Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 87

Certain Aluminium Zinc Coated Steel exported to Australia from the People's Republic of China

August 2018

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Abbreviations

Term	Meaning
Act	*Customs Act 1901*
Amending Act	*Customs Amendment (Anti-Dumping Measures) Act 2017*
ADN	Anti-Dumping Notice
Baosteel	Baoshan Iron & Steel Co., Ltd
China	The People's Republic of China
Commission	Anti-Dumping Commission
Commissioner	The Commissioner of the Anti-Dumping Commission
Div 5 Applications	The applications made by the applicants under Div 5 Part XVB of the Act for review of the Original Measures
Div 5 Reviews	The reviews under Div 5 Part XVB initiated by the Commissioner on 5 May 2017
Explanatory Memorandum	The explanatory memorandum which accompanied the *Customs Amendment (Anti-Dumping Measures) Bill 2017* when it was introduced into Parliament
Goods	Flat rolled products of iron and non-alloy steel of a width equal to or greater than 600mm, plated or coated with aluminium-zinc alloys, not painted whether or not including resin coating.
IDD	Interim dumping duty
Interpretation Act	*Acts Interpretation Act 1901*
Original Investigation period	1 July 2011 to 30 June 2012
Meisteel	Shanghai Meishan Iron and Steel Co., Ltd
Minister	Assistant Minister to the Minister for Jobs and Innovation

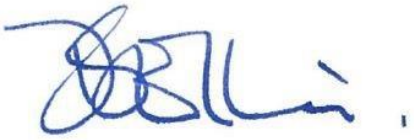
Original Measures	The anti-dumping measures applied to exports of the goods from China as a result of International Trade Remedies Branch Report No 190 and being the subject of ADN 2013/66 (as subsequently altered)
Report	The report published by the Commission in relation to Review 409 and Review 410 and dated 27 March 2018
Reviewable Decision	The decision of the Assistant Minister made on 26 April 2018 to make a declaration under s 269ZDB(1)(a)(iii), and being the subject of ADN 2018/54
Review Applications	The applications for review of the Reviewable Decision made on 30 May 2018
Review Period	1 April 2016 to 31 March 2017
[redacted] Goods	[redacted]
SEF	The Statement of Essential Facts in relation to REV 409 and REV 410 published on 28 August 2017

Recommendation

This is a review of the decision of the Hon Zed Seselja, the Assistant Minister for Science, Jobs and Innovation made on 26 April 2018 under s 269ZDB(1)(a)(iii) of the *Customs Act 1901* fixing different variable factors for the purposes of calculating the amount of interim dumping duty applicable to exports of certain aluminium zinc coated steel from the People's Republic of China.

I consider that the decision was the correct or preferable decision.

I recommend that the decision be affirmed.



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Scott Ellis
Panel Member
Anti-Dumping Review Panel
13 August 2018

Summary

1. This review concerns the variable factors used to calculate the rate of interim dumping duty (IDD) payable on certain aluminum zinc coated steel (goods) exported by Baoshan Iron & Steel Co., Ltd Co., Ltd (Baosteel) and Shanghai Meishan Iron and Steel Co., Ltd (Meisteel) from the People's Republic of China (China).

2. On 26 April 2018, the Hon Zed Seselja, the Assistant Minister for Science, Jobs and Innovation (Minister) made a decision under s 269ZDB(1)(a)(iii) of the Act (Reviewable Decision) fixing different variable factors for the purposes of calculating the amount of IDD applicable to exports of the goods from China by the applicants. The effect of the Reviewable Decision was that the dumping margin was reduced from 62.9% for both applicants to 23.4% for Baosteel, and to 11.0% for Meisteel.

3. In making the Reviewable Decision the Minister determined the export price, one of the variable factors, by applying s 269TAB(2A) and (2B) of the *Customs Act 1901*,[1] which are new provisions introduced by the *Customs Amendment (Anti-Dumping Measures) Act 2017* (Amending Act).

4. The applicants say that this was wrong. They say that:
   (a) s 269TAB(2A) and (2B) were not applicable to the applicants' situation (Ground 1); and
   (b) the Minister did not apply s 269TAB(2A) correctly and wrongly concluded that the applicants were "low volume exporters" within s 269TAB(2A) (Ground 2).

   The applicants argued that the Minister should have determined the export price under s 269TAB(3), which would have permitted or provided for the Minister to

[1] Unless indicated otherwise, reference to sections are references to sections of the Act.

determine that the export price was equal to the normal value and to calculate the IDD using a floor price mechanism.

5. I considered that the Reviewable Decision was the correct or preferable decision because:
   (a) the amendments to the Act by the Amending Act applied to the applicants' applications under Div 5 of Part XVB of the Act;
   (b) the reasons for applying the s 269TAB(2B) reflected the provisions of s 269TAB(2A); and
   (c) the decision to apply s 269TAB(2B) was supported by the circumstances of the case.

Background

6. Baosteel and Meisteel are Chinese manufacturers and exporters of steel, including the goods. The goods are more fully described as:

   > flat rolled products of iron and non-alloy steel of a width equal to or greater than 600mm, plated or coated with aluminium-zinc alloys, not painted whether or not including resin coating.

   Goods fall within this description whether the goods are passivated or not passivated, resin coated or not resin coated, oiled or not oiled and skin passed or not skin passed. However, painted and corrugated goods are not included.

7. Anti-dumping measures (Original Measures) were imposed on the goods on 5 August 2013[2] as a result of International Trade Remedies Branch Report No. 190 (REP 190). The applicants were treated as non-cooperative exporters. The investigation period for REP 190 was 1 July 2011 to 30 June 2012 (Original Investigation Period).[3]

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[2] ADN 2013/66.

[3] REP 190 at p7. Countervailing measures were also imposed following on International Trade Remedies Branch Report No. 190 (REP 190). The countervailing measures continue to apply at minimal levels but

8. Baosteel and Meisteel applied for review of the Original Measures under Div 5 of Part XVB of the Act on 18 April 2017 (Div 5 Applications).

9. Reviews were initiated under Division 5 Part XVB of the Act in response to each Div 5 Application on 8 May 2017 (Div 5 Reviews).[4] The review for Baosteel was Review 409. The review for Meisteel was Review 410.

10. The review period for both reviews was 1 April 2016 to 31 March 2017.

11. A joint Statement of Essential Facts (SEF) was published on 28 August 2017.

12. The Amending Act received Royal Assent of 30 October 2017. Schedule 1 of the Amending Act (including Item 4) came into force the next day, on 31 October 2017.[5]

13. The Commission subsequently published position papers in light of the enactment of the Amending Act.[6] Each of the applicants made submissions in response to the position papers.[7]

14. A final report dealing with both reviews was published on 30 April 2018 (Report).

15. The Reviewable Decision was made on 30 April 2018.

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are not in dispute in this matter. The Original Measures were subsequently altered as a result of various exemptions and reviews, but not in ways relevant to the present matter (see the Report at pp 10 – 11).

[4] ADN 2017/63.

[5] Section 2 of the Amending Act.

[6] EPR013 in REV 409, EPR011 in REV 410.

[7] EPR014 in REV 409, EPR 012 in REV 410.

16. In making the Reviewable Decision, the Minister accepted the findings and recommendations made in the Report, including all the material findings of facts and law.

17. Anti-Dumping Notice 2018/54 also identified the duty method used to calculate the amount of IDD. It was a combination of a fixed rate of IDD plus a variable rate equal to the amount, if any, by which the actual export price was lower than the ascertained export price.

18. The applications for review by the Panel (Review Applications) were made on 30 May 2018. Both applicants were represented by J Bracic & Associates Pty Ltd.

19. The Senior Member determined that the Panel in respect of the Review Applications should be constituted by me. The Review was initiated on 13 June 2018.

20. Submissions were received from the applicants on 13 July 2018.

The Amending Act

21. This review concerns the meaning and operation of s 269TAB. Before dealing with the grounds advanced by the applicants, it is helpful to discuss the section and the amendments made to it by the Amending Act.

22. Section 269TAB deals with how the export price is to be determined.

23. Section 269TAB(1) is the usual mechanism for determining export price. It provides for the determination of export price by reference to what might, in broad terms, be described as market transactions. It also provides, by paragraph (c) that the Minister may determine the export price having regard to all the circumstances of the exportation where paragraphs (a) and (b) do not apply. Section 269TAB(1) was not changed by the Amending Act.

24. The Amending Act introduced subsections (2A) to (2G) into s 269TAB. They are a special regime for determining the export price when considering applications for review under Div 5 of Part XVB.

25. The 'gateway' provision to the special regime is s 269TAB(2A):

> (2A) If an export price of goods exported to Australia is being ascertained for the purposes of conducting a review of anti-dumping measures under Division 5, the price may, despite subsection (1), be determined by the Minister in accordance with subsection (2B) if:
>
> (a) the price is being ascertained in relation to an exporter of those goods (whether the review is of the measures as they affect a particular exporter of those goods, or as they affect exporters of those goods generally); and
>
> (b) the Minister determines that there is insufficient or unreliable information to ascertain the price due to an absence or low volume of exports of those goods to Australia by that exporter having regard to the following:
>
> (i) previous volumes of exports of those goods to Australia by that exporter;
>
> (ii) patterns of trade for like goods;
>
> (iii) factors affecting patterns of trade for like goods that are not within the control of the exporter.

26. This review is primarily concerned with s 269TAB(2A).

27. Section 269TAB(2B) identifies information which may be used in determining the export price:

> (a) the export price determined in prior determinations involving the exporter. Section 269TAB(2D) specifies the determinations that may be taken into account;
>
> (b) the price paid for sales by the exporter to third countries; and

(c) the export price determined in prior decisions under the Act involving a third-party exporter from the same country of export but within a two-year period prior to initiation of the Div 5 review.

28. Section 269TAB(2G) provides that the export price determined under s 269TAB(2B) may be adjusted to reflect what the export price would have been had there not been an absence or low volume of exports, including adjustments relating to timing of exports and differences between the goods the subject of a Div 5 application and those the subject of the information under s 269TAB(2B).

29. Section s 269TAB(3) was not amended. It provides that the Minister may have regard to 'all available information' if the Minister is satisfied that 'sufficient information has not been furnished, or is not available, to enable the export price of goods to be ascertained under the preceding subsections'.

Ground 1: Application of the Amending Act

30. The first ground of both Review Applications was that the Minister erred in applying s 269TAB, as amended by the Amending Act, when considering the applicants' Div 5 Applications. The applicants argued that:

(a) the amendments did not apply to the applicants' Div 5 applications because those applications were not being undertaken 'immediately before the commencement of' Schedule 1 of the Amending Act on October 2017; and

(b) Item 4(b) should not be construed, or applied, so as to give retrospective effect to the amendments.

31. The arguments advanced by the applicants in this review on this ground were almost word for word the same as the arguments advanced by Jiangsu Shagang Group Co., Ltd and Hunan Valin Xiangtan Iron and Steel Co., Ltd in ADRP Review 2018/83 'Steel Rod in coils exported from the People's Republic of China' (Review 2018/83). In that review, Mr Bracic represented the applicants and I constituted the Panel. I rejected the arguments advanced by the applicants

in that case. In addition, Mr O'Connor, another member of the Panel, has considered, and rejected, essentially the same arguments in ADRP Review No. 84, 'Steel Reinforcing Bar Exported from the People's Republic of China'. I agree with Mr O'Connor's reasons.

32. The Reports of the Panel in those earlier reviews may be found on the ADRP website. The Panels' reasons for rejecting the applicants' arguments may be summarised as follows:

(a) Item 4(b) of Schedule 1 of the Amending Act is the relevant transitional provision. It provides that the amendments effected by the Amending Act apply to a review under Div 5 that was 'being undertaken immediately before the commencement of this Schedule but for which a declaration in accordance with subsection 269ZDB(1) of that Act had not been made'. That expression is apt to describe the Div 5 Applications in this case: the Div 5 Applications were being undertaken when the Schedule commenced on 31 October 2017 and a notice under s 269ZDB(1) had not been given in respect of them;

(a) Section 7(2) of the *Acts Interpretation Act 1901* (Interpretation Act) provides that an amending Act does not affect any acquired or accrued right or privilege. Application of the amendments to the applicants' applications under Div 5 did not involve the retrospective application of the amendments to an acquired or accrued right or privilege. Applications under Div 5 of the Act are essentially prospective in nature, setting the amount of duty that will be payable in the future. The Interpretation Act provides no reason why s 269TAB, as amended, would not apply to the Div 5 Reviews; and

(c) This interpretation of Item 4(b) is confirmed by page 3 of the Explanatory Memorandum which accompanied the Customs Amendment (Anti-Dumping Measures) Bill 2017 when it was introduced into Parliament (Explanatory Memorandum). The Explanatory Memorandum clearly contemplates that the amendments will apply to Div 5 applications which were then pending.

33. Those arguments are equally applicable to this matter. The Act, as amended, governed the applicants' Div 5 Reviews.

Ground 2: Incorrect application of s 269TAB(2A)

34. The second ground advanced by both applicants was that the Minister incorrectly applied s 269TAB(2A) if, contrary to the applicants' first ground, that provision applied at all.

35. The applicants contended that the Minister should have concluded that determination of the export price under s 269TAB(2B) was not warranted. They say the Minister should have fallen back on s 269TAB(3) when determining the export price.

Sub-paragraph (i): previous volume of exports

36. The first argument advanced by the applicants under this ground was that s 269TAB(2A) required the Minister to find that the previous export volumes were 'much higher' than the volumes exported during the review period in order to determine the export price under s 269TAB(2B).[8]

37. The applicants pointed to the expression 'relatively higher', which was used in the Report in the following passage:

> The Commission considers that Baosteel's and Meisteel's previous volumes of exports of the goods to Australia are relatively higher than the volume of exports during the review period during which neither Baosteel nor Meisteel have exported the goods to Australia.

38. The applicants contrasted this expression with the following passage from the Explanatory Memorandum:

[8] At page 11 of the Review Applications.

14. New paragraph 269TAB(2A)(b)(i) requires consideration of the previous volumes of exports (if any) of the goods that are the subject of the review to Australia by that Exporter. If the previous volumes of exports are **much higher** than the volume of exports during the period being examined by the review, this may indicate that the Exporter has adopted a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may be relevant in the Minister's determination that the information (if any) provided by the Exporter is insufficient or unreliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should be applied.[9]

39. The applicants argued that the volumes previously exported to Australia were not 'much higher' than the volumes exported during the review period and therefore, were not enough to support the use of s 269TAB(2B) to determine the export price.

40. I do not accept the argument of the applicants on this point.

41. First, the interpretation or construction of a statute is directed to ascertaining the meaning of the legislation. In that process, the primary focus is on the language of the statute. Although the language of the statute must be considered in its context, the focus remains of the words of the statute.[10]

42. Section 15AB of the Interpretation Act sets out circumstances in which regard may be had to the Explanatory Memorandum:

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[9] Emphasis in the Review Applications.

[10] *Alcan (NT) Alumina Pty Ltd* v *Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47], *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].

> Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

43. The Explanatory Memorandum is not a substitute for, and does not override, the words of the statute.

44. Section 269TAB(2A) does not refer to 'much' higher or 'much' lower. The inquiry under s 269TAB(2A) is as to whether there is 'insufficient or unreliable information to ascertain the price due to an absence or low volume of exports' having regard, to previous volumes of exports of those goods within sub-paragraph (i), along with patterns of trade for like goods within sub-paragraph (ii) and factors affecting patterns of trade within sub-paragraph (iii). No one of the factors identified in sub-paragraphs (i) to (iii) is decisive or necessary for the Minister to reach the conclusion that the information relating to the export price is insufficient or unreliable.

45. A further difficulty with the applicants' argument is that the passage quoted from the Explanatory Memorandum does not attempt to provide an exhaustive explanation of the circumstances in which the Minister might exercise his discretion under s 269TAB(2A). The discussion of 'much higher' volumes was an example, not the articulation of a rule. It may be true that the greater the

difference between the volumes exported in the review period and the previous volumes, the stronger the inference which may be drawn from that difference, but a 'much' higher or 'much' lower volume is not necessary.

46. In the present case, there was a difference between the volumes exported in the review period and the volumes exported previously, specifically during the Original Investigation Period. The applicants did not export the goods during the Review Period. Baosteel exported [redacted] metric tonnes during the Original Investigation Period. Meisteel exported [redacted] metric tonnes during the Original Investigation Period. The difference in volumes, and the complete lack of exports during the Review Period, support the use of s 269TAB(2B) to determine the export price.

47. The characteristics of the particular applicant cannot be ignored in considering the decision whether to determine the export price under s 269TAB(2B). In the present case, each of the applicants was a substantial entity which manufactured a broad range of aluminium zinc coated steel falling within the description of the goods the subject of the application. Baosteel's exports during the Original Investigation Period were about [redacted] of the total Australian market and about [redacted]% of its total production capacity.[11] Meisteel's exports during the Original Investigation Period were about [redacted] of the total Australian market and about [redacted] of its total production capacity. These matters make it more desirable, rather than less, that the export price should be determined under s 269TAB(2B) because the scope for the applicants to export a large amount of the goods to Australia. This is not a case where the exporter only produces a specialty product and cannot export large quantities of a broad range of the goods to Australia.

[11] Page 12 of the Review Applications.

Sub-paragraph (ii): Patterns of trade

48. The applicants argued secondly, that assessment of the 'patterns of trade' under paragraph (ii) should be undertaken in the context of 'the exporter in question' or 'the pattern of trade generally among Exporters of goods from the country in question'. The applicants contended that the Minister wrongly gave 'greater weight to a comparison of [the exporter's] previous export volumes to that of other exporting countries, over total volumes from China'.

49. The applicants relied of the following passage from the Explanatory Memorandum:

> 15. New paragraph 269TAB(2A)(b)(ii) requires consideration of the patterns of trade for those goods. For example, some goods are specialty or custom products that are consistently exported in low volumes. Considering patterns of trade may involve an examination of the previous patterns of trade for the Exporter in question, or the pattern of trade generally among Exporters of goods from the country of export. The Minister may also consider the pattern of trade in other ways. For example, if a decline in the pattern of trade from the Exporter reflects a similar decline in the pattern of trade from the country of export generally, during the period being examined by the review, this may demonstrate that low volumes are indicative of broader market trends, rather than a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may weigh in favour of the Minister determining that the information (if any) provided by the Exporter is sufficient and/or reliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should not be applied.[12]

[12] The emphasis is in the Review Applications, not the Memorandum.

50. It appears that this argument was directed to the following passage from the Report:

> In accordance with subsection 269TAB(2A)(b)(ii), the Commission has assessed and considered the overall pattern of trade, including the patterns of trade relating to countries other than the country of export in this particular instance. The Commission observes that the notable decline in the volume of exports from China during the March quarter of 2013 corresponds to the quarter when securities were imposed in respect of aluminium zinc coated steel exported from China. Therefore, it is not entirely unexpected that Baosteel and Meisteel's pattern of trade reflects the pattern of trade from other exporters from China generally, given the level of the anti-dumping measures imposed on exports from China.
>
> As noted previously, while the volume of aluminium zinc coated steel imported from China has decreased considerably since the March quarter of 2013 (when securities were imposed), the Commission notes that imports of aluminium zinc coated steel from other countries continued, and therefore considers that Baosteel's and Meisteel's lack of exports to Australia since the December quarter of 2012, and during the review period, does not pertain to an absence of exports, or low volume of exports, to Australia generally.[13]

51. It is true that the Explanatory Memorandum refers to 'the exporter in question' and 'the pattern of trade generally among Exporters of goods from the country in question'. However, those expressions are introduced by '[c]onsidering patterns of trade *may* involve ….'. The Explanatory Memorandum is giving examples, rather than making an exhaustive statement of the matters that may be considered under sub-paragraph (ii). Further, the Explanatory Memorandum is not the legislation.

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[13] Report at p18. References omitted.

52. Section 269TAB(2A)(b)(ii) does not require the assessment of patterns of trade to be carried out in a way which is focused either on the exporter in question, or on exports from the country of export. Information about exports from China is relevant under sub-paragraph (ii). However, information about the volumes of exports to Australia from all countries also falls within sub-paragraph (ii). The Minister is entitled to give such weight to information falling within sub-paragraph (ii) as he considers appropriate. Exports from China and exports by the applicants were referred to in the Report as part of the consideration of the exercise of the power under s 269TAB(2A). The Report, and the Minister, were entitled to deal with s 269TAB(2A)(b)(ii) as they did.

Sub-paragraph (iii): Factors not within the control of the exporter

53. The third argument advanced by the applicants concerned the scope of the factors that may be considered under s 269TAB(2A)(b)(iii). That subparagraph refers to factors affecting patterns of trade for like goods that are not within the control of the exporter.

54. The Report says:[14]

> The Commission notes that the explanatory memorandum to the *Customs Amendment (Anti-Dumping Measures) Bill 2017* identifies factors that may affect patterns of trade for like goods that are not within the control of the exporter. Such factors may include supply disruptions or natural events (such as flood, drought or fire) that affect production levels.
>
> The Commission has found that both Baosteel and Meisteel have manufactured and sold like goods on the domestic market and to third countries during the review period. The Commission considers that this indicates that there do not appear to be any factors (such as natural events) that are not within the control of either Baosteel or Meisteel that are affecting trade for like goods.

[14] At page 18. Citations omitted.

55. The approach of the Report does not reflect the language of sub-paragraph (ii), which is more generally expressed. Sub-paragraph (ii) does not confine 'factors … that are not within the control of the exporter' to events of force majeure such as floods, drought or fire. A lack of 'natural events' does not mean that there were no factors outside the control of the applicants affecting trade for like goods.

56. However, the applicants' primary complaint in the present context is that the Report did not have proper regard to the extent of demand for the particular product which the applicants proposed to export. The applicants contended that they had decided to re-enter the Australian market to supply a particular end user with aluminium zinc coated sheets [redacted] Goods).[15] The applicants contended that [redacted] Goods were goods for which there was only limited demand. They also contended that these products could not be supplied, at the moment, by the Australian industry.

57. I accept that the extent of demand for the goods the subject of a Div 5 application is a matter which may fall within sub-paragraph (iii). Its importance will depend of the circumstances of the case. However, sub-paragraph (iii) is concerned with factors affecting patterns of trade for 'like goods', not with any particular sub-class of 'like goods' which the exporter proposes to export, such as the [redacted] Goods in this case. It may be that the applicants cannot control the demand for custom products, such as [redacted] Goods. But the applications did not confine the class of goods under consideration to [redacted] Goods. The Original Measures were not confined in that way either. The applicants manufacture a range of 'like goods'. Limited demand for [redacted] Goods would not prevent the applicants exporting other product falling within the description of 'like goods'. The decision of the applicants to not export the goods, or like goods, to Australia does not

[15] Page 12 of each of the Review Applications.

appear to have been the result of limited demand for 'like goods'. The Report dealt with the 'overall' demand for like goods when it said, 'demand for aluminium zinc coated steel persist in the Australian domestic market'.[16] The Report has adequately taken into account demand for 'like goods' under sub-paragraph (iii).

58. The applicants referred to the trend of exports from China. They said that the exports from China were negligible for the period considered in the Report and that this reflected "a contrast in market dynamics between the Australian and Chinese domestic markets[17] and that the China wide trend reflected the trend of the applicants' exports. The applicants also stated that their decision to cease exporting to Australia was the result of their decision to concentrate in specialized products falling within the description of the goods. The Report considered that the trend in the applicants' exports was explicable by reference to the anti-dumping measures imposed. This conclusion was reasonably open. It appears likely that the anti-dumping measures, rather than 'market dynamics', impacted the China wide trend of exports of the goods as well as the trend in exports of the goods to Australia by the applicants.

The applicants' motives

59. The applicants also argued[18] that it was necessary for 'the Commission to show evidence to demonstrate that [the applicants] intended to implement an export strategy aimed at "gaming the system" in order to use the review process to achieve a favourable outcome.'

60. I do not consider that this is the correct approach to s 269TAB(2A).

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[16] Report at p 16.

[17] Review Applications, p 14.

[18] In their submissions dated 13 July 2018.

61. It may be accepted that the Explanatory Memorandum referred to situations in which the export price could not be reliably determined because of manipulation of the Div 5 review process by exporters. If that inference was open, it would support determination of the price under s 269TAB(2B).

62. However, the language of s 269TAB(2A) directs attention to the 'sufficiency or reliability' of information, rather than the motives of the exporters. This concern with the quality of the information available to determine the export price is reinforced by recalling that recourse to sub-section (2B) will likely involve determinations of the export price made using s 269TAB(1), which is the primary means for determining export price. Further, sub-section (2G), permits adjustments to the "raw" export price arrived at by applying sub-section (2B), to reach a more accurate figure. The use of s 269TAB(2B) does not entitle the Minister to act arbitrarily or without evidence in determining the export price.

63. The nature of a Div 5 review process is also relevant. Although there are mechanisms by which information may be obtained from exporters, it is unlikely that those mechanisms would be successful in compelling exporters to provide evidence of an intention to 'game the system'.

64. Section 269TAB(2A) applies in the context of Div 5 applications for the review of anti-dumping measures. This means that there has already been an investigation resulting in anti-dumping measures. Such measures would only have been imposed if, during the original investigation, the export price was less than the normal value. It appears from the Explanatory Memorandum that there had been a practice in Div 5 reviews of fixing the export price at the same figure as the normal value, and selecting the floor price method for calculating the dumping duty, where the export price could not be determined under s 269TAB(1) because of a lack of export transactions. It is also apparent from the Explanatory Memorandum that this practice was seen as leading to an unreliable outcome.

65. The export price is therefore more likely to be accurately ascertained by focusing on objective considerations than on the subjective intention of the exporters. The Minister is not required to establish any particular intention on the part of exporters in order to apply s 269TAB(2B).

Summary: s 269TAB(2A)

66. I consider that the decision to determine the export price under s 269TAB(2B) was the correct or preferable decision having regard to:
    (a) the absence of exports of goods by the applicants during the review period;
    (b) the difference in volumes of the goods exported during the review period and the period before the review period, including the Original Investigation Period, having regard, amongst other things, to the nature of the applicants' businesses;
    (c) the ongoing demand for the goods, as evidence by the volumes of exports of the goods to Australia from all sources; and
    (d) the likely impact of the Original Measures on volumes of goods exported to Australia by the applicants and other Chinese exporters.

Other matters

67. The applicants contended that the export price should have been determined under s 269TAB(3), which enables the Minister to determine the export price by having regard to 'all relevant information' where 'sufficient information has not been furnished or is not available, to enable the export price to be ascertained under the preceding sections'. It may be that s 269TAB(3) permits access by the Minister to the information upon which the Minister relied in this case or to the more general information that, during the Original Investigation Period, the export price of the goods exported by the applicants was been significantly less than the normal value of those goods, undermining the reliability of the normal value as a basis for determining the export price. Consequently, it is not clear that recourse to s 269TAB(3) would have resulted in a different export price. However, it is not necessary to reach a conclusion on the point.

68. The applicants contended that duty should have been calculated using a floor price method. The selection of the method of calculating the dumping duty specified by the Minister under s 8(5) of the *Customs Tariff (Anti-Dumping) Act 1975* is not reviewable by the Panel.

Conclusion

69. For the reasons given above I consider that the 'special regime' in s 269TAB(2A) to (2G) was applicable to the Div 5 applications.

70. I do not consider that the reasoning in the Report discloses error. I consider that the decision to determine the export price under s 269TAB(2B) was reasonably open to the Minister.

71. I consider that the Reviewable Decision was the correct and preferable decision.

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Scott Ellis
Panel Member
Anti-Dumping Review Panel
13 August 2018