding for all Chinese exporters of seamless copper tube exported to Australia.
38. I will now deal with the various grounds of review put forward by MM Kembla in its application for review in respect of Review No. 146.

## Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable

39. I note that a number of MM Kembla's arguments under this ground of review refer to claims for adjustments under s.269TAC(8) of the Act in respect of copper price volatility and hedging. Copper price volatility and hedging may be relevant to determining the 'date of sale', which I will address in my consideration of this ground of review as necessary. I will not, however, address the substantive arguments relating to adjustments for copper volatility and hedging costs claimed under s.269TAC(8) under this ground of review, as they are more properly dealt with under sub-grounds (vi) and (vi) of Ground 2 below.

### MM Kembla's Arguments

40. MM Kembla contends that the Commissioner's decision with respect to the selection of invoice date for fair comparison purposes was not the correct or preferable decision for all Chinese exporters.
41. In its application for review MM Kembla stated that the ADC calculated the dumping margins for Zhejiang Hailiang Copper Co., Ltd ("Zhejiang Hailiang") based on a comparison of quarterly weighted average export prices with the corresponding quarterly weighted-average normal value for the investigation period (as per



s.269TACB(2)(a)). MM Kembla stated that the date for fair comparison selected by the Commissioner was the invoice date.

42. MM Kembla referred to the Dumping and Subsidy Manual November 2018 (“the Manual”) which discusses “establishing the date of sale”, noting that the ADC, “will normally use the date of invoice as it best reflects the material terms of sale”. MM Kembla noted that the Manual also states that where, “a date other the date of invoice better reflects the date of sale”, the ADC “will examine the evidence provided”.<sup>8</sup>
43. MM Kembla contended that the Commissioner failed to give due consideration to the evidence provided by MM Kembla regarding the volatility of copper pricing that is priced differently for domestic and export sales when date of invoice is used for fair comparison purposes. MM Kembla contended that it demonstrated that copper pricing is more relevantly (and accurately) aligned at order date where the terms of sale are well established. It stated that in its response to SEF 557, MM Kembla demonstrated the volatility of copper pricing and how comparing a domestic and export sale at invoice date would likely result in substantially different raw material copper input prices for the copper tube.
44. MM Kembla acknowledged that the ADC’s methodology is considered reasonable if the same copper price time basis is used in the sales for domestic and export, but submitted that in reality however, this is not the case. MM Kembla submitted that given the variability of the copper commodity price and the exposure risk this creates when domestic and export orders are priced (at date of order), the industry accepted practice of hedging copper prices at the time of order results in an alignment of the cost of copper for the manufacturer and what the customer pays for the copper component of the pricing model.
45. MM Kembla submitted that importantly, the order date provides for a more comparable date for domestic and export sales where the cost of the raw material input copper (that accounts for up to 95 per cent of the cost of copper tube) is known for both domestic and export sales (whereas sales compared at invoice date have different agreed copper prices).

---

<sup>8</sup> Section 15.3 of the Manual, pages 66 – 67.

46. MM Kembla submitted that the movement in copper price from the date of order placement to invoice can be substantial and, given the longer lead time (up to three months) for export sales, it is not reasonable to compare domestic sales with export sales at date of invoice due to the volatility in the copper price that evolves over this period.
47. MM Kembla referred to the ADC's statement that the evidence demonstrated that sales quantities may differ between the date of order placement and the date of invoice. MM Kembla stated that it accepted that quantity in the order advice can change by up to █ per cent (being normal practice); but submitted that the price set at order date based on a copper benchmark used on the order does not change. MM Kembla contended that the ADC failed to demonstrate when and with what regularity the price change it evidenced had occurred. MM Kembla stated that it provided evidence<sup>9</sup> to the ADC of its own imported copper purchases showing the lag between order date and invoice date, and that prices do not change.
48. MM Kembla submitted that it demonstrated in its response to SEF 557 that the terms of sale are more accurately reflected on the date of order placement for copper tube that is exported to Australia. It submitted that at that time the terms of the contract (i.e. the three-month forward price of copper is used) can be correctly compared and contrasted with domestic sales that reflect a similar copper input price (and are not subject to the variations in copper pricing that are evident when invoice date is used for fair comparison purposes).
49. MM Kembla reiterated that the material difference in using the date of order as the comparison date for domestic and export sales more readily aligns the terms of sales in the different markets and removes the vagaries of subsequent movements in copper prices that inevitably occurs between setting of the copper benchmark, date of order, and invoice date.
50. MM Kembla concluded that the Commissioner's decision to use invoice date for fair comparison purposes is not the correct or preferable decision.

---

<sup>9</sup> Reference was made to MM Kembla's submission in response to SEF 557 of 4 October 2021, Confidential Attachment 2: Volatility of Copper and Hedge Book explained with Examples. Public version is Document #035 of EPR 557.

## ADC Position

51. The ADC referred to the Manual which provides that where a claim is made that a date other than the date of invoice better reflects the date of sale, the ADC will examine the evidence provided. The ADC stated that for such a claim to succeed it would first be necessary to demonstrate that the material terms of sale were, in fact, established by this other date. In doing so, the evidence would have to address whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed contract date.
52. The ADC noted that MM Kembla did not provide it with any evidence to substantiate its claim that the material terms of trade for fixed price tube exports for the subject exporters are established at the order placement date, and that price and quantity are not subject to any continuing negotiation between the buyer and the seller after this date. Nonetheless, the ADC stated that it reviewed the evidence before it, including sales confirmation and final invoices for the exporters the subject of this investigation.
53. The ADC stated in TER 557 that it verified the sales terms for each exporter and was satisfied that certain conditions of sale, for both domestic and export sales, were not finalised until the invoice date. The ADC stated further that it also compared the sales order dates and invoice dates for both domestic and export sales for all cooperative exporters for a sample of sales transactions used for the verification of sales. The ADC found that the number of days between sales order date and invoice date is not significant (and substantially less than the 3 months submitted by MM Kembla). The ADC found on average for at least one exporter, that the number of days between sales order date and invoice date is longer for domestic sales than export sales.<sup>10</sup> Therefore, the ADC disagreed with MM Kembla's claim that there is a mismatch between export and domestic sales.
54. The ADC concluded that it did not consider that MM Kembla provided the requisite evidence necessary to demonstrate that the order placement date was the date

---

<sup>10</sup> In the first Worksheet of Confidential Attachment 2 to TER 557 entitled, "██████████ Order vs Invoice" the ADC found that in the sample of █████ sales transactions on both the domestic and export market, the average difference in days between the order date and the invoice date was █████ for the export samples and █████ for the domestic samples.

which better reflected the date of sale. The ADC concluded that it was satisfied that the invoice date was the most appropriate date in determining normal values and export price.<sup>11</sup>

## The Notice, the Section A Notice Response, the Second and Third Conferences

55. In light of some of MM Kembla's arguments in its application for review, I sought further information from the ADC and clarifications of its findings and reasoning relating to 'date of sale', in the Notice and during the Second Conference.
56. Noting the ADC's finding that sales quantities may differ between the date of order placement and the date of invoice (which was not challenged by MM Kembla), I requested clarification from the ADC as to whether there was evidence before it demonstrating that the per unit price varied after order date. The ADC stated in response that for one of these exporters, in one sample there was a unit price variation of 1.5 per cent between sales order confirmation and invoice. The ADC stated that it considered volume variations to be relevant because it affected the weighted average normal value and export price used in calculating the dumping margin. The ADC further stated that one of the cooperative exporter did not set a price until the date of invoice, and observed that for one verified exporter, the sales contract (on the Pro Forma invoice) stated that the London Metals Exchange ("LME") price is set as a "tentative LME" [emphasis added], which indicated that the per unit price was likely linked to the LME and that the material terms of sale are not yet settled on the order date (date of the Pro Forma invoice). The ADC further stated that for one exporter, the [REDACTED] was listed as being the date of [REDACTED]. This indicated to the ADC that the final sales terms were not confirmed until the [REDACTED] which is the date that the tax invoice is issued, further indicating to the ADC that sales terms were not set until date of invoice.<sup>12</sup>

---

<sup>11</sup> See ADC's assessment on page 33 of TER 557.

<sup>12</sup> See Paragraphs 1 – 5 of the Section A Notice Response and Confidential Attachment 2 thereto. See also Paragraph 6 (a) and (b) of Second Conference Summary and updated Worksheets A – 1, A – 2 and A – 3 of Confidential Attachment 2 to the Section A Notice Response, provided to the Review Panel after the Second Conference. See also Paragraphs 3 to 14 of Appendix B to the Second Conference Summary.

57. The ADC stated that in circumstances where there can be variation between the order date and invoice date, it generally considers the sales term details contained in the invoices to be the material terms of sale unless it is provided with evidence otherwise. It stated further that the invoice date generally provides the preferred figures on which to base the dumping margin calculations because they reflect the actual price paid and/or volume received, which is the practice approach reflected in the Manual and the approach considered to be aligned with WTO practice.<sup>13</sup>
58. The ADC further stated that MM Kembla's application for anti-dumping measures on 29 May 2020 confirmed that in their own accounting records they record sales and volumes as at the "date of despatch", which the ADC understood occurred at the point of invoice rather than order. According to the ADC, MM Kembla stated in its application that income, impacts of discounts, rebates, sales returns, warranty claims and intercompany transfers are not recognised until the date of despatch in its own accounting records, which according to the ADC indicated that the price and/or volume changes are considered settled at the invoice date.<sup>14</sup> The ADC stated further that it verified accounting records for all cooperative exporters and was satisfied that they follow a similar approach in recording transactions at the invoice date, further supporting the finding that the invoice date is the appropriate date of sale for both domestic and export sales used in the calculation of dumping margins for all cooperative exporters.<sup>15</sup>
59. In response to a clarification request during the Second Conference relating to MM Kembla's claim that the time of order placement better reflected the 'date of sale' (rather than date of invoice), because it is industry accepted practice to enter copper hedging contracts at the time of order, the ADC stated that while it was aware that manufacturers may purchase hedging contracts at the point of making orders, either directly or indirectly via their trading entity, it was not a necessary part of the manufacturing process. The ADC pointed out that it did not identify hedging costs in the accounting records for any of the verified exporters, indicating that

---

<sup>13</sup>See Paragraphs 3, 4 and 5 of the Section A Notice Response. Reference was made in Paragraph 3 to pages 51 to 52 of the Manual and Footnote 8 at Article 2.4.1 of the WTO Anti-Dumping Agreement.

<sup>14</sup> Reference was made to Document #1 of EPR 557, page 6.

<sup>15</sup> See Paragraphs 4 and 5 of the Section A Notice Response.

these have not been taken into consideration as financial costs as part of the CTMS.<sup>16</sup>

60. During the Third Conference, MM Kembla stated that while MM Kembla agreed that the quantity can change by a permitted percentage, it contended that any change in quantity is not material and does not have a material impact on the weighted average calculation. MM Kembla stated that confirmation of price at order-taking, based on an agreed LME-linked copper benchmark was wide-spread in the industry, and that the ADC ignored this.<sup>17</sup>

## Consideration

61. Both MM Kembla and the ADC referred to the Manual's discussion of "establishing the date of sale", noting that the ADC, "will normally use the date of invoice as it best reflects the material terms of sale", but that when, "a date other the date of invoice better reflects the date of sale", the ADC "will examine the evidence provided".<sup>18</sup> The Manual reflects the practice approach of the ADC and is considered to be aligned with WTO practice, which is not disputed by MM Kembla. I agree with the ADC that in order for a claim to succeed that, "a date other the date of invoice better reflects the date of sale", it would be necessary to demonstrate that the material terms of sale were, in fact, established by this other date. The ADC, with reference to the Manual, stated that the evidence would have to address whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed contract date. This suggests an evidentiary burden on the party claiming that a date other the date of invoice better reflects the date of sale, being MM Kembla. This burden would be particularly challenging when the party making the claim is not a party to the contract or relevant transactions.
62. The ADC noted that MM Kembla did not provide it with actual evidence to substantiate its claim in this regard. The ADC stated that, nonetheless, it reviewed the evidence before it, including sales confirmation and final invoices for the

---

<sup>16</sup> See Paragraph 1 of Appendix B to the Second Conference Summary and Paragraphs 7 – 10 and 19 – 22 of the Section A Notice Response.

<sup>17</sup> See Paragraph 2(v) of the Third Conference Summary, page 10.

<sup>18</sup> See Section 15.3 of the Manual, pages 66 – 67.

exporters the subject of this investigation. I consider it to be appropriate for the ADC to review the evidence on its own initiative since MM Kembla, while submitting its own information relating to contractual terms and sales in support of its arguments, did not have access to the confidential details of the contractual relationship and documentation relating to the exporters' sales. WTO rules and jurisprudence provides that while interested parties claiming adjustments are required to provide evidence in support of and to quantify their claim, there is also an affirmative information-gathering burden on the investigating authority to ensure a "fair comparison", and Article 2.4 of the WTO Anti-Dumping Agreement ("ADA") requires that the authority in ensuring a fair comparison "shall not impose an unreasonable burden of proof" on the parties in question claiming the adjustment.<sup>19</sup> After conducting a review of the evidence the ADC concluded that it was satisfied that the invoice date was the most appropriate date in determining normal values.

63. Having reviewed all the further information and clarifications from the Section A Notice Response and during the Second and Third Conferences, I do not consider that it has been demonstrated that the material terms of sale for the exporters were established by the order date, as contended by MM Kembla. The following factors detract from order confirmation being considered to be the 'date of sale' instead of the invoice date:

- At least one instance of change of unit price, between order confirmation date and invoice date, indicating that material terms were not agreed at order confirmation date.<sup>20</sup>

---

<sup>19</sup> See WTO Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Reinforcing bar from Turkey* (WT/DS211/R) at paragraph 7.352; Appellate Body Report in *United States – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan* (WT/DS184/AB/R) paragraph 178; Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219/R), at paragraph 7.157 and 7.158.

<sup>20</sup> While there were many instances of variations in volume between sales order confirmation date and invoice date, these were all in accordance with the range of percentage variation permitted in the relevant contracts and at the agreed price. I was therefore more focussed on the variation in the unit price of at least one transaction. I was also not persuaded by the ADC's argument that it considered volume variations to be relevant because they affected the weighted average normal value and export price used in calculating the dumping margin. I did not factor this into my decision on this issue, which relates to 'date of sale' for the purpose of the comparison, not the calculation of the dumping margin.

- The “tentative LME” with reference to price in the sales contract (pro forma invoice) with respect to one exporter, indicating that the price is not confirmed on order confirmation date.
- For one exporter, the [REDACTED] was listed as date of [REDACTED], being the date that the tax invoice is issued, further indicating that sales terms were not set until date of invoice.
- The confirmation by MM Kembla in its original application that income, impacts of discounts, rebates, sales returns, warranty claims and intercompany transfers are not recognised until the date of despatch in its own accounting records, appearing to indicate that the price and/or volume changes are considered settled at the invoice date.
- The ADC’s satisfaction that according to the verified accounting records, all cooperative exporters followed a similar approach in recording transactions at the invoice date, further supporting the finding that the invoice date is the appropriate date of sale.
- A review of the relevant documents with samples of domestic and export sales for the three exporters, confirming the correctness of the ADC’s finding that the number of days between sales order date and invoice date is substantially less than the 3 months submitted by MM Kembla, and that in fact was on average for at least one exporter, was longer for domestic sales than export sales.<sup>21</sup> This detracted from MM Kembla’s claim that there is a mismatch between export and domestic sales regarding the volatility of copper pricing that is priced differently for domestic and export sales when date of invoice is used as the date of sale, as evidence that the order date was more appropriate for date of sale.

64. For the reasons discussed above, I consider that the Commissioner’s decision with respect to the selection of invoice date as the ‘date of sale’ for fair comparison purposes, was the correct or preferable decision for all Chinese exporters.

---

<sup>21</sup> See Worksheets A – 1, A – 2 and A – 3 of Confidential Attachment 2 to the Section A Notice Response.



## Ground 2: Determination of normal values under s.269TAC(1) is not correct or preferable decision

65. MM Kembla contended that the Commissioner's decision concerning the determination of normal values under s.269TAC(1), for Zhejiang Hailiang (and consequently all other Chinese exporters) is incorrect and not the preferred decision.
66. Under this ground of review MM Kembla addressed the following issues or sub-grounds of review:
- i. the particular market situation;
  - ii. cost of scrap copper in the domestic sales;
  - iii. model control codes ("MCC's") and international standards;
  - iv. drawing thin;
  - v. capping and cleaning costs;
  - vi. copper volatility; and
  - vii. hedging costs.
67. I will address each of the these issues or sub-grounds separately, under the same sub-headings referred to above, although sub-grounds (iii) and (iv) will be considered together, for the reasons discussed below.

### i) Particular market Situation

#### **MM Kembla's Arguments**

68. MM Kembla asserted that a "particular market situation" existed in respect of copper tube sold domestically in China, following a finding by the Canadian Border Services Agency ("CBSA") that domestic sales of copper tube in China could not be considered to have been determined on a competitive basis due to the influence of the Government of China ("GOC") on copper prices in China.

69. MM Kembla referred to CBSA's Statement of Reasons concerning the dumping and subsidisation of certain copper tube originating from China<sup>22</sup> which, according to MM Kembla, confirmed the existence of a wide range of measures applied by the GOC that have resulted in a significant influence on the Chinese non-ferrous industry including the copper sector, which included copper tube. According to MM Kembla, these influences caused CBSA to be of the opinion that:

- domestic prices are substantially determined by the GOC; and
- there was sufficient reason to believe that the domestic prices were not substantially the same as they would be in a competitive market.

70. MM Kembla recognised that the CBSA decision was made at the end of 2013, however, MM Kembla noted in its response to SEF 557<sup>23</sup> that the GOC continued to exert significant influence on the domestic Chinese copper market including supporting the Government-owned largest copper smelter and holding and releasing reserves of copper as appropriate.<sup>24</sup>

71. MM Kembla stated that the CBSA formed the view that the GOC influenced domestic selling prices in China for copper tube having identified the existence of government plans and policies that impact the non-ferrous industry in China.<sup>25</sup> According to MM Kembla, a significant factor was the CBSA analysis confirming that there were discrepancies in the copper prices on the LME, Shanghai Metals Exchange ("SHFE") and the Commodity Exchange Inc. ("COMEX") (being the primary futures and options market for trading metals such as gold, silver, copper, and aluminium) in respect of copper futures prices, that indicated the "domestic prices of copper in China are not determined under competitive market conditions". According to MM Kembla, the CBSA identified that copper prices in China were low

---

<sup>22</sup> Reference was made to the Statement of Reasons, Certain Copper Tube Originating In or Exported from the Federative Republic of Brazil, The Hellenic Republic, The People's Republic of China, The Republic of Korea and the United Mexican States, and the subsidizing of Certain Copper Tube Exported from The People's Republic of China, 3 December 2013.

<sup>23</sup> This was a reference to MM Kembla's submission in response to SEF 557 of 4 October 2021 (Document #035 of EPR 557).

<sup>24</sup> Reference was made to Confidential Attachment 14 of MM Kembla's response to SEF 557 of 4 October 2021 (Document #035 of EPR 557).

<sup>25</sup> The relevant factors considered by CBSA were included in MM Kembla's application for measures at Part B-3, pages 39-41.

and thereby impacted the selling prices of copper tube (as copper accounts for up to 95 per cent of the cost of the tube). MM Kembla contended that as the copper represents such a significant proportion of the cost of tube, even small deviations in copper pricing away from the LME can have a significant impact on copper tube pricing.

72. MM Kembla submitted that the United States also imposed anti-dumping and countervailing measures on copper tube exported from China and that the measures in the US continued to apply.
73. MM Kembla stated that it relied upon the CBSA's findings concerning the particular market situation allegation. It referred to the ADC's response to MM Kembla's submissions and its conclusion in TER 557 that "domestic prices of raw materials are set with reference to domestic copper costs and that the SHFE reflects the domestic cathode copper costs in China".<sup>26</sup> MM Kembla also referred to the ADC's finding that "the cathode copper price on the SHFE is higher than that on the LME in each month of the period examined". Further, MM Kembla referred to the ADC's finding that copper purchases by Zhejiang Hailiang in all but two months of the investigation period were higher than the LME and for Zhejiang Naile Copper Co., Ltd ("Naile"), selling prices followed a "similar trend" to the Zhejiang Hailiang's prices.
74. MM Kembla stated that it was concerned by the ADC's analysis for the following reasons:
  - the ADC's LME pricing analysis appeared to be limited to pricing at the "EXW" terms;
  - there was an absence of commentary surrounding the terms of the SHFE prices examined by the ADC (only stating that it reflected "domestic cathode copper price");
  - there was no reference to the import CIF port premium that was payable in addition to the LME cash price; and

---

<sup>26</sup> Reference was made to Section A5.2 of TER 557, page 77.

- it was unclear whether the SHFE “domestic price” was a delivered price to customer in China.

75. MM Kembla did not consider that the ADC’s comparison of domestic selling prices for cathode copper in China could be relied upon and submitted that the ADC’s decision that a particular market situation did not exist for copper tube sold domestically in China was not the correct or preferable decision.

### **ADC’s Position**

76. In TER 557, the ADC stated that in light of all the information before it, it was the ADC’s view that a particular market situation did not exist in respect of the domestic market for copper tube in China during the investigation period, with the ADC’s analysis set out in Appendix A of TER 557.

77. The ADC stated in Appendix A of TER 557 that:

- The ADC had been unable to substantiate MM Kembla’s claim that a market situation exists in the Chinese copper tube market.
- During the verification of the cooperative exporter, the ADC examined the impact, if any, of policies and initiatives implemented by the GOC and was unable to identify any financial reimbursements by the GOC to any of these exporters nor could it identify any government influence on the domestic selling prices of copper tube or raw material purchases.
- The ADC did not identify any evidence to suggest that the GOC’s plans and policies for the non-ferrous metals industry, including copper, influenced the domestic selling prices for raw material copper and the finished copper tube products.
- The ADC found that the cathode copper prices on the SHFE are higher than on the LME over a considerable period of time, including during the entirety of the investigation period.
- The ADC also compared the prices of Zhejiang Hailiang, the sole cooperating exporter from China, with the LME during the investigation period and found that the price paid for cathode copper by Zhejiang Hailiang

to be higher than the LME price in 10 months, and only slightly lower in the other two months.

- The ADC observed that Zhejiang Hailiang's purchase price of cathode copper and the price of cathode copper on the SHFE are closely aligned with prices of cathode copper on the LME. It considered that domestic selling prices in China are broadly consistent with global prices for cathode copper, which did not correlate with MM Kembla's assertion that domestic selling prices for copper tube in China were lower than they otherwise would be, due to the influence of the GOCs policies and plans in the non-ferrous industry, and that they were not determined on a competitive basis.

78. The ADC noted MM Kembla's citation of the CBSA Statement of Reasons concerning the dumping and subsidisation of certain copper tube originating from China, published in 2013, and stated that in general, it considers another administration's finding of dumping and subsidisation as relevant evidence in an investigation of the same goods. However, it was stated that the ADC will undertake its own assessment of all the evidence before it. The ADC pointed out that it had been unable to identify any significant discrepancies between the copper prices on the LME and SHFE to indicate that domestic selling prices of copper in China are not determined under competitive market conditions. Rather, the ADC observed that copper cathode prices of the cooperating exporter and prices on the SHFE were broadly aligned with prices on the LME.
79. The ADC also observed the older investigating period undertaken by the CBSA, being 1 May 2012 to 30 April 2013, compared to the period of investigation for the present investigation of 1 July 2019 to 30 June 2020, and considered that in the absence of additional information from the applicant, the findings of the CBSA are not contemporaneous to the present investigation and are not reliable in evidencing the current state of the Chinese market for copper tubes.
80. The ADC stated further in Appendix A to TER 557 that it had considered the submission from MM Kembla in response to SEF 557 and remained of the view that a particular market situation did not exist in respect of the domestic market for copper tube in China during the investigation period. It stated that while the ADC had identified some policies and plans for the non-ferrous metals industry, including

copper, it was unable to identify any resulting influence on the domestic selling prices for raw material copper and the finished copper tube products. Further the ADC stated that it considered that government influence on costs can only disqualify the sales on the basis of a market situation if those costs can be shown to be affecting the domestic prices, and it was unable to identify such evidence.

81. The ADC confirmed that it was not satisfied that a market situation existed in the domestic market of copper tube in China such that those prices are not suitable for determining normal values per section 269TAC(1).

### **The Notice, the Section B to G Notice Response, the Second and Third Conference**

82. While the ADC had in TER 557 addressed MM Kembla's submissions on particular market situation relating to CBSA's Statement of Reasons, I noted that the certain concerns about the ADC's analysis of copper pricing, articulated by MM Kembla in its application for review (discussed above under MM Kembla's arguments), had not been addressed. These related to: (i) limitation of the ADC's LME pricing analysis appearing to be limited to pricing at the "EXW" terms; (ii) absence of commentary surrounding the terms of the SHFE prices examined by the ADC (iii) lack of reference to the import CIF port premium; and (iv) lack of clarity as to whether the SHFE "domestic price" was a delivered price.
83. In the Notice I requested the ADC to comment on these articulated concerns of MM Kembla. The ADC responded comprehensively to each point raised by MM Kembla in the Section B – G Notice Response, with reference to Confidential Attachment 1 thereto. During the Second Conference, I reviewed the relevant worksheet of Confidential Attachment 1 to the Section B – G Notice Response and confirmed the ADC's observations and analysis, in responding to the issues raised.<sup>27</sup>
84. During the Third conference MM Kembla submitted that the ADC's comparison of the LME price and the SHFE price was flawed and that the reference to the cost of copper being 6 per cent higher on SHFE was concerning because, it did not seem possible given the fundamental economics of producing copper tube. MM Kembla contended that if Hailiang's copper purchase prices were "up to 6% higher" than the LME, with copper accounting for 90 per cent of production cost, Hailiang would be

---

<sup>27</sup> See Paragraphs 1, 2, and 3 of the Section B – G Notice Response and Confidential Attachment 1 thereto.

uncompetitive with Korean exporters, although the ADC stated that export prices for all exporters were similar. MM Kembla submitted that, “it possibly did not account correctly for port premiums or cathode premiums” and “possibly did not account for a 13 per cent VAT in China on copper for domestic sales”. MM Kembla contended that if correct, Chinese exporters would be uncompetitive on the global market because of additional fabrication costs to be added to the copper price, and would appear to be selling at a loss to stay competitive.<sup>28</sup>

## Consideration

85. One of MM Kembla’s main arguments in asserting that a “particular market situation” existed in respect of copper tube sold domestically in China, relied on a 2013 Canadian finding by CBSA. I agree with ADC’s position that while another administration’s finding of dumping and subsidisation may be considered as relevant evidence in an investigation of the same goods, it undertakes its own assessment of all the evidence before it. This was particularly relevant in the present case where the CBSA findings relied upon (from 2013) were not contemporaneous to the present investigation and were not considered reliable in evidencing the current state of the Chinese market for copper tubes.
86. The ADC undertook its own assessment and concluded that a particular market situation did not exist in respect of the domestic market for copper tube in China during the investigation period.<sup>29</sup>
87. I considered that the ADC had conducted a comprehensive assessment in Annexure A of TER 557. I also noted that the concerns of MM Kembla, relating to the ADC’s analysis of copper pricing, were appropriately addressed in the Sections B – G Notice Response and in Confidential Attachment 1 thereto. I reviewed the relevant worksheets of Confidential Attachment 1 and confirmed all the ADC’s clarifications and observations.
88. During the Third conference MM Kembla submitted that the ADC’s comparison of the LME price and the SHFE price was flawed and criticised its analysis, identifying

---

<sup>28</sup> See Section (vi) on Copper costs in China in Appendix A to the Third Conference Summary and Paragraph 2(vi) of the Third Conference Summary, page 10.

<sup>29</sup> See Annexure A of TER 557.

areas where it considered the ADC's analysis was "possibly" deficient.<sup>30</sup> However, I do not consider that this amounted to positive evidence refuting the ADC's finding that a particular market situation did not exist in respect of the domestic market for copper tube in China during the investigation period.

89. I agree with the ADC's conclusion that it was unable to substantiate MM Kembla's claims and that it was not satisfied that a market situation existed in the domestic market of copper tube in China such that those prices were not suitable for determining normal values per section 269TAC(1).
90. Therefore, for the reasons discussed above, I consider that the ADC's decision that a particular market situation did not exist for copper tube sold domestically in China, was the correct or preferable decision.

## ii) Cost of scrap copper in the domestic sales

### **MM Kembla's Arguments**

91. MM Kembla submits in its application for review that an additional concern arises from the ADC's absence of analysis of the cost of scrap copper in China, which is a raw material input in the domestic copper tube production, and the basis for the verified cost to make and sell copper tube at Zhejiang Hailiang.
92. MM Kembla states that it understands that only cathode copper is used in the manufacture of goods exported to Australia (so that the goods meet the AS/NZ Standards), whereas copper tube sold in China can be manufactured to a lower standard and is manufactured from both cathode and scrap copper. According to MM Kembla, this is confirmed by the ADC in its verification report for Zhejiang Hailiang where it states:

*.... the goods in both markets are produced at the same facilities and have the same manufacturing process. However, there is a difference in the cost of production as Zhejiang Hailiang utilizes the 'import processing scheme' for*

---

<sup>30</sup> See Section (vi) on Copper costs in China, of Appendix A to the Third Conference Summary and Paragraph 2(vi) of the Third Conference Summary, page 10.



*the raw material inputs in the manufacture of the exported goods, while for domestic goods it uses domestic priced raw materials.*<sup>31</sup>

93. According to MM Kembla, this statement should have triggered an adjustment to Zhejiang Hailiang's normal value, as it was recognized that there was a difference in costs for the goods sold domestically versus those exported to Australia. MM Kembla refers to Zhejiang Hailiang's submission of 15 October 2021 which states:

*Zhejiang Hailiang confirms that scrap was used in the production of copper billet which was then used in the production of both domestic and export sales.*<sup>32</sup>

MM Kembla submits that Zhejiang Hailiang's submission of 15 October 2021 contradicts its earlier representations to the ADC's investigation team where it confirmed that copper sourced for export sales was imported copper only. According to MM Kembla this admission raised considerable doubt as to the reliability of Zhejiang Hailiang's claimed copper costs as accepted by the verification team and demonstrates that the ADC has erred by not adjusting the exporter's normal value for differences in the copper costs used in domestic versus export sales.

94. MM Kembla submitted that there was clearly an absence of analysis by the ADC to correctly address the actual cost of copper for goods sold on the domestic market (scrap and cathode) versus the goods exported to Australia (allegedly in the first instance, cathode only). It submits that an adjustment to normal value is required (based upon the percentage and cost of scrap copper used in the production of copper tube for the domestic market) to account for the higher cost cathode used solely in the export sales.<sup>33</sup>
95. MM Kembla contended that the acceptance of the Chinese exporter production costs by the ADC as reflective of the CTMS for the exported goods was therefore incorrect and should not have been relied upon as the costs for producing copper tube for sale on the domestic market is lower than the cost of producing copper tube for the export market (to meet the required AS/NZ Standards). MM Kembla

---

<sup>31</sup> Zhejiang Hailiang Exporter Verification Report, Paragraph 2.5, page 8.

<sup>32</sup> Zhejiang Hailiang submission, 15 October 2021, Document #041 of EPR 557, page 12.

<sup>33</sup> Reference was made to MM Kembla's submission in response to SEF 557, page 23.

concluded that the decision to accept the Chinese exporters' cost of copper as verified for the purposes of determining the CTMS for the goods exported to Australia was not the correct or preferable decision.

### **ADC Position**

96. The ADC stated in TER 557 that it was in possession of verified cost information for each model sold domestically and exported to Australia. The ADC stated that it had further analysed the verified cost information and examined the amount of scrap used in the manufacture of domestic and export models. It was not satisfied that domestic products used more scrap than exported models, as claimed by MM Kembla. The analysis was contained at Confidential Attachment 2 to TER 557.<sup>34</sup>
97. The ADC submitted that it did not consider adjustments for differences in costs were necessary where the same model control codes ("MCC's") were used to compare the domestic sales to the export sales, as it did not affect price comparability.<sup>35</sup>

### **The Notice, the Section B – G Notice Response, the Second and Third Conferences**

98. I sought further information and clarifications from the ADC in the Notice and during the Second Conference, in respect of this issue of scrap copper.
99. In the Notice I requested clarification from the ADC on the apparent contradiction in the information submitted by Zhejiang Hailiang, that MM Kembla identified in its application for review, as discussed above.<sup>36</sup> In response, the ADC stated that it did not consider there to be any contradiction in that the verification found that exported copper tube was manufactured from imported copper, and the verification also found that the copper used to produce exported goods contained scrap copper. It stated that this corresponded with what Hailiang put forward in its submission, and the ADC's findings contained in the Hailiang verification report.<sup>37</sup>
100. In the Section B – G Response, the ADC provided an explanation of its analysis in Confidential Attachment 2 to TER 557, leading to the conclusion in TER 557 that it

---

<sup>34</sup> See TER 557, page 34 and Confidential Attachment 2.

<sup>35</sup> See TER 557, page 17.

<sup>36</sup> See Section C of the Notice.

<sup>37</sup> See Paragraph 4 of the B – G Notice Response.

was not satisfied with MM Kembla's claims that exporters use more scrap for domestic sales than for export sales. The ADC also pointed out that the sample month of July was an example of where the proportion of scrap to cathode copper contained in exported copper tube is actually higher than for domestic sales.<sup>38</sup> During the Second Conference, I reviewed Confidential Attachment 2 to TER 557 with the ADC and confirmed the ADC's observation. During the Second Conference the ADC reconfirmed that the copper, imported for use in copper tube for export, included scrap.

101. In response to a clarification request as to whether the domestic models included in a MCC had similar percentages of scrap copper as the exported models in that MCC, the ADC confirmed that although the amount of scrap was not a consideration for the MCC's, domestic and exported models in the same MCC's had similar scrap content. The ADC therefore confirmed that scrap copper was not used in domestic models at a higher level, as claimed by the applicant.<sup>39</sup>

## Consideration

102. I have considered the issues raised by MM Kembla with regard to this sub-ground of review, and have reviewed the analysis of the ADC in TER 557 and Confidential Attachment 2 thereto, as clarified by the ADC in the Sections B – G Response and during the Second Conference.

103. I found that there were no apparent contradictions in the representations and submissions by Zhejiang Hailiang with regard to scrap metal as an input into domestic and exported products, as claimed by MM Kembla. I also found that there appeared to be no reason to question the reliability of Zhejiang Hailiang's claimed copper costs as accepted by the ADC's verification team. The ADC's analysis of the actual cost of copper for goods sold on the domestic market versus the goods exported to Australia appeared to be sound, and has taken into consideration that the copper, imported for use in copper tube for export, included scrap. The ADC also confirmed that, although the amount of scrap was not a consideration for the

---

<sup>38</sup> See Paragraph 5 of the Section B – G Response and Confidential Attachment 2 to TER 557.

<sup>39</sup> See Paragraphs 1a, 1b and 1c of the Third Conference Summary.

establishment of the MCC's, domestic and exported models in the same MCCs had similar scrap content.

104. I do not consider that MM Kembla demonstrated that there is a basis for adjusting the exporters' normal value for differences in the copper costs (relating to scrap) used in domestic and export sales.

105. For the reasons discussed above, I consider that the ADC's decision not to make an adjustment to the exporters' normal value for differences in scrap copper costs used in domestic and export sales, was the correct and preferable decision.

### iii) MCC's and International Standards and iv) Drawing Thin

106. I will consider sub-grounds (iii) MCC's and International standards, and (iv) Drawing Thin, together. The reason for adopting this approach is that the physical characteristics of wall thickness ("WT") and outside diameter ("OD"), which relate to the process of "drawing thin" (the subject of sub-ground (iv)) is a major factor in differing International Standards (the subject of sub-ground (iii)). Sub-grounds (iii) and (iv) are therefore closely related with overlapping arguments and submissions, and it seems appropriate and efficient to consider them together, to avoid repetition.

### **MM Kembla's Arguments**

107. MM Kembla contended that the normal values for Chinese exporters as determined in TER 557 were for generic copper tube, that was manufactured to a lower standard and possessed physical characteristics that involved a lower cost of production (and selling price), than the goods exported to Australia.

108. MM Kembla contended that the Commissioner failed to adjust normal values to account for the less stringent physical characteristics that were evident in the Chinese domestic sales of copper tube, which included: product dimensions, product quality, copper content, product cleanliness and chemical composition. It contended that ultimately, the lower standards applicable in China resulted in a lower cost of production for the subject goods that, without appropriate adjustment, could not properly be compared with the goods exported to Australia (which were required to meet the AS/NZ Standards involving a higher cost of production).



not compulsory, customers in China can and do negotiate to purchase copper tube using customer-defined specifications. Further, MM Kembla submitted that customers in the Chinese domestic market are highly motivated to set their own WT specifications, well below the Chinese Standard, due to the high cost of copper as a percentage of total costs.

113. MM Kembla further contended that the ADC incorrectly accepted the Chinese exporter's CTMS for all goods (i.e. domestic and exports) which reflects the Chinese manufacturer's benefit of drawing thin. MM Kembla submitted that the ADC had ignored MM Kembla's representations in its assessment of normal value for Chinese (and Korean) exporters, thereby resulting in the determination of normal values that are under-valued (and hence negative or only small dumping margins have been calculated).<sup>42</sup>

114. MM Kembla contended that the Commissioner failed to consider the significance of the differing International Standards that apply to domestically sold copper tube in China (and Korea) with the exported goods (to Australian Standards). MM Kembla further submitted that the decision does not take account of an adjustment required to normal value to permit a fair comparison between the domestic copper tube (that is "drawn thin") and the exported goods (with a thickness that complies with Australian Standards), and is not the correct or preferable decision.

115. MM Kembla stated that the Commissioner therefore failed to comply with his obligation to calculate and apply adjustments to determine normal values to ensure fair comparison between normal values and export prices.

## **ADC Position**

116. In TER 557 in response to MM Kembla's claims related to adjustments for conversion costs related to differing International Standards, the ADC noted that each exporter provided, and the ADC verified, the costs for each specific model. It stated that:

*The commission has examined the specific models included in each MCC category and is satisfied that these contain both domestic and exported*

---

<sup>42</sup> Reference was made to the Confidential version of MM Kembla's submission of 9 October 2021 (Document #034 of EPR 557), page 2 -3. See also MM Kembla's application for review, page 11.

*models. The commission has analysed the WA cost for each MCC used in the dumping margin calculations and compared these with the cost to produce each specific model within that MCC category.*

*On each occasion, the commission has found that the highest cost within the MCC is for a domestic model and the WA cost closely aligns with the costs for each specific exported model. On this basis, the commission is satisfied that through calculating the cost to make (CTM) using the MCCs gives consideration to both domestic and export models and therefore, no adjustment to the normal value is required.<sup>43</sup>*

117. The ADC also noted that each MCC is made up of multiple models, both domestic and export, and that the MCC structure therefore accounts for a difference in standards between goods as well as differing physical characteristics, such as “drawing thin”. The ADC stated that it was not satisfied that an adjustment for difference in standards or WT was necessary.

### **The Notice, the Section B – G Response, the Second Conference and the Third Conference**

118. I considered that MM Kembla’s claims and arguments relating to these two sub-grounds of review raised legitimate questions in regard to the ADC’s finding. I therefore sought further information from the ADC and clarifications of its findings and reasoning in respect of these two issues, in the Notice and during the Second Conference. During the Third Conference, MM Kembla was provided with an opportunity to comment on the Sections B – G Notice Response and the relevant clarifications and further information provided during the Second Conferences.

119. In the Notice I requested the ADC’s reasons for determining that no adjustments were necessary with respect to each of the categories of differences referred to in MM Kembla’s submission of 9 September 2021, and an explanation as to how such a general response adequately addresses MM Kembla’s detailed submissions relating to differences in standards and drawing thin.

---

<sup>43</sup> REP 557, page 34.

120. In the Section B – G Notice Response and during the Second Conference, it was clarified that:

- There was no indication that any export models were sold on the domestic market.
- The ADC was satisfied that, in accordance with standard practice, each MCC contained a combination of both domestic and exported models with similar key characteristics and similar unit costs and pricing structures.
- In determining the MCC structure, the ADC had regard to differences in physical characteristics that gave rise to distinguishable and material differences in cost and price (such as, physical differences in applicable standards; safe working pressures; manufacturing WT tolerances; and manufacturing OD tolerance), where the ADC was reasonably satisfied that the cost differences affected price comparability.
- Since domestic and export models have similar costs and characteristics within the same MCC categories and since the differences were taken into account in the establishment of the MCC's, the ADC did not consider that there was any need for adjustments, as there were no differences that affected price comparability, within each MCC.
- The goods sold domestically with lower costs and prices were grouped in the same category as exported goods with the same or similar lower costs and prices. Therefore, a higher priced model sold on the domestic market would be compared to a higher priced model exported to Australia, because of the MCC structure.<sup>44</sup>
- The ADC ensured that appropriate models were included within each MCC, using verified data from each exporter, and considered that the MCC structure allowed for a proper comparison between domestic and exported goods when calculating dumping margins.

---

<sup>44</sup> In response to a clarification request, the ADC confirmed that there are similar higher priced models made to higher Australian-like standards that are also sold on the domestic markets in China and Korea, respectively. See Para 2b of the Second Conference Summary.



- The ADC analysed the weighted average cost for each MCC used in the dumping margin calculations and compared these with the cost to produce each specific model within that MCC category. On each occasion, the ADC found that there are both domestic and exported models that have the lowest and highest cost within particular MCCs, and the weighted average cost closely aligns with the costs for each specific exported model.<sup>45</sup>
- On the basis of the above, the ADC was satisfied that no adjustments to the normal value was required for differences in International Standards (including WT), as there were no differences, with respect to domestic and export sales within the MCC's (based on having similar costs, qualities and physical characteristics), that affected price comparability.<sup>46</sup>

121. The ADC stated that it had ensured that WD is incorporated into the comparison between export and domestic goods, by using a MCC system to set out the different characteristics of the goods which give rise to distinguishable and material differences in price. The ADC stated that it had considered whether there should have been a separate category for copper that had undergone a process to reduce WT, but based on information before it, did not determine that WT (and the associated drawing thin process) was the “principle distinguishable and material differences” for copper tube. The ADC stated, however, that differences in thickness result in different amounts of copper being used (which has a related price and/or cost effect) and is addressed through a unit weight figure, which the ADC stated, also addressed different standards between countries that may result in different weights / thicknesses. The ADC stated it was satisfied that through using the MCC's, models with similar costs and selling prices were compared with one another, regardless of whether sold domestically or exported.<sup>47</sup>

---

<sup>45</sup> In response to a clarification request, the ADC clarified that this meant that, within any particular MCC, the lowest cost models and the highest cost models were not necessarily always the domestic or exported models, respectively, as might be expected, but that there was a spread of both domestic and exported models having both the lowest and highest cost in the particular MCC. See Para 2c of the Second Conference Summary.

<sup>46</sup> See Paragraphs 11 – 17 of the Sections B – G Notice Response and Paragraphs 1b, 1c, 2a, 2b, 2c and 2d of the Second Conference Summary.

<sup>47</sup> See Paragraphs 18 – 21 of the Sections B – G Notice Response.

122. This ADC clarified its position during the Second Conference, that even though ‘drawing thin’ (relating to WT) was not a criterion for the MCC’s, it was directly related to weight, which was a consideration.<sup>48</sup> The ADC confirmed that the information received from the verified exporters included information on weight as part of the unit pricing information. The ADC also noted that copper is priced on the LME in USD per tonne for export sales and the weight of copper is the primary factor that determines the price of copper tube. The ADC concluded that the thickness of copper tube via weight of the copper was therefore incorporated into the analysis in the ADC’s calculation of the dumping margin. The ADC stated that it was satisfied that calculating the cost to make, using the MCC’s, and by having regard to weight, gives consideration to both domestic and export models, and that no adjustment to the normal value was required for differences relating to copper tube as a result of the ‘drawing thin’ process.<sup>49</sup>

123. During the Third Conference MM Kembla referred to its submissions during the investigation, that OD and WT should be included in the MCC structure, which had been rejected by the ADC. MM Kembla pointed out that the ADC had requested exporters to report the OD, WT and length of every domestic and Australian export sale that fell within the goods description (GUC), and had also asked exporters and interested parties to make submissions on what MCC sub-categories should be applied to WT, OD and length. MM Kembla pointed out that even Zhejiang Hailiang, in its Exporter Questionnaire Response had recommended, “that the comparison between domestic and Australian sales should be made between the same specifications, including outside diameter, WT and length, if required.” MM Kembla submitted that this recommendation was not considered by the ADC and no changes to MCC’s were made, and no adjustments were made to normal values for differences in the specification, OD, WT, fabrication or copper cost.<sup>50</sup>

124. MM Kembla also confirmed its submissions relating to the impact of OD and WT on fabrication costs, contending that this was relevant because different International Standards have a range of different OD and WT combinations and therefore different resulting fabrication costs. MM Kembla referred to its submission of the fabrication cost impact of WT, quoting a passage from its submission of 9

---

<sup>48</sup> See Paragraph 3a of the Second Conference Summary.

<sup>49</sup> See Paragraphs 18 – 21 of the Sections B – G Notice Response.

<sup>50</sup> See Section (i) on MCC structure, of Appendix A to the Third Conference Summary.

September 2021 which indicated that the thinner the WT (and lower the total weight of the product) the greater the increase in conversion cost on a \$/T basis, providing a specific dollar amount per tonne reduction in the variable conversion cost for every percentage increase of weight (thickness).<sup>51</sup> MM Kembla stated that the ADC's reference to this quoted passage in the Sections B – G Notice Response as an explanation of drawing thin, WT and actual weight was incorrect, since it actually related to the relationship of drawing thin to fabrication costs (not weight, as suggested by the ADC). According to MM Kembla this demonstrated the ADC's lack of understanding of the economics of manufacturing copper tube.<sup>52</sup>

125. MM Kembla clarified its discussion on the relationship between OD and WT on the one hand and "fabrication cost" on the other hand, as opposed to the "cost of copper", which MM Kembla contends is misunderstood by the ADC. MM Kembla clarified that the thinner the wall, the lower the weight (and cost of copper), but the higher the manufacturing (or fabrication) cost. I noted from this clarification that there was an inverse relationship between the wall thickness and fabrication costs, while there was a direct relationship between wall thickness and cost of copper.<sup>53</sup>

126. In commenting on the ADC's submission that WT was incorporated into its analysis via the consideration of weight, MM Kembla contended that the ADC also failed to recognise the distinction between selling and pricing based on 'nominal weight', rather than actual weight. MM Kembla submitted that copper tube is sold and priced based on its nominal weight or theoretical weight (as per the universally recognised formula)<sup>54</sup> and is then priced based on this nominal weight multiplied by a \$/tonne

---

<sup>51</sup> The relevant passage is reproduced below:

The thinner the wall thickness and lower the total weight of the product the conversion cost increases on a \$/T basis. In MM Kembla's experience every █% increase in weight equates to \$█/T reduction in variable conversion cost. The █% difference equates to \$█/t difference across the range due to the difference in the KS D5301 standard and AS1432. This equates to █% difference at the current LME copper cost. This is a material difference and should be a positive adjustment to the Nungwon normal value (so that the dumping margin truly reflects the difference in conversion cost between the domestic and export sales)."

<sup>52</sup> See Section (i) on MCC structure of Appendix A to the Third Conference Summary, page 2.

<sup>53</sup> See Paragraph 2(i) of the Third Conference Summary. It should be noted that in response to a further clarification request MM Kembla confirmed that the increase in fabrication costs (for thinner-walled products) definitely did not neutralise the full extent of the decrease in copper costs since copper was over 90 per cent of the cost of the product.

<sup>54</sup> The formula was set out by MM Kembla in point (a) at the bottom of page 3 of its written comments, attached as Appendix A to the Third Conference Summary:

price. MM Kembla contended that it was this unit weight figure (nominal weight) that the ADC took into consideration. MM Kembla pointed out that while the formula to calculate nominal weight includes WT and OD, there is a manufacturing WT an OD 'tolerance' built into the specified dimensions, and manufacturers will always manufacture to the lower end of this tolerance to reduce cost. According to MM Kembla, nominal weight is therefore distinguished from the actual weight of the product, which determines the cost of the copper in the finished goods sold. MM Kembla submitted that the ADC's consideration of weight, being 'nominal weight' (based on pricing as per the formula), would be significantly less than the actual weight, because of the tolerances and the practice of drawing thin.<sup>55</sup> In addition, MM Kembla submitted that by taking into account only the weight, meant that the ADC did not take into account the fabrication costs and the significantly differing pressures, cleanliness and other standard requirements across different markets, that were affected by drawing thin.<sup>56</sup>

127. MM Kembla also stated that based on all the public information from the exporter questionnaires, the exporters did not appear to do a detailed per unit cost calculation for each model and stated further that if the verification work was examined it was likely that the costs of all the differing models would be similar. It stated that in comparison, the MM Kembla verification would have shown varying fabrications costs for different OD and WT products and for plumbing and refrigeration tube, in accordance with MM Kembla's sophisticated costing system.<sup>57</sup>

### **Consideration in respect of (iii) MCC and International Standards and (iv) Drawing thin**

128. Neither International Standards nor WT were key characteristics identified by the ADC in formulating the MCC's, notwithstanding submissions by MM Kembla for these characteristics to be included, as well as a recommendation by the exporter, Zhejiang Hailiang, that the comparison between domestic and Australian sales should be made, "between the same specifications, including outside diameter, wall

---

"Copper tube is sold and priced based on its nominal weight ie the theoretical weight (kgs) is calculated by (Outside Diameter – Wall Thickness) x Wall Thickness x 0.0281 x length of the tube in metres"

<sup>55</sup> See Section (ii) on Drawing Thin, of Appendix A to the Third Conference Summary.

<sup>56</sup> See Section (ii) on Drawing Thin of the written version of MM Kembla's comments, attached as Appendix A to the Third Conference Summary and Paragraph 2(i) of the Third Conference Summary.

<sup>57</sup> See Paragraph 2(ii) of the Third Conference Summary.

thickness and length”. According to MM Kembla, the ADC had requested exporters to report the OD, WT and length of every domestic and Australian export sale that fell within the goods description, which meant that the information relating to WT was available to the ADC.

129. MM Kembla contended that it demonstrated that the resulting normal values for copper tube sold in China were manifestly under-stated due to the failure to adjust normal values for the identified physical differences relating to International Standards, in particular, ‘drawing thin’. The ADC was satisfied that the difference in standards and, in particular, difference in WT was incorporated into the analysis, through a unit weight figure (as a result of WT affecting the amount of copper used, with a related price and cost effect), which the ADC took into consideration in its analysis.

130. It was apparent from the submissions and clarifications, during the Second and Third Conferences, that the product model mix was complex with different combinations and ranges of OD and WT (resulting from differing standards). This appeared to create large variances in characteristics in the MCC’s, with differing effects on the weight and conversion costs (and therefore on total cost of production).

131. The ADC adopted a broad approach to the MCC’s, focussed on similarly costed and priced products being categorised in the same MCC’s. The ADC was satisfied that the MCC categories ensured that high cost exported models were compared with similar high cost models sold on the domestic market, and that in this way the MCC structure accounted for a differences in International Standards between goods (including WT). To substantiate its approach, the ADC stated it had analysed the weighted average (“WA”) cost for each MCC used in the dumping margin calculations and compared these with the cost to produce each specific model within that MCC category, and found that the WA cost closely aligned with the costs for each specific exported model. The ADC was also satisfied that the differences in thickness (WT) which resulted in different amounts of copper being used (which had a related price and cost effect) was addressed through a unit weight figure, which was part of the ADC’s consideration in its analysis. According to the ADC, an adjustment for difference in standards (or WT) was unnecessary since it was

accounted for by weight in the analysis, and in its view, there were no differences that affected price comparability within each MCC.

132. Throughout the review the ADC repeated the basis for its approach to establishing the MCC's (excluding International Standards and WT) and why an adjustment for difference in standards and / or WT was unnecessary. I had difficulty with the broad approach adopted and how it accounted for the very real physical differences (and the resulting non-linear cost differences) related to different International Standards and WT, as submitted and quantified by MM Kembla in some detail.

133. I consider that the ADC's reasons for the exclusion of WT (or International Standards) as a specific MCC criterion, is flawed and I found MM Kembla's arguments in this regard to be persuasive. It is undoubtedly correct that the thinner the tube, the less the weight (and amount of copper used), which has a significant effect on the cost and resulting price of the product, as contended by the ADC. However, it appears that this somewhat simplistic deduction by the ADC does not take into account the complex and inverse relationship between WT and conversion (or fabrication costs), bearing in mind that WT or 'drawing thin' significantly affects the product requirements relating to pressure, cleanliness and other standards, across different markets, further affecting fabrication costs. MM Kembla submitted details of this inverse relationship between thickness and fabrication costs, indicating that the, "thinner the wall thickness and lower the total weight of the product the conversion cost increases on a \$/T basis" and providing a specific dollar amount per tonne reduction in the variable conversion cost for every percentage increase of weight (thickness). I concluded that by including weight in its analysis, the ADC may have taken into consideration one of the cost effects of 'drawing thin', being the amount of copper used, but the ADC failed to also factor into its analysis, the effect of 'drawing thin' on fabrication costs, a complex and inverse relationship.

134. In addition, I noted the concerns of MM Kembla's relating to ADC's consideration of weight, being 'nominal weight' (based on pricing as per the standard industry-wide formula) and the contention that the ADC failed to recognise the distinction between pricing based on nominal weight, rather than actual weight, with nominal weight being significantly less than the actual weight because of the tolerances and the practice of drawing thin. I considered this to be a valid concern, which cast further

doubt on the ADC's methodology of establishing the MCC's, without taking WT (or International Standards) into consideration.

135. I concluded that the ADC's argument that by having regard to weight in the formulation of the MCC's had appropriately taken account of WT (a factor significantly differentiating International Standards) was significantly flawed. I consider that in formulating the MCC's the ADC did not have sufficient regard to major differences in physical characteristics (which significantly affected costs in complex ways) arising out of differing International Standards, and in particular, WT (or drawing thin).

136. For all the above reasons I consider that the ADC's decision not to include International Standards or WT (by the process of drawing thin) as a separate category in the MCC structure, or alternatively, by not making appropriate adjustments in the comparisons of normal value and export price, was not the correct or preferable decision.

## v) Capping and cleaning costs

### **MM Kembla Arguments**

137. MM Kembla stated that it provided the ADC with a submission demonstrating that the cost of cleaning and capping was not insignificant or immaterial, and that it should be included as an upward adjustment cost associated with the export of the refrigeration copper tube exported to Australia (required to be cleaned and capped).<sup>58</sup>

138. MM Kembla stated that the ADC required Zhejiang Hailiang to revise its domestic and Australian CTM to reflect the cost of capping based upon a quarterly cost, after Zhejiang Hailiang initially indicated that its cost of capping was included in its overhead costs, resulting in the costs being allocated across all production.<sup>59</sup> This related to MM Kembla's claim that the exporter's costing system did not separately capture all costs of all products, having an average fabrication cost, rather than a detailed per unit cost calculation for each model. MM Kembla based its view in this

---

<sup>58</sup> Reference was made to MM Kembla's submission to the ADC dated 14 May 2021.

<sup>59</sup> Reference was made to Table 1 of Zhejiang Hailiang Exporter Verification Report, page 6.

regard on the exporters' own statements in the exporter questionnaires and other public documents.

139. MM Kembla challenged the ADC's suggestion that capping costs are immaterial and submitted that the ADC did not cite the full capping and cleaning costs, as represented in MM Kembla's submission of 14 May 2021. MM Kembla submitted that it had quantified the capping and cleaning costs in its SEF 557 response submission to demonstrate the costs were not immaterial.<sup>60</sup>
140. MM Kembla stated that the ADC ignored MM Kembla's representations concerning capping and cleaning costs, and submitted that these costs cannot be considered insignificant or immaterial with a definite impact on the price of the goods sold in Australia. MM Kembla provided an example in its application for review, quantifying the variation in cost of manufacture and effect on price between the refrigeration tube AS1572 (cleaned and capped product) and plumbing tube AS1342 (uncapped and lower level of cleaning required), both being Australian Standard products.
141. MM Kembla submitted that the ADC's decision that the capping and cleaning costs were adequately incorporated into the CTM for the relevant model of MCC was incorrect and not the preferable decision.

### **ADC Position**

142. The ADC stated in TER 557 that it verified actual selling prices and costs for each exporter for each specific product code sold and was not satisfied that the cleaning and capping model characteristics indicated a material selling price and cost difference between domestic and export sales.<sup>61</sup>
143. The ADC stated that it examined the capping costs for each cooperating exporter throughout verification and observed that capping costs are not a material component of costs. The ADC stated further that it was also unable to identify a

---

<sup>60</sup> Reference was made to MM Kembla's submission in response to SEF 557 dated 4 October 2021 (Document #035 of EPR 557), pages 25 – 26.

<sup>61</sup> See TER 557, page 16.



material difference in selling price between capped and uncapped copper tube for the verified exporters.<sup>62</sup>

144. The ADC provided its general response to adjustments for conversion costs in TER 557:

*The commission has examined the specific models included in each MCC category and is satisfied that these contain both domestic and exported models. The commission has analysed the WA cost for each MCC used in the dumping margin calculations and compared these with the cost to produce each specific model within that MCC category. On each occasion, the commission has found that the highest cost within the MCC is for a domestic model and the WA cost closely aligns with the costs for each specific exported model. On this basis, the commission is satisfied that through calculating the cost to make (CTM) using the MCCs gives consideration to both domestic and export models and therefore, no adjustment to the normal value is required.<sup>63</sup>*

### **The Notice, the Sections B – G Response, the Second Conference and the Third Conference**

145. I sought further information from the ADC and clarifications of its findings and reasoning in respect of capping and cleaning costs, in the Notice and during the Second Conference. During the Third Conference, MM Kembla was provided with an opportunity to comment on the Sections B – G Notice Response and the relevant clarifications and further information provided during the Second Conference.

146. The ADC, in the Sections B – G Notice Response stated that:

- it uses a MCC system to set out the different characteristics of the goods which give rise to distinguishable and material differences in price.
- It used the MCC system to consider and compare products falling within the goods description for copper tube at a granular level, including those of

---

<sup>62</sup> See TER 557, page 21. The ADC stated that the details of the analysis conducted by verification teams was outlined in the relevant verification reports.

<sup>63</sup> See Section 6.2.2 of TER 557, page 34.

uncapped and capped copper tube, to ensure a fair comparison is made between the export price and normal value.

- It verified capping costs for each specific product code sold by the verified exporters using the MCC framework and did not identify a material difference in selling price between capped and uncapped copper tube for the verified exporters.
- It examined the specific costs associated with capping within the financial documents of each of the verified exporters, stating that the additional costs associated with the polyvinyl chloride (PVC) cap used by Hailiang for capping were minimal, with capping costs making up less than ■ per cent of the total cost to make. It was noted that in certain instances the capped product was cheaper than the uncapped product.<sup>64</sup>

147. During the Third Conference, MM Kembla stated:

- That capping and cleaning costs for refrigeration copper tube (as required by Australian Standard) extended beyond the cost of the plastic caps, as suggested by the ADC, and also included, for example, secondary cleaning cost, labour costs and additional handling costs.
- The lower cost of capped product evidenced in China is driven by ‘drawing thin’ on the copper to reduce costs in a highly competitive unregulated refrigeration market in China (which is the largest market segment in the domestic market).
- It had in its submissions demonstrated (verified by the ADC) that the refrigeration products sold in Australia (compliant to the Australian Standard), had a higher standard cost and selling price, compared to plumbing tube (compliant to the Australian Standard), noting that plumbing tube is not capped nor cleaned to the same standard as refrigeration tube.<sup>65</sup>

---

<sup>64</sup> See Paragraphs 22 – 24 of the Sections B – G Notice Response.

<sup>65</sup> MM Kembla’s provided quantification of the its increased cost of production of a tonne of refrigeration tube to Australian standards (requiring capping and cleaning) compared to plumbing tube, with prices also proportionately higher.

- The fact that both domestic and export Chinese (and Korean) tube did not have an increase in cost or price (due to cleaning and capping costs) is driven by the following factors:
  - a. the exporter's own admission during verification, that they do not separately capture these costs in their ERP system and therefore all products have an average fabrication cost.
  - b. Most of the tube manufactured by China (and Korean) producers are destined for the refrigeration markets which is larger by far than the plumbing market, with the Australian market being the reverse, that is largely plumbing. According to the ADC the very large and unregulated refrigeration market in China means drawing thin is a feasible way to reduce costs. MM Kembla made reference to a Chinese supplier of MM Kembla offering "thin" product to reduce cost, which explained why capped or refrigeration products was often cheaper than plumbing products (uncapped) in the domestic market.<sup>66</sup>
- It was only possible for plumbing and refrigeration products sold in and exported from China, to be similarly priced (with refrigeration tube in many cases, cheaper) through drawing refrigeration tube thinner in the China market and making a substantial saving in the copper cost.<sup>67</sup>

## Consideration

148. There would appear to be substantial difference in the cleaning and capping costs, associated with refrigeration products, as reflected in MM Kembla's and the exporters' accounts, respectively. The ADC stated in TER 557 that capping costs are not a material component of the exporters' costs, with capping costs making up a minimal amount of the total cost to make. The ADC stated that it was also unable to identify a material difference in selling price between capped and uncapped copper tube for the verified exporters, and in certain instances the capped products were cheaper than the uncapped product.

---

<sup>66</sup> See Section (iii) on Capping and Cleaning Costs, of Appendix A to the Third Conference Summary.

<sup>67</sup> See clarifications of Section (iii) on Capping and Cleaning Costs, in Appendix A to the Third Conference Summary.

149. MM Kembla disputed that capping costs were immaterial and submitted that the ADC did not have sight of the full capping and cleaning costs of the exporters, which extended beyond the cost of the plastic caps that the ADC referred to, (for example, secondary cleaning cost, labour costs and additional handling). MM Kembla had demonstrated that the capped refrigeration products sold in Australia (compliant to Australian standards) have a higher standard cost with the selling price proportionately higher when compared to uncapped plumbing product (compliant to the Australian standard), which is not cleaned to the same standard. This was based on MM Kembla's detailed verified information.

150. MM Kembla's submissions during the investigation, in regard to this issue, were detailed and based on verified costing information, and they were not disputed in any way by the ADC. I found them to be persuasive. MM Kembla's claimed the discrepancy in the Chinese exporter's accounts that did not show increased costs for cleaning and capping, was due to the exporters' costing systems not separately capturing these costs and all products having an average fabrication costs. MM Kembla based its view in this regard on the exporters' statements in the exporter questionnaires and other public documents, and claimed in various submissions that the exporters did not have a detailed per unit cost calculation for each model, as was the case with MM Kembla. Since the exported products would have been required to meet the same Australian standards as MM Kembla, the discrepancy in the exporters' per unit cleaning and capping costs, should have raised questions for the ADC as to whether the exporters' costing system effectively captured the specific costs, as reasonably argued by MM Kembla. The ADC did not appear to follow-up on this line of enquiry.

151. MM Kembla submitted that most of the tube manufactured by China and Korean producers are for the refrigeration market, with very little tube used for plumbing (with the Australian market being the reverse). According to MM Kembla this large, competitive and unregulated market means that 'drawing thin' is a way to substantially reduce costs, an explanation as to why capped products can be cheaper in the domestic market than uncapped plumbing products. MM Kembla argued that lower pricing for refrigeration products is only possible through drawing refrigeration tube thinner, with substantial saving in copper cost, overshadowing the additional cleaning and capping costs.

152. The ADC appeared to only superficially address MM Kembla's detailed submissions and costings differences, such as focusing on the PVC cap used by Hailiang for capping to come to the conclusion that capping costs were minimal, without considering the other elements of the cleaning and capping costs referenced by MM Kembla. The ADC did not address the possibility put forward by MM Kembla that the costs of cleaning and capping were overshadowed by the savings on copper through the practice of drawing refrigeration tube thinner, in the large competitive and unregulated refrigeration market in China. The deficiencies of not taking WT (or drawing thin) into consideration in forming the MCC's or making relevant adjustments in relation to fabrication costs (which are also relevant in this sub-ground of review) have been discussed above.

153. For all the above reasons I consider that the ADC's decision that it is satisfied that an adjustment to normal value for differences in capping and cleaning costs is unnecessary, was not the correct or preferable decision.

#### vi) Copper volatility

##### **MM Kembla Arguments**

154. MM Kembla submitted that the ADC did not make any adjustment to normal value to account for the volatility in the raw material copper price. It submitted that to accurately compare export sales prices with domestic prices, the ADC should have made due allowance under s.269TAC(8) to address differences in copper pricing between the two markets. It contended that such an adjustment was required in the absence of fair comparison between domestic and export sales at order placement date.

155. MM Kembla's referred to the ADC's statement that, to make an adjustment for copper volatility, it would require "evidence to suggest that copper price volatility affects price comparability between domestic and export markets." MM Kembla stated that in its submission to the ADC of 9 November 2021, it demonstrated the volatility on copper pricing and included the inter-monthly movements, monthly average movements, inter-month Low-High movements for copper across the investigation period, as well as on a quarterly basis. MM Kembla submitted that the volatility in the LME copper price during the 2019-20 investigation period far exceeded the ADC's claimed "falls of under 2%".

156. MM Kembla contended that the ADC should, based on the evidence before it as provided by MM Kembla and readily available from third party industry analysis in relation to domestic and global copper markets, have concluded that the volatility in the copper price during the period of investigation was significant and material.
157. Further, MM Kembla contended that a comparison of quarterly weighted average normal values and export prices was not appropriate; and submitted that a more appropriate basis for fair comparison purposes that was available to the Commissioner and that more accurately reflected the commercial terms and industry practices for copper tube sales involved a transaction by transaction comparison of domestic and export prices utilising order date (as per s.269TACB(3) of the Act).
158. MM Kembla contended that the ADC's failure to accurately assess the volatility in the copper price during the investigation period contributed to an understatement of the exporter's actual costs to make and sell the exported goods. It contended further that the exclusion of an adjustment to correctly price copper in the exporter's normal value for fair comparison purposes with export prices understated the actual margin of dumping for exports from China by Zhejiang Hailiang.
159. MM Kembla submitted that the movement in copper price from the date of order placement to invoice can be substantial and, given the longer lead time (up to three months) for export sales, it is not reasonable to compare domestic sales with export sales at date of invoice due to the volatility in the copper price that evolves over this period. Therefore it contended that the decision to not adjust normal values for copper volatility was not the correct or preferable decision.<sup>68</sup>

### **ADC Position**

160. The ADC stated in TER 557 that it had assessed the volatility of copper prices on a quarterly basis on the LME and noted that these are in the range of falls of approximately 5 per cent and increases of approximately 2 per cent. It further stated that it had also assessed the differences in the cathode copper price on the LME on a monthly basis and has found that the differences are both increases and falls of

---

<sup>68</sup> In TER 557 MM Kembla submitted that adjustments to the normal value are necessary to address this volatility and provided alternative methods of adjustments that would have regard to the volatility of the copper price. See TER 557, page 32.

under 2 per cent in the majority of months during the investigation period. The ADC stated that it did not consider these changes in copper prices to be significant and therefore, a comparison of quarterly weighted average (WA) normal values and export prices was appropriate.<sup>69</sup>

161. The ADC stated further that in order to make the adjustments as suggested by MM Kembla under s.269TAC(8), the ADC would need to be satisfied that these adjustments are necessary for price comparability, such that the normal value under s.269TAC(1) cannot be compared to the export price under s.269TAB(1). The ADC concluded that given the circumstances of each exporter, it had not been provided with any evidence to suggest that copper price volatility affected price comparability between domestic and export markets.<sup>70</sup>

162. The ADC stated further that it also compared the sales order dates and invoice dates for both domestic and export sales for all cooperative exporters for a sample of sales transactions used for the verification of sales. The ADC found that the number of days between sales order date and invoice date is not significant (and substantially less than the 3 months submitted by MM Kembla). The ADC found on average for at least one exporter, that the number of days between sales order date and invoice date was more for domestic sales than export sales. Therefore, the ADC disagreed with MM Kembla's claim that there is a mismatch between export and domestic sales.

163. The ADC concluded that it was not satisfied that any adjustments under s.269TAC(8) should have been made to the normal value for any exporter to account for MM Kembla's alleged volatility of copper prices.

### **The Notice, the Section A Response, the Second and the Third Conference**

164. I sought further information from the ADC and clarifications of its findings and reasoning in respect of copper volatility, in the Notice and during the Second Conference. During the Third Conference, MM Kembla was provided with an

---

<sup>69</sup> See TER 557, page 33.

<sup>70</sup> See ADC's assessment, TER 557, page 33.

opportunity to comment on the Section A Notice Response and the relevant clarifications and further information provided during the Second Conference.

165. The ADC reiterated its disagreement with MM Kembla's submission that the copper price variations between order date and the date of invoice, were significant.<sup>71</sup> It stated that it had undertaken further analysis and calculated the average monthly movement based on LME pricing, and in order to clarify the range of fluctuations:

- in 10 out of the 12 months of the investigation period, the month-to-month difference was below 5 per cent.
- for the remaining two months, the fluctuations were less than 10 per cent.
- from the start of the year to the end of the year, the difference in the LME Ex-works (EXW) copper price was less than 0.3 per cent.<sup>72</sup>

166. The ADC stated that the approach adopted in the investigation was consistent with standard and established ADC practice based on the evidence before it in relation to cost and selling price ranges. The ADC stated further that its approach was to adopt a quarterly analysis, unless there are sufficient changes in costs and/or prices over short periods within the investigation period (as per the Manual).<sup>73</sup> It stated that in this investigation, Australian industry and cooperative exporters provided data to the commission on a quarterly basis, and that it did not consider it more appropriate to compare the normal values and export prices on a monthly weighted average basis as compared to quarterly weighted average basis.

167. The ADC stated that it did not use s.269TACB(3) as there was sufficient information available to ascertain export prices under s.269TAB(1). In addition, the ADC noted that s.269TACB(3) would not be suitable because the export prices did not vary significantly between purchasers, regions, or over time.<sup>74</sup>

168. During the Second conference I requested clarification in regard to the ADC's disagreement with MM Kembla on the materiality of change in copper price. The

---

<sup>71</sup> See TER 557, page 33.

<sup>72</sup> See Paragraph 14 of the Section A Notice Response and Confidential Attachment 2 thereto.

<sup>73</sup> Reference was made to the Manual, pages 95-96.

<sup>74</sup> See Paragraphs 12 –18 of the ADC's Section A Notice Response and Worksheet A -4 of Confidential Attachment 2 thereto for the ADC's analysis of export prices.



ADC referred to the relevant Worksheet of Confidential Attachment 2 to the Section A Notice, showing the average monthly and quarterly variations of the copper price. The ADC confirmed that the general practice of the ADC is to consider the data on a quarterly basis, considered to be the most accurate comparison for the calculations since it averages out any of the larger fluctuations which could occur on a daily basis or a monthly basis. The ADC submitted that the additional analysis supported the use of the quarterly averages rather than monthly averages.<sup>75</sup>

## Consideration

169. I agree with the ADC's statement that in order to make an adjustment for copper volatility, it would require "evidence to suggest that copper price volatility affects price comparability between domestic and export markets." This is in accordance with the ADC's policy, which also reflects WTO law, that due allowance be made in each case on its merits, for differences which "affect price comparability".
170. It is undisputed that the price of copper, which constitutes the major input of the product (constituting over 90 per cent of the cost), is volatile and that price fluctuations of copper prices occur. MM Kembla and the ADC differed as to whether the copper price volatility was significant. MM Kembla contended that the ADC should have concluded that the volatility in the copper price during the period of investigation was significant and material, and submitted that during the investigation period it far exceeded what the ADC's claimed. The ADC disagreed with MM Kembla's submission that the price variations are significant and found that a comparison of quarterly weighted average (WA) normal values and export prices was the most appropriate in addressing fluctuations.
171. I reviewed the ADC's analysis of the average monthly and quarterly copper price variations in Confidential Attachment 2 to the Section A Notice Response. I agreed with the ADC's conclusions relating to materiality of the fluctuations. I also agreed with the ADC's conclusion that a consideration of the data on a quarterly basis appeared to be the most accurate comparison since it averaged out larger fluctuations which could occur on a daily basis or a monthly basis. I agreed with the ADC's conclusion that a comparison of quarterly weighted average (WA) normal values and export prices was the most appropriate in addressing fluctuations, noting

---

<sup>75</sup> See Paragraph 13 of the Second Conference Summary.

that this approach was consistent with established ADC practice. I also noted that the Australian industry and cooperative exporters provided data to the commission on a quarterly basis. I considered that the ADC's analysis supported the use of the quarterly averages rather than monthly averages.

172. In making this claim for adjustment, MM Kembla had also focussed on the difference in timing for delivery in the domestic and export market, contending that the movement in copper price from the date of order placement to invoice can be substantial, given the longer lead time of "up to three months". On reviewing the relevant worksheets of Confidential Attachment 2 to the Section A Notice Response, I confirmed the ADC's finding that the number of days between sales order date and invoice date was substantially less than the 3 months submitted by MM Kembla (and for at least one exporter, was longer for domestic sales than export sales).<sup>76</sup> This detracted from MM Kembla's argument. I considered that it had not been demonstrated that there was, consistently, a material difference between the price of copper applicable to production of domestic products and the production of exported products, at the time of comparison, to satisfy one of the requirements for an adjustment claim to be successful.

173. In addition, although MM Kembla provided evidence of copper price volatility, I do not consider that it provided evidence demonstrating that copper price volatility actually affected the setting of prices (that is, that it affected price comparability between domestic and export markets), in accordance with the requirement for an adjustment. Although hedging is not part of this particular sub-ground of review,<sup>77</sup> the practice of hedging in this industry (to ensure that pricing and profitability is not adversely affected by copper price volatility), would seem to me, to detract from the contention that the copper price volatility affected the setting of prices differently for the domestic and export prices.

174. For all the reasons discussed above I consider that the decision to not make adjustments for copper volatility was the correct or preferable decision.

---

<sup>76</sup> See Worksheets A-1, A -2 and A -3 of Confidential Attachment 2 to the Section A Notice Response.

<sup>77</sup> Hedging costs and hedging gains or losses, is in fact the subject of another adjustment claim by MM Kembla, discussed below.

## vii) Hedging Costs and Gains & Losses

### **MM Kembla's Arguments**

175. In its application for review, MM Kembla referred to its response to SEF 557 where it detailed the use of copper hedging by copper tube manufacturers,<sup>78</sup> exposed to the risk that the copper price will increase between the time at which the sales order price is fixed and the invoice date. MM Kembla points out in that submission that manufacturers will hedge this risk by buying forward derivative contracts on the LME that match the expected physical delivery date or adjusting the hedge book. MM Kembla further points out that gains and losses on the hedge contract or hedge book adjustment will offset the exposure created by taking the fixed price sales order.<sup>79</sup>

176. MM Kembla stated that for Zhejiang Hailiang all hedging was undertaken by its related trading company, Hailiang HK. MM Kembla highlighted that Hailiang HK incurred significant hedge losses during the investigation period.

177. MM Kembla submitted that it is irrefutable that industry practice involves the hedging of copper by copper tube manufacturers and referred to a statement by Zhejiang Hailiang that, "The copper hedge contracts are designed solely to eliminate the risks to profits of future sales from copper price fluctuation, by locking in a purchase price at future sales price."<sup>80</sup>

178. MM Kembla stated that it had provided the ADC with examples of the impact of hedging on copper tube contracts and submitted that the ADC dismissed its representations and accepted the explanations of the Chinese exporter. It submitted further that the ADC's stance to ignore the costs of hedging and to consider hedging practices as not relevant to pricing determinations, was misguided and incorrect.

---

<sup>78</sup> MM Kembla's submission in response to SEF 557 dated 4 October 2021, pages 4 – 5.

<sup>79</sup> See Attachment 2 to MM Kembla's application for review, page 14.

<sup>80</sup> Reference was made to Zhejiang Hailiang's submission of 15 October 2021 (EPR Document #041), page 3.

179. MM Kembla contended that the ADC's decision to not account for hedging gains/losses on export sales via the application of reasonable and proportionate adjustments to normal value is incorrect and not the preferable decision.

### **ADC's Position**

180. In TER 557, the ADC considered MM Kembla's claim that hedging costs should be included to ensure a fair comparison between domestic and export selling prices. The ADC noted that adjustments to the normal value are permitted in prescribed circumstances under s.269TAC(8) and pursuant to that section, where the normal value is the price paid or payable for like goods and that price and the export price: (i) relate to sales occurring at different times (ii) are not in respect of identical goods, or (iii) are modified in different ways by taxes or the terms or circumstances of the sales to which they relate. The ADC noted that adjustments may be made to the normal value so that those differences would not affect its comparison with that export price.

181. The ADC in TER 557 referred to Zhejiang Hailiang's submission that hedging contracts are used for both export and domestic copper purchases, and that it relies on the same information for its copper prices used to determine export and domestic selling prices. Further the ADC referred to Zhejiang Hailiang's submission that it does not take a position by speculating on future price fluctuations on its hedging contracts with a view to achieving additional profit, and that its copper hedging contracts are designed solely to eliminate the risks to profits of future sales from copper price fluctuations, by locking in a purchase price at future sales prices and this applies to both domestic and export sales. Therefore, it was submitted that there was no difference in costs or prices of the domestic and export sales caused by the hedging positions, and as such no adjustment was necessary.<sup>81</sup> The ADC in TER 557 also referred to Nungwon's submission that hedging contracts cover the risks of the LME price movement and are not used in setting export prices.<sup>82</sup>

182. The ADC stated in light of the evidence put forth by MM Kembla and Zhejiang Hailiang, it did not consider that there was a price comparability issue associated with hedging, such that an adjustment is warranted under s.269TAC(8). The ADC

---

<sup>81</sup> Reference was made to Documents #035 and #041 of EPR 557.

<sup>82</sup> Reference was made to Document #038 of EPR 557.

stated that it had been provided with the hedging gains/losses reported by Hailiang HK during the investigation period and Hailiang HK has reported a hedging gain during this period, and not a loss as suggested by MM Kembla, which, the ADC submitted, by MM Kembla's own formula would lead to a downwards adjustment. Irrespective of this, the ADC did not consider that an adjustment relating to gains or losses on hedging had any relevance to the setting of prices that necessitated an adjustment under s.269TAC(8).

183. The ADC was not satisfied that any adjustments under s.269TAC(8) should be made to the normal value for any exporter to account for hedging gains or losses.<sup>83</sup>

### **The Notice, the Section A Response, the Second, Third, Fourth and Fifth Conferences**

184. Since I considered this issue to be somewhat complex and I found that there was some confusion in the submissions documents between 'hedging costs' (the costs of entering and purchasing hedging contracts) and 'hedging gains and losses', I sought further information from the ADC and clarifications of its findings and reasoning in respect of this issue, in the Notice and during the Second Conference. I also found that there was some overlap in the submissions on the issue of hedging as it related to 'date of sale' and as it related to adjustments claimed by MM Kembla.

185. During the Third Conference, MM Kembla was provided with an opportunity to comment on the Section A Notice Response and the relevant clarifications and further information provided during the Second Conference, and during the Fourth Conference further clarification was sought from the ADC. During the Fifth Conference, MM Kembla was provided with an opportunity to comment on the further information provided by the ADC during the Fourth Conference.

186. MM Kembla's position with regard to hedging costs and hedging gains or losses was as follows:

- MM Kembla claimed that hedging costs and hedging gains or losses relating to purchases of raw materials and sales of finished goods, were borne by

---

<sup>83</sup> TER 557, pages 33 - 34.

Hailiang HK<sup>84</sup> (which was not verified), and have not been considered in normal value and export price determination.

- MM Kembla submitted that, the ADC's comment that the hedging costs and gains or losses not borne by the manufacturer are not relevant in the determination of the exporter's normal value and export price, was incorrect and that the exclusion of a directly related cost to the manufacturing and selling of copper tube was erroneous.
- MM Kembla submitted that pricing can only be fixed on customer orders if hedges are put in place, so there is a direct link to price (using an LME Benchmark) and to ignore this with a volatile commodity like copper when it represents 90 per cent of the sale price demonstrates the lack of understanding of the economics and risks associated with copper tube.
- MM Kembla contended that Hailiang Australia's profitability (as determined by the ADC) was incorrect because it only included one side of the hedging transaction. MM Kembla submitted that this resulted in Hailiang Australia selling at a loss, because Hailiang HK is doing the hedging of Hailiang Australia's sales, with Hailiang Australia being immune from any variation in the copper price. MM Kembla stated that this cost cannot be ignored particularly for the Hailiang Australia, a related completely protected from any hedge gains or losses accounted for by Hailiang HK.
- MM Kembla's submitted that the normal value should be increased through a s.269TAC(8) adjustment.

187. The ADC's position with regard to hedging costs and hedging gains or losses was as follows:

- The ADC stated that during verification, it did not identify hedging costs in the accounting records of Zhejiang Hailiang (or Hailiang Australia), noting that hedging costs were incurred by the trading entity, Hailiang HK.

---

<sup>84</sup> MM Kembla stated that it was made clear from one of the exporter responses that Hailiang HK managed all the hedging for all businesses across Hailiang, in all countries, in relation to all raw materials held and sold globally.

However, it was stated that all relevant financial costs (which could include hedging costs), were considered for each cooperative exporter during verification as part of the calculation relating to the cost to make and sell (CTMS), as an indirect cost.<sup>85</sup>

- The ADC stated that Hailiang HK's information was not verified (so there was no verification report or work program), but that the information that related to Hailiang HK would be reflected in the accounts and would form part of the Exporter Work Program for Zhejiang. It was confirmed that the information would have been used in calculating the SG&A for Hailiang HK and the export price.<sup>86</sup>
- The ADC stated that in the calculation of export price the ADC deducted any hedging costs which might form part of Hailiang HK's SG&A costs (finance costs). It further stated that in the assessment of Hailiang Australia's profitability, all expenses relevant to importation were taken into account when calculating profitability. The ADC reiterated that there was no reference to, or treatment of, hedging gains and losses in the accounts of Hailiang Australia or Zhejiang Hailiang in China and no evidence of any effect of hedging on the profitability of Hailiang Australia.
- The ADC's view was that hedging costs should not be considered as deductions or adjustments to the normal value, regardless of whether the exporters make a hedging loss or gain.
- The ADC clarified that it did not identify any differences in hedging costs between the export and domestic sales and clarified that at verification the ADC did not identify any hedging costs incurred by any of the manufacturers, in respect of either export or domestic sales. The ADC also pointed out that there is no evidence to suggest that hedging gains or losses are included in price setting.<sup>87</sup>
- The ADC was not satisfied that an adjustment to the normal value, for hedging gains or losses incurred by the exporter (or an entity related to the

---

<sup>85</sup> See Paragraphs 7 – 10 and 19 – 22 of the ADC's Section A Notice Response.

<sup>86</sup> See Paragraph 6f of the Second Conference Summary.

<sup>87</sup> See Paragraph 6e and 6f of the Second Conference Summary.

exporter), under s.269TAC(8) was necessary as it did not consider it to be a direct selling expense, nor did it “affect the comparison with that export price.”

188. During the Fifth Conference MM Kembla pointed out some discrepancies in the submissions of the ADC relating to whether and how hedging costs were taken into account and deducted from the export price. MM Kembla stated that the confusion as to the treatment of hedging costs and hedging gains or losses arose from the fact that all hedging activity took place in Hailiang HK, and Since Hailiang HK was not verified, it was difficult to understand how hedging costs and gains or losses were treated in the accounts of Hailiang HK.<sup>88</sup>

### Consideration

189. The subject of hedging relating to the production and sale of copper tube is complex, especially in relation to: (i) how the hedging activity and associated costs and profits (or losses) are reflected in the accounts of the various entities involved in the production and sale of the products; and (ii) the impact on the calculation of the dumping margin, particularly the export price.

190. The complexities are exacerbated in this matter by the fact that all the hedging activity took place in the Hong Kong trading company, Hailiang HK,<sup>89</sup> which was not verified. Both Zhejiang Hailiang, the manufacturer/exporter, and Hailiang Australia, the importing entity, were subject to verification by the ADC.

191. MM Kembla is claiming that the ADC should have made an adjustment to the normal value of the exporters pursuant to s.269TAC(8) for hedging costs and hedging gains or losses associated with the production and sale of the product. It is also claiming that hedging costs and hedging gains/losses, which were borne by Hailiang HK, have not been considered in the export price determination. MM Kembla contends that Hailiang Australia’s profitability (as determined by the ADC) is incorrect because it only includes one side of the hedging transaction, since Hailiang HK is doing the hedging of the Australian sales, with Hailiang Australia

---

<sup>88</sup> See Paragraph 2(b) of the Fifth Conference Summary.

<sup>89</sup> This was contended by MM Kembla, acknowledged by Zhejiang Hailiang and undisputed by the ADC.



immune from any variation in the copper price and protected from hedge gains and losses, which are accounted for by Hailiang HK.

192. There appears to be continuing uncertainty as to how costs and gains/losses associated with hedging were treated in the accounts of Hailiang HK, and how that affected the profitability of Hailiang Australia and the calculation of the dumping margin, since there was, unfortunately, no verification of Hailiang HK.
193. As discussed above, and in accordance with ADC policy and WTO law, a successful claim for an adjustment (in this case for costs and gains/losses associated with hedging), would require “evidence” demonstrating that, firstly, there was some difference between the hedging costs or gains/losses applicable to domestic and export products respectively, and secondly, that such differences affected price comparability.
194. There appears to be no evidence demonstrating (or even suggesting) that there was a difference in the hedging costs or gains/losses that were applicable to domestic and export products, respectively. In fact, the ADC in REP 557 referred to Zhejiang Hailiang’s submission that hedging contracts are used for both export and domestic copper purchases, and that it relied on the same information for its copper prices used to determine export and domestic selling prices. During the Second Conference, the ADC stated that it did not identify any differences in hedging costs between the export and domestic sales and further clarified that at verification the ADC did not identify any hedging costs incurred by any of the manufacturers, in respect of either export or domestic sales.<sup>90</sup>
195. There is also no evidence to suggest that any aspect of hedging activity affected the setting of prices at the time that the contract was entered into, or so-called “price comparability”. During the Second Conference the ADC confirmed that there was no evidence to suggest that hedging gains or losses are included in price setting.<sup>91</sup> The ADC referred to Zhejiang Hailiang’s submission that it does not take a position by speculating on future price fluctuations on its hedging contracts with a view to achieving additional profit, and that its copper hedging contracts are designed solely to eliminate the risks to profits of future sales from copper price fluctuations, by

---

<sup>90</sup> See Paragraph 6e of the Second Conference.

<sup>91</sup> See Paragraph 6f of the Second Conference.

locking in a purchase price at future sales prices and that this applies to both domestic and export sales. The parties could not know whether they would make foreign exchange gain or loss, at the time of entering the contract and the setting of price, and could not therefore knowingly adjust price for a future hedge loss or gain. Therefore, I do not consider that hedging can be considered to be a factor affecting price comparability.

196. In addition, the very purpose of hedging in this industry is to reduce or remove the risk associated with the volatility of the copper price, so that pricing and future profitability is not adversely affected by changes in the copper price during the period between order and invoice. This would also seem to detract from any contention that hedging affects price comparability. Even if it was later determined that there was a difference in hedging costs or gains/losses associated with the sale of domestic and exported products, respectively, it could not affect price comparability retrospectively to the time the sale was made.

197. For all the reasons discussed above I consider that the Commissioner's decision to not make adjustments for hedging costs or hedging gains /losses was the correct or preferable decision.

## Findings - Normal Value Adjustments

198. The following is a summary of the findings of the sub-grounds of review relating to normal value adjustments under this ground of review:

- The decisions relating to the following sub-grounds were found to be the correct or preferable decisions: (i) Particular Market Situation (ii) Cost of Scrap Copper (vi) Copper volatility, and (vii) Hedging costs and hedging gains/losses.
- The decisions relating to the following sub-grounds of review were not found to be the correct or preferable decisions: (iii) MCC's and International Standards; (iv) Drawing Thin; and (v) Capping and Cleaning costs.

## Ground 3: Decision concerning arms length sales between Hailiang HK and Hailiang Australia is not correct or preferable

### MM Kembla's Arguments

199. MM Kembla referred to the decision in TER 557 that while the ADC was not satisfied of the arms length nature of the transactions between Zhejiang Hailiang and Hailiang HK, it was "satisfied" of the arms length nature of export sales between Hailiang HK and the related importer, Hailiang Australia. MM Kembla challenged the latter part of the decision and considers that the finding of the arms length nature of the export sales between Hailiang HK and Hailiang Australia was not the correct or preferable decision. MM Kembla also contends that the Commissioner's recommendation on export price for Zhejiang Hailiang is not the correct or preferable decision.

200. MM Kembla referred to s.269TAA(1) of the Act,<sup>92</sup> and submitted that the existence of rebates paid by the exporter to Australian customers, along with the fact that the selling price from Zhejiang Hailiang to Hailiang HK did not recover all costs, categorises the export sales by Zhejiang Hailiang as 'non arms length'. MM Kembla stated that the ADC rejected MM Kembla's representations on these points and maintained that the selling price from Hailiang HK to Hailiang Australia could be considered arms-length, which MM Kembla considers is incorrect.

201. MM Kembla stated that it disagreed with the ADC's submission that, "off-invoice rebates have been considered in its assessment of the 'arms length' nature of

---

<sup>92</sup> Section 269TAA(1) of the Act states:

"For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:

- (a) There is any consideration payable for or in respect of the goods other than their price; or
- (b) The price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
- (c) In the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price."

transactions and in profitability calculations of the importer”.<sup>93</sup> MM Kembla submitted that it notified the ADC in the context of Exporter Briefings in INV 557 that [REDACTED]

[REDACTED].<sup>94</sup> MM Kembla pointed out that [REDACTED]

202. MM Kembla contended that the off-invoice rebates represented a consideration other than price and that at least one of the provisions of s.269TAA(1) had been met. According to MM Kembla, a further requirement, identified in s.269TAA(1)(b), was also met as the selling price between Zhejiang Hailiang and Hailiang HK clearly affected the selling price, as it was determined at less than full cost recovery. MM Kembla submitted that the payment of the off-invoice rebates renders selling prices between Hailiang HK and Hailiang Australia non arms length, and that the Commissioner’s decision was incorrect and not the preferable decision.

203. MM Kembla referred to the deductive export price calculations included in its response to SEF 557 ( in Confidential Attachment 1 thereto). It submitted that these calculations demonstrated that, based upon prevailing selling price for imported copper tube sold by Hailiang Australia during the investigation period, the importer was not recovering all costs, including the cost of copper as determined by prevailing LME copper prices.

204. MM Kembla submitted that the ADC refused to consider its representations that Hailiang Australia’s selling prices are not arms length, preferring instead to examine only whether the selling price from Hailiang HK to Hailiang Australia is recovered in Hailiang Australia’s customer selling prices. MM Kembla contended that the ADC’s methodology failed to consider the full effects of the export transactions from the manufacturer (Zhejiang Hailiang) via its related-party trader and related party Australian importer.

205. MM Kembla submitted that it had demonstrated, by virtue of the off-invoice rebates paid by Zhejiang Hailiang and the below cost selling price from Zhejiang Hailiang to

---

<sup>93</sup> Reference was made to Sections 6.3.2 of TER 557, page 36 - 37.

<sup>94</sup> MM Kembla stated that the rebates [REDACTED]

See Confidential

Attachment 2 to MM Kembla’s application for review, page 16.

Hailiang HK, that the export selling prices for goods manufactured by Zhejiang Hailiang were not non-arms length and that the decision was, therefore, not the correct or preferable decision.

## ADC Position

206. The ADC stated in TER 557 that MM Kembla's deductive export price calculation included a number of assumptions and estimates, while the ADC was in possession of actual costs and selling prices that were used in Hailiang Australia's profitability assessment. The ADC stated that it therefore did not consider the calculation presented by MM Kembla to be an accurate reflection of Hailiang Australia's ability to recover costs.<sup>95</sup>

207. The ADC stated that it had observed the 'arms length' nature of each stage of the importation process and considered that the price between Zeijiang Hailiang and Hailiang HK appeared to be influenced by a commercial or other relationship between the buyer and the seller. The ADC considered that Hailiang HK's profit margin in relation to these sales was insufficient to cover its selling, general and administration (SG&A) expenses and therefore, concluded that the transactions between Zeijiang Hailiang and Hailiang HK were not 'arms length' transactions.

208. In respect of Hailiang HK's sales of the goods to Australia during the period, to related and unrelated customers, the ADC considered the sales to be 'arms length' as it found no evidence that: (i) there was any consideration payable for, or in respect of, the goods other than its price; or (ii) the price appeared to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or (iii) the buyer, or an associate of the buyer, was directly or indirectly reimbursed, compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.<sup>96</sup>

209. The ADC stated in TER 557 that it did not consider that a deductive export price calculation was necessary where transactions are found to be 'arms length' between the exporter and importer and also confirmed that off-invoice rebates were

---

<sup>95</sup> See TER 557, page 36.

<sup>96</sup> Reference was made to s.269TAA

considered in its assessment of the 'arms length' nature of transactions and in profitability calculations of the importer.<sup>97</sup>

210. The ADC stated in TER 557 that in respect of the export sales of the goods to Australia by Zhejiang Hailiang, it found that the importer had not purchased the goods from the exporter, therefore, export prices could not be determined under s.269TAB(1)(a) or s.269TAB(1)(b). The ADC recommended that the export price be calculated under s.269TAB(1)(c) having regard to all the circumstances of the exportation. Specifically, the ADC recommended that the export price be calculated based on the price paid by the importer less an amount of Hailiang HK's SG&A costs and other prescribed deductions for costs arising after exportation. The ADC stated that it was satisfied of the 'arms length' nature of the transaction between Hailiang HK and the importer, while it was not satisfied of the 'arms length' nature of the transaction between Zhejiang Hailiang and Hailiang HK.<sup>98</sup>

## The Notice, the Sections B – G Response, the Second, Third, Fourth and the Fifth Conference

211. I sought further information from the ADC and clarifications of its findings and reasoning in respect of the decision concerning arms length sales between Hailiang HK and Hailiang Australia and the export price calculation, in the Notice and during the Second Conference. During the Third Conference, MM Kembla was provided with an opportunity to comment on the Sections B – G Notice Response and the relevant clarifications and further information provided during the Second Conferences.

212. In the Sections B – G Notice Response the ADC stated that its initial profitability analysis of Hailiang Australia compared the verified costs to import and sell of selected imports with the net selling price (i.e. net of off-invoice rebates) of the relevant MCC. Further, the ADC stated that for the purposes of the Review Panel's request in the Notice, it had completed an additional profitability analysis comparing the weighted average net invoice prices of all Hailiang Australia's sales over the investigation period, also taking into account all off-invoice rebates, and the weighted average costs to import and sell of the selected imports. The ADC stated

---

<sup>97</sup> See TER 557, page 37.

<sup>98</sup> See TER 557, page 37.

that, “this high-level analysis also found that Hailiang Australia was profitable”. The ADC stated that Australia’s profitability from INV 557 and the additional analysis was provided at Confidential Attachment 1 to the Sections B – G Notice Response.<sup>99</sup>

213. During the Second Conference the ADC took me through the relevant worksheets of Confidential Attachment 1 to the Sections B - G Notice Response. The ADC demonstrated that it had taken into account the off-invoice rebates by pointing out the difference in profitability of Hailiang Australia when the off-invoice rebates were taken into consideration. The ADC clarified that [REDACTED] [REDACTED], but pointed out that the Exporter Work Program relates to the manufacture of the goods in China by Zhejiang Hailiang, which sells the goods to Hailiang HK, the trading entity, which then on sells the goods to the Australian entity.<sup>100</sup>

214. During the Third Conference, MM Kembla criticised the ADC’s, “extremely high level analysis” as, “clearly inadequate”, in light of the, “failures with the commission’s MCC analysis”. MM Kembla submitted that the ADC’s response to the Notice concerning rebates did not account for rebates paid directly by Zhejiang Hailiang or Hailiang HK (which was not verified) to Australian customers. MM Kembla stated that it had provided the ADC with evidence<sup>101</sup> [REDACTED]. MM Kembla stated that the ADC’s response to Section G of the Notice was therefore incomplete and contended that the ADC had not taken into account rebates paid directly by [REDACTED], and further contended that when these rebates are considered, Hailiang Australia’s and Hailiang HK’s direct sales are not profitable.<sup>102</sup>

---

<sup>99</sup> See Paragraphs 25 – 27 of the ADC’s Section B – G Notice Response and Confidential Attachment 1 thereto (Worksheets G-1 “Hailiang Australia Profit” and G-2 “WA Hailiang Au Sales Prices”).

<sup>100</sup> See Second Conference Summary, Paragraph 5b.

<sup>101</sup> Reference was made to MM Kembla’s response to SEF of 4 October 2021 and the confidential Zhejiang Hailiang Exporter Briefing.

<sup>102</sup> See Section (iv) on “Non Arms Length Dealing with Hailiang HK”, of the written version of MM Kembla’s comments, attached as Appendix A to the Third Conference Summary.

215. In response to a clarification request during the Third Conference, MM Kembla confirmed that [REDACTED]

[REDACTED]

[REDACTED] MM

Kembla stated that Australian customers will either, (1) purchase directly from Hailiang HK for large quantities, for example, a full container required to stock product in Australia for a few months, or will (2) purchase from Hailiang Australia, because requirements are for smaller quantities, on a weekly or monthly basis. MM Kembla stated that it was its understanding from the documents on the public file that there was a mix of customers purchasing directly from Hailiang HK and customers purchasing from Hailiang Australia. MM Kembla stated that the ADC only verified Hailiang Australia's information (not Hailiang HK), and therefore did not verify whether rebates were paid by Hailiang HK to its direct Australian customers.<sup>103</sup>

216. During the Fourth Conference I requested comment from the ADC on MM Kembla's statement that the ADC did not take into account rebates paid by Hailiang HK to its direct Australian customers, that is, Australian customers that did not purchase through Hailiang Australia. The ADC confirmed that while some customers purchased directly from Zhejiang Hailiang through its trading entity, Hailiang HK, without importation through Hailiang Australia, there was no evidence of any rebates to those direct customers by either Hailiang HK or Zhejiang Hailiang in China, during the investigation period. In this regard the ADC referred to Hailiang HK's Trader Questionnaire Response, in which Hailiang HK confirmed that it did not provide on-invoice discounts or off-invoice rebates to its Australian customer during the period of investigation.<sup>104</sup> It was reiterated that while there was verification of Zhejiang Hailiang in China and Hailiang Australia, there was no verification of Hailiang HK. The ADC pointed out that the evidence submitted to the ADC by MM Kembla [REDACTED]

[REDACTED]<sup>105</sup>

---

<sup>103</sup> See Paragraph 2(iv) of the Third Conference Summary.

<sup>104</sup> The ADC referred to Section B7 of Hailiang HK's Trader Questionnaire Response (Document #021 of EPR 557), page 9.

<sup>105</sup> See Paragraph 1 the Fourth Conference Summary.



217. During the Fifth Conference MM Kembla was provided with an opportunity to comment on the relevant clarifications and further information provided by the ADC during the Fourth Conference. MM Kembla rejected the ADC's statement during the Fourth Conference as to the absence of evidence of the existence of off-invoice rebates and the reference to Hailiang HK's exporter questionnaire that there were no discounts or rebates. MM Kembla stated that this indicated that the ADC did not sufficiently investigate MM Kembla's claims as to the existence of rebates. MM Kembla again referred to the evidence previously provided by MM Kembla during INV 557 [REDACTED]<sup>106</sup> MM Kembla referred to the ADC's confirmation that it did not conduct a verification of Hailiang HK and contended that it therefore cannot rely upon an "absence of evidence" for the non-existence of off-invoice rebates.<sup>107</sup>

## Consideration

218. This ground of review focussed on, (1) whether the ADC had taken into consideration off- invoice rebates paid by Zhejiang Hailiang (or its related-party trader, Hailiang HK), to its Australian customers, in determining that it was "satisfied" of the arms length nature of export sales between Hailiang HK and the related importer, Hailiang Australia, and other Australian customers (2) the correctness of the ADC's calculation of the export price, based on Hailiang Australia's ability to recover costs and its profitability.

219. MM Kembla submitted that it had provided evidence to the ADC of [REDACTED] which demonstrated that, the export selling prices were non-arms length and that the decision was, therefore, not the correct or preferable decision.

220. In the Notice I had requested further information relating to the ADC's confirmation in TER 557 that off-invoice rebates were considered in its assessment of the 'arms length' nature of transactions and in the profitability calculations of Hailiang

---

<sup>106</sup> Reference was made to [REDACTED] included in MM Kembla's application for measures, as well as the Confidential Exporter Briefing for Zhejiang Hailiang provided by MM Kembla to the ADC. This information was also included in MM Kembla's response to SEF of 4 October 2021.

<sup>107</sup> See Paragraph II(a) of Appendix A to the Fifth Conference Summary.

Australia.<sup>108</sup> The ADC provided further information in the Sections B – G Notice Response<sup>109</sup> and “an additional profitability analysis” in Confidential Attachment 1 to the Sections B – G Notice Response. During the Second Conference I worked through the relevant worksheets of Confidential Attachment 1 to the Sections B – G Notice Response with the ADC, and the ADC demonstrated how it had taken into account the off-invoice rebates. This indicated that Hailiang Australia was still profitable when the off-invoice rebates were taken into account.<sup>110</sup> However, when I reviewed Confidential Attachment 3 to Hailiang Australia’s Importer Verification Report, (which the ADC had stated included Hailiang Australia’s profitability assessment for TER 557), I noted that the profitability assessment at that time did not take into account the off-invoice rebates, indicating a higher overall profitability for Hailiang Australia. It therefore appeared to me that the additional profitability analysis that included the off-invoice rebates was done only after the ADC made its finding in this regard, that is, after TER 557 was finalised. This was confirmed by the ADC’s statement in the Section B - G Notice Response, that the additional profitability analysis was “for the purposes of this request”, that is, only done in response to the Notice.<sup>111</sup>

221. I therefore considered that, at the time of making the decision, the Commissioner could not have been “satisfied” as to the profitability of Hailiang Australia and the arms length nature of the sales between Hailiang HK and Hailiang Australia, if the off-invoice rebates were not taken into consideration in the profitability analysis, as reflected in the relevant spreadsheet at the time of the decision (being Confidential Attachment 3 to Hailiang Australia’s importer verification report). The fact that the additional ‘high-level’ profitability analysis (subsequently undertaken by the ADC, for the purposing of responding to the Notice), found that Hailiang Australia was still profitable even when the off-invoice rebates were taken into consideration, does not detract from the apparent inadequacy of the profitability analysis of Hailiang Australia at the time the decision was made. I therefore consider that the decision of

---

<sup>108</sup> TER 557, page 37.

<sup>109</sup> See Paragraph 26 of the Sections B – G Notice Response.

<sup>110</sup> It was demonstrated to me per Worksheet G – 1 “Hailiang Australia Profit” of Confidential Attachment 1 to the Sections B – G Notice Response, that the overall profitability was ■■■ per cent net of off-invoice rebates) and ■■■ per cent taking into account all off-invoice rebates.

<sup>111</sup> See Worksheet G – 1 “Hailiang Australia Profit” of Confidential Attachment 1 to the B – G Notice Response and Confidential Attachment 3 ‘Profitability’ (Worksheet (b) ‘sales route’) to Hailiang Australia’s Importer Verification Report.

the Commissioner relating to the profitability of Hailiang Australia and the related finding of the arms length nature of the export sales between Hailiang HK and Hailiang Australia is not the correct or preferable decision.

222. In addition, I was also concerned as to whether the ADC sufficiently investigated MM Kembla's claims relating to whether rebates were paid by Hailiang HK to its direct Australian customers. MM Kembla repeatedly referred to evidence it had provided to the ADC during INV 557 [REDACTED]

[REDACTED]

During the Fourth Conference, the ADC pointed out that the evidence submitted to the ADC by MM Kembla [REDACTED].<sup>112</sup> The ADC also referred to Hailiang HK's Trader Questionnaire Response, in which Hailiang HK confirmed that it did not provide on-invoice discounts or off-invoice rebates to its Australian customer during the period of investigation. This led the ADC to conclude that there was no evidence of any rebates to those direct customers by either Hailiang HK or Zhejiang Hailiang, during the period of investigation.<sup>113</sup>

223. It seems unfortunate that there was no verification of Hailiang HK, since it was central to and played a pivotal role in all the exports of the products to Australia, whether to its related importer, Hailiang Australia (which on sold products to Australian customers), or directly to Australian customers. While the evidence provided by MM Kembla [REDACTED] I consider the approach adopted by the ADC [REDACTED] to be a rather formalistic and hands-off approach, particularly since there was no verification of Hailiang HK. I am reminded of the WTO jurisprudence that provides that while interested parties are required to provide evidence in support of their claims, there is also an affirmative information-gathering burden on the investigating authority, and a requirement that the authority, "shall not impose an unreasonable burden of proof" on the parties in question making the claims.<sup>114</sup>

---

<sup>112</sup> On reviewing the relevant information, I confirmed that [REDACTED]

<sup>113</sup> See Fifth Conference Summary.

<sup>114</sup> See WTO Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Reinforcing bar from Turkey* (WT/DS211/R) at paragraph 7.352.

224. In my view, there was sufficient information submitted for the ADC to adopt a more pro-active inquiry into whether rebates were paid directly to Australian customers, for example, by requesting further more detailed information and documentation from both Hailiang HK and other direct Australian customers.

225. There were also other indicators of the possible existence of rebates to direct Australian customers, to support a more proactive approach in regard to rebates.

Firstly, I noted that [REDACTED]  
[REDACTED]  
[REDACTED]<sup>115</sup>

Secondly, [REDACTED]  
[REDACTED]  
[REDACTED]<sup>116</sup> In addition,  
MM Kembla had confirmed during the Fifth Conference that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>117</sup>

226. All these factors seems to be indicative of the possibility that rebates were being paid to direct Australian customers of Hailiang HK, that in my view warranted further inquiry.

227. For all the reasons discussed above I consider that the Commissioner's decision concerning the profitability of Hailiang Australia and the related finding of the arms length nature of the export sales between Hailiang HK and Hailiang Australia was not the correct or preferable decision.

---

<sup>115</sup> See [REDACTED]  
[REDACTED] Confidential Exporter Briefing for Zhejiang Hailiang provided by MM Kembla to the ADC, page 4.

<sup>116</sup> See MM Kembla's submission to the ADC dated 4 October 2021, page 11 and Confidential Attachment 1 thereto, "(1a – 1e) – Deductive Export Price", [REDACTED]  
[REDACTED]  
[REDACTED]

<sup>117</sup> See Fifth Conference Summary.

## Ground 4: The determination of material injury for all Chinese exporters is not correct or preferable

### MM Kembla's arguments

228. MM Kembla contends that the Commissioner's decision that dumping had not caused material injury to the Australian industry is not the correct or preferable decision. It submits that the decision is premised on the ADC's finding that exports of seamless copper tube from China were not exported to Australia at dumped prices. MM Kembla submits further that had the Minister correctly determined normal values for Chinese exporters that adequately considered Grounds 1, 2 and 3, the Commissioner could not have reached the conclusion that he did in relation to material injury.
229. MM Kembla submitted that the ADC correctly assessed that there was undercutting of the Australian industry's selling prices), and that MM Kembla had suffered injury in the form of price depression, price suppression, and reduced profit and profitability, in the investigation period.
230. MM Kembla contended that once it is accepted that the price undercutting was achieved to a significant extent by dumping of the exports, the conclusion was "inescapable" that the injury found by the ADC was attributable at least in part to dumping.
231. MM Kembla submitted that because the ADC's analysis of material injury was premised on an absence of dumping (but found, correctly, that injury had occurred), the result of the analysis will necessarily be different (leading to a conclusion that material injury has been caused by dumping), if some or all of MM Kembla's arguments in relation to the ascertainment of normal value and export price are accepted. MM Kembla submitted that this would lead to a decision not to terminate the investigation.
232. MM Kembla submitted that the decision that the Australian industry has not suffered material injury from the dumping was therefore not the correct or preferable decision.

## ADC's Position

233. The ADC found that during the period of investigation the goods exported to Australia from China were not dumped and as a result terminated the investigation in so far as it related to the Chinese exporters. The ADC's analysis of injury and causal link in TER 557 did not therefore relate to Chinese exporters.

234. The ADC did not comment on this ground of review.

## Consideration

235. In its application for review, MM Kembla challenged the termination of INV 557 relating to Chinese exporters pursuant s.269TDA(1)(b)(i) of the Act, based on various grounds of review, including a number of grounds or sub-grounds of review relating to normal value and the dumping margin.

236. MM Kembla contended that the Commissioner's decision that dumping did not cause material injury to the Australian industry is premised on the ADC's finding that exports of seamless copper tube from China were not exported to Australia at dumped prices. MM Kembla submits further that had the Commissioner correctly determined normal values for Chinese exporters that adequately considered Grounds 1, 2 and 3, of this review, the Commissioner could not have reached the conclusion that he did in relation to material injury.

237. I have found that the Commissioner's decision is not the correct or preferable decision in respect of the following grounds (and sub-grounds) of review:

- Ground 2: Determination of Normal Value in respect (iii) MCC's and International Standards; (iv) Drawing Thin; and (v) Capping and Cleaning costs.
- Ground 3: Decision concerning the export price and profitability of Hailiang Australia and the related finding of the arms length nature of the export sales between Hailiang HK and Hailiang Australia.

Therefore the decision to terminate the dumping investigation under s.269TDA(1)(b)(i) is not considered to be the correct or preferable decision and is revoked.

238. Under s.269ZZT(2)(a) of the Act, the investigation related to the decision under s.269TDA(1)(b)(i), therefore resumes.

239. In revoking the decision under s.269TDA(1)(b)(i) , I am not making a finding that the Chinese exporters are dumping or that the Australian industry has suffered material injury caused by the dumping. That issue will be a matter for the ADC to decide in making its report to the Minister. Therefore, it follows that I am unable to make a decision in accordance with MM Kembla's Ground 4, as to whether the decision in TER 557 that the Australian industry had not suffered material injury from the dumped products, was the correct or preferable decision.

## Summary of Findings in respect of Review No: 146

240. The decisions relating to the following grounds and sub-grounds of review were found to be the correct or preferable decisions:

- Ground 1: Date of sale.
- Ground 2 : Determination of Normal Value in respect of: (i) Particular Market Situation (ii) Cost of Scrap Copper (vi) Copper volatility, and (vii) Hedging costs and hedging gains/losses.

241. The decisions relating to the following grounds and sub-grounds of review were not found to be the correct or preferable decisions:

- Ground 2: Determination of Normal Value in respect of: (iii) MCC's and International Standards; (iv) Drawing Thin; and (v) Capping and Cleaning costs.
- Ground 3: Arms length sales between Hailiang HK and Hailiang Australia.

242. For the reasons discussed above, I was unable to make a decision on Ground 4 relating to material injury.

# Review No.147: Reviewable Decision under s.269TDA(2)(b)(ii)

243. In its application for review MM Kembla stated that its application related to the Termination Decision in TER 557 under s.269TDA(2)(b)(ii), in respect of the negligible countervailable subsidy finding for Chinese exporters of seamless copper tube exported to Australia.

244. I will now deal with the ground of review put forward by MM Kembla in its application for review in respect of Review No. 147.

## Ground 1: Incorrect decision that a particular market situation did not exist and that Chinese exporters did not benefit from a countervailable subsidy

245. A decision relating to 'particular market situation' is usually relevant to a dumping investigation. Where a particular market situation is found, pursuant to s.269TAC(2)(a)(ii), the ADC must further consider whether, because of the situation in the subject market, sales in that market are also not suitable for determining normal value under s.269TAC(1).

246. Investigation No. 557 ("INV 557") was both an anti-dumping and countervailing investigation in regard to copper tube exported from China. The existence or not of a 'particular market situation' appears to be relevant not only in respect of the dumping investigation, in the context referred to in the paragraph above, but also in respect of the countervailing investigation, in that the ADC assessed whether exporters in China had received raw materials at less than adequate remuneration, as a countervailable subsidy. As part of the particular market situation analysis, the ADC also assessed whether copper prices (the major raw material input into copper tube) were artificially low on the domestic market.

247. Therefore, MM Kembla's ground of review in this Review No. 147 relates to the ADC's decision in TER 557 on 'particular market situation', even though it is a



review of the termination of the countervailing investigation. There is therefore substantial overlap in this review with Sub-ground 2(i) in Review No. 146 relating to MM Kembla's claim that the decision that a particular market situation did not exist for copper tube sold domestically in China, was not the correct or preferable decision.

248. To avoid repetition, I will be referring extensively to the arguments, submissions and consideration under Ground 2(i) relating to particular market situation in Review No. 146, discussed above.

## MM Kembla's Arguments

249. MM Kembla contends in its application for review that the Commissioner's decision that a particular market situation did not exist and that Chinese exporters did not benefit from a countervailable subsidy where the Government of China influences the selling price of copper in China, is not the correct or preferable decision.

250. MM Kembla's arguments in respect of this ground of review are similar to those in Ground 2(i) of Review No. 146 relating to "particular market situation" and are incorporated herein by reference.

## ADC's Position

251. The ADC's analysis of particular market situation is set out in Appendix A to TER 557. The ADC concluded that in light of all the information, it was of the view that a particular market situation did not exist in respect of the domestic market for copper tube in China during the investigation period.

252. The reasons for ADC's findings relating to particular market situation are set out under Ground 2(i) of Review No. 146 relating to "particular market situation" and are incorporated herein by reference. The ADC was unable to identify any financial reimbursements by the GOC to any of the exporters nor could it identify any government influence on the domestic selling prices of copper tube or raw material purchases. The ADC did not identify any evidence to suggest that the GOC's plans and policies for the non-ferrous metals industry, including copper, influenced the domestic selling prices for raw material copper and the finished copper tube products.

253. In its investigation into countervailable subsidies, and related to its finding on particular market situation, the ADC assessed whether exporters in China had received raw materials at less than adequate remuneration.
254. In order to complete this assessment, the ADC considered how raw materials are sourced for goods exported to Australia and also considered how prices of raw materials are set by both state invested enterprises (SIEs) and non-SIEs when selling raw materials, such as cathode copper, to Zhejiang Hailiang. The ADC stated that it observed that Zhejiang Hailiang has a 'bonded warehouse' arrangement whereby all exports of copper tube are manufactured using raw materials which are imported. According to the ADC these raw materials are priced in line with the LME. For raw materials purchased domestically, the ADC was satisfied that prices were set in line with prices in the domestic market for cathode copper and with reference to prices of cathode copper traded on the SHFE.
255. The ADC stated that it established a benchmark for a competitive market cost of cathode copper traded internationally, which relied on the price of cathode copper traded on the LME. The ADC stated that it compared the purchase prices for cathode copper for Zhejiang Hailiang with prices of cathode copper traded on the LME during the investigation period on ex-works (EXW) terms. The ADC stated that it observed that Zhejiang Hailiang's domestic purchase price for cathode copper during the investigation period was higher than the LME price in all but two months, and almost 3 per cent higher on average over the investigation period. Additionally, the ADC stated that it observed that raw materials purchased on the domestic market were not used in the manufacture of copper tube exported to Australia by Zhejiang Hailiang. Therefore, the ADC found that no benefit was conferred by Zhejiang Hailiang in its purchase of raw materials. Accordingly, the ADC was not satisfied that Zhejiang Hailiang had obtained raw materials at less than adequate remuneration.<sup>118</sup>

## Further Information and Clarifications

256. I noted that certain concerns about the ADC's analysis of copper pricing, articulated by MM Kembla in its application for review, had not been addressed in TER 557.

---

<sup>118</sup> See Section 7.4.1 of TER 557, including Figure 3, pages 51 – 52.

Therefore in the Notice I requested the ADC to comment on these articulated concerns of MM Kembla.

257. The details of the concerns, the relevant ADC response in the Sections B – G Notice Response, and further information and clarifications obtained during the Second and Third Conferences, are set out above in respect of Ground 2(i) of Review No. 146 relating to “particular market situation”, and are incorporated herein by reference.

## Consideration

258. My consideration of MM Kembla’s challenge of the ADC’s finding relating to particular market situation is the same as for Ground 2(i) of Review No. 146, and is incorporated herein by reference.

259. For the reasons discussed above, I consider that the Commissioner’s decision that a particular market situation did not exist for copper tube sold domestically in China, was the correct or preferable decision. I also consider that the decision that Chinese exporters did not benefit from a countervailable subsidy, relating to raw materials provided at less than adequate remuneration, is the correct or preferable decision.

## Summary of Findings in respect of Review No: 147

260. The decision relating to following ground of review was found to be the correct or preferable decision:

Ground 1: Non-existence of particular market situation and Chinese exporters not benefitting from countervailable subsidy.

## Review No. 148: Reviewable Decision under s.269TDA(13)

261. In its application for review MM Kembla stated that its application relates to the Termination Decision in TER 557 under 269TDA(13) in respect of the negligible injury by Daejin Copper Pipe & Tube Manufacturing Co Ltd, residual exporters and

uncooperative exporters from Korea, for exports of seamless copper tube exported to Australia.

262. I will now deal with the grounds of review put forward by MM Kembla in its application for review in respect of Review No. 148.

263. It should be noted that there is substantial overlap in this review with some of the grounds and sub-grounds of review in Review No. 146 relating to Chinese exporters. To avoid repetition, I will be referring extensively to (and incorporating by reference) the arguments, submissions, further information obtained during conferences and considerations, discussed under those similar grounds and sub-grounds of review.

## Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable

### MM Kembla's Arguments

264. MM Kembla contends that the Commissioner's decision concerning the selection of invoice date for fair comparison purposes, for Daejin, residual and uncooperative Korean exporters, is not the correct or preferable decision.

265. In its application for review MM Kembla stated that the ADC calculated the dumping margins for Nungwon and Daejin based on a comparison of quarterly weighted average export prices with the corresponding quarterly weighted-average normal value for the investigation period (as per s.269TACB(2)(a)). MM Kembla stated that the date for fair comparison selected by the Commissioner was the invoice date.

266. MM Kembla's arguments in respect of the Korean exporters in this ground of review are similar to its arguments in respect of the Chinese exporters as set out in Ground 1 of Review No. 146 and are incorporated herein by reference.

## ADC's Position

267. The ADC's position in respect to this ground of review is similar to its position as set out in respect of Ground 1 of Review No. 146, and is incorporated herein by reference.

## Further Information and Clarifications

268. The details of further information sought in the Notice and clarifications and comments arising from the Section A Notice Response and the Second and Third Conferences, relevant to this ground of review, are set out above in respect of Ground 1 of Review No. 146, and are incorporated herein by reference.

## Consideration

269. My consideration of the Commissioner's decision with respect to the selection of invoice date as the 'date of sale' for fair comparison purposes is the same as in respect of Ground 1 of Review No. 146, and is incorporated herein by reference.

270. For the reasons discussed above, I consider that the Commissioner's decision with respect to the selection of invoice date as the 'date of sale' for fair comparison purposes, was the correct or preferable decision.

## Ground 2: Determination of normal values under s.269TAC(1) is not correct or preferable decision

271. MM Kembla contended that the Commissioner's decision concerning the determination of normal values under s.269TAC(1), for all Korean exporters is incorrect and not the preferred decision.

272. MM Kembla stated that it provided the ADC with detailed explanations and quantifications concerning the required adjustments to normal values for Nungwon and Daejin. It submitted that the representations demonstrated numerous shortcomings with the acceptance of Korean normal values, based upon lower cost copper tube when contrasted with the goods exported to Australia that meet AS/NZ Standards.

273. MM Kembla submitted that the ADC elected to disregard each matter raised by MM Kembla (and its more than 100 years' experience producing seamless copper tube) in preference to responses from the cooperating exporters. MM Kembla stated that it did not receive any follow-up questions in responses to written submissions from the ADC during the conduct of the prolonged, five-times extended investigation.

274. MM Kembla submitted that the following items require adjustments to normal values for Korean exporters of copper tube to Australia:

- I. model control codes and international standards;
- II. drawing thin
- III. capping and cleaning costs
- IV. copper volatility
- V. hedging costs

275. I will address each of the issues / sub-grounds separately under the same sub-headings referred to above, although sub-grounds (i) and (ii) will be considered together, for the reasons discussed below.

276. It should be noted that there is substantial overlap in these sub-grounds of review with some of the sub-grounds of review in Review No. 146 relating to Chinese exporters. To avoid repetition, I will be referring extensively to (and incorporating by reference) the arguments, submissions, further information obtained in conferences and considerations, discussed under those similar sub-grounds of review.

#### i) MCC's and International Standards and ii) Drawing Thin

277. I will consider sub-grounds (i) MCC's and International standards, and (ii) Drawing Thin, together. The reason for adopting this approach is that the physical characteristics of wall thickness ("WT") and outside diameter ("OD"), which relate to the process of "drawing thin" (the subject of sub-ground (ii)) is a major factor in differing International Standards (the subject of sub-ground (i)). Sub-grounds (i) and (ii) are therefore closely related with overlapping arguments and submissions, and it seems appropriate and efficient to consider them together, to avoid repetition.

## MM Kembla's Arguments

278. MM Kembla's arguments in respect of the Korean exporters and (i) MCC's and International Standards, and (ii) Drawing Thin, are similar to its arguments in respect of the Chinese exporters as set out in Ground 2(iii) and (iv) of Review No. 146, and are incorporated herein by reference. Additional arguments relating to the Korean exporters, are set out below.
279. MM Kembla submitted that it had highlighted with the ADC (in the Exporter Briefings) the practice of "drawing thin" whereby a manufacturer can reduce the WT and OD of copper tube. MM Kembla pointed out that the result is that a piece of copper tube that is sold to a less-stringent Korean Standard on the domestic market in Korea incorporates less copper than a similar length of tube exported to Australia that complies with the relevant AS/NZ Standard. Hence, according to MM Kembla, the cost of production of Korean domestic copper tube is substantially lower than the cost of production of the exported goods.
280. MM Kembla submitted that it understands that the Korean exporter Daejin manufactures seamless copper tube adopting a "draw thin" practice, that is, the exporter manufactures the goods to meet the respective Standard (whether to Korean Standard or to AS/NZ Standard) and achieves the minimum threshold permitted under the Standard. MM Kembla submits that the practice involves producing copper tube with thinner WT and lower copper content to reduce costs and points out that this issue was also raised with the ADC in the Chinese Exporter briefing for Zhejiang Hailiang.
281. MM Kembla submits that as the Korean Standards differ from the Australian Standards, with customers of Daejin in Korea being supplied with narrower tube with a thinner WT than is exported to Australia.
282. MM Kembla indicated that the increased draw thin percentage was "in the order of an additional [REDACTED] per cent saving in copper cost".<sup>119</sup>

---

<sup>119</sup> MM Kembla quantified the saving based upon an average cost of copper of US\$ [REDACTED] per metric tonne across the investigation period, which it submitted is a US\$ [REDACTED] per tonne saving (or \$A [REDACTED] per metric tonne).

283. MM Kembla contends that the Commissioner incorrectly accepted Daejin's CTMS for all goods (i.e. domestic and exports) which included the benefit of drawing thin which was not included in the goods exported to Australia (that must comply with Australian Standards and do not allow for lenient tolerances that are evident on the Korean domestic market).

284. MM Kembla contends that the Commissioner's decision does not allow for a fair comparison between the domestic copper tube (that is drawn thin) versus the exported goods (with a thickness that complies with Australian Standards) and is not the correct or preferable decision.

### **ADC's Position**

285. ADC's position in respect of these two sub-ground of review is the same for Ground 2(iii) and (iv) of Review No. 146 above, and is incorporated by reference hereby.

### **Further Information and Clarifications**

286. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to these two sub-grounds of review, are set out above in respect of Ground 2(iii) and (iv) of Review No. 146, and are incorporated herein by reference.

### **Consideration in respect of (i) MCC and International Standards and (ii) Drawing Thin**

287. My consideration of MM Kembla's sub-grounds of review in respect of (i) MCC and International Standards and (ii) drawing thin, is the same as that for Ground (iii) and (iv) of Review No. 146 as set out above, and is incorporated herein by reference.

288. I therefore consider that the ADC's decision not to include International Standards or at least WT (by the process of drawing thin) as a separate category in the MCC structure, or alternatively by not making an appropriate adjustment in the comparisons of normal value and export price, was not the correct or preferable decision.



### iii) Capping and cleaning costs

#### **MM Kembla's Arguments**

289. MM Kembla submits that TER 557 does not discuss the costs of capping and cleaning associated with refrigeration tube. According to MM Kembla it provided the ADC with a submission demonstrating that the cost of cleaning and capping was not insignificant or immaterial, and that it should be included as an upward adjustment cost associated with the export of the refrigeration copper tube exported to Australia (that are required to be cleaned and capped).<sup>120</sup>
290. MM Kembla challenged the ADC's finding that capping and cleaning costs were immaterial. MM Kembla submitted that the ADC had not sighted the full capping and cleaning costs for Nungwon and Daejin as represented in its submission of 14 May 2021 and incorrectly concluded that all capping and cleaning costs were verified. MM Kembla submitted that it had further quantified the capping and cleaning costs in its SEF 557 response submission to demonstrate the costs were not immaterial.<sup>121</sup>
291. MM Kembla submitted that it considered that the Commissioner ignored MM Kembla's representations concerning capping and cleaning costs. It submitted further that these costs cannot be considered insignificant or immaterial and certainly do have an impact on the price of the goods sold in Australia. MM Kembla quantified these costs by way of an example in its application for review.<sup>122</sup>
292. MM Kembla contended that the Commissioner's decision that the capping and cleaning costs were adequately incorporated into the CTM for the relevant model of MCC, is incorrect and not the preferable decision.

---

<sup>120</sup> Reference was made to MM Kembla's submission to the ADC dated 14 May 2021.

<sup>121</sup> Reference was made to MM Kembla's submission in response to SEF 557 dated 4 October 2021 (Document #035 of EPR 557), pages 25 – 26.

<sup>122</sup> See the discussion under Korean exporters' Ground 2 (iii) "Capping and Cleaning" of Confidential Attachment 2 to the application for review, page 28.

## **ADC Position**

293. The ADC's position in respect to this ground of review is similar to its position as set out under Ground 2(v) of Review No. 146 and is incorporated herein by reference.

## **Further Information and Clarifications**

294. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to this sub-ground of review, are set out above in respect of Ground 2(v) of Review No. 146, and are incorporated herein by reference.

## **Consideration**

295. My consideration of this sub-ground of review in respect of (v) Capping and Cleaning Costs, is the same as that for Ground 2(v) of Review No. 146 as set out above, and is incorporated herein by reference.

296. For the reasons discussed above, I consider that the ADC's decision that it was satisfied that an adjustment to normal value for differences in capping and cleaning costs was unnecessary, was not the correct or preferable decision.

## **iv) Copper volatility**

### **MM Kembla's Arguments, the ADC's Position, Further Information and Clarifications**

297. MM Kembla's arguments and the ADC's position in respect of this sub-ground of review are similar to those set out under Ground 2(vi) of Review No. 146 above, and are incorporated herein by reference.

298. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to this sub-ground of review, are set out above in respect of Ground 2(vi) of Review No. 146, and are incorporated herein by reference.

## Consideration

299. My consideration of this sub-ground (iv) Copper Volatility, is the same as that for Ground 2(vi) of Review No. 146 as set out above, and is incorporated herein by reference.

300. For all the reasons discussed above, I consider that the decision to not make adjustments for copper volatility, was the correct or preferable decision.

## v) Hedging Costs

### MM Kembla's arguments

301. MM Kembla's arguments in respect of the Korean exporters in this sub-ground of review are similar to its arguments in respect of the Chinese exporters under Ground 2(vii) of Review No. 146, and are incorporated herein by reference, except with regard to the specific references to Zhejiang Hailiang.

302. In addition, MM Kembla stated in its application for review that it understands that Nungwon hedges its copper costs and contends that the ADC did not undertake an analysis of the Korean exporters' policies concerning the basis for pricing copper on export sales versus domestic sales.

### ADC's Position

303. With regard to hedging, the ADC in TER 557 mainly addressed hedging with reference to Zhejiang Hailiang's submission, although it referred to Nungwon's submission that hedging contracts cover the risks of the LME price movement and are not used in setting export prices.<sup>123</sup>

304. The ADC's position in respect to this ground of review is otherwise similar to its position as set out under Ground 2(vii) of Review No. 146, and is incorporated herein by reference.

---

<sup>123</sup> Reference was made to Document #038 of EPR 557.

## Further Information and Clarifications

305. The details of further information sought in the Notice and clarifications and comments arising from the Sections A Notice Response and the Second, Third, Fourth and Fifth Conferences, relevant to this sub-ground of review, are set out above in respect of Ground 2(vii) of Review No. 146, and are incorporated herein by reference.

## Consideration

306. My consideration of this sub-ground of review in respect of (v) Hedging Costs, is the same as for Ground 2(vii) of Review No. 146 as set out above, and is incorporated herein by reference.

307. For all the reasons discussed above, I consider that the decision to not make adjustments for hedging costs or hedging gains /losses was the correct or preferable decision.

## viii) Findings - Normal Value Adjustments

308. The following is a summary of the findings of the sub-grounds of review relating to normal value adjustments, under this ground of review:

- The decisions relating to the following sub-grounds were found to be the correct or preferable decisions: (iv) Copper volatility, and (v) Hedging costs and hedging gains/losses.
- The decisions relating to the following sub-grounds of review were not found to be the correct or preferable decisions: (i) MCC's and International Standards; (ii) Drawing Thin; and (iii) Capping and Cleaning costs.

## Ground 3: The decision relating to material injury is not correct or preferable

### MM Kembla's arguments

309. MM Kembla contends that the Commissioner's decision that dumping (and subsidisation) had not caused material injury to the Australian industry was not the correct or preferable decision. It submits that the decision is premised on the ADC's finding that certain exports of seamless copper tube from Korea were not exported to Australia at dumped prices. MM Kembla submitted further that had the Commissioner correctly determined normal values for Korean exporters that adequately considered Grounds 1 and 2 above relating to Korean exporters, the Commissioner could not have reached the conclusion that he did in relation to material injury.
310. MM Kembla submitted that the ADC correctly assessed that the selling prices of imported seamless copper tube undercut the Australian industry's selling prices, and concluded that MM Kembla had suffered injury in the form of price depression, price suppression, reduced profit and profitability in the investigation period.
311. MM Kembla contended that once it is accepted that the price undercutting was achieved to a significant extent by dumping of exports of seamless copper tube to Australia, the conclusion is "inescapable" that the injury found by the ADC was attributable at least in part to dumping.
312. MM Kembla submitted that because the ADC's analysis of material injury was partly premised on an absence of dumping (but found, correctly, that injury had occurred), the result of the analysis will necessarily be different, leading to a conclusion that material injury has been caused by dumping, if some or all of MM Kembla's arguments in relation to the ascertainment of normal value and export price are accepted. MM Kembla submits that this would lead to a decision not to terminate the investigation.
313. MM Kembla submits that the decision that the Australian industry has not suffered material injury from dumping (and subsidisation) is therefore not the correct or preferable decision.

## ADC's Position

314. In TER 557 the ADC found that during the investigation period, goods exported to Australia from the ROK by Nungwon were dumped, but at levels below 2 per cent. As a result, the Commissioner terminated the dumping investigation in so far as it related to those exporters.

315. The ADC also found that the Australian industry experienced injury coinciding with the presence of dumped goods exported from the ROK by exporters other than Nungwon. Therefore, the ADC confined its analysis of whether injury to the Australian industry was caused by dumping of goods exported from the ROK by exporters other than Nungwon, and whether that injury was material. The ADC found that the injury, if any, to MM Kembla caused by the dumping of goods exported from the ROK (other than Nungwon) was negligible. The ADC therefore terminated TER 557 under 269TDA(13) in respect of the negligible injury by Daejin Copper Pipe & Tube Manufacturing Co Ltd, residual exporters and uncooperative exporters from ROK (that is, exporters from the ROK other than Nungwon).

316. The ADC did not comment on this ground of review.

## Consideration

317. In this application for review, MM Kembla challenged the Termination Decision in TER 557 under 269TDA(13) in respect of the finding of negligible injury by Daejin, residual exporters and uncooperative exporters from Korea, based on various grounds of review, including a number of grounds or sub-grounds of review relating to normal value and the dumping margins.

318. MM Kembla contended that the Commissioner's decision of the finding of negligible injury to the Australian industry caused by dumping by exporters from the ROK (other than Nungwon) is premised in part on the ADC's findings that exports from the ROK by Nungwon were dumped at *de minimus* levels. MM Kembla submitted further that had the Commissioner correctly determined normal values for Korean exporters that adequately considered Grounds 1 and 2 of this review, the Commissioner could not have reached the conclusion that he did in relation to material injury.

319. I have found that the Commissioner's decision is not the correct or preferable decision in respect of the following grounds (and sub-grounds) of review:

Ground 2: Determination of Normal Value in respect of (i) MCC's and International Standards; (ii) Drawing Thin; and (iii) Capping and Cleaning costs.

Therefore the decision to terminate the dumping investigation under s.269TDA(13) is not considered to be the correct or preferable decision and is revoked.

320. Under s.269ZZT(2)(a) of the Act, the investigation related to the decision under s.269TDA(13), therefore resumes.

321. In revoking the decision under s.269TDA(13), I am not making a finding that the Korean exporters are dumping or that the Australian industry has suffered material injury caused by dumping. That issue will be a matter for the ADC to decide in making its report to the Minister.

322. Therefore, it follows that I am unable to make a decision in accordance with MM Kembla's Ground 3, as to whether the decision in TER 577 relating to material injury, was the correct or preferable decision.

## Summary of Findings in respect of Review No. 148

323. The decisions relating to the following grounds and sub-grounds of review were found to be the correct or preferable decisions:

- Ground 1: Date of sale.
- Ground 2: Determination of Normal Value in respect of: (v) Copper volatility, and (v) Hedging costs and hedging gains/losses.

324. The decisions relating to the following grounds and sub-grounds of review were not found to be the correct or preferable decisions:

- Ground 2: Determination of Normal Value in respect of: (i) MCC's and International Standards; (ii) Drawing Thin; and (iii) Capping and Cleaning costs.

325. For the reasons discussed above, I was unable to make a decision in accordance with Ground 3, relating to material injury.

## Review No. 149: Reviewable Decision under s.269TDA(1)(b)(ii)

326. In its application for review MM Kembla stated that its application relates to the Termination Decision in TER 557 under s.269TDA(1)(b)(ii) in respect of the dumping margin by the Korean exporter, Nungwon Metal Ind Co., Ltd of Korea which was determined as less than 2 per cent for its exports of seamless copper tube exported to Australia.

327. I will now deal with the grounds of review put forward by MM Kembla in its application for review in respect of Review No. 149.

328. It should be noted that there is therefore substantial overlap in this review with the grounds and sub-grounds of review in Review No. 148, also relating to Korean exporters. To avoid repetition, I will be referring extensively to (and incorporating by reference) the arguments, submissions, further information obtained in conferences and considerations discussed under those similar grounds and sub-grounds of review.

### Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable

#### MM Kembla's Arguments, the ADC's Position, Further Information and Clarifications

329. MM Kembla's arguments in respect of this ground of review are the same as those in respect of Ground 1 of Review No. 148 above, and are incorporated herein by reference.

330. The ADC's position in regard to this ground of review is the same as in Ground 1 of Review No. 148 above and is incorporated herein by reference.



331. The details of further information sought in the Notice and clarifications and comments arising from the Sections A Notice Response and the Second and Third Conferences, are set out above in respect of Ground 1 of Review No. 148 above, and are incorporated herein by reference.

## Consideration

332. My consideration of the ground of review relating to the selection of invoice date as the 'date of sale' for fair comparison purposes is the same as that in respect of Ground 1 of Review No. 148 above, and is incorporated herein by reference.

333. For the reasons discussed above, I consider that the Commissioner's decision with respect to the selection of invoice date as the 'date of sale' for fair comparison purposes, was the correct or preferable decision for all Korean exporters.

## Ground 2: Determination of normal values under s.269TAC(1) is not correct or preferable decision

334. MM Kembla contended that the Commissioner's decision concerning the determination of normal values under s.269TAC(1), for all Korean exporters is incorrect and not the preferred decision.

335. MM Kembla stated that it provided the ADC with detailed explanations and quantifications concerning the required adjustments to normal values for Nungwon and Daejin. It submitted that the representations demonstrated numerous shortcomings with the acceptance of Korean normal values based upon, lower cost copper tube when contrasted with the goods exported to Australia that meet AS/NZ Standards.

336. MM Kembla submitted that the ADC elected to disregard each matter raised by MM Kembla (and its more than 100 years' experience producing seamless copper tube) in preference to responses from the cooperating exporters. MM Kembla stated that it did not receive any follow questions in responses to written submissions from the ADC during the conduct of the prolonged, five-times extended investigation.

337. MM Kembla submitted that the following items require adjustments to normal values for Korean exporters of copper tube to Australia:

- i. model control codes and international standards;
- ii. drawing thin
- iii. capping and cleaning costs
- iv. copper volatility
- v. hedging costs

338. I will address each of the issues / sub-grounds separately under the same sub-headings referred to above although sub-grounds (i) and (ii) will be considered together, for the reasons discussed below.

339. It should be noted that these sub-grounds are the same as the sub-grounds of review in Review No. 148, also relating to Korean exporters. To avoid repetition, I will be referring extensively to, and incorporating by reference, the arguments, submissions, further information obtained from conferences and considerations discussed under those similar sub-grounds of review in Review No. 148.

#### i) MCC's and International Standards and ii) Drawing Thin

340. I will consider these two sub-grounds (i) and (ii) together before coming to a joint conclusion. The reason for adopting this approach is that the physical characteristics of wall thickness ("WT") and outside diameter ("OD"), which relate the process of "drawing thin" (the subject of sub-ground (ii)) is a major factor in differing International Standards (the subject of sub-ground (i)). Sub-grounds (i) and (ii) are therefore closely related with overlapping arguments and submissions, and it seems appropriate and efficient to consider them together, to avoid repetition.

#### **MM Kembla's Arguments, the ADC's Position, Further Information and Clarifications**

341. MM Kembla's arguments and the ADC's position in respect of these two sub-ground of review are the same as those set out under Ground 2(i) and (ii) of Review No. 148 above, and are incorporated herein by reference.

342. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to these two sub-ground of review, are set out above in respect of Ground 2(i) and (ii) of Review No. 148, and are incorporated herein by reference.

### **Consideration in respect of (i) MCC and International Standards and (ii) Drawing Thin**

343. My consideration of sub-grounds (i) MCC's and International Standards and (ii) Drawing Thin, is the same as for Ground 2(i) and (ii) of Review No. 148 above, and is incorporated herein by reference.

344. For the above reasons I consider that the ADC's decision not to include International Standards or WT (by the process of drawing thin) as a category in the MCC structure, or alternatively, by not making appropriate adjustments in the comparisons of normal value and export price, was not the correct or preferable decision.

### **iii) Capping and cleaning costs**

#### **MM Kembla's arguments, ADC Position and Further Information and Clarifications**

345. MM Kembla's arguments in respect of this sub-ground of review are the same as those of the Korean exporters set out under Ground 2(iii) of Review No. 148 above, and are incorporated by reference hereby.

346. The ADC's position in regard to this sub-ground of review is the same as that set out under Ground 2(iii) of Review No. 148 above, and is incorporated by reference hereby.

347. The details of the further information sought and provided, and clarifications and comments arising from the Notice, the Sections B – G Notice Response, and the Second and Third Conferences, are set out under Ground 2(iii) of Review No. 148 above, and are incorporated herein by reference.

## Consideration

348. My consideration of this sub-ground of review in respect of (iii) Capping and Cleaning Costs, is the same as for Ground 2(iii) of Review No. 148, and is incorporated herein by reference.

349. For the reasons discussed above, I consider that the ADC's decision that it is satisfied that an adjustment to normal value for differences in capping and cleaning costs is unnecessary, was not the correct or preferable decision.

## iv) Copper volatility

### **MM Kembla's Arguments, ADC Position and Further Information and Clarifications**

350. MM Kembla's arguments in respect of this sub-ground of review are the same as those of the Korean exporters set out under Ground 2(iv) of Review No. 148 above, and are incorporated herein by reference.

351. The ADC's position in regard to this sub-ground of review is the same as that set out in under Ground 2(iv) of Review No. 148 above, and is incorporated herein by reference.

352. The details of the further information sought and provided, and clarifications and comments arising from the Notice, the Section A Notice Response, and the Second and Third Conferences, are set out under Ground 2(iv) of Review No. 148 above, and are incorporated herein by reference.

## Consideration

353. My consideration of this sub-ground of review in respect of (iv) Copper Volatility, is the same as for Ground 2(iv) of Review No. 148 above, and is incorporated herein by reference.

354. For the reasons discussed above, I consider that the decision to not make adjustments for copper volatility was the correct or preferable decision.

## v) Hedging Costs

### **MM Kembla's Arguments, ADC Position and Further Information and Clarifications**

355. MM Kembla's arguments in respect of this sub-ground of review are the same as those of the Korean exporters under Ground 2(v) of Review No. 148 above, and are incorporated herein by reference.

356. The ADC's position in regard to this sub-ground of review is the same as set out in response to MM Kembla's arguments under Ground 2(v) of Review No. 148 above, and is incorporated by reference hereby.

357. The details of the further information sought and provided, and clarifications and comments arising from the Notice, the Section A Notice Response, and the Second, Third, Fourth and Fifth Conferences, are set out under Ground 2(v) of Review No. 148 above, and are incorporated herein by reference.

### **Consideration**

358. My consideration of this sub-ground of review in respect of (v) Hedging Costs, is the same as for Ground 2(v) of Review No. 148 above, and is incorporated herein by reference.

359. For all the reasons discussed above, I consider that the decision to not make adjustments for hedging costs or hedging gains /losses was the correct or preferable decision.

### **Findings - Normal Value Adjustments**

360. The following is a summary of the findings of the sub-grounds of review relating to normal value adjustments under this ground of review:

- The decisions relating to the following sub-grounds were found to be the correct or preferable decisions: (iv) Copper volatility, and (v) Hedging costs and hedging gains/losses.

- The decisions relating to the following sub-grounds of review were not found to be the correct or preferable decisions: (i) MCC's and International Standards; (ii) Drawing Thin; and (ii) Capping and Cleaning costs.

## Ground 3: The decision relating to material injury is not correct or preferable

### MM Kembla's Arguments

361. MM Kembla's arguments in respect of this ground of review are the same as those set out under Ground 3 of Review No. 148 above, and are incorporated herein by reference.

### ADC's Position

362. In TER 557 the ADC found that during the investigation period the goods exported to Australia from the ROK by Nungwon were dumped, but at levels below 2 per cent. As a result, the Commissioner terminated the dumping investigation under s.269TDA(1)(b)(ii) in respect of Korean exporter, Nungwon.

363. Therefore, the ADC confined its injury analysis to whether injury to the Australian industry was caused by dumping of goods exported from the ROK by exporters other than Nungwon, and whether that injury was material. The ADC found that the injury, if any, to MM Kembla caused by the dumping of goods exported from the ROK (other than by Nungwon) was negligible.

364. The ADC did not comment on this ground of review.

### Consideration

365. In this application for review, MM Kembla challenged the Termination Decision in TER 557 under s.269TDA(1)(b)(ii) in respect of the Korean exporter, Nungwon, as its dumping margin was determined as less than 2 per cent, based on various grounds of review, including a number of grounds or sub-grounds of review relating to normal value and the dumping margins.

366. MM Kembla contended that the Commissioner's decision that dumping did not cause material injury to the Australian industry is premised, inter alia, on the ADC's finding that exports from the ROK by Nungwon were dumped at *de minimis* levels. As a result, the Commissioner terminated the dumping investigation in so far as it related to Nungwon. MM Kembla submits further that had the Commissioner correctly determined normal values for Nungwon and Korean exporters that adequately considered Grounds 1 and 2 of this review, the Commissioner could not have reached the conclusion that he did in relation to material injury.

367. I have found that the Commissioner's decision is not the correct or preferable decision in respect of the following grounds (and sub-grounds) of review:

Ground 2: Determination of Normal Value in respect (i) MCC's and International Standards; (ii) Drawing Thin; and (iii) Capping and Cleaning costs.

Therefore the decision to terminate the dumping investigation under s.269TDA(1)(b)(ii) is not considered to be the correct or preferable decision and is revoked.

368. Under s.269ZZT(2)(a) of the Act the investigation related to the decision under s.269TDA(1)(b)(ii), therefore resumes.

369. In revoking the decision under s.269TDA(1)(b)(ii), I am not making a finding that the Korean exporters are dumping or that the Australian industry has suffered material injury caused by the dumping. That issue will be a matter for the ADC to decide in making its report to the Minister.

370. Therefore, it follows that I am unable to make a decision in accordance with Ground 3, as to whether the finding in TER 557 of negligible injury, was the correct or preferable decision.

## Summary of Findings in respect of Review No: 149

371. The decisions relating to the following grounds and sub-grounds of review were found to be the correct or preferable decisions:

- Ground 1: Date of sale

- Ground 2: Determination of Normal Value in respect of: (v) Copper volatility, and (v) Hedging costs and hedging gains/losses.

372. The decisions relating to the following grounds and sub-grounds of review were not found to be the correct or preferable decisions:

- Ground 2: Determination of Normal Value in respect of: (i) MCC's and International Standards; (ii) Drawing Thin; and (iii) Capping and Cleaning costs.

373. For the reasons discussed above, I was unable to make a decision in accordance with Ground 3, relating to material injury.

## Review No. 150: Reviewable Decision under s.269TDA(3)

374. In its application for review MM Kembla stated that its application relates to the Termination Decision in TER 557 under s.269TDA(3) and (4) of the Act in respect of the negligible volume of dumped goods from China of seamless copper tube exported to Australia.

375. I will now deal with the grounds of review put forward by MM Kembla in its application for review in respect of Review No. 150.

376. It should be noted that there is therefore substantial overlap in this review with the grounds and sub-grounds of review in Review No. 146, also relating to Chinese exporters. To avoid repetition, I will be referring extensively to (and incorporating by reference) the arguments, submissions, further information relating to conferences and considerations discussed under those similar grounds and sub-grounds of review.



## Ground 1: Selection of invoice date decision for fair comparison purposes is not correct or preferable

### MM Kembla's Arguments, the ADC's Position, Further Information and Clarifications

377. MM Kembla's arguments and the ADC's position in this ground of review are the same as those in respect of Ground 1 of Review No. 146, and are incorporated herein by reference.

378. The details of further information sought in the Notice and clarifications and comments arising from the Sections A Notice Response and the Second and Third Conferences, are set out above in respect of Ground 1 of Review No. 146, and are incorporated herein by reference.

### Consideration

379. My consideration of the ground of review relating to the selection of invoice date as the 'date of sale' for fair comparison purposes is the same as for Ground 1 of Review No. 146 above, and is incorporated herein by reference.

380. For the reasons discussed above, I consider that the Commissioner's decision with respect to the selection of invoice date as the 'date of sale' for fair comparison purposes, was the correct or preferable decision for all Chinese exporters.

## Ground 2: Determination of normal values under s.269TAC(1) is not correct or preferable decision

381. MM Kembla contended that the Commissioner's decision concerning the determination of normal values under s.269TAC(1), for the Chinese exporters is incorrect and not the preferred decision.

382. Under this ground of review MM Kembla addressed the following issues or sub-grounds:

- i. the particular market situation;
- ii. cost of scrap copper in the domestic sales;
- iii. model control codes and international standards;
- iv. drawing thin
- v. capping and cleaning costs
- vi. copper volatility
- vii. hedging costs

383. I will address each of the issues / sub-grounds separately under the same sub-headings referred to above although sub-grounds (iii) and (iv) will be considered together, for the reasons discussed below.

#### i) Particular market situation

#### **MM Kembla's arguments, the ADC's Position, Further Information and Clarifications**

384. MM Kembla's arguments and the ADC's position in respect of this sub-ground of review are the same as those of the Chinese exporters set out under Ground 2(i) of Review No. 146 above, and are incorporated by reference hereby.

385. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, are set out above in respect of Ground 2(i) of Review No. 146, and are incorporated herein by reference.

#### **Consideration**

386. My consideration of MM Kembla's sub-ground of review in respect of (i) Particular Market Situation, is the same as for Ground 2(i) of Review No. 146, and is incorporated herein by reference.

387. For the reasons discussed above, I consider that the ADC's decision that a particular market situation did not exist for copper tube sold domestically in China, was the correct or preferable decision.

## ii) Cost of scrap copper

### **MM Kembla's arguments, the ADC's Position, Further Information and Clarifications**

388. MM Kembla's arguments and the ADC's position in respect of this sub-ground of review are the same as those set out under Ground 2(ii) of Review No. 146 above, and are incorporated by reference hereby.

389. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to this sub-ground of review are set out above in respect of Ground 2(ii) of Review No. 146, and are incorporated herein by reference.

### **Consideration**

390. My consideration of the sub-ground of review in respect of (ii) Cost of Scrap Metal, is the same as for Ground 2(ii) of Review No. 146, and is incorporated herein by reference.

391. For the reasons discussed above, I consider that the ADC's decision not to make an adjustment to the exporters' normal value for differences in the copper costs used in domestic versus export sales, was the correct and preferable decision.

## iii. MCC's and International Standards and iv. Drawing Thin

392. I will consider these two sub-grounds (iii) and (iv) together before coming to a joint conclusion. The reason for adopting this approach is that the physical characteristics of wall thickness ("WT") and outside diameter ("OD"), which relate the process of "drawing thin" (the subject of sub-ground (iv)) is a major factor in differing International Standards (the subject of sub-ground (iii)). Sub-grounds (iii) and (iv) are therefore closely related with overlapping arguments and submissions, and it seems appropriate and efficient to consider them together, to avoid repetition.

## **MM Kembla's arguments, the ADC's Position, Further Information and Clarifications**

393. MM Kembla's arguments and the ADC's position in respect of these two sub-ground of review are the same as those set out under Ground 2(iii) and (iv) of Review No. 146 above, and are incorporated herein by reference.

394. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to these two sub-ground of review, are set out above in respect of Ground 2(iii) and (iv) of Review No. 146, and are incorporated herein by reference.

## **Consideration**

395. My consideration of sub-grounds (iii) MCC's and International Standards and (iv) Drawing thin, is the same as for Ground 2(iii) and (iv) of Review No. 146, and is incorporated herein by reference.

396. For all the above reasons I consider that the ADC's decision not to include International Standards or WT (by the process of drawing thin) as a category in the MCC structure, or alternatively, by not making appropriate adjustments in the comparisons of normal value and export price, was not the correct or preferable.

## **v) Capping and Cleaning Costs**

### **MM Kembla's arguments, ADC's Position, Further Information and Clarifications**

397. MM Kembla's arguments and the ADC's position in respect of these two sub-grounds of review are the same as those set out under Ground 2(v) of Review No. 146 above, and are incorporated herein by reference.

398. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to this sub-ground of review, are set out above in respect of Ground 2(v) of Review No. 146, and are incorporated herein by reference.

## **Consideration**

399. My consideration of sub-ground (v) Capping and Cleaning Costs, is the same as for Ground 2(v) of Review No. 146, and is incorporated herein by reference.

400. For all the above reasons I consider that the ADC's decision that it is satisfied that an adjustment to normal value for differences in capping and cleaning costs is unnecessary, was not the correct or preferable decision.

## **vi) Copper volatility**

### **MM Kembla's arguments, ADC's Position, Further Information and Clarifications**

401. MM Kembla's arguments and the ADC's position in respect of this sub-ground of review are the same as those set out under Ground 2(vi) of Review No. 146 above, and are incorporated by reference hereby.

402. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to this sub-ground of review, are set out above in respect of Ground 2(vi) of Review No. 146, and are incorporated herein by reference.

## **Consideration**

403. My consideration of sub-ground (vi) Copper Volatility, is the same as for Ground 2(vi) of Review No. 146, and is incorporated herein by reference.

404. For all the reasons discussed above I consider that the decision to not make adjustments for copper volatility was the correct or preferable decision.

## **vii) Hedging Costs**

### **MM Kembla's arguments, ADC's Position, Further Information and Clarifications**

405. MM Kembla's arguments and the ADC's position in respect of this sub-ground of review are the same as those set out under Ground 2(vii) of Review No. 146 above, and are incorporated herein by reference.

406. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second and Third Conferences, relevant to this sub-ground of review, are set out above in respect of Ground 2(vii) of Review No. 146, and are incorporated herein by reference.

### Consideration

407. My consideration of sub-ground (vii) Hedging Costs, is the same as for Ground 2(vii) of Review No. 146, and is incorporated herein by reference.

408. For all the reasons discussed above I consider that the Commissioner's decision to not make adjustments for hedging costs or hedging gains /losses was the correct or preferable decision.

### Findings - Normal Value Adjustments

409. The following is a summary of the findings of the sub-grounds of review relating to normal value adjustments under this ground of review:

- The decisions relating to the following sub-grounds were found to be the correct or preferable decisions: (i) Particular Market Situation (ii) Cost of Scrap Copper (vi) Copper volatility, and (vii) Hedging costs and hedging gains/losses.
- The decisions relating to the following sub-grounds of review were not to be found to be the correct or preferable decisions: (iii) MCC's and International Standards; (iv) Drawing Thin; and (v) Capping and Cleaning costs.

## Ground 3: Decision concerning arms length sales between Hailiang HK and Hailiang Australia is not correct or preferable

### MM Kembla's arguments, the ADC's Position, Further Information and Clarifications

410. MM Kembla's arguments and the ADC's position in respect of this ground of review are the same as those set out under Ground 3 of Review No. 146 above, and are incorporated herein by reference.

411. The details of further information sought in the Notice and clarifications and comments arising from the Sections B – G Notice Response and the Second, Third, Fourth and Fifth Conferences, relevant to this ground of review, are set out under Ground 3 of Review No. 146 above, and are incorporated herein by reference.

### Consideration

412. My consideration of Ground 3 concerning arms length sales between Hailiang HK and Hailiang Australia and export price, is the same as for Ground 3 of Review No. 146 above, and is incorporated herein by reference.

413. For the reasons discussed above I consider that the Commissioner's decision concerning the profitability of Hailiang Australia and the related finding of the arms length nature of the export sales between Hailiang HK and Hailiang Australia was not the correct or preferable decision.

## Ground 4: The determination of material injury for all Chinese exporters is not correct or preferable

### MM Kembla's arguments and the ADC's Position

414. MM Kembla's arguments and the ADC's position in respect of this ground of review are the same as those set out under Ground 4 of Review No. 146 above, and are incorporated herein by reference.

### Consideration

415. In its application for review, MM Kembla challenged the termination of INV 557 relating to Chinese exporters pursuant to s.269TDA(3) and (4) of the Act in respect of the negligible volume of dumped goods from China, based on various grounds of review, including a number of grounds or sub-grounds of review relating to normal value and the dumping margin.

416. MM Kembla contended that the Commissioner's decision that dumping did not cause material injury to the Australian industry is premised in part on the ADC's finding of the negligible volume of dumped goods from China. MM Kembla submits further that had the Commissioner correctly determined normal values for Chinese exporters that adequately considered Grounds 1, 2 and 3, of this review, the Commissioner could not have reached the conclusion that he did in relation to material injury.

417. I have found that the Commissioner's decision is not the correct or preferable decision in respect of the following grounds (and sub-grounds) of review:

- Ground 2: Determination of Normal Value in respect (iii) MCC's and International Standards; (iv) Drawing Thin; and (v) Capping and Cleaning costs.
- Ground 3: Decision concerning the export price and profitability of Hailiang Australia and the related finding of the arms length nature of the export sales between Hailiang HK and Hailiang Australia.



Therefore the decision to terminate the dumping investigation under s.269TDA(3) and (4) is not considered to be the correct or preferable decision and is revoked.

418. Under s.269ZZT(2)(a) of the Act, the investigation related to the termination under s.269TDA(3) and (4), therefore resumes.

419. In revoking the termination under s.269TDA(3) and (4) , I am not making a finding that the Chinese exporters are dumping or that the Australian industry has suffered material injury caused by the dumping. That issue will be a matter for the ADC to decide in making its report to the Minister.

420. Therefore, it follows that I am unable to make a decision in accordance with MM Kembla's Ground 4, as to whether the decision in TER 557 that the Australian industry has not suffered material injury from the dumped products, is the correct or preferable decision.

## Summary of Findings in respect of Review No. 150:

421. The decisions relating to the following grounds and sub-grounds of review were found to be the correct or preferable decisions:

- Ground 1: Date of sale.
- Ground 2 : Determination of Normal Value in respect of: (i) Particular Market Situation (ii) Cost of Scrap Copper (vi) Copper volatility, and (vii) Hedging costs and hedging gains/losses.

422. The decisions relating to the following grounds and sub-grounds of review were not found to be the correct or preferable decisions:

- Ground 2: Determination of Normal Value in respect of: (iii) MCC's and International Standards; (iv) Drawing Thin; and (v) Capping and Cleaning costs.
- Ground 3: Arms length sales between Hailiang HK and Hailiang Australia.

423. For the reasons discussed above, I was unable to make a decision in accordance with Ground 4 relating to material injury.

# Conclusions

424. For the reasons set out above, my decision in respect of each of the Reviewable Decisions is as follows:

- Review No: 146: The decision to terminate under s.269TDA(1)(b)(i), is not considered to be the correct or preferable decision and is revoked.
- Review No: 147: The decision to terminate under s.269TDA(2), is considered to be the correct or preferable decision and is affirmed.
- Review No: 148: The decision to terminate under s.269TDA(13), is not considered to be the correct or preferable decision and is revoked.
- Review No: 149: The decision to terminate under s.269TDA(1)(b)(ii), is not considered to be the correct or preferable decision and is revoked.
- Review No: 150: The decision to terminate under s.269TDA(3), is not considered to be the correct or preferable decision and is revoked.

425. Under s.269ZZT(2)(a) of the Act, the investigation that is related to the decisions under subsections 269TDA(1)(b)(i), 269TDA(13), 269TDA(1)(b)(ii) and 269TDA(3), therefore resumes.

426. Interested parties may be eligible to seek a review of this decision by lodging an application with the Federal Court of Australia, in accordance with the requirements in the *Administrative Decision (Judicial Review) Act 1977*, within 28 days of receiving notice.



Leora Blumberg  
Panel Member  
Anti-Dumping Review Panel  
24 June 2022

## Conferences

<b>Date of conference</b>	<b>Participants</b>	<b>Purpose</b>	<b>Abbreviation</b>
11 January 2022	MM Kembla	To obtain further information and clarification in relation to the applications.	The First Conference
26 April 2022	ADC	To obtain further information and clarification in relation to the reviews.	The Second Conference
27 May 2022	MM Kembla	To provide an MM Kembla with an opportunity to comment on further information	The Third Conference
7 June 2022	ADC	To obtain further information	The Fourth Conference
13 June 2022	MM Kembla	To provide an MM Kembla with an opportunity to comment on further information	The Fifth Conference



### Addendum to ADRP Decision Nos. 146-150

On 24 June 2022, the ADRP made its decision in regard to ADRP Review Nos. 146-150. Following the decision being made, one typographical issue and two factual issues were identified, as follows:

- A typographical error was identified at line one of paragraph 121. The sentence referred to the term “WD” instead of the correct term, “WT”.
- A factual error was made at line 6 of paragraph 225 where reference is made to, [REDACTED] instead of the correct reference to, [REDACTED].
- Subsequent to the finalisation of this report, MM Kembla advised of a factual error at line 15 of Paragraph 126 which was repeated at line 5 of Paragraph 134, that is, in respect of the phrase, “.....‘nominal weight’ .....would be significantly less than the actual weight, because of the tolerances and the practice of drawing thin” [emphasis added]. MM Kembla advised that the emphasised word “less”, should be replaced with the word, “more” in both paragraphs. The source of the original statement for the Review Panel was in Paragraph 2(i) of the Third Conference Summary (the last paragraph on page 5), which was reviewed by MM Kembla prior to finalisation and publication, without the factual error being identified. The corrected version of the phrase in Paragraphs 126 and 134 does not affect the Review Panel’s consideration of the issue as set out in Paragraph 134, since it still involves a distinction between pricing based on nominal weight, rather than actual weight, which the ADC failed to recognise, and which cast further doubt on the ADC’s methodology of establishing the MCC’s, without taking WT (or International Standards) into consideration.