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Australian Government
Department of Industry, Science, Energy and Resources

Anti-Dumping Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

By EMAIL

Ms Leora Blumberg
Panel Member
Anti-Dumping Review Panel
GPO Box 2013
CANBERRA ACT 2601

Dear Ms Blumberg

ADRP Review Nos. 146-150 Copper Tube exported from the People's Republic of China and the Republic of Korea

I write in response to the notice under section 269ZZRB of the *Customs Act 1901* (Cth) (the Act) provided to me on 30 March 2022. The notice requested further information in respect of a number of grounds (or sub-grounds) of review of the various applications.

Please find at **Attachment A** my response to Section A of the notice (my responses to Sections B to G of the notice were provided on 13 April 2022). This response reflects the information that was before me at the time of the Reviewable Decisions.

I remain at your disposal to assist you in this matter. Officers from the Anti-Dumping Commission are available to participate in a conference if you consider it helpful to do so.

Yours sincerely

Dr Bradley Armstrong PSM
Commissioner,Anti-Dumping Commission
21 April 2022

Attachment A

A. Further information is requested in relation to the following grounds or sub-grounds of review:

- **The decision concerning the selection of invoice date for fair comparison purposes, for Chinese and Korean exporters, is not the correct or preferable decision**
- **The determination of normal values under s.269TAC(1) is not the correct or preferable decision, in respect of (i) copper volatility and (ii) hedging costs**

ADRP request (Question A-1):

The ADC stated in TER 557 that, "…the evidence demonstrates 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 but submitted that the price set at order date (based on a copper benchmark) does not change. It stated that it provided evidence to the ADC of its own imported copper purchases from the same exporters showing the lag between order date and invoice date, and that prices do not change. Please clarify whether evidence was before the ADC demonstrating that price varied after order date if price of copper and /or volumes were changed.

Commission's response:

1. The commission verified sample sales records for all cooperative exporters, including sales to MM Kembla, and is satisfied that there are variations in price and/or volume between sales order and invoice date. Evidence before the commission indicates that for 2 cooperative exporters, volume and amount may change between 5% and 20% between order or contract date and invoice date. For one of these exporters, in one sample there was a unit price variation of 1.5% between sales order confirmation and invoice.[1] The remainder of the sample transactions for this exporter had variations of up to 3% in volume between sales order confirmation and invoice date. The commission considers volume variations are relevant because they affect the weighted average normal value and export price used in calculating the dumping margin. The remaining cooperative exporter does not set a price until the date of invoice.[2]

2. In addition to the commission's observation that the price and/or volumes vary between order and invoice date, the commission observed that for one verified exporter, the sales contract states that the London Metals Exchange (LME) price is set as a "tentative LME".[3] That is, that the order on face value indicates that material terms of sale are not yet settled.

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[1] Refer to **Confidential Attachment 2** at sheet **A-1**

[2] Refer to **Confidential Attachment 2** at sheet **A-2**

[3] Refer to **Confidential Attachment 2** at sheet **A-3**

3. In circumstances where there can be variation between the order date and invoice date, the commission generally considers the sales term details contained in the invoices (at the date of invoice) to be the material terms of sale unless it is provided with evidence otherwise. 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. This practice approach is reflected in the *Dumping & Subsidy Manual – December* 2021 (the Manual) at pages 51 to 52. The commission considers this approach to be aligned with WTO practice.[4]

4. The commission notes that MM Kembla's application for anti-dumping measures on 29 May 2020 confirmed that in their own accounting records they record their sales and volumes as at the date of despatch,[5] which the commission understands occurs at the point of invoice rather than order. 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, indicating that the price and/or volume changes are considered settled at the invoice date.

5. The commission verified accounting records for all cooperative exporters and is satisfied that they follow a similar approach in recording transactions at the invoice date. This further supports the commission's 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.

ADRP Request (Question A-2):

> *Please comment on the "Export Fixed Price Tube Sales Examples" provided in Confidential Attachment 2 to MM Kembla's submission to the ADC, dated 4 October 2021, and the apparent impact of the copper price fluctuations that occurred between the date when the fixed price order is set and the date of the sales invoice.*

Commission's response:

6. The commission is aware of the price fluctuation of copper that occurred between the date when the fixed price order is set and the date of the sales invoice. However, these variations are not considered in the commission's calculations, as the terms of sale are calculated on the basis of the invoice date for the reasons outlined above.

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[4] Footnote 8 at Article 2.4.1 of the Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[5] EPR 557, document no. 1, page 6

7. Separately, although the commission is aware of hedging practices of exporters, the commission's view is 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 commission considered the hedging practices of verified exporters and considered that adjustments to account for hedging gains or losses are not necessary, "having regard to all circumstances of the exportation",[6] or "represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation".[7]

   The example provided by MM Kembla in its submission of 4 October 2021 outlines theoretical transactions where a hedging loss may be observed, and it argues that the hedging loss should be attributed by either adjusting the export price down, or adjusting the normal value higher by the value of the hedging costs.

8. The commission sets out below its consideration of the hedging costs relating to the verified exporters:

   - In relation to the export price, the commission calculated Nungwon Metal Ind Co., Ltd's (Nungwon) export price under section 269TAB(1)(a) of the Act[8] based on "the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation."[9] As hedging costs are not a transport expense or a matter arising after exportation, it is not a cost that warrants a deduction from the export price.

   - The commission calculated Daejin Copper Pipe & Tube Manufacturing Co., Ltd's (Daejin) export price under section 269TAB(1)(c), having regard to the circumstances of the exportation, which was based on the invoice price between Daejin and its intermediary customer. The commission considers that this invoice price best reflects the export price, having regard to the circumstances of the exportation. The commission determined that an adjustment for any hedging cost is not necessary, because a hedging cost is not an expense that resulted from "having regard to all circumstances of the

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[6] Section 269TAB(1)(c) of the *Customs Act 1901*

[7] Section 269TAB(1)(a) of the *Customs Act 1901*

[8] All legislative references in the commission's response are to the *Customs Act 1901* unless otherwise specified.

[9] Section 269TAB(1)(a)

exportation",[10] that is, the activities associated with the importation of the goods from the port of loading (such as duties and transportation costs).

- The commission calculated Zhajiang Hailiang Copper Co., Ltd's (Hailiang) export price under section 269TAB(1)(c), having regard to the circumstances of the exportation, which was based on the invoice price paid by the importer, less an amount of Hong Kong Hailiang Metal Trading Limited's (Hailiang HK) selling, general & administration (SG&A) costs and other deductions arising after exportation. The commission did not deduct an amount for Hailiang HK's hedging cost as, similar to Daejin, it is not an expense that resulted from having regard to "the circumstances of the exportation."

9. The commission notes the hedging costs are sometimes included in SG&A as part of the the cost to make and sell (CTMS) for each respective exporter as an indirect cost. These costs, where they have been incurred by the exporter, are considered as part of the calculation relating to the cost to make and sell (CTMS) for each respective exporter as an indirect cost. As outlined in the commission's response to ADRP request (Question A-6) below, in this matter there were no heding costs included.

10. In relation to MM Kembla's submission of 4 October 2021 which suggests that the normal value should be increased through a section 269TAC(8) adjustment, the commission is not satisfied that any hedging gains or losses incurred by the exporter or an entity related to the exporter affects price comparability. The commission is not satisfied that an adjustment under section 269TAC(8) to the normal value is necessary. This is further discussed in detail in paragraphs 19 to 22 below.

ADRP request (Question A-3):

The ADC stated in TER 557 that it compared the sales order dates and invoice dates for both domestic and export sales for <u>all cooperative exporters</u>, for a sample of sales transactions used for the verification of sales. The ADC found that the number of days between sales order dates and invoice dates to be substantially less than the 3 months submitted by MM Kembla. The ADC stated further that it found that the number of days between the sales order date and invoice date, on average for "at least one exporter", is longer for domestic sales than export sales. Reference was made to Confidential Attachment 2 to TER 557 in this regard. Does the ADC have comparable data for any other exporters, and if so please provide this information to the Review Panel?

Commission's response:

[10] Section 269TAB(1)(c)

11. The commission provides **Confidential Attachment 2**, which compares the number of days between sales order date and invoice date from verified sales samples for all cooperative exporters for domestic and export sales. The Confidential Attachment confirms the statements quoted above from TER 557.

ADRP request (Question A-4):

The ADC also stated in TER 557 that it assessed the volatility of copper prices on a quarterly basis on the LME and noted that these were in the range of falls of approximately 5% and increases of approximately 2%. It stated further that it had also assessed the differences in the cathode copper price on the LME on a monthly basis and found that the differences were both increases and falls of under 2% in the majority of months during the investigation period. The ADC did not consider these changes in copper prices to be significant and therefore found that a comparison of quarterly weighted average (WA) normal values and export prices was appropriate.

a. *With reference to the table included in MM Kembla's submission to the ADC on 9 November 2021, pages 7 – 8, please could the ADC comment on MM Kembla's statement that, "the inter-month volatility was very significant and further supports why it is not reasonable to compare domestic sales with export sales at the date of invoice even if the timing difference is less than 3 months as suggested by the Commission".*

b. *In the light of MM Kembla's submission that it is incorrect to suggest that the volatility of copper prices is not significant or material considering, "the economics of manufacturing and selling copper tube when the raw material accounts for more than 90 per cent of the selling price", and in view of the fact that inter-month volatility was less than when assessed on a quarterly basis, did the ADC consider whether it was more appropriate to compare monthly WA normal values and export prices, rather than on a quarterly basis? Please provide the reasons for your answer.*

Commission's response:

12. In response to **part a)** of the ADRP's request above, the commission has reviewed MM Kembla's submission dated 9 November 2021 relating to the volatility of copper prices, and confirms its view that where there are price differences between the sales order date and the invoice dates, it is preferable to use the invoice date for the reasons outlined above at paragraphs 1 to 5. Accordingly, it is the commission's view that even if there is a longer period between the sales order date and the invoice date between domestic sales and export sales and there are fluctuations in price, the invoice reflects the material terms of sales for both domestic sales and export sales.

13. For the purposes of clarification, the commission notes MM Kembla's submission that the price variations are significant and disagrees with this conclusion. The commission noted in the Termination Report No. 557 that:

"The commission has assessed the volatility of copper prices on a quarterly basis on the LME and that these are in the range of falls of approximately 5% and increases of approximately 2%. The commission has also assessed the differences in the cathode copper price on the LME on a monthly basis and has found that 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 under 2% in the majority of months during the investigation period."

14. Further, the commission has 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%
- for the remaining two months, the fluctuations were less than 10%
- 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% (**Confidential Attachment 2**).

15. In response to **part b)** of the ADRP's request, the approach adopted by the commission in the investigation is consistent with standard and established commission practice based on the evidence before it in relation to cost and selling price ranges. The commission's general approach is 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).[11]

16. In this investigation, Australian industry and cooperative exporters provided data to the commission on a quarterly basis. As stated in the commission's response to part a) above at paragraph 14, the monthly movements are below 5% in 10 months of the investigation period. Accordingly, the commission does 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.

ADRP request (Question A-5):

If there were concerns about the volatility of the price of copper, did the ADC consider using s.269TACB(3) of the Act, as suggested by MM Kembla, even if it considered the relevant date of sale to be the date of invoice? Please provide the reasons for your answer

Commission's response:

17. The commission did not use section 269TACB(3) as there was sufficient information available to ascertain export prices under section 269TAB(1). This information included the price paid or payable for the goods by the importer, other

[11] The Manual at pages 95-96

than any part of that price that represents a charge in respect of the transport of the goods after exportation, or in respect of any other matter arising after exportation, or the price paid having regard to all circumstances of the exportation.

18. In addition to the commission's view that there was sufficient information to use section 269TAB(1), the commission notes that 269TACB(3) would not be suitable because the export prices did not vary significantly between purchasers, regions, or over time. The commission notes that copper tube prices are set in line with global benchmarks, and therefore the commission notes that export prices for all cooperative exporters will likely be similar. Further, the commission has analysed export prices for all cooperative exporters and notes that they do not vary significantly between purchasers, regions or over time. Analysis of export prices is at **Confidential Attachment 2**.

ADRP request (Question A-6):

> *The ADC stated in TER 557 that it does not consider that an adjustment relating to "gains or losses on hedging" has any relevance to the setting of prices that necessitates an adjustment under section 269TAC(8). Please clarify whether hedging costs (associated with entering into hedging contracts) were taken into consideration (as financial costs) as part of the CTMS and if so, whether there were differences in hedging costs for domestic and export sales that could warrant an adjustment.*

Commission's response:

19. As noted in response to Question A-2 above, the commission did not consider that an upwards adjustment to the normal value for hedging costs under section 269TAC(8) was necessary as it does not consider it to be a direct selling expense, nor does it "affect its comparison with that export price."[12]

20. All relevant financial costs, *including* hedging costs, were considered for each cooperative exporter during verification of the costs where such costs had been identified by the exporter. These costs, where they have been incurred by the exporter, have been considered as part of the calculation relating to the cost to make and sell (CTMS) for each respective exporter as an indirect cost.

21. During verification, the following findings were made:

- The commission did not identify hedging costs in the accounting records of Hailiang and therefore, hedging costs were not included in its CTMS. The commission notes that hedging costs were incurred by the trading entity, Hailiang HK, and therefore was not included in the CTMS for Hailiang.

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[12] Section 269TAC(8)

- The commission did not identify hedging costs in the accounting records of either of Nungwon or Daejin. Any gains or losses resulting from variations in raw material fluctuations have been recorded in the CTMS accordingly.

22. As the commission did not identify hedging costs in the accounting records for any of the verified exporters, these have not been taken into consideration as financial costs as part of the CTMS.