

PUBLIC SUBMISSION
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Dear Mr Katsoulis

Non – Confidential

Comments on Guardian Submission EPR 034

NIP

An NIP must be based on the Australian industry's unsuppressed selling price as determined. The ADC will, no doubt, consider the circumstances where the lesser duty rule does not have to apply.

Section 269 TDA

The SEF concluded that the de minimis and negligible provisions in s. 269 TDA did not apply in a continuation inquiry. That was the same conclusion reached in Viridian's submission dated 17 June (EPR 028) which was outside the 1 June consideration time for submissions. (SEF, page 11). Viridian's submission referenced the Panel Report US-Corrosion Steel to confirm the exclusion of the thresholds in a continuation inquiry.

The exporter's submission repeats the assertion that the "qualifying words" of s 269ZHF(2) assist in the exporter's interpretation that s 269TDA is relevant to the continuation of measures:

The SEF at 8.4.4 refers to our client's submission as to the effect of s 269TDA of the Act. In short, that submission is that the qualifying words of s 269ZHF(2) – "that the measures are intended to prevent" – pick up s 269 TDA. In this way, the Commissioner is obliged to consider whether dumping margins or volumes are negligible in the course of a continuation inquiry.

The words "that the measures are intended to prevent" relate to material injury caused by dumping. The measures do not relate to de minimis. The notice implementing the measures has been arrived at by excluding de minimis exporters. The measures in place cannot "prevent" de minimis levels of dumping. That has been established as part of the investigation. In the 2010 period of dumping investigation (YEM 2010) Xinyi Ultrathin was found to have a de minimis dumping margin of -2.8%. Consequently the investigation of Xinyi Ultrathin was terminated. For this reason, Xinyi Ultrathin is not part of the continuation inquiry. If s 269TDA was to apply then it could be argued the de minimis margin would have to be re-investigated. But as Xinyi Ultrathin is not included in the notice provided in Division 3 this could not happen.

The purpose of s.269ZHF(2) was described in Siam Polyethylene as preventing material injury or the threat of injury:

But, the continuation review under Div 6A is still directed to the purpose of preventing material injury or the threat of such an injury caused by dumping. So, in exercising his or her discretion under s 269ZHG(1), I am of opinion that the Minister must consider whether the existing measures are appropriate and adapted to achieve the purpose served by the measures identified in s 269ZHF(2) if they are to be continued.(para 41)

The existing measures have the purpose of addressing material injury and dumping.

The exporter's submission also refers to the Explanatory Memorandum to the 1998 legislation:

"... prohibits the CEO from recommending the continuation of anti-dumping measures unless he or she is satisfied the factual grounds that must be present prior to the taking of anti-dumping measures, set out in Division 3, have been satisfied."(para 49)

The exporter believes that the "factual grounds" includes de minimis. But the factual grounds (material injury and dumping) have been established after excluding the de minimis exporters during the investigation as to whether a notice should be published. The function of Division 3 is to implement measures after (normally) an investigation has been concluded.

The exporter submission refers to the following paragraph from Siam Polyethylene:

Since s 269TG(2) authorised the use of the measures where there was a threat of material injury to an Australian industry caused by dumping, the character of the likelihood in s 269ZHF(2) will take its meaning from the purpose for which the original imposition of dumping duty under s 269TG(2) was imposed.(para 47)

The "character of the likelihood" is whether there is a likelihood that material injury and dumping would again be identified. That is, the purpose of the notice is to address material injury and dumping. The notice is not connected to s 269TDA as that section's provisions were involved with the investigation and not the measures .

Yours sincerely

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