PUBLIC

Australian Government
Anti-Dumping Review Panel

ADRP Report No. 165

Hot Rolled Coil Steel exported from Taiwan

March 2023

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ABF	Australian Border Force
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AUD	Australian Dollar
Appellate Body	Appellate Body of the World Trade Organisation
BlueScope	BlueScope Steel Limited
CIO Regulation	*Customs (International Obligations) Regulation 2015*
CSC	China Steel Corporation
CTMS	Cost to Make and Sell
Commissioner	Commissioner of the Anti-Dumping Commission
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
FOB	Free on board
GAAP	Generally accepted accounting principles
Goods	Hot rolled coil (including in sheet form), a flat rolled product of iron or non-alloy steel, not clad, plated or coated (other than oil coated). Goods excluded from this application are hot rolled products that have patterns in relief (known as checker plate) and plate products. The goods subject to the measures do not include hot rolled sheet that is 4.75 millimetres (mm) thick or more, as it is considered to be plate steel. HRC in coil form with a thickness of 4.75mm or more is still subject to the measures.
IDD	Interim dumping duty

Inquiry period	1 January 2021 to 31 December 2021
Manual	Dumping and Subsidy Manual December 2021
Minister	Minister for Industry and Science
NIP	Non-injurious price
RIQ	Response to Importer Questionnaire
REQ	Response to Exporter Questionnaire
REP 594	The report published by the ADC Concerning the Continuation of the Anti-Dumping Measures Applying to Certain Hot Rolled Coil Steel Exported to Australia from Taiwan, dated 09 November 2022
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister made on 24 November 2022, pursuant to s.269ZHG(1)(b) of the *Customs Act 1901* to secure the continuation of the anti-dumping measures applying to Hot Rolled Coil Steel exported to Australia from Taiwan.
Review Period	1 January 2021 to 31 December 2021
SCM	Agreement on Subsidies and Countervailing Measures
SEF 594	Statement of Essential Facts No. 594
SG&A	Selling, general and administration expenses
USP	Unsuppressed selling price
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the Minister for Industry and Science (the Minister) to secure the continuation of anti-dumping measures pursuant to s.269ZHG(1)(b) of the *Customs Act 1901* (the Act) in respect of Hot Rolled Coil steel (HRC) exported from Taiwan (the Reviewable Decision). The applicant for the review is China Steel Corporation (CSC).

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

Introduction

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

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

5. The application was accepted and notice of the proposed review, as required by s.269ZZI, was published on 18 January 2023.

Background

6. Anti-dumping measures on certain HRC exported to Australia from Taiwan have been in place since October 2012. The anti-dumping measures were initially imposed by Notice of the Minister's Decision published on 20 December 2012 (Australian Customs Dumping Notice No. 2012/66). By Anti-Dumping Notice 2017/166 published on 18 December 2017 the measures were continued with changes to the method of duty applicable. After reviews of the measures in 2018 (Anti-Dumping Notice No. 2018/126) and in 2020 (Anti-Dumping Notice No. 2020/92), the measures were due to expire on 20 December 2022.

7. An application was made by BlueScope Steel Limited (BlueScope) to the Anti-Dumping Commission (ADC) to initiate an inquiry concerning the continuation of the anti-dumping measures applying to HRC from Taiwan. The application was accepted and an inquiry into a continuation of the measures was initiated by the Commissioner

on 4 January 2022. The inquiry period for this continuation inquiry was 1 January 2021 to 31 December 2021 (the inquiry period).

8. A Statement of Essential Facts (SEF) was published by the ADC on 22 August 2022 and on 9 November 2022 the Commissioner provided a report, REP 594, to the Minister. The Commissioner reported that he was satisfied that the expiration of the anti-dumping measures in respect of exports of HRC steel from Taiwan would be likely to lead to a continuation of, or a recurrence of, dumping and the material injury that the anti-dumping measures were intended to prevent. The basis for the Commissioner's finding was that:

    i. during the inquiry period the Australian market for HRC was supplied by BlueScope and imports from multiple countries, and that demand for HRC increased during the inquiry period however, this increased demand is unlikely to continue in the following years and would likely return to the long-term average;

    ii. variable factors relevant to the determination of duty payable have changed since they were last ascertained, with the Commissioner determining new dumping margins for each exporter based on the newly ascertained variable factors determined for the inquiry period;

    iii. although before the inquiry period the Australian industry's economic condition continued to show signs of vulnerability, particularly in terms of its low profits and profitability, by the end of the inquiry period the Australian industry's sales volume and market share had grown, and profit and profitability improved. However, the Commission assessed the Australian industry's economic condition, in the context of (i) changes in supply and demand resulting from supply chain disruptions due to the COVID-19 pandemic, and (ii) an increase in construction activity driven by government incentives during the pandemic, concluding that the Australian industry remains susceptible to injury caused by dumped goods in the Australian market;

    iv. should the measures expire, exports from Taiwan are likely to continue on the basis that (a) exports to Australia from Taiwan continued after anti-dumping measures were imposed and continued in 2012 and 2017 respectively, and

consistently comprised a significant proportion of the total HRC imported into Australia, including more than 5% of the total Australian HRC market, (b) Taiwanese exporters have maintained distribution links to the Australian market, (c) Taiwanese exporters have total spare production capacity greater than the total size of the Australian HRC market, and (d) expiration of the measures may make Australia a comparatively attractive and accessible market compared to other global markets that have trade measures against Taiwan.

v. expiration of the measures would be likely to lead to a continuation of dumping by all exporters from Taiwan, on the basis that (a) dumping occurred during the inquiry period, (b) Taiwanese exporters have exported goods at dumped prices at various points throughout the life of the measures, and (c) although HRC export prices increased significantly during the inquiry period, this increase is not likely to continue as the COVID-19 pandemic's effect on supply and demand recedes and the Australian HRC market normalises.

vi. the non-injurious price (NIP) relevant to the determination of interim duty payable has changed since it was last ascertained, and that for all Taiwanese exporters the NIP is not less than the normal value of the goods. Accordingly, the Minister is not required to have regard to the desirability of specifying a lesser amount of duty in respect of the goods.

9. Based on the findings in REP 594, the Commissioner recommended to the Minister that the anti-dumping measures applying to HRC exported from Taiwan be continued. On 24 November 2022, the Minister accepted the recommendations of the Commissioner and declared that he had decided to secure the continuation of the anti-dumping measures applying to HRC exported to Australia from Taiwan (the Reviewable Decision).

Conduct of the Review

10. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the Reviewable Decision, or revoke it and substitute a new specified decision. Section 269ZZK(1A) of the Act requires that the Review Panel

may only make a recommendation to revoke and substitute a new specified decision if the new decision is materially different from the Reviewable Decision.

11. 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, and having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

12. Subject to certain exceptions,[1] the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e., information to which the Commissioner had regard to or ought to have had regard when making his findings and recommendations to the Minister.

13. 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. Pursuant to s.269ZZHA of the Act a conference with the ADC was held on 1 February 2023 for the purpose of obtaining further information in relation to the review. A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act. No other conferences were held.

14. In conducting this review I have had regard to:

    i. the application and documents submitted with the application;

    ii. the submission from BlueScope of 17 February 2023; and

    iii. the submission from the ADC of 17 February 2023;

    received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information.

    I have also had regard to REP 594 and relevant information obtained at the only conference held.

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

15. Australia's anti-dumping and countervailing system implements the following WTO agreements to which Australia is a party:

    a) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) – which prescribes rules for the conduct of anti-dumping investigations and the application of measures to address dumping, including how member countries may: initiate cases, calculate dumping margins, determine injury, enforce remedial measures and review past determinations; and

    b) Agreement on Subsidies and Countervailing Measures (SCM Agreement) – which regulates measures designed to remedy material injury caused by subsidised imports, along similar lines to the Anti-Dumping Agreement.

16. The Act and the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) are the principal legislation relating to anti-dumping measures in Australia. The Review Panel will interpret and apply the legislation, as far as its language permits, so that it is in conformity, and not in conflict, with Australia's international obligations. In practice, this means where the legislation is ambiguous the Review Panel will favour a construction that is consistent with the Anti-Dumping Agreement and the SCM Agreement and the obligations which they impose (see *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* [2002] FCAFC 423 at [25]—[27]).

17. The Review Panel's conduct of the review, including its consideration of whether the Minister's decision was the correct or preferable decision, is confined and constrained in certain respects. In particular, the Review Panel must conduct the review in relation to the reviewable grounds and no other grounds. It must also only have regard to certain information, that information essentially being the information that the Commissioner had regard to, or was required to have regard to, as well as any reinvestigation report. The fact that the Review Panel is required to conduct the review only in relation to the reviewable grounds is particularly significant, especially given that the criterion for determining whether a ground is a "reviewable ground" is whether it is a "reasonable ground for the reviewable decision not being the correct or preferable decision". It follows that the nature of the review undertaken by the Review Panel is to essentially determine whether the reviewable decision is not the correct or preferable decision for any of the reasons articulated in the reviewable

grounds. It is only to that extent, and on those terms, that the Review Panel is required to consider and determine whether the reviewable decision is the correct or preferable decision.[2]

Ground of Review

18. The ground of review relied upon by CSC, which the Review Panel accepted in the public notification of the review pursuant to s.269ZZI, is as follows:

    - The Minister erred in finding that recurrence of material injury was likely in the absence of measures.

19. Before proceeding to assess this one ground of review relied upon by CSC, it is useful to consider the relevant law and the context in which this ground of review is relied upon.

20. Pursuant to sections 269ZHC to 269ZHF of the Act, within 60 days after publication of a notice by the Commissioner of expiry of anti-dumping measures, an application may be made to the Commissioner for continuation of the applicable anti-dumping measures. If the Commissioner does not reject the application, an inquiry is initiated of whether continuation of the measures is justified.[3] Following publication of the notice initiating the inquiry, the Commissioner undertakes the inquiry and subsequently places on the public record a "statement of essential facts" (SEF) upon which the Commissioner proposes to base his or her recommendations to the Minister concerning continuation of measures. Generally, 45 days later (absent any extension granted), the Commissioner must give the Minister a report recommending whether the anti-dumping measures should expire or continue (and if continuing, whether they should be changed in some way).[4]

21. Section 269ZHF(2) of the Act provides that:

    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

[2] *Yara AB v Minister for Industry, Science and Technology* [2022] FCA 847 52 [182 -183].
[3] Section 269ZHD(4) of the Act.
[4] Section 269ZHF of the Act.

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.

The ground of review submitted by CSC concerns this s.269ZHF(2) of the Act requiring that before recommending continuation of the anti-dumping measure, the Commissioner must be satisfied that expiration of the measures would be likely to lead to recurrence of material injury that the anti-dumping measure is intended to prevent.

22. The Commissioner commenced the inquiry after receiving an application from BlueScope for continuation of the anti-dumping measures on HRC from Taiwan. After commencing the inquiry the Commissioner placed on the public record a copy of the SEF. As required by s.269ZHF(3) of the Act, the Commissioner decided to make a recommendation to the Minister after having regard to submissions made in response to the SEF including submissions from BlueScope[5] and CSC.[6] After taking into account all responses to SEF 594, a notable change to the ADC's assessment of likelihood of injury, was to reassess and change the method used of calculating a non-injurious price (NIP).[7] This is significant given CSC's arguments in this Review.

23. The NIP is a potentially relevant matter in the assessment of the likelihood of recurrence of injury for the Commissioner to be satisfied that expiration of the anti-dumping measure would be likely to lead to a recurrence of the dumping and material injury that the measure is intended to prevent.

24. The Act at s.269TACA defines NIP as:

The non-injurious price of goods exported to Australia is the minimum price necessary:
(a) if the goods are the subject of, or of an application for, a dumping duty notice under subsection 269TG(1) or (2) — to prevent the injury, or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TG(1)(b) or (2)(b); …

[5] BlueScope Response to SEF 594 dated 11 September 2023.
[6] CSC Response to SEF 594 dated 12 September 2023.
[7] See REP 594 at points 9.3 and 9.4, pp. 70 – 72.

25. While NIP is defined in the Act as indicated above, the method of calculating a NIP is not prescribed under legislation. The Dumping Duty Act requires the Minister to have regard to the desirability of specifying a lesser amount of duty than the full dumping margin when the imposition of a lesser amount of duty than the full margin is sufficient to remove injury.[8] There is however, no requirement under legislation to calculate a NIP or to take it into account, when considering an application for continuation of anti-dumping measures.

26. Under s.269ZHF(3) of the Act, for the purpose of being satisfied (or not) that expiry of the measure would be likely to lead to a continuation or recurrence of dumping and material injury that the measure is intended to prevent, the Commissioner must have regard to:

    i. BlueScope's application for continuation of measures;

    ii. submissions relating generally to continuation of measures for the purpose of formulating the SEF;

    iii. the SEF;

    iv. submissions in response to the SEF.

    The Commissioner also "***may*** have regard to any other matter that the Commissioner considers to be relevant to the inquiry" [emphasis added].[9]

27. Under s.269ZHF(3) of the Act, the Commissioner has a wide discretion on the matters he or she considers to be relevant to an inquiry concerning the expiry of anti-dumping measures for the purpose of being satisfied (or not) that expiry of the measures would be likely to lead to a recurrence of dumping and material injury, including whether and how to take into account any NIP.

28. The Dumping and Subsidy Manual (Manual) of the ADC specifically mentions the NIP as an example of one of the non-exhaustive list of matters that may be a fact relevant to: (a) assessing whether dumping will resume, and (b) assessing the likelihood of continuing or recurring injury.[10] The NIP is only one of a potential non-

[8] Section 8, Dumping Duty Act.
[9] Section 269ZHF(3) (b) of the Act.
[10] Manual December 2021, Point 35.3 at pp 137 &138.

exhaustive list of matters that the Commissioner may have regard to as relevant to the inquiry.

29. It is noted that while the NIP is defined in the Act at s.269TACA, there is no methodology set out in legislation for calculating the NIP. The Manual sets out a policy that, depending on the circumstances, the ADC "*will **generally** derive the NIP from an unsuppressed selling price (USP)*"[11] [emphasis added] which is the selling price the Australian industry could reasonably achieve in the market in the absence of dumped or subsidised imports. If, however, there are reasons for not using this approach, the Manual provides that a different methodology may be used, such as a constructed price or the selling prices of undumped or unsubsidised imports, with the appropriate approach being considered on a case by case basis.[12]

30. The Manual also states that:

> *Estimates of the USP and the NIP can assist in assessing whether dumping has caused material injury and the level of remedy that industry could expect from anti-dumping measures. This is a useful test during the consideration of an application. As the investigation advances, the same issues can be further considered, while progressively referring to data that has been verified.*
> *As the investigation progresses, the NIP will be compared to export prices to assess causal link and the likelihood of an injury margin. Where export prices are found to be above the NIP, the Commission may consider the likelihood that material injury was not caused by dumping*.[13]

This indicates that the NIP and the method of calculating a NIP can change as the inquiry progresses and as additional facts and considerations are assessed. An estimate of NIP made at the time of publishing a SEF can be different to the NIP finally established in the Report later given to the Minister under Section 269ZHF of the Act.

31. It can be concluded that:

[11] Manual December 2021, p.106 at point 24.2.
[12] Manual December 2021, pp.107 to 108 at point 24.2.
[13] Manual December 2021, p. 108 at point 24.3.

i. the Commissioner has a wide discretion on the matters he or she considers to be relevant for the purpose of being satisfied (or not) that expiry of measures would be likely to lead to a recurrence of dumping and material injury, including whether and how to take into account any NIP;

ii. the NIP is only one of a non-exhaustive list of matters that the Commissioner may consider relevant to be satisfied of the likelihood of recurrence of injury caused by dumped imports;

iii. the method of establishing a NIP is “generally”, but not always, the selling price the Australian industry could reasonably achieve in the market in the absence of dumped or subsidised imports (i.e., the USP) and other methodologies may be used for calculating a NIP; and

iv. the NIP may change as the inquiry develops so that a NIP estimated at the time of publishing the SEF can be quite different to and calculated using a different methodology, to the NIP finally established in the report later given to the Minister under s.269ZHF of the Act.

Consideration of Ground

32. In support of its ground of review, CSC submits that the Commissioner, in finalising his recommendation to the Minister in the REP 594,

i. erred in not calculating a meaningful or reasonable estimate of NIP for CSC’s exports;

ii. by not making a reasonable estimate of NIP, omitted a critical element (being a comparison between export prices and a reasonable of estimate of the NIP); that would assist in understanding whether recurrence of material injury caused by dumping was likely;

iii. disregarded its own guidance that export prices above a meaningful NIP estimate, whether dumped or not, are a strong indication that material injury is not being caused by dumping;

iv. should have undertaken a proper comparison of CSC’s export prices, with estimates of the NIP and the Australian industry’s estimated USP; and

v. positive evidence available to the ADC demonstrated that injury was not being experienced by the Australian industry because imports continued to be exported above the prevailing floor price and above non-injurious levels.

Establishing a meaningful or reasonable estimate of NIP for the Applicant's exports

33. There is no requirement under the Act or in the Manual that there should be established an "estimate of NIP" when considering the likelihood of recurrence of material injury. In the ADC's REP 594 there was established a NIP (not an estimate) for CSC's exports. As already mentioned above, Section 269TACA defines the NIP of goods exported to Australia as the minimum price necessary to prevent the injury, or a recurrence of injury, or to remove the hindrance to Australian industry caused by the dumped goods the subject of a dumping duty notice.

34. In REP 594 the ADC considered that a NIP equivalent to the normal value for each exporter is the minimum price necessary to prevent a recurrence of material injury to the Australian industry caused by dumping.[14] An actual NIP was established and not an estimate of NIP. It is noted that CSC, while questioning the failure to establish and use a "reasonable estimate of NIP", does not question the methodology used by the ADC in REP 594 when determining a NIP equivalent to the normal value for each exporter as the minimum price necessary to prevent a recurrence of material injury to the Australian industry.

35. In BlueScope's submission to the Review Panel there is a useful summary of the various possibilities considered by the ADC before finalising the NIP. These possibilities are:

    i. Australian industry's domestic prices for like goods sold during the inquiry period;

    ii. Australian industry's domestic prices for like goods sold during the period 1 October 2018 to 30 September 2019;

[14] REP 594 at p 71.

iii. constructed selling prices using the Australian industry's weighted average CTMS of like goods sold during the inquiry period, plus profit generated in the period 1 October 2018 to 30 September 2019;

iv. constructed selling prices using the Australian industry's weighted average CTMS of like goods sold during the inquiry period, plus profit with reference to industry return on investment; and

v. prices of undumped imports.[15]

36. The ADC's Manual at point 35.3 (under "Continuation of Measures") provides that in assessing the likelihood of recurrence of injury, the Commission's "inquiry may gather facts as relevant on (the list is non-exhaustive) price of exports compared with NIP and USP." This consideration refers only to NIP and not to any "estimate of NIP". Further, in assessing the likelihood of recurrence of injury, the NIP is only one consideration to take into account in combination with other factors set out in a non-exhaustive list. By establishing a NIP (and not an estimate of NIP) the Commission correctly used the definition of NIP in the Act and, in accordance with its Manual, compared the price of exports with the NIP and not an estimate of NIP. CSC does not question that approach. CSC considers however, that the ADC should also have used an estimate of NIP in assessing the likelihood of recurrence of injury.

37. The ADC established a NIP after an assessment of available evidence and followed its own guidance on different methodologies that could be used to determine a NIP as set out in the Manual.[16] The ADC also took into account BlueScope's submissions on NIP[17] and CSC's submission to the ADC on findings that the export price was higher than the ascertained NIP in Review 454, Review 528 and in Continuation Inquiry 400.

38. While not challenging the methodology used by the ADC in establishment of a NIP in REP 594, CSC nevertheless argues that the ADC should also have used the estimate of a NIP used in the earlier SEF 594 but rejected for a different NIP established in REP 594.

[15] BlueScope's submission to the Review Panel, p.5.
[16] See Manual December 2021 at pp 106 to 108.
[17] REP 594 at pp.71 & 71.

39. There is nothing to indicate that the ADC has erred in the methodology used to establish the NIP in REP 594 and to use a NIP equivalent to the normal value for each exporter. To go back to using an estimate of NIP considered in SEF 594 would be to contradict the ADC's final consideration that a NIP equivalent to the normal value for each exporter, was a correct and the preferable conclusion on NIP. CSC does not challenge the methodology used by the ADC in establishing a NIP and there is nothing that shows the ADC was necessarily in error by not calculating an estimate of NIP for CSC's exports.

40. The ADC argues in its submission to the Review Panel that limitations affecting the ADC's ability to calculate an accurate USP demonstrate the lack of utility of any comparative analysis involving a "NIP estimate" and would have provided no meaningful assistance to the future-oriented task of assessing the likelihood of recurrence of injury.[18] The ADC considered that this was because the inquiry period was marked by anomalous market conditions which the ADC does not consider are a reliable indicator of future market conditions.

41. There is no suggestion that a NIP has not been properly established. There is no apparent reason to use a probably less accurate "estimate of NIP" in assessing the likelihood of recurrence of injury. If a NIP has been properly established, and the methodology used to establish the NIP is not questioned by CSC, a likely less accurate estimate of a NIP found earlier in the inquiry procedure would be of little additional assistance when assessing the likelihood of recurrence of injury.

42. There is no requirement to establish an estimate of NIP, or to use the estimate of NIP found in SEF 594, when a preferred NIP can be used that has been established in accordance with the Act and the Manual using a reasoned and preferred methodology, and CSC has not questioned that methodology.

43. It is concluded then, that use of an estimate of NIP is not preferable when there is available an established NIP arrived at using the methodology set out in the Manual and which methodology is not questioned by CSC.

[18] ADC submission of 17 February 2023 at para. 27.

By not making an estimate of NIP, was there omitted a critical element that would assist in understanding whether recurrence of material injury caused by dumping was likely?

44. The Manual indicates that, amongst a non-exhaustive list of matters to consider when assessing the likelihood of recurrence of injury, there can be considered the price of exports compared with the NIP and USP. It is noted that there is no mention of use of an estimate of NIP. There is no requirement (or anything in the Manual) that the ADC should or would always consider that "export prices above a meaningful Non-Injurious Price (NIP) estimate, whether dumped or not, is a strong indication that material injury is not being caused by dumping."[19] As already indicated above, it is preferable to use a NIP that has been established according to the Manual rather than use a likely less accurate estimate of a NIP.

45. The ADC found that, despite increased HRC prices achieved by Australian industry and by Taiwanese exporters to Australia, during the inquiry period HRC exported to Australia from Taiwan was dumped[20]. CSC does not dispute that finding. To assess whether injury to the Australian industry could be caused by dumped goods from Taiwan, the ADC analysed the price at which injury would be unlikely to be occurring – the NIP. In the absence of any other reasonable method for determining the NIP, the ADC considered that the NIP of the goods exported by each exporter from Taiwan should reflect the respective undumped price for each exporter. The ADC concluded that a NIP equivalent to the normal value for each exporter is the minimum price necessary to prevent a recurrence of material injury to the Australian industry caused by dumping.[21] This conclusion is based on the ADC's overall assessment of the evidence.

46. When assessing NIP in the context of the likelihood of recurrence of injury to the Australian industry, there is a difference between a NIP estimate made earlier during the course of an inquiry and a final determination of NIP. The ADC's Manual states that "Estimates of the Unsuppressed Selling Price (USP) and the NIP can assist in assessing whether dumping has caused material injury and the level of remedy that

[19] CSC's application at p.8.
[20] REP 594 point 8.5.1 at p.52.
[21] See REP 594, section 8.6.4 at pages 65 & 66 and section 9.4 at pages 70 to 72.

industry could expect from anti-dumping measures".[22] However the Manual goes on to say that "This is a useful test during the consideration of an application. As the investigation advances, the same issues can be further considered, while progressively referring to data that has been verified". It is apparent then, that estimating NIP is an on-going assessment during the conduct of the investigation, however the estimate is not a final determination of a NIP. As evidence is collected and further assessed, the estimation of NIP is updated until a final determination of a NIP is made. Such a determination can be used both for duty assessment and for considering the minimum price necessary to prevent a recurrence of material injury to the Australian industry caused by dumping. An estimate of NIP may not be as well or as fully assessed and/or may not take into account all of the relevant factors and evidence used in finalising a NIP.

47. In its submission to the Review Panel, the ADC points out that section 269ZHF(2) does not prescribe any particular methodology for assessing whether expiration of measures would lead or be likely to lead to a continuation or recurrence of material injury, and that the Manual only outlines that the ADC *may* gather information on prices of exports as compared to the NIP and USP where relevant as part of a continuation enquiry.[23]

48. The ADC goes on to argue that while section 35.3 of the Manual sets out an extensive, and non-exhaustive, list of the kinds of factors the Commissioner may consider in a continuation inquiry, the Manual does not detract from the Commissioner's discretion to determine a suitable methodology for assessing the likelihood of continued or recurring dumping and injury according to the facts and circumstances of a given case. In such a case, the ADC submits that there is no requirement under s.269ZHF(2) to conduct a comparative analysis using the NIP as part of a continuation inquiry.[24]

49. A NIP or an estimate of NIP relates to a particular inquiry period so only provides an analysis of the situation during the period of the applicable inquiry period. The NIP cannot by itself give a conclusive prediction of the likelihood of what will occur in the future. A NIP or an estimate of NIP is only one factor that *may* be taken into account

[22] ADC Manual 2021 at 24.3.
[23] ADC Submission of 17 February 2023 para. 25 referring to the Manual at pp. 136 to 138.
[24] ADC Submission of 17 February 2023 para. 25.

when assessing the likelihood of future recurrence of material injury to the Australian industry caused by dumping. As the list in section 35.3 of the Manual demonstrates, there are numerous other factors that may be relevant to assessing the likelihood of recurrence of material injury caused by dumping and those other factors may be more critical to the Commissioner's assessment (in particular) of the likelihood of recurrence of injury.

50. In view of the above, the Review Panel does not accept it is critical to the assessment of the likelihood of recurrence of material injury caused by dumping, that the ADC did not also make an estimate of NIP for its assessment.

Did the ADC disregard its own guidance that export prices above a meaningful NIP estimate, whether dumped or not, is a strong indication that material injury is not being caused by dumping?

51. In REP 594, the ADC acknowledges that it "would expect that the ascertained export prices would be at or above the NIP in most instances where the goods are not dumped" and "where the ascertained export price of dumped goods was found to be higher that the NIP for each exporter… [this] may indicate that any material injury experienced by the Australian industry was not caused by dumping in the period examined."[25] It is noted that both the Manual and REP 594 do not refer to a "meaningful NIP estimate."[26] Rather, they refer to the NIP as established by the ADC.

52. It is clear from the discussion in REP 594 of the comparison between the export price and the NIP and whether it was higher than the NIP, that the ADC did not disregard its own Manual that export prices above NIP whether dumped or not may indicate that material injury is not being caused by dumping.

Did the ADC undertake a proper comparison of the Applicant's export prices, with estimates of the NIP and the Australian industry's estimated USP?

53. As discussed above, there is no requirement for the ADC to use estimates of NIP (including an estimated USP) when a NIP has been established. There was no

[25] See REP 594, page 66 in section 8.6.4.
[26] CSC's Application for Review of 22 December 2022 at p.8.

requirement, and the ADC was not in error if it did not compare export prices with estimates of the NIP (or USP estimate) when there had been established a NIP. It must be remembered that the purpose of the inquiry is for the Commissioner to be satisfied (or not) that the expiration of the measures applying to HRC exported to Australia from Taiwan would be likely to lead to a recurrence of dumping and the material injury that the measures are intended to prevent. A comparison of export prices with the NIP (including USP) is only one factor amongst a number of factors that may be taken into account in that inquiry.[27] The ADC took into account the NIP established after considering other possible methodologies for establishing the NIP and after a reasoned analysis of the evidence, finally preferring to use the normal value as the NIP and not an earlier estimate of NIP.

54. In REP 594, the ADC compared the ascertained weighted average export price for each exporter (including the applicant) with the ascertained NIP (not estimate of a NIP) and discussed its findings regarding export prices.[28] It was found that the ascertained weighted average export price for each exporter was higher than the ascertained NIP in the periods examined in Review 454 and Review 528 and Continuation Inquiry 400 (all of which concerned HSC exports to Australia from Taiwan). The relevant inquiry periods are:

    i. Continuation Inquiry 400 – 1 January 2016 to 31 December 2016

    ii. Review 454 – 1 October 2016 to 30 September 2017

    iii. Review 528 – 1 October 2018 and 30 September 2019

55. The ADC found in Continuation Inquiry 400 and in Review 528, that the goods from Taiwan were not dumped in these two periods examined, so that export prices (being undumped prices) could not have caused material injury to the Australian industry due to dumping, and that this is consistent with the prices being higher than the NIP in the periods examined. The ADC found that the only instance in which the ascertained export price of dumped goods was found to be higher than the NIP for each exporter was in Review 454 (i.e., for the period from 1 October 2016 to 30 September 2017). The ADC noted that this may indicate that any material injury

[27] See section 35.3 of the Manual that sets out a non-exhaustive list of the kinds of factors the Commissioner may consider in a continuation inquiry.
[28] See REP 594, pages 65 to 67 in section 8.6.4.

experienced by the Australian Industry was not caused by dumping in the period examined and went on to consider that this one instance is not determinative of what is likely to occur should the measures expire.[29]

56. The ADC also compared Australian industry's prices and exporter prices during the inquiry period for Review 528, with the ascertained export prices, and concluded that Australian industry and exporter prices had increased significantly since September 2019. This significant increase in prices since September 2019 led the ADC to consider that it was not preferable to determine USP and a NIP based on prices prevailing between October 2018 and September 2019.[30] A different methodology for establishing a NIP was considered preferable in the context of rapidly increased prices and abnormal market conditions substantially due to the COVID-19 pandemic.

57. In its submission to the Review Panel, the ADC stated that when examining prices in the market compared to the NIP in previous inquiry periods, it observed a disconnect between export prices and the NIP, as well as a disconnect between the NIP and Australian industry selling prices suggesting that the NIP during those periods may have been understated.[31] For this reason also, the ADC considered that evidence of CSC's export price being above the NIP and floor price in previous periods was not a reliable indicator of future dumping causing a recurrence of material injury.[32]

58. The ADC considered CSC's export prices during the inquiry period and compared them with the established NIP (including USP), and also considered a comparison of CSC's export prices during earlier inquiry periods with the NIP established for those periods. There is nothing to indicate that the export prices used or relevant NIP used, or the methodology of comparing those factors, was not properly made, or that the concerns regarding the accuracy or otherwise of the NIP in previous periods was misplaced.

59. The Review Panel concludes that the ADC made no improper comparison of CSC's export prices with the established NIP (including the USP) or failed to give sufficient

[29] REP 594 at pp 65 & 66.
[30] REP 594 at page 71.
[31] ADC Submission of 17 February 2023 para. 25.
[32] ADC Submission of 17 February 2023 para. 25.

weight to such a comparison in view of the questionable accuracy of the NIP in previous periods.

Was there positive evidence available to the ADC demonstrating that injury was not being experienced by the Australian industry because imports continued to be exported above the prevailing floor price and above non-injurious levels?

60. It should be noted that even if there is positive evidence available indicating that injury was not being experienced by the Australian industry, such evidence is only part of the assessment that needs to be made in this case. It is the overall assessment of both positive and negative evidence that the Commissioner must consider in order to be satisfied (or not) that expiration of the measures would be likely to lead to a continuation of, or recurrence of, the dumping and material injury that the measures are intended to prevent.

61. The applicant provided a chart ostensibly showing that during previous ADC inquiries CSC's ascertained export prices were above both the NIP and the then applicable floor price. CSC asserts that this chart reveals and confirms a number of facts that provide positive evidence injury was not experienced by BlueScope (the Australian industry) and that CSC's imports continued to be exported above both the prevailing floor price and above non-injurious levels. The chart refers to the "ascertained free-on-board export prices" and compares them to the NIP and the prevailing floor prices for each of the reviews prior to REP 594.

62. The extent to which "free-on-board export prices" is above the floor price can only be of limited use to the Commissioner in order to be satisfied (or otherwise) that expiration of the anti-dumping measures would be likely to lead to a continuation of, or a recurrence of, dumping and the material injury that the anti-dumping measures were intended to prevent. Rather it is the comparison of the weighted average export price with the normal value and a NIP, that will be most relevant since it is those comparisons that determine whether or not dumping is occurring and the minimum price above which injury caused by dumping is likely not occurring.

63. In addition, CSC states that "at all times its weighted average export prices were above the corresponding NIP so that the exports would not result in material injury

being caused by dumping". Contrary to this assertion of the applicant, the chart submitted refers to free-on-board export prices and not the weighted average export price. Also, it does not mention that data from the inquiry period shows[33] there was dumping in two quarters of 2021 so that the export price was less than normal value and so less than NIP. In that circumstance it cannot be accepted that there was necessarily no material injury to the Australian industry caused by dumping.

64. Further, all the CSC's contentions concerning Review 528, and the margins between the "AEP and NIP" increasing and being of significance, is of limited usefulness when the AEP used is the free-on-board export price and not the weighted average export price. The price that was used to establish dumping under the terms of the Act is the weighted average export price. The free-on-board export prices may be higher or lower than the weighted average export price, so the percentage by which the NIP or floor price is above the free-on-board export prices is not (absent additional information) decisive or indicative when assessing the level of dumping and injury, or the likelihood of recurrence of material injury.

65. CSC also refers to a certain percentage margin between the free-on-board export prices and the NIP established in Review 528 (prior to the COVID-19 pandemic), as refuting the ADC's view that BlueScope remains susceptible to injury, and price volatility was likely due to supply constraints associated with the COVID-19 pandemic. However, it will be seen from REP 594 that the ADC's assessment of pricing and susceptibility to injury during the inquiry period not only took account of supply factors but also demand factors. The demand factors assessed included significant government stimulus initiatives intended to support confidence in the residential construction industry during the uncertainty caused by the COVID-19 pandemic, and a change in consumption patterns away from services toward spending on, amongst other things, home improvement materials.[34] Both demand and supply factors taken into account by the ADC were properly taken into account. Price volatility and susceptibility to injury during COVID-19 pandemic were both relevant factors that the Commissioner could take into account for the purpose of being satisfied as to the likelihood of recurrence of dumping and material injury that the measures are intended to prevent. The presence of price volatility during the

[33] Set out in ADC's Confidential Attachment 23.
[34] See REP 594 at p.21.

inquiry period does not mean the Commissioner could not also take into account the lower susceptibility to injury during the COVID-19 pandemic, suggesting that once the effects of the COVID-19 pandemic have lessened then injury may recur.

66. CSC also asserts that instances of price undercutting during the current review period are merely irregular occurrences, more likely to be the result of volatility in raw material costs, importation expenses and foreign exchange rates, and not positive evidence of a likelihood that CSC would seek to undercut local prices. Contrary to CSC's assertion, the ADC did consider differences in raw material costs including costs for different models of the goods.[35] In any event, the cost of raw materials would likely be substantially the same for both BlueScope and CSC. This is because the cost of raw materials is based on a worldwide price for iron ore so any volatility in raw material costs would be reflected in both CSC's and BlueScope's prices and any volatility would be more likely due to something other than material costs.

67. Importation costs, particularly freight costs, were considered by the ADC and evidence of freight costs were taken into account including comparisons with historical freight rates from China and worldwide.[36] There is nothing in that evidence that indicates price undercutting was the result of volatile freight costs. Further, price undercutting occurred during quarters of the inquiry period when different models were sold at very different prices compared to prior periods. If the volatility of freight costs caused price undercutting, price undercutting in one quarter would have seen similar changes to prices over all models of product imported from Taiwan. However, price undercutting was at different prices and in respect of different customers and were at very different percentages applicable to different models. If prices had been subject to volatile freight rates, it is most likely that the pricing of each model would change in similar proportion to the rate of increase in freight costs. However, price undercutting was not consistent over models or for different customers in any quarter so it would be expected that price volatility had a different cause.

68. That leaves CSC's contention that evidence of price undercutting was merely irregular occurrences more likely due to the result of volatility in foreign exchange rates. The Commission compared quarterly weighted average free-into-store selling prices for the 5 most significant MCCs (by volume) to 6 customers of BlueScope

[35] See REP 594 at page 38.
[36] See REP 594, Confidential Attachment 22 Trends in Shipping Costs provided by BlueScope.

which were also identified as having purchased these MCCs from Taiwanese exporters. The Commission found that BlueScope's selling prices of like goods were undercut by dumped goods imported from Taiwan during the inquiry period, with the margin of undercutting ranging from 0.1% up to 21% when prices are compared at the MCC level, and from 3% up to 26% when compared at the MCC and customer level.[37]

69. If the foreign exchange rate had been volatile, it would be expected that prices at the MCC level and customer level should have been affected to the same extent for all models to different customers. However, the difference in prices and undercutting over any one quarter of the inquiry period are significant for some models but hardly changed for other models and customers. This indicates that the undercutting is not more likely to have been irregular occurrences resulting from volatile foreign exchange rates.

70. CSC also submits that prices above the prevailing floor price are confirmation that in the absence of anti-dumping measures there is no positive evidence that CSC would have or will reduce its export prices. CSC asserts that the most contemporary equivalent period unaffected by the COVID-19 pandemic is Review 528 where export prices exceeded the prevailing floor price (and contemporary NIP) by significant margins in percentage terms. CSC says that its prices could have been reduced by a significant amount and still remained non-injurious. However, it is not just the change in margins between the floor price and CSC's selling prices established during an earlier period, that could be a predictor of the likelihood that expiration of the measures would lead to recurrence of dumping and material injury. Another, and perhaps better predictor of future injury if dumping should recur, is to compare the Australian industry's prices to the actual prices achieved by importers sourcing goods from exporters from Taiwan during the inquiry period.

71. The ADC undertook such an analysis finding that in the fourth quarter 2021,

    i. duty paid import prices from Taiwan had returned to being the cheapest imports compared to imports from China and Korea;[38] and

[37] REP 594 at p.58.
[38] REP 594 page 56.

ii. price undercutting by importers sourcing goods from Taiwanese exporters compared to the sale prices of the Australian industry were as high as 21% undercutting.

This analysis indicated that there was injury caused by Taiwanese exports in the form of price depression and price suppression[39] during the inquiry period. When such price undercutting is combined with the finding of dumping during the inquiry period (remembering that a floor price based on factors in a previous period does not necessarily indicate dumping and injury) the sometimes significant price undercutting by importers sourcing goods from Taiwanese exporters compared to prices of the Australian industry, was an equally (and given it is more recent data on the market, perhaps more) relevant factor than export prices above a floor price established during an earlier inquiry period.

72. The ADC also found that during the inquiry period CSC's dumped imports undercut the Australian industry's prices for 6 of the 16 models of goods exported by the applicant to Australia. This reinforced the assessment that undercutting by dumped imports exported by CSC and other Taiwanese exporters of the goods at undercutting margins of up to 21%, had occurred in the inquiry period and suggested there was a likelihood that the same could occur in the future.

73. In its submission to the Review Panel, BlueScope asserts that there is a multitude of qualitative and quantitative evidence provided during the inquiry that CSC's exports will be injurious if the measures are removed. This includes evidence that actual world HRC selling prices realised since the end of the inquiry period have already fallen and monthly forecast data to August 2023 indicates a price decline for world HRC prices were forecast to fall significantly over the next 12 to 18 months.[40] BlueScope then did some calculations using these forecasts concluding that, "Taiwanese export prices would be below non-injurious levels."[41] Further, the BlueScope submission to the Review Panel emphasises that in REP 594 the ADC stated that:

[39] REP 594 at page 57 and 58.
[40] BlueScope Submission to Review of 17 February 2023 at p.10.
[41] BlueScope Submission to Review of 17 February 2023 at p.9.

> *Based on [BlueScope's] information, the [ADC] observes that from January 2017 to June 2022 inclusive, import offers referenced in BlueScope's IPP benchmark were predominantly from Taiwan, which is consistent with the commission's finding that imports from Taiwan remain the largest source of imports into Australia relative to all other countries including China and Korea. In almost all months examined from January 2017 to June 2022 inclusive, there was at least one import offer from Taiwan, which is not consistently observed for all other countries.*[42]

It can be concluded then, that there was positive evidence available to the ADC demonstrating that price undercutting by dumped Taiwanese exports to Australia was, or likely was, causing injury to the Australian industry. Further, dumping and injury had been experienced by the Australian industry at various times since first imposition of anti-dumping measures on the goods exported from Taiwan to Australia. Such evidence of injury and dumping was available even if there might also be a finding that the goods exported from Taiwan were, at various times in the past, exported to Australia at prices above the then prevailing floor price and also above non-injurious levels.

Recommendations and Conclusions

74. The Review Panel has considered each of CSC's arguments and found that, while CSC's application for review included facts that the ADC also accepted, the ADC had come to a different view of the weight to be given to those facts. This included CSC's price undercutting and the likelihood of further price undercutting as the market returned to its historical level of supply and demand. The Commissioner has the task of assessing the relevant evidence and found that during the inquiry period, dumping had occurred and injury in the shape of price suppression and lower profits caused by dumping would be likely to recur in the future. The Commissioner concluded that, on the basis of the positive evidence of dumping and material injury being caused to Australian industry because of dumped exports from Taiwan since first introduction of measures and putting greater weight on the most recent evidence

[42] BlueScope Submission to Review of 17 February 2023 at p.10.

collected, it was found that injury was likely to recur if the current measures are discontinued.

75. The ADC made no critical error in not comparing export prices with an ‘estimate’ of NIP and estimate of USP. Further, the ADC did not disregard its own Manual on export prices and NIP indicating injury caused by dumping. The ADC took into account relevant evidence, and based on that evidence, made a coherent assessment of the likelihood of recurrence of injury caused by dumped goods from Taiwan. In that circumstance, the Commissioner could be satisfied that the expiration of the anti-dumping measure in respect of exports of HRC steel from Taiwan would be likely to lead to a continuation of, or a recurrence of, dumping and the material injury that the anti-dumping measure was intended to prevent. In view of all of the above, contrary to CSC’s ground of review, the Minister did not err in finding that recurrence of material injury was likely in the absence of measures.

76. Based on my consideration of the reviewable ground and for the reasons given above, I consider that the Reviewable Decision was the correct or preferable decision.

77. Pursuant to s.269ZZK(1) of the Act, I recommend that the Minister affirm the Reviewable Decision.

FRANK SCHONEVELD
Panel Member
Anti-Dumping Review Panel
20 MARCH 2023

Appendix A

Conference

Date of conference	Participants	Purpose of conference
1st February 2023	ADC officials -– two investigators and two legal staff	To obtain information on supply chain issues, demand and prices in Australia, and to clarify references to a normal market situation.