Australian Government
Anti-Dumping Review Panel

ADRP REPORT NO. 22

Deep Drawn Stainless Steel Sinks from the People's Republic of China

11 September 2015

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Review of a Decision of the Parliamentary Secretary to Publish a Dumping Duty Notice and a Countervailing Duty Notice in Relation to Deep Drawn Stainless Steel Sinks Exported from the People's Republic of China

11 September 2015

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Introduction

1. The following Applicants applied in terms of s.269ZZC of the Customs Act 1901(the Act), for review of a decision of the Parliamentary Secretary to the Minister for Industry and Science (the Parliamentary Secretary), pursuant to s.269TG(1) and s.269TG(2) of the Act to publish a Dumping Duty Notice and pursuant to s.269TJ(2) of the Act to publish a Countervailing Duty Notice in respect of Deep Drawn Stainless Steel Sinks exported from the People's Republic of China:

   Everhard Industries Pty Ltd (Everhard)
   Milena Australia Pty Ltd (Milena)

2. The Senior Member of the Anti-Dumping Review Panel (the Review Panel) directed in writing, pursuant to s.269ZYA of the Act, that the Review Panel for the purpose of this review be constituted by me.

3. The applications for review were accepted and notice of the proposed review as required by s.269ZZI of the Act, was published on 18 May 2015.

4. Before commencing the review I advised the Applicants and interested parties that when I was in private practice in Hong Kong, I was a member of the trade team of an international law firm that acted for the Ministry of Commerce, People's Republic of China (MOFCOM), in a countervailing case initiated by the International Trade Administration Commission of South Africa (ITAC) in July 2008, in respect of "Stainless Steel Kitchen Sinks Originating or Imported from China". I further advised that the countervailing investigation was formally terminated by ITAC in January 2009 and that I had not acted for MOFCOM or for the Chinese Government since that time.[1] None of the Applicants or interested parties objected to my conducting the review.

Background

5. On 31 January 2014 Tasman Sinkware Pty Ltd (Tasman) lodged an application under s.269TB of the Act, requesting that a Dumping Duty Notice and a Countervailing Duty Notice be published in respect of Deep Drawn Stainless Steel Sinks exported to Australia from China. The application was not rejected and public notification of the initiation of the investigation was made on 18 March 2014 by the Commissioner of the Anti-Dumping Commission (the ADC).[2]

6. On 13 August 2014 the Commissioner of the ADC (the Commissioner) made a Preliminary Affirmative Decision (PAD) and securities were taken in respect of Deep Drawn Stainless Steel Sinks exported from China. The PAD did not make preliminary findings in relation to the request for the publication of a

[1] See Letter to the Applicants and Notice to Interested Parties dated 18 May 2015
[2] ADN No.2014/20

Countervailing Duty Notice. The levels of securities taken were adjusted on 24 October 2014 and 23 December 2014. On 23 December 2014 the ADC issued the Statement of Essential Facts (SEF) for the investigation (SEF 238).[3]

7. The final report to the Parliamentary Secretary was made by the ADC in Anti-Dumping Commission Report 238 (Report 238). The ADC recommended to the Parliamentary Secretary that a Dumping Duty Notice and a Countervailing Duty Notice be published in respect of Deep Drawn Stainless Steel Sinks exported to Australia from China. The Parliamentary Secretary accepted the recommendations and a Dumping Duty Notice under subsections 269TG(1) and (2) of the Act and a Countervailing Duty Notice under subsection 269TJ(2) of the Act was published on 26 March 2015.

The Review

8. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister (or as in this case, the Parliamentary Secretary) either affirm the decision under review or revoke it and substitute a specified new decision.

9. The Review Panel must determine whether the decision to publish was the correct or preferable one. If it is concluded that the decision is the correct or preferable one, then the Review Panel must report to the Minister recommending that he or she affirm the decision. If the Review Panel is not satisfied that the decision was the correct or preferable decision, the Review Panel must report to the Minister recommending that he or she revoke the decision and substitute a specified new decision.

10. In undertaking the review, s.269ZZ requires the Review Panel to determine a matter required to be determined by the Minister 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.

11. An applicant is required to set out reasons for believing that the reviewable decision is not the correct or preferable decision, and failure to do so may result in rejection of the application. However, as it was stated in the ADRP Report No.15[4], because an application is not rejected it does not follow that all grounds advanced in the application are to be viewed, or have been accepted as reasonable grounds for the reviewable decision not being the correct or preferable decision. It is also pointed out in the ADRP Report No.15 that the obligation on an applicant to set out the reasons is linked to the task the Review Panel has in determining whether the ultimate decision (the reviewable decision) was the correct or preferable one.

[3] Statement of Essential Facts Report No. 238 dated 23 December 2014
[4] See ADRP Report No. 15 concerning Wind Towers exported from the People's Republic of China and the Republic of Korea, paragraph 16

12. In making its recommendation the Review Panel must not have regard to any information other than the *"relevant information"* as defined in s.269ZZK(6)(a), that is, information to which the ADC had regard or was required to have regard when making its findings and recommendations to the Minister. The Review Panel must only have regard to the relevant information and any conclusions based on the relevant information that are contained in the application for review and any submissions received under s.269ZZJ.[5] In other words, the Review Panel does not undertake its own new investigation and is limited to the information that had been before the ADC.

13. In conducting this review I have had regard to the applications (including documents submitted with the applications) and to the submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to Report 238 and information relevant to the review which was referenced in Report 238. I have also had regard to SEF 238 and to documents referenced in SEF 238.

14. After the applications for review of the Parliamentary Secretary's decision were accepted by the Review Panel, the ADC was invited to provide comments on the grounds raised in the applications for review (the Invitation to Comment Letter). The response from the ADC was received on 3 June 2015 (the ADC Response). Both the Invitation to Comment Letter and the ADC Response were made publicly available. I have had regard to the ADC Response only to the extent that the ADC has identified information to which it had regard in making its recommendation to the Parliamentary Secretary and which it considered responsive to the claims made by the Applicants.

15. The time for submissions by interested parties under s.269ZZJ is 30 days after the public notice. As the public notice was given on 18 May 2015 the time for submission expired on 17 June 2015. Submissions were received in this period from:
    - Tasman; and
    - Milena.

16. After reviewing the applications, submissions and other material described above, pursuant to s.269ZZL of the Act, on 13 July 2015, I required the the ADC to reinvestigate the finding that the goods produced by Tasman are "like goods" to lipped stainless steel laundry tubs (LSSL tubs) imported by Everhard and Milena, for the purpose of determining if the dumped and subsidised goods cause material industry to the Australian industry. I also required the ADC to reinvestigate the finding that stand-alone laundry units (whether imported fully assembled or in a "kit") are not the goods subject to the investigation or any resulting measures, in particular taking into account Milena's submission of 2 December 2014[6], as well as all other parties' submissions. I requested the

[5] See s.269ZZK(4) of the Act
[6] See #85 of the Public Record

ADC's reinvestigation report in this regard by 12 August 2015 (Reinvestigation Report). The request for reinvestigation and the Reinvestigation Report were made publically available. A copy of the Reinvestigation Report is attached as Annexure 1 to this report.

Grounds of Review

Everhard

17. Everhard is an importer of LSSL tubs, which are goods that are the subject of the reviewable decision application. Everhard is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX.[7] Everhard also manufactures injection-moulded polymer drop-in laundry sinks and stand-alone polymer bowls and cabinets in Australia. The imported LSSL tubs are fitted onto imported stainless steel cabinets or the Australian-made polymer cabinets to make a stand-alone laundry unit.

18. While it is not clearly set out in Everhard's application for review, the grounds for the reviewable decision not being the correct or preferable decision appear to be that:

- There has been an error in the decision that LSSL tubs are "like goods" to the goods produced by the Australian industry.[8] This ground of review would appear to relate to the rejection by the ADC of the eligibility of LSSL tubs for exemption from measures in accordance with s.8(7)(b) or 10(8)(aa) of the Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act)[9];
- The importation of LSSL tubs cannot cause material injury to an Australian manufacturer of the Deep Drawn Stainless Steel Sinks.[10]

Milena

19. Milena is an importer of LSSL tubs, which are goods that are the subject of the reviewable decision application. Milena is therefore an "interested party" in relation to a reviewable decision within the meaning of s.269ZX. Milena also manufactures injection-moulded polymer stand-alone polymer bowls and cabinets in Australia. The imported LSSL tubs are fitted onto the Australian-made polymer cabinets to make a stand-alone laundry unit.

20. The grounds of review relied upon by Milena are set out in its application for review:

[7] See the definition of interested party in s.269ZX(c)
[8] See paragraph 2 of Attachment 1 and Attachment 3 of Everhard's application for review
[9] See paragraph 2 of Attachment 1 of Everhard's application for review
[10] See paragraph 2 of Attachment 1 and Attachment 3 of Everhard's application for review

- There was inadequate notification and communication with affected parties by the ADC;
- The ADC erred in its investigation not to consider additional information provided to it during the investigation;
- The Parliamentary Secretary erred in her decision to declare LSSL tubs "like goods" to the goods which are the subject of the notice;
- The Parliamentary Secretary erred in her decision not to declare stand-alone laundry units (fully assembled or in kits) as "like goods";
- The Parliamentary Secretary erred in determining the duty imposed on "Uncooperative and Other Exporters" by setting it too high; and
- The currency exchange rate was not properly taken into account in the investigation and in setting the duty under the notice.

Preliminary Issues

21. Before considering the grounds of review in detail, I will deal with two preliminary issue arising from:

    i. Everhard's first ground of review and Milena's third ground of review, that is, LSSL tubs are not "like goods" to the goods produced by the Australian manufacturer and should be considered to be eligible for exemption from any measures in accordance with s. 8(7) or s.10(8)(aa) of the Dumping Duty Act; and

    ii. Milenas first two grounds of review, that is, there was inadequate notification and communication with affected parties by the ADC and that the ADC erred in its investigation not to consider additional information provided to it during the investigation. Both these grounds of review relate to procedural fairness.

Grounds of Review Relating to Exemption under Subsections 8(7) or 10(8)(aa) of the Dumping Duty Act

22. Both Everhard and Milena contend that LSSL tubs should be eligible for exemption from any measures that may be applied following the completion of the investigation in accordance with s.8(7) or s.10(8)(aa) of the Dumping Duty Act. These subsections provide that the Minister (or in this case, the Parliamentary Secretary) may, by notice in writing, exempt goods from measures if he or she is satisfied as to a number of conditions. The relevant condition relating to Everhard and Milena is where, "*like or directly competitive*

goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade".[11]

23. In Report 238 the ADC found that the Australian industry does produce "like goods" to LSSL tubs and therefore considers that the requirements of an exemption under the relevant provisions of the Dumping Duty Act are not satisfied.[12] The preliminary issue arising is whether the Review Panel has power to review a decision of the Parliamentary Secretary to grant exemption or refuse to grant exemption of a product from measures pursuant to s.8(7) or s.10(8)(aa) of the Dumping Duty Act.

24. In my view, the contention by Everhard that LSSL tubs should be the subject of such an exemption under the Dumping Duty Act cannot be considered in an application for review by the Review Panel. The decisions of the Minister (or Parliamentary Secretary) which can be reviewed by the Review Panel are set out in section 269ZZA of the Act. They include the decision of the Minister to publish a Dumping Duty Notice under subsections 269TG(1) or (2) or a Countervailing Duty Notice under subsections 269TJ(1) or (2) of the Act, but do not include a decision to exempt or not exempt a product from dumping or countervailing duties under subsections 8(7) or 10(8)(aa) of the Dumping Duty Act. I find that the Review Panel therefore has no power to review the decision of the Parliamentary Secretary not to grant an exemption to LSSL tubs imported by Everhard and Milena. This is the same conclusion reached by the Review Panel in the Review of Decision to Impose Dumping Duties on Zinc Coated (Galvanised) Steel Exported from the Republic of Korea (Report relating to POSCO).[13]

Grounds of Review Relating to Procedural Fairness

25. In respect of its first ground of review Milena contends that the ADC should have notified it and its Chinese exporter directly, and that notification by publication in the Australian and on the ADC's website was not fair notice. In respect of its second ground of review, Milena contends that the ADC should have been willing to take into account the late submission of its exporter, so that it would not automatically be deemed to be "Uncooperative and Other". In respect of both grounds Milena requests that the Minister grant immediate review of all Exporters and in particular Shengzhou Chunyi Electrical Appliances Co Ltd.[14]

26. These two grounds of review appear to be directed at the process undertaken by the ADC or "procedural fairness" rather than at "reviewable decisions" by the Minister, referred to in s.269ZZA. This raises the issue of whether or not the

[11] See s.8(7)(a) and s.10(8)(aa) of the Dumping Duty Act
[12] See Section 3.6 of Report 238 (page 22) and Section III(ii) of Non-Confidential Appendix 1 of Report 238 (pages 99 -105)
[13] See paragraph 9 on page 5
[14] See paragraph 9.1 of Milena's application for review

Review Panel has the power to consider whether a denial of procedural fairness is a ground of review to find a reviewable decision is not the correct or preferable decision. This issue was considered by the Review Panel in ADRP Report No.16 [15] which referred to *GM Holden Limited v Commissioner of the Anti-Dumping Commission*[16] in which Mortimer J considered that it was not part of the function of the Trade Measures Review Officer (TMRO). The following statement of her Honour was quoted:

> *"That being the function, there is no basis in the scheme to impose an obligation on the TMRO to consider and deal with a claim of denial of procedural fairness in its own terms. What the TMRO may need to do, as it did in this case, is examine an underlying factual and reasoning challenge articulated by the party said to have been denied procedural fairness in relation to a particular "finding" in the Chief Executive Officer's report."*[17]

27. The Review Panel in ADRP Report No. 16 acknowledges that there are differences with a review by the Review Panel to that which was conducted by the TMRO, but did not consider that the differences are such that they would lead to a different conclusion to the one her Honour reached. Like the TMRO, the Review Panel only makes a recommendation to the Minister.

28. I concur with the decision in ADRP No. 16 and consider that these procedural issues fall outside the scope of the powers of the Review Panel. I am limited to recommending that the Minister affirm or revoke the reviewable decision and substitute a specified new decision.[18] I will therefore not make findings in respect of Milena's first two grounds of review. In any event, it would appear to me that:

    i. In respect of Milena's first ground of review, the ADC not only complied with all the legislative and World Trade Organisation (WTO) notification requirements relating to the initiation of the investigation, but also took additional steps that went further than what was reasonably necessary to notify interested parties; and

    ii. In respect of Milena's second ground of review, the ADC complied with all the legislative and WTO requirements relating to acceptance or rejection of late submissions, particularly an exporter questionnaire, which is subject to stricter requirements. In this regard I refer to Moore J's discussion of the operation of the legislative scheme in Pilkington *(Australia) v Minister of State for Justice and Customs.*[19]

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[15] ADRP Report No. 16, Quenched and Tempered Steel Plate exported from Finland, Japan and Sweden, paragraphs 120 to 123
[16] [2014] FCA 708
[17] Paragraph [175]
[18] See s.269ZZK(1) of the Act
[19] [2002] FCA 770, paragraph [41]

Consideration of Grounds of Review

29. I will now deal with the second grounds of review put forward by Everhard in its application for review. Everhard did not make a submissions pursuant to s.269ZZI.

The importation of LSSL tubs cannot cause material injury to an Australian manufacturer of the Deep Drawn Stainless Steel Sinks

30. While this ground of review was not separately and clearly articulated by Everhard in its application for review, it is referred to a number of times in Everhard's application for review, and in various submissions to the ADC[20], usually in connection with the discussion on whether LSSL tubs are "like goods" for the purposes of the investigation.

31. Everhard is an Australian owned family business that has been manufacturing laundry products since 1926, selling them to hardware and plumbing merchants in Australia. Everhard manufactures injection-moulded polymer drop-in laundry sinks and stand-alone polymer bowls and cabinets in Australia. As mentioned above, Everhard is also an importer of LSSL tubs, which are goods that are the subject of the reviewable decision application. The imported LSSL tubs are fitted onto imported stainless steel cabinets or the Australian-made polymer cabinets to make stand-alone laundry units.

32. Everhard also imports stainless steel bowls for fitting into benchtops that are similar to those sold by Tasman, but is not requesting a review of the decision to impose duties on these products. Everhard also imports complete laundry units in a flat pack configuration (metal cabinets and lipped bowl) and assembles them in Australia. These have been found by the ADC not to be "like goods" and are not subject to the duty. According to Everhard, this has led to the "perverse" outcome that the fully imported product (a lipped bowl and a cabinet) is not subject to duty but the same bowl when imported for use with an Australian-made cabinet is subject to duty. Everhard is not challenging this decision but contends that if the duty on LSSL tubs is retained, it will need to consider having the polymer cabinets manufactured overseas and brought in as flat packs so as to remain competitive. This is the subject of one of Milena's grounds of review, discussed below.

33. Everhard contends that Tasman does not manufacture a stainless steel lipped laundry bowl in Australia and therefore this type of bowl should not be considered to be the goods under investigation because no material injury can be caused to the Australian Industry. Everhard states:

[20] See paragraph 2 of Attachment 1 to Everhard's application for review and submissions to the ADC of 26 September 2014 (#66 of the Public Record) and 11 November 2014 (#79 of the Public Record)

"More significantly, the Commission's assessment of material injury must be based on the assessment of the impact of dumped imports on the domestic industry producing "like products".[f] Given the fact that the Australian industry does not produce lipped bowls for the assembling of laundry kits or goods that are "like" lipped bowls (which will be discussed below), it is hard to understand how the importation of lipped bowls could possibly cause material injury to the Australian industry. The Australian industry's submission does not provide any evidence to show how it may suffer material injury caused by the importation of lipped bowls." (footnote excluded).[21]

34. Everhard contends and provided evidence to show that:

- LSSL tubs have unique features, that is, its unique lipped top edge;
- LSSL tubs are not interchangeable with Tasman's bowls and that it is impossible to fit a LSSL tubs to anything other than a purpose-built cabinet which can be made from either metal or polymer;
- These LSSL tubs are designed and shaped to fit onto the purpose-designed cabinet to provide rigidity to the unit;
- Tasman does not manufacture this type of LSSL tubs. Tasman makes laundry tubs that are designed to be mounted into a bench top (also referred to as (inset tubs) which require a solid bench or cabinetry for support;
- Due to their specific design LSSL tubs cannot be used in a bench top and bench top laundry sinks cannot be used on a cabinet without a "lip" as the LSSL tubs would simply fall off the cabinet.[22]

35. Everhard compares LSSL tub bowls and "drop in"/benchtop sinks in terms of physical likeness, commercial likeness, functional likeness and application, emphasising their differences.[23] The most significant issue would seem to be the contention of Everhard (and Milena) that the imported LSSL tubs and Tasmin's inset tubs are not interchangeable or directly competitive. Everhard submitted evidence indicating that it "may" be possible to use a LSSL tub in a bench, but only with extensive modification, which would not even then produce a satisfactory result. In the same way, it would be extremely difficult to use a bench top bowl in a freestanding laundry cabinet, also with an unsatisfactory result, and possibly creating a safety hazard and a health risk. [24]

36. The relevant issue in relation to this ground of review is whether the goods produced by Tasman are "like goods" for the purpose of determining if the dumped and subsdised goods <u>cause material injury</u> to the Australian industry

[21] See Everhard submission to the ADC dated 11 November 2014 (#79 of the Public Record)
[22] See Everhard submission to the ADC dated 11 November 2014 (#79 of the Public Record)
[23] See Attachment 1 of Everhard's application for review, paragraphs 3 and 4
[24] See Letter from C.L.R. Maintance Group, Attachment 2 to Everhard's application for review

(my emphasis).[25] It should be noted the the ADC did not identify this as a ground of review in the ADC Response, indicating that Everhard's application contains only one ground of review, being "*that individually-imported lipped laundry tubs …….should be exempted from the anti-dumping measures by the Parliamentary Secretary under s.8(7)(a) and 10(8)(a) of the Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act)".*[26] The reason for this could be the lack of clarity relating to Everhard's grounds of review and some confusion of terminology such as 'goods under consideration' and "like goods" in the various submissions. This will be discussed in more detail below.

37. The ADC also did not appear to acknowledge this claim of Everhard during the course of the investigation, and did not separately analyse these imports in its consideration of whether dumped imports of the goods under investigation had caused material injury to Tasman. The ADC appears only to have considered the issue of imports of LSSL tubs in the context of whether they fall within the broader category of "goods under consideration" and whether they are eligible for exemption under s.8(7) of the Dumping Duty Act.

38. It is important at this stage to distinguish between a product falling within the parameters of the "goods under consideration", that is, the imported product being the subject of the investigation (and with respect to which a determination of dumping is made), and the term 'like goods' for the purpose of the investigation, as defined in s.269T(1) of the Act[27](or the similar term ,'like product' as defined in the WTO Agreement on the Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement).[28]

39. The WTO jurisprudence is very clear about the distinction referred to above, and in particular, that there is no obligation on investigating authorities to ensure that where the product under consideration is made up of categories of products, that all such categories must be "like" each other, thereby constituting a single homogeneous product.[29] In other words, the "like product" definition in Article 2.6 does not apply to the "product under consideration".

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[25] See s.269TG(1) and (2)

[26] See Section 2 of the ADC Response, page 1

[27] The term "like goods" is defined in s. 269T(1) as follows:

"*like goods, in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration*"

[28] Article 2.6 provides:

"*Throughout this Agreement the term "like product" ("product similar") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".*

[29] See Panel Report, *European Communities — Anti-Dumping Measure on Farmed Salmon from Norway, WT/DS337/R (EC - Salmon),* para.7.68; Panel Report European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/R *(EC – Fasteners*), para 7.278; *Panel Report, Korea – Anti-Dumping Duties on Imports of Certain Paper from*

40. The term "like goods" (or "like product") has a number of applications in the Act (or the Anti-Dumping Agreement):[30]

    (i) in the context of dumping margin calculations, being the goods produced in the country of export and sold on the exporter's domestic market, which are "like" the exported products (or the "goods under consideration").[31] This context is not relevant for the purpose of this review;

    (ii) in the context of determination of injury, it is the goods produced by the Australian industry which are "like" the imported product (or the "goods under consideration")[32]; and

    (iii) in the context of the goods subject to the Dumping Duty Notice, providing for the Minister to declare that s.8 of the Dumping Duty Act applies to goods which are "like" the goods exported to Australia.[33] This context is also not relevant for the purpose of this review.

    It should also be noted that the term "like or directly competitive goods" is used with regard to determining the eligibility for the exemptions in s.8(7) and s.10(8)(aa) of the Dumping Duty Act. This issue was the subject of analysis in Report 238.

41. The context of "like goods" with regard to this particular ground of review of Everhard, is that referred to in (ii) above. In order to have made a declaration under s.269TG(1) or (2) of the Act, the Parliamentary Secretary had to be satisfied that because of the export to Australia of the LSSL tubs at dumped prices*, "material injury to an Australian industry producing like goods has been or is being caused or is threatened ……".* The Parliamentary Secretary could only have been satisfied that the imports of LSSL tubs had caused material injury if they were "like goods" to products sold by Tasman and with respect to which the injury finding was made. This would also be in line with WTO jurisprudence. The Panel in Korea – Certain Paper stated:

> *"once the product under consideration is defined, the investigating authority has to make sure that the product it is using in its injury determination is like the product under consideration. As long as that determination is made consistently with the parameters set out in Article 2.6, the investigating authority's like product definition will be WTO-consistent."*[34]

Indonesia, WT/DS312/R,(Korea –Certain Paper), para 7.221
[30] See discussion in Chapter 2 of the Dumping and Subsidy Manual (2013), page 8
[31] See s.269TAC(1) of the Act
[32] See s.269TB(1) of the Act
[33] See s.269TG(1) and (2)
[34] Para,7.219

42. The ADC did not, however, undertake this particular analysis in Report 238, that is, the analysis with respect to "like product' and injury". The ADC addressed "the Goods and Like Goods" with respect to LSSL tubs in Chapter 3 of Report 238 and particularly in Non-Confidential Appendix 1 of the report. There were two assessments in regard to imported LSSL tubs, that is:

- Whether they fall within the parameters of the "goods under consideration"; and
- Whether they are eligible for an exemption under s.8(7)(a) and s.10(8)(aa) of the Dumping Duty Act, which involved an analysis of whether Tasman's inset tubs are "like goods" to the imported LSSL tubs.

43. The ADC's assessment of whether LSSL tubs fall within the parameters of the "goods under consideration" is as follows:

> *"The Commissioner has examined the characteristics of imported stainless steel cleaner's sinks and considers that these products are captured by the description of the goods, being Deep Drawn Stainless Steel Sinks of a certain capacity (regardless of them including additional components).*
>
> *The Commissioner therefore considers that, in the absence of a Parliamentary Secretary exemption, these products are subject to the investigation, and any anti-dumping measures that may result."*[35]

The finding was not challenged by Everhard or Milena as a ground of review, although they both alluded to it in their applications for review and in various submissions to the ADC.The references were usually in respect of LSSL tubs not being a "like good" to the product under consideration, which as indicated above, is not the correct test to determine the parameters of "good under consideration".

44. The second assessment in relation to LSSL tubs in Report 238 is the detailed analysis of whether the goods are eligible for an exemption under s.8(7)(a) and s.10(8)(a) of the Dumping Duty Act. In this regard, and "*as a first step"* the ADC considered whether Tasman's inset tubs are "like goods" to lipped laundry tubs, *"in line with the considerations applied by the Commissioner in assessing "like goods" for the purposes of Part VXB of the Act."* The ADC states that this involved applying the policy and practice outlined in the Dumping and Subsidy Manual in relation to determining whether goods are like each other, that is, an analysis of physical likeness, commercial likeness, functional likeness and production likeness. After finding that that the Australian industry does produce "like goods" to lipped laundry tubs, the ADC considered that the requirements of an exemption were not satisfied and recommended that the Parliamentary

[35] Non-Confidential Appendix 1 of Report No. 238, page 102

Secretary not exercise her discretion under the Dumping Duty Act to exclude individually-imported lipped laundry tubs from anti-dumping measures.[36]

45. The detailed analysis of "like goods" referred to above was in the context of determing the eligibility for the exemption under the Dumping Duty Act which decision, the Review Panel has no power to review, as discussed above.[37] . Given that there was no specific finding in Report 238 that the goods produced by Tasman are "like goods" to the imported LSSL tubs, for the purpose of determining if the dumped and subsidised goods cause material injury, I required the ADC to reinvestigate this issue, and in particular address the considerations of physical likeness, commercial likeness, functional likeness and production likeness of Tasman's inset tubs and the imported LSSL tubs, having regard to the submissions made by all interested parties.[38]

46. In the Reinvestigation Request I pointed out that while the ADC considered whether Tasman's inset tubs are "like goods" to imported LSSL tubs, in Report 238, this analysis was for the purpose of determining whether LSSL tubs are eligible for an exemption from measures, pursuant to s8(7)(a) and s.10(8)(a) of the Dumping Duty Act. I confirmed that I was not requesting a reinvestigation of the ADC's finding in regard to the exemption. However, I also pointed out that if in the reinvestigation the ADC was to use a similar analysis of "like goods" as used in Report 238 (for the purpose of determining eligibility for exemption), then the consideration of "commercial likeness" should be revisited for the following reasons:

- In the analysis in Report 238 the ADC compared free standing units (with lipped sinks) to bench tops (with drop in sinks), therefore in effect comparing different "laundry solutions" and their commercial likeness and substitutability, rather than a comparison of the actual products under consideration, being the LSSL tubs and the input tubs (which are actually inputs in the downstream products); and

- The ADC was requested to take into consideration the submission on behalf of Everhard dated 26 November 2014 and the submission by Milena dated 2 December 2014, both of which were not specifically referred to in Report 238, as well as the submissions of all other parties in this regard.

47. In the Reinvestigation Report, the ADC in setting out its approach to "like goods" assessment, referred to the Panel's decision in EC - Salmon, stating: [39]

[36] Non-Confidential Appendix 1 of Report No. 238, pages 103-105
[37] See section above on 'Grounds of Review Relating to Exemption under Subsections 8(7) or 10(8)(aa) of the Dumping Duty Act'
[38] See Reinvestigation Request
[39] See Reinvestigation Report, page 13

"The Dispute Panel concluded that Articles 2.1 and 2.6 of the Anti-Dumping Agreement did not require the European Communities to have defined the product under consideration to include only products that are all "like", and do not establish an obligation on investigating authorities to ensure that where the product under consideration is made up of categories of products, all such categories of products are individually "like" each other".

After referring to the EC – Salmon case, the ADC went on to state:

"Following this approach, the Commission's "like goods" assessment did not define "like goods" for each sub category of the goods under consideration, but assessed the goods as a whole. Where locally produced goods and the imported goods are not alike in all respects, the Commissioner assesses whether they have characteristics closely resembling each other. In practice, this means that the Commission did not assess every variation of Tasman's sinks to every variation of sink that may be covered by the goods description, one of which being a lipped laundry tub."[40]

48. As discussed earlier in this section, the WTO jurisprudence makes it clear that it is not necessary to include only products that are "like" within the scope or parameters of the "product under consideration", and it is not required of the ADC to make a "like goods" assessment for each sub-category of the product in this regard. However, the fact that a product comes within the description of the goods does not mean that the issue of like goods, if raised with respect to a certain product, does not need to be investigated,[41] particularly in the contexts referred to in (i) and (ii) of paragraph 40 above.

49. Nevertheless, the ADC in the Reinvestigation Report examined the likeness of the inset tubs produced by Tasman and the imported LSSL tubs, having regard to the physical likeness, functional likeness and production likeness, and taking into account the considerations that I requested in the reinvestigation request, particularly focusing on commercial likeness and functional considerations. The ADC's main findings in the Reinvestigation Report are:

Physical likeness

- Although Australian produced sinks possess edges or lips that differ to imported sinks, both products possess the same feature, that is, have an edge of some sort, which for the purpose of the "like goods" assessment does not make either product distinct from one or the other.

Commercial likeness

[40] Reinvestigation Report, page 13
[41] See Review of Decision to Impose Dumping Duties on Zinc Coated (Galvanised) Steel Exported from the Republic of Korea (Report relating to POSCO), para.30, page 11. See also the finding of the Panel in Korea – Certain Paper referred to above

- When treated as a whole, Australian made sinks are considered commercially like when compared to imported sinks.
- Regardless of whether the imported sink is sold as a component of another finished product, imported sinks and Australian made sinks are ultimately both sold in retail stores and other building supply outlets.
- The ADC does not consider that the domestic availability of certain subsets of sinks on the Australian market to be relevant to the finding of commercial likeness.
- Within the "like goods" framework adopted by the ADC, Australian made sinks, including laundry tubs, are considered commercially like.

Functional likeness

- Both imported lipped laundry sinks and Australian produced laundry tubs are both capable of fulfilling the function as a device for "collecting and draining a controlled volume of water in a manner consistent with plumbing standards."
- At the time of import, both imported sinks and Australian sinks function in the same way.
- The function of the sink does not change on the basis of the style of lip it might possess or whether it becomes part of a different product after arrival.

Production likeness

- Aside from variations in the specific stages of production for a Deep Drawn Stainless Steel Sink, the existence of a lip feature of the sink is no different to other features such as holes, ridges and flanges which are all similarly formed during the stamping process.

50. The ADC concluded in the Reinvestigation Report that Australian produced Stainless Steel Deep Drawn Sinks are, as a whole, "like goods" which have "closely" resembling characteristics to the goods under consideration as a whole. Although the ADC's analysis was specific to the imported LSSL tubs and the inset tubs manufactured by Tasman, as I requested, its conclusion was somewhat more general. It nevertheless did the analysis required. In my view the ADC should have focused more on the question of substitutability and direct competitiveness of the imported LSSL tubs and Tasmin's inset tubs, in respect of commercial likeness. If it had done so, it may very well have come to a different conclusion. However, as mentioned above (in the section dealing with "The Review"), the Review Panel does not undertake its own new investigation or make its own assessment. In ADRP Report No. 15 it was stated:

> "*The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgement. I do not see the Panel's role as involving this type of evaluation afresh. Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate*

reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations".[42]

51. I am satisfied that the concerns that I had in relation to the ADC's findings in Report 238 were addressed by the ADC in the Reinvestigation Report and that the basis on which the ADC found that that Tasman's products were "like goods" to imported LSSL tubs, for the purpose of the injury determination, was reasonable. As the products are considered to be "like goods", the claim of Everhard, that the importation of LSSL tub bowls cannot cause material injury to the Australian manufacturer of the Deep Drawn Stainless Steel Sinks, must therefore fail.

Milena

52. As discussed above under Preliminary Issues, procedural issues fall outside the scope of the powers of the Review Panel so I will therefore not consider Milena's first two grounds of review. I will also not consider Milena's third ground of review, challenging the finding of the Parliamentary Secretary that the Australian industry does produce "like goods" to LSSL tubs and therefore does not satisfy the requirements of an exemption under the relevant provisions of the Dumping Duty Act, since it has been determined that the Review Panel does not have the power to review the decision of the Parliamentary Secretary to grant or not grant an exemption, pursuant to the Dumping Duty Act.[43]

53. I will now deal with the rest of the grounds of review put forward by Milena in its application for review. Milena made a submission pursuant to s.269ZZI within the required time period.

The Parliamentary Secretary erred in her decision not to declare stand-alone laundry units (fully assembled or in kits) as "like goods"

54. Milena submits that based on the finding that LSSL tubs (used to complete locally made stand-alone laundry units) were "like goods" the subsequent finding that imported stand-alone laundry units were not "like goods" is "absurd". Milena points out that it was surely not the intention of the Minister that Milena and other Australian manufacturers should move their production of cabinets entirely to China and then import the complete or partially complete units back, since doing so would mean avoiding paying a duty. Milena points out that the effect of this measure is to advantage Chinese manufacturers of stand-alone laundry units over Australian manufacturers.

[42] See ADRP Report No. 15 concerning Wind Towers exported from the People's Republic of China and the Republic of Korea, paragraph 15
[43] See discussion under Preliminary Issues above

55. The ADC in Report 238 considered that stand-alone laundry units do not fall inside the parameters of the goods description,[44] and hence are not subject to the duties that may result from the investigation. The ADC's analysis is set out in Non-Confidential Appendix to Report 238.[45]

- The main arguments surrounding the issue have focused on whether the laundry cabinet that is supplied with the LSSL tubs to make a free standing unit is an "accessory" in the sense of the goods description (making the imported product a sink with accessories), or whether the cabinet is not an accessory within the meaning of the goods description (and the imported product is something outside of the goods description).

- The ADC considered that the imported product contains a significant number of additional elements other than a Deep Drawn Stainless Steel bowl and "accessories", and determined that, as a result, they no longer are considered to essentially be a Deep Drawn Stainless Steel Sink and accessories, but rather are free-standing laundry units that include a Deep Drawn Stainless Steel Sink, but is not in itself such a sink.

- The ADC found that the laundry cabinet (on top of which the LSSL tubs sits to make a free standing laundry unit) should not be considered "accessories" in the context of the sinks market. The ADC found that "accessories" in the context of the sinks market are generally accepted to include such items as chopping boards, taps, colanders, bowl protectors, utility trays and drainer baskets.

56. In the ADC Response, the ADC reiterated the above reasons for its finding on accessories and also pointed out that the free standing laundry units contain various items essential to the product's ability to function which do not fall inside the parameters of the goods description, and hence should not be subject to the investigation or the resulting measures. The ADC also noted that its findings were made in line with established policy and practice and through a reasonable and objective examination of the parameters of the goods description and the physical characteristics of standalone laundry units.

57. Tasman made a submission pursuant to s.269ZZI reiterating various points that it had made on this issue during the investigation, which it considered had not been given the appropriate level of consideration by the ADC, particularly focusing on what it considered to be the "incorrect statement" and incorrect reasoning of the ADC that the laundry cabinet is not an accessory. It contends that:

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[44] The goods are described as:
"Deep Drawn Stainless Steel Sinks with a single Deep Drawn bowl having a volume of between 7 and 70 litres (inclusive), or multiple drawn bowls having a combined volume of between 12 and 70 litres (inclusive), with or without integrated drain boards, whether finished or unfinished, regardless of type of finish, gauge, or grade of stainless steel and whether or not including accessories."

[45] See Section III (iii), pages 105 -110

- All pressed bowl sinks/tubs require installation into a form of cabinetry as "an essential element to enable the product to function", and to limit this assessment to free standing laundry units is incorrect and an error of fact;

- The cabinet is an accessory as it added to the laundry tub and has no commercial value as an independent item, not being sold in isolation for storage purposes;

- The level of functionality does not affect the inclusion of an item within the definition of "like goods", which position has been accepted by the ADC as the addition of taps and waste outlets are accepted as accessories;

- The complete unit still meets the legal definition of "like goods" in that it is not alike in all aspects but does have primary characteristics that resemble goods produced by the Australian Industry; and

- The cabinet itself is not a product which is available for separate purchase without an inclusion of a tub, detracting from the ADC's observation that the laundry unit cabinet is an "essential element" as opposed to an accessory. Tasman refers to Milena's submission of 2 December 2014 in this regard.[46]

58. Tasman contends that these arguments were not given full consideration by the Parliamentary Secretary as part of the information was excluded from Report 238, especially the argument in the last bullet point referred to above. I therefore requested the ADC to reinvestigate its finding that the laundry cabinet that is supplied with the LSSL tubs to make a free standing laundry unit is not an "accessory" in the sense of the goods description. I particularly requested that ADC take into consideration the point made by Milena in its submission to the ADC of 2 December 2014 that was referred to in Tasman's submission to the Review Panel.

59. In the reinvestigation request I also requested the ADC to include in its reinvestigation, a consideration of the implications for the definition of "Australian Industry" in the event of a finding that stand alone laundry units are the goods subject to the investigation, bearing in mind that in Report 238 Tasman was identified as the sole Australian producer of the "like goods", and that Everhard and Milena are two Australian manufacturers of stand-alone laundry units.

60. As noted above the ADC reported on the reinvestigation on 12 August 2015. With regard to the issue of whether or not a cabinet is an accessory to a sink, the ADC considered Milena's 2 December 2015 submission and evaluated all other relevant submissions. It also turned its attention to the points raised by

[46] See #85 of the Public Record

various parties regarding purchasing behavior, which the ADC regards as an important indicator in determing whether it is appropriate to describe the cabinet as an accessory.

61. Based on an assessment of all relevant submissions the ADC found that the purchase of the cabinet would not be viewed as discretionary and as the name implies, the two items are sold together in the form of an integrated "unit" and should be treated as such because it is not possible to distinguish the two items at the point of sale. It concluded that the cabinet, which is imported together with a lipped laundry tub, is therefore not an "accessory" within the meaning of the goods description.[47]

62. The ADC then considered if a laundry unit would satisfy the goods description, and found that:

- laundry units can satisfy several functions, such as interfacing with washing appliances, storage and providing a work bench area, that go beyond the primary function of a Deep Drawn sink;
- laundry units come with substantially different physical characteristics and can satisfy a broader range of functions when compared to the product described in the goods description;
- laundry units are also produced using significantly more complex production processes in addition to the deep draw stamping process used for the sink; and
.
- laundry units should not be considered to Deep Drawn Stainless Steel Sinks with accessories, but rather a laundry unit, that at the time of export integrates several components, such as a Stainless Steel Deep Drawn Sink and a cabinet which together perform a broader range of functions.

The ADC concluded that laundry units do not possess the characteristics of a Stainless Steel Deep Drawn Sink exported to Australia, but have become a different product. It was found that laundry units exported to Australia either assembled or in "kit" form are therefore not considered to be the goods under consideration and subject to anti-dumping measures.[48]

63. I am now satisfied that the ADC took into consideration all relevant submissions and I am of the view that its approach and analysis was reasonable. I agree with the ADC's finding that stand-alone laundry units (fully assembled or in kits) do not fall within the description of the "goods" under consideration and hence are not subject to the measures that result from the investigation.

[47] See section 4.4.2 of the Reinvestigation Report (pages 19 – 21),
[48] See section 4.4.2 of the Reinvestigation Report (pages 19 – 22),

64. In the reinvestigation request I also requested the ADC to include in its reinvestigation, a consideration of the implications for the definition of "Australian Industry" in the event of a finding that stand alone laundry units are the goods subject to the investigation, bearing in mind that in Report 238 Tasman was identified as the sole Australian producer of the "like goods", and that Everhard and Milena are two Australian manufacturers of stand-alone laundry units. As the ADC confirmed its finding that that stand-alone laundry units do not fall within the description of the goods and are therefore not subject to the investigation, it is not necessary to further consider this issue. A different finding in this regard would have thrown into question the identity of the "domestic industry", with implications for the entire investigation and its findings.

The Parliamentary Secretary erred in determining the duty imposed on Uncooperative and Other Exporters by setting it too high

65. Milena contends that a levy of 52.6 percent on "Uncooperative and Other Exporters", while not allowing a review for 12 months, is "simply punitive and unjustified". Milena referred particularly to exporter Shengzhou Chunyi Electrical Appliances Co Ltd which it contented could not be "guilty" of dumping since they were not selling the products they make for Australia, in their local Chinese market.[49] Milena points out the ADC believes that dumping was occurring at around 10 percent yet it chose to levy 52.6 percent on what it terms, "Uncooperative and other Exporters".

66. Milena again refers to the lack of direct notification by the ADC to affected companies in both China and Australia, which it considers did not constitute "Fair Notice", a contention which was also included in Milena's first ground of review. As discussed under "Preliminary Issues" above, this contention is directed at the process undertaken by the ADC or "procedural fairness" rather than at "reviewable decisions" by the Minister, referred to in s.269ZZA, thereby falling outside the scope of the powers of the Review Panel. I will therefore not consider this contention of Milena under this particular ground of review.

67. Even in respect of the first part of this particular ground of review (and as pointed out by the ADC in the ADC Response), Milena's focus appears to be on the unfairness of the imposition of a higher rate of duty on exporters deemed not to co-operate, rather than challenging the decision to impose these high rates of duty, in terms of the legislative framework. It could be argued that this challenge is not directed at a "reviewable decision", thereby also falling outside the scope of the powers of the Review Panel. I will, however, in any event address this issue.

68. An "uncooperative exporter" is defined under s. 269T(1) of the Act as:

[49] See page 6 and Attachment 3 of Milena's application for review

"an exporter who did not provide the Commissioner information considered relevant to the investigation, or an exporter that significantly impedes the investigation".

69. In Report 238 it is stated that all exporters that did not submit Exporter Questionnaires, or submitted Exporter Questionnaires that did not meet the Commission's requirements, were deemed to be uncooperative. Further, it was stated that for uncooperative exporters, given that these exporters have not provided sufficient information via a response to the Exporter Questionnaire, dumping margins were calculated using all "relevant information and reasonable assumptions".[50] It was further stated that the dumping margin for uncooperative and all other exporters from China was established in accordance with s.269TACB(2)(a) of the Act, by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period. The dumping margin for uncooperative and all other exporters was calculated to be 49.5 percent.[51]

70. Similarly, with regard to subsidy margins the ADC stated that,

"In the absence of GOC advice regarding the individual enterprises that had received financial contributions under each of the investigated subsidy programs, the Commissioner has had regard to the available relevant facts and determines that uncooperative exporters have received financial contributions that have conferred a benefit under 23 programs found to be countervailable in relation to Deep Drawn Stainless Steel Sinks."[52]

71. Further the ADC stated that pursuant to s.29TAACA(1)(c) and 269TAACA(1)(d) it had acted on the basis of all the facts available and made reasonable assumptions in order to determine whether a countervailable subsidy has been received in respect of the goods.[53] On this basis the subsidy margin was calculated to be 6.4 percent for "Uncooperative and all other exporters".

72. The Parliamentary Secretary acted on the recommendation of the ADC, which would appear to be in accordance with the legislation, in calculating and imposing the higher duty rate on uncooperative exporters. It is also in accordance with Australia's WTO obligations under the "the Anti-dumping Agreement" which provides:

"It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could

[50] See Section 6.3.3 of Report No. 238, page 32
[51] See Section 6.14.3 of Report No. 238, page 50
[52] See Section 7.5.3 of Report No. 238, page 54 - 55
[53] See Non-Confidential Appendix 8 of Report No. 238, page 170

lead to a result which is less favourable to the party than if the party did cooperate."[54]

73. In summary, this approach is reflected in Part XVB of the Act dealing with the treatment of uncooperative exporters. The exports of the uncooperative exporters are not examined as part of the investigation and the Minister is authorised by the legislation to ascertain the normal value and export price on the basis of all relevant information. That this may lead to a more unfavourable result for the exporter, is a consequence of being found to be uncooperative.

74. The approach taken by the ADC was reasonable and in accordance with the legislative and WTO framework and Milena's ground of review in this regard fails.

The currency exchange rate was not properly taken into account in the investigation and in setting the duty under the notice.

75. Milena submits that while some consideration was given to the exchange rates, this "was lost in the final findings", since the Australian Dollar was near parity with the US Dollar when the investigation commenced and during its course, but currently it is nearer to 0.75. Milena illustrates the point by example, that is, at parity a local manufacturer producing a LSSL tubs for AU$30 would have found it difficult to compete with an imported LSSL tubs sold for US$25 (AU$25). However at a rate of 0.75 the local manufacturer would find it easy to compete with the imported US$25 (AU$33.33) LSSL tubs.[55]

76. Similarly, Milena contends that the currency exchange rate is not fully factored into the duty and submits that the variable nature of exchange rates makes the use of a percentage based on the US Dollar inappropriate for a levy. Milena provides another example to illustrate its point, that is, at parity a local importer of tubs from an "Uncooperative Exporter" at US$25 would need to pay a net price of AU$38.15 per LSSL tubs. However, at a rate of 0.75 the same importer would be paying a net price of AU$50.86 per LSSL tubs.[56]

77. In the ADC Response it is contended that these arguments were not made to the ADC during the investigation and that no submissions were made in respect of these matters. The ADC therefore considers that these are irrelevant considerations for the Review Panel as the information was not before the ADC at the time of making its report to the Parliamentary Secretary and should thus not be included in the review.

78. The ADC further notes in the ADC Response that Milena may apply for a review of the anti-dumping measure (no sooner than 12 months after publication of the

[54] Annex II (Paragraph 7) of the Anti-Dumping Agreement
[55] See Section 8.6 of Milena's application for review, page 6
[56] See Section 8.7 of Milena's application for review, page 6

Parliamentary Secretary's decision) if it considers that the variable factors (including export price, which may be influenced by exchange rates) have changed.

79. I agree with the ADC. As stated above, in making its recommendation the Review Panel must not have regard to any information other than the "relevant information" as defined in s.269ZZK(6)(a) of the Act, that is, information to which the ADC had regard or was required to have regard when making its findings and recommendations to the Minister. The Review Panel must only have regard to the relevant information and any conclusions based on the relevant information that are contained in the application for review and any submissions received under s269ZZJ. In other words, the Review Panel does not undertake its own new investigation and is limited to the information that has been before the ADC. Since Milena's last ground of review relates to information after the investigation period and the particular arguments were not submitted to the ADC during the investigation, it cannot be considered to be "relevant information" as defined in s.269ZZK(6)(a), and by virtue of s.269ZZK(4) the Review Panel cannot have regard to such information. This ground of review must therefore fail. See also the discussion by Moore J of the operation of this section (in relation to the Review Officer*) in Pilkington (Australia) Ltd v Minister for Justice and Customs.*[57]

80. Even if there were arguments and more recent information relating to the exchange rate, submitted to the ADC during the investigation which could be considered to be "relevant information" and taken into consideration in this review, the ground of review would still fail, on an analysis of the relevant sections of Part XVB of the Act.

81. Although, not specifically stated in Milena's application for review, it is implied that the volatile exchange rate would have impacted on the export price and therefore the dumping margin. Pursuant to s.269TACB of the Act, the export price or prices of goods exported to Australia during "the investigation period"[58] are those used to determine if dumping has occurred. This determination is one of the preconditions to the decision of the Minister under ss.169TG(1) and (2) of the Act to declare that s.8 of the Dumping Duty Act applies. Pursuant to s.269TG(3) the Minister has to include a statement of the normal value, export price and non-injurious price of the goods, the so called "variable factors" used in the calculation of any dumping duty. Justice Nicholas in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth*[59] stated:

> "*There is nothing in s 269TG to suggest that there was any intention to confer upon the Minister a discretion that would enable him or her to*

[57] [2002]FCA 770 at paragraph [57]
[58] The investigation period is set out in the notice issued under s.269TC(4) of the Act at the commencement of the investigation.
[59] [2013] FCA 870

determine variable factors different to those utilised for the purpose of determining whether dumping occurred and, if so, at what margin."[60]

82. This indicates that the export price used for the purpose of any Dumping Duty Notice is the same as that used to determine dumping, that is, during the investigation period, and a different export price cannot be used for the purpose of s.269TG(3). It therefore does not appear to be open to the Minister to ascertain a different export price based on information that relates to a period other than the investigation period. As pointed out by the ADC, if there are changes to the variable factors (including export price, which is influenced by exchange rates), the remedy available to an affected party is to seek a review of the variable factors under Division 5 of Part XVB of the Act, once the 12 month period has expired.

Recommendations / Conclusion

83. For the reasons set out above, pursuant to s.269ZZK(1) of the Act, I recommend that the Parliamentary Secretary affirm all decisions made pursuant to ss.269TG(1) and (2) of the Act to publish a Dumping Duty Notice and pursuant to s.269 TJ(2) of the Act to publish a Countervailing Duty Notice with respect to Deep Drawn Stainless Steel Sinks exported from the People's Republic of China.

[60] At paragraph [140]