



**Australian Government**

**Anti-Dumping Review Panel**

# **ADRP REPORT No. 66**

Certain Zinc Coated (Galvanised) Steel  
Exported from the People's Republic of  
China, Taiwan and the Republic of Korea  
and

Certain Aluminium Zinc Coated Steel  
Exported from the People's Republic of  
China and the Republic of Korea

October 2017

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## Abbreviations

<b>Term</b>	<b>Meaning</b>
Act	<i>Customs Act 1901</i>
ADA	Agreement on the Implementation of Article VI of the GATT (Anti-Dumping Agreement)
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AEP	Ascertained export price
ANV	Ascertained normal value
AUD	Australian Dollar
BlueScope	BlueScope Steel Limited
CTMS	Cost to make and sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dongbu	Dongbu Steel Co., Ltd
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
FOB	Free on board
the Goods	Certain Zinc Coated (Galvanised) Steel and Certain Aluminium Zinc Coated Steel
HRC	Hot rolled coil
IDD	Interim dumping duty
Korea	Republic of Korea
Manual	Dumping and Subsidy Manual November 2015
Minister	Minister for Industry, Innovation and Science
NIP	Non-injurious price
Parliamentary	The Parliamentary Secretary to the Minister for Industry, Innovation

Secretary	and Science (the Minister)
CIO Regulation	<i>Customs (International Obligations) Regulation 2015</i>
REP 385 and 386	The report published by the Anti-Dumping Commission in relation to Reviews of Anti-Dumping Measures applying to Certain Zinc Coated (Galvanised) Steel and Certain Aluminium Zinc Coated Steel exported from the Republic of Korea by Dongbu Steel Co., Ltd dated June 2017
Reviewable Decisions	The decisions of the Parliamentary Secretary made on 19 July 2017 published on 20 July 2017
Review Panel	Anti-Dumping Review Panel
Review Period	1 October 2015 - 30 September 2016
SEF 385 and 386	Statement of Essential Facts Report Nos 385 and 386
TMRO	Trade Measures Review Officer
WTO	The World Trade Organization

## Summary

1. This report has been prepared in response to an application by BlueScope Steel Limited, for a review of a decision by the Parliamentary Secretary to publish different variable factors in relation to exports of Certain Aluminium Zinc Coated Steel and Certain Zinc Coated (Galvanised) Steel exported by Dongbu Steel Co Ltd from the Republic of Korea.
2. The Anti-Dumping Commission undertook a review of measures focusing on the review period of 1 October 2015 - 30 September 2016 and recommended to the Parliamentary Secretary that different variable factors should apply.
3. BlueScope sought a review of this decision on the basis of two grounds.
4. The Review Panel has considered these grounds and does not agree that BlueScope has established that the Parliamentary Secretary's decision was not correct or preferable. Accordingly, the Review Panel recommends that the Parliamentary Secretary's reviewable decision be affirmed.

## Introduction

5. BlueScope Steel Limited (BlueScope) has applied for a review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science, (the Minister), made on 19 July 2017, to publish a notice under section 269ZDB(1)(a)(iii) of the *Customs Act 1901*, following a review of anti-dumping measures on Certain Aluminium Zinc Coated Steel and Certain Zinc Coated (Galvanised) Steel exported by Dongbu Steel Co., Ltd (Dongbu) from the Republic of Korea (Korea).
6. The application for review was accepted and notice of the proposed review, as required by section 269ZZI of the Act, was published on 31 August 2017. The Senior Member of the Anti-Dumping Review Panel (Review Panel) has directed in writing, pursuant to section 269ZYA, that the Panel for the purpose of this review be constituted by me.

## Background to the application

7. On 16 November 2016, an application by Dongbu, was published on the Anti-Dumping Commission (ADC) website requesting a review of the anti-dumping measures as they applied to its export of Certain Zinc Coated (Galvanised) Steel and Certain Aluminium Zinc Coated Steel (the goods), on the basis that there had been a change in the variable factors. It claimed, in particular, that as there had been a substantial fall in the price of hot rolled coil (HRC), which is the major raw material used to produce the goods, which would have impacted on the prices of

the ascertained export price (AEP), ascertained normal value (ANV) and the non-injurious price (NIP) of the goods.

8. The Commission published a Statement of Essential Facts (SEF Nos 385 and 386)<sup>1</sup> in May 2017 and subsequently made its Report (Report Nos 385 and 386)<sup>2</sup> in June 2017. The Commissioner found that the variable factors had changed for the goods and recommended to the Parliamentary Secretary that the dumping duty notices in respect of the goods have effect as if different variable factors (being the AEP, ANV and NIP) had been ascertained in respect to Dongbu.
9. There has previously been a review of anti-dumping measures undertaken for Dongbu, Report Nos 272 and 273 refers.<sup>3</sup> REP 272 and 273 recommended that the dumping duty notice have effect in relation to Dongbu as if different variable factors had been ascertained. The notice, as it applied to Dongbu, was altered and notice of the decision was published in the Commonwealth of Australia Gazette on 3 August 2015. The previous rate and form of duty on the export of the goods by Dongbu was a combination duty method with a fixed component of zero and a variable component, payable if the actual export price was below the ascertained export price.

## Conduct of the Review

10. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister (in this case the Parliamentary Secretary) either affirm the decision under review, or revoke it and substitute a new specified decision. In addition, s.269ZZK(1A) of the Act requires that if recommending a new specified decision, it must be materially different from the reviewable decision. In undertaking the review, s.269ZZ(1) requires the Review Panel to determine a matter required to be determined by the Minister, in like manner as if it was the Minister, having regard to the considerations to which the Minister would be required to have regard, if the Minister was determining the matter.

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<sup>1</sup> Statement of Essential Facts Report Numbers 385 and 386 - Review of Anti-Dumping Measures applying to Aluminium Zinc Coated Steel and Zinc Coated (Galvanised) Steel exported from the Republic of Korea by Dongbu Steel Co., Ltd - May 2017

<sup>2</sup> Report Numbers 385 and 386 - Review of Anti-Dumping Measures applying to Aluminium Zinc Coated Steel and Zinc Coated (Galvanised) Steel exported from the Republic of Korea by Dongbu Steel Co., Ltd - June 2017

<sup>3</sup> Report Numbers 272 and 273 - Review of Anti-Dumping Measures applying to Aluminium Zinc Coated Steel and Zinc Coated (Galvanised) Steel exported from the Republic of Korea by Dongbu Steel Co., Ltd -

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11. 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) of the Act. That is, information to which the Commissioner had, or was required to have, regard in reporting to the Minister.<sup>4</sup> In addition to relevant information, the Review Panel is only to have regard to conclusions based on relevant information that is contained in the application for review and any submissions received under s.269ZZJ.<sup>5</sup>
12. If a conference is held under s.269ZZHA of the Act, the Review Panel may have regard to further information obtained at the conference to the extent that it relates to relevant information and to conclusions reached at the conference based on that relevant information. A conference was held with the ADC on 6 October 2017 to obtain additional information in relation to the AEP and the analysis undertaken of HRC costs and the goods prices, mentioned in the report. A non-confidential summary of the conference was placed on the Review Panel’s website.
13. Unless otherwise indicated in conducting this review, I have had regard to the application (including documents submitted with the application), to the submissions received pursuant to section 269ZZJ, insofar as it contained conclusions based on relevant information and to the confidential information discussed with the ADC at the above mentioned conference. I have also had regard to REP 385 and 386 (and information relevant to the review which was referenced therein) and to SEF 385 and 386 (and to documents referenced therein).
14. Submissions were received from the following:
- ADC dated 22 September 2017; and
  - Dongbu dated 2 October 2017.
- Non-confidential versions were placed on the Review Panel’s website.
15. The ADC also provided relevant documents containing confidential information. These documents and the correspondence with the Commission, concerning them, were not made publicly available.
16. The Review Panel must provide a report to the Minister at least 30 days, and no later than 60 days, after the public notification of the review, unless an extension

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<sup>4</sup> S.269ZZK(6)(c)

<sup>5</sup> S.269ZZK(4) of the Act

has been granted by the Minister or there has been a reinvestigation request made to the ADC. In this case, the report is due no later than 30 October 2017.

## Grounds for Review

17. The grounds upon which BlueScope argued that the decision of the Minister was not the correct or preferable decision were:

- (1) in establishing revised variable factors for the nominated exporters, the Assistant Minister failed to consider the significant increases in raw material prices in the period subsequent to the review period (and up to the date of the decision); and
- (2) the Assistant Minister should not have accepted the Commissioner's recommendation to set an exporter's export price equal to its normal value in the absence of any exports by that exporter during the review period.

## Consideration of Grounds

(1) [Should the Parliamentary Secretary in determining the different variable factors for the goods exported by Dongbu have considered the period subsequent to the review period?](#)

18. The essence of the ground is that subsequent to the review period, BlueScope claims there was a sustained increase in the price of HRC, a raw material in the manufacture of the goods, which would have impacted the prices of those goods. BlueScope considers that these changes should have been taken into account to ensure that the revised measures did not 'under-address' injury to the Australian industry.

19. BlueScope states that the ADC noted its representations regarding the dramatic increases in HRC costs and the goods, subsequent to the review period. It says that the ADC stated in REP 385 and 386 that:

“The Commission notes that, although raw materials prices are currently higher than those during the review period, having regard to the long terms trends of HRC prices, there is no evidence to establish that the current raw material prices are sustained, or more representative, than the prices verified in the review period.



The Commission, therefore, does not recommend an adjustment to the variable factors for the review period to account for the movement of HRC prices following the review period.”<sup>6</sup>

20. BlueScope suggests there is a precedent for using information outside the investigation period and quotes the Trade Measures Review Officer (TMRO) report dated 2 April 2013 on Hot Rolled Coil Steel<sup>7</sup> and the International Trade Remedies Branch Report No 209 (original investigation No 188) on Hot Rolled Coil Steel dated 13 June 2013.<sup>8</sup> It states the Minister used information subsequent to the investigation period in assessing anti-dumping measures to be imposed.

21. BlueScope quotes a number of paragraphs from the TMRO report but emphasises the following:

“74. I do not consider that the Customs Act provides any express or implied prohibition on the CEO having regard to information concerning prices outside the investigation period when formulating recommendations to the Minister on the separate issue of what measures should be put in place as a result of dumping having occurred during the investigation period. Indeed, as the purpose of the Customs Act is to safeguard Australian industry from the adverse effects of future dumping (but not from adverse effects otherwise arising), it would seem to be inconsistent with that policy if the CEO were to be so constrained.”

“79. An appropriate case could exist where it was apparent that prices after the investigation period would differ from those within the investigation period on a sustained basis so that it was apparent that ignoring the later prices would mean that anti-dumping measures were set at a level that either under- or over-redressed the dumping that has been found to exist historically and likely to continue prospectively.”

22. BlueScope claims that it provided the ADC with the “exceptional market conditions that were experienced immediately following the review investigation period”.<sup>9</sup> It claims that these more recent prices were at least 20% higher than the review period, and will adversely impact the Australian industry should exports be made at the “new” normal value for Dongbu.

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<sup>6</sup> BlueScope application page 8 and REP 385 and 386 Section 4.6.2, page 21

<sup>7</sup> Trade Measures Review Office Report dated 2 April 2013 on Hot Rolled Coil Steel

<sup>8</sup> International Trade Remedies Branch Report dated 13 June 2013 on Hot Rolled Coil Steel

<sup>9</sup> BlueScope application page 10

23. BlueScope further claims that the increases in prices following the review period is relevant information and should have been subject to the consideration of the Commissioner in REP 385 and 386. It does, however, acknowledge that the ADC did have regard to the claims by BlueScope but disagrees with the fact that this information was not used to modify the variable factors.

24. The issue appears to be centered on the reasoning outlined by the ADC in its report<sup>10</sup> for not modifying the variable factors in the manner requested by BlueScope as follows:

- Its standard practice in conducting reviews is to consider the 12 months (called the review period) preceding the review initiation date;
- The public notice advising of the review specifies that this is the period being considered;
- It acknowledges that this has some degree of retrospectivity, however it suggests that this is balanced by transparency and certainty to the interested parties about the conduct of the review;
- It allows for verification of data and timely delivery of findings; and
- It noted that raw materials were currently higher than those during the review period but had regard to the long term trends of HRC and considered this did not suggest the current raw material prices were sustained, or more representative, than the prices in the review period.

25. In REP 385 and 386, the ADC indicates it had regard to submissions from both BlueScope and Dongbu on the issue of looking at more contemporary raw material pricing information to determine the variable factors. However for the above mentioned reasons, the ADC commented that it chose not to modify its approach to the variable factors.

26. The role of the Review Panel is to undertake a “merits review” of the grounds raised by the applicant, that is, to examine the merits of the case by consideration of the facts as well as the law.

27. In this ground, there are three issues to be considered. Firstly, whether the legislation allows the use of the information outside of the review period. Secondly, if the legislation does allow the use of such information, (in other words does not prohibit its use), whether the information should be used. Thirdly, whether the ADC assessment of the current trend in HRC prices is correct and reasonable in the circumstances or whether it should have used the more recent pricing information as proposed by BlueScope.

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<sup>10</sup> REP Nos 385 and 386 Section 4.6.2 page 21

28. BlueScope claims that the TMRO report on HRC<sup>11</sup> indicates that the Commissioner (and the Minister) is not constrained from using prices outside the review period to determine variable factors and there is no legislative prohibition. It claims that the Dongbu case is a mirror of the circumstances facing the Investigation 188 and the TMRO review, and that failure to take into account contemporary data would lead to inadequate redress.
29. Dongbu in its submission<sup>12</sup> claims that the BlueScope review application fails to establish the Minister's decision was not the correct or preferable one. In particular, it states that the TMRO decision on HRC should be differentiated from the current review of measures for a number of reasons:
- the TMRO decision is concerned with the extent of duties which should be payable (s.269TEA(1)(c)) whereas the review of measures is dealing with the consideration of the individual variable factors under s.269ZDA(1);
  - there is no legislative provision that would enable the ANV to be adjusted based on fluctuations to the raw material costs subsequent to the assessment of the normal value under s.269TAC(1); and
  - the TMRO decision does not represent a broad finding that any information at all may be taken into account by the Minister.
30. I now consider the legislative provisions relating to the "review period" in a review of measures as discussed in Division 5 of Part XVB of the Act.
31. Where anti-dumping measures are in place for goods, s.269ZA of the Act provides that an affected party may lodge an application for a review of those measures if it considers that one or more the variable factors have changed.
32. Section 269T(4E) defines variable factors relevant to a review of measures as the normal value, export price or non-injurious price (NIP), as ascertained or last ascertained by the Minister of the goods the subject of an anti-dumping duty notice.
33. Section 269ZB describes the content and lodgement of the application relating to a review, and s.269ZC indicates how the ADC should consider the application requesting a review, and prescribes the timeframes under which the ADC must operate within. In particular, s.269ZC(7) provides that the notice advising that the ADC is undertaking a review of measures must describe:

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<sup>11</sup> Trade Measures Review Office Report dated 2 April 2013 on Hot Rolled Coil Steel

<sup>12</sup> Dongbu submission to the Review Panel dated 2 October 2017

- the goods;
- the measures to which the review relates;
- if the review is examining whether the variable factors have changed, state that fact;
- the timeframe in which the review will be undertaken;
- advise the date the timeframes under which submissions should be made;
- the date in which the SEF will be published, and the timeframe in which submissions in relation to the SEF should be made; and
- that a report will be made to the Minister within 155 days of the public notice (unless an extension has been granted).

34. Section 269ZDA of the Act requires the Commissioner of the ADC (Commissioner) to provide a report to the Minister and recommend whether the dumping duty notice, in effect, have different variable factors or remain unaltered. It outlines the process to be followed and what matters the Commissioner must, or may, have regard to in preparing the recommendations. In particular, subparagraph (3)(b) indicates that in preparing the report to the Minister, the Commissioner may have regard to any other matter that he considers to be relevant to the review.<sup>13</sup>

35. These provisions are similar to the provisions related to the ADC's consideration of applications for anti-dumping measures as detailed in Division 2 of Part XVB of the Act.

36. However, there is at least one main difference between the Division 2 and Division 5 investigative processes. In Division 2, the public notice advising of an application and investigation of anti-dumping measures must specify the "investigation period". The investigation period is defined as a period specified by the Commissioner to be the investigation period in relation to the application. It is explained in some detail in the Anti-Dumping Policy Manual.<sup>14</sup> It states that the investigation period has an end and start date and events outside this period are not taken into account.

37. There is not an equivalent provision in relation to the period to be examined in the consideration of reviews of measures in Division 5. It is clear from an administrative point of view that the ADC has a standard operating practice of specifying the review period in a similar fashion to the "investigation period". In

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<sup>13</sup> S.269ZDA(3)(b)

<sup>14</sup> Anti-Dumping Manual November 2015, Section 3 Investigation Period pages 12 - 13

this case, the public notice of the review of measures advised that the “review period is 1 October 2015 to 30 September 2016”.<sup>15</sup>

38. There is no specific legal provision restricting the consideration of information to the “review period” as there is in the “investigation period”.

39. I can find no judgements dealing directly with this issue. However, the Pilkington judgement,<sup>16</sup> which dealt with whether it is open for the Minister to consider a period wider than the “investigation period” in considering whether dumping had occurred, is relevant. It deals with the future imposition of anti-dumping duties following an investigation, rather than the change (or otherwise) of variable factors as part of a review of measures investigation. I acknowledge that the circumstances and legislative provisions are not identical. It does, however, explore the issues regarding the ‘prescriptive regime’, conformity with the World Trade Organization Anti-Dumping Agreement (ADA) and reliance on the investigation period in its decision, as follows:

*‘The statute has plainly sought to institute a detailed prescriptive regime in which guidance as to what is relevant for the interested parties to deal with is clear...’*

*‘We agree with the submission of the respondents that it would be subversive of the intended detailed prescription of the investigation in Part XVB, which was and is plainly intended to conform with the matters found in the Implementation Agreement, for the Minister to be required to go outside the investigation period to ascertain whether dumping has occurred in the past for the purposes of pars 269TG(1)(a) and (2)(a)...’*

*‘Thus, we conclude that, in the circumstances of decisions under s.269TG consequent upon an application under s269TB, the satisfaction as to the relationship between export prices and normal values in the past called for in pars 269TG(1)(a) and TG(2)(a) is to be reached by reference to the process laid down by s.269TACB and by reference to the investigation period as called for by subs 269TACB(1).’*

40. The judgement does however further state:

*‘We do not see in the legislation a positive proscription on the Minister informing himself or herself of matters beyond the CEO’s Report. Questions of procedural fairness may arise. However, if, for instance, clear*

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<sup>15</sup> Anti-Dumping Notices 2016/130 and 2016/129

<sup>16</sup> *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* [2002] FCAFC 423 paras 115 to 130

*evidence came to light, after the Report, falsifying significant parts of its contents, we see nothing in Part XVB to prohibit the Minister from examining such material.'*

41. The Pilkington judgement, makes clear that in normal circumstances, for the benefit of all interested parties, the Minister should only have regard to the investigation period in establishing anti-dumping duties. It refers to the principles contained in Article 6 of the ADA and their reflection in the provisions of the Customs Act. It does provide that in exceptional circumstances, noting the questions of procedural fairness, the Minister could consider 'matters beyond the CEO's report'. This is not necessarily suggesting a different period but it does leave a degree of openness to what could cause the Minister to avail himself of this avenue.
42. The ADC, via its practice of specifying a review period in the public notice announcing the review of measures, appears to be aligning its approach to that outlined in the Pilkington judgement, as an administrative approach, to provide certainty of process.
43. There is support in this approach from the following angles. Firstly, Article 11.4 of the ADA indicates that the evidence and procedures outlined in Article 6 should also be applied to reviews of anti-dumping duties.<sup>17</sup> Secondly, Australia's legislation related to review of measures largely reflects this approach. Thirdly, the notification in the public notice of the review period provides weight from an administrative law perspective, that interested parties should focus on that period.
44. However, as referred to above, the review of measures procedures described in Division 5 of Part XVB do not exactly mirror those of Division 2. Division 2 outlines more details relating to the investigation period in the calculation and assessment of the dumping margins contemplated in s.269TACB and s.269TEA(1)(c) of the Act. Apart from this, the requirements are similar.
45. In relation to Dongbu's submission to the Review Panel, I agree to a certain extent with the points raised regarding the use of the TMRO report on the use of information outside the investigation period, particularly in relation to the:
- The consideration of the variable factors is different to the assessment of the dumping duties payable; and
  - It was not a 'broad finding that any information at all may be taken into consideration'.

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<sup>17</sup> World Trade Organization Anti-Dumping Agreement Article 11.4 page 15

46. However, it does not deal specifically with whether the legislation allows or prohibits the use of information outside the review period in a review of measures, if circumstances warranted such an approach. Given my finding outlined below, I do not need to deal further with the Dongbu submission.
47. The second issue to be dealt with, on the basis that if there is no legislative prohibition, is whether the ADC should use the information.
48. BlueScope submits that the changed pricing information should have been considered on the basis of the dramatic increases immediately following the review period and that these changes were on a sustained basis, which would justify the use of information outside the review period. It suggests this is consistent with the rationale adopted by the TMRO in the HRC review.
49. While BlueScope suggests that the TMRO report on HRC supports its position, there are a couple of key differences. Firstly, the TMRO report relates to the imposition of future dumping duties, not the establishment of the variable factors, as highlighted by Dongbu in its submission. Secondly, there is the question of whether there has been a substantial increase over a sustained period.
50. Dongbu on the other hand, suggests that the variable factors have been correctly determined during the review period, and consideration outside of this period is not relevant or required.<sup>18</sup>
51. As referred to above, the legislation establishes strict investigative processes, which reflects the requirements in Article 6 of the Anti-Dumping Agreement (ADA). Article 6 outlines the need for transparency and certainty of process, the public file, fairness to all parties as well as the ability to undertake a timely investigation and decision process. As mentioned above, Article 11.4 of the ADA indicates that the evidence and procedures outlined in Article 6 should also be applied to reviews of anti-dumping duties.
52. There is also a degree of overlap with my comments regarding the Pilkington judgement, as to whether information following the review period should be considered. The main point relates to whether the statements concerning the benefits flowing to all parties involved in an anti-dumping investigation, (in having certainty of process, transparency and clear timeframes in which to expect the finalisation of decisions and the reflection of the relevant articles of the ADA), outweigh the value of more recent data.

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<sup>18</sup> Dongbu letter dated 2 October 2017 page 3



53. In practical terms, in any investigation process, there will always be a time lag between the commencement of an investigation and its finalisation. Circumstances can and do change prior to an investigation being finalised. In considering the practicalities of not limiting investigations to specified timeframes, or where the investigation process enabled parties to continuously submit additional material to the decision maker, there would be substantial challenges in finalising a report and decision-making. Again, the relevant point is the need to strike a balance between the extremes of the impacts of using “ageing” information and the advantages of clarity and certainty of process for interested parties and delivering timely reports.
54. I note that the legislation contemplates that changes do occur and includes provisions that enable reviews of measures to be undertaken within a reasonable timeframe following the publication of a dumping duty notice and from reviews of measures.
55. On balance, and I consider supported by the comments made in the Pilkington judgement, there are compelling reasons such as transparency, natural justice and certainty of process, to not consider information from outside of the review period, unless there are exceptional circumstances as contemplated in para 125 of the Pilkington judgement.<sup>19</sup> If the ADC had decided to modify the review period or undertake additional inquiries on the basis of the information that BlueScope submitted on HRC price increases, it would have in all probability necessitated a further investigation with the exporter and an extension of time from the Minister. It is not a simple matter of making an adjustment. While a further investigation is undoubtedly possible, it should only be undertaken in unusual or exceptional circumstances, or it could set a precedent which would disturb the review of measures investigation process and create uncertainty.
56. I turn to the third issue, as to whether its assessment of the current trend in HRC prices correct and reasonable in the circumstances or are the circumstances sufficiently compelling to require a further investigation? The ADC did not undertake a change in its determination of the variable factors based on the submission of the changed HRC and goods prices.
57. BlueScope claims that the raw material prices have changed substantially since the review period. It suggests, in essence, that the review period be modified to consider a different review period and proposes the period 1 July 2016 to 30 June 2017 rather than the period announced by the ADC, that is, 1 October 2015 - 30 September 2016 (noting the application for the review of measures was lodged in November 2016). BlueScope provided the information relating to the changes in

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<sup>19</sup> *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* [2002] FCAFC 423 paras 125



the HRC and the goods prices late in the investigation process. The information was supplied on the last day that submissions could be made to the ADC, following the SEF. In theory, this prevented Dongbu from commenting on the BlueScope submission. I note that Dongbu did make a submission and the ADC did have regard to it.<sup>20</sup>

58. In practical terms, if the ADC had decided to investigate this latter period, it would have been required to commence a further investigation. As stated above, for transparency and natural justice reasons, this would require re-commencing the process of exporter questionnaire and verification, and delaying the report to the Minister. While it could be argued that this is possible, the question remains as to whether the circumstances in this case were that exceptional that would justify such an approach.

59. I held a conference with the ADC<sup>21</sup> to seek further information on the information it had used to assess and analyse the long term pricing trends given its statement in the REP 385 and 386 that “there is no evidence to establish current raw material prices are sustained, or more representative, than the prices verified in the review period”.

60. The ADC provided a copy of the confidential graph which summarised SBB East Asia HRC import prices CFR US\$/T for the period 2011 until May 2017. This included the review period as well as the period proposed by BlueScope. It also indicated that the BlueScope HRC price information supplied to the ADC was expressed in Australian dollars (AUD)/T which did show greater peaks and troughs than information revealed in the SBB information. The ADC stated that the AUD had been subject to currency variations during the period in question. Given it relates to information relating to Korean prices, it would seem appropriate to assess this information using Korean currency or the currency in which commodities are normally traded (generally US dollars). I agree with the approach adopted by the ADC in this regard.

61. On the basis of the SBB HRC pricing information, together with other information on HRC and steel prices in other investigations being undertaken at a similar time, the ADC in REP 385 and 386 had formed the view that there was no evidence suggesting that the fluctuations in pricing in the period proposed by BlueScope were more representative, or would be sustained. It decided that the review period remained relevant.

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<sup>20</sup> REP 385 and 386, section 4.6.2 page 21

<sup>21</sup> Conference Summary with ADC 6 October 2017 - placed on ADRP website

62. Having assessed this information, I consider the ADC's conclusion is reasonable in the circumstances. It does not appear that the BlueScope evidence is sufficiently compelling to warrant a further examination or modification to the review period.
63. Having assessed the material placed before the ADC by BlueScope as well as the additional information provided at the conference, I do not consider the BlueScope information on the sustained price increase sufficiently compelling to justify a change of the review period. If the full year period proposed by BlueScope is examined, then there are periods during that year where prices are at lower levels (similar to the review period) and also periods where they are higher. Generally speaking, the use of a full year tends to average out the peaks and troughs to a certain extent.
64. I am also aware that should BlueScope's concerns relating to the sustained nature of the price increase be correct, there are avenues available for the Minister to initiate a review of measures at any time under s.269ZA(3) of the Act. While I do not advocate such an approach, it does provide a safeguard, should exceptional circumstances emerge.
65. Therefore, while there is no specific legislative prohibition from using information outside the "review period" there are a variety of reasons, in my view, that it is preferable to use the "review period" in assessing the variable factors. Having assessed the BlueScope claims regarding the changed HRC and goods prices, subsequent to the review period, I do not agree that BlueScope has established in this case, that the circumstances are so exceptional to necessitate a change of variable factors.
66. Accordingly, I consider that the approach of the ADC was reasonable and that BlueScope has not demonstrated that the Minister's decision was not correct or preferable in relation to having regard to the review period only in assessing the variable factors.

(2) Should the Parliamentary Secretary have accepted for the goods that the ascertained export price be established at the same level as the ascertained normal value in the absence of any exports during the review period?

67. BlueScope states that the Commissioner should not set the export price at the same level as the normal value in the absence of any exports. It claims that this establishes a dangerous precedent which involves 'gaming' of measures as it assumes that the exporter has ceased dumping which is inconsistent with the exporter's previous behaviour. It claims that the approach taken by the Commissioner is similar to that of accelerated reviews, as found in Division 6 of the Act. It states that it is reasonable in the context of 'new exporters' having the export price set at the normal value given they have not exported to Australia. However, this is not appropriate for exporters previously found to be dumping and who have ceased exporting. It claims this is a reward as it is setting a zero interim dumping duty impost.

68. The ADC found that Dongbu had not exported any of the goods during the review period. It indicated that it could not determine an export price under s.269TAB(1)(a), (b) or (c) of the Act. In such circumstances it states that where there is insufficient information available, export price shall be determined by the Minister having regard to all relevant information under s.269TAB(3) of the Act.

69. In its submission to the Review Panel,<sup>22</sup> the ADC make the following points:

- Division 5 does not require an exporter to have exported in order to apply for a review;
- the normal value is relevant information;
- its approach is an established practice and not a precedent; and
- where the normal value is equal to the export price, and the variable factors are being altered following a review, the floor price method of duty assessment is allowable under the *Customs Tariff (Anti-Dumping) Regulation 2013*.

70. It is clear that s.269TAB(1) of the Act requires that there be an exportation of the goods to Australia in order to have the export price determined under this subsection as follows.

71. Section 269TAB(1)(a) relies on an arms length purchase by the importer from the exporter which enables the price so paid to form the basis of the export price (allowing deductions for any parts of the price that relate to charges of transport after exportation or other matters arising after exportation).

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<sup>22</sup> ADC submission to the Review Panel dated 22 September 2017 Appendix A page 2

72. Section 269TAB(1)(b) deals with circumstances where there is a sale between the exporter and the importer which is not arms length and the export price can be based on the sale by the importer less certain prescribed deductions.
73. Section 269TAB(1)(c) indicates that if neither s.269TAB(1)(a) or (b) are possible, the Minister may determine a price having regard to all the circumstances of the exportation.
74. In the situation where it is clear that there are no exports, or in other words, no transactions between an exporter and importer, export price cannot be determined under s.269TAB(1).
75. In such circumstances, s.269TAB(3) of the Act is the only provision available for the determination of the export price.
76. Turning to s.269TAB(3) of the Act, the Minister may have regard to all relevant information. The ADC indicates that the most relevant information it has available is the ANV.
77. In REP 385 and 386, the ADC notes that it had access to recent sales and cost to make and sell (CTMS) data for other Asian producers/exporters of the goods. It states that this information confirmed the trends observed in Dongbu's sales and CTMS. It considered this was reliable and accurate. In these circumstances it is open for the ADC to use the normal value as the export price. In essence this establishes an export price which is at an undumped level, at least at that point of time.
78. Dongbu in its submission to the Review Panel,<sup>23</sup> states that the Minister's decision to determine the AEP at the level of the ANV is correct or preferable and that BlueScope has not provided any technical reasons why this is not the case. Dongbu claims:
- The Minister's decision does impose dumping duty should Dongbu export below the ANV;
  - The ADC's earlier review of measures of Dongbu (for which there had been exports) had not been dumped; and
  - challenges the language used by BlueScope in relation to gaming and setting a dangerous precedent.

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<sup>23</sup> Dongbu letter dated 2 October 2017 page 5

79. At the conference held with the ADC on the 6 October 2017, I asked the ADC to elaborate on whether it had considered any other information in relation to the assessment of the export price, as this had not been referred to specifically in its report. It indicated that it did give consideration to other sellers in the market place as well as the fact that there were concurrent reviews underway in relation to the goods exported from the People's Republic of China and Taiwan. However, it indicated there were a variety of reasons that it considered this information less relevant than the ANV of Dongbu.
80. In theory, it may have been possible for the ADC to consider the export prices of other exporters the subject of the original investigation or other export sales by Dongbu, given there is an ability to consider all relevant information. However, such information from other exporters may have confidentiality issues as well as practical issues associated with currency conversion, due allowance adjustments etc which may have presented challenges. Therefore I consider it was reasonable for the ADC to have considered the ANV for Dongbu more relevant than other information available to it.
81. Given my findings on this ground it is unnecessary to comment further on the submission by Dongbu on this ground.
82. The use of Dongbu's normal value to establish the export price has the advantage of relevance to Dongbu, and creates a floor price for which goods exported at that level or higher, should in theory, not be dumped. By setting the AEP at the ANV level, and then specifying a floor method, an interim dumping duty becomes payable should the actual export price be lower than the AEP. This should address BlueScope's concerns regarding dumping duty being payable when exports are sold to Australia at a dumped level.
83. In relation to BlueScope's comments regarding "gaming" and "rewards" in regard to establishing the AEP at the same level as the ANV in circumstances where there have been no exports, I am not sure that I fully understand its concerns. Should Dongbu recommence exporting the goods to Australia at prices less than the ANV, interim dumping duties will become payable.
84. It is not possible to have a dumping margin if the export price is higher than the normal value as this would mean dumping does not exist. I am also cognizant that Article 9.3 of the ADA states that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article 2 indicates that goods are considered to be dumped if the export price is less than the normal value. This is reflected in s.269TG(1)(a) which provides that dumping occurs when the export price is less than the normal value.

85. I also note that BlueScope did not express a view as to what the AEP should be, except to state that it should be set higher.

86. For the reasons outlined above, I do not consider that BlueScope has demonstrated that the Minister has erred in relation to the establishment of the AEP.

## Recommendations/Conclusion

87. I do not consider that BlueScope has established that the decisions of the Parliamentary Secretary were not the correct or the preferable decisions in relation to both of its grounds in the review application.

88. Pursuant to s.269ZZK of the Act, I recommend that the Parliamentary Secretary affirm the reviewable decision.



Jaclyne Fisher  
Panel Member  
Anti-Dumping Review Panel  
30 October 2017