Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 6 July 2021 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application to the ADRP for review of a Ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information
You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10, 11 and/or 12 of this application form (s 269ZZG(1)). See the ADRP website for more information.

Withdrawal
You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

Contact
If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name:	**Compañía Electro Metalúrgica S.A ("ME Elecmetal")**
Address:	**Avenida Andrés Bello 2233** **Piso 12 Providencia** **Santiago** **Chile** **7510056**
Type of entity (trade union, corporation, government etc.):	**Corporation**

2. Contact person for applicant

Full name:	**Alistair Bridges**
Position	**Senior Associate**
Email	**alistair.bridges@moulislegal.com**
Telephone	**+61 2 6163 1000**

3. Set out the basis on which the applicant considers it is an interested party:

Pursuant to Section 269ZZC of the Customs Act 1901 ("the Act") a person who is an interested party in relation to a reviewable decision may apply for a review of that decision.

The reviewable decision in this case relates to the Minister's decision under Section 269ZHG(1) to secure the continuation of anti-dumping measures that apply to the exportation of grinding media.

Under Section 269T of the Act an "interested party" for the purpose of that kind of a reviewable decision is defined as including, amongst others, any person who is or is likely to be directly concerned with the importation or exportation into Australia of the goods the subject of the reviewable decision; any person who has been or is likely to be directly concerned with the importation or exportation into Australia of like goods; and any person who is or is likely to be directly concerned with the production or manufacture of the goods the subject of the application or of like goods that have been, or are likely to be, exported to Australia

ME Elecmetal is a participant in the Australian market for grinding balls. It imports grinding ball that is manufactured in China and exported by Changshu Longte

Grinding Ball Co., Ltd. Accordingly, ME Elecmetal is directly concerned with the importation of the goods subject to the reviewable decision.

4. **Is the applicant represented?**

Yes ☒ **No** ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☐Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☒Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed**.

6. Provide a full description of the goods which were the subject of the reviewable decision:

The goods subject of the reviewable decision, as described in Final Report 569 are:

Ferrous grinding balls, whether or not containing alloys, cast or forged, with diameters in the range 22 mm to 170 mm (inclusive).

The goods covered include all ferrous grinding balls, typically used for the comminution of metalliferous ores, meeting the above description of the goods, regardless of the particular grade or alloy content.

Goods that are excluded include stainless steel balls, precision balls that have been machined and/or polished, and ball bearings.

7. Provide the tariff classifications/statistical codes of the imported goods:

The goods are generally classified according to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

Tariff code	Statistical code	Description
7325.91.00	26	Grinding balls and similar articles for mills

7326.11.00	**29**	**Grinding balls and similar articles for mills**
7326.90.90	**60**	**Other**

8. **Anti-Dumping Notice details:**

Anti-Dumping Notice (ADN) number	**Anti-Dumping Notice No. 2021/95. Please refet to Attachment 1.**
Date ADN was published	**8 September 2021**

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application*

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be highlighted in yellow, and the document marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page.

Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

Noted. ME Elecmetal's application does not include confidential information.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

9. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

Please refer to Attachment 2 – Grounds for review.

10. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:**

Please refer to Attachment 2 – Grounds for review.

11. **Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:**

Please refer to Attachment 2 – Grounds for review.

12. **Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:**

Please refer to Attachment 2 – Grounds for review.

13. **Please list all attachments provided in support of this application:**

The attachments provided in support of this application are: • **Attachment 1 – ADN 2021/095;** • **Attachment 2 – Grounds for review; and** • **Attachment 4 – Letter to ADRP re ML authority.**

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature	
Name	**Alistair Bridges**
Position	**Senior Associate**

Organisation	**Moulis Legal**
Date	**8 October 2021**

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative:

Full name of representative	**Alistair Bridges**
Organisation	**Moulis Legal**
Address	**6/2 Brindabella Circuit** **Brindabella Business Park** **Canberra International Airport** **Australian Capital Territory 2609** **Australia**
Email address	**alistair.bridges@moulislegal.com**
Telephone number	**+61 2 6163 1000**

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

Please refer to Attachment 3 – Letter to ADRP re ML Authority

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date: / /

ANTI-DUMPING NOTICE NO. 2021/95

Customs Act 1901 - Part XVB

Grinding Balls exported to Australia from the People's Republic of China

Decision on Continuation Inquiry No. 569 into Anti-Dumping Measures

Notice under section 269ZHG(1)[1]

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry, which commenced on 14 December 2020, concerning the continuation of the anti-dumping measures, in the form of an anti-dumping notice and a countervailing duty notice, applying to grinding balls (the goods) exported to Australia from the People's Republic of China (China).

Recommendations resulting from the inquiry completed by the Commissioner, reasons for the recommendations and material findings of fact and law in relation to the inquiry are contained in Commissioner's Report No. 569 (REP 569).

I, CHRISTIAN PORTER, the Minister for Industry, Science and Technology, have considered REP 569 and have decided to not accept the recommendations in REP 569.

Under section 269ZHG(1)(b) of the Act, I **DECLARE** that I have decided to secure the continuation of the anti-dumping measures set out in the dumping duty notice and the countervailing duty notice currently applying to the goods exported to Australia from China.

Having decided to secure the continuation of the anti-dumping measures set out in the notices currently applying to the goods exported to Australia from China, I **DETERMINE** pursuant to section 269ZHG(4)(a)(i) of the Act, that the notices continue in force after 9 September 2021.

REP 569 and the reasons for my decision will be placed on the public record which may be examined on the Anti-Dumping Commission website.[2] Enquiries about this notice may be directed to the Anti-Dumping Commission at: clientsupport@adcommission.gov.au

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.[3]

[1] All legislative references are to the *Customs Act 1901* (Cth) (the Act), unless otherwise stated.
[2] The public record is available at www.adcommission.gov.au
[3] The Anti-Dumping Review Panel website may be accessed via http://www.industry.gov.au/about-us/our-structure/anti-dumping-review-panel

Dated this 8th day of September 2021

CHRISTIAN PORTER

Minister for Industry, Science and Technology

Application for review

Continuation inquiry No. 569
Grinding balls from China

Compañía Electro Metalúrgica S.A.

8 October 2021

A Introduction

By way of notice published 14 December 2020, the Commissioner of the Anti-Dumping Commission ("the Commissioner") initiated an inquiry regarding the continuation of anti-dumping measures applying to grinding balls exported from China ("Inquiry 569").

Anti-dumping measures had originally been imposed on grinding balls pursuant to Anti-Dumping Notice No. 2016/90 ("the Original Notice").[1]

On 12 November 2020, the anti-dumping measures were varied with respect to the goods exported by Changshu Longte Grinding Ball Co., Ltd ("Longte") pursuant to Anti-Dumping Notice No. 2020/117, following a variable factors review. ("Review 520").

The initiation of Inquiry 569 was a consequence of an application lodged by the Commonwealth Steel Company Pty Ltd ("Molycop") which constitutes the Australian industry producing like goods.

At the conclusion of Inquiry 569, the Commissioner recommended that the original notice expire on the expiry date, being 9 September 2021. The Commissioner set out his findings, conclusions and recommendations in *Customs Act 1901 – Part XVB – Report No. 569 – Inquiry into the Continuation of Anti-Dumping Measures Applying to Certain Grinding Balls Exported to Australia from the People's Republic of China* dated 23 July 2021 ("Report 569").

The then Minister for Industry, Science and Technology ("the Minister") did not accept the expiry recommendation. On 8 September 2021, *via* notice made under s 269ZHG(1) of the *Customs Act 1901* ("the Act") the Minister declared that he had decided to secure the continuation of the anti-dumping measures set out in the Original Notice. The Minister released his reasons for so deciding on 10 September 2021 ("the Minister's Reasons").

The Minister's Reasons note:

> *I do not agree with the Commissioner's findings of fact, evidence and reasons for the Commissioner's recommendations in REP 569 that the expiration of the anti-dumping measures in respect of exports of the goods from China would not lead or be likely to lead, to a continuation of, or a recurrence of, the dumping and subsidisation and the material injury that those measures are intended to prevent.*

Compañía Electro Metalúrgica S.A. ("ME Elecmetal") is involved in the exportation and importation of grinding balls manufactured and exported from China by Longte.[2] ME Elecmetal fully cooperated with the Commissioner during Inquiry 569 and was pleased that the Anti-Dumping Commission ("the Commission") determined a significant no-dumping margin of 8.9% and indicated, in the Statement of Essential Facts in Inquiry 569, the intention to recommend that the measures expire.

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1 Note, although countervailing measures have been imposed on some exporters, those measures do not apply to grinding balls manufactured by Longte.

2 This is as *per* the finding of the Commissioner in Report 569, at section 6.7.2 of Report 569, whether or not ME Elecmetal agrees with same.

The Minister's decision means that despite the careful and considered process undertaken by the Commissioner, and despite the outcomes achieved in Report 569, ME Elecmetal will still be required to pay anti-dumping duties on imports of Longte manufactured grinding balls for the next five years.

As outlined in this application, ME Elecmetal seeks review by the Anti-Dumping Review Panel ("ADRP") of the Minister's decision, under ss 269ZZA(1)(d) and 269ZZC of the Act.

B Preliminary issues

This application is made on the basis that the Minister's Reasons are just that – the reasons for his making of the reviewable decision, including any material findings of fact and particulars of evidence upon which those findings were based.[3]

Acknowledging the express terms of the Minister's Reasons, ME Elecmetal makes this application on the understanding that the Minister has not agreed with any *"findings of fact, evidence and reasons for the Commissioner's recommendations"* in Report 569. That is, the Reviewable Decision is not based on Report 569.

As such, ME Elecmetal's grounds for challenging the Minister's decision are based only on the Minister's Reasons. ME Elecmetal will not address any concerns it may have with the Commissioner's recommendations, noting that if such concerns were raised by ME Elecmetal, and decided in its favour, the result would likely be a further *reduction* in Longte's no-dumping margin. Our understanding is that the ADRP does not offer a venue to address such issues, as the Commissioner's findings of fact and conclusions do not form the basis for the Reviewable Decision. They cannot, because the Minister states, in the Minister's Reasons, that he did not agree with them.

C First ground – wrong standard for continuation

9 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

In making the reviewable decision, the Minister adopted an incorrect standard to determine whether the measures should continue, which was contrary to both Australian law and Australia's obligations as a member of the World Trade Organisation ("WTO").

For the Commissioner to recommend the continuation of anti-dumping measures, he or she is required to reach a certain degree of satisfaction. Specifically, as stated at s 269ZHF(2) of the Act:

> *The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the*

[3] There would be an obvious practical injustice if interested parties sought to appeal his decision to the ADRP, but did not have access to a full statement of reasons, including identification of any other materials he considered in tandem with the Commissioner's report under s 269ZHG(1).

> *dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*

This is the focus of a continuation inquiry. The Australian industry argues why the Commissioner should be so satisfied, interested parties who wish the measures to expire argue why he should not. In Inquiry 569, the Commissioner did not reach that standard of satisfaction – "*that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent"* - and so could not recommend the continuation of the measures.

S 269ZHF(2) falls within Part XVB of the Act. It was included in the Act by virtue of the *Customs Legislation (Anti-Dumping Amendments) Act 1998* ("the Amendment Act"). The Amendment Act amended the Act to *"enable Australia to meet its obligations"* under the WTO treaties.[4] S 269ZHG(2) specifically has been identified as reflecting the terms of Article 11.3 of the Anti-Dumping Agreement,[5] which provides:

> *…any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.* [our emphasis, citation removed]

The relevant determination is whether the expiry of the duty would be likely to lead to a continuation or recurrence of the dumping and injury. This requires there to be a nexus between the two, such that the former would lead to the latter.[6] The WTO *Anti-Dumping Agreement* ("the ADA") requires that such a determination be based on positive evidence.[7] Indeed the WTO Appellate Body has noted that an investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.[8]

The Commissioner can only recommend continuation of measures where he is satisfied that their expiry will lead to the continuation or recurrence of dumping and material injury. In our view, and consistent with Australia's international obligations, that satisfaction must be based on positive evidence upon which reasoned and adequate conclusions can then be drawn.

We would suggest that the foregoing paragraph is uncontroversial. What is equally uncontroversial is that the Minister did not form the requisite satisfaction for the continuation of measures.

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4 *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86, per Graham and Flick JJ at para 34.

5 *Ibid*, para 89.

6 Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 108.

7 *Ibid*, para 180.

8 Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114 (quoting Panel Report, US – Corrosion-Resistant Steel Sunset Review, para. 7.271).

The Minister's Reasons paraphrase the s 269ZHF(2) test at their conclusion. However, we here find that the Minister, when making his decision, has actually adopted a reverse standard to that required under the relevant statutory provision. The Minister's Reason's articulate a belief that the measures must continue unless it can be shown that dumping and material injury is not likely to continue or recur. This is evident from the following extracts:

> *I do not agree with the Commissioner's findings of fact, evidence and reasons for the Commissioner's recommendations in REP 569 that the expiration of the anti-dumping measures in respect of exports of the goods from China would not lead or be likely to lead, to a continuation of, or a recurrence of, the dumping and subsidisation and the material injury that those measures are intended to prevent.* [our emphasis]

Here the Minister articulates a belief that the Commissioner's recommendation was based on a finding that the expiry of measures *"would not lead"* to the relevant continuation or recurrence. This inverts what the Commissioner was required to consider. On the Minister's understanding, instead of being satisfied that the measures should be continued, he would need to be satisfied they should not. This Ministerial misapprehension is further clear here:

> *After considering REP 569 I am not satisfied that there is evidence in support of not continuing the dumping and countervailing measures on the goods.* [our emphasis]

This may sound like an issue of semantics, but it is not. In adopting this threshold, the Minister has made a finding that goods exported in the inquiry period were *"likely dumped"*, that such dumping would be likely to continue if the measures were allowed to expire, and that this would inevitably result in material injury to the Australian industry. No supporting evidence is cited for any of these conclusions. The only basis for such conclusion is the Minister *disagreement* with the Commissioner.

This is clearly inconsistent with the terms of the Act, the terms of the ADA that the Act is intended to implement, the Commissioner's focus in undertaking the inquiry, and the understanding of interested parties of the basis upon which the decision would be made.

10 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

Both the correct and preferable decision is that the Minister should have decided not to secure the continuation of the anti-dumping measures in accordance with s 269ZHG(1)(a) of the Act. If the correct standard was applied, that would have been the only permissible outcome.

11 Grounds in support of decision

Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

It is open for the Minister to disagree with the Commissioner's recommendation. It is not open for him to do so and then to adopt a standard that is not recognised under domestic or international law to

support a desire to continue the measures. We submit that in adopting this standard he has fallen into error, and so his decision is not and cannot be the correct decision.

Based on the Minister's Reasons, his determination that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury is not based on positive evidence. Accordingly, the reviewable decision is not the correct or preferable decision. Due to the lack of positive evidence to support the likelihood of dumping or material injury, and the evidence-based findings and recommendations by the Commissioner in contained in Report 569 that the Minister should not be satisfied that such likelihood can be established, the correct and preferable decision was not to secure the continuation of the measures, in accordance with s 269ZHG(1)(a).

D Second ground – finding that dumping "likely" not supported by evidence or law

9 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

With regard to dumping, the Minister states that:

> *I consider that the goods are likely to be dumped, and that the goods exported by many Chinese exporters are subsidised.*

We understand that it is the goods imported during the inquiry period that the Minister considers are "likely" dumped. This seems to be the basis for the Minister's finding that dumping would continue once the measures expired.[9]

In coming to that conclusion, the Minister has not determined a dumping margin for any of the exporters. He has not declared that he is satisfied of any of the things he is required to be satisfied under either s 269TAC or 269TAB in order to determine normal values or export prices. He has not undertaken a s 269TAAD OCOT test. He has not determined costs of production under s 43(2) of the of the *Customs (International Obligation) Regulations 2015* ("the Regulations") or otherwise. He has not compared export prices to normal values. In other words, he has not determined the goods are dumped, he just suspects they might be.

This is contrary to the Commissioner's findings. In Longte's case, the no-dumping margin determined by the Commissioner was -8.9%. This no-dumping margin was determined in accordance with the requirements of the Act.

The focus of the Minister's Reasons is on the benchmark used by the Commissioner. He considers a *"more appropriate selection of benchmark"* may have resulted in a *"materially different finding"*. That appears to be the basis for considering the goods were *"likely"* dumped, to form the basis for a finding that such dumping would likely continue.

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9 Note, the Minister has not made any finding, or articulated any reason to conclude, that dumping is likely to recur if the measures were revoked.

How a different benchmark would be likely to turn an 8.9% negative margin of *not dumping*, into a positive margin *dumping* is not articulated in the Minister's Reasons. So, as a starting point, we do not believe the Minister's decision is based on positive evidence. But, further to that, we do not see how a different benchmark would make a dumping finding more "likely".

As a matter of legality, the use of a benchmark is not mandated under the Act. It is a concept adopted by the Commission to ascertain whether an exporter's costs reasonably reflect competitive market costs for the purpose of s 43(2) of the Regulations. There is no legal requirement to adopt a specific benchmark, or even any benchmark whatsoever, under the Act or the Regulations.

The function of s 43(2) is to inform the Minister what she or he may consider in determining an amount to be the cost of production in the country of export for s 269TAAD(4)(a) or s 269TAC(2)(c)(i) of the Act. The latter provides that the Minister *must* determine the costs of production using the exporter's records where the following criteria are met:

> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records:*
>
> *(i) are in accordance with generally accepted accounting principles in the country of export; and*
>
> *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;*[10]

Adopting a "benchmark" is the administrative solution that has been created to test whether the exporter's records *"reasonably reflect competitive market costs"*. What turns on that test is whether the Minister is obligated to use the exporter's records to determine the cost of production, nothing more.

The Minister's disapproval of the benchmark used by the Commissioner does not mean that records of the exporter concerned do not reasonably reflect competitive market costs. Nor does it necessarily follow that the use of a different benchmark would have any impact on the normal value adopted.

For instance, the determination of production costs is primarily relevant in undertaking the ordinary course of trade test ("OCOT test") in accordance with s 269TAAD. The cost of production determined by the Minister is a fundamental part of the cost of like goods sold in the country of export for the purposes of s 269TAAD(1)(a). However, the OCOT test is itself cast in the negative. Domestic sales of like goods will be in the ordinary course of trade unless the Minister is *satisfied* they are sold at a price that is less than the cost of such goods, and that it is unlikely that the seller will be able to recover the cost of such goods. So, if the Minister refuses to determine a cost of production, it merely means that he is not satisfied that any domestic sales were not in the ordinary course of trade. This does not make dumping *"likely"*.

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[10] As the Member is no doubt aware, the phrase *"competitive market costs"* or similar language is not to be found in the text of the Anti-Dumping Agreement. It is a parochial embellishment of the treaty requirements, which merely require records to *"reasonably reflect costs associated with the production or manufacture of like goods"*.

Similarly, ascertaining the cost of production under s 43 can be relevant to constructing a normal value under s 269TAC(2)(c)(i). But the Commissioner ascertained price-based normal values for Longte under s 269TAC(1). Recourse can only be had to a constructed normal value where the Minister is *satisfied* that there is an absence or low volume of like goods sold in the ordinary course of trade in the market of the country of export, or where the situation in that market is such that sales are not suitable for use in determining a price under subsection 269TAC(1). The Minister has made no finding as to these things. And, indeed, if regard is had to the Commission's recommendations, it would seem there is no reason to be satisfied of such:

> *While the effect of a market situation may be borne out in the prices of goods without there needing to be an artificially low priced input, there is no evidence before the Commission for it to be satisfied that a proper comparison cannot be made between the domestic and export prices. The Commission is therefore not satisfied that the situation in the market of the country of export during the inquiry period is such that sales in that market are not suitable for use when determining a price under section 269TAC(1) for Longte.*[11]

While in Review 520, the Commissioner recommended the normal value for Longte's exports be determined on a cost construction basis under Section 269TAC(2)(c), this was because of a "low volume" rather than any effect of a market situation. Review 520 also found that Longte's normal value should be determined by using Longte's actual records, on the basis that those records are in accordance with GAAP in China, and the costs reported by Longte "was a competitive market cost".[12] Those findings and determinations were accepted and adopted by the then Minister and formed basis for the revised dumping margin and duty rates as stated in ADN 2020/117. The Commissioner adopted the same benchmark for its cost determination in both Report 520 and Report 569. So, the Minister's disagreement with the Commissioner's choice of cost benchmark in Report 569 directly contradicts his view that the dumping duty determined from Review 520 should continue. The outcome in Review 520 – leading to the measures that are still operative as a result of the reviewable decision - was predicated on the exact some methodology the Commissioner adopted in Inquiry 569.

So, the Minister's finding that Longte's goods were likely dumped finds no support in the legislation, and nor is it supported by any evidence. It is purely arbitrary.

10 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

[11] Page 42. We note that this appears to be a way of reflecting the Panel's decision in the *Australia — Anti-Dumping Measures on A4 Copy Paper* dispute ("DS529"), in which regard the Panel noted:

> *In our assessment, the phrases "particular market situation" and "permit a proper comparison" function together to establish a condition for disregarding domestic market sales as the basis for normal value. Specifically, that domestic sales "do not permit a proper comparison" must be "because of the particular market situation". If domestic sales do permit a proper comparison, then they cannot be disregarded as the basis for normal value, regardless of the existence of the particular market situation and its effects, whatever those may be.*

[12] Report 520, at page 28. https://www.industry.gov.au/sites/default/files/adc/public-record/520_-_028_-_report_-_final_report_-_rep_520.pdf

Both the correct and preferable decision is that the Minister should have decided not to secure the continuation of the anti-dumping measures with respect to goods exported by Longte in accordance with s 269ZHG(1)(a) of the Act. The conclusion that the goods were likely dumped and would likely continue to be dumped once the measures were revoked, is based only on loose speculation and is unsupported by fact.

11 Grounds in support of decision

Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

As we have noted, the question in deciding whether the measures should continue is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Again, this question needs to be answered based on positive evidence. The Minister's Reasons cite no positive evidence to support the conclusion that the goods were likely dumped, nor do they provide any rationale to suggest such dumping would continue if the measures were revoked. In the absence of positive evidence establishing the required probability, the correct and preferable decision is that the measure with respect to goods exported by Longte must expire.

E Third ground – the Minister's critique of the benchmark is misconstrued

9 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Minister's Reasons for rejecting the Commissioner's recommendations were:

> *I am not satisfied that the Commissioner's selection of benchmarks used in the assessment in REP 569 of whether the Chinese exporters were dumping were the appropriate benchmarks. I am not satisfied that the Commissioner's conclusions about dumping by Chinese exporters are correct.*

It is not entirely clear why he was *"not satisfied"* by these benchmarks. His reasoning seems to flow from the following extracts from the Minister's Reasons:

> *I note that steel billet is converted into grinding bar which is then further converted into grinding balls. Grinding bar is therefore closer in the production chain to the goods under consideration, and I am satisfied it is a more appropriate benchmark to use than steel billet where both benchmarks are available.*
>
> *I am not satisfied that the Commissioner conducted a thorough analysis of available benchmarks for steel billet in REP 569, in light of the submission by Molycop. I am not satisfied that the Latin American benchmark is the most appropriate benchmark.*

So, there appear to be two strands of logic to the Minister's dissatisfaction:

- Firstly – that the benchmark cost adopted by the Commission is not a *"grinding bar"* cost.
- Secondly – that the Commissioner did not undertake a *"thorough analysis"* of available benchmarks

But this logic is incorrect and appears to be dictated by a misapprehension regarding the role of s 43 of the Regulations. The Minister's preferred approach to adopting a benchmark is not supported by law.

The Minister appears to be confused about the nature of the benchmark adopted by the Commission. He characterises is as the *"Latin American steel billet price benchmark"*. He considers that a more appropriate benchmark would be based on grinding bar, as that is *"closer"* to the goods under consideration in the production chain.

But the Commission did not use a *"Latin American steel billet price"* as its benchmark. The Commission determined a competitive market benchmark for grinding bar. The Latin America steel billet price was but one component of this benchmark. The entire benchmark was constructed on the basis of:

> *i. a monthly Latin American export billet price at FOB terms; and*
>
> *ii. a matrix of alloyed billet grades reasonably reflecting the chemical composition of each grinding ball grade; and*
>
> *iii. a relevant cost of converting the alloyed billet to an alloyed grinding bar cost.*[13]

The result of this methodology is a grinding bar cost that the Commissioner intended would reflect steel, alloy and actual conversion costs in China. The Commission refers to this as the *"constructed grinding bar benchmark"*.[14] The Minister's Reasons do not reflect this and, as a result, we consider some degree of his dissatisfaction arises from a mistaken understanding of what the Commission actually did.

The Minister's position that a *"thorough analysis"* regarding available benchmarks was not undertaken also appears to be somewhat mistaken. Pages 32 through 39 of Report 569 lay out the Commission's analysis. Further, the methodology adopted by the Commission was previously adopted when the measures were originally imposed in Investigation 316, and when the variable factors were reviewed in Review 520.[15] In each of these cases, the Commissioner considered interested parties' views as to the appropriateness of the benchmark methodology. In each case the Commissioner recommended the use of the methodology, and in each case the Minister accepted that recommendation. On top of that, the use of this benchmark methodology was assessed by the ADRP, and the Federal Court, and the Full Federal Court of Australia, and the approach was upheld in each instance.[16] These assessments amount to quite a fulsome review of the appropriateness of the adopted methodology, as well as alternately available benchmarks.

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13 Page 34.

14 Page 33.

15 Page 32.

16 *Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to the Minister for Immigration, Innovation and Science* [2019] FCAFC 122.

The Minister has grasped submissions made by Molycop regarding how a benchmark should be assessed. As a matter of plain fact, the Commission did analyse Molycop's submissions, along with the submissions of many interested parties responding to Molycop on the issue of the benchmark. The Minister's Reasons do not cite the Commissioner's considerations, or other interested parties' submissions, nor do they note that relevant concerns regarding the accuracy of Molycop's proposal were raised by the Commissioner and by interested parties. The Minister's Reasons do not refer to the Commissioner's finding that the propositions upon which Molycop's submission were based were found not to be supported by evidence.[17] All those Reasons do is channel an ill-founded assertion by Molycop.

So, the idea that the benchmark had not been thoroughly analysed is not supported by the history of these measures nor by the content of Report 569. The benchmark adopted was indeed a benchmark for grinding bar. So, we do not understand the basis for the Minister's dissatisfaction.

Lastly, we point out again to the self-contradictions in the then Minister's apparent disagreement with the benchmark adopted by the Commission in the Minister's Reasons, and his view that the dumping duty determined based on that very same benchmark in both the original Investigation 316 and Review 520, should be continued. The Minister's decision and reasons are not supported by logic or evidence.

10 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

The correct decision is that the Minister should have accepted the Commissioner's recommendation and reasons for that recommendation and decided not to secure the continuation of the anti-dumping measures with respect to goods exported by Longte in accordance with s 269ZHG(1)(a) of the Act. He had no basis not to do so and did not articulate any findings that would allow him to do so.

11 Grounds in support of decision

Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

The benchmark adopted in Report 569 is thoroughly tested, and was comprehensively and transparently explained. The Minister's dismissal of that benchmark was based on a misunderstanding of both the purpose of the benchmark and the nature of the benchmark. His dissatisfaction reflects a failure to genuinely and adequately consider the Commissioner's report. His Reasons appear, illogical, and arbitrary.

[17] Page 37.

F Fourth ground – no evidence or analysis to support material injury finding

9 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:

The Minister found that a recurrence of material injury was *"likely"*. This, too, is contrary to the Commissioner's recommendation. The reason the Minister rejected that recommendation was that

> *The analysis of material injury in REP 569 was premised on the conclusion of the Commissioner that the exporters were not dumping. That conclusion was based on the use of benchmarks that I am not satisfied were appropriate.*

The reason why the Minister considered material injury would likely recur was that:

> *I consider that such dumping and subsidisation is likely to continue and the cumulative effect of this is likely to result in the recurrence of material injury that the measures are intended to prevent if the measures were removed.*

The Minister's conclusion that material injury is likely to recur is erroneous. That conclusion is based purely on the assumption that dumping was likely to continue after the measures were revoked. As we have discussed, there is no evidence to suggest that is the case. Further, the Minister merely assumes that any dumping would be injurious. That is also not supported by evidence.

Dumping is not always injurious, let alone materially so. Even were it established that dumping had occurred or was likely to continue it cannot be assumed that material injury would follow. Basing the continuation of the measures on such a bold assumption is not the correct decision.

Indeed, we note that the evidence before the Commission indicates as follows:

- In sales of grinding ball from importers to end-users instances of prices undercutting those of the Australian industry were limited to one quarter of the inquiry period, and only involved one diameter of grinding ball.[18]
- In sales of grinding ball between exporters and end-users, prices did undercut the Australian industry's prices. However, the Commission considered some degree of this undercutting was due to *"the cost savings associated with bypassing a trading company with the additional costs and margins that entails"*.[19]
- Volumes of forged grinding balls from China have decreased. This is because the prevailing movement in the market is toward cast grinding balls at the expense of forged grinding balls. The Australian industry does not produce cast grinding balls.[20] So, while exports of forged

18 Page 70.

19 Page 71.

20 Page 72.

grinding balls may continue in the absence of the measures, it is not apparent that there will be any increase in the volume of forged grinding balls imported.

- Exports of cast grinding balls may increase, however, at present that bulk of the demand in Australia is supplied by cast grinding balls that are not of Chinese origin.

Each of these factors makes material injury caused by dumping of the goods subject to measure, as a result of expiry of the measure, less likely rather than more likely. The Commissioner's analysis undercuts the assumption that the expiry of the measures would likely lead to a recurrence of material injury. By rejecting the Commissioner's report in total, the Minister has refused to consider these findings of fact and/or has replaced those findings of fact with none of his own. This cogently and irrefutably illustrates the Minister's failure to base his conclusion on positive evidence.

10 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

The correct or preferable decision is that the Minister could not be satisfied that material injury was likely to recur. As such there was no basis to continue the measures, and so the Minister should have decided to not to secure their continuation with respect to goods exported by Longte under s 269ZHG(1)(a).

11 Grounds in support of decision

Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

The Minister's Reasons cite no evidence to support the finding that material injury would recur because of the expiry of the measures. As such the Minister should not have been satisfied that the measures should continue with respect to goods exported by Longte.

G Conclusion and request

The Minister's decision to which this application refers is a reviewable decision under s 269ZZA of the Act.

ME Elecmetal is an interested party in relation to the reviewable decision.

ME Elecmetal's application is in the prescribed form and has otherwise been lodged in accordance with the Act.

We submit that the application is a sufficient statement setting out ME Elecmetal's reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of this application for review.

The correct and preferable decision that should result from the grounds that are raised in the application are dealt with and detailed above

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