



Australian Government

Anti-Dumping Review Panel

ADRP REPORT No. 95

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

October 2018

Table of Contents

Abbreviations	2
Summary	4
Introduction	5
Conduct of the Review	6
Grounds for Review	8
Consideration of Grounds	9
Synn Industrial Co, Ltd - Ground 1: The Minister erred in comparing Synn's normal values and export prices using quarterly time periods which distorted the dumping margin due to the significant fluctuation and volatility of costs and prices across the review period.	9
Analysis	17
Synn Industrial Co, Ltd - Ground 2: The Minister erred by not determining normal values pursuant to subsection 269TAC(1) for periods in which corresponding domestic sales did not exist.	23
Chung Hung Steel Corporation – Ground 1: The Minister erred in ascertaining Chung Hung's export prices by including exported goods which are exempt from the dumping duty notice subject to review.	24
Analysis	27
Recommendations	35

Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Appellate Body	Appellate Body of the World Trade Organisation
BlueScope	BlueScope Steel Limited
Chung Hung	Chung Hung Steel Corporation
Commissioner	The Commissioner of the Anti-Dumping Commission
Commission	The Anti-Dumping Commission
CTMS	Cost to Make and Sell
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
Goods	Zinc Coated (Galvanised) Steel
IDD	Interim dumping duty
Manual	Dumping and Subsidy Manual April 2017
Minister	Assistant Minister for Science, Jobs and Innovation
OCOT	Ordinary Course of Trade
REP 456	The report published by the Commission in relation to the review of measures relating to Zinc Coated (Galvanised) Steel and dated 14 June 2018
Review Period	1 October 2016 to 30 September 2017
Reviewable Decision	The decision of the Minister made on 12 July 2018

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SEF 456	Statement of Essential Facts
Synn	Synn Industrial Co. Ltd
TCO	Tariff Concession Order
WTO	The World Trade Organization

Summary

1. Synn Industrial Co. Ltd (Synn) and Chung Hung Steel Corporation (Chung Hung) are Taiwanese producers and exporters of Zinc Coated (Galvanised) Steel (the goods). Synn and Chung Hung are collectively hereinafter referred to as the Applicants.
2. Synn's first Ground Of Review was that the Minister erred in comparing Synn's normal value and export price using quarterly time periods rather than monthly time periods as provided by Synn in its response to the Exporter Questionnaire. Synn asserted that by adopting quarterly comparisons, the Commission distorted the dumping margin due to significant monthly fluctuations and volatility of costs and prices across the review period. Synn's second Ground of Review was consequential on its view of the first Ground of Review being accepted by the Review Panel. As I have rejected Synn's first Ground of Review, the Second necessarily falls away.
3. Chung Hung argued that goods which were the subject of an exemption notice granted under section 8(7) of *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) ought not to have been included in the Commission's ascertainment of Chung Hung's export price. I have determined that the clear wording of the *Customs Act 1901* (the Act) does not permit such goods to be excluded from a review of export price.

Introduction

4. Anti-Dumping measures were initially imposed upon the goods by public notice on 5 August 2013.¹
5. On 2 November 2017, the then Assistant Minister for Industry, Innovation and Science (Minister) requested that the Commissioner of the Anti-Dumping Commission (the Commissioner) initiate a review, under Part XVB, Division 5 of the Act² of “the anti-dumping measures in relation to ... zinc coated (galvanized) steel exported to Australia from China and Korea as they affect exporters of those goods generally”.³ The Commissioner conducted a review and, on 14 June 2018, gave a report to the Minister: *Anti-Dumping Commission Reports Nos 456 and 457* (REP 456 and 457).⁴ The Commissioner’s review examined exports to Australia in the period 1 October 2016 to 30 September 2017 (the review period).
6. On 12 July 2018, the then Minister declared that he had “decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts or law set out in REP 456”.⁵ He also declared, under section 269ZDB(1)(a)(iii) of the Act, that for the purposes of the Act and the Dumping Duty Act, the notices that had earlier imposed anti-dumping measures were taken to have effect as if different variable factors had been fixed in respect of exporters generally. Particulars of the dumping margins established for each exporter were set out in a table attached to the then Minister’s notice. Dumping margins were worked out in accordance with the “combination of fixed and variable duty method”. For Synn the combined rate was 6.1% and for Chung Hung the combined rate was 10.2% (the reviewable decision).

¹ See ADN 2013/66.

² Legislative references are to the *Customs Act 1901*, unless otherwise specified.

³ ADN 2017/157.

⁴ See the Act, s 269ZDA. REP 456 relates to exports of zinc-coated (galvanized) steel; REP 457 relates to exports of aluminium zinc-coated steel.

⁵ ADN 2018/94, published 17 July 2018.

7. On 16 August 2018, each of the Applicants lodged an application for a review of the decision (Review Applications) with the Anti-Dumping Review Panel (Review Panel).
8. The Review Applications were accepted and a notice of the Review Panel's review, as required by section 269ZZI of the Act, was published on 23 August 2018. The Senior Member of the Review Panel has directed in writing that the Review Panel for the purposes of each review be constituted by me.

Conduct of the Review

9. In accordance with section 269ZZK(1), the Review Panel must recommend that the Minister either affirm the decision under Review, or revoke it and substitute a new specified decision. The Review Panel may recommend revocation of the Reviewable decision and substitution of a new decision only in circumstances where the new decision is materially different from the Reviewable Decision.
10. In undertaking the Review, section 269ZZ 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.
11. Subject to the limited exceptions provided for in subsections 269ZZK(4A) and (5), 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 section 269ZZK(6)(c), that is, information to which the Commission had, or was required to have, regard in reporting to the Minister. In addition to relevant information, the Review Panel is only to have regard to conclusions based on relevant information that is contained in the Review application and any submissions received under section 269ZZJ.
12. If a conference is held under section 269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent

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that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information.

13. On 29 August 2018, I held a conference with staff of the Anti-Dumping Commission (the Commission). Because of the similarities between one of the Grounds of Review in this review, and the Ground of Review in review number 2018/96,⁶ the conference was conducted jointly with a conference for that review.⁷ The purpose of the conference was to obtain clarification of aspects of REP 456 and 457. On 13 September 2018, I published, on the Review Panel's website, a non-confidential summary of the further information obtained at the conference.
14. The Commission provided relevant documents containing confidential information. These documents and the correspondence with the Commission, concerning them, were not made publicly available.
15. Written submissions were received on 24 September 2018 from the Commission and from BlueScope Steel Limited (BlueScope), the Australian manufacturer of the goods. The Applicants did not provide a written submission.
16. Unless otherwise indicated in conducting this Review, I have had regard to the Review Applications (including documents submitted with the applications), insofar as they contained conclusions based on relevant information. I have also had regard to REP 457, to documentation provided by the Commission, to the written submissions received and to the matters discussed in conference.

⁶ Aluminium Zinc Coated Steel exported from the People's Republic of China, the Republic of Korea and Taiwan.

⁷ Mr James Pople constituted the Review Panel for the purposes of review number 2018/96.

Grounds for Review

17. The Review Panel accepted the following as 'reviewable grounds' under section 269ZZQA(5)(b) of the Act as reasonable grounds that the reviewable decision was not correct or preferable:

1. Synn Industrial Co., Ltd:

- Ground 1: The Minister erred in comparing Synn's normal values and export prices using quarterly time periods which distorted the dumping margin due to the significant fluctuation and volatility of costs and prices across the review period.
- Ground 2: The Minister erred in constructing normal values under section 269TAC92)(c) of the Act for certain export models when suitable domestic sales of like goods existed during the review period which would have allowed for normal values to be determined pursuant to subsection 269TAC(1) of the Act.

2. Chung Hung Steel Corporation:

- Ground 1: The Minister erred in ascertaining Chung Hung's export prices by including exported goods which are exempt from the dumping duty notice subject to review.

Consideration of Grounds

Synn Industrial Co, Ltd - Ground 1: The Minister erred in comparing Synn's normal values and export prices using quarterly time periods which distorted the dumping margin due to the significant fluctuation and volatility of costs and prices across the review period.

18. In preparing and submitting its Exporter Questionnaire, Synn provided the Commission with detailed monthly cost to make and sell data for each individual type of domestic and exported goods sold during the review period. The cost data was provided on a monthly basis for the following reasons:
 1. Synn prepares and maintains monthly cost accounts which record the relevant monthly material purchases and consumption, along with scrap steel recovery values;
 2. Synn reviews and adjusts its selling prices on a monthly basis given the short-term fluctuations in hot-rolled coil (HRC) and cold-rolled coil (CRC) prices which are the main raw material inputs and drivers of its total production costs; and
 3. Synn's export sales to Australia during the review period occurred infrequently and in single months within corresponding quarters, unlike domestic sales which tended to occur regularly and across all months of the review period.

19. Despite costs and sales being presented on a monthly basis, the Commission instead relied on quarterly periods in undertaking the following:
 1. Testing whether Synn's domestic sales were sold in the ordinary course of trade (OCOT);
 2. Identifying the relevant costs of production for constructed normal values; and
 3. Comparing normal values with corresponding export prices.

20. In its application to the Review Panel, Synn submits that by doing so the Commission distorted the calculated profitability and price comparisons. Synn argues the preferred method for assessing OCOT, constructed normal values and weighting the respective export prices and normal values, was on a monthly basis given the substantial fluctuations in the costs of key raw material inputs such as HRC and CRC, and corresponding prices of galvanised steel across the whole of the investigation period and within each of the quarters.
21. Section 269TAC of the Act provides for the calculation of the normal value of any goods exported to Australia. The Commission's Dumping and Subsidy Manual (the Manual) says the following about how normal value can be ascertained for the purposes of s 269TAC:
- ... the Commission first examines whether there are suitable sales of like goods for home consumption in the country of export by the exporter, made in the ordinary course of trade and at arms length over the investigation period. ... One of the circumstances where sales may not be in the ordinary course of trade is when sales have been made at a loss.⁸
22. The Manual then details the steps to take when examining sales at a loss. The first step, it says, is to quantify the volume of sales at a loss over the investigation period which, in turn, requires the determination of the domestic costs to make and sell (CTMS) for each model. Synn refers to that part of the Manual that deals with the calculation of the CTMS:
- The CTMS for domestic sales are verified for each model. The CTMS is generally calculated for each quarter of the investigation period. In some circumstances a monthly, or an annual, domestic CTMS may be used. A monthly CTMS may be appropriate where an exporter has monthly costing records and: there are significant variations in raw material costs from month to month; or there is a highly inflationary or deflationary market.⁹

⁸ Manual at 33.

⁹ Manual at 33. In its application, Synn quotes an extract, in similar terms, from an earlier version of the Manual - the Commission's *Anti-Dumping Policy* (3 December 2015) at 31.

23. Synn also refers to that part of the Manual that deals with the calculation of weighted average dumping margins for the purposes of section 269TACB of the Act:

Whilst weighted average unit normal values are typically calculated on a quarterly basis, the Commission may use monthly data where it determines that there are sufficient changes in costs and/or prices over short periods within the investigation period and the use of monthly unit normal values yields a more accurate dumping margin calculation.¹⁰

24. Synn also sought to rely upon the Commission's past practice where in a recent written submission to the Review Panel dated 31 May 2018 the Commission, stated that its usual practice in constructing normal value is to have regard to the most relevant costs that aligned to the export sales. Practically the shortest timeframe for doing so is on a monthly basis as most producers record and report on costs on a monthly basis, as would appear to be the case for Zongcheng. The Commission did however acknowledge that this practice is "somewhat arbitrary" as goods could be produced some months prior to export.¹¹

25. Synn also noted that in an earlier review the Review Panel, referring to the OCOT test, agreed with the proposition,

"where there are significant cost variations during a period, it is more appropriate to undertake monthly rather than quarterly calculations as undertaken in relation to other calculations".¹²

26. Notwithstanding what Synn asserts to be "the generally accepted practice" that relying on monthly periods for undertaking the necessary dumping calculations is the preferred approach where the exporter has submitted monthly cost and sales

¹⁰ Manual at 120. In its application, Synn quotes an extract, to similar effect, from an earlier version of the Manual - the Commission's *Anti-Dumping Policy* (3 December 2015) at 117. The current version of the Manual is dated April 2017.

¹¹ ADRP Decisions 78 and 81, para 30, page 9.

¹² ADRP Report No. 39, para 153, page 38.

information, and there is evidence of significant cost variations during the review period, the Commission simply concluded it had not observed any significant variation in Synn's raw material costs and found there were no "erratic" movements in costs and/or prices over short periods. However, the Commission did not reveal the extent of the fluctuations it had observed nor did it provide any insight into the magnitude of the movements in costs it would view as being "erratic".

27. In its application to the Review Panel, Synn included a table which it was said tracked the movement of its cost to make on both a monthly and quarterly basis over the review period and which highlighted the significant variance evident when costs were calculated on a quarterly basis. The table focused on Synn's largest selling Australian export model and its largest selling domestic model.
28. The table highlights that on a quarterly basis, "Synn's costs experienced significant erratic fluctuations" across the review period. For example, Synn's main export model's costs varied approximately [REDACTED]% across consecutive quarters and over a period of five consecutive months there were month on month variations with the difference between the lowest and the highest cost approximating [REDACTED]%. Further, variation in costs across the review period was approximately [REDACTED]% between the lowest monthly cost and the highest monthly cost.
29. For Synn's main domestic model, similar variations were observed. The domestic models costs varied approximately [REDACTED]% between the December quarter 2016 and the June quarter 2017. On a month to month basis costs varied approximately [REDACTED]% between January and May 2017. Variation in costs across the review period for the domestic model was approximately [REDACTED]% between the lowest monthly cost and the highest monthly cost.
30. Synn also argues that the OCOT test is distorted by the use of quarterly costs as domestic prices are incorrectly compared with costs that bear no relationship to

the goods sold. For example, Synn argues that for an export sale in January 2017, it should be compared to the January production costs. However, if costs are determined on a quarterly basis a January 2017 export sale would be compared to the March quarter's production costs, such costs being influenced by higher raw material costs incurred in February and March 2017.

31. The Commission and BlueScope each say that the decision under review is correct, and should be affirmed.

32. The Commission uses a quarterly rather than monthly approach to the OCOT test in its dumping margin calculations for the following reasons:¹³
 1. A quarter-to-quarter approach is preferable to a month-to-month comparison, acknowledging that in some circumstances a calculation or comparison on a 12-monthly basis may be appropriate.
 2. The decision comes down to what time period is appropriate to reflect fluctuations that are invariably going to happen in any manufacturing process, in terms of raw material costs, the actual manufacturing costs and price competition that may be happening in the market.
 3. Using too short a period may, of itself, introduce volatility as invariably there may be maintenance shutdowns, short-term fluctuations in the cost of raw materials due to particular purchase arrangements with particular suppliers and production errors which may give rise to higher than average amounts of substandard product or scrap.
 4. Taking a quarterly approach smooths out some of those fluctuations that are already inherent in the manufacturing process and provides a sense of the big picture, like the broader trends associated with pricing and costs in the production of the goods and the export of goods.

¹³ The first six of these reasons were given by the Commission at the conference (conference summary at [12]), and adopted in the Commissioner's submission (Attachment A at 2). The remainder were given in the Commissioner's submission (Attachment A at 2–3). I note that the first "reason" is not so much a reason as a restatement of the Commission's position.

NON-CONFIDENTIAL

5. Another advantage of the quarterly approach is that, when companies tend to approach the end of their financial year, they may also have accounting methodologies that encourage a higher level of cost being born in the month ending the financial year. So, rather than taking a comparison of June to June, taking the quarter ending June helps to minimize the unusual effect of some of those fluctuations.
6. A quarterly comparison picks up sales of particular models that might be infrequent. For example, if sales of the particular model occurred in month one, month seven and month 10, such sales will be reflected in three quarters.
7. The Commission's experience is that, in many cases, the exporters' accounting system (and therefore the evidence it puts to the Commission) does not report data in the level of detail required (by model) for the Commission to undertake a reliable month-to-month comparison.
8. The OCOT test (per section 269TAAAD) requires a comparison of costs to corresponding sales of the goods on a line-by-line basis to assess whether they were profitable, whether those costs were recoverable and whether those sales which are profitable and/or recoverable were in sufficient volumes to enable a proper comparison. The point at which the terms of the sale are established and the point at which the cost of production and the associated selling, general and administrative costs are incurred is a function of the exporter's accounting practices.
9. Arguably, if reliable data is available, the Commission could undertake the OCOT comparison on a week-to-week, month-to-month or quarter-to-quarter basis.¹⁴ However, there are significant practical impediments to using shorter time periods, not least the potentially vast array of different model types. Further, the flow of raw materials through production to the finished goods is often inconsistent, such that raw material purchases in one month may relate to production in the same and/or a following month;

¹⁴ A week-to-week comparison is precluded by s 269TACB(2A)(a): see [46] below.

the same applies to the timing of the sale, which may also occur in the same or a following month. Whilst the use of quarterly data doesn't fully resolve this issue, it is a reasonable means of accounting for these timing differences to provide a more reliable comparison in most instances.

33. The Commission, in its written submission, refers to that part of the Manual that deals with the calculation of the CTMS, including the passage that reads:

A monthly CTMS may be appropriate where an exporter has monthly costing records and: there are significant variations in raw material costs from month to month; or there is a highly inflationary or deflationary market.¹⁵

34. The Commission points out that “[t]here is no further guidance provided in the Manual concerning the definition of a ‘significant variation’”.¹⁶

35. The Commission concedes that:

... some sort of month to month volatility, or a highly inflationary/deflationary market, might provide grounds for moving to a month to month calculation. In other cases, a significant variation might occur due to circumstances beyond the exporter's control (e.g. an unexpected shortage in raw materials leads to a sudden, sharp increase in costs that can't be matched by a corresponding increase in prices).¹⁷

However, the Commission maintains that there is no reason to make a month-to-month comparison in this case.

36. BlueScope agrees with the Commission. BlueScope says, in its submission, that it “is the only Australian manufacturer of the goods and comprises the Australian industry for the purposes of the review of measures investigation”.¹⁸ It says that:

The Commission has stated that following its examination of costs and prices there were no “erratic” movements over short periods and therefore the

¹⁵ Manual at 33.

¹⁶ Attachment A at 3.

¹⁷ Attachment A at 3.

¹⁸ At 1.

quarterly calculation of dumping margins was appropriate. BlueScope concurs with the ... Commission's ... approach.¹⁹

37. BlueScope makes a number of the same arguments made by the Commission, and adds:

BlueScope considers that the alignment of export prices with the costs of producing the goods that reflect those export prices is an important consideration. In most instances, the weighted-average approach to determining dumping margins would fully account for fluctuating costs used in the manufacture of the exported goods.

BlueScope also makes the observation that the Synn application for review has focused on attempting to demonstrate the fluctuations or changes in raw material input costs used by Synn in manufacturing the goods across the investigation period. The application for review has failed to demonstrate that had the dumping margins been calculated on a monthly basis, how that monthly dumping margin methodology would reflect a more accurate assessment of actual margins of dumping than those determined on a weighted average quarterly basis. In BlueScope's view, the onus is on the applicant to demonstrate that the proposed monthly dumping margin methodology yields a more accurate dumping margin calculation.²⁰

38. BlueScope concludes that Synn:

... has not demonstrated that the Commission erred in its methodology to calculate weighted-average dumping margins on a quarterly basis. Whilst Synn has argued that its costs demonstrated some volatility throughout the investigation period, it has not demonstrated that the proposed monthly dumping margin calculations yield a more accurate dumping margin calculation.²¹

¹⁹ At 2.

²⁰ At 3.

²¹ At 4.

39. The Commission, in its submission, says:

The Commission has previously provided the [Review Panel] with the underlying calculations for the dumping margin calculation for Synn. Drawing on this information in Confidential Attachment 1 the Commission has examined the monthly variations in Synn's cost to make data by reference to each model type as well as the benchmark raw material (HRC) price. Confidential Attachment 1 also shows monthly movements in Synn's selling prices for galvanised zinc coated steel in both the domestic and export markets.²²

40. The Commission concedes that "Synn was able to provide the Commission with reliable monthly costing records from a cost to make point of view" and these figures show that "there are some increases and some decreases from month to month".²³ However, the Commission "does not consider there to be any basis for arguing that these monthly variations are unusual, excessive, significant, volatile or otherwise indicative of unreliable data on which to base its calculations, nor why an OCOT test conducted on a quarterly basis is inappropriate".²⁴

Analysis

41. I have examined the figures in Synn's confidential application, and in the confidential attachment to the Commission's submission. Each document shows that there is a greater variation in Synn's cost to make the goods when considered on a monthly basis than when considered on a quarterly basis. But, that is to be expected in any situation where there are variations within a quarter: taking the average across the quarter will flatten out those variations.

42. Section 269TACB of the Act sets out the method for "[w]orking out whether dumping has occurred and levels of dumping". Section 269TACB(1) provides for the comparison of export prices (established in accordance with section 269TAB) with corresponding normal values (established in accordance with section

²² Attachment A at 4.

²³ Attachment A at 4.

²⁴ Attachment A at 4.

269TAC). Section 269TACB(2) provides (amongst other things) that that comparison can be of weighted averages over the whole of the investigation period, or “in respect of parts of the investigation period as if each of these parts were the whole of the investigation period”: section 269TACB(2)(aa).

Section 269TACB(2A)(a) provides that “each part of the investigation period ... must not be less than 1 month”.

43. The Act provides no guidance for deciding whether a comparison made under section 269TACB should be made over the whole of the investigation period or in respect of parts of the investigation period, and (relevantly) no guidance as to how many such parts there should be—except that each part must be at least one month (and that the parts must together comprise the whole of the investigation period).²⁵

44. Section 269 TAC B (5) provides:

“if, in a comparison under subsection (2), the Minister is satisfied that an export price in respect of an individual transaction during the investigation period is less than the corresponding normal value:

(a) the goods exported to Australia in that transaction are taken to have been dumped; and

(b) the dumping margin for the exporter concerned in respect of those goods and that transaction is the difference between that export price and that normal value.”

45. Section 269TACB was inserted into the Act in 1994.²⁶ The Explanatory Memorandum to the Bill that introduced the amendment it explains that the new sections 269TACB(1) to (6) were inserted to give effect to Article 2.4.2 of the *Agreement on Implementation of Article I of the General Agreement on Tariffs and Trade 1994* “which sets out the different methods by which dumping must be

²⁵ Section 269TACB(2A)(b).

²⁶ Section 269TACB was inserted by section 11 of the *Customs Legislation (World Trade Organization Amendments) Act 1994*.

established”.²⁷ But Article 2.4.2 provides no guidance about the time period over which comparisons should be made.

46. The Explanatory Memoranda to the Bills, that introduced the amendments to section 269TACB²⁸, also provide no guidance on this point, except in relation to the minimum duration of each part of the investigation period. Section 269TACB(2A)(a) was inserted in 1998, and provided for a minimum duration of two months.²⁹ That minimum duration was changed to one month in 2015.³⁰ The Explanatory Memorandum to the Bill that brought about the reduction—from two months to one—explained that amendment as follows:

The objective of this amendment is to reduce the minimum time that each part of an investigation must take to complete the method of comparisons referred to in paragraphs 269TACB(2)(aa) and (c). This amendment is intended to enable a more flexible approach when working out whether or not dumping has occurred and the level of dumping, where a comparison of part of an investigation period is considered appropriate.³¹

47. In summary, the legislation and relevant Explanatory Memoranda provide no guidance about the time period over which comparisons should be made under s 269TACB of the Act, except that the minimum period of one month (previously two) was intended to provide for a flexible approach in deciding the level of dumping, if any.

48. The Commission’s Manual has no legislative basis. As the Manual itself explains:

²⁷ Explanatory Memorandum, Customs Legislation (World Trade Organization Amendments) Bill 1994.

²⁸ Section 269TACB was amended by the *Customs Legislation (Anti-dumping Amendments) Act 1998*, the *Customs Amendment (Anti-dumping Improvements) Act (No. 3) 2012* and the *Customs Amendment (Anti-dumping Measures) Act (No. 1) 2015*.

²⁹ Section 269TACB(2A)(a) was inserted by item 34 of Schedule 1 to the *Customs Legislation (Anti-dumping Amendments) Act 1998*.

³⁰ Section 269TACB(2A)(a) was amended by item 69 of Schedule 1 to the *Customs Amendment (Anti-dumping Measures) Act (No. 1) 2015*.

³¹ Explanatory Memorandum, Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015, item 69.

NON-CONFIDENTIAL

The Dumping and Subsidy Manual sets out the legislative framework, principles, and practices followed by the [Commission] as they normally apply to anti-dumping and countervailing investigations. The Manual does not intend to provide a mandatory set of instructions or constrain the decisions of the Commission officers.³²

Nonetheless, to the extent that the Manual sets out the Commission's practice, it is a policy document. The Manual is not binding, but the Review Panel "is entitled to treat such government policy as a relevant factor"³³ in coming to a decision on review.

49. As noted above, the Manual says that the comparison under section 269TACB is typically made on a quarterly basis, but may be made on a monthly basis where that "yields a more accurate dumping margin calculation".³⁴ The Manual provides no guidance on the meaning of "accurate". And there is no concept of an "accurate" dumping margin calculation in section 269TACB, except to the extent that a dumping margin calculated under that section is clearly intended to accurately reflect the "level of dumping", if any.
50. Not only does the Manual provide no guidance on the meaning of "significant variation", or "accurate", it provides no guidance on when it will be "appropriate" (the term used in one of the explanatory memoranda) to make the comparison under section 269TACB on a monthly rather than a quarterly basis.
51. I disagree with Synn when it says that, based on the Manual and previous Review Panel decisions, a monthly comparison is *preferred* where the exporter has provided monthly information and there is evidence of "significant cost variations".³⁵ This is an overstatement: it can only be said that a monthly

³² Manual at 5.

³³ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 69 per Bowen CJ and Deane J.

³⁴ Manual at page 120.

³⁵ Attachment B at 13.

comparison is an option in such circumstances. It must be remembered that there will nearly always be some variation on a monthly basis which would be smoothed out on a quarterly basis. And, in any event, it is not clear what would make such a variation “significant” for these purposes.

52. The Commission says that one reason why quarterly comparisons are to be preferred is that, in many cases, the information provided by the exporter is not sufficiently detailed to allow a month-to-month comparison. I do not think that this can be a general reason to prefer quarterly comparisons. In any event, Synn provided reliable and sufficiently detailed information for a month-to-month comparison in this case.

53. The Commission also says that:

The key raw material input of aluminium zinc coated steel is HRC or CRC, which accounts for approximately 80 per cent of the weighted average cost to make coated steel products. The Commission is therefore of the understanding that substantial fluctuations in the costs of key raw material inputs would impact every exporter of aluminium zinc coated steel from the People’s Republic of China and the Republic of Korea. Synn is the only applicant to seek a review of the Reviewable Decision under Anti-Dumping Notice No. 2018/94 on this ground.³⁶

54. The clear implication of this passage is that fluctuations in the costs of raw materials cannot have had the claimed effect on Synn’s export costs, because no other exporter has sought review of the reviewable decision on this ground. But, Synn is not the only exporter to seek review on this ground: see 2018/96. In any event, I do not think it would have been relevant if Synn had been the only such exporter. There are many possible reasons why an exporter might choose not to seek review of a decision. The fact that other affected exporters have chosen not

³⁶ Attachment A at 3.

NON-CONFIDENTIAL

to seek review does not necessarily mean that there were no “substantial fluctuations” in the costs of raw materials.

55. I am not bound to follow the Manual, but I can treat its statements of policy as relevant factors when coming to my decision on review. The Commission’s practice—its policy—as set out in the Manual, is to make the comparison under section 269TACB on a quarterly basis, unless a comparison on a monthly basis produces a more accurate dumping margin—that is, a dumping margin that more accurately reflects the level of dumping, if any. This approach is consistent with the minimum period of one month in section 269TACB(2A)(a), which is intended to provide flexibility in calculating that level of dumping.
56. The Commission is clearly correct when he says that taking a quarterly approach smooths out some of the fluctuations that are inherent in the manufacturing process and “provides a sense of the big picture”.³⁷ Averaging over a longer period will always have a smoothing effect, except where there is no variation over the shorter period. And it is appropriate to smooth out the sort of inconsistencies that the Commission identifies: raw material purchased in one month relating to production in a following month; and sales occurring in a following month. The Commission concedes that using a quarterly approach does not fully resolve this issue, but says (and I agree) that it is “a reasonable means of accounting for these timing differences to provide a more reliable comparison in most instances”.³⁸
57. Similarly, I think the Commission is right to say that using a shorter period may “introduce volatility” due to “maintenance shutdowns, short-term fluctuations in the cost of raw materials ... and production errors”.³⁹ And volatility for such reasons—not so much *introduced* by the use of a shorter period as *not smoothed*

³⁷ Conference summary at [12], adopted in the Commissioner’s submission.

³⁸ Commissioner’s submission, Attachment A at 3.

³⁹ Conference summary at [12], adopted in the Commissioner’s submission.

out by the use of a longer one—would lead to a dumping margin that less accurately reflects the level of dumping, if any.

58. Having regard to these reasons for adopting a quarterly approach to the application of section 269TACB, I think it follows that a monthly approach should be adopted only where use of the shorter period produces a significant variation—one that is not attributable to the kind of inconsistency that use of a longer period is intended to smooth out in order to provide “a sense of the big picture”.
59. As noted above, there is a greater variation in Synn’s cost to make the goods when considered on a monthly basis than when considered on a quarterly basis. However, I do not consider that variation to be significant.
60. An examination of the monthly HRC price over the review period, as detailed in the Commission’s Confidential Attachment A to its written submission to the Review Panel, reveals that in the second month of the review period, December 2016, the month on month price variation with the preceding month was ■%. There were three other months in which the variation, month on month, exceeded ■%. In the remaining months the variation was less than ■%. I find, overall such variations not to have been significant or erratic, but indicative of price movements of a product generally regarded as a commodity, one which reacts to the ebb and flow of commerce. I therefore reject Synn’s first Ground of Review.

Synn Industrial Co, Ltd - Ground 2: The Minister erred by not determining normal values pursuant to subsection 269TAC(1) for periods in which corresponding domestic sales did not exist.

61. Over the review period the Commission identified that Synn had exported five models of the goods to Australia. However, the Commission determined that only one of these models had sufficient volumes of domestic sales of like goods that were arms length transactions and at prices that were in the ordinary course of

trade. Accordingly, the Commission determined the normal value of that model upon domestic selling prices pursuant to section 269TAC(1). For the other four export models, the Commission constructed the normal value under section 269TAC(2)(c).

62. In its application to the Review Panel, Synn argues that if production costs had been determined on the monthly rather than quarterly basis and the OCOT test applied, a greater number of domestic sales would have met the OCOT test such that normal values would have been determined under section 269TAC(1) based on those sales for all export models rather than having recourse to the constructed method under section 269TAC(2)(c).
63. This Ground of Review is premised upon acceptance of Synn's first Ground of Review having been accepted by the Review Panel. As I have rejected that Ground of Review, the second Ground of Review consequentially falls away. I therefore, formally reject Synn's second Ground of Review.

Chung Hung Steel Corporation – Ground 1: The Minister erred in ascertaining Chung Hung's export prices by including exported goods which are exempt from the dumping duty notice subject to review.

64. On 5 August 2013, the then Minister accepted the recommendations contained within REP 190 and imposed a dumping duties upon the goods exported from China, Korea and Taiwan.
65. REP 190 also recommended that that then Minister exercise his powers under section 8(7) of the Dumping Duty Act to exempt from the dumping duty certain goods which were covered by Tariff Concession Orders (TCOs) in force at the date of the report. Subsequent to the imposition of measures, two further exemptions to the notice were approved. The goods the subject of the exemptions are hereinafter referred to as the exempt goods.

66. In the review of the variable factors, the subject of the review by the Review Panel, Chung Hung, in completing the Exporter Questionnaire listed all Australian sales of the goods, including the exempt goods.
67. In SEF 457, the Commission indicated it had excluded from its analysis of Chung Hung's export prices the exempt goods as
- “the majority of Chung Hung's exports to Australia are subject to a goods exemption and are therefore not considered in the calculation of the export price⁴⁰.”

In its application to the Review Panel Chung Hung stated it,

“agrees and supports the Commission's preliminary view that as exempted goods are not covered by the dumping duty notice, those exempted goods do not fall within the parameters of the review of the dumping duty notice.⁴¹”

68. In ascertaining Chung Hung's normal value in SEF 457 the Commission also excluded from its analysis domestic sales of exempt goods. In a written submission to the Commission dated 21 May 2018, in response to SEF 457, Chung Hung, stated that it
- “requests the Commission recalculate normal values and the preliminary dumping margin ensuring that all TCO domestic sales of like goods by [Chung Hung], which comply with the conditions of subsection 269TAC(1) of the Act, be included. There is no basis upon which the Commission should or can exclude domestic sales of like goods simply because those goods fall within the parameters of an exemption notice.”
69. In REP 457, the Commission accepted Chung Hung's submission with respect to the calculation of normal value. However, the Commission reversed its position in relation to the ascertainment of export price noting that the terms of subsection 269TAB(1)(a) are inclusive of all exports (not simply those that have attracted a

⁴⁰ SEF 457 at page 30.

⁴¹ Application to the Review Panel at page 12.

duty liability). Accordingly, the Commission recommended the Minister ascertain the Chung Hung's export prices with the inclusion of the exempt goods. In doing so the Commission noted an exemption under section 8(7) of the Dumping Duty Act "does not exclude the goods from the operation of a notice under section 269TG".⁴²

70. Chung Hung, in its application to the Review Panel, argues,
"the scope of the review of measures is limited to ascertaining variable factors for those goods subject to the dumping duty notice".⁴³
71. BlueScope, in its written submission to the Review Panel dated 21 September 2018, drew attention to Chung Hung's position, as outlined in its submission to the Commission dated 21 May 2018 and argued,
"in the event the exemption goods are included in the normal value calculations, it follows that the exemption goods must also be included in the export price calculations."
72. In its written submission to the Review Panel dated 24 September 2018, the Commission stated that it considers REP 457 adequately deals with the grounds raised by Chung Hong in its application and offered no further comment.
73. Section 269T defines "dumping duty notice" as a notice published by the Minister under section 269TG(2). Chung Hung argues, the relevant declarations made under section 8 of the Dumping Duty Act (including an exemption under section 8(7)) establish the scope of those goods subject to the dumping duty notice and as such the exempted goods must be excluded from the review of the variable factors.

⁴² REP 457 at page 34.

⁴³ Application to the Review Panel at page 13.

74. Chung Hung disagrees with the Minister's view that the powers to exempt certain goods from dumping duties under section 8 of the Dumping Duty Act are distinct and separate from the Minister's power under section 269TG. In support of this position Chung Hung relies upon section 6 of the Dumping Duty Act which states, "the *Customs Act 1901* ... is incorporated and shall be read as one with this Act."
75. Chung Hung argues that its interpretation is consistent with the intent of the legislation which is to address material injury caused by dumped imports. However, the decision to exempt certain goods, due to the existence of the TCO, indicates that substitutable goods are not manufactured locally and therefore the exempt goods cannot be the cause of any material injury to an Australian industry.
76. Chung Hung notes, by including the exempt goods in the calculation of export price, the Commission could conceivably result in no dumping duties being imposed on injurious dumped goods due to a greater weighting of the overall dumping margin by the non-injurious exempt goods.
77. The Review Panel notes, in this instance, the Division 5 review was limited to the review of the variable factors and did not require consideration of issues or arguments which go to the cause of material injury to an Australian industry.

Analysis

78. I will begin my analysis by considering the relevant provisions of the Act and how they interact with the Dumping Duty Act. In doing so, I acknowledge that any decisions taken under the Dumping Duty Act are not within the Review Panel's jurisdiction as reviewable decisions, as defined by the Act. In resolving Chung Hung's application to the Review Panel, I do not need to make any findings in relation to or make any determination under the Dumping Duty Act. The application before the Review Panel can be determined having regard to findings of fact, interpretations and determinations made with respect to the Act, and particularly, the interpretation of the phrase "anti-dumping measures".

79. The imposition of anti-dumping measures follows an investigation in response to the importation of certain goods specified in a Notice published by the Commission. The object of the investigation is to determine if such imported goods were dumped during a defined investigation period.
80. The goods which had been imported may be a subset of the goods specified in the Notice. That is, they may be limited to certain models or thicknesses within the range of models or thicknesses specified in the Notice.
81. The investigation has both a retrospective and prospective focus. The retrospective focus requires a determination as to whether the particular goods, which had been imported within a specified investigation period, had been dumped. Such a determination culminates in the publication of a section 269TG(1) Notice declaring that section 8 of the Dumping Duty Act applies to those goods.
82. The prospective focus requires a determination as to whether goods, like those previously imported, and, importantly, within the scope of those goods specified in the Notice, may be imported in future at dumped prices. Such a determination culminates in the publication of a section 269TG(2) Notice declaring that section 8 of the Dumping Duty Act applies to those like goods.
83. Like goods (to those which had been imported and within the range or types of goods specified in the Notice) are
- “goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration”.⁴⁴

⁴⁴ Section 269T of the Act.

84. Section 8(2) of the Dumping Duty Act provides in relevant part, there is imposed, on goods to which the section applies, by virtue of a Notice under section 269TG(1) or (2), a special duty of Customs, to be known as dumping duty, calculated in accordance with section 8(6) of the Dumping Duty Act. That section relevantly provides that the dumping duty payable on goods, the subject of a Notice under section 269TG(1) or (2), is an amount equal to the difference between the amounts that the Minister ascertained to be the export price and the normal value of those particular goods.
85. Section 8(3) of the Dumping Duty Act provides, pending final assessment of the dumping duty payable on goods the subject of a Notice under section 269TG(2), an interim dumping duty is payable on those goods.
86. Section 8(7) of the Dumping Duty Act provides that the Minister may, by Notice in writing, exempt goods from dumping duty when satisfied of certain matters, which include that like or directly competitive goods are not offered for sale in Australia or where a TCO is in place in respect of the goods.
87. Although section 8 of the Dumping Duty Act is silent as to the power to revoke an exemption granted under section 8(7), such a power is implicit should the Minister cease to be satisfied as to the relevant matters referred to in section 8(7) of the Dumping Duty Act.⁴⁵
88. Division 5 of Part XVB of the Act enables affected parties to apply for the review of anti-dumping measures. Section 269T defines anti-dumping measures as the publication of a dumping duty Notice. Such a Notice is, in turn, defined as a Notice published by the Minister under section 269TG(1) or (2).

⁴⁵ Section 33(3) of the *Acts Interpretation Act 1901* provides, "where an Act confers power to make, grant or issue any instrument of the legislative or administrative character ... the power shall be construed as including a power exercisable in like manner and subject to like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument".

89. Section 269ZA(3)(b), within Division 5, relevantly provides that where it may be appropriate to review anti-dumping measures (i.e. applicable to the goods subject to a section 269TG(2) Notice) due to a change in one or more of the variable factors, relating to a particular exporter, or exporters generally, the Minister may request that the Commission initiate a review. Section 269T(4E) relevantly provides, a reference to variable factors relevant to a review under Division 5 of anti-dumping measures in respect of goods is a reference to normal value, export price and non-injurious price of goods of that kind as ascertained.

90. ADN 2012/40, dated 5 September 2012, initiated the initial investigation which culminated in the imposition of the anti-dumping measures. The initiation Notice stated,

“the imported goods the subject of the galvanised steel investigation are:
“flat rolled products of iron and non-alloy steel of the with less than 600 mm and equal to or greater than 600 mm, plated or coated with zinc.

The goods the subject of this application are generically called galvanised steel (referring to zinc coated steel).”

Any goods imported within the investigation period, which fell within the description of the goods in the initiation notice were goods under consideration for the purposes of the investigation.

91. On 21 December 2012, the Commission published ADN 2012/62 in which it stated:

“following the initiation of the investigation a number of interested parties sought clarification regarding goods that are subject to investigations. The intent of this ADN is to provide clarification regarding the goods that are covered by the investigations. This ADN that does not alter the description of the goods as described in the applications.”

92. The Notice went on to repeat the description of the goods the subject of the application as stated in the September Notice⁴⁶. The December Notice then went on to state:

“the imported goods the subject of the aluminium zinc coated steel application are: flat rolled products of iron and non-alloy steel of the width equal to or greater than 600 mm, plated or coated with aluminium zinc alloys, not painted whether or not including resin coatings.

The goods are subject to this application are generically called aluminum zinc coated steel.”

93. The December Notice did not alter the description of the zinc coated steel goods. It merely clarified that the description also included aluminum zinc coated steel goods.

94. The Anti-Dumping measures, the subject of the Division 5 review, now before the Review Panel, were imposed by ADN number 2013/66, published on 5 August 2013. That Notice stated that a full description of the goods can be found in ADN No. 2012/40 (relating to initiation) and ADN No. 2012/62 (relating to clarification of the goods).

95. ADN 2013/66 stated that the then Minister had accepted the Commission’s recommendations and reasons for recommendation contained within the Commission’s report. In doing so the then Minister ascertained the variable factors and declared by publication of a section 269TG(1) Notice that the goods under consideration, and which had been imported during the investigation had been dumped and that section 8 of the Dumping Duty Act applied to those imported goods.

⁴⁶ ADN 2012/62.

96. The then Minister also declared by publication of the section 269TG(2) Notice that the amount of the export price of like goods (to those which had been imported and which had been dumped) that may be exported to Australia in future may be less than the normal value of the goods and that section 8 of the Dumping Duty Act applies to such goods. As noted above, by accepting the Commission's recommendations and reasons outlined in the Commission's report, the then Minister ascertained the variable factors (relevantly the normal values and export prices) and these applied to subsequent importations, pending final assessment of the dumping duty payable.
97. The description of the goods contained within the Notices referred to above is broad. Goods imported which fell within the broad description, or which were like goods to those described in the Notice, are goods which were within the scope of section 269TG(2) Notice.
98. In the present case, the Division 5 review, initiated on 2 November 2017, required the Commission to assess the export price for goods imported during the review period which were the subject of a section 269TG(2), to determine if such prices had varied from the export price ascertained at the time of the imposition of measures on 5 August 2013, and to then make a report and recommendation to the Minister. The starting point for such determination was the identification of imported goods that fell within the scope of the section 269TG(2) Notice. This is done by reference to the scope of the goods under consideration, that is, the description of the goods as specified in ADN No. 2013/66 and the identification of any goods imported during the review period, which were like goods to those so specified.
99. Upon receipt of a report and recommendation, section 269ZDB(1)(a) relevantly provides that the Minister must declare that for the purposes of the Act and the Dumping Duty Act, to the extent that the Anti-Dumping measures concerned involved the publication of a dumping duty notice (i.e. section 269TG(2) Notice),

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the section 269TG(2) Notice is to be taken to have had effect, as if the Minister had fixed different variable factors, relevant to the determination of duty.

100. The effect of a declaration under section 269ZDB(1)(a) is to leave the section 269TG(2) Notice in place, without alteration to the scope of the goods to which it applies. The Notice continues to apply to goods which were imported during the review period and goods which may be imported subsequent to that period, those latter goods being like goods to those imported during the original investigation period. The Notice amended the variable factors, such variation taking effect from the date of the publication of the Minister's declaration.
101. Chung Hung does not argue that the exempt goods imported during the review period were not like goods to those that which had been imported during the investigation period or were otherwise not goods as described in ADN 2013/66. Indeed, in its application to the Review Panel, Chung Hung noted that in its response to the Export Questionnaire it had listed all Australian export sales of galvanised steel, including sales of exempt goods. Chung Hung asserted that such goods were "exempt from the current dumping duty notice." I disagree with this assertion. As noted above, a "dumping duty notice" is defined, in this case, as a notice published by the Minister under section 269TG(2).
102. The effect of the publication of the section 269TG(2) notice was to apply section 8 of the Dumping Duty Act to like goods to those which were found to have been dumped and which may be exported to Australia after the publication of the section 269TG(2) notice.
103. An exemption under section 8(7) of the Dumping Duty Act only removes from the goods liability, initially, in relation to interim dumping duty and then finally with respect to dumping duty.
104. Chung Hung places great emphasis upon the wording of the Notice initiating the review of the variable factors. It points to the following extract from that Notice:

“[the] review will be limited to examining whether the variable factors relevant to the taking of the anti-dumping measures ... should be varied”.⁴⁷

It then argues the scope of the review of measures is limited to ascertaining variable factors for those goods subject to the dumping duty notice. Again, Chung Hung misdescribes what is meant by the phrase “dumping duty notice”. Chung Hung then asserts that the exemptions granted under section 8(7) of the Dumping Duty Act must establish the scope of the goods subject to the dumping duty notice.

105. The language adopted in the initiation notice of the review cannot limit or constrain the language used in the legislation. The modern approach to statutory interpretation is that an Act of Parliament is to be read as a whole. The object of statutory construction is to construe the meaning of words used in a section, in the context of the language and the legislation as a whole, to try to discern the intention of the legislature. The starting point of any construction is to first look to the ordinary meaning of the words used and the context within which they appear.⁴⁸ Whilst I can see some logic in Chung Hung’s case, regarding the practical implications for exempt goods in the context of a variable factors review, nevertheless, the statutory language is clear. Its focus is upon a review of anti-dumping measures, being a review of those goods, the subject of a notice published under section 269TG(2), to ascertain whether it is appropriate to adjust the variable factors pertaining to such goods.

106. Acceptance of the argument advanced by Chung Hung would involve the departure from the clear meaning conveyed by the phrases “anti-dumping measures”, “publication of a dumping duty notice” and “a notice published by the

⁴⁷ Chung Hung's application to the Review Panel at page 12.

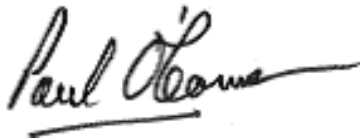
⁴⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

Minister under section 269TG(2).” Such a departure would not give rise to a decision which is correct or preferable.

107. In my view, goods exempted under section 8(7) of the Dumping Duty Act axiomatically must fall within the definition of like goods and are like goods to those which were found to have been dumped in the initial investigation period and are therefore goods to which a Notice under section 269TG(2) applies.

Recommendations

108. As I have rejected the Grounds of Review contained within the Review Applications lodged with the Review Panel by the Applicants (Synn and Chung Hung), I therefore recommend that the Minister affirm the Reviewable Decisions made on 12 July 2018.

A handwritten signature in black ink that reads "Paul O'Connor". The signature is written in a cursive style with a horizontal line underneath the name.

Paul O'Connor
Panel Member
Anti-Dumping Review Panel
17 October 2018