



Australian Government

Anti-Dumping Review Panel

ADRP REPORT No. 63

Hollow Structural Sections Exported from
the People's Republic of China, Republic
of Korea, Malaysia and Taiwan

February 2018

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Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADC	Anti-Dumping Commission
ADC Report	Final Report 379 by the Commissioner to the Minister
ADN	Anti-Dumping Notice
Alpine	Alpine Pipe Manufacturing SDN BHD Company
Appellate Body	Appellate Body of the World Trade Organisation
Assistant Minister	Assistant Minister to the Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister
Austube Mills	Austube Mills Pty Ltd
China	The People's Republic of China
Commissioner	The Commissioner of the Anti-Dumping Commission
Croft	Croft Steel Traders Pty Ltd
Dalian	Dalian Steelforce Hi-Tech Co., Ltd
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
EC Report	Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence
GOC	Government of China
HRC	Hot Rolled Coil
HSS	Hollow Structural Sections
Inquiry Period	1 July 2015 to 30 June 2016
LTAR	Less than adequate remuneration

Korea	Republic of Korea
Manual	Dumping and Subsidy Manual April 2017
Minister	Minister for Industry, Innovation and Science
OCOT	Ordinary course of trade
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Industry, Innovation and Science
Regulation	<i>Customs (International Obligations) Regulation 2015</i>
Reviewable Decision	The decision of the Assistant Minister made on 21 June 2017
SEF	Statement of Essential Facts 379
SG&A	Selling, general and administrative
SIE	State Invested Enterprises
Tianjin Youfa	Tianjin Youfa Steel Pipe Group Co., Ltd
Steelforce Australia	Steelforce Australia Pty Ltd
Steelforce Trading	Steelforce Trading Pty Ltd
UAE	United Arab Emirates
Ursine	Ursine Steel Co., Ltd
WTO	The World Trade Organization

Summary

1. For the reasons given below, I consider that except for a change to the dumping duty notice and the countervailing duty notice, the decision to secure the continuation of the measures was the correct or preferable decision.

Introduction

2. The following parties have applied pursuant to s.269ZZC of the *Customs Act 1901* (the Act) for review of a decision of the Assistant Minister made on 21 June 2017 to secure the continuation of the measures then applying to the export of Hollow Structural Sections (HSS) exported from the People's Republic of China (China), the Republic of Korea (Korea), Malaysia and Taiwan (Reviewable Decision):
 - Dalian Steelforce Hi-Tech Co., Ltd (Dalian);
 - Ursine Steel Co., Ltd (Ursine);
 - Croft Steel Traders Pty Ltd (Croft); and
 - Tianjin Youfa Steel Pipe Group Co., Ltd (Tianjin Youfa).
3. The applications for review were accepted and notice of the proposed review as required by s.269ZZI of the Act was published on 23 August 2017. As Senior Member of the Review Panel, I directed in writing pursuant to s.269ZYA of the Act that the Review Panel for this review be constituted by me.

Background to the application

4. On 31 October 2016, the Commissioner of the Anti-Dumping Commission (ADC) commenced an inquiry into whether the continuation of the anti-dumping measures applying to HSS exported from China, Korea, Malaysia and Taiwan was justified¹. The inquiry was as a result of the application by Austube Mills Pty Ltd (Austube Mills) and Orrcon Pty Ltd for a continuation of the measures.

¹ ADN No. 2016/113.

5. The anti-dumping measures were in the form of a dumping duty notice in respect of HSS exported from China, Korea, Malaysia and Taiwan and a countervailing duty notice in respect of HSS exported from China. The measures had initially been imposed on 3 July 2012 and were due to expire on 2 July 2017.
6. The inquiry period for the inquiry was 1 July 2015 to 30 June 2016. A Statement of Essential Facts (SEF) was published on 11 April 2017 and a report to the Minister was made in May 2017 (the ADC Report). The Commissioner recommended to the Minister that he take steps to secure the continuation of:
 - The dumping duty notice applicable to the HSS exported from China, Korea, Malaysia and Taiwan; and
 - The countervailing duty notice applicable to the HSS exported from China by all exporters except Dalian, Huludao City Steel Pipe Industrial Co, Ltd and Qingdao Xianxing Steel Pipe Co. Ltd.
7. The Minister accepted the recommendations of the Commissioner and made the Reviewable Decision.

Conduct of the Review

8. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.
9. With limited exceptions², in carrying out its function the Review Panel is not to have regard to any information other than to “relevant information” as that expression is defined in s.269ZZK(6). For the purpose of the review, the relevant

² The exceptions are in s269ZZK(4A) and s.269ZZHA(2).

information is that to which the Commissioner had, or was required to have, regard when making the findings set out in the report to the Minister³. In addition to relevant information, the Review Panel may have regard to conclusions based on relevant information that are contained in the application for review and any submissions received under s.269ZZJ⁴.

10. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information and to conclusions reached at the conference based on that relevant information. A conference was held on 15 August 2017 with representatives of the ADC and Mr. J Waincymer representing Tianjin Youfa. A summary of the conference was published on the Review Panel's website.
11. Unless otherwise indicated, in conducting this review, I have had regard to the applications (including documents submitted with the applications or referenced in the applications) and the submissions received pursuant to s.269ZZJ, insofar as they contained conclusions based on relevant information. I have had regard to the ADC Report and the SEF, and information relevant to the review which was referenced in the ADC Report and the SEF. This latter information included submissions made to the ADC by interested parties. I have also had regard to verification or visit reports where relevant.
12. The ADC provided relevant documents containing confidential information which were part of the material relied upon by the Commissioner in making the recommendations to the Minister. These documents and the correspondence with the ADC concerning them were not made publicly available.
13. Submissions were received within the 30 days required by s.269ZZJ of the Act from the ADC, Austube Mills and Dalian. I had regard to these submissions.

³ S.269ZZK(6)(a).

⁴ S.269ZZK(4).

14. During the course of the review I decided to request the Commissioner to conduct a reinvestigation of certain findings made in the ADC Report⁵. As required by s.269ZZK(4A), I had regard to the report made by the Commissioner as a result of the reinvestigation.

Grounds for Review

Dalian

15. Dalian's application for review had six grounds of review which were accepted by the Review Panel pursuant to s.269ZZG(5) of the Act. These grounds were:
- The ADC erred in determining a deductive export price;
 - The ADC erred in treating free-trade zone sales as domestic sales for the purposes of calculating profit;
 - The ADC erred in not treating HSS downgrade domestic sales as like goods and excluding those sales from the calculation of profit;
 - The ADC erred by not determining SG&A costs on the basis of information from the records of the exporter or producer of like goods;
 - The ADC erred by not determining profit on the basis of domestic sales of the same general category of goods by the exporter or producer; and
 - The ADC erred in not determining costs in the country of export.
16. The application for review was accompanied by a submission by J Bracic & Associates.

Ursine

17. Ursine's application for review relied upon two grounds which were accepted pursuant to s. 269ZZG(5). These were:
- The ADC erred in determining normal values on the basis of domestic sales pursuant to subsection 269TAC(1) of the Act; and

⁵ Letter from the Anti-Dumping Review Panel to the Anti-Dumping Commissioner dated 6 October 2017.
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- In determining normal value on the basis of domestic sales of like goods, the ADC erred in excluding certain domestic sales which were also considered to be like goods.

18. The application for review was also accompanied by a submission by J Bracic & Associates.

Croft

19. There is only one ground in the application for review by Croft. This was that the ADC model selection criteria does not provide fair comparison for due allowance and distorts the suitability of sales for normal value.

Tianjin Youfa

20. Eight of the grounds relied upon by Tianjin Youfa in its application for review were accepted by the Review Panel under s.269ZZG(5) of the Act. These were:

- The ADC failed to engage in a proper investigation in failing to analyse whether State Invested Enterprises (SIEs) were "public bodies", wrongly concluded that Tianjin Youfa did not respond to information requests, failed to ask proper questions, failed to give timely notice of unanswered questions posed to the Government of China (GOC), placed undue reliance on previous investigations and relied inappropriately on its own overly general market research report;
- The ADC wrongly concluded that there was a subsidy from a "public body";
- The ADC wrongly concluded that there was a "benefit" by reason of less than adequate remuneration (LTAR) from domestic suppliers of narrow strip and hot rolled coil (HRC), in so far as it adopted the wrong geographical benchmark; considered the wrong product and failed to apply the de minimis rule;
- The ADC wrongly concluded that any benefit was "specific";
- The calculations applied by the ADC were erroneous, even if a countervailable subsidy otherwise existed, by reason of applying the wrong benchmark country, the wrong product, utilising the wrong income denominator and failing to limit its accounting to the alleged differential

between actual prices and the benchmark and instead counting the entire benchmark figure as the benefit;

- The ADC improperly double counted for the alleged LTAR input materials, adjusting both as to a constructed normal value and as to a countervailable subsidy;
- The ADC failed to adequately consider whether there would likely be material injury caused if the measures were revoked; and
- The ADC wrongly based a number of assessments on an erroneous finding of a market situation in China.

Consideration of Grounds

Dalian

Deductive export Price

21. On the Commissioner's recommendation, the Assistant Minister determined the export price for Dalian under s.269TAB(1)(c) using a deductive export price methodology on the basis that prices between Dalian, Steelforce Trading Pty Ltd (Steelforce Trading) and Steelforce Australia Pty Ltd (Steelforce Australia) were not arms length prices. During the investigation, the ADC found that prices between entities in the Steelforce group appeared to be influenced by the commercial relationships between the entities. Specifically, there were findings that:

- Dalian was the exporter of the HSS and Steelforce Australia was the importer of the goods.
- Steelforce Trading was an intermediary in the export sales.
- Dalian and Steelforce Australia are related entities, as Steelforce Australia is the owner of Dalian;
- there is a high degree of coordination between Steelforce Trading, Dalian and Steelforce Australia;
- Steelforce Australia management understands the implications of internal transfer pricing within the Steelforce group regarding its potential liabilities for duties under anti-dumping measures; and

- only one of the verified shipments was sold profitably by the importer and therefore it was reasonable to consider all shipments overall were unprofitable.⁶
22. As part of its assessment of whether the export sales were arms-length transactions, the ADC did an analysis in which it compared the prices to a non-related party with the prices for related party sales. This analysis showed that while the non-related party sales were only a very small percentage of the volume of sales compared to the related party sales, the prices to the related party were substantially higher.⁷
23. Dalian takes issue with the finding that the prices between the related Steelforce companies were not arms length and in particular criticises the evidence in support of the finding that the export price was influenced by the relationship between the Steelforce companies. The first argument made by Dalian is that the analysis of the export sales was flawed as it incorrectly compared export prices denominated in different currencies.
24. I have reviewed the analysis conducted by the ADC of the export sales and am satisfied that this analysis was done by converting the prices to the same currency in order to make a price comparison.
25. Dalian also contends that it provided the ADC with evidence to demonstrate that the negotiated prices between the related Steelforce businesses were indicative of arms-length transactions. The submission by Dalian relies on the decision of Justice Lockhart in *Castle Bacon Pty Ltd v Comptroller-General of Customs*⁸ and on comments in the Dumping and Subsidy Manual. Lockhart J. made the point that the mere fact that parties are related does not mean that they cannot engage in arms-length transactions. The Manual identifies factors that are relevant to assessing whether a transaction is the result of real bargaining.

⁶ Final Report 379 at section 7.4.2.1, pages 20 and 21.

⁷ Dalian Steelforce Exporter Visit Report, section 3.6.2 and attachment GP4-Exporter Sales Analysis.

⁸ *Castle Bacon Pty Ltd v The Comptroller-General of Customs & Anor* [1995] FCA 415.

26. I do not consider that the points made by Dalian detract from the conclusion reached by the ADC. The ADC did consider the evidence when assessing whether or not the sales were arms-length and I find that evidence persuasive.

Free trade Zone Sales

27. The normal value of Dalian's exports was calculated under s.269TAC(2)(c) of the Act. In calculating the normal value, the ADC calculated an amount for profit under s.45(3)(a) of the *Customs (International Obligations) Regulation 2015* (the Regulation). Dalian contends that the ADC erred in including in this calculation certain sales made to a customer whose manufacturing operations were located in a free trade export processing zone.
28. The argument by Dalian is that the primary purpose of constructing a normal value pursuant to s.269TAC(2)(c) is to find a price which is approximate to that which could be expected if the product had been sold in the ordinary course of trade in the domestic market. Given that the ADC had determined that Dalian did not have any domestic sales in the ordinary course of trade such that they were not suitable for determining profit under s.45(2)(a) of the Regulation, it was incompatible for the ADC to consider those same profits suitable for determining profit under s.45(3)(a) of the Regulation.
29. In its submission, the ADC submits that s.45(3)(a) is not restricted to sales made in the ordinary course of trade and refers to the decision of Justice Robertson in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*⁹ as support for its position. I am not sure that the point being raised by Dalian was dealt with expressly in that decision. However, I do agree with the ADC submission to the extent that s.45(3)(a) does not require that the sales used to calculate the profit be sales in the ordinary course of trade. The wording of s.45(3)(a) can be contrasted in this respect with that of s.45(2) of the Regulation.

⁹ *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309.

30. In *Steelforce Trading*, Robertson J. stated that
- “ s 269TAC(2)(c)(ii) proceeds on an assumption, that assumption being that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export. It is in that context that the Minister may determine what would be, relevantly, the profit on that hypothetical sale.”

The sale is a hypothetical one because there are no sales which fit the description. It would therefore be illogical to require the sales used pursuant to s.45(3)(a) to be made in the ordinary course of trade. I also note that the Dumping and Subsidy Manual states that there is no requirement for sales used under s.45(3)(a) to be in the ordinary course of trade.¹⁰

31. Since the applications for review and the submissions under s.269ZZJ were made, the appeal from the decision of Justice Robertson has been handed down. In his judgment, Justice Perram stated that the amounts in s.45(3)(a) do not exclude sales which did not occur in the ordinary course of trade.¹¹
32. The submission by Dalian on this point does not persuade me that the ADC erred in using the sales made to the customer located in the free trade zone.

HSS downgrade sales

33. As noted above, the normal value of Dalian’s exports was determined using a constructed normal value under s.269TAC(2)(c) of the Act. In constructing that value, the ADC excluded from the sales used to determine the profit under s.45(3)(a) of the Regulation domestic sales by Dalian described as “mixed downgrade” as the ADC did not consider the mixed downgrade goods were in the same general category of goods as required by s.45(3)(a). Dalian contends that the ADC erred in excluding such sales from the determination of profit.

¹⁰ Page 49.

¹¹ *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20 at [101].

34. The submission by Dalian asserts that the HSS sold as mixed downgrade was like goods or in the same general category of goods as the HSS exported to Australia or to other downgrade HSS products sold domestically. The basis for this assertion according to Dalian's submission, is that "all domestic sales of HSS are downgrade product, with some sales allowing for the identification of finish and others being of a mixed variety that does not allow for the identification of finish. Importantly, in terms of their physical, commercial and functional characteristics, all downgrade products are similar and each possesses defects which prevent them from complying with the Australian standard and being exported to Australia."¹²
35. The reasons given by the ADC for finding that the mixed downgrade goods were not like goods were:
- While the goods are produced in the same factory and are physically alike, goods sold on the domestic market contain more significant defects than others. The fact that the mixed downgrade goods were on average sold at a price lower than the price of average scrap sales, indicates that these are likely the goods with greater physical defects and therefore sold in a similar manner to scrap;
 - The mixed downgrade sales were sold to customers who only purchased the mixed downgrade product, including a number of companies described as material recycling companies and other companies unlikely to be using the mixed downgrade product in the same functional and commercial manner as the goods exported to Australia; and
 - The goods described as mixed downgrade sales in the revised domestic sales list were described only as "downgrade" on the face of the invoice for samples selected for downward verification, while those goods described as pregal downgrade and NOPC downgrade were described using the corresponding finish type of the face of the sample invoices selected (the

¹² Attachment B to the Application by Dalian, page 17.

word “downgrade” was not used in relation to the pregal and NOPC products, it was only used in relation to the mixed downgrade products).¹³

36. Dalian takes issue with the above findings. It argues that there is no basis for the conclusion that mixed downgrade products contain more defects than others. The only basis for this finding, according to Dalian’s submission, is the conclusion reached by the ADC that lower average prices indicate that the mixed downgrade goods are likely to have greater physical defects and are therefore sold in a manner similar to scrap. Dalian gives an explanation for the lower prices but does not reference the asserted facts to any material before the ADC. It is difficult therefore to assess these assertions and to know whether they are based on relevant material within the meaning of s.269ZZK(6) of the Act.
37. Another finding Dalian takes issue with is that regarding the nature of the customers to whom the mixed downgrade was sold. Contrary to the finding by the ADC, Dalian asserts that there were customers who purchased both mixed downgrade and other downgrade products. The reference to recycling was also, according to Dalian, misunderstood and that those companies undertook minor fabrication/rectification work before reselling at local steel markets. Again, Dalian’s submission does not provide supporting references to material before the ADC and it is difficult to give weight to these assertions.
38. Dalian’s submission also explains why there was simply a reference to “downgrade” on the invoices in that the lack of reference to the finish on the invoice was a function of the mixed bundling and loading of various finishes and the fact that the volumes are insignificant which makes the importance and relevance of recording the total number of pieces or tonnes for each finish inconsequential. While the Dalian submission asserts that this was explained and demonstrated to the ADC, there are no references to where such an explanation can be found in the material before the ADC.

¹³ Steelforce Export Visit Report, section 2.2.2 at page 9.

39. Dalian also points to changes which were made to the classification of sales to mixed downgrade on the basis of the unit selling price. The submission asserts that the ADC's explanation highlighted that the amendments were not based on actual evidence but on mere conjecture or unsupported assumptions. In support of its argument, Dalian refers to Confidential Attachment D. I have reviewed Attachment D and do not consider that it supports Dalian's submission.
40. I have examined the analysis conducted by the ADC of Dalian's domestic sales and in particular the prices for the mixed downgrade product. When comparing these prices with those of other products, there is a clear basis for there being some basis for the distinction made by the ADC. I am not in a position to weigh the factual assertions made by Dalian against the material relied upon by the ADC and the reasons for the conclusions. I consider that Dalian has not established that the ADC erred in its exclusion of the mixed downgrade sales from the profit calculations under s.45(3)(a).

SG&A Costs

41. The ADC Report stated that in constructing the normal value of Dalian's exports, the selling, general and administrative (SG&A) costs were worked out under s44(2) of the Regulation using information set out in Dalian's records. Dalian submits that this was not what happened and that the ADC disregarded Dalian's SG&A costs and instead relied solely on the records of a separate legal entity. In doing so, Dalian contended that the Assistant Minister had not complied with s.44(2) of the Regulation.
42. In its submission to the Review Panel, the ADC rejected the claim that only the SG&A costs of a separate legal entity were used. The ADC had verified that a large majority of Dalian's domestic sales were made to [REDACTED] and then sold by [REDACTED] to [REDACTED] domestic customers. As the sales were not made in the ordinary course of trade (OCOT) an adjustment was required to Dalian's SG&A costs to include the SG&A costs incurred by [REDACTED]. This treatment of the SG&A costs for Dalian was set

out in the Exporter Visit Report for Dalian which was conducted for Duty Assessments 59 and 71¹⁴.

43. As the ADC Report correctly notes, the SG&A costs for a constructed normal value under s.269TAC(2)(c)(ii) must be worked out in accordance with s.44 of the Regulation¹⁵. The ADC Report states that the SG&A costs for Dalian were worked out under s.44(2) of the Regulation. S.44(2) provides that if “an exporter or producer of like goods keeps records relating to the like goods” and certain conditions are met in relation to those records, then “the Minister must work out the amount by using the information set out in the records”.
44. The difficulty I had with the submission made by the ADC was that there is no qualification in s.44(2) that the SG&A costs in the records of the exporter must be with respect to OCOT sales. Even if this requirement can be implied into s.44(2), it would mean that the ADC would have to work out the SG&A costs under s.44(3) which is not what the ADC did. Further, s.44(2) refers to the “exporter”. [REDACTED] is not the exporter.
45. There does not appear to be any basis under the relevant legislation for the approach taken by the ADC to the calculation of the SG&A costs for Dalian. Either the records of Dalian met the conditions of s.44(2), in which case the information in those records must be used, or the Minister must use one of the methods in s.44(3). There is nothing in s.44(2) allowing the records of the exporter to be adjusted as the ADC has done in this case.
46. A footnote to the ADC’s submission on this issue seems to contend that the adjustment to the SG&A costs was made under s.269TAC(9) of the Act. However, the list of adjustments the ADC considered necessary to be made under s.269TAC(9) is set out in the ADC Report and did not include an adjustment made to the SG&A costs to include the SG&A costs of [REDACTED]

¹⁴ Section 4.1.22 on page 18.

¹⁵ S.269TAC(5A)(b) and s.269TAAD(4)(b).

██████¹⁶. Any such adjustment would need to come within the criteria of s.269TAC(9) which requires the Minister to make such adjustments as are necessary to ensure that the normal value ascertained under s.269TAC(2)(c) is properly comparable with the export price of the goods. In any event, if the ADC is going to recommend to the Minister that an adjustment be made under s.269TAC(9), that adjustment and the basis for it should be set out in the report to the Minister.

47. For the above reasons, I agreed with the submission of Dalian to the extent that the SG&A costs had not been worked out in accordance with s.44(2) and I required the Commissioner to reinvestigate the findings with respect to the normal value of Dalian's exports¹⁷. The Commissioner provided his report on that reinvestigation on 29 January 2018.

48. In the reinvestigation report, the Commissioner found that:

- The SG&A costs associated with the sale of Dalian produced HSS in China should not be worked out under s.44(2);
- rather those SG&A costs should be worked out under s.44(3)(c); and
- on that basis the ADC affirms its approach to calculating the SG&A costs associated with the sale of Dalian produced HSS in China.

49. I have considered the reasons given by the Commissioner in the reinvestigation report and accept the approach as a reasonable basis for determining the SG&A costs given the circumstances of Dalian's domestic HSS sales outlined in the reinvestigation report.

Profit

50. According to the ADC Report, the ADC calculated the amount of profit to be included in the constructed normal value for Dalian's exports under s.45(3)(a) of the Regulation. In its application for review, Dalian contends this statement is not

¹⁶ Final Report 379, section 7.4.2.2 at page 22.

¹⁷ Letter from the Review Panel to the Commissioner dated 6 October 2017.

correct and that what the ADC did was to calculate the profit based on the amounts realised by [REDACTED]

51. The submission by the ADC to the Review Panel appears to accept that the contention by Dalian is correct, that is that the profit on the sale by [REDACTED] was used, not that from the sale of the goods by Dalian Steelforce. The basis for the approach taken by the ADC is stated in the submission to be that when constructing normal value, the Act mandates an assumption that the goods have been sold in the OCOT and that the transfer of the goods from Dalian Steelforce to [REDACTED] is not an OCOT sale.
52. It is correct that s.269TAC(2)(c)(ii) does refer to the assumption that the goods have been sold in the OCOT. However, s.269TAC(5B) states that the amount of profit is to be determined as the regulations provide for that purpose. While s.45(2) of the Regulation refers to the sale of like goods by the exporter in the OCOT, there is no such requirement in s.45(3). The approach by the ADC in this case also seems at odds with the ADC's policy as set out in the Dumping and Subsidy Manual which relevantly states when referring to s.45(3):

“There is no requirement to test for ordinary course of trade in any of these three alternatives, nor will the ADC read any ordinary course of trade requirement into them.”¹⁸

53. The ADC's submission also refers to the decision of the Federal Court in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*¹⁹ as support for the approach taken by the ADC. However, there is no reference in that case to the profit not being based on the sales of the exporter under s.45(3). That case proceeded on the basis that the Commissioner worked out the amounts under s.45(3) based on the prices

¹⁸ Dumping and Subsidy Manual at page 49.

¹⁹ *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309.

received by Dalian Steelforce.²⁰ The decision of the Federal Court in that case does not provide support for the approach taken by the ADC in this case.²¹

54. For the above reasons, I required the Commissioner to reinvestigate the finding with respect to the profit to be included in the constructed normal value for Dalian's exports.²² The Commissioner's report on the reinvestigation accepted that the amount of the domestic profit to be worked out under s.45(3)(a) had to include the amounts realised by Dalian in the relevant domestic sales and not include the amounts realised by [REDACTED] on its sales to third parties.
55. As a result of the recalculation of Dalian's profit, the ADC has made consequential changes to the normal value and dumping margin for Dalian's exports. The new dumping margin is 11.1%. I will recommend to the Minister that this change is made.

Costs of Production

56. In its submission, Dalian contends that it was not open to the ADC to use a benchmark for HRC prices based on prices of HRC from Korea, Malaysia and Taiwan. It argues that the cost of production of goods in the country of export must be worked out by reference to the cost of production or manufacture of the goods in the country of export, which in this case was China.
57. Dalian contends that there is nothing in the Act that expressly or impliedly indicates that under s.269TAC(2)(c), costs of production in a third country with a competitive market can simply be substituted for the costs in the country of export. Specifically, Dalian's submission relies on the wording of s.269TAAD(4)(a) which provides that the cost of goods is worked out by adding

²⁰ As above at [64] and [93].

²¹ The majority decision of the Full Court of the Federal Court in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20 would also seem to support Dalian's submission on this point.

²² Letter from the Review Panel to the Commissioner dated 6 October 2017.

the amount determined by the Minister to be the cost of production or manufacture of those goods “in the country of export” and that s.43(2) of the Regulation provides a mandatory source of evidence for making the calculations.

58. Dalian’s submission notes that the records of the manufacturer have to be used when the conditions in s.43(2)(a) and (b) of the Regulation are met but contends that even if the conditions are not met, the Minister must still determine the costs of production or manufacture of like goods in the country of export but is not limited to the records of the manufacturer. In this case it is the costs of manufacture or production in China.
59. In addition to the analysis of the legislation provided in the submission, Dalian also relies on the decision of the WTO Panel in *European Union – Anti-Dumping Measures on Biodiesel from Argentina*²³. According to Dalian’s submission, this is authority for the proposition that the costs used for constructing normal value under Article 2.2. of the Anti-Dumping Agreement²⁴ must be based on the cost of production in the country of origin. Dalian’s submission also refers to the decision of the Appellate Body upholding the decision of the Panel.
60. The submission by the ADC to the Review Panel, pointed to the difference in the wording of Article 2.2.1.1 and that of s.43(2)(b) of the Regulation. The ADC submission also referred to the decisions of the Federal Court in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth*²⁵ and *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs*²⁶ in support of the use of a benchmark to work out Dalian’s cost of production.
61. There is an important difference between the wording of Article 2.2 and the wording of s.43(2) as to the qualification the records of the manufacturer have to meet. However, it does not seem to me that this answers Dalian’s complaint with

²³ WT/DS473/R.

²⁴ WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

²⁵ *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870.

²⁶ *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885.

the approach of the ADC. Dalian's submission is not that the ADC was required to use the records of Dalian but rather that the Minister must still determine the costs of production in China and cannot do this by identifying costs in third countries.

62. There is a difficulty in applying the decisions of the WTO Panel and Appellate Body to the situation in Australia because of the difference in the wording in Article 2.2.1.1 and s.43(2). However, I do not consider that these decisions necessarily rule out the approach taken by the ADC. In the reasons of the Appellate Body there is the following statement:

“In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin"²⁷ (emphasis added).

63. It seems to me that what the Appellate Body is criticising is an approach which simply replaces the costs of production in the country of export with costs of production in another country. I am not sure that this describes the approach which the ADC took in working out the cost of production for the constructed normal value.

²⁷ WT/DS473/AB/R at para 6.73.

64. The ADC Report states that the ADC collated all HRC purchases from co-operative exporters in Korea, Malaysia and Taiwan during the inquiry period and calculated a quarterly weighted average HRC purchase cost in Chinese Yuan (RMB) for black and pre-galvanised finishes. The Chinese exporters' HRC purchase costs were then uplifted by the difference between the price actually paid by them for that product and the price of the comparable competitive market benchmark that has been calculated from verified data of the selected exporters in Korea, Malaysia and Taiwan.
65. This approach does not appear to me to be simply substituting the costs from outside China for the costs in China. However, if I am wrong in this view, it is difficult to understand how otherwise the ADC could determine the costs of the HRC in China given the distortions in the Chinese market identified by the ADC. The submission by Dalian states that the use of the benchmark without an adjustment for suitable use as the cost of HRC in China is not the correct or preferable decision. It does not though identify how this adjustment would be calculated.
66. In any event, this issue was addressed in the decision of the Federal Court in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*²⁸. In that case, it was argued that s.269TAC(2)(i) only permitted the Minister to determine the cost of production or manufacture in the country of export. Justice Robertson found that such a submission does not take into account the context in which the expression “the cost of production or manufacture of the goods in the country of export” appears. His Honour went on to state:

“The context is that the Minister is satisfied that the normal value of goods exported to Australia cannot be ascertained under s 269TAC(1) or that the Minister is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that

²⁸ *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309.

are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under s 269TAC(1).

In those circumstances, the normal value of the goods for the purposes of Pt XVB is to be, relevantly, such amount as *the Minister determines to be* the cost of production or manufacture of the goods in the country of export (emphasis added.) In my opinion, contrary to the applicants' submission, the provision does not exclude the use of overseas data in an appropriate case. The object of the provision is to determine the cost of production or manufacture of the goods in the country of export but it does not follow that only the cost of production or manufacture of the goods in that country may be used, particularly where it has been found that the costs of HRC provided by Dalian Steelforce relating to the review period do not reasonably reflect competitive market prices".²⁹

67. I do not consider that the argument made by Dalian in relation to the wording of s.269TAAD(4) can be distinguished from the conclusion reached by the court in the *Steelforce Trading* case. I note that s.269TAAD(4) refers to "the amount determined by the Minister to be the cost of production".

68. For the above reasons, I consider that the approach taken by the ADC to working out the cost of production does not mean that the Reviewable Decision is not the correct or preferable decision.

Ursine

Use of s269TAC(1)

69. During the investigation, Ursine was identified as an exporter of HSS from Taiwan to Australia. Ursine's submission contends that the Commissioner erred

²⁹ As above at [111]. His Honour's comments were approved by the Full Court in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20.

in determining the normal value of Ursine's exports under s.269TAC(1) of the Act.

70. Both Ursine and the ADC agree that during the investigation the ADC identified a certain model sold by Ursine domestically as one which was the most comparable to the product exported to Australia. Ursine submits however that the sales of this model on the domestic Chinese market were of such a low volume that they could not be used to determine the normal value under s.269TAC(1) and consequently the ADC should have used a constructed normal value.
71. In its submission to the Review Panel, the ADC agrees with Ursine's submission that the volumes of Ursine's domestic sales of the identified model were low. The ADC Report explains that there was a sufficient volume of domestic sales made in the OCOT for all of the models of HSS exported to Australia during the inquiry period. Where the models were not an identical match, a surrogate model was used and adjustments were made based on the difference in specifications.
72. The difficulty I have with the submission by Ursine is that it is premised on a view that only domestic sales of the model most matching the product exported to Australia can be used for a normal value determined under s.269TAC(1). This is clearly not the case. S.269TAC(1) refers to sales of "like goods" sold in the OCOT in the domestic market. S.269TAC(8) provides for adjustments to be made where the domestic price and the export price are not in respect of identical goods.
73. In this case, the ADC has identified that there were sufficient sales of like goods sold on the domestic market in OCOT. Accordingly, it was appropriate to use those sales and to make adjustments for differences in the specifications of the goods sold domestically and those of the exported goods. I cannot see any error in this approach.

Exclusion of Domestic sales

74. Ursine submits that having opted to use surrogate domestic models of like goods, the ADC should have used all domestic sales of pre-galvanised HSS complying with the domestic grade STKR. In its submission, the ADC stated that it excluded domestic sales of non-structural HSS because Ursine only exported structural grades of HSS.
75. I agree with the submission of Ursine, that having determined that there were sufficient domestic OCOT sales of like goods to use pursuant to s.269TAC(1), the ADC should use all of those sales to ascertain the normal value. However, from my review of the material, that appears to be what the ADC has done. The relevant worksheets for the calculation of the normal value for Ursine's export, show that the domestic grades described in Ursine's submission have in fact been included.
76. Ursine's submission does not establish that the Reviewable Decision was not the correct or preferable decision.

Croft

77. Croft is an importer of HSS. In its application for review, Croft makes a submission related to the determination of the normal value for the exports made by Alpine Pipe Manufacturing SDN BHD Company (Alpine). Alpine exports HSS to Australia from Malaysia.
78. The ADC Report states that the ADC was satisfied that there was a sufficient volume of domestic sales made in the OCOT by Alpine for two of the six model groups of HSS exported to Australia during the review period. For those model groups where there were insufficient domestic sales of an identical model group, the ADC used a surrogate model group and made specification adjustments³⁰.

³⁰ Final Report 379, section 7.6.1.2 at page 30.

79. In its response to the SEF, Alpine submitted that the model matching criteria selected by the verification team was too broad and did not take into account true commercial price breaks for proper comparison. It noted that in three previous investigations the ADC adopted an expanded thickness range for fair comparison and that premiums were charged for larger RHS/SHS.
80. The submission by Alpine was addressed in the ADC Report. With respect to the price variations for the different thicknesses, the ADC noted that Alpine had not provided the verification team with a price list evidencing the alleged price difference. The ADC Report goes on to state that, after conducting further analysis, the ADC did not find any discernible trend to support a further dividing of the thickness ranges. Finally, it noted that Alpine had not provided any evidence attached to its submission on this point and referred to Confidential Attachment 1.1. to the ADC Report.
81. I have reviewed Confidential Attachment 1.1 and agree with the ADC's statement that the information on sales and thicknesses in that attachment does not show a correlation between the thickness and pricing. In its application, Croft contends that Confidential Attachment 1.1 used the wrong level of trade to do the comparison. In its submission to the Review Panel, the ADC stated that the price analysis that it conducted was presented in a spreadsheet that allowed price comparison to be carried out at all levels of trade.
82. Confidential Attachment 1.1 does refer to the comparison being done at the end user level. However, provided that the price comparison was made at the same level of trade, I fail to see how this could affect the validity of the exercise carried out by the ADC. When the prices of the products with the different thicknesses are compared at the same level of trade, such a comparison does not support the contention that there should have been more thickness ranges.

83. Croft provides information in its application regarding Alpine's domestic sales³¹. This information is not cross referenced to any of the material before the Commissioner. In its submission to the Review Panel, the ADC advises that new information was provided in that section. Given the lack of reference to material before the Commissioner and the submission by the ADC, I cannot have regard to that further information.
84. The submission by Croft appears to be that the domestic sales used by the ADC were not sufficient to meet the test in s.269TAC(14). However, as the application by Croft concedes, there were sufficient domestic sales of like goods to meet that test. I also checked the information on Alpine's domestic sales in the relevant confidential attachment to the Visit Report and it confirms this. The fact that some of the sales of particular models did not meet the test in s.269TAC(14) does not affect this as the ADC used the domestic sales of those models for which there were sufficient sales and a surrogate model for the rest with adjustments for differences under s.269TAC(8).
85. I am not persuaded that the ADC made any error in the approach taken to the determination of normal value for the Alpine exports. For the purpose of s.269TAC(14) there were sufficient OCOT domestic sales of like goods to calculate the normal value under s.269TAC(1) and adjustments were made under s.269TAC(8) to ensure a fair comparison with the export price.

Tianjin Youfa

Public Body

86. Tianjin Youfa is an exporter of HSS from China and consequently its exports are affected by the decision to continue countervailing measures against exports of HSS from China. The submission by Tianjin Youfa takes issue with the findings by the ADC in relation to a subsidy called Program 20. This subsidy was

³¹ Paragraph 10b of the application for review.

described in the ADC Report as “Hot rolled steel provided by government at less than fair market value”.³²

87. The first argument by Tianjin Youfa is that the ADC did not ask the questions necessary to determine whether the providers of the input materials could be described as “public bodies” within the legislative definition of subsidy in s.269T of the Act. Tianjin Youfa complains that the ADC only asked whether such providers were SIEs and made no attempt to differentiate among the SIEs as to the degree of government control or to investigate the degree of government investment.
88. Another argument by Tianjin Youfa is that the ADC wrongly asserted that relevant information had not been provided by the exporter and that as a result the ADC was entitled to make its decision on the basis of the facts available. I do not consider the argument by Tianjin Youfa regarding whether it provided certain information affects the reliance by the ADC on s.269TAACA(1) and the decision to act on the basis of the facts available.
89. In the ADC Report, the ADC notes³³ that the GOC had been provided with a government questionnaire to gather evidence for the purposes of determining whether existing subsidy programs were still countervailable in relation to HSS exported to Australia from China. Because the GOC had not given the ADC information considered relevant to the inquiry, the ADC acted on the basis of the facts available in accordance with s.269TAACA(1). Hence, it was not any failure by Tianjin Youfa to provide information but rather the failure by the GOC to provide information.
90. With respect to the failure of the GOC to respond to the questionnaire, Tianjin Youfa submits that either the questions should have been asked of the exporters or at least a copy of the government questionnaire should have been provided on the public record so that exporters could have sought to answer the questions.

³² Final Report 379, Appendix B at page 102.

³³ As above at page 100.

However, as Tianjin's submission notes, the questionnaire which was sent to the GOC for an earlier investigation was publicly available and it would be apparent from that the type of information sought by the ADC. I also note that the questionnaire provided to Tianjin Youfa asked questions related to Program 20.

91. There was sufficient information available to Tianjin Youfa for it to be aware that the ADC was investigating whether Program 20 continued and for Tianjin Youfa to provide information to the ADC with respect to that issue. In any event, the Review Panel has a limited role in reviewing the conduct of an investigation by the ADC. It can only do so to the extent it affects whether the reviewable decision was the correct or preferable decision.
92. A further criticism of the ADC Report on this issue is that the ADC failed to update the information from the original investigation period. Specifically, the submission by Tianjin Youfa contends that the most recent reasonably available information on Chinese policy was not considered and points to the 12th and 13th Five Year Plans. It notes that at the very least the ADC should have considered the 12th Five Year Plan (2011-2015) when drawing conclusions regarding the Chinese domestic market during the investigation period.
93. While the Tianjin Youfa submission points to information which was available to the ADC, it does not demonstrate how that information should have led to a different conclusion. As noted above, the role of the Review Panel is not a supervisory one over the conduct of the ADC. Any failure by the ADC to consider material has to result in the Reviewable Decision not being the correct or preferable decision. In any event, I note that the 13th 5 Year Plan was referenced as part of the material used by the ADC in its analysis of the HSS/HRC market in China which is set out in Appendix A to the ADC Report.
94. I do agree with Tianjin Youfa that it was necessary for the ADC in conducting the continuation inquiry to update the information relied upon in the original investigation to the extent this was possible. I note that the ADC relied on a more recent investigation to update the information. That earlier investigation was with

respect to steel grinding balls from China³⁴. I consider the reliance on this investigation below.

95. Another criticism made by Tianjin Youfa of the ADC Report is the reliance on a report by the ADC on the Steel and Aluminium Industry published in August 2016. Tianjin Youfa complains that this report on broad aspects of certain industries on a worldwide basis can have no relevance to a particular investigation. It does not drill down into dumping and subsidy issues in relation to particular product categories or discrete time periods or particular exporters.
96. I do not consider there is any error in the ADC having regard to a general report on the worldwide steel industry in an investigation into a product such as HSS as part of the material considered by the ADC. The part of the ADC Report to which the submission refers is dealing with the ADC's consideration of the use of a HRC benchmark in working out the costs of production for the Chinese exporters. The ADC placed some reliance on it (along with other material) for the finding that the GOC materially influenced conditions within the Chinese HRC market. To that extent, the report has some relevance.
97. Tianjin Youfa's submission also contends that the ADC erred in the analysis of whether the SIEs that supplied the HRC were public bodies. It argues that there was a failure to identify the nature of the SIE, the extent, if any, of government investment, the degree of such investment and the extent to which such involvement may have led to pricing decisions. Tianjin Youfa contends that the ADC erred in presuming that any benefit indirectly provided by a SIE satisfied the requirement that it be from a public body.
98. I do not agree that the ADC simply presumed that SIEs supplying HRC were public bodies. In its consideration of Program 20 the ADC relied on the finding in the steel grinding balls investigation that SIEs producing steel raw materials continued to be considered as public bodies for the purpose of the definition of

³⁴ Final Report 316 Grinding Balls from China.

subsidy in s.269T of the Act. The report on that investigation was made in June 2016 and the investigation period was 1 October 2014 to 30 September 2015.

99. It was not unreasonable for the ADC to rely on the findings made in another investigation if the investigation covered substantially the same period or was reasonably proximate to the inquiry period and the findings included the product and manufacturers involved in the continuation inquiry. However, I had a number of problems with the reliance on the steel grinding balls report. The grinding balls investigation did not conclude that SIEs producing steel raw materials continue to be considered as ‘public bodies’. Rather that report concluded “for the purpose of the current investigation that SIE’s that produce and supply raw materials *to manufacturers of grinding balls* should be considered public bodies” (emphasis added).³⁵

100. For this and other reasons, I asked the Commissioner to reinvestigate the finding that Tianjin Youfa had received a countervailable subsidy.³⁶ The reinvestigation report confirmed the finding. In particular, the ADC confirmed the finding that HRC suppliers to Tianjin Youfa that are SIEs are public bodies.

101. In the reinvestigation report, the ADC based its finding on public bodies on three sources of material:

- verified information gathered during the course of Inquiry 379;
- previous findings by the Commission in REP 177; and
- findings by the European Commission (EC) in a report entitled *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence* (EC Report).

102. The reference to REP 177 is to the report from the original investigation which led to the measures which were the subject of the continuation inquiry. The findings

³⁵ Final Report 316, Appendix 5 at page 161.

³⁶ Letter from the Anti-Dumping Review Panel to the Anti-Dumping Commissioner dated 6 October 2017.

in REP 177, and in particular the finding relating to the public body issue were the subject of a reinvestigation following a report by the Trade Measures Review Officer.³⁷ The reinvestigation confirmed the findings in REP 177 and these were subsequently upheld by the Federal Court in *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs*.³⁸

103. As noted above, I agree with the submission by Tianjin Youfa that the information relied upon by the Minister for the original decision to impose the measures has to be updated in a continuation inquiry. To the extent that the ADC did this by relying on the steel grinding balls report, I found this problematic. The ADC also relied on the analysis it did of the HSS/HRC market in China for the particular market situation assessment.³⁹ While this analysis was not specifically with respect to the issue of the SIE HRC providers being public bodies, it does provide, at a general level, updated information on intervention in and influence over the HRC market by the GOC and the role of SIEs in the Chinese economy.

104. More specifically to Tianjin Youfa, in the reinvestigation, the ADC reviewed the SIE suppliers of HRC to Tianjin Youfa and found that a number of those SIEs were found to be public bodies in the original investigation. Further those SIEs supplied over half of the HRC supplied to Tianjin Youfa by SIEs.⁴⁰

105. Finally, the ADC relies on the EC Report. This report was published in December 2017. However, much of the material referenced in the report is relevant to the situation in China before and during the inquiry period. In particular, the 13th Five Year Plan is referenced. Having reviewed relevant sections of the EC Report, it does provide a basis for the findings relied upon by the ADC in the reinvestigation report, namely that:

- the GOC controls the behaviour of SIEs;

³⁷ International Trade Remedies Branch Report to the Minister No 203.

³⁸ *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885.

³⁹ Appendix A to Final Report No 379.

⁴⁰ Reinvestigation of certain findings in Report No 379, section 4.4.2 at page 10.

- the GOC’s current plans are to strengthen SIEs, strengthen SIEs’ control and influence to better serve strategic goals of China and create larger SIEs to serve the GOC’s strategic industrial policies (rather than focus on their own economic performance);
- SIEs (and large private companies) execute the GOC’s policy objectives; and
- the GOC no longer directs SIEs to adapt to a market environment or to promote market oriented allocation of resources.

106. Given when the EC Report was published, it was not material which was before the Commissioner (and hence not material which the Commissioner had regard to or was required to have regard to) when making the report to the Minister under s.269ZHF. The EC Report does not therefore come within the definition of “relevant information” within s.269ZZK(6). However, the restriction on the Review Panel having regard to only “relevant information” in s.269ZZK(4) is made subject to s.269ZZK(4A) and s.269ZZK(4A) requires the Review Panel to have regard to the reinvestigation report provided by the Commissioner under s.269ZZL(2).

107. I note that there is no restriction on the Commissioner in conducting an inquiry under s.269ZZL(2) having regard to new information⁴¹. Most, if not all of the information referenced in the EC Report, such as the GOC’s 13th Five Year Plan was material which was available at the time of the ADC Report, although the conclusions based on that material were not. Any procedural unfairness in the ADC using new material in a reinvestigation could presumably be dealt with by allowing submissions during the reinvestigation. However, whether to invite submissions in a reinvestigation is a matter for the Commissioner. I also note that there is not the same requirement in s.269ZZL for submissions or transparency with a reinvestigation as there is with an original investigation or inquiry.

⁴¹ This can be contrasted with a former version of s.269ZZL which contained a restriction on the use of new information in a reinvestigation following a report by the Trade Measures Review Officer to the Minister (s.269ZZL(2)(a)(i)).

108. Given the terms of s.269ZZK(4A), I am required to have regard to the reinvestigation report by the Commissioner, including the conclusions based on the EC Report.

109. It was put by Austube Mills in its submission to the Review Panel that the extent of the fact finding in a continuation inquiry may not be the same as that required in an original investigation. I am not sure that this is the case. The role of the continuation inquiry is to determine whether if the measures are not continued, material injury from the subsidisation would continue or recur. Subsection 269ZHF(2) provides:

“The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury which the anti-dumping measure is intended to prevent.”

110. There needs to be a factual basis to the Commissioner’s satisfaction that the subsidisation will continue or recur. In *Siam Polyethylene Co. Ltd v Minister for State for Home Affairs* [2009] FCA 838, Justice Rares found that the test in s.269ZHF(2) was that “likely to lead” should be interpreted as meaning more probable than not.⁴² The test then is that there must be facts upon which the Commissioner could be satisfied that it is more probable than not that the subsidisation would continue or recur. Such satisfaction would of course be as to the elements set out in the legislation for a countervailable subsidy, including in the case of Program 20, that the SIE providers of HRC to Tianjin Youfa are public bodies.

111. The finding by the ADC in the reinvestigation report was that it was reasonable to assume that the SIE’s possess, exercise and are vested with governmental

⁴² At para [48]. In this respect his Honour’s decision was not affected by the Full Court’s decision: *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86 at [90] to [92].

authority and on this basis the ADC considered the SIEs supplying the HRC to Tianjin Youfa are public bodies. I consider that there was a sufficient factual basis for the Commissioner to be so satisfied as to the SIEs being public bodies. In particular, I find the following persuasive:

- The original findings in REP 177;
- The background information as to the Chinese HRC market in Appendix B to the ADC Report;
- The reinvestigation report and, in particular, information in the EC Report; and
- The lack of a response by the GOC government to the questionnaire sent by the ADC.

112. It is probably the last fact that is most persuasive in that, if the situation had changed from the period covered by the investigation for REP 177, it could be expected that the GOC would provide information to support this. Finally, I note that while the submission by Tianjin Youfa points to publicly available information which it contends the ADC should have considered, it does not point out how such information supports a different conclusion to that drawn by the ADC.

Benefit

113. In order for there to be a subsidy as defined by s.269T(1) of the Act, there has to be a benefit in relation to the goods exported to Australia. The benefit identified by the ADC in relation to Program 20 was that HRC provided by SIEs was less than the competitive market benchmark. Tianjin Youfa submits that the ADC applied the wrong benchmark in this case.

114. Tianjin's submission relies on s.269TACC(4) and the reference to the adequacy of the remuneration "is to be determined having regard to prevailing market conditions for like goods...in the country where those goods...are provided...". The submission points out that despite this legislative requirement, the ADC looked solely at market conditions in Taiwan, Korea and Malaysia and that the ADC Report gave no reason why.

115. The reason that the ADC used an external benchmark was not explained in any detail in the ADC Report. However, it is apparent from the comments in the schedule in Appendix B to the ADC Report that it was based on the analysis of the HRC market in China set out in Appendix A. The conclusion from that analysis was that the GOC materially influenced conditions within that market.

116. The Commission in its submission to the Review Panel on this issue stated that the Commission used the same benchmark to determine the amount of the benefit under Program 20 as was calculated for the purposes of establishing normal value under s.269TAC(2)(c) of the Act, being a weighted average benchmark of verified actual prices paid by cooperating exporters for HRC from Korea, Malaysia and Taiwan. The difficulty with this is that while the analysis for s.269TAC(2)(c) can be relevant to an analysis for the purpose of s.269TACC(4) it is not a substitute for it.

117. For this and other reasons, I asked the Commissioner to reinvestigate the finding that Tianjin Youfa had received a countervailable subsidy. In the reinvestigation report, on the issue of the use of an external benchmark, the Commission:

- affirmed its finding that Program 20 conferred a benefit in relation to the goods exported to Australia from China on the basis that HRC was provided for less than adequate remuneration (s269TACC(3)(d)); and
- found that the benchmark of verified actual HRC costs for HSS exporters from Korea, Malaysia and Taiwan was suitable for determining the adequacy of remuneration having regard to the prevailing market conditions in the Chinese HRC market (s269TACC(4)).

118. The reinvestigation report sets out the reasons why the ADC used an external benchmark. From its analysis of the market conditions in China for HRC, it concluded that the GOC materially affected that market and that this distorted all Chinese HRC prices, not just the prices for HRC supplied by SIEs. Hence, any benchmark using Chinese HRC prices would be an unreliable comparator in assessing the adequacy of remuneration. I consider that the explanation

provided by the ADC in the reinvestigation report supports this conclusion and I note that the use of an external benchmark was upheld in *Dalian Steelforce*.⁴³

119. Tianjin Youfa also challenges the benchmark methodology. Its submission points to jurisprudence which it contends requires that if a third country is to be utilised, it must be a country that most closely resembles the country under investigation. In this respect, Tianjin Youfa argued that India would have been a better benchmark and pointed to data in the ADC Report which showed lower import prices for exports from India. Tianjin Youfa also contends that jurisprudence requires that allowances must be made for the scale of production and the purchasing power of the exporter under investigation.
120. The analysis of the particular market situation in Appendix A to the ADC Report noted that the ADC's preference when benchmarking prices is to use "in region" benchmarks where possible. There was no explanation however as to why India was not within the same region as China or a benchmark based on its pricing was not possible or suitable for the purpose of s.269TACC(4).
121. It was also not clear from the ADC Report whether regard had been had by the ADC to the question whether there was a need to adjust any external benchmark. In *Dalian Steelforce*, the use of an external benchmark was found not to be inconsistent with the legislation, provided regard is had to prevailing market conditions in the country of export. In that case consideration had been given to the question of whether there was a need to adjust any external market benchmark.
122. In the reinvestigation report the ADC addressed the above concerns. With respect to the argument that there should be an allowance or adjustment for comparative advantage, the ADC concluded that it was not possible to determine any net comparative advantage, particularly given the significant involvement of the GOC in relevant markets. I consider that in the reinvestigation, the ADC has

⁴³ *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 at [111].

satisfied the requirement that consideration be given to whether the HRC benchmark should be adjusted.

123. With the argument that India should have been used as a benchmark, the reinvestigation report notes that the data on Indian prices was from the undercutting analysis performed during the continuation inquiry. That undercutting analysis showed prices charged to Australian customers for HSS. It did not show the HRC costs for the exporters. The ADC did not have reliable HRC cost data for India for the relevant period.
124. A further argument which Tianjin makes with regard to the benchmark used by the ADC is that it was a benchmark for the wrong product. The benchmark was for HRC when the ADC had been advised that Tianjin Youfa used very little HRC but instead used narrow strip. Both in its submission to the Review Panel and in the reinvestigation report, the ADC provides reasons why it did not make any adjustment based on Tianjin's Youfa's claims that it did not use HRC but rather narrow strip. According to the reinvestigation report, Tianjin Youfa did not provide any evidence substantiating the use of narrow strip as the only raw material or evidence that demonstrated pricing differences between narrow strip and HRC.⁴⁴
125. I have reviewed the material referenced by the ADC and agree with the reasons given by the ADC for not making an adjustment. I am satisfied with the explanation given by the ADC with regard to the benchmark methodology.
126. Tianjin Youfa also contends that the benefit which was received by its exports from the Program 20 subsidy was less than 1% and therefore de minimus principles apply. However, this argument is based on a comparison with the price of HRC from non-SIE domestic producers. This argument does not take into account the finding by the ADC regarding the distortion in the Chinese market caused by the influence of the GOC.

⁴⁴ Reinvestigation Report, section 5.4.2.1 at page 17.

127. Finally, Tianjin Youfa submits that Program 20 cannot be a countervailable subsidy as it is not specific. Subsection 269TAAC(1) of the Act provides that a subsidy is a countervailable subsidy if it is specific. Tianjin Youfa argues that HRC can be used in hundreds of industries, thousands of applications and hence should not be seen as specific.
128. Much of Tianjin Youfa's submission on this issue deals with the requirements of Article 2 of the WTO Agreement on Subsidies and Countervailable Measures. In Australia, s.269TAAC(4) of the Act provides that the Minister may determine that a subsidy is specific having regard to certain factors. One of these is the fact that the subsidy benefits a limited number of particular enterprises. This is the basis for the ADC's finding that Program 20 was specific.
129. The basis for the ADC's finding was that HRC is a key input in the manufacture of downstream products, including HSS, and that only enterprises engaged in the manufacture of these products would benefit from the provision of the input by the GOC at less than adequate remuneration. The crux of Tianjin Youfa's argument is that this is too broad a category of potential beneficiaries to be specific. However, it is this argument which was dismissed in *Dalian Steelforce*.⁴⁵
130. I do not consider that Tianjin Youfa has established that the Reviewable Decision was not the correct or preferable decision with respect to the finding of benefit.

Calculation of Subsidy

131. Tianjin Youfa's submission is that even if there was a countervailable subsidy, the ADC misapplied the data to arrive at a much higher level than that which could at most pertain. Tianjin Youfa contends that there was a significant computational error in the calculation of the subsidy in that the ADC deducted the total benchmark and not simply the difference in the HRC pricing. Given the submission by the ADC to the Review Panel on this issue, I requested the

⁴⁵ *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 at [94].

Commissioner to reinvestigate the finding as to the amount of the subsidy which Tianjin Youfa had received.

132. The reinvestigation report concludes that the subsidy margin for Tianjin Youfa should be changed to correct a miscalculation in the ADC Report. I accept the new finding by the ADC and will make a recommendation to the Minister accordingly.

Double counting

133. Tianjin Youfa submits that there should be no countervailing duty imposed given that the same benchmark that was used to determine the benefit for the subsidy was also used to construct the normal value which gave rise to the dumping margin. It contends this is contrary to both the legislation and to WTO provisions, although the submission does not specify which provisions.

134. It is the case that anti-dumping measures, including countervailing duty, can only be imposed to the extent of any injury caused by the subsidy and dumping. The submissions from the ADC and Austube Mills to the Review Panel assert that no double counting has occurred because of the way in which the countervailing duty and the dumping duty has been imposed. The ADC submits that Tianjin Youfa is only subject to interim countervailing duty and no fixed component of interim dumping duty. There is no combination of both.

135. In Australia, the avoidance of imposing both countervailing and dumping duties for the same injury is dealt with in the *Customs Tariff (Anti-Dumping) Act 1975*.⁴⁶ Decisions under that legislation are not reviewable by the Review Panel.

Material injury and causation

136. The first argument made by Tianjin Youfa with respect to the injury/causation finding by the ADC was that it did not consider which imported HSS material was in fact subsidised. If it had, then Tianjin Youfa submits it would have readily have

⁴⁶ S.(5BA) and s.10(3D).

identified that very little of the material exported by Tianjin Youfa had HRC which was LTAR HRC. No reference to material which was before the Commissioner is provided to support this allegation and accordingly, I am unable to give it any weight.

137. In any event, this argument by Tianjin Youfa overlooks the exercise to be conducted in making a recommendation to the Minister after a continuation inquiry. S.269ZHF(2) requires that the Commissioner be satisfied as to whether the subsidisation and material injury from such subsidisation will continue or recur if the measures expire. It is a hypothetical exercise considering the likelihood of a future event, although any consideration of the likelihood of such an event has to be based on facts.
138. Tianjin Youfa submission argues that there was a flaw in the consideration of supply and demand in China for the HSS. In particular the submission takes issue with the conclusion by the ADC that the data showing a general decline in overall production contrasted with a steady increase in pipe and tube production “demonstrates that China’s crude steel industry not only has a capacity problem, it is faced with an environment of chronic oversupply.”⁴⁷ I do not agree with the criticism made by Tianjin Youfa of this conclusion. It is not simply based on the comparison with the data regarding pipe and tube production but on the factors identified as to demand and production in the Chinese domestic steel market.
139. Another complaint made by Tianjin Youfa is that there was no real attempt made to identify a likely impact if there was a removal of the countervailing measure. Tianjin Youfa’s submission argues that the ADC simply concluded that in relation to subsidisation, “exports of HSS from China continue to benefit from countervailable subsidy programs during the inquiry period”.⁴⁸
140. The submission makes the same arguments about the finding that there was a countervailable subsidy which are dealt with above. It also argues that it was

⁴⁷ Final Report 379, section 9.6.2 at page 52.

⁴⁸ As above, section 9.6.3 at page 53.

necessary in addition to the subsidy finding to consider the nature of the market in Australia, imports, domestic production and the likely competitive scenario and injury potential if the measures were removed. This argument though ignores what was being addressed by the ADC Report when the above quote occurs. The ADC was looking at whether or not the subsidisation would continue. Not at injury or causation. This analysis occurs in Chapter 10 of the ADC Report.

141. A further argument made by Tianjin Youfa was that the ADC approach was flawed because it did not consider the potential impact of each individual exporter. The reason for this, according to the submission, is that some exporters concentrated on high quality structural grades, while others concentrated at the other end of the spectrum. No reference is made by Tianjin Youfa to material before the ADC which supported this assertion.
142. Tianjin Youfa's submission refers to seven factors relied upon by the ADC for the conclusion that, if measures are to be removed, it would likely lead, to a continuation of, or recurrence of dumping and subsidisation by Chinese exporters. Tianjin Youfa submits that it is telling that not one of the seven factors identified related to subsidisation per se.
143. The factors are mostly indicative of the likelihood of the Chinese exports of HSS increasing. While not directly dealing with the likelihood of Program 20 continuing, they are not irrelevant either. These factors have to be considered in the context of the finding also made by the ADC that exports of HSS from China continued to benefit from countervailable subsidy programs during the inquiry period.
144. Both the above argument and further arguments made in the submission that the consideration by the ADC in Chapter 9 of the ADC Report did not deal adequately with the situation of subsidy have a flaw. As noted above, Chapter 9 considers whether dumping and subsidisation would recur or continue if the measures expired. Given the finding that the Chinese exports had continued to benefit from countervailable subsidies (which included Program 20) it is not

surprising that most of Chapter 9 deals with an analysis of factors more related to predicting whether dumping would recur or continue.

145. Finally, Tianjin Youfa submits that the ADC did not properly consider and address why any injury to the Australian industry would not occur anyway given the low priced exports from India and the UAE which were not subject to measures. The ADC did consider the impact of exports from India and the UAE. The ADC Report notes that after measures were imposed some volume was transferred to those countries not subject to measures. Predominately, this volume was sourced from India and the UAE. However, the ADC Report also noted that there was a switch back to Chinese and Taiwanese exporters during the period 2014 to 2016. This had apparently happened after the exporters lowered prices.

146. I consider that the analysis done by the ADC of the possible injury being caused by exports from the India and the UAE was adequate.
In this respect I also note that the injury from the exports the subject of the measures does not need to be the sole source of injury to the Australian industry.

147. For the above reasons, I do not accept the arguments put by Tianjin Youfa in its submission that the finding by the ADC as to injury and causation was flawed such that the Reviewable Decision was not the correct or preferable decision.

Market Situation

148. The ADC found that because of the situation in the Chinese domestic market sales of like goods in that market were not suitable to be used to determine the normal value of the HSS exports. Tianjin Youfa submits that this was an error.

149. The first argument is that the conclusion was not based on a proper examination during the inquiry period but reiterated findings from REP 177 and the ADC's Steel and Aluminum Report of August 2016. The ADC did have regard to the earlier market situation assessments of the Chinese HSS and HRC markets. It also had regard to its Steel and Aluminium Report.

150. This was not however the only material on which the assessment of the market situation was made. The ADC Report also refers to:

- A report by the Duke Centre on Globalization, Governance and Competitiveness on conditions within the Chinese steel industry.
- Responses to the exporter questionnaire by selected exporters.
- Desktop research, including information obtained from departmental resources and third party information providers.⁴⁹

151. The ADC Report also notes that the ADC did not receive a response to the government questionnaire from the GOC for the inquiry and that this impeded the ADC's assessment of the market situation.

152. Tianjin Youfa's submission makes reference to Australia's international obligations and asserts that the ADC was likely to have relied on inappropriate principles in its determination of the market situation. The submission does not provide further details. In any event, the determination of normal value has to be consistent with the relevant Australian legislation, namely s.269TAC and Tianjin Youfa has not demonstrated how the ADC has not complied with the legislation in making the determination in this case.

153. A further argument made by Tianjin Youfa is that the finding relating to the Chinese market was with respect to the Chinese HRC market. Tianjin Youfa argues that this did not address the fact that the majority of Tianjin Youfa's products do not utilise HRC. I have already dealt with this assertion by Tianjin Youfa in relation to the arguments made with respect to the findings of subsidisation. Nothing further was put in support of the assertion.

154. Finally, Tianjin Youfa submits that the ADC's analysis was wholly inadequate and did not provide any meaningful basis for its conclusions. The submission refers to the conclusion by the ADC that the GOC "materially influenced conditions within

⁴⁹ Final Report 379 Appendix A at page 86.

the HSS markets during the inquiry period. The GOC was able to exert this influence through its directives and oversight, subsidy programs, taxation arrangements and the significant number of state owned enterprises”.⁵⁰ Tianjin Youfa’s complaint is with the lack of detail and in particular detail as to how they were relevant for each exporter.

155. The conclusion by the ADC as to the particular market situation was based on the analysis conducted in Appendix A. That analysis provides further details of the factors relied upon by the ADC in its finding of a market situation. Tianjin Youfa also argues that the relevance of GOC directives should be identified for each affected exporter. I do not agree that this is necessary. The analysis being conducted is of the market and the influence of the GOC on that market such that prices are different to what they would otherwise have been.

156. I do not consider that anything put by Tianjin Youfa demonstrates that the finding by the ADC with respect to the market situation meant that the Reviewable Decision was not the correct or preferable decision.

Recommendations/Conclusion

157. Apart from the change to the subsidy margin for Tianjin Youfa and the change to the normal value for Dalian, I do not consider that the applicants have established that the Reviewable Decision was not the correct or preferable decision.

158. Pursuant to s.269ZZK(1) of the Act, I recommend to the Minister that the Minister revoke the Reviewable Decision and substitute it with a new decision. The new decision which is recommended is one which is in the same terms as the Reviewable Decision except that for the purpose of s.269ZH(4)(a)(iii) and the dumping duty notice and the countervailing duty notice, it is recommended that:

⁵⁰ Final Report 379, section 7.4.1 at page 17.

- The countervailable subsidy for Tianjin Youfa, expressed as a percentage of the export price, be changed to 3.0%; and
- The normal value for Dalian's exports be changed, resulting in a new dumping margin for Dalian of 11.1%.

159. For the purpose of s.269ZZK(1A) of the Act, the new decision is materially different from the Reviewable Decision.



Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
28 February 2018