NON CONFIDENTIAL VERSION
ADRP 2019/121

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17 February 2020

SYS-Submission to ADRP – application to review ADC Report 505

Introduction

1. Anti-dumping duties were imposed on hot-rolled structural steel sections from Japan, Korea, Taiwan and Thailand ("the goods") on 20 November 2014. An application for review in respect of the goods was made by Liberty Steel and Review 499 was initiated by the Anti-Dumping Commission ("ADC" or "the Commission") on 3 January 2019. On 21 January 2019, Liberty Steel also applied to ADC for a continuation of measures. Continuation Inquiry 505 was initiated by ADC on 11 February 2019. ADC made clear that in evaluating the application for continuation, it would consider the conclusions it reached as to alteration of variable factors that might arise under Review 499.[1]
2. By a Notice signed on 5 November 2019 and published on 11 November 2019, the Minister altered the variable factors. The Minister also resolved to continue the measures by Notice also signed on 5 November 2019 and published on 11 November 2019.[2] Pursuant to the Minister's obligation to provide reasons for her decision and an indication of the material findings of fact and law on which it was based, she declared in the relevant Notice that she had *"considered Rep 505 and … decided to accept the recommendations and reasons for the recommendations, including all material findings of fact and law therein."*
3. The combined operation of the Review and Continuation decisions was to continue the measures but at revised dumping margins as found in Report 499 as adopted by the Minister.
4. This application specifically pertains to Continuation Inquiry 505. A separate submission has been made in relation to Review 499. It is acknowledged, however, that the two assessments overlap significantly with identical goods, identical interested persons and an identical period under investigation. In addition, the Final Report in 505 stated:

> *"For the purposes of this continuation inquiry, the Commissioner has had regard to other matters considered relevant to the inquiry,*

[1] ADM 2019/21, p 6.
[2] ADM 2019/126.

including the variable factors established in Review 499, to assess whether dumping has occurred during the inquiry period, and whether dumping is likely to continue or recur if the anti-dumping measures were to expire."[3]

5. Report 505 also stated:

"As exports from Thailand have continued since measures were imposed, and have to be found to be at dumped prices, the Commission considers that it is likely that the expiration of anti- dumping measures would improve the competitiveness of HRS exported to Australia from Thailand and that this would encourage importers to acquire HRS from Thailand at dumped prices and in greater volumes."

6. It is clear that the Commission in Report 505 relied upon its variable factor findings in 499 and that the Commission in 505 believed that its Report in 499 required it to conclude in 505 that SYS goods "have to be found to be at dumped prices." Hence the 505 conclusions are in part dependent on the conclusions in 499 and on whether the decisions in 499 are correct and preferable. Hence, all of the grounds of challenge to Report 505 flow from the grounds of challenge to Report 499. For this reason, this submission and the submission in respect of Review 499 are largely identical, save as to distinct page references as between the 499 Review Report and the Continuation Inquiry 505 Report where the same reasoning is found in each.

Ground 1: Use of MCC structure and rejection of identical goods analysis

Introduction and outline of argument

7. The Commission erred in refusing to concentrate attention on identical goods where such data was available. The Commission essentially argues that it is not obliged to do so and that such an obligation is not the implication of the legislative terms or policy or of the WTO Anti-Dumping Agreement that the legislation aims to give effect to.
8. To the contrary, the legislation properly interpreted, both as to its terms and its intent, should lead to the contrary conclusion. Where domestic sales of identical goods are profitable and are at sufficient volumes, these must be the sole basis on which to calculate normal value.
9. Alternatively, if the legislation allows for merely alike goods to be considered even where identical goods are sold in sufficient quantities, section 269TAC(8) leads to the same outcome as if the merely alike goods were ignored, by mandating adjustments where a comparison is not being made with identical goods. If alike goods have different prices to identical goods, the conditions mandating adjustment are present.
10. The Commission also erred when it concluded that there is no evidence of price difference on which to base an adjustment.

[3] Final Report 505 page 27

Analysis

11. Turning first to the legislation, section 269T(1) defines like goods as:

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

12. In seeking to justify rejecting identical goods, the Commission stated that *"(t)he legislation does not require the Commission to only consider domestic sales of identical goods where they are present."*[4]
13. While the legislation does not state this categorically, the question is whether a proper interpretation provides that a preference should be given to data in relation to identical goods, or whether the Commission has a unilateral discretion to choose between identical and like goods wherever it sees fit.
14. If the latter outcome was intended, the definition would not be in two parts, distinguishing between identical and alike goods, with identical goods first referred to. It might also have used a term such as "either." It follows from the structure of that definition, that where data is available, analysis should be under the first limb of the definition, being as to identical goods. The alternative second limb of the definition should be utilized where identical goods have not been sold in the relevant period of calculation in sufficient quantities and/or at sufficiently profitable levels. In other circumstances, identical goods must be the focus of attention.
15. That is supported by a purposive approach to interpretation. The ultimate aim is to consider whether there is injurious price discrimination between *identical* goods. It is where identical goods have differing prices that a protective concern arises. That concern may of course still arise with alike goods, but not if a comparison of identical goods shows that there is no problem. Furthermore if only alike goods are considered, there must be adjustments to account for differences to identical goods.
16. That is clearly confirmed by the WTO Anti-Dumping Agreement ("ADA"). Given the presumption that domestic legislation should be interpreted consistently with Australia's international obligations, resort to ADA should ensure that any ambiguity is interpreted in favour of consistency. Art 2.6 ADA states as follows:

> *"Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration,* ***or in the absence of such a product****, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."* (emphasis added).

17. ADA makes clear that one only turns to merely alike goods "in the absence" of identical goods.
18. Hence the Commission's view as to the legislation is erroneous and should be rejected by ADRP.

[4] Final Report 499 p 47.

19. The Commission's view in its Review and Continuation Reports is also inconsistent with its own Dumping and Subsidy Manual 2018 ("DSM 2018").
20. DSM 2018:11 states;

> *"The Commission's policy is to interpret the legislation in a manner consistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement, ADA) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).*
> *Identical goods will be regarded as like goods should such goods exist; and goods closely resembling the goods under consideration will be regarded as like goods in the absence of identical goods"*

21. DSM 2018:60 states;

> *"When determining normal value under subsection 269TAC(1) based on domestic sales of like goods in the exporter's domestic market, the Commission obtains information on all sales of these goods. In cases where different models of the goods exist, it is necessary to select the domestically sold models that are most directly comparable to the particular models exported to Australia. This allows for a proper comparison between the normal value and export price of the goods for the purposes of working out the dumping margin."*

22. DSM 2018:61states;

> *"Importantly, the MCC structure will establish the model matching hierarchy. The categories in the MCC structure will be listed, in descending order, according to the significance of the category to the goods when model matching. This is to ensure that the most comparable surrogate models are chosen, for model matching purposes, when there are insufficient domestic sales of the identical model. The most comparable model is usually considered to be the surrogate model that has the closest physical characteristics (an indicator of this may be the model that has the smallest difference in cost of production per unit)."*

23. The priority given to identical goods is clear in the above quotes.
24. This result not only flows from the order of the definition, and from the purpose of the legislation and from ADA, but is also reached by another route via the requirements of section 269TAC(8)(b) which mandates adjustment if it is found that the price paid or payable for like goods and for exported goods "are not in respect of identical goods …".
25. Thus the Commission has two choices in combining the definition of like goods with the adjustment provision. First, if there is data available as to identical goods, such data should be used and there would then be no basis for a mandated adjustment for product differences. If the Commission is unable to apply that simple and direct method of calculation, and is forced to consider goods that are alike but not identical, it must consider what adjustment is required by reason of those differences.

26. In terms of the required adjustment, this is stated to be an adjustment directed by the Minister "so that those differences would not affect its comparison with that export price."
27. This is confirmed in the Manual. DSM 2018:64 states;

> *"The ADA requires that, when determining dumping, a fair comparison be made between export price and normal value. It states that the comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time. It requires that due allowance be made in each case, on its merits, for differences which "affect price comparability".*
>
> *Australia's anti-dumping legislation incorporates this obligation by requiring that:*
> *the prices of goods exported to Australia are compared with corresponding normal values (subsection 269TACB); and*
> *any necessary adjustments are made to domestic prices (or constructed domestic prices) so that they can be fairly compared to export prices (subsections 269TAC(8) and 269TAC(9)).*"

28. The Commission is also incorrect to assert that, *"the introduction of the MCC structure reduced the requirement for adjustments to account for differences between domestic and export models."*[5] The Commission's reference to the intent of the merely procedural MCC framework must be wholly irrelevant. It is the legislation that must guide the Commission's obligations. There either is or is not in the legislation and Anti-Dumping Agreement the preference to use identical goods where these are available. If they are available they should be used.
29. Differences either exist or they do not. Whether the Commission makes global calculations or separate ones for MCCs, this cannot possibly affect commercial and physical differences that need to be valued and adjusted for. A model code analysis only makes sense if it is undertaken to determine whether individual grades require distinct duty levels or should be excluded from any final duty. Whether MCC is used or not, the Commission should always use the best evidence available for each individual calculation consistent with the legislative terms and policy. Because the policy behind the legislation and the Anti-Dumping Agreement is to make the most meaningful determination of whether there is price discrimination, identical goods should be examined where there are sales at sufficient levels. There should be no policy or legislative basis for watering down the most relevant evidence.
30. In particular, the Commission's reference to the MCC process fails to distinguish between cases where it *ultimately* determines to recommend different outcomes for different MCC grades and cases where it does not. In the latter event, a mere MCC detour cannot possibly change anything that the legislation and ADA direct. If instead it chooses to recommend discrete MCC duty treatment, (not the case in this instance), it is accepted that this might impact upon which goods are indeed seen as identical to each distinct grade. But where as in this case MCC calculations are first done, but these are ultimately

[5] Final Report 499 p 15

combined to establish a single dumping margin, assumptions made along the way before deciding if separate duties are to apply, cannot direct the outcome where discrete analysis is ultimately rejected.

31. The Commission goes further and in addition to its arguments about legislative structure and supposed MCC policy, suggests that it;

> *"found the differences in physical characteristics between AS 300 and SS (SM 400) did not give rise to distinguishable and material differences in price in the domestic market. It was therefore appropriate to also match SS (SM 400) to the Australian export grades."*

32. The legislation and ADA do not limit attention to physical characteristics alone in mandating adjustments, although even here it was even known by ADC that the two types have differing yield strengths at least, this being a key criterion on which it defined and then refined MCC categories.
33. As to other aspects of difference, such as differing markets, the Commission had access to the data for identical goods and alike goods. There either is or is not a difference in values and characteristics between those products.
34. To the extent that it is demonstrably the case that the normal values for identical goods were lower than for merely alike goods, the WAV normal value for the entire product group would be lower than currently calculated if identical goods data was used for the purposes of section 269TAC(1) or alternatively, if the differences in value between identical and merely alike goods were adjusted for as required under section 269TAC(8).
35. As to the factual assertion that there were no resultant material differences in price, that is simply erroneous and is clearly shown to be so by the Commission's own calculations and spread-sheets. It is demonstrably the case that there are such differences in price domestically between identical and merely alike goods. If there are such differences, it is then impossible to understand the meaning of the Commission's comment that differences do not give rise to distinguishable and material differences in price. Because the prices do indeed differ and because the dumping margin would vary significantly if identical goods were utilised, the Commission's proposition is erroneous in fact as well as being illogical.
36. It is easy to demonstrate the factual error. ADC officer Mr [redacted]{name} sent an email to Mr [redacted] {name) dated 21 June 2019 that contained an attachment, described as Appendix 4. From that, it is readily discernible that the net value of AS 300 sold locally in Q1 was significantly lower than the net value of SS 400 in the same period. If AS 300 figures were used as the basis of calculation when domestic sales constituted at least 5% of export volumes, then the overall normal value would clearly be lower than the normal value as calculated. AS 300 domestic sales are clearly at more than 5% of export volumes. Similarly, ADC's knowledge of characteristic differences can be shown by all of its correspondence as to MCC categories.
37. In any event, lack of price difference should not lead to departure from use of data for identical goods. Whether concentrating on identical goods leads to a different figure as compared to use of merely alike goods should not impact upon whether choice of identical goods should be the first priority. If it is logical to direct attention to identical goods where these are available in sufficient quantities, then the calculations that ensue should then apply. Even in circumstances where alike goods would lead to the same numerical outcomes, there is no justification for then doing further calculations to prove that point. If

instead, incorporation of merely alike goods changes the figures, there is simply no policy justification for departing from the figures established by identical goods. Hence the Commission's approach is unreasonable.

38. While the Commission notes that use of identical goods will not always be practical, nevertheless, it conceded that *"it is preferable to identify the most directly comparable like goods on an exporter's domestic market and match these to export sales ..."*[6] In terms of what is preferable, if identical goods were sold locally on less than all quarters, but at total volumes over 5% of the volume of exported goods, the WAV value of the identical goods should apply throughout. The legislation and ADA do not allow for rejection of goods that meet the 5% threshold for the entire PUI but did not for a discrete period determined arbitrarily by ADC during an MCC consideration that is ultimately rejected in terms of discrete treatment of MCC grades. Quarterly calculations should also not be used to skew annual calculations by artificially ignoring best evidence from other quarters.
39. While that is the applicant's primary position, at the very least, identical goods should have been used in quarters that met those benchmarks accepted by ADC as having been met.
40. In terms of adjustment under section 269TAC(8), if SS 400 prices need to be adjusted for the differences to the domestic prices of AS 300 and if as in this case, section 269TAC(1) is being utilised, that is, calculations are to be based on the actual sales figures of SYS made and accounted for under generally accepted accounting principles, the adjustment to SS 400 values should be by reduction of the percentage difference in per unit value of SS 400 and per unit value of AS 300. That effectively replaces SS 400 values with AS 300 values.
41. Importantly where adjustments are concerned, these must be made regardless of whether any AS 300 is sold domestically or not in a particular quarter. Section 269TAC(8) is mandatory. Given that one can find percentage differences between SS 400 and AS 300 in Q1 and Q2, that percentage should apply to reduce the normal value of SS 400 in Q3 and Q4 unless there is a good reason to conclude that some other method of adjustment should be appropriate.[7]
42. Again, while that is the applicant's primary position, at the very least, identical goods should have been used in quarters that met those benchmarks accepted by ADC as having been met.

[6] Final Report 499 p 15. I note that ADRP Review 2018/80 found a pro forma invoice date to be more significant than a sales invoice date for the exporter Nervacero S.A.

[7] The extremely low volumes of AS 300 in Q3 and Q4 can naturally be disregarded on the clear commercial assumption that when such low volumes are needed, prices will tend to be above normal levels.

Ground 2: Credit charge adjustments

Introduction and outline of argument

43. SYS gives its domestic customers the option of a cash price or a credit price. It is not in dispute that the credit component needs to be adjusted out to properly compare NV to EP as no export sales came with a credit charge.[8] It should not be in dispute that SYS charges [redacted]%{rate} per annum as domestic credit, applied pro rata depending on the time of credit selected by the customer. ADC erroneously rejected the actual charge that is an essential term of each domestic contract, and replaced it with a lesser figure it derived from some banking records that have nothing to do with this transaction or this type of transaction. This is contrary to legislation and ADA requiring decisions to be based on the actual transaction and documentation.

Analysis

44. In the SEF to Review 499, the Commission concluded *"(t)he Commission does not accept the domestic credit costs sought by SYS as a due allowance under 269TAC(8) because this relied on an interest rate set by an internal company notice."*[9]
45. In the Final 499 Report the Commission reiterated that view but added a separate line of reasoning. In terms of reiteration, the Commission stated that it *"does not accept the domestic credit costs sought by SYS as a due allowance under 269TAC(8) because this relied on an interest rate set by an internal company notice."*
46. The comments in both SEF and Final Report are almost incomprehensible in referencing an irrelevant fact. The issue is not the gestation of an interest figure but simply whether it does or does not contractually apply to the transactions being considered. If a binding contract between a seller and a buyer does indeed incorporate that interest rate, it must be irrelevant whether the idea emanated from an internal company notice, or from a whim of a negotiator or from an offer by the customer or arose for any other reason. The interest rate either does or does not apply contractually. If it does, it cannot be ignored by the Commission when it seeks to comply with its statutory obligations under sections 269 TAC(1) to use actual figures of the exporter established under generally accepted accounting principles ("GAAP") and also the obligations to make adjustments under 269TAC(8), which obligations are necessary for

[8] Ground 3 deals with a challenge to a minor adjustment to one export shipment merely because payment could not be made over the New Year break.
[9] SEF page 40

Australia to comply with its international obligations under the Anti-Dumping Agreement.

47. The Commission seeks to justify its rejection of the true contractual scenario in favour of some minimum lending rate for commercial banks by referencing a practice purportedly described in the Anti-dumping Manual "which provides an order of preference for the interest rate that is generally applied in making a credit adjustment."[10] The Manual actually states;

> *"The Commission will generally apply the same interest rate in calculating the domestic and export credit terms adjustments, unless the exporter can demonstrate that different interest rates apply to domestic and export sales.*
>
> *Where the terms for both domestic and export sales are credit (e.g. 60 days on domestic sales and 180 days on export sales), an adjustment is made having regard to the interest rates and terms applying in each markets.."*

48. The key words are "apply" and "applying." The [redacted]%{rate} applied by SYS must be used. The [redacted]% arbitrarily selected by ADC that clearly does not apply, cannot.
49. The legislative sources for the Commission's rights and obligations simply provide no basis for its rejection of actual commercial reality and for it to revert instead, to an interest rate applied on wholly differing styles of contracts, for differing parties in differing circumstances.
50. In the Final Report, the Commission added a further purported justification for its options. It asserts that it:

> *"... conducted further credit pricing analysis on SYS's domestic sales by comparing the difference between cash terms and other payment days and by controlling for variables such as month, MCC model and level of trade. The Commission did not find that the actual credit costs of claims by SYS were incurred."*

51. It is hard to understand what the Commission is trying to say. As a general principle, the question is not what credit costs were actually incurred but instead, what credit costs were built into the agreed price that would be payable if prompt payment was not. Any credit inclusive price, whether credit was availed of or not, needed to be adjusted back to a cash price equivalent, using the exporter's own validated data.
52. Furthermore, the Commission reached an erroneous conclusion of fact in holding that no such credit costs were incurred on any of the transaction it reviewed in the verification report. Given that such errors of fact have no basis in the evidentiary records of the Commission, it constitutes an error of law as defined under the Administrative Decisions (Judicial Review) Act.
53. When the Commission undertook its verification visit to SYS, it expressly asked for documentation in relation to certain transactions. It was provided with full access to all such transactions. Annexed to this submission in Appendix 1 are copies of documents made available to the Commission that indicate on their face credit charges at [redacted]% {rate}for [redacted] {no} days, which equate to [redacted]%{rate} per annum. Hence there is no basis for the Commission to have rejected the clear evidence from material before it.

[10] Final Report 499 p 46.

54. A reference to SYS' payment and credit terms must be to its real commercial and contractual payment and credit terms, and not to some terms irrelevant to this transaction offered by commercial bank lenders who offer terms on wholly different bases to manufacturers of goods. A bank sets interest rates as part of a business practice seeking a competitive profit rate as between its costs of borrowing and its competitive costs of lending. It wants to lend and charge an interest rate and sets one that is competitive and profitable. Alternatively, a supplier of goods offering credit, sets credit fees for a wholly differing reason. One would normally expect a supplier of goods would want no possibility of bad debts and would want guaranteed payment immediately upon or before delivery wherever possible. Many customers, however, want delayed terms of payment for cash-flow purposes and may even want suppliers to run the risk of insolvency by delivering goods before payment without any security device. Interest rates set in these circumstances will always be commercially higher than the interest rates offered as a core business activity by a commercial lender. Thus it makes good sense for a supplier of goods to demand a higher interest rate than bank lending rates to induce prompt payment [redacted]%{rate} for this reason as against bank rates [redacted]%{rate} are entirely justified as a result.
55. Thus there is simply no legal or commercial basis for the Commission to ignore the natural commercial reality of higher rates of vendor finance than the rates offered by financial institutions whose business models are to willingly undertake such credit risks.

Ground 3: Export selling charges

Introduction and outline of argument

56. ADC found one instance with part delayed payment for exported goods and wrongly concluded that there must be a credit charge needing adjustment. The short delay of a few days was only because of the New Year bank holiday. No credit charges were paid or payable and no adjustment was justified.

Analysis

57. In a conference with ADRP, Mr Howard confirmed that the normal value adjustment for export credits in this case would make no difference to ascertained normal value. The Review Panel advised that its role was only to consider grounds related to the reviewable decision not being correct or preferable.
58. It is important to understand that Mr Howard's concession was only that if all other grounds are rejected but this was accepted, no change to the final duty would be made. It is obvious that if an adjustment was made that should not have been, it must affect the calculations to some degree at least. There would only be no impact upon the duty if the impact on calculations was at a lesser decimal level than that used by ADC to round off its calculations. That is only the case if all other grounds are rejected. But rejection of these other grounds cannot be presumed *a priori* by ADRP. Hence ADRP must consider the question of whether the adjustment made was indeed correct or preferable and then see the impact when combined with its decision on all other grounds.

59. Furthermore, future duty assessments must flow from a valid methodology adopted by the Minister. That process is not meant to be a forum in which to air disputes as to methodology. Hence it would also be wrong for the Review Panel to refuse to consider the nature of the export credits adjustment made by the Minister, the reasons given for it, and SYS' arguments as to why those reasons are not correct or preferable.
60. SYS' challenge is not as to the calculations themselves, but instead, as to the very decision to make an adjustment. SYS' argument is that it was unreasonable to make an adjustment on the single transaction that had to accommodate the New Year bank closure as if a credit fee applied, when none did so or should have done so.
61. It would have been clear to ADC officers that SYS makes no provision for credit in its export price to [redacted] {name} Credit terms are simply not intended. All bar one transaction in the relevant period indeed stipulated that there were zero payment terms.
62. The only exception was the very last shipment in the relevant period, being one on 31 December. Because it was not possible to organise payment in the normal way, [redacted] {name} provided [redacted]% {rate} prepayment with the balance paid on 4 January. Because the balance was later than the normal payment time, the Commission considered that there should be a nominal adjustment for export credit at its chosen [redacted]% {rate}annual credit rate.
63. The Commission has no basis to presume a credit charge where none is intended or legally payable. The unique payment terms were simply to accommodate the inability to pay as usual. There was no intention to alter the material contract terms that set a credit free price. The price was set in the same way as for all other transactions.

64. This approach is confirmed by the Manual. DSM 2018:74 states;

> *"An adjustment is warranted when credit terms for export sales differ from the credit terms for domestic sales.*
>
> *The Commission will generally use the credit period agreed at the time of sale as shown on the sales invoice or the sales contract. The rationale is that it is reasonable to assume that these known actual credit periods were taken into account when setting prices."*

65. The key question is whether there were credit terms "for" export sales. There were not. Hence no adjustment should be permitted.

Ground 4: Ordinary course of trade ("OCOT") and loss sales for smaller sizes

Introduction and outline of argument

66. ADC has wrongly rejected certain unprofitable sales from its calculations that did not meet the statutory benchmark for such rejection. Hence the rejection was not correct or preferable.

Analysis

67. DSM 2018:32 states;

> *"One condition of section 269TAAD is that sales at a loss must have occurred in substantial quantities in order to be rejected from the normal value determination. The Commission will find that there have been substantial quantities of sales at a loss when the volume of domestic sales found to be sold at a loss within a reasonable period are 20 per cent or more of the total volume sold in the exporting country. The reasonable period of time is taken to be the investigation period."*

68. This comment is compliant with footnote 5 to Art 2.2 ADA which states:

> *"Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value."*

69. The key phrase is "transactions under consideration," which was ultimately determined to be one description without separate determinations for MCC grades evaluated.
70. Nevertheless the Manual and ADC behaviour on this occasion suggest that there is a difference in procedure when an MCC approach is adopted to make interim calculations but where ADC ultimately decides not to treat differing MCC types discretely for final determination of applicable duties.
71. ADN No 2018/128 of 9 August 2018 contains an announcement by the Commission that it would utilise a Model Control Code (MCC) structure in new investigations.
72. DSM2018:33 states;

> *"Model matching criteria will be followed in order to identify identical goods sold on the exporter's domestic market; or absent identical goods which goods most closely resemble the goods under consideration (see Model Matching chapter). The sales at a loss tests are applied separately for each grade or model."*

73. First it should be noted that the Foreward to the Manual states: *"The Manual does not intend to provide a mandatory set of instructions or constrain the decisions of the Commission officers."* Nor can it change the legislation or Regulations or adopt processes contrary to Australia's international obligations.

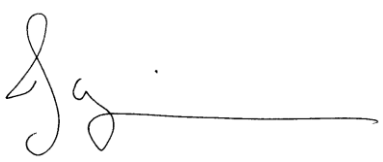
74. ADC's new practice as to sales at a loss as stated in the Manual, fails to properly differentiate between cases where it ultimately makes differing decisions on MCC items and cases like this one where it did not. In the latter event, it should not be possible to reject items ignored in an interim MCC calculation where that calculation does not lead to discrete decisions. Stated differently, if ADC finds that differing MCCs deserve differing duties, it has set up differing forms of identical goods for comparison. Loss sales on such differing goods might then

meet the threshold where they would not if the goods are instead treated for duty purposes as described in the application that led to duty in the first place.

75. It is clear from the legislation and ADA that where ADC ultimately treats the goods for duty purposes as characterized in that initiating application, the statutory threshold must apply to such goods.
76. Given that an applicant for anti-dumping duty can have an undesirable power over the application of positive findings simply through its definition of the goods in the application itself, it is eminently sensible for ADC to utilise MCC to determine whether certain grades should be excluded from any duty because they are not dumped and/or do not cause injury, or alternatively, to determine if a different dumping margin should apply to differing grades.
77. If that approach is to be ultimately followed, with differing duties or exclusions, then figures for particular grades might be excluded if there are insufficient quantities or perhaps because of sales at a loss for particular grades. But more often than not as in this case, the Commission simply uses an MCC approach as a detour to identify whether there should be different duties and ultimately concludes to the contrary and combines all MCC calculations into a global WAV calculation.
78. In the latter event, the Commission is simply determining in the final analysis that a global WAV comparison should be made between export price and normal value over the entire range of goods that fit within the initial application and goods like those goods. In such circumstances, it is wholly inconsistent and irrational to ignore the ultimate decision to make a global analysis and reject certain grades on the basis that they are being sold at a loss at levels below the 20% statutory cut-off in comparison with the final characterization of the goods the subject of ADC's recommendation to the Minister. The fact that the Commission has first made separate calculations should not alter this principle. It is the ultimate decision as to the way duties are to be determined that is important. If it is global, then there must be more than 20% of loss sales over the entire goods being considered for such sales to be validly rejected under the legislation.
79. The approach adopted is also inconsistent with the Commission's attitude as to the sufficiency of sales volumes sold on the domestic market in the ordinary course of trade. At p 47 of Final Report 499, the Commission noted that it had assessed and compared the total quantity of like goods sold on the domestic market to that of the goods exported to Australia over the review period. If one takes a global approach to the sufficiency of the sales volumes, one should also take a global approach to determining whether there is an unacceptable level of sales at a loss.

Conclusion

80. The Commission's decision is not the correct or preferable one for each of the above four grounds.



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Attachment: Confidential Appendix 1 comprising commercially sensitive sales transaction documents that cannot be provided in a non- confidential form