



Australian Government
Anti-Dumping Review Panel

ADRP Report No. 94

Zinc Coated Galvanised Steel exported
from the People's Republic of China, the
Republic of Korea and Taiwan

October 2018

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Abbreviations

| Term | Meaning |
|--------------------|--|
| Act | <i>Customs Act 1901</i> |
| ADA | <i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement)</i> |
| ADN | Anti-Dumping Notice |
| Assistant Minister | Senator the Hon Zed Seselja, the former Assistant Minister for Science, Jobs and Innovation. |
| BlueScope | BlueScope Steel Limited |
| Citic | Citic Australia Steel Products Pty Ltd |
| Commission | Anti-Dumping Commission |
| Commissioner | The Commissioner of the ADC |
| Dongbu | Dongbu Steel Co., Ltd |
| Dongkuk | Dongkuk Steel Mill Co Ltd |
| Goods | <p>The goods the subject of the measures being:</p> <p>flat rolled products of iron and non-alloy steel of a width less than 600mm and, equal to or greater than 600mm, plated or coated with zinc;</p> <p>and</p> <p>flat rolled iron or steel products containing alloys of a width less than 600mm and, equal to or greater than 600mm, plated or coated with zinc exported from:</p> <p style="padding-left: 40px;">China by Angang Steel Co., Ltd or Benxi Iron and Steel (Group) International Economic & Trading Co.; or</p> <p style="padding-left: 40px;">Taiwan by Yieh Phui Enterprise Co., Ltd</p> |
| IDD | Interim dumping duty |
| Interpretation Act | <i>Acts Interpretation Act 1901</i> |

| | |
|---------------------|--|
| Minister | Minister for Industry, Science and Technology |
| Inquiry Period | 1 October 2016 to 30 September 2017 |
| Report 457 | The report published by the Commission in relation to Review 457 (and Review 456) of the variable factors relevant to the measures published by the Commission and dated 12 July 2018. |
| Reviewable Decision | The decision of the former Minister made on 19 April 2018 |
| Review Period | 1 October 2016 to 30 September 2017 |
| Report | The report published by the Commission in relation to inquiry 449 (and 450) and dated 14 June 2018 |
| SEF | The Statement of Essential Facts published by the Commission in relation to Inquiry 449 (and Inquiry 450) and dated 30 April 2018 |
| Yieh Phui | Yieh Phui Enterprise Co Ltd, a Taiwanese exporter of the goods |

The Review Panel corrected typographical errors at the third sentence of paragraph 63 following the Minister's decision. The sentence previously read "he general practice of the Commissioner's reports to specifically address substantive arguments advanced in response to the SEF."

Recommendation

This is a review of the decision made by Senator the Hon Zed Seselja, the former Assistant Minister for Science, Jobs and Innovation on 12 July 2018 to secure the continuation of the anti-dumping and countervailing measures which applied to galvanised steel exported to Australia from the People's Republic of China, the Republic of Korea and Taiwan.

I consider that the decision is the correct or preferable decision.

I recommend that the Minister affirm the decision



.....
Scott Ellis
Panel Member
Anti-Dumping Review Panel
30 October 2018

Summary

1. The Review arises out of a continuation inquiry conducted under Division 6A of Part XVB of anti-dumping and countervailing measures (measures) imposed on galvanised zinc (goods)¹ imported from the People's Republic of China, Korea and Taiwan.
2. The measures were first imposed on 5 August 2013. The measures were due to expire 5 years later², on 5 August 2018, subject to the ability of the Minister to secure the continuation of the measures by publication of a notice under s 269ZHG(1)(b) of the Act.
3. On 12 July 2018, the Hon Zed Seselja, then the Assistant Minister for Science, Jobs and Innovation (Assistant Minister), made a decision (Decision) under s 269ZHG(1)(b) of the Act to secure the continuation of the anti-dumping measures which at that time applied to galvanised steel (goods) exported to Australia from the People's Republic of China, the Republic of Korea and Taiwan.³ The Assistant Minister did so by continuing the dumping duty and countervailing notices applicable to the goods, subject to various amendments identified in Anti-Dumping Notice 2018/96.
4. Citic Australia Steel Products Pty Ltd (Citic), an importer of the goods, sought review of the whole of the decision.⁴ Dongbu Steel Co., Ltd (Dongbu), a Korean exporter of the goods, sought review of the Decision in so far as it continued the measures of the goods by Dongbu from Korea to Australia.⁵

¹ A fuller definition of the goods is provided at paragraph 7.

² Section 269TM.

³ The decision was the subject of Anti-Dumping Notice no 2018/96.

⁴ Citic application at pages 5 and 25.

⁵ Dongbu application at p2.

5. The Panel considered that the Decision was the correct or preferable decision and recommends that the Decision be affirmed.

Background

6. The measures were first imposed on 5 August 2013 following consideration of *International Trade Remedies Branch Report No 190 and International Trade Remedies Branch Report No. 193*. Since the measures were first imposed, several exemptions have been granted and a number of reviews of the variable factors undertaken.⁶ The measures comprise interim dumping duties and interim countervailing duties on goods imported from the People's Republic of China and interim dumping duties of goods imported from Korea and Taiwan. The rates and form of measures differ.⁷
7. The goods to which the measures apply are:

flat rolled products of iron and non-alloy steel of a width less than 600mm and, equal to or greater than 600mm, plated or coated with zinc;

and

flat rolled iron or steel products containing alloys of a width less than 600mm and, equal to or greater than 600mm, plated or coated with zinc exported from:

China by Angang Steel Co., Ltd or Benxi Iron and Steel (Group)
International Economic & Trading Co.; or

⁶ The measures, the exemptions and the results of reviews of the measures are set out at pages 10 and 11 of REP 449.

⁷ The measures are listed at page 11 of the Anti-Dumping Commission Report Nos. 449 and 450, EPR449, Doc 016.

Taiwan by Yieh Phui Enterprise Co., Ltd

8. The measures were due to expire on 5 August 2018, 5 years after they were first imposed.⁸
9. BlueScope Steel Ltd (BlueScope) applied for continuation of the measures on 5 October 2017. BlueScope is the Australian Industry.
10. A continuation inquiry was initiated by the Commissioner in respect of the measures on 11 November 2017 (Inquiry 449).⁹
11. The Commissioner also initiated a review of the variable factors for the measures, Review 457. The inquiry period for Inquiry 449 and the review period for Review 457 were the same, 1 October 2016 to 30 September 2017.¹⁰
12. A statement of essential facts (SEF 449) dated 30 April 2018 was published in respect of Investigation 449.¹¹
13. A final report (REP 449) was made on 14 June 2018.¹² The Commissioner made a final Report in respect of Review 457 on the same day.¹³

⁸ Section 269TM.

⁹ In addition to the measures on the goods, measures have been imposed on aluminium zinc coated steel exported to Australia from China, Korea and Taiwan. These measures were also due to expire on 5 August 2018. At the instigation of BlueScope, an inquiry into the continuation of the measures on aluminium zinc coated steel was initiated (Investigation 450). Investigation 450 was conducted in tandem with Investigation 449.

¹⁰ The Commissioner also conducted a review into the variable factors relevant to the measures imposed on aluminium zinc coated steel, Review 456.

¹¹ EPR 449 Doc 009. It was a joint SEF with Inquiry 450.

¹² EPR 449, Doc 016. It was a joint report with Inquiry 450.

¹³ EPR457, Doc 030. It was a joint report with Review 456.

14. The Decision was made on 12 July 2018.¹⁴ In making the Decision, the Minister adopted the recommendations, findings and reasons for recommendations in REP449.
15. The Assistant Minister also made a decision in respect of Review 457 on 12 July 2018.¹⁵ By that decision the Assistant Minister fixed new variable factors in respect of the measures and made a decision under the *Customs Tariff (Anti-Dumping) Act 1975* determining the methods by which duty is to be calculated.
16. Timely applications for review of the Decision were made by Citic and Dongbu.
17. Each of the grounds advanced was accepted as disclosing a reasonable ground of review.
18. Citic imports goods exported by Yieh Phui Enterprise Co Ltd (Yieh Phui), a Taiwanese exporter of the goods which is subject to the measures.
19. The Senior Member determined that the Panel should be constituted in respect of this review by me.
20. The following submissions were received:
 - (a) BlueScope's submissions dated 25 September 2018 in relation to Citic's application;
 - (b) BlueScope submissions dated 25 September 2018 in relation to Dongbu's application; and

¹⁴ ADN 2018/96. At the same time, a decision was also made in respect of the measures applicable to aluminium zinc coated steel (ADN 2018/97).

¹⁵ ADN 2018/94.

- (c) Dongbu's submissions dated 25 September 2018 in relation to its own application for review (Dongbu Supplementary Submissions).
21. A conference was held with representatives of the Commission on 19 October 2018.¹⁶
 22. It is convenient to deal in turn with each of the grounds advanced by Citic, then deal with Dongbu's application.

Citic Ground 1: Failure to have regard to Citic's submissions of December 2017.

Introduction

23. Section 269ZHE(2)(a)(ii) provides that, in formulating the statement of essential facts, the Commissioner must have regard, amongst other things, to 'any submissions relating generally to the inquiry that are received by the Commission within 37 days after the publication of the notice under s 269ZHD(4)' initiating the inquiry.
24. It was not disputed that:
 - (a) the notice under s 269ZHD(4) was published on 10 November 2017;
 - (b) Citic made submissions in December 2017 (December submissions), within the 37-day time limit;
 - (c) the Commission subsequently published the SEF;
 - (d) the December submissions were overlooked and the Commissioner had no regard to the December submissions in preparing the SEF; and

¹⁶ Summaries of conferences are available on the ADRP website.

- (e) Citic subsequently provided submissions in response to the SEF (May submissions).¹⁷
- 25. It is apparent that the Commissioner failed to comply with the requirement of s 269ZHD(4).
- 26. Citic contended that the correct or preferable decision flowing from this ground of review, like all the other grounds, was that the Minister should have declared that he had decided not to secure the continuation of the anti-dumping measures concerned.

The role of the Panel

- 27. Before dealing with this ground, it is helpful to recapitulate the role and powers of the Panel under the Act.
- 28. The role of the Panel under the Act is to produce a recommendation to the Minister, supported by a report. The recommendation takes one of two forms:
 - (a) the Minister affirm the reviewable decision; or
 - (b) the Minister revoke the reviewable decision and substitute a specified new decision.¹⁸
- 29. In conducting a review the Panel must determine the matter in like manner as if it were the Minister and having regard to the consideration to which the Minister would be required to have regard if the Minister were determining the matter.¹⁹ The Panel must give reasons for its recommendations.²⁰

¹⁷ EPR 449, Doc 009.

¹⁸ Section 269ZZK.

¹⁹ Section 269ZZ.

²⁰ Section 269ZZK(2).

30. In making the recommendation, the materials to which the Panel may have regard are limited to:
- (a) 'relevant information', as defined in s 269ZZK(6). In this case, the Decision was made as a result of an application under s 269ZHB, so 'relevant information' is defined to mean the information the Commissioner had regard to, or was obliged to have regard to, when making the findings in the report under s 269ZHF;²¹
 - (b) any report made by the Commissioner under s 269ZZL; and
 - (c) further information provided at a conference under s 269ZZHA, to the extent that it relates to the relevant information and any conclusions reached at the conference based on that relevant information.
31. The Panel may require reinvestigation by the Commissioner before making a recommendation to the Minister.²² The reinvestigation is of a specific finding or findings that formed the basis of the decision under review.²³ The Commission must report the result of the reinvestigation. The Panel must take into account the report of the investigation. The Panel has no original investigative powers of its own.
32. The Panel may call a conference and may take into account information received at a conference, but the information which the Panel may take into account under s 269ZZHA must be based on the 'relevant information'.
33. The nature of the review conducted by the Panel was discussed by the Hon Michael Moore in ADRP Report No. 24 – Power Transformers:

²¹ Section 269ZZK(6)(d).

²² Section 269ZZL.

²³ Section 269ZZL(1).

It seems to me that having regard to the fact that the Panel will ordinarily have to undertake a review in a comparatively short time frame against a background where the Commissioner will have ordinarily undertaken an extensive process of investigation and reporting, and also having regard to the fact that the Panel can require the Commissioner to reinvestigate, the Panel's role in a review does not entail full reinvestigation of matters considered by the Commissioner and raised by interested parties in the application for review. The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgment. I do not see the Panel's role as involving this type of evaluation afresh. Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations. The Panel's powers to revoke or recommend the revocation of a number of types of reviewable decisions only arises if the reviewable decision was either not the correct decision (when there has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). It is tolerably clear this is the statutory test having regard to the obligation (at various points in Division 9 of Part XVB) on an applicant for review to identify in the application reasons for believing that the decision was not the correct or preferable decision and the power of the Panel to reject an application if this is not done.

34. In making a recommendation, the Panel is concerned with whether the decision under review is, substantively, the correct or preferable decision. A review is directed to the substantive merits of the decision. This has the consequence that procedural issues have limited significance. If the Panel was persuaded that a

decision was the correct or preferable decision, the Panel would recommend that the decision be affirmed, even if it was apparent that there were procedural defects in the process by which the decision was reached.

Discussion

35. The process by which the SEF was prepared did not comply with the process mandated by the Act.
36. However, the Panel is concerned with the substance of the Decision, rather than with the process by which it was reached. The review is a review of the merits of the Decision. The Commissioner's failure to consider the December submissions in formulating the SEF does not, of itself, provide a basis for concluding that the Decision was not the correct or preferable decision.
37. The failure to comply with s 269ZHE does not, in the Panel's opinion, have the effect of rendering the Decision void. An intention should not be inferred from the legislation that a failure to comply with 269ZHE(2)(a)(ii) would have this effect.²⁴ The preparation of the SEF is only a preliminary step along the way to a decision whether to continue measures. Where the SEF expresses views with which a party disagrees, or where, as here, a party's submissions have not been considered in formulating the SEF, the party can make post SEF submissions. With a continuation inquiry, the measures the subject of the inquiry expire at the end of their term. If a decision under s 269ZHG were invalidated because of an inadvertent procedural error, the Australian industry might be materially injured by the expiration of the measures, even though the Australian industry was in no way responsible for the procedural defect.

²⁴ *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.

38. Further, the Panel is satisfied that the failure to have regard to the December submissions did not have any substantive impact on the Decision. The matters canvassed in the December submissions relevant to the substance of the Decision were again canvassed in the submissions made by Citic in response to the SEF.²⁵ It appears that the Commissioner considered the December submissions,²⁶ although Citic is dissatisfied with the Commissioner's reasons in relation to them.
39. This ground provides no basis for requiring the Commissioner to reinvestigate the findings made in the Report. There is no reason to think that, on a reinvestigation, the Commissioner would obtain information in addition to that which Citic provide in its May submissions.

Conclusion

40. The failure of the Commissioner to have regard to the December submissions in preparing the SEF does not mean that the Decision is not the correct and preferable decision.

Citic Ground 2: Non-confidential summaries of the BlueScope's material

Introduction

41. The BlueScope's continuation application contained confidential information. BlueScope adopted the usual practice of providing 'confidential' and 'public' versions of its application. The public version of BlueScope's application did not

²⁵ EPR 457, Doc 030. The December submissions also dealt with whether the Commissioner ought to have initiated an inquiry under s 269ZHD. The initiation of an inquiry is not a matter upon which the Commissioner is required to consider submissions from interested parties. The December submissions also dealt with the Commissioner's failure to require BlueScope to provide summaries of confidential information included in its application. This issue was also ventilated by Citic in this review and is dealt with below.

²⁶ Report at p48.

include attachments and appendixes that were said to be confidential. Portions of the public version were redacted.

42. Citic contended that:

- (a) BlueScope's application did not provide a summary of that confidential information;
- (b) the Commissioner failed to require BlueScope to provide a summary of the confidential information;
- (c) it was prejudiced in dealing with the application as a result; and
- (d) consequently, the Decision was not the correct or preferable decision.

The legislation

43. The provision of summaries of confidential information is governed in s 269ZJ of the Act. Citic quoted extensively from the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (ADA)* which also deals with the topic but failed to refer to s 269ZJ. The ADA may assist in the interpretation of the Act, but the ADA is not a substitute for the Act.
44. The redaction of confidential information operates as a qualification to the Commission's obligation to maintain a public record of all material provided to the Commissioner during the various inquiries, reviews and investigations which the Commissioner conducts. The public record is the mechanism by which interested persons obtain information about Commission proceedings. It is an important function.
45. Section 269ZJ(2) provides that, to the extent that a person who gives information to Commissioner claims that information is confidential, that person 'must' ensure that a summary of that information is also provided which:

- (a) contains enough detail to allow a reasonable understanding of the substance of the information; but
 - (b) does not breach that confidentiality or adversely affect those interests.
46. A party is not required to give a summary if that person satisfies the Commissioner that it is not feasible to provide a summary that would allow a reasonable understanding of the confidential information.²⁷
47. Section 269ZJ(5) and (6) deal with disputes about the provision of confidential summaries.
48. Section 269ZJ(5) provides that if, in relation to an application *inter alia*, under s 269ZHB:
- (a) a person claims that information is confidential;
 - (b) the Commissioner indicates that he or she disagrees with that claim;
 - (c) the person will not:
 - (i) agree to the inclusion of the information in the public record; or
 - (ii) prepare a summary of the information for inclusion in the public record;

then ‘the Commissioner may disregard the information unless it is demonstrated that the information is correct’.

49. Section 269ZJ(6) deals with the situation where:
- (a) a person claims that information is confidential;

²⁷ Section 269ZJ(3).

(b) the Commissioner indicates that he or she agrees with the claim;

but the person will not prepare a summary of the confidential information. In these circumstances, again, ‘the Commissioner may disregard the information unless it is demonstrated that the information is correct’.

Discussion

50. First, the adequacy of the summaries of confidential information provided by BlueScope is not a matter which is directly relevant to a review by the Panel under Subdivision B of Division 9 of Part XVB of the Act. A failure to provide a summary of confidential information does not mean that the Decision was not the correct or preferable decision. If Citic considered that the Commission ought to have required BlueScope to do more by way of the provision of a confidential summary, then there may have been remedies available to Citic compelling the Commission to take these steps or perhaps prohibiting the Commission taking the confidential information into account.
51. Second, it is not apparent that BlueScope’s treatment of its confidential information was so inadequate that the Commission should have taken steps in relation to it.
52. The confidential attachments and appendixes to BlueScope’s application were described in a table at the end of the application and were described in the body of BlueScope’s application. Some parts of the public version were redacted. For example, BlueScope’s application²⁸ contains a number of tables. Table 2 is described as follows:

Table 2 – Domestic selling prices for zinc coated (galvanised) steel in China, Korea and Taiwan; monthly’

²⁸ EPR 449 001 at p 7.

There follows a table, with four columns, headed 'Month', 'China A\$/MT', 'Korea \$A/MT' and 'Taiwan/MT'. The rows identify the months from October 2016 to September 2017. The confidential version contains various figures. The public version has the figures replaced by '[XXX]'. There were also less extensive redactions. The description of the information used to produce this table was, in part, said to be derived from '[commercially sensitive source]'.

53. The Panel has had access to the confidential versions of BlueScope's applications. The public version of BlueScope's application adequately summarises the nature of the information said to be confidential, without, of course, disclosing it.
54. Citic complained that it was impossible 'to elicit the most appropriate and compelling information from an exporter as to its commercial in confidence domestic prices policy, among other things' in the absence of useful non-confidential summaries of matters that are then investigated by the Commission. The Panel does not consider that BlueScope's treatment of the confidential information would have had this effect. Further, the Commission took positive steps to obtain information from Citic and Yieh Phui, including information relevant to export prices. The Commission conducted an 'on site' verification of information provided by Citic.
55. Confidential information was provided to the Commission by Citic and Yieh Phui. The Commission published versions of the exporter responses provided by Citic and Yieh Phui, and reports in respect of the verification of the information provided by them. It did not disclose confidential information provided by them in doing so. The level of disclosure was similar to that adopted by BlueScope.

Conclusion

56. The matters raised in this ground do not provide any basis for considering that the Decision was not the correct or preferable decision.

Citic Ground 3: The Report and the Decision failed to provide any reasoning for rejecting all aspects of Citic's submission dated 20 May 2018.

57. Citic's third ground was that the Report did not provide any reasoning for rejecting the arguments presented in Citic's May submissions.²⁹
58. The Commissioner is required to provide reasons for any recommendation made by the Commissioner in his report to the Minister. That obligation is set out in s 269ZHG(5) of the Act:
- (5) The report to the Minister must include a statement of the Commissioner's reasons for any recommendation contained in the report that:
 - (a) sets out the material findings of fact on which that recommendation is based; and
 - (b) provides particulars of the evidence relied on to support those findings.
59. In making the Decision, the Assistant Minister adopted the reasons contained in the Report.³⁰
60. In this case, the Commissioner gave reasons in the Report for the recommendation, set out the material findings and gave particulars of the evidence relied on at pages 7, 8, 35, 36, 37, 39, 40, 41, 42, 44, 45, 46, 47, 48, 51 and 52, and the attachments and appendixes referred to in those pages. In the case of goods exported from Taiwan, the Report specifically considered the

²⁹ Page 16.

³⁰ ADN 2018/96.

likelihood of dumping by Taiwanese exporters continuing and the likelihood that that such dumping would cause material injury to the BlueScope.³¹ The findings in relation to Taiwan relied on the information about imports contained in Confidential Attachment 1 and were made against the background of the analysis of the situation with respect to galvanised steel contained in section 6.4 of the Report. There were similar treatments of exports from other countries and exporters.

61. Section 269ZHF(2) does not require the Commissioner to provide reasons for not arriving at conclusions. For example, the Commissioner would be required to provide reasons for finding that the dumping margin was 'X'. The Commissioner is not required to provide reasons why the dumping margin was not 'Y', even if one of the parties contended that 'Y' was appropriate. Frequently, articulation of the Commissioner's reasons for reaching a conclusion will also identify why the Commissioner did not adopt other alternative, conclusions.
62. Second, the present review is concerned with whether the Decision was, substantively, the correct or preferable decision. As indicated above, the Decision may be the correct or preferable decision even if the reasons given by the Minister or the Commissioner were flawed.
63. Third, the Report did address the December submissions, albeit at a global rather than a granular level.³² The Panel's reasons on this point should not be taken as suggesting that it is not appropriate for the Report to specifically address substantive arguments advanced by persons interested in the outcome of the inquiry, although it is noted that inquiry, and associated reviews, involved considering material from a number of interested persons. The general practice of the Commissioner's reports is to specifically address substantive arguments advanced in response to the SEF. A failure to deal with substantive submissions

³¹ Report, page 48.

³² Report, page 48.

advanced by a party provides a reason to scrutinize the reasons advanced by the Commissioner in the Report. But it does not, in itself, mean that a decision of the Minister adopting the recommendation in the Report is not the correct or preferable decision.

64. Citic's fifth ground of review seeks to rehearse each of the arguments contained in the May submissions. It is dealt with below. Citic's third ground does not show that the Decision was not the correct or preferable decision.

Ground 4: The Report fails to address each element required under s 269ZHF.

Introduction

65. Citic asserted³³ that s 269ZHF(2) requires the Minister to be satisfied that the evidence before him makes it more likely than not that:

- (a) dumping will re-occur;
- (b) such dumping will be at more than *de minimis* levels;³⁴
- (c) such dumping will cause injury; and
- (d) such injury will be material.

66. Citic's substantive arguments in relation to this ground were:

³³ Citic application at p17.

³⁴ Section 269ZHF(2) does not expressly refer to *de minimis* levels of dumping and Citic did not, in its submissions, seek to explain why this requirement should be imported into s 269ZHF. The issue was developed by Dongbu, and is dealt with at [131] to [136] below.

- (a) the Report was required to consider whether it was likely that expiration of the measures would lead to a continuation or recurrence of dumping or subsidisation; and
- (b) the Report did not properly consider whether dumping was likely because the Report:
 - (i) had regard to 'static' dumping margins derived from Review 457 and did not consider possible changes in the normal value of the goods resulting from changes in the domestic price of the goods³⁵; and
 - (ii) failed to consider the specific history of 'Citics's exporter', which appears to be Yieh Phui.

Discussion

67. The Report considered the likelihood of goods exported from Taiwan being dumped in the following passage:

As was noted in REP 456 and 457, for galvanised steel, the goods exported from Taiwan during the inquiry period were at dumped prices.

... the Commission notes that Taiwan had significant excess capacity for the production of galvanised steel during the inquiry period.

The Commission has examined ABF data concerning prices of galvanised steel exported to Australia from Taiwan during the inquiry period and found that they are below prices from China and Korea in three of the four quarters of the inquiry period. Taiwanese prices are generally below those of galvanised steel originating from Korea and China; Taiwan exporters

³⁵ Citic application at p18.

have recently experienced significant growth in market share and the cooperating Taiwanese exporters have significant excess capacity.

Accordingly, the Commission considers that it is likely that future exports of galvanised steel from Taiwan would be dumped on the Australian market in the absence of the current measures.

68. The Report formulated its conclusion about the prospect of dumping in the future by using the expression 'likely'.³⁶ This word is used in the legislation. It is enough for the Commission to express its conclusions in the language adopted by the legislation.
69. The Report was entitled to rely on the dumping margins ascertained in REP 457 to provide evidence of the extent of dumping by exporters during the investigation period. The findings made by the Commissioner in REP 457 are conclusions reached by him after an investigation by the ADC. The continuation inquiry was in respect of the goods. The inquiry period for the continuation inquiry was the same as the review period leading to REP 457.
70. The findings that Taiwanese exporters have significant excess capacity and have experienced significant growth in market share support the inference that it is likely that Taiwanese exporters would continue to export to Australia at dumped prices.
71. It is not necessary for the Commissioner to specifically consider possible changes in the normal value when considering whether dumping is likely. The dumping margin identifies a relationship between the normal value and the export price. The fact that the normal value might change from time to time does not warrant the assumption that the export price will remain static and the dumping margin will change.

³⁶ For example, Report, at page 48.

72. The Decision was made in tandem with the decision of the Assistant Minister to determine the method by which the amount of interim dumping duty was to be ascertained. This decision was the subject of ADN 2018/94 and REP 457 and was made under the *Customs Tariff (Anti-Dumping) Act 1975*. The Minister adopted a combination of the fixed and variable duty methods. This method involved a floor price. It may be accepted that the possibility of changes in the normal value of Taiwan exports associated with changes in the Taiwanese domestic market for the goods is a matter which bears upon the selection of the method, the determination of the floor price and the impact of the measures. Citic might consider that the floor price is not appropriate because the normal value of goods exported from Taiwan is not static and might change. However, decisions under the *Customs Tariff (Anti-Dumping) Act* are not decisions which are subject to review by the Panel.³⁷
73. Citic's second argument was directed to the circumstances associated with Yieh Phui. Citic contended that there had been numerous proceedings under the Act in which Yieh Phui had been involved and with which Yieh Phui had always cooperated. Citic asserted that 'the Commission would know how often that exporter had been found to dump over the past five years.' Citic did not, however, provide details to the Panel. Citic's submissions said 'on the rare occasions when an investigation had found dumping, it has been at the most modest of levels which are not then maintained'.
74. It may be accepted that the intention or plans of an exporter may be relevant to whether it is likely to export to Australia and whether such exports would be dumped. However, the matters identified in the passage quoted at [67] above, permit the conclusion to be drawn that dumping was likely. Further, Yieh Phui was found to have engaged in circumvention activity in respect of the

³⁷ Section 269ZZA.

measures.³⁸ In addition, it appears that volumes of exports by Yieh Phui to Australia were influenced by measures applied to its goods.³⁹ These matters support the conclusion reached by the Commissioner.

75. Citic also asserted⁴⁰ that dumping was unlikely because of BlueScope's pricing policy. BlueScope's pricing policy is described as an 'import benchmark pricing strategy.'⁴¹ BlueScope's policy appears to work by BlueScope obtaining information about competing prices for the goods in the Australian market. Citic's submissions suggested that dumping was only likely where an exporter to Australia always matched local prices, which would lead the exporter to dump in order to match the local prices. It argued that, because BlueScope only matches prices, dumping would not occur. This argument should not be accepted. It ignores the fact that BlueScope is not the only participant in the Australian market. The Report found that a number of exporters to Australia undercut BlueScope's prices. On Citic's hypothesis, exporters would match the prices of those other undercutting exporters, rather than BlueScope's prices, and undercut BlueScope in those circumstances, leading to loss of profit and price suppression.

Ground 5: The Report failed to include adequate reasoning for each of the conclusions sought to be drawn

76. Citic's fifth ground of review was that the Report fails to include adequate reasoning for *each* of the conclusions sought to be drawn.

³⁸ Report 290 and 298 – Anti-Circumvention Inquiries – Galvanised Steel from Korea, Taiwan and China, reviewed in ADRP Report No. 38 – Zinc Coated (Galvanized) Steel from the Republic of Korea, Taiwan and the People's Republic of China.

³⁹ Rep 449, Confidential Attachment 4, 'Shift in Imports'.

⁴⁰ At page 19.

⁴¹ At page 27.

77. Citic's approach to the Report fails to appreciate the nature of the obligation of the Report to provide reasons, and the nature of the review conducted by the Panel. These are discussed above.
78. More prosaically, Citic's application did not clearly identify the conclusions which the Commission drew in the Report and explain the respects in which those conclusions were wrong and the reasons they were wrong. By way of example, sub-ground 5.1 is headed 'Import Share' but it is not clear what conclusion in the Report, or even what page in the Report, Citic is dealing with. The expression 'import share' does not appear in the Report.
79. The submissions asked the Panel to consider 'each and every argument' in Citic's May submissions and analyse the inadequacy of the reasoning in the Report in light of Citic's May submissions.⁴² The Panel does not propose to do this. Several parts of the May submissions address issues that are raised in the earlier grounds of Citic's submissions. The May submissions deal with matters that are not relevant (eg Posco's submissions about the standard of satisfaction under s 269ZHF.) Accordingly, the Panel will proceed on the basis that the Citic's application has identified each of the arguments or submissions in the May submissions which it thinks are worthy of consideration. The matters identified in the application will be addressed. The issues identified in ground 5 appear to cover the field previously ploughed by the May submissions.

Sub-ground 5.1: Import Share

80. In sub-ground, Citic appears to be arguing that:
- (a) the Report could not properly have concluded that future dumping was likely to cause material injury without separately analyzing the data of

⁴² Report page 27.

companies the subject of high levels of measures and companies that were not the subject of high levels of measures; and

(b) the Decision was wrong because the Report did not do so.

81. Citic pointed out that s 269ZHF(1)(ii) permits the Commissioner to recommend to the Minister that measures cease to apply to specific exporters. A decision of this nature occurred in this case - the Decision exempted Posco from the measures, while continuing the anti-dumping measures in respect of other Korea exporters. The Minister's decision in respect of Posco was based on the Report's conclusion about the likelihood that Posco would continue to export to Australia in light of the demise of the local car making industry.⁴³ The Minister also considered the specific situation of Dongbu, although the measures were continued against it. It appears that the position of individual exporters was considered and, where appropriate, dealt with specifically.

82. It does not, however, follow that the Minister is obliged to consider the likelihood of material injury on a company by company basis or by categorizing companies into high dumping margin companies and low dumping margin companies when considering the likelihood or magnitude of injury. Section 269ZHF(2) requires the Commissioner to address whether the expiration of 'the anti-dumping measures' would lead to a recurrence or continuation of the material injury. The Minister is entitled to consider the collective effect of the exports the subject of the measures.⁴⁴ Citic did not argue that the volume of dumped goods from Taiwan was negligible.

83. This argument should be rejected.

⁴³ Report, page 46.

⁴⁴ See below at [131] to [136].

Sub-ground 5.2: Distribution networks

84. It appears from this section of the application, and paragraphs [78] to [89] of the May submissions, which are referred to in the application, that Citic contends that:
- (a) 'internal transfers' made by BlueScope were made at prices which are not determined by reference to market prices but at prices which are fixed by BlueScope; and
 - (b) consequently, any adverse effects of such internal transfers should not be attributed to exports and cannot form part of any material injury analysis.
85. The Commissioner does not appear to have considered 'internal transfers' when carrying out the material injury analysis. The Commissioner considered transactions in which ownership of goods was transferred from one legal entity rather than another. 'Transfers' between different legal entities where ownership changes are not 'internal transfers'. The Commissioner may take such transactions into account in determining material injury.
86. Citic contended that 'it cannot be correct' that related and unrelated customers were treated the same.⁴⁵ It contended that 'it has to have been clear from the Commissioner's investigations that BlueScope will not sell to competitor distributors at prices which would allow them to compete with Bluescope's own distribution network'. Citic did not point to any relevant information which supported this assertion. The Commission verified the information provided by BlueScope and found that the pricing and terms of sales to related entities and unrelated entities were the same⁴⁶. The Panel is not persuaded by Citic's bald assertion that the results of the Commission's investigation were wrong.

⁴⁵ Citic Application, p20.

⁴⁶ Report, p26.

Sub-ground 5.3: Import Parity Pricing

87. Although this section of the application is headed ‘Import Parity Pricing’, the arguments contained in it do not appear to relate to this topic.
88. The substantive propositions advanced in this section appear to be:
- (a) BlueScope is ‘never able to make a profit’ even though it is operating at near full capacity;
 - (b) there have been dumping measures in place for some time;
 - (c) the dumping measures must be assumed to have eliminated the adverse effects of dumping by exporters;
 - (d) BlueScope needs to maintain its loss-making division to service its Colorbond business; and
 - (e) therefore, BlueScope’s unprofitability cannot have been caused by dumping.
89. These matters do not provide a basis for concluding that the Decision was not the correct or preferable decision.
90. First, it is not only profitable businesses which can suffer material injury. An unprofitable business may suffer a further decrease in profitability as a result of dumping. This is as much an injury as the transformation of a business from one which make a profit into one which make a loss. BlueScope said that, as a result of dumping after 2012 it suffered a negative ‘total profit impact’ of ■■■ (‘Y’) million during the period 2014/15 to 2016/17. It does not matter whether BlueScope’s profit started at Y million and went to zero or started at zero and fell to negative Y. It is still a loss of profit and profitability.

91. Second, BlueScope contended⁴⁷ that the measures in respect of the goods were ineffective because variable factors and the duty methods determined in connection with the measures did not adequately deal with changes in market conditions. It argued that:
- (a) after the imposition of duties in 2012, reviews of measures under Division 5 resulted in variable factors that were substantially below prevailing global prices for the goods and a zero percent dumping margin (although floor price measures were imposed); and
 - (b) these unrealistic variable factors and the floor price measures meant exporters were able to re-enter the market at prices which undercut BlueScope's and it was not able to raise prices in line with increases in the costs of hot rolled coil, the main component of the goods.
92. BlueScope's analysis was supported by material linking sale prices to the review processes and the Explanatory Memorandum for the *Customs Amendment (Anti-dumping Measures) Bill, 2017*. Considering this material, Citic's a priori assertion that the measures would have prevented the dumping and its effects cannot be given any weight. This analysis is also supported by the results of Review 457, which found that dumping had incurred during the inquiry period. Citic's assumptions about the continuation of dumping are wrong.
93. Thirdly, BlueScope's motives in continuing to carry on business selling the goods are not relevant to the continuation of the anti-dumping measures, provided that the requirements of s 269ZHF are met.
94. The import benchmark pricing strategy operated by BlueScope provides a mechanism by which dumped imports might adversely affect the price at which BlueScope sell the goods, leading to the comparative loss of profit and the price

⁴⁷ Citic application at p10.

suppression, identified by BlueScope as material injury suffered by the Australian industry.

Sub-ground 5.4: Sales Volume

95. Citic's application refers to paragraphs 94 to 98 of the December submissions. The argument in these paragraphs appears to be that there was no injury from dumping because BlueScope's volume of sales in 2016 was the highest since 2008.
96. BlueScope did not allege that it had suffered injury by way of loss of sales volume. It alleged that it had experienced price undercutting, price suppression and loss of profits and profitability. Injuries of this type are not inconsistent with high sales volume. The question in the present case is whether BlueScope's sales were made at prices that were adversely affected by dumping. This argument does not assist Citic.

Sub-ground 5.5: Market Share

97. The application refers to paragraphs 99 to 103 of the May submissions. To the extent that market share is linked to sales volume, the impact of sales volumes has been dealt with above.
98. Citic also said in the application⁴⁸ and the May submissions⁴⁹ that the volume of goods exported into Australia from countries that were the subject of measures did not change in light of the imposition of duties. Citic contended⁵⁰ that anti-dumping measures have had little impact on the companies alleged to be

⁴⁸ Citic at page 22.

⁴⁹ At [101].

⁵⁰ Citic application at page 22, May submissions at [101].

dumping. In the May submissions it drew the conclusion that this undermined the inference that material injury was likely from dumping.

99. The Panel is not persuaded by these arguments. The injury complained of by BlueScope is price, rather than volume, related. Further, dumping measures do appear to influence the volumes of goods exported to Australia.⁵¹

Sub-ground 5.6: Price Effects

100. The thrust of this portion of the application appears to be that dumping did not cause 'price effects' because:

- (a) BlueScope was unable to make a profit, even when it was operating at near full capacity;
- (b) BlueScope's cost structure must be significantly higher than those of its competitors in the market; and
- (c) BlueScope's cost structure is the reason it does not make a profit, rather than any dumping.

101. The fact that BlueScope does not make a profit does not mean that it cannot or did not suffer injury. Citic identified BlueScope as a monopolist on several occasions. If BlueScope is a monopolist, that does not prevent it suffering material injury. If Citic is concerned about monopolistic behavior by BlueScope, there are other remedies available to it.

Sub-ground 5.7: Profit and Profitability

102. In this section of the application, Citic repeated the argument that, if BlueScope was unable to make a profit while the measures were on foot, then that injury was caused by other factors. This argument does not take into account that the

⁵¹ Rep 449 at page 41 and Confidential Attachment 4, 'Shift in Imports'.

material injury is not the transition from a profitable business to a loss-making business, but a decrease in profits and price suppression. Dumping does not have to be responsible for all of BlueScope's losses.

Sub-ground 5.8: Other Factors

103. Citic complains that the Report does not address the arguments in paragraphs 121 to 128 of its May submissions. Citic's application says the effect of those paragraphs is to argue that many of the factors identified in section 5.6 of the 'SEF Final Report' are irrelevant or can be explained by reasons other than likelihood of injurious future dumping. The Panel's understanding of the effect of section 5.6 of the SEF (and section 5.6 of the Report) is that the Commissioner is summarizing information provided about those matters by way of background. The Report does suggest that any of the changes identified constitute a component of the likely material injury or were the result of dumping.

104. The matters that are put at paragraphs 121 to 128 of the May submissions do not add to the arguments that are put elsewhere. In large part, they repeat the argument that the measures should not be continued because BlueScope's business relating to the goods was not profitable. This has been dealt with above.

Ground 6: The Report failed to address injury factors other than dumping.

105. The application contends that:

- (a) the Report did not consider the likely impact of factors other than dumping;
and
- (b) therefore, the Report was in violation of s 269ZHF(5).

106. The application referred specifically⁵² to the behavior of exempt companies, countries not subject to measures and BlueScope's joint venture with Nippon Steel and Sumitomo Metal Corporation.
107. Citic's formulation of this ground does not address whether the Decision was the correct or preferable decision. It addresses the Report. Even if Citic's contentions about the Report are correct (which is by no means clear), that does not have the consequence that the Decision was not the correct or preferable decision.
108. However, it is appropriate to address the question whether factors other than dumping caused material injury. Citic referred to the behavior of exempt companies, countries not subject to measures and BlueScope's joint venture with Nippon Steel and Sumitomo Metal Corporation), would cause any material injury that BlueScope might suffer if Minister did not take steps to secure their continuation.
109. It is noted firstly that Citic did not identify any information which the Panel can take into account under s 269ZZK of the Act, about the joint venture alleged to exist between BlueScope, Nippon Steel and Sumitomo.⁵³ The Commission notes in the Report⁵⁴ that BlueScope imported small volumes of the goods, some of which was from a country subject to measures. The volume of such imports was less than 1% of the total. If this is a reference to the joint venture, it does not appear to be material. If it is not, then the Panel is not able to take the matter further.

⁵² At page 25.

⁵³ The joint venture is referred to in paragraph 211 of the May submissions, but no substantive information is provided about it.

⁵⁴ At page 26.

110. As to exports of the goods from countries not subject to the measures and from companies which were exempt from the measures, it appears that goods from exporters subject to measures were price leaders in the market. It also appears that a substantial volume of goods which were subject to the measures were exported to Australia, notwithstanding that they were not price leaders at the time of export.⁵⁵ The Report did not make a specific finding that exports from exempt exporters and exporters not the subject of these measures would not have, or were not likely to cause material injury. The Act does not require this to be done. However, the analysis conducted by the Commission distinguished between goods that were subject to measures and enable an inference to be drawn as to the relationship with BlueScope's pricing.

111. The matters referred to by Citic do not persuade the Panel that the Decision was not the correct or preferable decision.

Citic: Summary

112. The Panel is not persuaded by the matters put by Citic that the Decision was not the correct or preferable decision.

Dongbu

Introduction

113. Dongbu argued that the material before the Commissioner and the Minister did not support the conclusions that the expiration of the measures would be likely to lead to a continuation or a recurrence of either:

- (a) dumping or subsidisation; or
- (b) material injury.

⁵⁵ Confidential Attachment 1.

114. Three questions arise in relation to Dongbu:

- (a) how did Dongbu's prices compare with the prices of other exporters?
- (b) was it likely that Dongbu would dump?
- (c) was it likely that dumping of goods by Dongbu would cause material injury to the Australian industry?

Pricing

115. Dongbu raised concerns about the description of pricing in the SEF and in the Report. The SEF said:

Dongbu's FOB export price to Australia was, on a weighted average, higher than that of any other exporter subject to the anti-dumping measures during the inquiry period. Dongbu's galvanised steel prices were also higher than the prices of goods exported to Australia by Dongkuk, which is exempt from the measures.⁵⁶

By contrast, the Report said:

The Commission has re-examined Dongbu's FOB export price to Australia. The Commission has found that Dongbu's price was in fact one of the lowest of all exporters subject to the measures, and that the finding in the SEF 449 and 450 was incorrect. Dongbu's price was also lower than the FOB export price of exporters from Korea that are not subject to the dumping duty notice. This analysis is contained in Confidential Attachment 1.

116. In conference, the ADC accepted that the wrong word was used in the SEF. In effect, 'highest' was used instead of 'lowest'. This is not satisfactory. However,

⁵⁶ At page 43.

the description in the *Report* of Dongbu's pricing reflects the information in Confidential Attachment 1. Relevantly, Dongbu's pricing was less than the pricing of other exports subject to the measures.

117. The Report said 'Taiwanese prices are generally below those of galvanised steel originating from Korea and 'China. Dongbu contended that this was inconsistent with the statement quoted at [115] above but, in fact, that was not the case. Dongbu only exported [REDACTED]. In *general*, the Taiwanese prices were lower than the Korean prices, but Dongbu did not participate in the market for the whole of the inquiry period.

Dumping

118. Dongbu argued that it was unlikely to dump because:

- (a) the dumping margin was not great, only 2.4%, barely above the 2% the threshold of negligibility identified in s269TAE(2C)(c) and s 269TDA(1);
- (b) there is a risk of error in pricing associated with currency fluctuations, conversion dates and differences in terms of sale;
- (c) the dumping margin was calculated based [REDACTED];
- (d) the sales were sales to traders, rather than being sales under an ongoing trading relationship;
- (e) the measures applicable to Dongbu during the inquiry period involved an floor price. Its goods were exported at prices which were significantly above the floor price. Had Dongbu been intent on competing with the Australian Industry, it would have priced sales considerably lower than it did without dumping duty being incurred; and

(f) Dongbu had applied for review of the dumping measures. The outcome of those reviews had Dongbu had not dumped.⁵⁷

119. Dongbu also asserted that it exports to [REDACTED], had over [REDACTED] utilization in the review period and had increased its domestic sales by [REDACTED] in the period since the original investigations. These are matters which might also be said to make Dongbu less likely to chase sales in Australia by dumping.

120. The Panel considers that it was open to the Commissioner to conclude that Dongbu was likely to dump in the future. The fact that an exporter has dumped during the investigation period provides positive evidence from which a 'reasoned and adequate conclusion' may be drawn that future dumping is likely. At the end of the day, if an exporter dumped during a period when measures were in place, why would it stop if the measures were not continued?

121. The strength of the inference from past dumping is affected by the size of the dumping margin. The inference from dumping during the investigation period might also be weaker where, as here, the measures involve a floor price, so that the exporter might not suffer the immediate spur of the exaction of interim dumping duty if the export price was above the floor price.

122. In the present case, the dumping margin exceeded the 2% standard in s 269TAE(2C)(c). The 2% margin might be seen as allowing the margin for the sorts of errors in pricing identified by Dongbu. Further, Dongbu's exports to Australia were the subject of more than [REDACTED] separate exportations. The dumping margin was, of course, a weighted average. The size of the margin varied significantly between individual transactions, which suggests that the pricing was

⁵⁷ See EPR 273, Doc 013 – Report 272 & 273, *Aluminium Zinc Coated Steel & Zinc Coated Galvanised Steel*, at pages 16 and 21, EPR 386 – Doc 014, *Review of Anti-dumping Measures Applying to Aluminium Zinc Coated and Zinc Coated (Galvanised) Steel exported from the Republic of Korea by Dongbu Steel Co, Ltd*. The conclusion in EPR 386 was upheld on review (ADRP Report No 66, *Certain Zinc Coated (Galvanised) Steel Exported from the People's Republic of China etc.*

not the result of attempts by Dongbu sales staff to set prices at or about the normal value but the result of more opportunistic pricing.

123. It is true that Dongbu had applied for reviews of the variable factors applicable to it and that there was found not to be any dumping. However, it was also found that Dongbu did not export during the review period for EPR 385/386.⁵⁸ Even if Dongbu is focusing on domestic Korean sales, the opportunity for sales to traders exporting to Australia persists, and apparently occurs at dumped prices.

124. The conclusion that Dongbu was likely to dump goods if the measures, in so far as they related to it, were not continued, was reasonably open to the Commissioner based on the available evidence.

Material injury

125. Dongbu argued that it was not likely that the Australian Industry would suffer material injury if the measures were not continued.

126. The question whether it was likely that goods exported by Dongbu would cause material injury was considered in the Report:

Further, the Commission considers it likely that the dumping of galvanised steel exported from Korea by Dongbu would place downwards pressure on prices in the Australian market, and that BlueScope would respond by reducing its own prices in order to maintain its market share. Noting the economic condition of the Australian industry and its present vulnerability, the Commission considers it likely that material injury would be experienced by BlueScope as a result of the continuation and recurrence of dumping of galvanised steel exported from Korea by Dongbu.⁵⁹

⁵⁸ Report 385, 386 at page 17. Dongbu described both applications as application to achieve variable factors that would enable it to participate in the market (see Dongbu Supplementary Submissions at p4).

⁵⁹ Page 48.

127. Matters identified by Dongbu as relevant to the likelihood of injury were:

- (a) the majority of goods exported from Korea were exported by Dongkuk Steel Mill Co Ltd (Dongkuk), which was not subject to the measures. Of the exports from Korea that were subject to the measures, Dongbu's goods comprised only a [REDACTED];
- (b) the good exported by Dongbu were:
 - (i) less than [REDACTED] of the entire Australian market for the goods;
 - (ii) likely less than [REDACTED] of the total volume of imports during the inquiry period;
- (c) in the future, given that measures did not apply to Dongkuk, and that Posco would no longer be subject to measures, Dongbu would be the only Korean entity exporting the goods to Australia which was subject to the measures;
- (d) the relatively small size of the dumping margin;
- (e) Dongbu's prices, when the dumping margin is discounted, were low, so that its effect on the market was driven more by manufacturing efficiency (and perhaps competitive advantage) than dumping;
- (f) Dongbu's capacity and desire to export to Australia is limited because:
 - (i) Dongbu exports to [REDACTED] other countries, Dongbu is increasingly focused on its domestic market;
 - (ii) Dongbu has over [REDACTED] utilization in the period of review;
 - (iii) Dongbu's sales to Australia were sales to traders;
 - (iv) Dongbu did not have any long-term supply arrangements in the Australian market; and

- (g) Dongbu was not aware that BlueScope had used its imports as comparators in operating its import parity pricing policy.

Dongbu also questioned whether BlueScope was ‘vulnerable’.

128. The question the volume of exports arises out of the matters identified at (a), (b) and (c) above. Dongbu pointed out that, had this been an investigation into the initial imposition of anti-dumping measures on exports of the goods from Korea, the Commissioner would have had to terminate the investigation under s 269TDA because the volume of goods was negligible. It argued that the volume of Dongbu’s exports undermined the conclusion that it was likely that there would be material injury.

129. BlueScope argued⁶⁰ that Dongbu’s emphasis on the relatively small volume of exports was misplaced because the Commission ‘was correct in aggregating the impact of the dumped and injurious exports to Australia’.

130. The Panel does not accept that the Report aggregated the effect of dumped goods from different countries. The effect of the passage quoted above is that the Commission found that the likely dumping of goods *by Dongbu* would lead to material injury by BlueScope. There is no reference to the effect of dumping by goods other than Dongbu’s.

131. The Panel does not, however, accept that the apparently low volume of dumped goods by Dongbu undermines the conclusion that material injury was likely. Section 269TAE deals with the matters that are to be taken into account by the Minister in determining whether there has been material injury for the purposes of s 269TG, 269TJ, 269TH and 269TK. Section 269TAE(2C) provides that the Minister should only consider the cumulative effect of dumping from different countries of export if the Minister is satisfied that the volume of the goods dumped from each country is not ‘negligible for the purposes of subsection

⁶⁰ BlueScope submissions in relation to Dongbu at page 3.

269TDA(3) because of s 269TDA(4)'. Section 269TDA(3), (4) and (5) set out circumstances in which the Commissioner must terminate a dumping or subsidisation inquiry because negligible volumes of dumping are found. In general terms, the Commissioner must terminate an inquiry if the volume of dumped goods from a particular country is less than 3% of the total volume of goods that have been exported to Australia.

132. The extent to which the provisions of s 269TAE (and hence the provisions of s 269TDA(3), (4) and (5)) govern determinations by the Minister under s 269ZHF. was considered by Rares J in *Siam Polyethylene Company Ltd v Minister of State for Home Affairs (No 2)*⁶¹ and, on appeal, in *Minister for Home Affairs v Siam Polyethylene Company Ltd*⁶².

133. Rares J held that a determination of material injury for the purposes of sections 269TG, 269TJ, 269TH and 269TK extended to determinations of 'material injury' under s 269ZHF, so that the provisions of s 269TAE(2C) had to be considered by the Minister when making a determination under s 269ZHF. However, on appeal, Graham and Flick JJ said:

[105] Section 269TAE(1) and (2), it will be noted, confine the application of s 269TAE to ss 269TG and 269TJ and ss 269TH and 269TK respectively. The application of s 269TAE(2A), (2B) or (2C) to the task being undertaken when discharging the functions conferred by ss 269ZHF and 269ZHG is thus not immediately self-evident.

[106] Nor is the application of ss 269TAE–269ZHF or 269ZHG to be assumed. The relevance of the examination required by s 269TAE(2A) and (2B) may well depend upon the particular facts and circumstances under inquiry.

⁶¹ (2009) 258 ALR 515; [2009] FCA 838.

⁶² (2010) 187 FCR 229; [2010] FCAFC 86.

[107] It may not be without significance to the interrelationship as between s 269TG (and s 269TAE(1)) and s 269ZHF(2) that Div 3 and Div 6A of Pt XVB apply at different stages. For the purposes of applying s 269TG and imposing anti-dumping measures at the outset, the identification of those considerations set forth in s 269TAE(2B) and (2C) may be more appropriate than when making a recommendation as to whether existing anti-dumping measures should be continued pursuant to s 269ZHF(2). A consideration of those matters set forth in s 269TAE(2B) and (2C) may be more appropriate at the outset than at that point of time when anti-dumping measures have been in place for some time. But even when exercising the powers conferred by s 269ZHF, the facts and circumstances of a particular case may make it a not irrelevant exercise to consider those matters also set forth in s 269TAE(2A). The sharp division sought to be drawn by the Appellants between those different stages at which each of the powers in issue are being exercised may not always be warranted.

134. Graham and Flick JJ went on to say:

[108] But the resolution of such issues may be left for a future occasion. Just as it has been concluded that it is unnecessary to express any more than a tentative view as to whether or not s 269TG is incorporated as a matter of statutory construction when discharging the functions conferred by ss 269ZDA or 269ZDB, it is similarly unnecessary to express any more concluded view as to the relevance of s 269TAE when exercising the functions conferred by ss 269ZHF or 269ZHG.

135. The third member of the Court, Justice Bennett, did reserved her opinion on these questions.⁶³

136. Section 269ZHF was considered by the Panel in ADRP Report No. 44 – Clear Float Glass exported from the People’s Republic of China, the Republic of

⁶³ At [2].

ADRP Report No. 94 – Zinc Coated Galvanised Steel exported from the People’s Republic of China, the Republic of Korea and Taiwan

Indonesia and the Kingdom of Thailand. After quoting from paragraph 106 of the Full Court decision in *Minister for Home Affairs v Siam Polyethylene*, the Panel said:⁶⁴

...it is difficult to understand how s.269TAE(2C) could apply in a Division 6A inquiry given that there are anti-dumping measures in place which would be likely to have affected the volume of dumped exports.

The nature of the inquiry under Division 6A of the Act is very different to that conducted under Division 2 and Division 3 when the Minister is considering imposing the anti-dumping measures. In the latter case, the inquiry focuses of the exports which have occurred during the inquiry period to determine whether or not there has been dumping which has caused material injury to the Australian industry. Such an exercise cannot be conducted in a continuation inquiry because there have been measures in place to prevent the injurious dumping of the exports.

While what has occurred with exports and the Australian market during the inquiry period is relevant to a continuation inquiry, it cannot be determinative. It is relevant to the extent it indicates which is likely to happen if the measures expire. For this reason, there is not the same need for the restriction on the consideration of exports from different countries as there is in an original dumping investigation.

137. In the present case, the volume of exports by Dongbu during the investigation period was less than 3% by volume. This suggests that the volume of goods subject to the measures from Korea would be less than 3% of the volume of imports and might suggest that the likely volume of Dongbu's exports would not cause material injury or contribute materially to injury cause by other dumped exports. However, the export of dumped goods by Dongbu occurred [REDACTED] of the investigation period, rather than during the whole of the

⁶⁴ At [44] to [46]

investigation period. The volume of dumped exports from Korea would exceed 3% if exports by Dongbu continued after the investigation period at the same level as [REDACTED] of the investigation period and the total volume of exports to Australia did not increase significantly. On this basis, there is no reason to treat the volume of Korean exports subject to the measures as if they were negligible.

138. The size of the dumping margin is, of course, also relevant to the likelihood that material injury would occur. Section 269TDA(1) stipulates that a 2% dumping margin is negligible for the purposes of terminating a dumping investigation. Section 269TAE(2C) excludes consideration of the cumulative effect of goods dumped from different countries where the dumping margins was less than 2%.
139. Where the dumping margin is more than 2% and the volume of goods exported is more than 3%, the Minister may well conclude that material injury is likely to result from those exports. The injury may be assessed having regard to goods subject to measures likely to be exported from other countries subject to the measures as well.
140. In the present case, the injury complained of by BlueScope was price suppression and loss of profits. Price suppression occurred in the context of its import price parity scheme by which it matched imported prices which it regarded as threats when setting its scale of prices. This policy would have had the consequence that lowering the base price because of imports would have lowered BlueScope's prices across the range of the goods. The impact is broader than just matching specific competing prices on an ad hoc basis. It may be accepted that the 2.4% dumping margin does not account for the whole of the apparent undercutting by Dongbu of BlueScope's pricing. However, the Commissioner is not obliged to consider the effect of Dongbu's conduct in isolation from the effect of dumping by other exporters the subject of the measures. Further the injury from the portion of the undercutting attributable to the dumping by Dongbu may be material.

141. Dongbu argued that it was unlikely that it would export large volumes of the goods to Australia because it was focusing on the domestic market and exported to many other countries as well. However, Dongbu does not suggest that there has been a sudden, substantial policy shift since the inquiry period, when the exports were made. Dongbu indicated that its Australian customers are traders who could as easily purchase from other sources.⁶⁵ This flexibility means that the traders, who would be attuned to competitive pricing would be likely to pursue exports from Dongbu, if Dongbu continued to price competitively. The Panel considers the Commissioner was entitled to conclude that the volumes exported by Dongbu to Australia would be maintained and that, in the circumstances, exports of those goods at dumped prices would likely lead to material injury.
142. A conclusion that material injury is likely does not depend on the Australian industry being 'vulnerable'.
143. The Panel considers that it was open to the Assistant Minister to conclude that material injury was likely if the measures were not continued. The Panel considers that the Decision was the correct or preferable decision in relation to Dongbu.

⁶⁵ Dongbu application at p9.

Conclusion

144. For the reasons given above, the Panel considers that the Decision was the correct or preferable decision and has recommended that the Decision be affirmed.



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Scott Ellis
Panel Member
Anti-Dumping Review Panel
30 October 2018