Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 38

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

September 2016

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Introduction

1. CITIC Australia Steel Products Pty Ltd (Citic) has applied pursuant to s.269ZZC of the *Customs Act 1901* (the Act) for review of a decision of the former Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary) to alter a dumping duty and countervailing duty notice in respect of zinc coated (galvanised) steel exported to Australia from the Republic of Korea (Korea), Taiwan and the People's Republic of China (China).

2. The application for review was accepted and notice of the proposed review as required by s.269ZZI was published on 25 May 2016. As acting Senior Member of the Review Panel, I directed in writing pursuant to s.269ZYA that the Review Panel for the purpose of this review be constituted by me.

Background to the application(s)

3. On 1 April 2015, Bluescope Steel Limited (Bluescope) lodged an application under s.269ZDBC(1) of the Act requesting that the Commissioner of the Anti-Dumping Commission (the ADC) conduct an anti-circumvention inquiry in relation to the dumping duty notice and countervailing duty notice published in respect of zinc coated (galvanised) steel exported from Korea and Taiwan. On 7 May 2015 a further application under s.269ZDBC(1) was made by Bluescope with respect to exports from China.

4. The dumping duty notice and countervailing duty notice for exports of galvanised steel had originally been published in August 2013[1]. Anti-dumping measures were imposed on all exporters from Korea, Taiwan and China, except for:
   - Union Steel Co., Ltd of Korea;
   - Sheng Yu Co., Ltd of Taiwan, and
   - Ta Fong Steel Co., Ltd of Taiwan.

5. Countervailing measures were imposed on all exporters from China except for:
   - Angang Steel Co., Ltd and
   - ANSC TKS Galvanising Co.,Ltd.

[1] ADN No 2013/66

6. Bluescope alleged that these measures had been circumvented by certain exporters through the slight modification of the galvanised steel exported to Australia, namely the addition of alloying elements.

7. The applications by Bluescope were accepted by the ADC and on 5 May 2015 an anti-circumvention inquiry was initiated by the ADC into exports of galvanised steel from Korea and Taiwan[2] and on 1 June 2015 a similar inquiry was initiated into exports of galvanised steel from China[3]. As the goods the subject of both inquiries were identical and given the nature of the alleged circumvention activity, the ADC decided to conduct the inquiries in parallel.

8. The Statement of Essential Facts (SEF) was published on 5 November 2015 by the ADC and the final report to the Minister was made by the ADC on 29 February 2016 (the ADC Report)[4]. The ADC found that a circumvention activity had occurred with respect to certain exporters and recommended to the Parliamentary Secretary that the original notices be altered to specify that different goods exported by the specified exporters or supplied by the specified suppliers are to be the subject of the original notices.[5]

9. The Parliamentary Secretary accepted the recommendations of the ADC and on 17 March 2016 the Parliamentary Secretary declared that for the purposes of the Customs Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act):

- the original notice under s.269TG(2) of the Act be altered by amending the goods description to also include flat rolled products of alloyed steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from China by Angang Steel Co., Ltd or Benxi Iron and Steel (Group) International Economic & Trading Co. or from Taiwan by Yieh Phui Enterprise Co., Ltd.
- the original notice under s.269TJ(2) of the Act be altered by amending the goods description to also include flat rolled products of alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from China by Benxi Iron and Steel (Group) International Economic & Trading Co.

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[2] ADN No 2015/55

[3] ADN No 2015/69

[4] ADC Final Report No. 290 and No. 298

[5] As above, section 1.4.4 page 8

10. The Parliamentary Secretary also declared that the alterations to the notices are taken to have been made:
    - for the goods exported from Korea and Taiwan, with effect on and after 5 May 2015; and
    - for the goods exported from China the notices with effect on and after 1 June 2015.

11. The decision of the Parliamentary Secretary was published on 18 March 2016.

12. Citic is affected by the decision of the Parliamentary Secretary as it has imported alloyed galvanised steel from Yieh Phui Enterprise Co., Ltd (Yieh Phui).

Conduct of the Review

13. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Parliamentary Secretary either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ requires the Review Panel to determine a matter required to be determined by the Minister (in this case the Parliamentary Secretary) in like manner as if it was the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

14. In carrying out its function the Review Panel is not to have regard to any information other than to "relevant information" as that expression is defined in s.269ZZK(6). For the purpose of the review, the relevant information is that to which the ADC had, or was required to have, regard when making the findings set out in the report to the Minister[6]. In addition to relevant information, the Review Panel is only to have regard to conclusions based on relevant information that is contained in the application for review and any submissions received under s.269ZZJ[7].

15. Unless otherwise indicated, in conducting this review, I have had regard to the application (including documents submitted with the application or referenced in the application) and the submissions received pursuant to s.269ZZJ, insofar as they contained conclusions based on relevant information. I have also had regard to the ADC Report, and information relevant to the review which was referenced in the ADC Report. This latter

[6] S.269ZZK(6)(ca)

[7] S.269ZZK(4)

information included the original report which led to the anti-dumping and countervailing measures being imposed[8], verification reports and correspondence between the ADC and interested parties.

16. On 20 May 2016 I had a conference with Citic's representative. The conference was held pursuant to s.269ZZHA of the Act. A summary of the conference was published on the website of the Review Panel.

17. On 22 July 2016 I required the ADC to reinvestigate the finding at section 5.3.2.4 of the ADC Report that had the circumvention goods not been slightly modified, they would have been subject to the original notice. A conference under s.269ZZHA was held with representatives of the ADC on 1 August 2016 and a summary of the conference was published on the Review Panel's website on 10 August 2016. The ADC provided its report on its reinvestigation on 23 August 2016. I had regard to that report as required by s.269ZZK(4A) of the Act. A copy of the report is attached to this report.

18. The ADC also provided relevant documents containing confidential information. These documents and the correspondence with the ADC concerning them was not made publicly available.

19. Submissions were received within the 30 days required by s.269ZZJ of the Act from Bluescope and the ADC.

Grounds for Review

20. The first ground relied upon by the applicant was that the changes to the original dumping duty notice were inappropriate both as to timing and scope. The reasons for this were that:
    - the Parliamentary Secretary wrongly revised the original notice as from 5 May 2015;
    - the Parliamentary Secretary failed to consider the exercise of the discretion to address the variable factors; and
    - the inconsistency with findings in other investigations, particularly Investigation 249.

21. The other grounds were that:
    - the Parliamentary Secretary failed to address key scientific questions or failed to adequately evaluate the scientific evidence before the ADC;

[8] Australian Customs and Border Protection Services Report No. 148, April 2010

- The Parliamentary Secretary's decision wrongly determined that differences between the original goods and the circumvention goods were merely minor;
- The ADC wrongly dealt with confidentiality;
- There was a wrong application of law as per Regulation 48(2)(b) of the *Customs (International Obligations) Regulation 2015*, as the relevant goods were never changed;
- The Parliamentary Secretary's decision failed to make the required analysis of normal value, export price, injury and causation and hence is not the correct or preferable decision consistent with Australia's international obligations and is not justifiable under a proper construction of the relevant legislation; and
- The ADC wrongly failed to address each of the designated factors.

Consideration of Grounds

Timing and scope of changes

Retrospectivity

22. The first argument made by the applicant is that the changes to the dumping duty notice should not have been made retrospective to 5 May 2015. In support of this argument, Citic points to the way in which the interim duty and final assessment provisions of the Act work. Having the changes to the notice made retrospective means, according to Citic, excessive interim dumping is paid and there cannot be a final dumping duty assessed as contemplated by the legislation.

23. Citic contends that in order to apply for a duty assessment under s.269V of the Act it must have paid the interim dumping duty. As there is no interim dumping duty claimable until after the decision to alter the dumping duty notice, Citic argues that the interim dumping duty could not be paid and therefore it is prevented from making an application for assessment of the final duty payable on the imports affected by the retrospective application of the changes to the dumping duty notice.

24. The point made by Citic regarding the need to have paid the interim dumping duty before an application for a duty assessment is made is correct. S.269V does have that requirement with the effect that the interim dumping duty has to be paid by the time an application for a duty assessment is made. Citic contends that no interim dumping duty can be

paid until it is assessed.[9] This is not correct. The amount of interim dumping duty is payable on imported goods the subject of a dumping duty notice by virtue of the determination of the interim dumping duty by the Minister pursuant to s.8 of the *Customs Tarrif (Anti-Dumping) Act 1975* (Dumping Duty Act).

25. There is no need for an assessment of interim dumping duty nor any legislative provision for such an assessment. The legislation anticipates that the interim dumping duty will be paid at the time of importation pursuant to the notice under s.8 of the Dumping Duty Act. The interim dumping duty on the imports of alloyed galvanised steel by Citic is payable pursuant to s.8(3) of the Dumping Duty Act as a result of the retrospective alteration of the dumping duty notice to include those goods.

26. In its submission, Citic notes that a demand for the interim dumping duty was sent to it on 15 April 2016. It argues that even if the interim dumping duty was paid in response, no application for duty assessment would have been available for the period from 5 May 2015 to 5 August 2015. This is because an application for a duty assessment must be made within 6 months after the end of the importation period in which the goods were entered for home consumption.

27. At the time of the ADC Report, the ADC acknowledged the practical impact on importers of any retrospective application of the changes to the dumping duty notice[10]. The ADC Report refers to a note published by the ADC on 16 December 2015 which indicated the impending expiry of the application period for the relevant importation period that would be affected by any retrospective imposition of the measures on the circumvention goods.

28. The note and the comments by the ADC in the ADC Report assume that the legislation does allow an application for a duty assessment to be made at a time when there is no interim dumping payable on the imported goods. It may be that this is possible and that Citic could have made a payment of the interim dumping duty that would become payable if the changes to the notice were to be made retrospective. Citic's submission seems to consider that the ADC was suggesting that the application should have been made with regard to different goods, that is those goods already subject to the dumping duty notice. I do not consider that this is what the ADC was proposing.

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[9] Paragraph 49 of the submission

[10] Page 59, section 6.6 of Final Report 290, 298

29. It is not necessary to decide for the purpose of this report whether or not it was possible for Citic to make an application for a duty assessment at a time when there was no interim duty payable on the imported goods. The fact is that once the ADC published notice of the anti-circumvention inquiry, Citic was on notice that the goods it was importing which were subject to the inquiry, could be made retrospectively liable to interim dumping duties. By continuing to import the alloyed galvanised steel while the inquiry took place, Citic chose to take the risk that it would be liable to pay dumping duty on those imports for which it may subsequently be out of time to seek a final duty assessment.

30. S.269ZDBH (8) of the Act clearly gives the Minister power to make the alterations to the dumping duty notice apply retrospectively as far back as the date the anti-circumvention inquiry was notified. Given the time taken for the inquiry and the report to the Minister, the effectiveness of anti-circumvention measures would be compromised if the alterations to the notice were only prospective. Limiting the retrospective operation to the date of the notice of the inquiry provides a degree of fairness to the importers in not subjecting their imports to retrospective duties before they are put on notice of the inquiry. Once notice of the inquiry is given, they continue to import the circumvention goods with the risk that they could retrospectively be subject to dumping duties.

31. Citic argues that it would be inconsistent with the Dumping Duty Act and contrary to Australian and international law to impose the dumping duties in a time frame that denies the importer the opportunity to seek a final assessment. I do not accept this argument. S.269ZDBH(8) was inserted into the framework of the legislation which provided the deadline for duty assessments. Had the legislative intent been as contended by Citic, then the limit on the Ministerial power to make the alterations retrospective would have been imposed differently.

32. In considering the arguments made by Citic against retrospectivity it needs to be kept in mind that the power of the Minister to make the alterations to the dumping duty notice apply retrospectively is only enlivened once there has been an inquiry and report which finds that there has been circumvention activity. Such activity is designed to avoid the full payment of duties on products the subject of a dumping duty notice. In those circumstances, it is not surprising the legislation gives the Minister the power to make the alterations to the notice apply retrospectively.

33. Citic argues that there were no reasons given in the ADC Report to support retrospective application. The submission by Citic refers to the

comment in the SEF that the justification for retrospectivity was to ensure that any alteration to the notice provides an effective remedy to the injurious effect caused by the circumvention behaviour. Citic argues that there has been no analysis of whether or not there has been injury to the Australian industry from the importation of a circumvention good and that retrospectivity has no commercial impact on the historical profitability or otherwise of the Australian industry.

34. This argument by Citic misconstrues the purpose of the anti-circumvention legislation. It is to prevent the circumvention of the impact of the original dumping duty notice. When that intention is considered there is a very logical policy reason to make the alterations apply retrospectively.

35. Citic also argues that it is wrong to apply retrospective duty on goods ordered before Regulation 48 came into force. The submission by Citic provides certain information regarding the placing of orders by Citic for the alloyed galvanised steel. However, this information is not cross-referenced to information which was before the ADC and consequently it is not clear to me that it is relevant information within the meaning of s.269ZZK(6) to which I can have regard.

36. The argument by Citic needs to be considered in the context that:

- in June 2011 the Australian Government announced that legislative action would be taken against circumvention activity which included the slight modification of a product to make it fall outside the description of the goods the subject of the dumping duty notice[11];
- the anti-circumvention legislation in place from June 2013[12] provided for retrospective action against circumvention activity and for further circumvention activity to be prescribed by regulation;
- on 15 December 2015 the Federal Government announced that there would be a regulation addressing the activity whereby exporters were slightly modifying their goods in order to circumvent existing dumping duties[13];
- while Regulation 48 did not commence until 1 April 2015, it received the Royal Assent on 26 February 2015; and

[11] Streamlining Australia's Anti-Dumping System-An effective anti-dumping and countervailing system for Australia June 2011, pages 63-64.

[12] Customs Amendment (Anti-Dumping Improvements) Act (N0. 3) 2012

[13] ADC Anti-Dumping Notice 2015/44

- as a result of the anti-circumvention inquiry, the circumvention activity prescribed by Regulation 48 was found to have occurred in relation to the exports of alloyed galvanised steel by Yieh Phui.

37. If Citic placed orders for alloyed galvanised steel before the inquiry was announced or the regulation came into force, then it placed those orders, with the risk that the circumstances of the export of those goods would be prescribed as circumvention activity. Citic was on notice from at least December 2014 that this would happen and that any alteration to the dumping duty notice could be made retrospective. In this context, the application of the dumping duty notice retrospectively to the announcement of the anti-circumvention inquiry does not have the unfairness which Citic claims it has.

38. A further argument made by Citic against the retrospective application of the altered dumping duty notice is that it ignores the changes to the variable factors. I address below the argument made by Citic that the Parliamentary Secretary should have addressed changes to the variable factors. For the reasons given below, I do not agree with this argument by Citic.

Scope of changes

39. In addition to arguing against the retrospective application of the altered dumping duty notice, Citic contends that the scope of the change was too broad. The submission by Citic does not state what it contends should have been the narrower change to the dumping duty notice. The complaint is that the alteration covers any amount of alloy in any configuration when Yeih Phui is the exporter.

40. The only disadvantage to which Citic points with the scope of the changes is that it cannot compete with Bao Australia Pty Ltd (Bao Australia) to service its customers. The exports by Bao Australia are not subject to the alterations to the dumping duty notice. This was because its exports of alloyed galvanised steel were not related to a circumvention activity. The end use of the alloyed galvanised steel exported by Bao Australia was the manufacture of specific automotive parts.[14] The exports of alloyed steel made by Yieh Phui were found not to have had the levels of boron of alloyed galvanised steel exported for the automotive parts market.

[14] ADC Report 290/298 section 5.6.2.2, page 52

41. The argument by Citic is academic. While the submission argues that there should in theory be a limit to the level of boron or that other alloys should be excluded, it does not give specific examples of what other uses products with a higher boron content or with other alloys would have, other than that for automotive components. The submission does not put forward what should have been the level of boron specified in the dumping duty notice.

42. I accept the reasons given by the ADC in the ADC Report for not limiting the scope of the alteration to the dumping duty notice. The purpose of the anti-circumvention legislation would not be met if the alteration was limited to certain levels of boron. The dumping duty notice could be easily circumvented by the addition of additional boron or other alloys at a relative low cost.

43. The submission by Citic criticises the reliance by the ADC on the report of Professor Dunne. For the reasons given below, I do not accept this criticism. I also do not accept that the evidence supports the assertion by Yieh Phui that the boron was added to deal with strain age hardening.

Failure to Address Variable Factors

44. Citic contends that the Parliamentary Secretary had a discretion under s.269ZDBG(2) to consider whether the variable factors had changed between the time of the original dumping duty notice and the decision to alter that notice, particularly if the Parliamentary Secretary was going to accept a recommendation of the ADC for retrospective duties. For this, Citic relies on the wording of s.269ZDBG(2) which states that the ADC, in making the report to the Minister, may have regard to any other matter that the ADC considers to be relevant to the inquiry and to the wording of s.269ZDBH(1) which states that the Minister may in addition to considering the report of the ADC, consider any other information which the Minister considers relevant.

45. The submission by Citic also refers to s.269ZDBH(2)(d) which provides that in relation to existing exporters one of the alterations to the notice can be the specification of different variable factors. I agree with Citic that the legislation does allow the Minister to alter the variable factors when altering a dumping duty notice as a result of an anti-circumvention inquiry and report. In appropriate circumstances this would require consideration by the ADC and the Minister of what the changes to the variable factors would need to be. However, I do not agree that in the circumstances of the inquiry and report in this case, it was appropriate to consider such changes.

46. The Minister is given the power to alter the dumping duty notice in order to address the circumvention activity which was identified as a result of the inquiry. In this case the circumvention activity was the addition of the boron to the galvanised steel product exported by Yieh Phui. It was not necessary to alter the variable factors in order to address that circumvention activity and so neither the ADC nor the Parliamentary Secretary needed to consider whether there had been changes to the variable factors.

47. What the submission by Citic does not take into account is that it is the original dumping duty notice which is being applied retrospectively to the alloyed galvanised steel exports as it was that notice which was being circumvented. In this respect it is not new anti-dumping duty measures which are being taken. As was noted in *Final Report No 241-Certain Aluminium Extrusions-China* to which Citic refers, if an importer such as Citic considers that the variable factors have changed from those in the original notice, it can apply for a review of those factors under Division 5 of the Act.

Inconsistent applications and Investigation 249

48. In support of its contention that changes to the variable factors should have been considered, Citic points to material from other investigations, and in particular to Investigation 249, which it claims shows that exports from Taiwan were not being dumped. Citic also claims that the ADC accepted in other investigations current world market figures and that steel prices have come down significantly and that hence the variable factors have shifted significantly.

49. The submission by Citic again disregards the purpose of the anti-circumvention inquiry and the alterations which the Minister makes to the dumping duty notice as a result. The inquiry is not considering whether or not the variable factors determined for the original notice have changed. Nor is its purpose to consider whether or not material injury is being caused to the Australian industry by the dumping of the relevant goods. The purpose of the inquiry is to investigate and report on whether or not there has been the prescribed circumvention activity and what alterations need to be made to the dumping duty notice to address that activity.

50. If Citic has evidence which establishes that the variable factors in the original dumping duty notice have altered or that the original measures are no longer warranted, then it can make an application under s.269ZA for a review of the measures under Division 5.

Scientific Evidence

51. The first argument by Citic with this ground is that the ADC failed to investigate the science regarding the uses of boron to deal with strain ageing before the publication of the SEF. This had the result, Citic claims, that there was inadequate opportunity for interested parties to respond and provide contradictory evidence in a timely fashion.

52. The ADC commissioned a report by Emeritus Professor Dunne of the University of Wollongong after submissions were received in response to the SEF. The report was used by the ADC as part of the consideration of the issue raised by the submissions regarding the scope of the alterations to the notice, particularly whether or not the original notice could be altered to refer to the addition of boron in a defined proportion.

53. The Review Panel will not usually consider complaints about procedural fairness in a review as the task of the Review Panel is to consider whether or not the reviewable decision was the correct or preferable decision. In this case, I do not consider that there has been any unfairness in the ADC obtaining the report from Professor Dunne after the submissions to the SEF were received, as it was obtained to address those submissions. More importantly, the timing of when the report was obtained does not affect the issue for the Review Panel, namely whether or not the decision of the Parliamentary Secretary was the correct or preferable decision.

54. Of more relevance to the review is the claim by Citic that the ADC failed to investigate the scientific issues before the publication of the SEF. The scientific issue to which Citic is referring is the alleged beneficial impact of boron. In its response to the exporter questionnaire during the inquiry Yieh Phui had stated that the main purpose of switching from non-alloyed galvanised steel to boron added galvanised steel was to minimise the strain ageing effect of the galvanised steel. The issue of the beneficial impact of adding boron is relevant to whether or not the alloyed galvanised steel has been slightly modified within the meaning of Regulation 48.

55. The ADC did consider the claim by Yieh Phui and the ADC's response is detailed in the ADC Report. The ADC found that the end use of non-alloyed and alloyed galvanised steel exported to Australia by Yieh Phui during the inquiry period was the same and that the alloyed and non-alloyed galvanised steel were substantially interchangeable and fulfil similar customer preferences and expectations.

56. Citic complains that the ADC had no basis for its finding on this issue without scientific evidence on the material benefits of adding boron. I do not agree with the claim by Citic. The issue for the ADC was whether or not there had been a slight modification of the goods. This issue has to be resolved by comparing the alloyed galvanised steel with the non-alloyed galvanised steel by having regard to factors such as those set out in Regulation 48(3). This is the exercise which the ADC undertook.

57. I have reviewed the analysis undertaken by the ADC and I consider that there was a reasonable basis for the finding made by the ADC. The analysis in terms of the factors set out in Regulation 48(3) supports the conclusion reached by the ADC.

58. A further criticism is made by the Citic submission that Professor Dunne was asked the wrong question and in particular that the report did not address the strain ageing effect resulting from the addition of boron. The submission in this respect seems to mistake the purpose of the report from Professor Dunne. As noted above that report was obtained to assist the ADC in considering the scope of the alterations to the original dumping duty notice.

59. I do not consider that the criticisms made by Citic affect the issue for the Review Panel in conducting the review, namely whether or not the reviewable decision was the correct or preferable decision. The evidence relied upon by the ADC, and consequently the Parliamentary Secretary, in deciding that the alloyed galvanised steel had been slightly modified in terms of Regulation 48 is convincing and I do not consider that scientific evidence of the kind Citic claims should have been obtained was necessary.

Determination that differences were minor

60. The first criticism made of the ADC's finding in this respect is of the approach taken to the analysis of the physical characteristics of the alloyed and non-alloyed galvanised steel products. As part of the task of determining whether or not the alloyed product has been slightly modified, the ADC considered the physical characteristics of the goods. This is one of the factors listed in Regulation 48(3).

61. The argument by Citic is that the ADC did not adequately consider the claim by Yieh Phui that the addition of the boron, typically at 20-30 ppm, had benefits such as dealing with strain ageing effect, easier trimming, fewer defects and ease of cold rolling. Citic's submission noted that the

ADC Report found that the physical characteristics of both goods were similar, the main difference being the presence of boron. Citic concedes that this is the difference in the physical composition but that a characteristic is different to composition. Citic argues that the impact of adding the boron must be considered.

62. The ADC Report did conclude that the addition of boron had little or no impact on the physical characteristics of the galvanised steel[15]. However, Citic claims that there is no indication given as to how the ADC came to this conclusion.

63. Apart from the strain ageing effect, the other benefits listed by Citic in its submission appear to be claimed differences in the production process. It appears to me that such differences in production are not physical characteristics. Even if they were it is not clear to me how they make the differences between the two products more than minor. I note that elsewhere in its submission, Citic appears to accept that the production processes for the products are similar.

64. The beneficial impact of adding boron in dealing with the strain ageing effect was considered in the context of end use, customer preferences and expectations relating to the goods. This seems to be an appropriate approach. I am not persuaded by the arguments put by Citic that there was any error in the finding by the ADC with respect to the physical characteristics of the goods.

65. Citic notes in its submission the finding by the ADC that the manufacturing process of alloy and non-alloy galvanised steel would be similar but argues that as this is also the case for automotive components, it should not be influential. The differences in the processes used to produce the respective goods is one of the factors listed in Regulation 43(3) and in my view while not in itself determinative, was properly considered by the ADC in determining whether or not the alloyed galvanised steel had been slightly modified.

66. The principal criticism of the ADC's finding that the alloyed galvanised steel had been slightly modified is that there was not due consideration of the end use of the alloyed galvanised steel. Again, this complaint concerns the rejection by the ADC of the exporter's claim regarding improved response to strain ageing. In particular, Citic contends that the ADC was not entitled to reject the claim without seeking confirmation from

[15] ADC Final Report No 290/298, page 38

the relevant end-users. A further claim is made that the relevant end-users were the ultimate end users.

67. In its submission, Citic refers to reasons why end users would prefer the beneficial effect on strain ageing of alloyed galvanised steel. In particular, reference is made to certain aspects of the current commercial climate. It is not clear however that these reasons are based on material which was relevant information within the meaning of s.269ZZK(6) of the Act and hence information to which I can have regard. There is no cross reference to material which was before the ADC.

68. If there was evidence from end-users which would have supported the claim made by Citic, then it was open to Citic to provide such evidence to the ADC during the investigation. The ADC is not under an obligation to investigate and establish for itself every fact which may be relevant to an inquiry and is entitled to rely primarily on submissions made to it by interested parties.[16]

69. The ADC noted in its report the claim by Citic that the alloyed steel was beneficial in some cases in comparison to the non-alloyed steel and therefore the goods were not completely interchangeable. The ADC Report also noted that there were conflicting views as to whether the addition of boron was beneficial in minimising the strain ageing effect of the steel and it conceded that there may be some beneficial effect with steel stored for long periods.

70. In considering the claim by Citic, it is important to note that it is not the issue of the beneficial effect of boron which is determinative. The issue for the ADC to consider was whether or not the alloyed galvanised steel was slightly modified. In making a determination on this issue, the ADC was required to compare the non-alloyed and alloyed galvanised steel, having regard to factors such as those listed in Regulation 48(3). It is only to the extent that the beneficial use of boron might be relevant to such factors that the issue has any relevance.

71. I find the reasons given by the ADC for not accepting the claim by Yieh Phui and Citic regarding differences in the end use of the alloyed and non-alloyed galvanised steel persuasive. Given the evidence which was available to the ADC during the investigation regarding the market for galvanised steel, I do not consider that it was unreasonable for the ADC

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[16] Schaefer Waste Technology Sdn Bhd v Chief Executive Officer, Australian Customs Service & Ors (2006) 156 FCR 94

not to further investigate the claim regarding the beneficial benefit of boron. In particular, I find the evidence in Confidential Attachment 1 compelling.

72. Citic agrees with the finding in the ADC Report that the extra cost of adding the boron was a small percentage of the purchase price of the principal input for the galvanised steel. However, it contends that this was not negligible and that there should have been a cost-benefit analysis. I do not agree with the submission. The low cost of the boron was relevant to the extent it went to the issue that the goods were slightly modified and there was no need for the ADC to pursue a cost/benefit analysis.

73. An argument is made by Citic in its submission that too much emphasis was placed by the ADC on the patterns of trade which showed that shipments of alloyed galvanised steel replaced shipments of non-alloyed galvanised steel. I do not agree that there was any failure by the ADC to consider other factors or that the ADC's conclusion on the issue of whether the alloyed galvanised steel was slightly modified was based on only one element. The evidence of the patterns of trade was compelling. However, the ADC Report shows that other factors were considered. The fact that submissions by Yieh Phui and Citic were rejected on such matters does not mean that those matters were not properly considered.

Confidentiality

74. Citic has two complaints regarding the way in which the ADC dealt with confidentiality issues during the investigation. The first complaint is that the ADC did not take into account relevant confidential material provided on behalf of exporters and importers. The second is that Bluescope was not required to provide adequate non-confidential summaries of its confidential information.

75. The first complaint is not really an issue with confidentiality but rather an allegation that the ADC did not adequately investigate confidential material which indicated that an entity in a third country had ordered from Yieh Phui alloyed galvanised steel. Citic argues it was incorrect to exclude consideration of the information on the ground that the party against whose interests the information was provided was denied an opportunity to respond to it.

76. The confidentiality of the material and the inability of the party against whose interests it was provided to defend its interests were the reasons given by the ADC. However, the ADC did not consider that the material was relevant because it was not related to exports to Australia. The point

made by the ADC was that the anti-circumvention inquiry was with respect to the circumvention of anti-dumping measures as they relate to exports to Australia.

77. The confidential material was relied upon by Yieh Phui as evidence of the legitimate use of boron-alloyed galvanised steel. I am not in a position to assess whether the material would demonstrate this. However, I do not consider that the failure of the ADC to investigate the circumstances of this order was unreasonable or that it could possibly be a reason why the reviewable decision was not the correct or preferable decision.

78. The issue of the legitimate use of boron was considered by the ADC. In the ADC Report it was accepted that there were legitimate reasons for adding boron. I do not consider that the material provided by Yieh Phui relating to an export to a third country would have added anything to the consideration of the issue which was before the ADC, and hence the Parliamentary Secretary, namely whether there had been anti-circumvention activity in relation to exports to Australia.

79. The second complaint relates to the adequacy of the redacted non-confidential summaries of confidential information provided by Bluescope. I note that the ADC considered that a sufficiently detailed non-confidential application had been supplied by Bluescope and placed on the public record. It is only in rare circumstances that a failure to provide procedural fairness would be determinative of the issue to be resolved by the Review Panel, namely whether or not the reviewable decision was the correct or preferable decision.

80. In this case, the only substantive point made about the redacted material is that it denied the interested parties the opportunity to comment on a possible cut-off level for the added boron. I fail to understand how the interested parties were denied an opportunity to make submissions to the ADC about the cut off level of any added boron. More importantly, it is difficult to understand how this could mean that the decision of the Parliamentary Secretary was not the correct or preferable decision, especially given that a cut off was ultimately not used.

81. Citic also complains that the ADC conducted a number of anti-circumvention inquiries in parallel but fails to point to any impact this had on the reviewable decision except to point to its claim that inappropriate questions were asked of Professor Dunne. I have already dealt with Citic's criticism of Professor Dunne's report.

82. Another complaint made by Citic is that the inquiry period used by the ADC for the inquiry predated Regulation 48. The effect of Regulation 48 was that it added a further circumstance of circumvention activity which could be the subject of an application and inquiry by the ADC under Division 5A. Such an inquiry is of activity which occurs in relation to a dumping duty or countervailing notice.

83. While Regulation 48 may not have been in operation at the time of the imports by Citic, the dumping duty notice was in place. It is the circumvention of that notice which was investigated. An inquiry period is always going to predate the date of the application. To accept Citic's submission would be to interpret the legislation as not allowing any applications for an inquiry into circumvention activity as defined by Regulation 48 until some indefinite time after the regulation came into force. There is no indication that this was the legislative intention.

Wrong Application of the law

84. Citic's submission makes a number of points regarding the application of Regulation 48 to the findings in the inquiry. The first point is that the requirements of Regulation 48(2)(b) had not been met. Regulation 48(2)(b) requires that before export the circumvention goods are slightly modified.

85. The argument made by Citic is that the alloyed galvanised steel was never changed. The goods were produced that way from the outset. The findings in the ADC Report and the submission made by the ADC under s.269ZZJ make it clear that the alloyed galvanised steel was produced as that product and it was not the case that non-alloyed galvanised steel was modified to produce the alloyed galvanised steel. Rather, the production process for the galvanised steel was changed or modified by the addition of small amounts of boron to the raw material used to produce the galvanised steel.

86. This point made by Citic raises an issue with the interpretation of Regulation 48. The difficulty is that the expression "circumvention goods" is defined in Regulation 48(2)(a) as the goods that are exported to Australia. If this is meant to intend the goods that are exported after the modification takes place then the circumvention goods in this case are the exports of alloyed galvanised steel. Citic's submission points out that the exports of alloyed galvanised steel were not modified.

87. Citic's submission also points out that if the reference to "circumvention goods" is meant to be to the non-alloy goods, then Regulation 48(2)(e)

would not be satisfied as those goods were subject to the dumping duty notice. Regulation 48(2)(e) provides that section 8 or 10 of the Dumping Duty Act not apply to the circumvention goods.

88. The wording of Regulation 48 and in particular the different use of the expression “circumvention goods” in Regulation 48(2) raises an issue as to the proper construction of the Regulation. Given that this issue had also been raised in another review, the Review Panel obtained advice from external counsel on the proper interpretation of Regulation 48. A copy of this advice is attached to this report. Attachment 2.

89. I find the reasoning in the advice persuasive on this issue. In particular, the approach taken by Counsel results in a construction of Regulation 48 which makes the Regulation workable. This achieves the purpose of the legislation. I am also persuaded by the inclusion of Regulation 48(3)(d) and its reference to the differences in processes used to produce each good.

90. If Regulation 48(2) and (3) are read together then the reference to different production processes being a factor to be considered when comparing the goods before and after they are modified supports an interpretation of Regulation 48 that allows for a circumvention activity to be found when changes are not made before export to an already existing good, but rather the production process for goods which would otherwise have been subject to the dumping duty notice is slightly modified.

91. A further criticism Citic makes of the ADC’s approach is with the finding in terms of Regulation 48(2)(c) which requires that the use or purpose of the circumvention goods is the same before, and after, they are modified. The criticism is that when considering Regulation 48(2)(c) the ADC Report simply referred back to the previous discussion in relation to Regulation 48(2)(b).

92. Citic is right to criticise this approach by the ADC. It is not satisfactory. The legislation requires that the ADC be satisfied that all of the circumstances set out in Regulation 48(2) have occurred. The ADC is also required to set out the material findings of fact on which the recommendation to the Minister is based and the evidence relied on to support those findings. The previous discussion on Regulation 48(2)(b) covered a number of issues and was dealing with a different question. The ADC Report should have at least listed in a summary form those facts relied upon to reach the required conclusion for Regulation 48(2)(c).

93. However, a flaw in the ADC Report does not necessarily mean that the reviewable decision was not the correct or preferable decision. It is necessary to consider whether or not the finding by the ADC could be made based on the available evidence. A review of the section of the ADC Report dealing with the issues of interchangeability, end use and customer preference and expectations does support a finding in terms of Regulation 48(2)(c).

94. Citic's submission also argues that there was a flaw with the consideration of Regulation 48(2)(d). This paragraph requires that had the circumvention goods not been slightly modified they would have been the subject of the dumping duty notice. The criticism made by Citic is that the ADC simply considered "it likely that the vast majority, if not all, of the galvanised steel did not qualify for an exemption and hence would have subject to the original dumping duty notices had they not been so slightly modified".[17]

95. Citic argues that the ADC had not investigated whether or not the Tariff Concession Orders (TCOs) which existed in relation to the galvanised steel covered the goods exported by Yieh Phui. I do not agree that the ADC Report supports the argument by Citic that the ADC did not investigate whether the TCOs covered any of the goods exported by Yieh Phui. The ADC did clearly consider the application of the TCO's to Yieh Phui's goods.

96. It was not clear to me, however, that the ADC Report disclosed that the ADC had the requisite satisfaction as to Regulation 48(2)(d) which the legislation requires. My concern was not only with the conclusion that it was likely that the vast majority did not qualify for an exemption (which indicates that some may qualify) but also that the ADC considered "it did not have definitive evidence to establish whether all of Yieh Phui's exports of alloyed galvanised steel during the inquiry period fit into any of the excluded categories of steel or the exempted TCOs".

97. If any of the exports by Yieh Phui were entitled to the benefit of a TCO or were exempt from the dumping duty notice, then such goods could not come within the circumstance prescribed by Regulation 48. As it was not clear to me that the ADC had the requisite level of satisfaction, I required the ADC to reinvestigate its finding in terms of Regulation 48(2)(d). The report by the ADC as a result of its reinvestigation found:

> "The Commission's analysis and the available evidence demonstrates that the goods exported by Yieh Phui would not have

[17] ADC Report 290 and 298, section 5.3.3.4, page 41

been eligible to claim a tariff concession or exemption from the anti-dumping duties, or that they were otherwise excluded from the measures. The test required by subsection 48(2)(d) of the Regulation – that if the circumvention goods exported by Yieh Phui had not been so slightly modified, those goods would have been the subject of the original dumping duty notice – is therefore satisfied, and the Commissioner affirms the findings made in REP 290 / 298."[18]

98. Having reviewed the reinvestigation report and the reasons for the finding made in that report, I am satisfied that there is a basis for that finding and the conclusion made in terms of Regulation 48(2)(d) was reasonable.

Failure to analyse variable factors

99. Citic submits that the Parliamentary Secretary was required to consider changes to the variable factors, namely export price and normal value in making the reviewable decision. The basis for this submission is stated to be that it is required by the Dumping Duty Act and Australia's international obligations. As noted above, I do not consider that the Parliamentary Secretary was required to consider whether or not changes had occurred to the variable factors. However, the arguments based on the Dumping Duty Act and Australia's international obligations need to be addressed.

100. The argument regarding the Dumping Duty Act relies on s.8(6) of that act which provides that the dumping duty payable on goods the subject of a dumping duty notice is the difference between the amount which the Minister ascertains to be the export price and the normal value of those goods. Citic contends that no final duty is permitted without the ascertainment of the export price and the normal value of the particular goods the subject of the notice.

101. Citic also points to the requirement in s.8(5) of the Dumping Duty Act that requires the Minister to determine by signed notice the interim duty to be worked out in accordance with a method specified in the signed notice. The notice signed by the Parliamentary Secretary on 17 March 2016 did not specify a method for calculating interim dumping duty.

102. The arguments by Citic in this respect are not supported by the legislation. The alterations to the original dumping duty notice as a result of an anti-circumvention inquiry are to deal with the circumvention activities identified in the inquiry. In the case of a circumvention activity prescribed

[18] ADC Re-investigation Report 364, section 1.2, page 3

by Regulation 48, the appropriate alteration is to extend the goods subject to the original notice to the circumvention goods. S.8 of the Dumping Duty Act then applies to the circumvention goods as a result of the original notice as altered. The notice signed on 17 March 2016 altered the original dumping duty notice. It was not itself a dumping duty notice and therefore did not need to deal with the requirements of s.8 of the Dumping Duty Act.

103. S.269ZDBC of the Act provides that the Australian industry can apply for an anti-circumvention inquiry. One of the preconditions for the application is that the applicant "considers that it may be appropriate to alter the notice because of the circumvention activities". S.269ZDBG requires the ADC to give a report after conducting the anti-circumvention inquiry recommending either that the notice not be altered or that the original notice be altered because the ADC "is satisfied that circumvention activities in relation to the original notice have occurred".

104. An inquiry under Division 5A of the Act is conducted to determine whether or not there have been circumvention activities and if so, the alterations to the original notice that are required to be made to deal with those activities. It is not an investigation into whether or not dumping has occurred, or material injury caused to an Australian industry as a result. It is also not an investigation into whether or not one or more of the variable factors have changed.

105. The ambit of an anti-circumvention inquiry is limited and the alterations which can be made to the original notice as a result of such an inquiry are similarly limited. In *Companhia Vidraria Santa Marina v Minister for Small Business & Consumer Affairs* [1997] FCA 300, Emmett J stated when referring to the ambit of an investigation under Division 5 of the Act:

> "The scope of the exercise required under division 5 is narrower than the scope of the exercise which must be undertaken before a dumping notice is published. It would be curious if the limited review that is contemplated under division 5, as compared with the division 2 and division 3 process, left open the possibility that the base which was being reviewed could be completely undermined by reason of the CEO adopting a completely different approach to the establishment of the three matters which are reviewed."

106. These comments were directed to the exercise to be undertaken for the purpose of determining in an investigation under Division 5 whether or not the variable factors have changed. They also support the view that an inquiry under Division 5A is similarly limited by the purpose of the inquiry. Unless it is necessary to consider changing the variable factors in order to deal with the circumvention activity, I do not consider that the ADC or the Minister is required to consider such matters. Indeed, there is probably no power under that division to make alterations to the original notice for a

purpose other than what is required to address the circumvention activities.

107. The submission by Citic argues that the legislation needs to be considered in the context of Australia's obligations under the WTO[19]. While extraneous material can be taken into account in interpreting legislation, nothing in the material to which Citic's submission refers is of assistance in this case. The relevant WTO agreement[20] does not deal with anti-circumvention action. Whether or not Australia's anti-circumvention legislation is consistent with Australia's obligations under the WTO agreements is not a matter for the Review Panel.

108. Finally, Citic's submission makes an argument that to interpret the relevant legislation in the way the ADC has would mean that Regulation 48 was invalid as it was altering the effect of the legislation which subsidiary legislation cannot do. This argument is based on the view taken that the legislation requires as a precondition to imposing a dumping duty that there be injurious dumping. I do not agree with the arguments made by Citic in this respect. The basis for the imposition of the duty on the exports of alloyed galvanised steel is the finding of circumvention activities with respect to the original dumping duty notice. The notice signed by the Parliamentary Secretary on 17 March 2016 had the effect of applying the original dumping duty to those exports. There was no requirement under the legislation for the preconditions for the issue of a dumping duty notice to be met in order for the alterations to the original dumping duty notice to be made.

109. To the extent that Citic contends that Regulation 48 is invalid, that is not a matter to be considered by the Review Panel.

Failure to address designated factors

110. Citic contends that the ADC is required to consider each of the factors listed in Regulation 48(3). While Citic concedes that the list in Regulation 48(3) is non-exhaustive, it argues that the ADC must determine which of the thirteen factors are relevant and properly consider them.

111. I agree with the contention by Citic that the ADC does not have a discretion to ignore a factor which would otherwise be relevant to the exercise to be conducted under Regulation 48(3). However, I am unable

[19] World Trade Organisation

[20] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

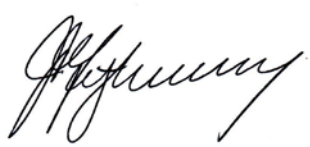
to discern from Citic's submission any basis for finding that the ADC did ignore a relevant factor. The only one mentioned by the submission is the tariff classification. The submission does not state how consideration of the tariff classifications of the goods would lead to a different conclusion.

112. The other arguments put by Citic to support its contention that the ADC wrongly failed to address each of the designated factors such as ignoring scientific evidence, not investigating end-use and the relevance of strain ageing effect have been dealt with above. I also do not consider that the ADC's reliance on trade patterns in conducting the Regulation 48(3) exercise was in any way in error.

Recommendations/Conclusion

113. The Applicant's submission has highlighted an issue regarding the interpretation of Regulation 48. I do not however consider that the Applicant's interpretation is to be preferred to the approach which the ADC took. I do not consider that the grounds relied upon by the Applicant establish that the decision of the Parliamentary Secretary was not the correct or the preferable decision.

114. Pursuant to s.269ZZK of the Act, I recommend that the Parliamentary Secretary affirm the reviewable decision.



Joan Fitzhenry

Senior Member

Anti-Dumping Review Panel

6 September 2016