Australian Government
Anti-Dumping Review Panel

ADRP Report No. 104

Certain Aluminium Extrusions exported from the People's Republic of China

August 2019

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	***Customs Act 1901***
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Assistant Minister	Assistant Minister to the Minister for Jobs and Innovation
Appellate Body	Appellate Body of the World Trade Organisation
Capral	Capral Limited
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	***Customs Tariff (Anti-Dumping) Act, 1975***
GOC	Government of China
Goods	Certain aluminium extrustions exported from the Peoples Republic of China
Injury analysis period	From 1 July 2014
Investigation period	1 July 2017 to 30 June 2018
Manual	Dumping and Subsidy Manual November 2018
Minister	Minister for Industry, Science and Technology
NIP	Non-injurious price
Regulation	***Customs (International Obligations) Regulation 2015***

REP 482	The report published by the Commission in relation to Certain Aluminium Extrusions and dated April 2019
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister made on 8 May 2019
SCM	Agreement on Subsidies and Countervailing Measures
SEF	Statement of Essential Facts
SOEs	State Owned Enterprises
USP	Unsuppressed Selling Price
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (Minister) following a review of anti-dumping measures in respect of certain aluminium extrusions (the goods) exported from the People's Republic of China (China).

2. The Applicants for the review were Tai Shan City Kam Kiu Aluminium Extrusions Co., Ltd (Kam Kiu),[1] Fujian Minfa Aluminium Inc. (Minfa) and PanAsia Aluminium (China) Limited (PanAsia) who are Chinese exporters of certain Aluminium extrusions (the goods), and Darley Aluminium Trading Pty Ltd (Darley) is an Australian company that imports the goods exported by a Chinese manufacturer, Guangdong Zhongya Aluminium Company Ltd (Zhongya).

3. Pursuant to s 269ZZK(1) of the ***Customs Act 1901***[2] (Act) and for the reasons set out in this report, I recommend to the Minister that the reviewable decision, in so far as it relates to:

    - **Zhongya** be revoked and that the Minister substitute a new decision declaring that the Countervailing Duty Notice with respect to Zhongya be revoked;
    - **Kam Kiu** be revoked and that the Minister substitute a new decision under section 269ZDB(1)(iii) of the Act that the Dumping Duty and Countervailing Duty Notice with respect to Kam Kiu be varied and taken to have effect as if different variable factors had been fixed, namely that the normal value is varied to produce a Dumping margin of 13%;
    - **Minfa** be affirmed; and
    - **PanAsia** be revoked and that the Minister substitute a new decision under section 269ZDB(1)(iii) of the Act that the Dumping Duty and Countervailing Duty Notice with respect to PanAsia be varied and taken to have effect as if

[1] Together with its related entities.
[2] Unless otherwise specified, all legislative references are to the ***Customs Act 1901***.

different variable factors had been fixed, namely that the normal value is varied to produce a dumping margin of 50.2%.

Introduction

4. Capral Limited (Capral) is an Australian manufacturer of the goods.

5. Kam Kiu, Minfa, PanAsia and Darley separately applied under section 269ZZC of the Act for a review of the decision of the Minister dated 8 May 2019 following a review of anti-dumping measures pursuant to section 269ZDB(1) of the Act in respect of certain aluminium extrustions exported from China (the reviewable decision).

6. The Applications were accepted and notice of the proposed review, as required by section 269ZZI, was published on 24 June 2019.

7. The Senior Member of the Anti-Dumping Review Panel directed in writing that the Anti-Dumping Review Panel (Review Panel) be constituted by me in accordance with section 269ZYA of the Act.

Background

8. Anti-dumping measures have been in place against exports of the goods from China since October 2010.

9. On 20 October 2015, the then Minister continued measures for a further five years, until 28 October 2020.

10. Following a request from the then Minister pursuant to section 269ZA(3) of the Act, on 12 July 2018, pursuant to section 269ZA of the Act, the Anti-Dumping Commission (the Commission) initiated a variable factors review concerning the export of the goods from China (Review 482).

11. On 6 September 2018, the Commission extended Review 482 to include a revocation review of the countervailing duty notice in relation to the goods exported

to Australia from China by Zhongya, to examine whether the notice should be revoked.

12. Based on recommendations contained in the Final Report (REP 482), the Minister decided to accept the recommendations and reasons for the recommendations including all the material findings of fact or law set out in REP 482. This included the Commission's recommendations that:
    - the variable factors relevant to the determination of dumping duty under the dumping duty act have changed and that individual rates of interim duty for Kam Kiu and PanAsia be varied and now set at 35.7% and 55.2% respectively and that Minfa be allocated a residual rate of 29.1%: and
    - the countervailing duty notice in respect of exports of goods from Zhongya should not be revoked as the Commissioner is satisfied that Zhongya continues to receive subsidies in relation to its exports and this is likely to continue, and if measures were to be revoked there would be a continuation of the material injury that the measures were intended to prevent.

Conduct of the Review

13. In accordance with section 269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision, if they are satisfied that the decision is the correct or preferable one, or revoke it and substitute a new specified decision. In undertaking the review section 269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

14. Subject to certain exceptions,[3] the Review Panel is not to have regard to any information other than relevant information pursuant to section 269ZZK, i.e.

[3] See s 269ZZK(4).

information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister.

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

16. Conferences were held with the Commission, pursuant to s 269ZZHA of the Act, on 10 July and 6 August 2019 for the purpose of clarifying matters in REP 482 and in the Applications. A further conference was held with the Commission on 15 August 2019 to discuss recalculations undertaken with respect to Kam Kiu and PanAsia. Non-confidential summaries of the information obtained at the conferences were made publicly available in accordance with section 269ZZX(1) of the Act.

17. During the conferences convened on 10 July and 6 August 2019, Commission representatives indicated further calculations would be undertaken in relation to the normal values and consequential dumping margin to be applied to goods exported by Kam Kiu and PanAsia. Those calculations were provided to the Review Panel in the conference convened on 15 August 2019 and have been adopted by the Review Panel. Accordingly, the Review Panel has not needed to substantively address all of the arguments advanced by Kam Kiu and PanAsia in support of their respective Grounds of Review.

18. In conducting this review I have had regard to all relevant materials e.g the Applications and documents submitted with the Applications and to submissions received pursuant to section 269ZZJ of the Act, insofar as they contained conclusions based on relevant information. I have also had regard to REP 482, SEF 482, REP 392 and to SEF 392 and relevant information obtained at the conferences.

19. The role of the Review Panel is to determine whether the reviewable decisions were each the correct or preferable decision, having regard to the material before the Commission and to the matters raised in the Applicants' Grounds of Review. The Applicants each bear the onus of showing, in the circumstances, the reviewable

decision was not correct or preferable. If the Applicants meet that onus, the Review Panel is to recommend to the Minister that revoke the reviewable decisions and substitute a specified new decision.[4]

20. To identify whether the reviewable decision was the preferable decision the Review Panel:[5]
    - ascertains the law that is applicable and the relevant issues;
    - considers the material that is relevant to resolving the issues; and
    - makes findings of fact that are based on that material and relevant to the issues.

21. Having done so, the Review Panel will ascertain the range of decisions that can correctly be made in light of the law and the facts.

22. If more than one decision can correctly be made, the Review Panel should then choose the decision that is the preferable decision. The preferable decision is the decision that is the best decision, taking into account all the relevant information.

23. The Review Panel's review function is broader than that which is available by means of judicial review, such review requiring identification of jurisdictional error or other error of law. The Review Panel is not so constrained, and in determining what is the preferable decision the Review Panel is able to stand in the shoes of the decision-maker, and in doing so, it is able to exercise its own judgement and substitute its own decision. In taking such action Review Panel does not need to be satisfied the Commission decision was unreasonable in the ***Wednesbury*** sense, i.e. so unreasonable that no reasonable decision-maker could have so decided.[6] The Commission's decision may have been one of several decisions or options reasonably open on Commission. Nevertheless, in such circumstances the Review

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[4] Section 269ZZK(1).
[5] See ADRP Report No. 24: ***Power Transformers*** – former Senior Panel Member of the Anti-Dumping Review Panel, the Hon Michael Moore.
[6] ***Associated Provincial Picture Houses v Wednesbury Corporation*** [1948] 1 KB 223.

Panel can prefer one of the other options or outcomes, if it considers such to be preferable to that adopted by the Commission.

Grounds of Review

24. The grounds of review relied upon by the Applicants, which the Review Panel accepted, are as follows:

Darley Aluminium

Ground 1: It was incorrect for the Commissioner to be satisfied that revocation of the measures would likely lead to a recurrence or continuation of actionable subsidy the measure was intended to prevent. The measure is not intended to prevent the continuation or recurrence of a negligible subsidy.

Ground 2: There was insufficient evidence to support the finding that revocation would lead or be likely to lead to a continuation or recurrence of material injury the measures were intended to prevent.

Minfa

Ground 1: In the review Minfa indicated it was willing to cooperate and prepared a detailed submission. Minfa wanted its own individual rate in this review. The ADC did not agree to this request - it considered that it was unable to examine the exporters individual circumstances due to the workload of the review. The ADC decided to make the exporter subject to a residual rate of duty as determined in the review.

Kam Kiu

Ground 1: The Minister erred in constructing normal value by failing to exclude from the calculation the profit margin derived from the domestic sales of “high-end” like goods which had not been exported to Australia.

Ground 2: In the alternative, if the profit derived from domestic sales of “high-end” like goods were included as part of the profit, the Minister failed to make an adjustment for that profit so as to ensure a fair comparison between the goods sold domestically and those exported to Australia.

PanAsia

Ground 1: In constructing the cost to make and sell (CTMS) the Minister erred in uplifting all production costs incurred by PanAsia and not just its aluminium raw material costs.

Consideration of Grounds

Darley Aluminium

Ground 1: It was incorrect for the Commissioner to be satisfied that revocation of the measures would likely lead to a recurrence or continuation of actionable subsidy the measure was intended to prevent. The measure is not intended to prevent the continuation or recurrence of a negligible subsidy.

25. In support of this Ground of Review in Darley's Application to the Review Panel (Darley's Application) made two arguments:
    - the measure is not intended to prevent the continuation or recurrence of a negligible subsidy; and
    - there is insufficient evidence that revocation would likely lead to a recurrence or continuation of actionable subsidy the measure intended to prevent.

26. The starting point of the analysis of the first argument is to note that since October 2010 Zhongya's exports to Australia have been subject to countervailing duties imposed in accordance with Division 3 of Part XVB of the Act. Measures were imposed as Zhongya had benefited from a subsidy amounting to 7.6% of the per unit export price.

27. In October 2015 the measures were subject to a continuation inquiry under Division 6A of Part XVB which extended the measures until 2020 as the Commissioner was satisfied the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, subsidisation and material injury that the

measures were intended to prevent.[7] As a result of that Review, the measures with respect to Zhongya were reduced to 0.6% of Zhongya's per unit export price.

28. In 2017 the measures were subject to a variable factors review under section 269ZD of Division 5, which resulted in the measures applicable to Zhongya being reduced further to 0.1%.

29. In September 2018, following an application by Zhongya, a revocation review was initiated by the Commissioner under Division 5 and which culminated in the reviewable decision, as the Minister accepted the Commissioner's findings and recommendations as set out in REP 482.

30. In REP 482, the Commissioner, adopting the language of section 269ZDA(1A) within Division 5, decided not to make a revocation recommendation with respect to Zhongya, stating:
    - ***'if the anti-dumping measures were to be revoked, it would lead, or be likely to lead, to a continuation of, or a recurrence of, the subsidisation that the anti-dumping measures are intended to prevent';*** and
    - ***'if the anti-dumping measures were to be revoked, it would lead, or be likely to lead, to a continuation of, or a recurrence of, the material injury that he anti-dumping measures are intended to prevent.'***[8]

31. The focus of Darley's challenge is upon the meaning to be ascribed to the phrase ***"that the anti-dumping measures[9] are intended to prevent,"*** a phrase which is not defined in the Act. Relevant to the present Review, the Commissioner needed to be satisfied as to the continuation of both the subsidisation and the resultant material injury the countervailing duty notice was intended to prevent.

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[7] Refer section 269ZHF(2) of the Act.
[8] REP 482 at page 78.
[9] Section 269T defines "anti-dumping measures" in respect of goods as including a countervailing notice published under section 269TJ.

32. As to the first element, Darley's Application argues the Commissioner is required to be satisfied of the likelihood of the continuation or recurrence of an "actionable" level of subsidisation because "if the margin of subsidisation is likely to be at a 'negligible' level following the revocation of the measure, then it must be accepted that such subsidisation is not what the measure was intended to prevent."[10]

33. Section 269TBA of the Act sets out what Division 2 is about, and it is headed "***Consideration of anti-dumping matters by the Commissioner"***. Division 2, relevantly:
    - sets out the procedures to be followed, and the matters to be considered, by the Commissioner in conducting investigations; and
    - sets out the circumstances in which the Commissioner must terminate investigations.

34. Section 269TDA(2) section heading states "***Commissioner must terminate if countervailable subsidisation is negligible***." Subsection (2) relevantly provides that where an application has been made for a dumping duty notice and the Commissioner is satisfied that a subsidy has been received by an exporter which did not exceed the negligible threshold the Commissioner must terminate the investigation so far as it relates to that exporter. Section 269TDA relevantly provides that a subsidy is negligible if it is less than 2% when expressed as a percentage of the export price of the goods.

35. The Full Court of the Federal Court has held[11] that Part XVB of the Act is intended to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of Trade Agreements. The World Trade Organization's (WTO) ***Agreement on Subsidies and Countervailing Measures (SCM Agreement)***[12] is one such agreement.

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[10] Darley's Application at page 4.
[11] ***Minister of State for Home Affairs v Siam Polyethelyne Co Ltd*** [2010] FCAFC 86 at [34].
[12] ***Pilkington (Australia) Ltd v Minister of State for Justice and Customs*** [2002] FCAFC 423 at [22].

36. The Full Court also agreed that the provisions within Part XVB are to be interpreted and applied, as far as the language pertmits, in accordance with Australia's international obligations and a broad approach to construction should be adopted.[13] Accordingly I will have regard to relevant WTO jurisprudence to identify the nature and extent of the obligations which Part XVB seeks to reflect.

37. Negligible levels of subsidisation or, as they are referred to in Article 11 of the SCM Agreement, de minimus margins, were introduced as a new and additional discipline in the SCM Agreement recognising it was not appropriate to authorise the imposition of countervailable measures in response to subsidisation levels which were below the de minimus threshold[14], which were set by the SCM Agreement at less than 1% ad valorem.

38. WTO jurisprudence is well settled with respect to the application of the de minimus threshold but does not support Darley's arguments. The Appellate Body in ***US - Carbon Steel*** observed the de minimus thresholds were limited to an investigating authority's initiation and conduct of a countervailing duty investigation.

39. The Appellate Body commented there was nothing within the SCM Agreement:

> ***"to suggest that its de minimus standard was intended to create a special category of 'non-negligible' subsidisation, or that it reflects a concept that subsidisation at less than a de minimus threshold can never cause injury … the de minimus standard … does no more than lay down an agreed rule that if de minimus subsidisation is found to exist in an original investigation, authorities are obliged to terminate their investigation [emphasis added]."***

In support of this view the Appellate Body noted cross referencing is frequently used in the SCM Agreement, and therefore the Appellate Body attached significance to

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[13] ***Minister of State for Home Affairs v Siam Polyethelyne Co Ltd*** op cit at [35].
[14] The Appellant Body in ***US - Carbon Steel*** WT/DS432/AB/R considered the negotiation history of the SCM agreement and noted the application of a specific de minimus standard in investigations "were considered to be highly important were the subject of protracted negotiations" and the final text imposing such thresholds "were the result of carefully negotiated compromise."

the absence of any such cross-referencing of the de minimus threshold to those Articles governing the conduct of review or revocation inquiries.

40. Whilst WTO jurisprudence is informative, the Review Panel is required to give effect to the language used in the Act and in particular to the phrase “that the measures are intended to prevent” as they appear in section 269ZDA(1A)(b) of the Act.

41. 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 in the legislation as a whole, to try to discern the intention of the legislature.[15] The starting point of any consideration is to first look to the meaning of the words used and the context within which they appear.

42. The operation of the statutory scheme outlined in Part XVB can provide context to aid in the interpretation of the language used. It contains provisions detailing the conduct of investigations to determine whether measures ought to be imposed, the duration of measures, how they may be reviewed over time, whether measures ought to be continued for a further period, and, as in the case of the matter before the Review Panel, whether measures ought to be revoked.

43. Section 269SM provides a useful overview of the operation of Part XVB and its Divisions. Section 269TBA in turn clarifies what Division 2 is about and relevantly sets out:
    - the procedures to be followed, and the matters to be considered, by the Commissioner in conducting investigations in relation to goods covered by applications for the publication of countervailing duty notices: and
    - the circumstances in which the Commissioner must terminate such investigations.

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

44. The Heading to Division 5 is "***Review of anti-dumping measures***." Section 269Z clarifies that Division 5 provides for the review of measures and also sets out the procedure to be followed by the Commissioner in dealing with applications, including applications for the revocation of measures.

45. The issue before the Review Panel is therefore whether the procedures pertaining to the de minimus or negligible margins mandated under section 269TBA of Division 2 also have application in the context of a revocation inquiry under section 269ZDA (1A)(b). In my view they do not.

46. Section 269TDA is limited in its application to matters governed by Division 2, i.e. the conduct of investigations to determine whether measures ought to be imposed. It is within this context that negligible margins are prescribed. If those margins are not met, the Commissioner must terminate the investigation at that point and need not give consideration to any impact the exports may have had on the Australian industry. There is nothing within section 269TDA, or Division 2 generally, to suggest that the negligible margin threshold also has application in context of a revocation review under Division 5.

47. Division 5 is equally clear as to its scope and is prescriptive as to how reviews are to be conducted. Section 269ZA details the circumstances in which an application may be made for a review. These circumstances are limited to where there has been a change in the variable factors and where "the anti-dumping measures are no longer warranted." The section makes no reference to negligible margins as being a reason why measures may no longer be warranted.

48. Support for the limited application of section 269TBA(1A)(b) to investigations and not to reviews can be drawn from the Federal Court decision in ***Minister of State for Home Affairs v Siam Polyethylene Co Ltd***.[16] There the Court drew upon the overall operation of Part XVB as providing context and stated Part XVB sought to sequentially deal with the manner in which anti-dumping measures may be imposed

[16] Op cit. at [38].

and, thereafter, to deal with applications for the review of such measures, once imposed (Division 5). The issue before the Court was whether a feature of central importance to the imposition of measures (section 269TG(2)) - contained within Division 3 also applied or was "incorporated" into reviews under Division 5 such that a proper discharge of the powers under Division 5 required consideration to be given to the analysis demanded by section 269TG(2). The Court held, albeit tentatively, that it did not, noting that Division 5 was silent and made no express reference to section 269TG(2). The Court went on to note there was no self-evident reason why powers conferred under Division 5 are not powers only constrained by the express terms by which they are conferred.

49. Like the Appellate Body, I also view the absence of any cross referencing of the negligible margin threshold in Division 5 as being significant. In light of the above, I reject Darley's argument that the negligible margins prescribed in Division 2 have application in reviews undertaken in Division 5.

50. Darley's second argument with respect to the first Ground of Review is that there is insufficient evidence that revocation would likely lead to a recurrence or continuation of the actionable subsidy that the measure is intended to prevent.

51. That said, Darley's arguments also challenge the basis of the Commissioner's finding that the level of subsidisation would increase following changes to VAT rebate arrangements and to likely changed purchasing practices of raw materials on the part of Zhongya.

52. Before dealing with these two proposed changes I will set out the relevant standard to which the the Commissioner was obligated to adhere in examining these issues. These standards are drawn from WTO jurisprudence and align with relevant grounds for judicial review of administrative actions outlined in the ***Administrative Decisions (Judicial Review) Act 1977***.

53. WTO jurisprudence suggests investigating authorities, such as the Commissioner, are subject to an overarching obligation to conduct an objective examination on the

basis of positive evidence.[17] Positive evidence means that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.[18] When an investigating authority might have to rely upon reasonable assumptions and draw inferences, these should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.[19] Further, a methodology premised upon unsubstantiated assumptions would not satisfy the positive evidence standard, and an assumption is not properly substantiated when an investigating authority does not explain why it would be appropriate to use it in the analysis.[20]

54. With regard to the applicable increase in the VAT rate, REP 482 expressed differing levels of confidence as to the probability of a change in the applicable VAT rate. At one point, REP 482 noted "given the GOC's announcement relating to an increase in the VAT rebate for exports of aluminium extrusion … this **could** result in reduced export prices and allow for further price undercutting"[21] [emphasis added]. Satisfaction of the likelihood test requires that there be evidence to support a finding that an occurrence is probable not merely possible. The use of the term "could" suggest the Commissioner had the lesser standard of possible in mind. That said, I acknowledge REP 482 must be read in a commonsense matter, that particular parts of the report have to be read in the broader context of the whole report and that the Commissioner's reasons are not to be read with an eye keenly attuned perception of error.[22]

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[17] Appellate Body Report, ***US – GOES*** WT/DS414/AB/R at para 201.
[18] Appellent Body Report, ***US - Hot Rolled Steel*** op cit at para. 201.
[19] Appellant Body Report, ***Mexico - Anti-Dumping on Rice*** WT/DS295/AB/R at paragraph 204.
[20] Ibid at paragraph 205.
[21] REP 482 ap pages 72-73.
[22] Refer ***Steel Force Trading Pty Ltd v Parliamentary Secretary to the Minister for industry, Innovation and Science*** [2018] FCAFC 20 at [78] and ***Minister of State for Home Affairs v Siam Polyethylene Co Ltd*** [2010] FCAFC 86 [62]. See also ***Steel Force Trading Pty Ltd v Parliamentary Secretary to the Minister for industry, Innovation and Science*** [2016] FCA 1309 at para [89] where Robertson J stated "a court on judicial review should not be concerned with looseness in the language of the decision-maker and should not read the decision-maker's reasons with an eye keenly attuned to the perception of error. The reasons are meant to inform and their language is not to be scrutinised over zealously."

55. Later, the Report noted "it is **more probable than not** that levels of subsidisation will increase as a result of recently announced increases in VAT rebates"[23] [emphasis added]. The Commissioner based this conclusion upon "the [Government of China] GOC's announcement relating to an increase in VAT rebates for exports of aluminium intrusions."[24] In support of this conclusion the Report provided a link to a Government of China website which reported on an announcement to apply tax reductions to factories affected by capacity cuts and tax breaks to enterprises facing production suspension due to capacity constraints.

56. The GOC's website was drawn to the Commission's attention in a submission by Capral dated 4 December 2018.[25] In that submission Capral stated that it "understands" the GOC had announced its intention to raise the applicable value added tax (VAT) on certain products, which included the goods under consideration. It suggested that those products with the current rebate of 13% will benefit from the increased VAT rebate of 16%. Capral stated its expectation was that exporters such as Zhongya will use the rebate to reduce export prices.

57. Darley's Application challenged the Report's finding claiming that, "the VAT refund rate in relation to exported goods by Zhongya has not increased and is unlikely to increase in the future … the VAT rate has remained the same and will likely remain the same-there is no room for it to increase."[26]

58. The Commissioner's submission did not substantively engage with Darley's claim and merely restated the Report's findings that "**should** the government of China increase the Value-Added Tax rebate on aluminium extrusions, it is likely that Zhongya will use that increased rebate in its pricing, further undercutting Australian industry prices"[27] [emphasis added]. Neither the report nor the Commissioner's submission considered whether the alleged changes to the VAT arrangements constituted an actionable subsidy. I find this limited response puzzling as the

[23] RER 482 at page 77.
[24] Ibid at page 72.
[25] Document 37 on EPR 482.
[26] Darley's Application at Attachment 2 pages 6-7.
[27] Commissioner's Submission at page 5.

purported changes to the VAT was one of the two principal reasons as to why the Commissioner concluded that the level of subsidisation would likely increase.

59. Accordingly, I find Commissioner has not provided a reasoned explanation based upon positive evidence as to the basis of the finding in relation to the change in the VAT rate.

60. In SEF 482 the Commission foreshadowed the conclusion that Zhongya would likely revert to purchasing the majority of its aluminium raw material inputs from State Owned Enterprises (SOEs). In response, Zhongya claimed there was no commercial benefit or incentive for it to change its current practice whereby it had ceased purchasing aluminium raw materials from SOEs.

61. To put this issue in context when measures were first put in place, almost 9 years ago, it was found that Zhongya had purchased significant quantities of aluminium raw materials from SOEs at purchase prices less than an external benchmark of "adequate remuneration", thereby conferring a benefit on Zhongya which resulted in a subsidisation rate of 7.6%.

62. Over the years Zhongya claims to have moved away almost completely from reliance upon SOEs as raw material suppliers. Zhongya argued this was demonstrated by duty refund applications, lodged by Darley, over the intervening period, an outcome acknowledged in REP 482 where it stated "since the implementation of measures in 2010, Zhongya, has largely ceased purchasing aluminium raw materials from SOE's."[28] Nevertheless, the Report went on to conclude "Zhongya will likely return to its former purchasing behaviour by purchasing aluminium raw materials from SOEs" such "that **it is more probable than not** that Zhongya will export the goods at injurious prices, similar to those seen in the original investigation [in 2010] "[29] [emphasis added].

[28] REP 482 at page 70.
[29] Ibid.

63. The Commissioner's Submission acknowledged "that in the context of a revocation review the word ***likely*** has been interpreted to mean more probable than not"[30] and went on to restate the Report's finding, with respect to the probability of a change in purchasing practices, that "past conduct is probably the most reliable indicator of future conduct."[31] Consistent with this view, REP 482 noted all Darley's duty assessments from March 2012 had been examined and found that, in all final assessments of duty payable, Darley had received **partial repayments** of duty. Such partial repayments implied that Zhongya continued to purchase **some** raw materials from SOEs.

64. Later the Report referred to the Commission's request to Zhongya for additional information with respect to two duty assessment applications made by Darley "subsequent to the original investigation" in 2010. The report went on to note the two assessments had "found that Zhongya had purchased primary aluminium from SOEs."[32] However, the report did not indicate how long ago the duty assessment applications had been lodged, nor the relativity of the quantities of raw materials found to have been purchased from SOEs.

65. The report also noted "Zhongya did not provide evidence to the Commission in the information that it provided to indicate that it was no longer purchasing primary aluminium from SOEs".[33] I am unsure as to the relevance of this comment as the onus was upon the Commissioner to be satisfied that it was more probable than not that Zhongya would revert from its current practice, a current practice which the Commission had acknowledged.

66. In response to SEF 482, Zhongya argued "there is no commercial benefit or incentive for Zhongya to change its existing supply arrangements."[34] The

[30] Op cit submission at page 5.
[31] Op cit REP 482 at page 75.
[32] Ibid at page 76.
[33] Ibid.
[34] REP 482 at page 74.

Commission chose not to address this argument in REP 482 and instead relied upon Zhongya's past behaviour as noted above.

67. Darley' Application also takes issue with the Commissioner's conclusion regarding the likelihood of change to purchasing practices. Darley argues "there is zero evidence going to the proposition that revocation of the measure would lead to or likely lead to Zhongya changing purchasing model back to a subsidy- triggering arrangement with an SOE."[35]

68. Whilst I agree with the general proposition that past conduct is probably a reliable indicator of future conduct, it is unwise to treat it as determinative. It's application and relevance must be assessed in context, and its influence necessarily weakens over time, as other factors intervene. What the Commissioner seeks to rely upon is a practice dating back almost 9 years and one the extent of which is not consistent with the Commission's observations of Zhongya's current purchasing behaviour.

69. I find that the Commissioner has not provided a reasoned explanation based upon positive evidence to substantiate the assumption that changes to the Zhongya's purchasing practices would be a probable outcome following the revocation of measures.

70. My findings with respect to likely changes in the VAT and in Zhongya's purchasing practices were fundamental to the Commissioner's conclusions that the level of subsidization would increase. Nevertheless, they do not provide support for the relief which Darley seeks.

71. The findings go to likely increases in the likely level of subsidisation rather than the continuation of subsidisation. Section 269ZDA(1A)(b) requires that the Commissioner be satisfied as to the continuation **or** recurrence of subsidisation. As noted above the provision is silent as the amount of the quantum of the subsidization.

[35] Darley's Application at page 9.

72. The Commission reviewed the level of subsidisation that had been received throughout the investigation period and found that it had increased from 0.1% to 0.2%. Darley does not take issue with this finding, with the exception as to the significance of the quantum i.e. that the amount received was not 'actionable'.

73. REP 482 found "Zhongya is **continuing to receive subsidisation**, and that it is **likely to continue** to receive subsidisation."[36] Accordingly, notwithstanding my concerns regarding the Commissioner's findings with respect to likely increases in the level of subsidisation, I find the Commissioner was correct in determining that the subsidisation would continue. Accordingly, the Commissioner has satisfied the first leg of section 269ZDA(1A)(b) namely, the continuation of subsidisation.

74. In light of the above, I reject Darley's first Ground of Review.

Ground 2: There was insufficient evidence to support the finding that revocation would lead or be likely to lead to a continuation or recurrence of material injury the measures were intended to prevent.

75. The Commissioner's Submission stated Chapter 8.4 of REP 482[37] summarised the reasons for finding that the revocation of the measures would lead, or be likely to lead to a continuation or recurrence of material injury that the measures are intended to prevent. Those reasons were:
    - Zhongya is continuing to receive subsidisation for their exports of goods and that level of subsidisation is increasing;
    - it is more probable than not that levels of subsidisation will increase as a result of recently announced increased VAT rebates;
    - the prior behaviour of Zhongya in switching to purchasing raw materials from SOEs to private companies as a result of the imposition of measures; and
    - the evidence available Zhongya's exports are likely to further undercut Australian industry's prices in the absence of measures.

[36] REP 482 at page 76.
[37] REP 482 at page 77.

76. Darley's application takes issue with several of the Commissioner's findings which go to the possible increase in the level of subsidisation. Darley makes the point that even if such increases occurred, which it disputes, such increases would still not increase the subsidisation level such that they would become "actionable". Stated differently, the negligible threshold margin would not be exceeded. In light of my findings with regard to the first Ground of Review, there is no need to further address this argument.

77. Darley's Application challenged the Commissioner's finding that Capral constituted a sufficient portion of the Australian industry. It argued:

> ***"the material injury analysis of Report 482 was conducted on the premise of whether Zhongya's's exports… had being causing material injury to Capral, being only one member of the Australian industry, and who accounted for less than half of the Australian industry's market share."***[38]

78. Section 269T(4)(a) relevantly provides that for the purposes of Part XVB where there is a person or there are persons who produced like goods in Australia to those goods imported (in this case aluminium extrusions) there is an Australian industry in respect of those like goods and the industry consists of that person or those persons. REP 482 estimates "that Capral currently accounts for approximately 45% of domestically manufactured aluminium intrusions and almost one third of the overall Australian market (including imports)".[39]

79. The ***Dumping and Subsidy Manual*** notes "the Federal Court[40] has held that the Australian industry is the sum total of the industry in Australia (not any part …) and the material injury determination must be assessed against the Australian industry as a whole. This assessment is required regardless of the size of the applicant."[41]

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[38] Darley's Application at page 13.
[39] REP 482 at page 64.
[40] See ***Swan Portland Cement Ltd and Cockburn Cement Ltd v the Minister of Science, Customs and Small Business and the Anti-Dumping Authority*** [1989] FCA 461 in judgement NG26 (Wilcox J).
[41] ***Dumping and Subsidy Manual*** at page 16.

80. REP 482 also noted "as Capral holds a large portion of the Australian market, the Commission views it appropriate to consider it is representative of the Australian market as a whole[42]." Further, the Report considered Capral's questionnaire response to the review was both representative of the Australian industry and reliable for the purpose of assessing the economic condition of the Australian industry.

81. The Commissioner's Submission noted:

> ***"Capral is the largest Australian industry member. The Commissioner also had regard to the data and information collected as part of previous investigations and reviews of measures. The Commissioner is satisfied that the totality of information is representative of the Australian industry as a whole."[43]***

82. It is implicit in the Commissioner's findings and conclusions that given Capral is the largest Australian industry member, material injury to Capral can be such as to constitute material injury to the Australian industry as a whole. This conclusion is supported by material before the Commissioner, and accordingly I reject Darley's argument that the Commissioner's analysis needed to encompass the financial health of all members of the Australian industry.

83. Darley's Application argues that the Commissioner could not be satisfied as to the material injury component of section 269ZDA(1A)(b), because the Commissioner's "approach was to consider whether there was a likelihood of material injury to the Australian industry by Zhongya's exports, regardless of subsidisation".[44] Darley also argues the Commissioner's analysis with respect to material injury does not assess the existence or likelihood of material injury that the measures are intended to prevent. Darley argues any continuing adverse impact Zhongya's exports will have

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[42] REP 482 at page 62.
[43] Commissioner's Submission at page 6.
[44] Darley's Application at page 13.

on Capral are the result of Zhongya's continued competitiveness, which has nothing to do with subsidization.

84. Before dealing with this argument it is useful to restate the Commissioner's relevant findings with respect to material injury which were as follows:[45]

- the Australian market for the goods has increased over the injury analysis period[46];
- Capral currently accounts for "almost one third of the overall Australian market (including imports)"[47];
- Capral's sales volume increased by approximately 12% across the injury analysis period[48];
- Capral was profitable in the final two years of the injury analysis period, with an improvement in performance in the review period[49];
- from FY 2017 to FY 2018 Zhongya's exports increased at a similar level to other Chinese supporters and had increased by 57%[50];
- Zhongya is one of the largest exporters of the goods to Australia and given its export volumes and market share it is reasonable to find that its prices affect the market[51];
- while costs have been rising Capral has not been able to maintain its [price] spread and achieve a desired price[52];
- the Commissioner undertook a price undercutting analysis whereby Zhongya's and the Australian industry's delivered prices for the same goods to a common customer were compared. The Commissioner found that Zhongya's prices undercut the Australian industry by approximately 7% or higher; and
- the Commissioner then undertook a comparison of Capral's Unsuppressed Selling Price (USP) and the Non-Injurious Price (NIP) with Zhongya's ascertained export prices. The Commission found Zhongya's prices were

[45] It will be recalled that for the purposes of the review the Commissioner focused on an injury analysis period which commenced on 1 July 2014 and a review period from 1 July 2017 to 30 June 2018.
[46] REP 482 at page 64.
[47] Ibid at page 64.
[48] Ibid at page 63.
[49] Ibid at page 67.
[50] Ibid at page 73.
[51] Ibid at page 76.
[52] Ibid at page 66.

lower than both the NIP and the USP. It will be recalled that Zhongya's export prices were not dumped during the review period.

85. I will now examine the nature of the analysis of material injury required by section 269ZDA(1A)(b), namely that revocation of the measures would lead, or be likely to lead, to a continuation of or a recurrence of the material injury that the measures are intended to prevent.

86. Section 269TAE deals with "material injury to industry." The section is to be found within Division 1 of Part XVB of the Act. Division 1 deals with what are referred to as "preliminary matters" and, inter alia, "provides the basis for determining whether dumping or subsidisation is causing material injury to Australian industry.[53]"

87. Section 269TAE sets out a list of factors that the Minister **may** have regard to in ascertaining whether exported goods have caused or will cause material injury. Section 269TAE(2A) prescribes a list of factors the Minister **must** consider in order to determine whether any injury to industry is being caused by factors other than the exportation of goods to Austrlaia. Relevant mandatory factors include contractions in demand or changes in patterns of consumption and **competition between foreign and Australian producers** of like goods. That section further provides that any injury found to have been caused by any such factor must not be attributed to the exported goods. In performing this non-attribution analysis the Commissioner is not obligated to quantify the injury caused by relevant mandatory factors in order to separate and distinguish it from the injurious effects of subsidised imports.[54]

88. Section 269TAE appears limited in its scope, by the express language, to the determination of material injury in the context of sections 269TG or 269TJ, which can be found within Division 3 of Part XVB of the Act. Therefore, neither the discretionary nor the mandated considerations or factors prescribed by section 269TAE can be said to apply expressly to reviews undertaken under Division 5. This outcome is consistent with my analysis of Darley's first Ground of Review

[53] Refer section 269SN.
[54] Panel Report, ***US – Countervailing Duty Investigation on DRAMs*** at para.7.353.

which established that negligible margins described in Division 2 have no application to reviews undertaken under Division 5.

89. This outcome is also consistent with WTO jurisprudence which has found that obligations with respect to the determination of material injury in the context of investigations regarding the imposition of measures do not expressly carryover into revocation inquiries. Although these WTO cases dealt with reviews of dumping measures it is accepted that the same principles hold true for reviews of the level of subsidisation. Examples of this jurisprudence are detailed below.

90. In ***US – Corrosion-Resistant Steel Sunset Review***[55] the Appellant Body held that the review mechanisms under the Anti-Dumping Agreement do not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in sunset reviews.

91. Similarly, in ***US - Oil*** Country ***Tubular Goods Sunset Reviews*** the Appellant Body held:

> ***"the Anti-Dumping Agreement distinguishes between determinations of injury, addressed in Article 3 and determinations of likelihood of continuation or recurrence … of injury, addressed in Article 11.3. In addition, Article 11.3 does not contain any cross-reference to Article 3 to the effect that, in making the likelihood-of-injury determination, all the provisions of Article 3 – or any particular provisions of Article 3 – must be followed by investigating authorities***."[56]

Importantly, the Appellant Body went on to state:

> ***"certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive***

[55] Appellate Body, ***US – Corrosion-Resistant Steel Sunset Review*** WT/DS244/AB/R.
[56] Appellate Body, ***US-Oil Country Tubular Goods Sunset Reviews*** WT/DA268?AB/R at para. 278.

> ***evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also … consider other factors … when making a likelihood of injury determination [emphasis added].[57]"***

92. What these WTO cases suggest is that although the relevant Agreements do not expressly require investigating authorities, in a review of measures, to consider the factors which pertain to injury determinations in the context of an investigation, the particular circumstances of a revocation review may be such that consideration is required to meet the positive evidence and objective determination standards.

93. What then is the meaning to be given to the phrase "the material injury that the measures are intended to prevent," referred to in section 269ZDA(1A)(b), particularly as it does not cross reference to section 269TAE?

94. The ***Dumping and Subsidy Manual*** does not provide clarity as it only states:

> "a revocation review includes an examination of the current economic conditions of the industry as part of assessing whether the injury would be likely to recur following any revocation of the anti-dumping measure … Examining revocation claims concerning injury entails the collection of detailed cost and price data from the industry, normally for several years, similar to a continuation enquiry."[58]

95. The use of the indefinite article "***the***" in section 269ZDA(1A)(b) is informative, and, in my view, is a reference to an outcome rather than a reference to the process through which that outcome was reached. Stated differently, this means an investigating authority may commence a revocation review not under an express

[57] Ibid. at para.284.
[58] ***Dumping and Subsidy Manual*** at page 182.

obligation to have regard to the discretionary and to each of the mandatory factors pertaining to material injury as set out in section 269TAE. Therefore, an investigating authority may commence a review assuming that the material injury determination made in the context of the initial investigation remains current. That said, the particular circumstances of the review may be such that some of the section 269TAE factors may be relevant considerations which must be considered to ensure a reasoned conclusion based upon positive evidence.

96. I draw support for this proposition from the Full Court of the Federal Court's decision in ***Siam Polyethylene***.[59] Although not strictly on point, there the Court considered whether the provisions of section 269TG (within Division 3) were not as a matter of statutory construction incorporated such that the requirements of that section had to be considered when the review functions conferred by section 269ZDA (within Division 5) had to be discharged. The Court held that there was no self-evident reason why the powers conferred by section 269ZDA are not powers only constrained by the express terms in which they are conferred such that they remain unconfined by any express restraint other than those referred to in the section.

97. The Court nevertheless suggested the reason why section 269ZDA was left unconstrained was to provide flexibility to the investigating authority, given the potential range of factors which could be taken into account in recommending to the Minister whether a measure continue or be revoked. Importantly, the Court stated the factors to be considered in the context of a review under section 269ZDA "would depend upon the facts and circumstances of each individual case[60]."

98. The Court also considered whether the mandatory factors prescribed in section 269TAE(2A) also had application in the context of continuation or sunset reviews. The Court opined, "the facts and circumstances of a particular case may make it a not irrelevant exercise to consider those matters also set forth in section 269TAE(2A)[61]". The Court saw, "much to be said … for a conclusion that the use of

[59] ***Minister of State for Home Affairs v Siam Polyethylene Co Ltd*** [2010] FCAFC 86 at [54].
[60] Ibid.
[61] Op cit at [108].

the phrase 'material injury' when used in [reviews] bears the same meaning as set forth in Division 1 and section 269TAE. Division 1 is itself a preliminary Division which sets for a series of definitions to be thereafter applied. And it is a fundamental rule of construction that unless a contrary intention appears the words in the statute are used consistently.[62]"

99. Although noting section 269TAE(1) and 269TAE(2) by their express terms are limited in their application to matters to be determined under Division 3, the Court went on to state "there is no self evident reason why, in any given case, the matters set forth in … section 269TAE(2A) … may not also be relevant matters to which regard may be had [in Division 5 reviews] … The express confinement of the operation of section 269TAE(1)and (2) to specific sections there mentioned … is not necessarily a reason why those provisions may not also be of relevance in discharging the functions set forth in [Division 5]."[63]

100. In REP 482 the Commissioner acknowledged that "the injury analysis period has been affected in various ways by past cases examining dumping and subsidisation of the goods from China, Malaysia and Vietnam. This results in the consideration of material injury in respect of Zhongya's exports in isolation to other exporters challenging."[64]

101. Recalling the Commissioner's material injury findings summarised in paragraph 85 above, Capral had returned to profitability in the last two years of the investigation period, but it had not been able to increase its prices to "a desired price". A likely reason for such inability was Zhongya's dominant position with the Australian market as "a price setter", one able to undercut Capral's selling prices "by approximately 7% or higher", such prices being less than both Capral's USP and its NIP. Notwithstanding this level of undercutting, Zhongya's exports were not dumped and were found to have benefited from a subsidisation rate of 0.2%.

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[62] Ibid at [118].
[63] Ibid at [122].
[64] Ibid at page 71.

102. The Commissioner's analysis correctly identified the injurious effects of the subsidised imports, as it is the effect of the subsidised imports and not the subsidy or its quantum which is more often than not determinative. However, I recall that in ***US - Carbon Steel the Appellate Body***[65] recognised that it would be 'unlikely' that very low levels of subsidisation could be shown to cause 'material' injury. The Appellant Body's view reflects the importance of the exclusion of other factors impacting upon the domestic industry from the injury and causation analysis and suggests that where very low levels of subsidisation exist additional focus will fall upon the non-attribution analysis.

103. The Commissioner was confronted with Zhongya's selling prices in the market which undercut those of Capral. This difference exceeded what the Appellate Body referred to as "very low levels of subsidisation". In such circumstances the impact of the subsidised imports was no longer determinative and other factors impacting upon the competition between Zhongya' and Capral's goods in the market became relevant considerations in the material injury analysis. The Commissioner did consider the conditions of competition existing between Zhongya and Capral when referencing the relativity between the prices at which Zhongya's exports were sold to customers in Australia and Capral's USP and NIP. However, the Commissioner did not go on to analyse the implications arising from this price relationship, notwithstanding that REP 482 had found "that overall measures have been effective in remedying injury from dumping and subsidisation , noting that for the majority of the injury period Capral has been profitable."[66]

104. I find the Commissioner has not provided a reasoned explanation as to how the injurious effects of other factors impacting upon the financial health of the Australian industry were excluded from the analysis of material injury. In the absence of such an explanation I am not satisfied that revocation of the measures would lead, or be likely to lead, to a continuation of, or a recurrence of the material injury that the measures are intended to prevent. Accordingly, I recommend that the Minister

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[65] Appellate Body Report, ***US – Carbon Steel*** WT/DS432/AB/R at paras. 77-82.
[66] REP 482 at page 68.

revoke the reviewable decision with respect to Zhongya, and substitute a new decision that the measures, as they apply to Zhongya, be revoked..

Minfa

Ground 1: In the review Minfa indicated it was willing to cooperate and prepared a detailed submission. Minfa wanted its own individual rate in this review. The ADC did not agree to this request - it considered that it was unable to examine the exporters individual circumstances due to the workload of the review. The ADC decided to make the exporter subject to a residual rate of duty as determined in the review.

105. On or shortly after the initiation of the investigation, the Commission invited exporters to complete and return an Exporter Questionnaire. The Commission received completed responses to the questionnaire from nine exporters, one of which was Minfa. From these, the Commission selected five exporters whose information was to be used to make relevant findings. REP 482 notes that "the selected exporters represent approximately 82% of the volume of goods … exported to Australia from China during the review period."[67]

106. Selected exporters can expect Commission representatives to attend upon their premises for what is known as a verification, the purpose of which is to test the accuracy of the exporter's response to the Exporter Questionnaire by reference to the exporter's manufacturing and financial accounts.

107. Minfa was not one of the five selected exporters. Minfa was "classified as a residual exporter for the purposes of this [investigation]."[68] The term residual exporter is relevantly defined in section 269T as meaning an exporter of goods that are the subject of the investigationand where that exporter's goods were not examined as part of the investigation. Minfa was nevertheless "willing to cooperate" and

[67] REP 482 at page 17.
[68] REP 482 at page 19.

participate in a verification process. Minfa's Application states it requested the Commission to determine its own individual rate of interim dumping duty.

108. In a File Note, dated 3 October 2017, a copy of which was placed upon the Commission's Electronic Public Record[69] (EPR), the Commission stated:

> ***"providing a response to the full exporter questionnaire, for non-selected exporters, does not guarantee an exporter will have information individually examined and/or an individual rate of duty determined."***

109. The File Note went on to state that the Commission would seek to verify the financial data provided by non-selected exporters subject to two conditions:

- the Commission's assessment of whether extending the investigation to include non-selected exporters would likely prevent the timely completion of the review; and,
- the available resources within the Commission to undertake on-site or remote verification.

110. As a residual exporter Minfa was allocated a residual rate of interim duty of 29.1%. Minfa argues such a rate was "considerably higher than the rate that provisionally applied. Also, it does not reflect the information in [Minfa's response to the Exporter Questionnaire]"[70]. Minfa further argues even though it had not been selected for verification this did not prevent the Commission from examining the veracity of the information it had provided in other ways. For example, by comparing that information to that of exporters that were examined. Minfa notes the Commission had previously relied upon information it had provided in October 2018 to assist in a duty assessment application lodged by another party.

111. Section 269TACAA(1) governs the selection of exporters who are to be subject to verification. That section relevantly provides, where the number of exporters from a particular country is so large that it is not practicable to examine the exports of all

[69] The EPR is commonly referred to as the Public File.
[70] Minfa's Application at page 6.

those exporters then the investigation may be carried out and findings made on the basis of information obtained from an examination of a selected number of exporters who are responsible for the largest volume of exports to Australia that can be reasonably examined.

112. Section 269TACAA(2) relevantly provides that if an exporter has provided information but not selected for verification, the investigation must extend to that exporter (i.e. that exporter's information must be verified or otherwise tested) unless to do so would prevent timely completion of the investigation.

113. The Commission's ***Dumping and Subsidy Manual*** provides limited further guidance regarding the selection of exporters for verification and the classification of other exporters as residual exporters. It states:

> ***"the Commission will consider whether the number of exporters is so large that it is unable to determine individual margins for each of them. If a large number of exporters are identified, the Commission will decide which exporters should be sampled for further investigation"[71].***

114. The Manual goes on to state that a consideration relevant to the number of exporters selected will be "the available resources to properly undertake the investigation" and that if "an exporter who is not sampled request its own individual treatment and completes the Exporter Questionnaire, the Commission will examine that information only if there is time available and having regard to any resource constraints."[72]

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[71] Dumping and Subsidy Manual at page 122.

[72] I note Article 6.10 of the Anti-Dumping Agreement is in similar terms to section 269TACAA. A WTO panel, ***EC - Salmon (Norway)***, considered the scope of Article 6.10 and held, "the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resources. Another Panel, ***US - OCTG (Korea)***, accepted the argument that time and resource constraints were relevant considerations in the decision not to individually examine any voluntary respondents.

115. Minfa bears the onus of demonstrating that the reviewable decision was not the correct or preferable decision. The legislation implicitly acknowledges that resource constraints, both in terms of staff and time, may legitimately impact upon the conduct of investigations. Notwithstanding the full cooperation of an exporter, such constraints may preclude that exporter from being subject to a verification visit and the legislation therefore prescribes its classification as a residual exporter. The Commissioner has referred to the constraints to which he was subject, both in the Report and in his Submission.

116. It is apparent from REP 482 that the five selected exporters accounted for the majority (82%) of the volume of China's exports of goods to Australia. The Report clearly indicates the selection was influenced by limited resources in terms of time and staff. In such circumstances the legislation prescribes what is to happen to those exporters such as Minfa. The legislation is silent as to any other means by which a non-selected exporter can obtain an individual rate in a particular investigation.

117. The legislation does however provide safeguard mechanisms which can be pursued at the conclusion of the investigation. Companies importing from the non-selected exporters can pay the interim duty rate and apply for a duty assessment. If the final duty as assessed is determined to be more than the final margin a refund will be paid. In addition, Minfa can also apply for an expedited review of the application of the residual rate to its particular circumstances.

118. REP 482 acknowledged resource constraints did limit the Commission's ability to undertake a verification of all cooperative exporters. In such circumstances, the legislation prescribes how residual exporters, such as Minfa, are to be dealt with. The Commissioner had regard to relevant considerations when determining which exporters were to be selected. It is irrelevant that as a result of not being selected Minfa was classified as a residual exporter and as such received a rate which may have been less favourable than if an individual rate had been determined. In this instance Minfa has not demonstrated that the reviewable decision was not the correct or preferable decision and accordingly I reject its Ground of Review.

Kam Kiu

Ground 1: The Minister erred in constructing normal value by failing to exclude from the calculation the profit margin derived from the domestic sales of "high-end" like goods which had not been exported to Australia.

119. The Commission was satisfied that a particular market situation existed in China with respect to the goods such that domestic sales of like goods could not be utilised to determine normal values. Accordingly, normal values of the goods had to be determined under section 269TAC(2)(c) using a constructive method which required the Commission to determine the sum of:
    - the cost of production of the exported goods;
    - selling, general and administrative costs that would be incurred on the assumption that the exports could be sold on the domestic market; and
    - an amount of profit.

120. Kam Kiu's Application seeks to challenge the amount profit determined by the Commission. The focus of the challenge is upon the meaning to be ascribed to section 45(2) of the ***Customs (International Obligations) Regulation 2015*** (Regulation). That section relevantly provides that when normal values are to be constructed in circumstances where a particular market situation applies "the Minister must, if reasonably practicable, work out the amount [of profit] using data related to the production and sale of like goods."

121. Accordingly, the Commission calculated an amount for profit based upon Kam Kiu's domestic sales of all goods which are considered to be like to those exported to Australia. Kam Kiu notes that it produces and sells domestically two types or models of goods. One such type or model were the goods exported to Australia. The other type, which it describes in its application as "high-end", were not explored to Australia during the relevant period.

122. Kam Kiu's Application states "high-end models account for 65% of Kam Kiu's domestic sales"[73]. The high-end models differ from other models sold domestically, and importantly from the goods exported to Australia in that they involve different combinations of:

    a) tighter manufacturing tolerances;
    b) higher grades of alloy;
    c) additional processing:
    d) additional preparations prior to being coated; and/or
    e) detailed finishes.

123. Kam Kiu's Application states "the high-end models that Kam Kiu sells domestically differ to the models exported to Australia in a range of ways which affect their price compatibility, and the comparability of profit derived from high-end models and the exported models". Kam Kiu argues "the Commission should have made an allowance in the calculation of the constructive normal value, for the significantly higher profit associated with the high-end models than the profits earned domestically on goods of the type exported to Australia."[74]

124. Kam Kiu argued, "by including those higher profit margins in the profit component, there is the potential for a flawed and unfair outcome in which any of Kam Kiu's competitors that do not manufacture models equivalent to the high end models … would have a lower rate profit applied to their products by the Commission during its construction of normal value in respect of their products. In this case, Kam Kiu's normal products would have a higher dumping margin apply to them-despite potentially having the same cost to manufacture and sell as its competitors.[75]"

125. Kam Kiu's Application referred to an earlier review, REP 392 which was completed in 2017 and noted the approach taken to the profit component of Kam Kiu's constructed normal value in that review was different to the approach taken by the

[73] Kam Kiu's Application at page 3.
[74] Kam Kiu's Application at page 3.
[75] Ibid at page 4.

Commission in REP 482. In REP 392 the Commission determined profits derived from the domestic sales of High-end Models should be excluded from the calculation of profit for the purpose of constructing a normal value. High-end models were identified by reference to product code numbers. Accordingly, at the conclusion of REP 392, the Commission calculated a dumping margin of 21% as compared to the higher dumping margin of 35.7% determined for Kam Kiu as a result of REP 482.

126. Kam Kiu's Application seeks to rely upon what it perceives to be inconsistent treatment concerning the Commission's treatment of Kam Kiu's profits attributed to its "High-end" models in REPs 392 and 482.

127. The Commission in SEF 392 did accept "that the profits derived from the domestic sales of high-end models should be excluded from the calculation of profit for the purpose of constructing a normal value. This will ensure a fair comparison is made between the export price of the goods under consideration and the normal value of those goods".[76]

128. In REP 392[77] the Commission noted the revised profit was determined by reference to product code which had the effect of excluding 99.5% of High-end models by virtue of the fact that these product codes related to models not exported to Australia. The report noted that the cost data provided by Kam Kiu and compiled (and therefore verified) at a product code level, rather than at a more detailed level which differentiates between High-end models and standard models. The Report noted the profit component still retained data pertaining to 0.05% of High-end models [[redacted] model] because without cost data provided at a more detailed level, i.e. beyond product code level, the(se) model(s) could not be excluded.

[76] SEF 392 at page 31.
[77] REP 392 at page 34.

129. In REP 392, Kam Kiu was a selected exporter and its information was subject to an on-site verification. However, in REP 482 the Commission conducted a remote benchmark verification of the information Kam Kiu disclosed in its response to the Exporter Questionnaire. The Verification Report "found that the results were as expected and in line with the CTMS findings of REV 392", with the exception of [redacted] model.[78] I accept Verification Reports are not determinative and that the Commission emphasises such reports are subject to review and that the final determination with respect to normal value may well change.

130. As noted above, the Commission's reasoning in REP 482 was that the data provided by Kam Kiu was not sufficiently detailed to exclude **all** high-end models. This reflects a different approach to that adopted in REP 392 which appears to have accepted there were clear cost/profit differences between the two models, which had an impact upon price such that an adjustment was appropriate. This was so even though the Commision considered the data was not sufficiently detailed to enable the identification of and exclusion of the remaining 0.5% of relevant sales. This is an approach accepting of the limitations arising from the conduct of business.

131. I am concerned, in these circumstances, insistence upon the provision of data in a highly detailed form such as would identify and eliminate from consideration **all** high-end domestic transactions may be inappropriate where it has been generally accepted that there are relevant (and verified) differences between models.

132. Accordingly, following a conference convened on 6 August 2019, I requested the Commission to undertake recalculations with respect to Kam Kiu's constructed normal value to give effect to the acknowledged differences between models by excluding High-end models from the profit calculation, using a similar methodology to that in a REP 392. The Commission revised Kam Kiu's profit amount, including all other appendices relevant to the calculation of Kam Kiu's dumping margin. The Commission used Kam Kiu's costs at the product code level to conduct the ordinary

[78] Verification Report at Section 4.2.

course of trade (OCOT) test to exclude High-end models from the profit calculation. This methodology is consistent with the methodology used in REP 392.

133. In a conference convened on 15 August 2019, the Commission submitted revised calculations in the form of five Appendices.[79] As a result of the revised Appendices (including the revised profit amount), the dumping margin for Kam Kiu has decreased from 35.7% (as determined in REP 482) to 13%.

134. Accordingly, I recommend the Minister revoke the reviewable decision with respect to Kam Kiu and substitute new decisions with respect to normal values and dumping margins as detailed in the five revised Appendices resulting in a reduction in Kam Kiu's dumping marging to 13%.

Ground 2: In the alternative, if the profit derived from domestic sales of "high-end" like goods were included as part of the profit, the Minister failed to make an adjustment for that profit so as to ensure a fair comparison between the goods sold domestically and those exported to Australia.

135. As this Ground is argued in the alternative to Ground 1, and as I have accepted Ground 1, Ground 2 may become moot as my recommendation with respect to Ground 1 will obviate the need to the adjustment sought under Ground 2. Nevertheless, should the Minister not accept my recommendations with respect to Ground 1, I will therefore briefly outline my reasoning with respect to Ground 2.

136. As will be recalled, there are acknowledged differences between the High-end models sold domestically and the goods exported to Australia. It is also accepted that such differences give rise to differences in costs such that the High-end models are more expensive to produce than the exported models. Investigating authorities

[79] Export Price, "482-Kam Kiu - Appendix 1 - export price (revised Aug 2019)"; CTMS, "482-Kam Kiu - Appendix 2 - CTMS (revised Aug 2019)"; OCOT and profit, "482-Kam Kiu - Appendix 3 – Domestic sales & profit (revised Aug 2019)"; Normal value, "482-Kam Kiu - Appendix 4 – Normal value (revised Aug 2019)"; and Dumping margin, "482-Kam Kiu - Appendix 5 – Dumping margin (revised Aug 2019)."

are under an obligation to ensure a fair comparison between normal value and export price by making adjustments for such differences.

137. Accordingly, if the Minister were minded not to accept my recommendation with respect to Ground 1, I am of the view the Minister would nevertheless be obligated to ensure a fair comparison by making an adjustment, under section 269TAC(9), to remove the cost differences between the exported goods and like goods sold on the domestic market.

PanAsia

Ground 1: In constructing the cost to make and sell (CTMS) the Minister erred in uplifting all production costs incurred by PanAsia and not just its aluminium raw material costs.

138. In its Application, PanAsia submits that the uplift methodology applied by the Commission in adjusting the raw material costs (aluminium ingot and billet) used in constructing the normal value is flawed as it does not apply the percentage uplifts separately determined for aluminium ingot and aluminium billet to PanAsia's corresponding ingot and billet purchases.

139. PanAsia also submits that, in adjusting its raw material costs, the Commission erred in not making a corresponding adjustment to its scrap recovery, or cost offset for scrap, given that scrap is deducted from the uplifted raw material costs.

140. In relation to both adjustments PanAsia argued this Ground of Review centres around whether the data referred to, was provided and verified during the on-site verification visit. In its Submission, the Commission agreed with this assessment.

141. REP 482 argued that the relevant information was provided by PanAsia subsequent to verification and as such was viewed as "new unverified information". Therefore, the Commission took the view that it was unable to adopt the information to enable the separate identification of the costs of the purchased aluminium ingots from the purchased aluminium billet. The Commission took a similar view in relation to its treatment of scrap.

142. The Commission's Submission acknowledge that some of the relevant information "was recorded in the 'original' CTMS data" which formed part of PanAsia's response to its Exporter Questionnaire. Further, although "data relevant to PanAsia's purchased aluminium billet transferred to the production of extrusions … whilst not separately identified in PanAsia's 'original' CTMS data which formed part of the verification" the Commission noted, the data relating to such purchases and transfers did reconcile to PanAsia's raw material inventory and purchase ledgers which were provided at the verification visit.

143. In relation to the verification of scrap recovery or cost offset, the Commission's submission noted PanAsia had included data relevant to its aluminium scrap recovery in the original CTMS spreadsheets that it provided in response to the Exporter Questionnaire. It further acknowledged that scrap was verified at the verification visit as part of the 'upwards' cost reconciliation through the relevant sub-ledgers.

144. Accordingly, the Commission considered that an amendment to PanAsia's self-produced billet costs was required to arrive at a more accurate determination of the cost to make as it relates to manufactured extrusions. Such an amendment would involve an additional step in the calculation to extend the unit uplifted self-produced billet costs in a particular month by the quantity of self-produced billet transferred to the manufacture of extrusions in the same month. The Commission also indicated that PanAsia's purchased billet and scrap costs as provided were accurate such that they could be relied upon to undertake relevant adjustments to the raw material costs.

145. I requested the Commission to make the necessary adjustments allowing amendments to the normal value and a dumping margin calculations as they relate to PanAsia. These amendments, in the form of revised Appendices 4 and 5, were relayed to me in a conference convened on 15 August 2019. As a result of the revised normal value, the dumping margin for PanAsia has decreased from 55.2% to 50.2%.

146. In light of the above, I uphold this Ground of Review and recommend to the Minister that the reviewable decision be revoked and that the Minster substitute new

decisions, reliant upon revised Appendices 4 and 5, pertaining to PanAsia's normal value and dumping margin calculations resulting in a reduction of PanAsia's dumping margin to 50.2%.

Ground 2: The Commission erred in deducting interim dumping duties paid by the importer in calculating the deductive export price.

147. The Commission concluded that PanAsia's export sales were not arm's-length and determined that export price ought to be calculated using the deductive method provided by section 269TAB(1)(b). This necessitated the export price be calculated by reference to the invoice price from PanAsia Australia to its Australian customers, less 'prescribed deductions' under section 269TAB(2). One such prescribed deduction is "any duties of Customs". I note that section 7 of the Anti-Dumping Act relevantly provides that "duties of Customs" are imposed in accordance with that Act and therefore are caught by the phrase "any duties of Customs" referred to in section 269TAB(2).

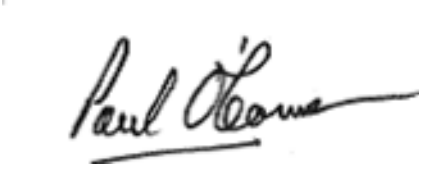
148. Nevertheless, PanAsia argues that the Commission ought not to have deducted the amounts of interim dumping duty in calculating the export price via the deductive method. It argues that consistency supports this outcome in that when reconciliation between interim dumping duty paid and the assessment of final duty is undertaken this also requires export price to be determined by the deductive method. However, in such circumstances the amounts paid by way of interim dumping duty are excluded from the amounts deducted by virtue of section 269X(5B)(b) which expressly directs the Commission "not deduct the amount of interim duty" if certain circumstances exist. Rather than support PanAsia's argument, I find reliance upon that section drives an outcome contrary to that sought. What section 269X(5B)(b) creates is a limited exception to the norm which is that duties imposed under the Anti-Dumping Act are to be deducted.

149. I find the Commission's application of the deductive method in determining PanAsia's export price was consistent with the express provisions of section 269TAB(2). Accordingly, I reject Ground 2 of PanAsia's Application.

Recommendations or Conclusions

150. Pursuant to s 269ZZK(1) of the Act and for the reasons given above, I recommend to the Minister that the reviewable decisions, in so far as they relate to:

- **Zhongya** be revoked, and that the Minister substitute a new decision declaring that the Countervailing Duty Notice with respect to Zhongya be revoked;
- **Kam Kiu** be revoked, and that the Minister substitute a new decision under section 269ZDB(1)(iii) of the Act that the Dumping Duty and Countervailing Duty Notice with respect to Kam Kiu be varied and taken to have effect as if different variable factors had been fixed, namely that the normal value is varied to produce a Dumping margin of 13%;
- **Minfa** be affirmed; and
- **PanAsia** be revoked, and that the Minister substitute a new decision under section 269ZDB(1)(iii) of the Act that the Dumping Duty and Countervailing Duty Notice with respect to PanAsia be varied and taken to have effect as if different variable factors had been fixed, namely that the normal value is varied to produce a dumping margin of 50.2%.



Paul O'Connor
Panel Member
Anti-Dumping Review Panel
23 August 2019