Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 67

Zinc Coated (Galvanised) Steel exported from the Republic of India

December 2017

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Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Appellate Body	Appellate Body of the World Trade Organization
BlueScope	BlueScope Steel Limited
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
ESSAR	Essar Steel India Ltd
Goods	Flat rolled iron or steel (whether or not containing alloys) that are plated or coated with zinc exported to Australia from India.
Original Investigation period	1 July 2015 and 30 June 2016
Manual	Dumping and Subsidy Manual April 2017
Minister	Minister for Industry, Innovation and Science
REP 370	The report published by the Commission in relation to Alleged Dumping of Zinc Coated (Galvanised) Steel Exported to Australia From the Republic of India And The Socialist Republic of Vietnam and dated July 2017
Reviewable Decision	The decision of the Minister on 16 August 2017
SCM	Agreement on Subsidies and Countervailing Measures
SEF 370	The Statement of Essential Facts published by the Commission in relation to the Alleged Dumping of Zinc Coated (Galvanised) Steel

	Exported to Australia From the Republic of India And The Socialist Republic of Vietnam
WTO	The World Trade Organization

Summary

1. Essar Steel India Ltd ("ESSAR"), an Indian exporter, was subject to both a dumping and subsidy investigation into the same goods. Due to resource constraints, the exporter chose only to cooperate with the subsidy investigation but in doing so provided complete details of its export sales to Australia. This data was relied upon as *"relevant information"* and used to determine the exporter's export price under section 269TAB(3) of the *Customs Act 1901*("the Act"). The applicant asserts, as the exporter was regarded as uncooperative in the dumping investigation, its export prices ought to have been determined by reference to the weighted average export prices of other non-cooperating exporters. The Review Panel finds, in the circumstances, it was the correct or preferable decision to determine export prices by reference to the export price sales data submitted by the exporter.

Introduction

2. BlueScope Steel Limited ("BlueScope") has applied for a Review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science, ("the Minister"), made on 16 August 2017, to accept the recommendations of the Anti-Dumping Commissioner ("Commissioner") contained within Anti-Dumping Commission Report No. 370 ("REP 370") and declare, under section 269TG(1) of the *Customs Act 1901* ("the Act"), that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* ("the Dumping Duty Act") applies to flat rolled iron or steel (whether or not containing alloys) that are plated or coated with zinc exported to Australia from India ("the goods").

3. The application for Review was accepted and notice of the proposed Review, as required by section 269ZZI, was published on 9 October 2017. The Senior Member of the Anti-Dumping Review Panel ("the Review Panel") has directed in writing, pursuant to section 269ZYA, that the Review Panel for the purpose of this Review be constituted by me.

Background to the application

4. BlueScope is the sole Australian manufacturer of the goods.

5. ESSAR is an exporter of the goods to Australia.

6. On 15 August 2016, BlueScope lodged an application alleging that the Australian industry had suffered material injury caused by exports on the goods to Australia from India from several companies, including ESSAR, and that those goods were exported at dumped and subsidised prices.

7. On 7 October 2016, the Commission initiated an investigation into the alleged dumping and subsidisation of the goods exported from India. The investigation period was nominated as 1 July 2015 to 30 June 2016.

8. On 16 August 2017, the Minister imposed anti-dumping duties on the goods exported from India by ESSAR and other exporters.

9. The investigation initiated on 7 October 2016 alleged both dumping and subsidisation of the goods. ESSAR only participated in the subsidy investigation. When answering the subsidy Exporter Questionnaire, ESSAR provided data relating to its export sales to Australia. The Commission in REP 370 stated that it was able to satisfactorily verify that data, albeit in what it described as *"a desk top examination".*

10. BlueScope argues it is the Commission's established practice, for *"uncooperative exporters,"* in dumping investigations, to have their export price determined by reference to the lowest weighted average export price for cooperating exporters from the nominated country, in this case India.

11. BlueScope notes that section 269TACAB(1)(d) requires the export price for an uncooperative exporter be determined in accordance with section 269TAB(3). That section relevantly provides, where the Minister is satisfied that sufficient information has not been furnished, or is not available, the export price is to be determined *"having regard to all relevant information".*

12. In relation to ESSAR's export price, the Commission, rather than following what BlueScope alleges to be the Commission's established practice, i.e. determining export price for uncooperative exporters by reference to the lowest weighted average export price established for cooperative exporters from India, considered ESSAR's verified export price data provided in its response to the subsidy investigation Exporter Questionnaire. The Commission considered it *"relevant information",* under section 269TAB(3), thus providing an adequate basis for the determination of export price.

13. BlueScope argues that the export price data provided by ESSAR in response to the subsidy Exporter Questionnaire should not *"cross-over"* into the dumping investigation and *"afford ESSAR a* ***favourable outcome*** *when determining its dumping margin"* [emphasis added].

14. BlueScope notes that while the export price data supplied by ESSAR in the context of the subsidy investigation, may have been considered *"adequate"* for the Commission's determination of subsidy margins; in respect of a dumping investigation, the export price declared by an exporter *"is subject to more intensive investigation as to whether it represents a selling price that recovers all costs".*

Conduct of the Review

15. In accordance with section 269ZZK(1), the Review Panel must recommend that the Minister either affirm the decision under Review, or revoke it and substitute a new specified decision. However, the Review Panel may only do so in circumstances where the new decision is materially different from the Reviewable decision.

16. In undertaking the Review, section 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.

17. Subject to the limited exceptions provided for in subsections 269ZZK(4A) and (5), in carrying out its function the Review Panel is not to have regard to any information other than to *"relevant information"* as that expression is defined in section 269ZZK(6)(c), that is, information to which the Commissioner had, or was required to have, regard in reporting to the Minister. In addition to relevant information, the Review Panel is only to have regard to conclusions based on relevant information that is contained in the application for Review and any submissions received under section 269ZZJ.

18. If a conference is held under section 269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information.

19. A conference was held with representatives of the Commission on 13 October 2017, for the purpose of clarifying information contained within REP 370. A non-confidential summary of the conference was placed on the public record.

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

21. Submissions were received on 23 October 2017, from the Commission, and on 6 November 2017, from ESSAR. Both submissions were received within the 30 day period specified in section 269ZZJ.

22. Unless otherwise indicated in conducting this Review, I have had regard to the application (including documents submitted with the application), insofar as it contained conclusions based on relevant information. I have also had regard to REP 370 and to SEF 370, to documentation provided by the Commission, to the submissions received from the Commission and ESSAR and to the matters discussed in conference with representatives of the Commission.

Grounds for Review

23. BlueScope's ground for review is that the Commission erred in its treatment of ESSAR in the dumping investigation by affording ESSAR a separate *"favourable"* margin to the *"uncooperative and all other exporters of the goods from India."* BlueScope asserts the correct and preferable decision of the Minister was to assign ESSAR the same weighted average export price as all uncooperative exporters of the goods from India, as required by section 269TACAB. BlueScope did not seek to challenge the determination of ESSAR's normal value.

24. BlueScope asserts the Commission's decision to set aside its usual practice to base an uncooperative exporter's export price on the lowest weighted average export prices of the cooperative exporters, and afford ESSAR a favourable export price outcome based upon information obtained in the subsidy investigation, is not the correct or preferable decision.

Consideration of Grounds

25. In the written submission of 23 October 2017, the Commission confirmed that what was referred to as a *"desktop verification"* in REP 370 comprised both an *"upward"* and *"downward"* verification process. That is, ESSAR's export sales listings provided in its response to the Exporter Subsidy Questionnaire were reconciled to the total export value and quantity as recorded in the import database maintained by the Australian Border Force, for the investigation period. The Commission also matched the source documents for two export shipments to Australia provided by ESSAR against its overall sales data.

26. Further, the Commission conducted an on-site verification visit to one of ESSAR's major Australian customers and determined that all exports of the goods from ESSAR to that customer were at arm's-length. The Commission was also satisfied that the importer's sales to its customers were profitable.

27. The Commission also considered information from an earlier investigation to be relevant.[1] Investigation 370, the subject of the review, was the second investigation into the alleged dumping of goods by ESSAR. The second investigation was initiated less than 12 months after the Review Panel affirmed the Minister's decision to terminate the investigation against all exporters, one of of which was ESSAR. In the submission of 23 October 2017, the Commission stated, in INV 249, all exports by ESSAR to its Australian customers were at arm's-length. The Commission also noted that ESSAR's major Australian customers had not changed between the two investigations.

28. The Commission also noted in its submission, whilst elements of the subsidy investigation are undertaken under different legislative provisions to that of a dumping investigation:

> *"information provided for one investigation can be used for the other where it is relevant and reasonable to do so (i.e. the cooperating exporter/importer does not have to submit the same information twice)."*

29. A similar point was made by ESSAR in its submission of 6 November 2017 where it pointed out:

> *"ESSAR submitted its export price information under that part of the exporter questionnaire issued by the Commission which, in the context of an investigation involving consideration of both anti-dumping and countervailing, used for the purposes of making determinations with respect both dumping and subsidisation."*

30. In the submission of 6 November 2017, ESSAR takes issue with BlueScope's claim that the relevant legislation *"required"* the use of the weighted average export prices determined for other noncooperative exporters. ESSAR notes that section 269TACAB(1) makes no reference to such a method, rather it only requires that export price be *"worked out under subsection 269TAB(3)",* which simply refers to having *"regard to all relevant information."* ESSAR notes that there is no statutory requirement to have recourse to the weighted average export price method. I agree with ESSAR's interpretation. The legislation does not require recourse to be had to the weighted average method to determine ESSAR's export prices

[1] Investigation 249.

31. ESSAR went on to point out that BlueScope *"appears to have attributed a typical practice of the Commission as an absolute requirement".* ESSAR agrees that where no relevant and verified data has been provided by an exporter, a weighted average export price method would typically be used. However, in this instance, the Commission had available to it sufficient relevant and verified information enabling the determination of ESSAR's export price.

32. Crucial to the determination of the Review will be the scope of the phrase *"all relevant information"* contained within section 269TAB(3).

33. It is clear from Blue Scope's application for review that it regards the Commission's classification of ESSAR as an *"uncooperative exporter"* in the conduct of the dumping investigation as determinative. It sees the result of such classification as requiring an adverse or unfavourable outcome for ESSAR. As noted above it sees the Commission's deviation from its:

> *"usual practice to base an uncooperative exporters export price on the lowest weighted average export prices of the cooperative exporters, and afford Essar* ***a favourable export price outcome*** *based upon information obtained in the subsidy investigation, is not the correct or preferable decision" [emphasis added].*

34. Interpreting the phrase *"all relevant information"* in section 269TAB(3), in context, suggests the phrase refers to all information in the possession of the Minister (or Commissioner) which is relevant to an accurate or correct determination of the export price of the particular *"uncooperative"* exporter under consideration.

35. In the present case, the Minister had information about ESSAR's export price, albeit provided in the context of the subsidy investigation. Accordingly, the Minister was required to take that information into account. The Minister was also in possession of other information, namely the weighted average export prices of other *"uncooperative"* exporters from India. The Minister was also obligated to take that information into account.

36. The Minister was entitled to consider all relevant information available to arrive at the most accurate determination of ESSAR's export price.

37. The phrase *"all relevant information*" is not defined in the Act. The Full Court of the Federal Court in *Pilkington (Australia) Ltd v Minister of State for Justice and Customs*[2] noted that amendments to Part XVB of the Act sought to give effect to Australia's obligation under the relevant World Trade Organization (WTO) Agreements and that the:

> *"legislation will be interpreted and applied, as far as its language permits, so that it is in conformity, and not in conflict, with Australia's international obligations. Where a statute is ambiguous… the court should favour a construction consistent with the international instrument and the obligation which it imposes over another construction*."[3].

38. WTO jurisprudence can therefore be considered to ascertain the scope of the phrase *"all* relevant *information"* to the extent that such jurisprudence is not inconsistent with the provisions within Part XVB of the Act.

39. There have been several recent WTO Appellate Body decisions touching upon when recourse can be had to *"facts available*", a WTO synonym for *"all relevant information"*, within the context of the Anti-Dumping Agreement and the Subsidies and Countervailing Measures (SCM) Agreement ("the Agreements"). The most recent of these decisions is *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* ("US - Anti-Dumping Methodologies (China)") was handed down on 11 May 2017.[4] Two other relevant Appellant Body decisions are *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* ("Mexico – Rice"[5]), handed down on 29 November 2005 and *United States – Countervailing Measures on Certain Hot Rolled Carbon Steel Flat Products from India*[6] ("US – Carbon Steel (India)"), handed down on 8 December 2014.

40. The relevant provisions of the Agreements are as follows:

> Anti Dumping Agreement, Article 6.8 relevantly provides, in cases in which any interested party refuses access to…necessary information within a

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[2] (2002) 71 ALD 301.

[3] Ibid. at para 25.

[4] DS471/AB.

[5] DS295/AB.

[6] DS436/AB.

> reasonable period or significantly impedes the investigation, preliminary and final determinations…may be made on the basis of the facts available.
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> SCM Agreement. Article 12.7 relevantly provides, in cases in which any interested…interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations…may be made on the basis of the facts available.

41. Although there are subtle differences in language used by each of the Agreements, in the context of *"facts available,"* it is it is accepted that each provides relevant context to aid in the construction of the other. The Appellate Body, in Mexico - Rice found that it would be*:*

> *"anomalous if Article 12.7 of the SCM agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations".*[7]

42. Recourse to *"facts available*" under either of the Agreements is to ensure that the lack of information does not hinder the ability of investigating authorities to conduct the investigation, thereby allowing investigating authorities to fill in gaps by using the *"facts available"* they deem relevant, in order to make a determination.

43. The Appellate Body in Mexico - Rice[8] observed that recourse to *"facts available"* serves the double purpose of providing investigating authorities with as broad an evidence basis as possible and guaranteeing due process for interested parties.

44. The Appellate Body has noted the Agreements are concerned with overcoming the absence of information required to complete a determination. Accordingly, investigating authorities can resort to facts available:

> *"solely for the purpose of replacing information that may be missing, in order to arrive at an accurate…determination*[9]*."*

45. Importantly, the *"facts available"* must be facts that are in the possession of investigating authority and on its written record. When making a determination on

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[7] Appellate Body Report, Mexico – Rice at para. 295.

[8] Ibid at para 292.

[9] Appellate Body Report, US – Carbon Steel (India) at para. 4.416.

facts available, an investigating authority cannot resort to nonfactual assumptions or speculation and must take into account all substantiated facts on the record.[10]

46. Recourse to *"facts available"* involves a process of reasoning and evaluation of all substantiated facts on the record on the part of the investigating authority.[11] In the event that the investigating authority must choose among several facts available, the process of reasoning and evaluation would involve a degree of comparison in order to arrive at an accurate determination[12] and that this process must be evident from its finding or report. In such a process, no substantiated facts on the record can be *a priori* excluded from consideration.[13] The evaluation of the *"facts available"* that is required, and the form it may take, depend upon the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record and the particular determination to be made[14].

47. The Appellate Body in US – Carbon Steel (India) emphasised that recourse to facts available

> *"should not be used to punish non-cooperating parties by choosing adverse facts for that purpose".*[15]

The Appellant Body went on to note that the provisions of the Agreements

> *"recognise some potential reasons why the 'necessary information'… may not be provided, namely, confidentiality and resource constraints. This is implicit in the requirement for investigating authorities to protect confidentiality and to provide any assistance practicable, in particular to small companies, in the provision of information".*

The Appellant Body was of the view that

> *"the manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of 'facts available."*

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[10] Ibid at paras. 4.417 and 4.419.

[11] Ibid at para. 4.424.

[12] Ibid at paras. 4.431 and 4.435.

[13] Appellate Body Report, Mexico – Rice at para. 294.

[14] Appellate Body Report, US – Carbon Steel (India) at para.4.421.

[15] Ibid at para 4.419.

The Appellant Body noted that the relevant Agreement

> *"requires an investigating authority to take 'due account of any difficulties experienced by interested parties', which includes interested parties that have not provided the 'necessary information'. The kinds of 'difficulties', or lack thereof, experienced by interested parties to be taken into account by an investigating authority in having recourse to [facts available] could relate, inter alia, to the nature and availability of the evidence being sought, the adequacy of protection accorded by an investigating authority to the confidentiality of information, the time period provided in which to respond, and the extent or number of opportunities to respond, including in relation to the essential facts under consideration".*[16]

48. WTO jurisprudence therefore suggests that the question to be determined by the Review Panel is whether REP 370 provided an explanation that sufficiently disclosed the Commission's process of reasoning and evaluation, such that the Review Panel can access how the Commission chose from all the relevant information available that which could reasonably enable completion of an accurate determination, in this instance, of ESSAR's export price. Whereas the explanation and analysis provided in REP 370 must be sufficient to allow the Review Panel to access how and why the relevant information relied upon by the Commission is a *"reasonable"* replacement for the information alleged by BlueScope to be missing, the nature and extent of the explanation and analysis required will necessarily vary from determination to determination.

49. It is apparent from WTO jurisprudence that the object of having recourse to *"facts available"* is to arrive at an accurate determination[17] of, in this case, ESSAR's export price. The object of recourse to facts available, or in this instance *"relevant information,"* cannot be to generate an outcome which is *per se* unfavourable to the exporter concerned. Put another way, non-cooperation should not be used to punish non-cooperative exporters by intentionally choosing the most adverse facts for that purpose.

50. In REP 370 the Commission confirmed ESSAR had not chosen to cooperate in the dumping investigation. The reasons of this decision was detailed in

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[16] Ibid at para. 4.422.

[17] Appellate Body Report, US _ Anti-Dumping Methodologies (China) at para 5.172.

correspondence from ESSAR's representative to the Commission, dated 28 November 2016, which stated:

> *"the ongoing trade remedy investigations that have been conducted… continue to consume significant resources and time within ESSAR. This includes prolonged verification and the continued burden of information provision. Our client now realises the level of resources and time required has exceeded its previous estimation completely. It must of necessity dedicates further administrative, human and time resources to those procedures, and prioritise those procedures, as they are of critical commercial importance."*

Noting that its Australian sales volume during investigation period had been much lower than before, the correspondence concluded by confirming that ESSAR would not be able to participate in the anti-dumping investigation by way of providing responses to all questions in the Exporter Questionnaire. ESSAR nevertheless fully cooperated with the subsidy investigation.

51. In REP 370 the Commission noted that as part of the subsidy investigation ESSAR had provided a detailed listing of all its export sales to Australia. It supported this information with complete copies of documents relating to two consignments to Australia. REP 370 went on to note that ESSAR's export sales data had been verified to the Commission's satisfaction in *"a desk top examination".* In its submission to the Review Panel, the Commission confirmed that its verification processes included; the examination of the source documents relevant to the two consignments; the reconciliation of ESSAR's export sales data against import data maintained by the Australian Border Force; the verification of sales to a major Australian customer of ESSAR and that customers subsequent sales; and, data provided by ESSAR in an earlier enquiry.

52. In my view the action taken by the Commission to verify and assess the export sales data provided by ESSAR was sufficient to arrive at an "*accurate determination"* of relevant export prices. The export sales data provided by ESSAR , verified to the satisfaction of the Commission, clearly fell within the scope of "relevant information." REP 370 sufficiently disclosed the Commission's process of reasoning and evaluation as to the reasons why it considered ESSAR's export price data, in preference to other information, as constituting relevant information for the purposes of section 269TAB(3).

53. I am therefore satisfied that the Commission's approach to the ascertainment of ESSAR's export price was the correct and preferable decision.

Recommendations/Conclusion

Pursuant to section 269ZZK(1)(a), I recommend the Minister affirm his decision of 16 August 2017, made under section 269TG(1), to declare that section 8 of the Dumping Duty Act applied to the goods exported by ESSAR.

Paul O'Connor
Anti-Dumping Review Panel
1 December 2017