Australian Government
Anti-Dumping Review Panel

ADRP Report No. 129

Aluminium Extrusions exported from the People's Republic of China

January 2021

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Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Anti-Dumping Agreement	WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade
Capral	Capral Limited
China	People's Republic of China
Commissioner	Commissioner of the Anti-Dumping Commission
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
FOB	Free on board
Foshan Lvqiang	Foshan Lvqiang Metal Product Co., Ltd
Goods	Aluminium Extrusions
Inquiry period	1 January 2019 to 31 December 2019
Minister	Minister for Industry, Science and Technology
PanAsia Australia	PanAsia Aluminium Pty Ltd
PanAsia China	PanAsia Aluminium (China) Limited
PanAsia Group	PanAsia Group of Companies
REP 543	Final Report No. 543 published by the ADC entitled *Inquiry into the Continuation of Anti-Dumping and Countervailing Measures Applying to Aluminium Extrusions exported to Australia from the People's Republic of China* and dated 14 September 2020

Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister made on 12 October 2020 under s.269ZHG of the Act
SEF	Statement of Essential Facts
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (the Minister) made pursuant to s.269ZHG(1) of the *Customs Act 1901* (the Act) in relation to the continuation of anti-dumping measures in respect of aluminium extrusions exported from the People's Republic of China (China) (the Reviewable Decision). The applicants for the review were PanAsia Aluminium Pty Ltd (PanAsia Australia) and other members of the PanAsia Group of companies (the PanAsia Group) and Foshan Lvqiang Metal Product Co., Ltd (Foshan Lvqiang).

2. For the reasons set out in this report, I recommend that the Reviewable Decision be affirmed.

Introduction

3. The applicants applied under s.269ZZC of the Act for a review of the Reviewable Decision.

4. The applications were accepted and notice of the proposed review, as required by s.269ZZI of the Act, was published on 30 November 2020.

5. As the Senior Member of the Anti-Dumping Review Panel (Review Panel), I directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

Background

6. Since 2010 anti-dumping measures have applied to certain aluminium extrusions exported to Australia from China. As a result, interim dumping duty was payable on those exports. PanAsia Aluminium (China) Limited (PanAsia China), a member of the PanAsia Group, and Foshan Lvqiang are exporters of aluminium extrusions to Australia. PanAsia Australia is an importer of aluminium extrusions from China into Australia.

7. On 24 January 2020, Capral Limited (Capral) lodged with the Anti-Dumping Commission (ADC) an application under s.269ZHC of the Act seeking the

continuation of the anti-dumping measures then applying to exports of aluminium extrusions from China to Australia. The measures were due to expire on 28 October 2020.

8. The ADC initiated an inquiry into whether the continuation of the anti-dumping measures was justified. Notice of the initiation of the inquiry was published on 13 February 2020. The inquiry period for the inquiry was 1 January 2019 to 31 December 2019 (the inquiry period).

9. After two extensions of time, the Statement of Essential Facts (SEF) was placed on the public record on 29 July 2020. A Final Report (REP 543) was made to the Minister on 14 September 2020 and the Commissioner recommended to the Minister that:

    - the Minister take steps to secure the continuation of the anti-dumping measures, being the dumping and countervailing duty notices; and
    - the dumping and countervailing duty notices have effect in relation to all exporters from China generally, as if different variable factors had been ascertained.

10. On 12 October 2020, the Minister accepted the recommendations of the Commissioner and:

    - under s.269ZHG(1)(b) of the Act declared that she had decided to secure the continuation of the anti-dumping measures currently applying to aluminium extrusions exported to Australia from China; and
    - determined pursuant to s.269ZHG(4)(a)(iii) of the Act that the dumping duty notice continued in force after 28 October 2020 but after that day, the notice had effect as if different specified variable factors had been fixed in relation to all exporters generally.

    Notice of the Minister's decision was published on 15 October 2020.[1]

[1] ADN 2020/103.

11. Pursuant to the decision of the Minister, from 28 October 2020 the dumping margin for PanAsia China was 70% and for residual exporters it was 11.1%. Foshan Lvqiang was a residual exporter.

Conduct of the Review

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

13. Subject to certain exceptions,[2] the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK of the Act, i.e. information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister.

14. Four submissions were received pursuant to s.269ZZJ of the Act. Two of the submissions were received from Capral, one from the PanAsia Group and one was from the Commissioner of the ADC. A further submission was received from the PanAsia Group but it was received outside the time specified in s.269ZZJ and hence was not a submission to which I could have regard pursuant to s.269ZZK(4) of the Act.

15. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information. No conference was held pursuant to s.269ZZHA.

16. In conducting this review I have had regard to the applications and documents submitted with or referenced in the applications and to the submissions made

[2] See s.269ZZK(4).

pursuant to s.269ZZJ of the Act insofar as they were based on relevant information within the meaning of s.269ZZK(6) of the Act. I have also had regard to REP 543 and documents referenced in REP 543.

Grounds of Review

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

    The PanAsia Group

    - There were errors in the calculation of the export price of the goods in that in calculating the deductive export price under s.269TAB(1)(b), the ADC erred in ascertaining the "prescribed deductions" within the meaning of s.269TAB(2), particularly with respect to its construction of s.269TAB(2)(a).

    Foshan Lvqiang

    - To the extent that the application by the PanAsia Group establishes that the Reviewable Decision is not the correct or preferable decision, then the Reviewable Decision is not the correct or preferable decision with respect to the determination of the residual export price and/or normal value of Foshan Lvqiang's exports.

Consideration of Grounds

PanAsia Group

18. The PanAsia Group's principal contention is that in making the prescribed deductions set out in s.269TAB(2) for the purpose of determining a deductive export price under s.269TAB(1)(b), it is not appropriate for the ADC to deduct the amount of interim dumping duty paid in relation to those goods, at least where an application for a final duty assessment in accordance with s.269V is, or may be, on foot.

19. In REP 543, the ADC found that PanAsia China was the exporter of aluminium extrusions exported to Australia during the inquiry period and that:

- the goods had been exported to Australia otherwise than by the importer;
- the goods had been purchased by the importer from the exporter;
- the purchases of the goods by the importer were not arms length transactions; and
- the goods were subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer.

Accordingly, the ADC determined the export price for PanAsia China's exports under s.269TAB(1)(b).

20. Under s.269TAB(1)(b), the export price is the price at which the goods were sold by the importer less the prescribed deductions. The prescribed deductions are found in s.269TAB(2) and relevantly include at s.269TAB(2)(a) "any duties of Customs or sales tax paid or payable on the goods". In determining the export price of the goods exported by PanAsia China, the ADC deducted the amount of interim dumping duty paid on the importation of such goods.

21. The PanAsia Group submits that interim dumping duties are not duties of Customs within the meaning of s.269TAB(2)(a) and the ADC erred in concluding otherwise in REP 543. Rather, according to the PanAsia Group, only the final dumping duty that is or will be payable should be treated as a prescribed deduction. The final dumping duty is, according to the submission:

    - if no application for an assessment is made within the time allowed by s.269V(2) of the Act, the amount of interim dumping duty; or
    - if such an application is made (or may yet be made), the amount determined to be payable following a duty assessment completed in respect of the goods under s.269Y of the Act.

22. At the time of REP 543 and the Reviewable Decision by the Minister, there were two outstanding applications by PanAsia Australia for duty assessments. The importation periods covered by the assessment applications substantially overlapped the inquiry period.

23. In support of its contention that s.269TAB(2)(a) should be construed to permit only the deduction of final dumping duties, the PanAsia Group make six contentions, namely:

- the construction best accords with the text of s.269TAB(2)(a), taking into account the distinct nature of “interim” and “final” duty assessments;
- it is the construction most consistent with the purpose of calculating a deductive export price, namely, to deliver a reliable export price that is representative of an arms-length sale;
- it is supported by the text of other provisions of the Act, including the definition of “dumping duty” in s.269T, and the duty assessment provisions in s.269X;
- it is consistent with existing practice adopted by the ADC and the Review Panel in other inquiries in circumstances which are not materially different;
- the approach is consistent with the terms of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement);
- the approach adopted by the ADC will lead to perverse, capricious, and unreasonable consequences.

24. I consider the arguments made in support of each of these contentions below. However, the PanAsia Group’s ground for review is essentially one of the proper construction of s.269TAB(1)(b) and s.269TAB(2)(a). Before considering the above contentions, it is useful to consider the approach required in construing legislation such as s.269TAB(1)(b) and s.269TAB(2)(a).

25. The principles of statutory construction have been stated by the High Court on a number of occasions and are well settled. These principles have been described as follows:

- The task of statutory construction begins with a consideration of the text itself.[3]

- No part of a statute can be considered in isolation from its context.[4]

- The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.[5]

- A court construing a statutory provision must strive to give meaning to every word of the provision.[6]

26. The High Court has summarised the approach as:

> *… the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself*.[7]

The nature of interim duty assessments

27. The PanAsia Group submission on the first contention starts with a reference to s.8(1) of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) and that the duty of Customs imposed by s.8(1) is referred to as "dumping duty". The submission then points to s.8(3) which provides that an interim dumping duty is payable pending final assessment of the dumping duty payable on goods. This means, that "dumping duty" is the final duty assessed in accordance with s.8(6) of

[3] *Alcan (NT) Alumina Pty Ltd v Cmr of Territory Revenue (Northern Territory)* [2009] HCA 41 at [47] per Hayne, Heydon, Crennan & Kiefel JJ.
[4] *Cooper Brookes (Wollongong) Proprietary Ltd v Commissioner of Taxation (Cth)* [1981] HCA 26; (1981) 147 CLR 297 at 304 per Gibbs CJ.
[5] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [69] per McHugh, Gummow, Kirby and Hayne JJ.
[6] Above at [71].
[7] *Federal Cmr of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 at [39].

the Dumping Duty Act and that the imposition of liability to pay the interim duty is , like the provisional tax arrangement upheld in *Commissioner of Taxation v Clyne*[8], not a distinct tax, but a measure ancillary to the imposition of the principal tax.

28. This structure is, according to the PanAsia Group submission, reflected in the Act. The argument is that at all times before the prescribed time for an application for duty assessment expires, the interim duty remains subject to the possibility that an application for duty will be made. If such an application is made, it ends with either a refund of any overpayment of duty or a waiver of any unpaid duty pursuant to s.269Y(1). If no application for a duty assessment is made, then pursuant to s.269Y(4) the interim dumping duty is deemed to be the duty payable.

29. It is s.269Y(4) which, according to the argument, serves to confirm that the statutory scheme identifies the dumping duty calculated under s.8(6) of the Dumping Duty Act as the relevant dumping duty. The payment of interim dumping duty is never the "end of the story" in so far as the imposition of dumping duty is concerned. In these circumstances, the PanAsia Group argues, interim duty is not properly described as a duty of Customs.

30. It is also argued that the interim duty is not "paid or payable" except in a provisional sense as until one of the results in s.269Y(1) or s.269Y(4) occurs, the interim dumping duty is subject to the possibility of being wholly or partially refunded. In circumstances where interim dumping duty has been paid in excess of the duty properly payable under the Dumping Duty Act, the PanAsia Group argue it can be fairly said that there is an entitlement to recover the unpaid amount.

31. The above, according to the PanAsia Group submission, means that, for the purposes of s.269TAB(2)(a)[9], the only "duty of Customs…paid or payable on the goods" pursuant to the Dumping Duty Act is the amount of final duty assessed, or deemed to be payable, under s.269Y.

32. In order to consider the arguments made by the PanAsia Group on this point it is necessary to start with the words of s.269TAB(2) which relevantly provide that a reference to prescribed deductions in s.269TAB(1)(b) shall be read as a reference

[8] (1958) 100 CLR 246.

[9] The submission accompanying the PanAsia Group application referred to s.269TAB(2)(b). I have read this as a reference to s.269TAB(2)(a).

to, among other things, “any duties of Customs or sales tax paid or payable on the goods”: s.269TAB(2)(a). Does the reference to any duties of Customs include a reference to interim dumping duty paid at the time of the importation of goods the subject of a notice under s.269TG(1) or (2) of the Act?

33. The submission by the PanAsia Group correctly refers to the Dumping Duty Act as the source of the liability to pay interim dumping duty. The starting point though is s.7 of the Dumping Duty Act. That section provides that “Duties of Customs are imposed in accordance with this Act.”

34. Subsection 8(2) of the Dumping Duty Act provides:

> *There is imposed, and there must be collected and paid, on goods:*
>
> *(a) to which this section applies by virtue of a notice under subsection 269TG(1) or (2) of the Customs Act;*
>
> *(b) in relation to which the amount of the export price is less than the amount of the normal value;*
>
> *a special duty of Customs, to be known as dumping duty calculated in accordance with subsection (6)*.

35. The liability to pay interim dumping duty arises under s.8(3) which provides that:

> *Pending final assessment of the dumping duty payable on goods the subject of a notice under subsection 269TG(1) or (2) of the Customs Act, an interim dumping duty is payable on those goods*.

36. From the above, it can be concluded that the Dumping Duty Act imposes a liability to pay interim dumping duty in certain circumstances and that duties imposed by the Dumping Duty Act are duties of Customs. It is difficult in these circumstances to conclude other than that the liability imposed to pay interim dumping duty is a liability to pay a duty of Customs.

37. The argument by the PanAsia Group essentially relies on the provisional or interim nature of interim dumping duty and that there is a possibility that at some time after importation it may be wholly or partially refunded. However, I do not consider that

this means that interim dumping duty which is imposed on imports under s.8(3) of the Dumping Duty Act is not a duty of Customs.

38. If the PanAsia Group submission is to be accepted then interim dumping duty must be something other than a duty of Customs. The explanation offered is that it is a measure ancillary to the imposition of dumping duty in a similar way to provisional tax is to the principal tax. However, as was pointed out in *Commissioner of Tax v Clyne*[10], the liability to pay provisional tax "is not a liability to another and distinct tax". Taking this approach, interim dumping duty is not a separate duty to the dumping duty imposed by the Dumping Duty Act but rather an interim dumping duty, as its name implies.

39. I consider that interim dumping duty is properly described as a duty of Customs. There is then the argument that it is not "paid or payable". I am not persuaded by the arguments made by the PanAsia Group that the interim dumping duty paid by PanAsia Australia on the importation of aluminium extrusions was not paid within the meaning of s.269TAB(2)(a). There were clearly amounts paid as the PanAsia Group submission states. The possibility that at some time subsequent to that payment, the amounts may be repayable in whole or in part does not make it any less a fact that such amounts of interim duty have been paid.

40. To accept the argument by the PanAsia Group would mean ignoring the word "paid" in s.269TAB(2)(a). As noted above, in construing a statue, an effort must be made to give meaning to every word.[11] I note that the Commissioner in his submission refers to authority that omitting words from legislation is only permissible in circumstances involving "simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision".[12] Nothing is put by the PanAsia Group which would support reading s.269TAB(2)(a) as if "paid" was not included in the paragraph.

41. If their ordinary meaning is given to the words in s.269TAB(2)(a), then any duty of Customs paid on the goods should be one of the deductions for the purpose of calculating the export price under s.269TAB(1)(b). Interim dumping duty is a duty of

[10] (1958) 100 CLR 246.
[11] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [71].
[12] *Taylor v Owners - Strata Plan No. 11564* (2014) 253 CLR, 548 [38] per French CJ, Crennan and Bell JJ.

Customs and it was paid on the importation of the goods by PanAsia Australia. It is therefore an amount that is deducted under s.269TAB(2)(a) when calculating the export price for the exports of PanAsia China under s.269TAB(1)(b).

42. The PanAsia Group submission also refers to the reasoning of the ADC in REP 543 that final dumping duty only becomes payable once the Minister has ascertained the variable factors relevant to the determination of duty payable under the Dumping Duty Act. It is submitted that while this is correct as far as it goes, it fails to grasp the character of the interim duty as explained in the PanAsia Group submission.

43. Two possible outcomes are stated to flow from the analysis, either:

    (a) No dumping duty is permitted to be deducted under s.269TAB(2)(a)[13] in arriving at a deductive export price, unless a liability to final duty has crystallised under s.269Y(1) or (4); or

    (b) Section 269TAB(2)(a)[14] read in context, extends to duties of Customs (including dumping duty) that will become payable on the goods, and in such a case calls for a reasonable estimate to the made of those duties.

    I note that the first outcome is the PanAsia Group's preferred position.

44. Neither of the two outcomes put forward by the PanAsia Group are an obvious interpretation of s.269TAB(2)(a). Both require, in effect, re-writing of the legislative provision. The application of the ordinary meaning of the words of s.269TAB(2)(a) does not result in an outcome that would warrant such a re-writing.

45. I do not consider it necessary to come to a view on when dumping duty becomes "payable" within the meaning of s.269TAB(2)(a) for the purpose of this review. I note that under the scheme of the legislation relating to the assessment of dumping duty, only the interim dumping duty is actually paid as any amount assessed in excess of the interim dumping duty is waived: s.269Y(1)(b).

[13] The submission by the PanAsia Group which accompanied the application referred to s.269TAB(2)(b). I have read it as a reference to s.269TAB(2)(a).
[14] As above.

The purpose of calculating a deductive export price

46. The PanAsia Group submits that its preferred construction of s.269TAB(1)(b) more accurately reflects the purpose of the assessment in s.269TAB(1)(b). The submission refers to the ADC's Dumping and Subsidy Manual commentary on s.269TAB(1)(b) and argues that the purpose of s.269TAB(1)(b) and s.269TAB(2)(a) is to provide a mechanism for the construction of an export price that is representative of an arms length sale. A reference is also made to the statement in REP 543 that the determination under s.269TAB(1)(b) was designed to "work the invoiced amount back to a FOB price from China".[15]

47. The submission also refers to an information sheet published by the then Department of Industry, Innovation and Science for the calculation of a deductive export price[16] and claims that what emerges from the list is that the calculation of a "deductive export price" is concerned with actual expenses incurred in the process of exportation/importation. It is argued that this is clear from an express reference to "net" profit as distinct from any gross profit margin which might otherwise have been considered.

48. Given the above, the PanAsia Group contend that it is neither appropriate nor useful for the ADC to have regard only to interim duties paid in circumstances where a duty assessment is on foot. Deducting interim duty and taking no account of the possibility that some portions of that duty are, or are likely to be, subject to a refund following assessment, fails to deliver a reliable export price that is representative of an arms length sale as it significantly over-estimates the impact of duties upon the selling price by having regard to funds which are, or will be, refunded.

49. To illustrate the point it was making, the PanAsia Group refers to a submission it made to the ADC to the effect that if an importer pays $20,000 in interim dumping duty, and the ADC establishes that the final amount payable was zero which results in a final refund of the interim dumping duty paid, the importer has in effect incurred

[15] REP 543 section 6.9.2 at page 61.
[16] *International Trade Remedies Advisory Service Fact Sheet: "How to Calculate a Deductive Export Price*?" (31 July 2019).

no dumping duty expense. It was further submitted that this was despite the fact that the importer may be refunded the duties some months after the importation.

50. I accept the contention by the PanAsia Group to the extent that it asserts that the purpose of s.269TAB(1)(b) is to ascertain an export price which approximates an arms length transaction. It does this by taking the price at which the goods are sold by the importer and deducting from that price the prescribed deductions. These deductions are specified in s.269TAB(2). I also agree that s.269TAB(2) is concerned with the expenses incurred in the process of exportation/importation.

51. In *Powerlift (Nissan) Pty Ltd v Minister for Small Business, Construction & Customs*[17], Hill J described the role of s.269TAB(1)(b) and s.269TAB(2) as follows:

> *However, if exporter and importer are not at arms length, then the Act recognises the need to adopt some other method of calculation to work back to what an arms length price between exporter and importer would have been. The simplest calculation, and that with which s.269TAB(1)(b) and the related subsection s.269TAB(2) is concerned, commences with the price received by the importer for the sale of the goods to an arms length third party and proceeds to deduct from that price certain amounts to arrive at an approximation of the arms length price from the exporter to the importer*.[18]

52. However, it does not follow from the above that the purpose of s.269TAB(1)(b) requires s.269TAB(2)(a) to be read as excluding interim dumping duty from the reference to "any duties of Customs".

53. Some assistance in considering this issue may be obtained from the legislative history of these provisions.

54. Section 269TAB was introduced into the Act by the *Customs Legislation (Anti-Dumping) Act 1988*. Before that the legislative provision for determination of the export price was found in s.4 of the Dumping Duty Act. The earlier version of s.269TAB(1(b) and s.269TAB(2) was found in s.4(1)(b) which provided as follows:

[17] [1993] FCA 38.
[18] Above at page 45.

where the goods have been so exported otherwise than by the importer and have been purchased by the importer (whether before or after exportation) and the purchase is not an arms length transaction, but the goods, in the condition in which they were exported, have been purchased from the importer by another person and the purchase by that other person is an arms length transaction— the price paid or payable for the goods by that person less—

(i) duties of Customs and sales tax paid or payable on the goods;

(ii) all costs, charges and expenses arising in relation to the goods after exportation; and

(iii) *the profit, if any, on the sale to that person or, where the Minister so directs, the amount calculated in accordance with such rate as the Minister, having regard to all the circumstances of the sale, specifies, in writing, as the rate that, for the purposes of this Act, is to be regarded as the rate of profit on the sale*.

55. The Explanatory Memorandum for the Bill introducing the Dumping Duty Act stated with respect to s.4(1)(b) that:

> *In the case of transactions which are not at arm's length, the export price may be assessed by reference to a sale by the importer in Australia. This provision will more effectively counter the practice of hidden dumping (sometimes referred to as sales dumping) than is possible under existing legislation*.[19]

"Sales dumping" can occur when goods have not entered Australia at a price less than the normal value in the country of export, but have thereafter been "dumped" by being sold at a loss by the importer.[20]

56. The Explanatory Memorandum also stated as one of its objects that it was designed to give effect to the Australian Government's decision to adopt the "GATT Anti-Dumping Code". This was a reference to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, an earlier version of the

[19] Explanatory Memorandum to Customs Tariff (Anti-Dumping) Bill 1975, clause 4(b) at page 2.
[20] *Powerlift (Nissan) Pty Ltd v Minister for Small Business, Construction & Customs* [1993] FCA 38 at page 70.

WTO Anti-Dumping Agreement.[21] Article 2(e), the relevant provision of the GATT Anti-Dumping Code, provided that:

> *In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine*.[22]

57. Article 2(f) of the GATT Anti-Dumping Code also provided that for the cases referred to in Article 2(e) "allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made". The relevant provisions of the WTO Anti-Dumping Agreement are Article 2.3 and Article 2.4.

58. Interim dumping duties were introduced by the *Customs Tariff (Anti-dumping) Amendment Act (No. 2) 1992* which amended the Dumping Duty Act. Consequential changes were made to the Act by the *Customs Legislation (Anti-Dumping Amendments) Act 1992*. The latter Act amended the definition of "dumping duty" to exclude interim dumping duty, introduced a definition of interim dumping duty, introduced new provisions to deal with duty assessments (Division 4) and for reviews of interim duty (Division 5) and made other consequential changes. No change was made to the reference to "any duties of Customs" in s.269TAB(2)(a).

59. From the above, some points can be made about the purpose of s.269TAB(1)(b) and s.269TAB(2)(a). First, they provide a mechanism to obtain a constructed export price in circumstances where the actual export price is unreliable because it is not arms length. Second, they do this by taking an actual price at which the goods are on sold to an independent buyer and then deducting costs plus profit to arrive at a reliable export price.

[21] WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
[22] Australian Treaty Series 1975 No. 44.

60. The purpose of the legislation was also to prescribe what costs were to be deducted from the on-sale price in accordance with the GATT Anti-Dumping Code which specified “duties and taxes” as included in the costs for which allowance should be made. The legislation was also designed to avoid “sales dumping” occurring, that is, when the imported goods are on-sold at prices which do not cover all of the costs to import and sell.

61. It is also clear from the above legislative context that while consequential changes were made to the anti-dumping legislation to account for the introduction of interim dumping duties, no change was considered necessary for the wording of s.269TAB(2)(a).

62. Interim dumping duty is a duty of customs which is paid on importation of goods the subject of a notice under s.269TG(1) or (2). It is a cost or expense incurred on the importation of the goods and there is an obvious legislative intent to include all costs incurred in connection with the importation of the relevant goods. While it may be that at some later time, some or all of that duty is refunded, it does not alter the fact that the interim dumping duty was paid and accordingly, the application of s.269TAB(2)(a) requires such paid duty to be deducted from the on-sale price.

Additional Textual Support for the Applicant’s Approach

63. The PanAsia Group contend that support for their construction of s.269TAB(2) can be drawn from two other provisions in the Act. The first is the definition of “dumping duty” which refers to duty other than interim dumping duty. I do not consider this assists them. The relevant words of s.269TAB(2)(a) are “any duties of Customs”. There is no reference to dumping duty. It would be a laboured construction to use a definition of one phrase using certain words to define a different phrase using other and different words.

64. As noted above, the amendment to the definition was made by the legislation introducing the interim dumping duty scheme. While consequential amendments were made, these did not include any change to the wording of s.269TAB(2)(a).

65. The second provision is found in Division 4 of the Act which contains the duty assessment scheme. Section 269X(5B)(b) provides that in provisionally ascertaining the export price under s.269TAB(1)(b), the Commissioner must not deduct the

amount of interim duty, if the Commissioner has conclusive evidence of the things listed in s.269X(5B)(a).

66. The PanAsia Group argue that this assumes special significance in circumstances where a duty assessment is to be determined concurrently with a continuation inquiry. Consistency in approach across these provisions, it is argued, supports their construction of s.269TAB(2)(a).

67. I do not consider that this argument supports the construction of s.269TAB(2)(a) for which they contend. The wording of s.269X(5B)(b) opens with "despite paragraph 269TAB(1)(b)". This would suggest a concern by the drafter of the legislation that there may otherwise be a conflict with the requirement in s.269TAB(1)(b) for the deduction of interim dumping duty through the application of s.269TAB(2)(a).

68. Subsection 269X(5B) is concerned with the ascertainment of the export price in the context of a duty assessment. It requires that the export price be ascertained with no deduction for the amount of the interim dumping duty paid if the Commissioner has conclusive evidence of the matters specified in s.269X(5B)(a). It provides no assistance to the construction of s.269TAB(2)(a) for which the PanAsia Group contends. To the extent that the subsection assumes that interim dumping duty may otherwise be deducted, it works against that contention.

69. I note that my approach to the argument based on s.269X(5B) is consistent with that of the Review Panel in ADRP Report No.104.[23]

Consistency with Existing Practice

70. In support of their interpretation of s.269TAB(2)(a), the PanAsia Group refers to the approach of the ADC in previous similar circumstances. In particular, reference is made to the construction of one of the exporter's export price in an inquiry into the continuation of measures applicable to certain power transformers exported to Australia from Indonesia, Taiwan and Thailand. In that case, the deductions made to reach a constructed export price included an amount for final anti-dumping duties preliminarily calculated based on information submitted by the exporter in support of a duty assessment application then under consideration.

[23] ADRP Report No. 104 at [148] and [149].

71. The ADC had rejected this argument by the PanAsia Group on the basis that the export price in the case referenced was constructed under s.269TAB(1)(c) which, according to the ADC, required the Minister to determine a price having regard to all of the circumstances of the exportation, whereas s.269TAB(1)(b) was more prescriptive.

72. The PanAsia Group contend that the ADC response shows a misunderstanding of their argument. This argument is not that the relevant sections should be interpreted as if the Minister could take into account all relevant circumstances. Rather as the wording of s.269TAB(1)(b) and s.269TAB(2)(a) is ambiguous fundamental values of consistency, fairness, predictability, equality of treatment and integrity in decision making favour adopting a construction that is consistent with that adopted under s.269TAB(1)(c).

73. They further argue that s.269TAB(1)(b) and (1)(c) share the same underlying purpose and function: namely both provide methods of constructing a reliable export price that is indicative of an arms length transaction in circumstances where the price paid is deemed to be unreliable. The difference in the circumstances in which recourse may be had to each subsection, it is argued, discloses no rational basis to support the adoption of a different approach to the calculation.

74. The PanAsia Group also points to the report of the Review Panel in ADRP Report No. 58 and relies on certain comments made in that report. The Review Panel in that review was however considering whether sales had been made at a loss within the meaning of s.269TAA(2)(b) and not the construction of s.269TAB(1)(b) and s.269TAB(2)(a).

75. In addition, the PanAsia Group refer to other examples of the approach by the ADC to the calculation of a deductive export price in which adjustments were made to account for the recovery of interim dumping duty. The examples are provided, it is stated, as an aid to the proper interpretation of the scope of “duty paid or payable” within s.269TAB(2)(a). It would, it is argued, be illogical and highly unusual to expect that export prices would be determined differently under different subsections of s.269TAB, where the information related to the same period, same consignments, same data and same circumstances, and the purpose of the provisions are the same.

76. I do not find the examples provided by the PanAsia Group of the ADC's approach in other investigations or inquiries of assistance. The approach of the ADC in other investigations or inquiries cannot be an aid to statutory interpretation. While in some cases the approach to the ascertainment of a deductive export price under s.269TAB(1)(b) and (c) may be the same, this may not always be the case. As was noted in *Powerlift (Nissan) Pty Ltd v Minister for Small Business, Construction & Customs*, the Minister has a wider discretion to determine the export price under s.269TAB(1)(c).[24]

Consistency with GATT 1994

77. The PanAsia Group contends that their approach is more consistent with the terms of the WTO Anti-Dumping Agreement than that of the ADC. The basis for this contention is the wording in Article 2.4 which refers to "costs, including duties and taxes, incurred between importation and resale" as opposed to the language of "duties paid or payable".

78. It is argued that the reference to duties and taxes as included within the concept of "costs…incurred between importation and resale" reinforces their submission that s.269TAB(1)(b) and (2)(a) are concerned with the net duty actually incurred as a final expense, after any refunds have been processed following duty assessment. This is further reinforced, it is argued, by reference to Article 9.3.3.

79. Article 9.3.3 of the WTO Anti-Dumping Agreement provides:

> *In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided*.

80. As noted by the PanAsia Group, Article 9.3.3 is the basis for s.269X(5B). I note that the submission by the Commissioner refers to the Explanatory Memorandum to the

[24] [1993] FCA 38 at page 45.

Bill which introduced s.269X(5B) into the Act which confirms that s.269X(5B) was introduced to give effect to Article 9.3.3.[25]

81. I am not convinced that there is any inconsistency between the approach which treats any interim dumping duty paid as a "duty of Customs" for the purpose of s.269TAB(2)(a) and Article 2.4 of the WTO Anti-Dumping Agreement. Article 2.4 makes it clear that any duties or taxes paid between importation and resale are to be included as costs.

82. For the same reason s.269X(5B) does not assist the PanAsia Group, Article 9.3.3 also does not support their contention.

Practical Consequences are Perverse and Capricious

83. The PanAsia Group submit that a number of practical consequences of the ADC's interpretation are perverse and capricious.

First Instance

84. For the first instance they contend that the approach adopted by the ADC would appear to be inconsistent with the general purpose of imposing interim dumping duties. To describe the general purpose they reference the following excerpt from a report of the Review Panel:

> *In general terms, the intent of the imposition of interim dumping duty, in a prospective duty collection regime, is to deliver protection to the domestic industry in circumstances in which export prices continue to be less than normal values. If however, the exporter alters its pricing structure such that export price exceeds that of the normal value the legislation confers upon the importer the right to apply for a dumping duty assessment*.[26]

85. It is argued that the approach adopted by the ADC is discordant with the objective outlined as there is no scope for PanAsia China to meaningfully reduce its dumping margin. If the export price calculation simply ignores the likely refund of interim dumping duties in calculating the deductive export price, then to reduce its dumping

[25] Explanatory Memorandum to the *Customs Legislation Amendment Bill (No.2) 2002* at item 19.
[26] ADRP Report No. 58 at [64].

margin to zero (so as to prevent the continuation of measures), PanAsia Australia would have to adjust its selling prices by an amount double the interim dumping duties which it had paid. Such an alteration, it is submitted, is far beyond that which is required for the protection of domestic industry and highlights the absurdity of the ADC's approach.

86. A further argument is made to the effect that in a hypothetical situation the measures would be self perpetuating. This hypothetical situation is based on the PanAsia Group reforming its operations by 2019 so that the goods exported to Australia were no longer dumped. However, interim dumping duty was payable based on the variable factors last determined by the Minister, although the Group would have been confident of obtaining a full refund. On the ADC's approach, the full amount of the interim dumping duty would be deducted from PanAsia Australia's selling prices in calculating the export price and the goods would have been wrongly taken to have been dumped (leading again to the continuation of the measures).

87. I consider the above examples given by the PanAsia Group oversimplify what might occur and do not take into account the different factors which constitute a finding of dumping and a decision to continue measures. There are many variables which need to be considered. For example, the outcome may depend on what period is selected by the ADC for the inquiry. I note that the practice of the ADC is to use the net amount paid in interim dumping duty for the deduction under s.269TAB(2)(a) where there has been a refund ordered under s.269Y(1)(b).

88. Even if the hypothetical outcome was a possibility, I do not accept that the outcome is so absurd that it justifies interpreting s.269TAB(2)(a) in a way that requires the exclusion of words or the addition of qualifying words. The words of s.269TAB(2)(a) are clear. Any duties of Customs paid are to be deducted from the sale price used under s.269TAB(1)(b). For the reasons given above, interim dumping duty is a duty of Customs.

89. I also note that the clearer the natural meaning of the text of the legislation, the more difficult it is in construing such text to depart from it.[27] To depart from the

[27] *SAS Trustee Corporation v Miles* [2018] HCA 55 per Edelman J at [64].

ordinary meaning of the words in s.269TAB(1)(b) and s.269TAB(2)(a) would require a much stronger case than that put forward by the PanAsia Group.

The Second Instance

90. The second case put forward is based on the ADC's position that final dumping duty only becomes payable after the Minister's decision under s.269Y(1). From this, the PanAsia Group point out that the ADC would consider the effect of the decision of the Minister but would not consider a final duty assessed and recommended to the Minister by the ADC but not yet formally determined by the Minister (notwithstanding that the Minister does not appear to have any significant scope to depart from that recommendation).

91. The above has the effect, it is argued, that the ADC is compelled to have regard to out of date information or information that it knew to be no longer reliable or representative.

92. As I note above, I have not given consideration to the debate as to when the final dumping duty becomes payable as under the scheme of the legislation only the interim dumping duty is paid and no further amount ever becomes payable. However, to the extent the debate is as to when any refund becomes payable, then it has more relevance.

93. I understand the point being made by the PanAsia Group and there is some merit in an argument that, if the ADC has information that the net amount of the interim dumping duty will be less than that paid, this should be taken into account in ascertaining a deductive export price. However, this is not what the legislation provides. The words of s.269TAB(1)(b) and s.269TAB(2)(a) are clear that any duty of Customs paid on importation is to be deducted in calculating the export price under s.269TAB(1)(b). Interim dumping duty is a duty of Customs.

94. The approach of the ADC to allow a net amount for the deduction of interim dumping duty if, as a result of a duty assessment, the Minister orders a repayment of any excess duty has merit. However, that situation does not arise in this review. There was no such order by the Minister at the time of the Reviewable Decision.

The third instance

95. The third instance relied upon by the PanAsia Group follows from the second instance. It is submitted that the approach of the ADC to the construction of s.269TAB(2)(b) makes the export price dependant on the alacrity or otherwise with which the ADC, and the Minister, perform their duties under the duty assessment provisions. This, it is argued, is a perverse result and therefore unlikely to have been intended by the legislature.

96. The PanAsia Group also point to the circumstance of PanAsia Australia's duty assessment applications. As noted above, they relate to a period substantially overlapping with the inquiry period. According to the PanAsia Group, the ADC proposed to deal with the assessment applications and the continuation inquiry in parallel and extended the deadlines of the former so this could happen. However, by the time of REP 543, the assessment applications had not produced an outcome and the whole of the interim dumping duty was deducted in determining the export price. According to the PanAsia Group submission, had the completion of the assessment applications not been delayed, the outcome of would have been different. This, they contend, cannot be what Parliament intended.

97. The first point to be made with respect to the above is that as the result of the duty assessment applications was not available at the time of the Reviewable Decision, it is not something which I can simply assume. As noted above, the issue of the ADC allowing for any refund of duty paid in making a deduction under s.269TAB(2)(a) does not arise in this review. Even if this approach to the legislation is correct, any resulting anomaly in the approach depending on the timing of the completion of the duty assessment process does not warrant interpreting s.269TAB(1)(b) and s.269TAB(2)(a) differently to the ADC's approach in this case.

98. For all of the reasons above, I consider that the PanAsia Group has not established that the Reviewable Decision is not the correct or preferable decision.

Foshan Lvqiang

99. The ground upon which Foshan Lvqiang's application relies for the Reviewable Decision not being the correct or preferable decision depends on the outcome of the application by the PanAsia Group. It follows therefore that as I have not found that the PanAsia Group has established that the Reviewable Decision is not the correct

or preferable decision, I must also find that similarly Foshan Lvqiang has not succeed with its ground for review.

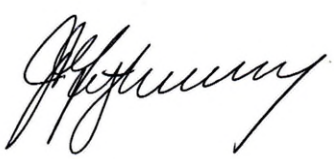
Recommendations and Conclusions

100. I can understand the difficulty which the PanAsia Group has with accepting the deductive export price determined in the course of the continuation inquiry given that there appears to be a possible anomaly in the approach based on the timing of related duty assessments. However, the Review Panel, along with the ADC and the Minister, has to apply the legislation as drafted. Applying the rules of statutory construction, the relevant legislative provisions were correctly construed by the ADC.

101. As s.269TAB(1)(b) and s.269TAB(2)(a) of the Act, properly construed, required that the amount of interim dumping duty paid on the importation of the goods be deducted when calculating the export price for PanAsia China's exports, no error occurred in that respect. No other error is alleged in the ground for review in the application by the PanAsia Group or the application by Foshan Lvqiang.

102. Neither the PanAsia Group application nor the Foshan Lvqiang application establishes that the Reviewable Decision was not the correct or preferable decision. In those circumstances, I find that the Reviewable Decision was the correct or preferable decision.

103. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I recommend that the Minister affirm the Reviewable Decision.



Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
27 January 2021