Australian Government
Anti-Dumping Review Panel

ADRP REPORT NO. 33

ALUMINIUM ROAD WHEELS EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA.

16 May 2016

Australian Government
Anti-Dumping Review Panel

Review of a Decision of the Parliamentary Secretary to Alter a Dumping Duty Notice and a Countervailing Duty Notice following a review enquiry in relation to Aluminium Road Wheels Exported from the People's Republic of China

Contents

Introduction

1. The following Applicants applied in terms of s.269ZZC of the *Customs Act 1901*(the Customs Act), for review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary), to alter a Dumping Duty and Countervailing Duty Notice following a review enquiry pursuant to s.269ZDB(1) of the Act in respect of Aluminium Road Wheels Exported from the People's Republic of China:

   a. Pilotdoer Wheels Co. Ltd (Pilotdoer) on 18 November 2015; and
   b. Zhejiang Yueling Co., Ltd (Yueling) on 23 November 2015.

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

3. In a letter dated 20 November 2015, the Review Panel sought further information from Pilotdoer, pursuant to s.269ZZG(4) of the Customs Act, in order to complete the application. Pilotdoer submitted supplementary information on 23 November 2015, within the 30-day time period referred to in s.269ZZD of the Customs Act.

4. The applications for review of both Pilotdoer (as supplemented) and Yueling were accepted and notice of the proposed review as required by s.269ZZI of the Customs Act, was published on 22 December 2015.

Background

5. Anti-dumping measures applicable to certain aluminium road wheels (ARWs) exported from the People's Republic of China (China) were established following an anti-dumping and countervailing investigation completed in 2012 by the then Australian Customs and Border Protection Services (ACBPS). Notification by the then Minister for Home Affairs' decision to apply dumping and countervailing duties to ARWs was given in Australian Customs Dumping Notice No. 2012/33.

6. On 4 August 2014 Jiangsu Yaozhong Aluminium Wheels Co., Ltd (Jiangsu Yaozhong) lodged an application with the Anti-Dumping Commission (ADC) under s.269ZA of the Customs Act, requesting a review of the anti-dumping measures as they apply to its exports of ARWs to Australia from China. Jiangsu Yaozhong claimed that certain variable factors relevant to the dumping and countervailing duties had changed.

7. The application was not rejected and public notification of the initiation of the review was made on 15 September 2014 by the Commissioner of the ADC (the Commissioner). The Commissioner identified that the changes in variable factors upon which Jiangsu Yaozhong's application was based would likely have implications for all exporters, and hence the then Parliamentary Secretary to the

Minister for Industry extended the review of measures to all exporters of ARWs from China.

8. The review was completed and findings and recommendations were reported to the Parliamentary Secretary in Anti-Dumping Commission Report No. 263 (REP 263). The ADC recommended that the dumping and countervailing duty notices currently applying to the goods exported to Australia from China are to be taken to have effect, or to have had effect, as if different variable factors had been fixed in respect of all exporters relevant to the determination of duty. The Parliamentary Secretary accepted the recommendations and reasons for the recommendations, including all material findings of fact or law set out in the REP 263, on 22 October 2015.[1]

The Review

9. In accordance with s.269ZZK(1) of the Customs 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.

10. 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 Parliamentary Secretary 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.

11. In undertaking the review, s.269ZZ of the Customs Act 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.

12. 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,[2] 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

[1] See Anti-Dumping Notice No. 2015/113
[2] See ADRP Report No. 15 concerning Wind Towers exported from the People's Republic of China and the Republic of Korea, paragraph 16

Panel has in determining whether the ultimate decision (the reviewable decision) was the correct or preferable one.

13. 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) of the Customs 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 s.269ZZJ of the Customs Act.[3] 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.

14. 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 Customs Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 263 and information relevant to the review which was referenced in REP 263. I have also had regard to the Statement of Essential Facts (SEF 263) and to documents referenced in SEF 263.

15. 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 in a letter dated 22 December 2015 (the Invitation to Comment Letter). The response from the ADC was received on19 January 2016 (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. It also identified information submitted by Yueling in its application, which was not submitted during the review, and which the ADC considered to be "not relevant".[4]

16. The time for submissions by interested parties under s.269ZZJ is 30 days after the public notice. As the public notice was given on 22 December 2015 the time for submission expired on 21 January 2016. Submissions were received in this period from:

- Yueling; and
- Versus Wheels International (an importer of ARWs manufactured by Yueling, to Australia)

17. After reviewing the applications, submissions and other material described above, on 22 February 2016, pursuant to s.269ZZL of the Customs Act, I required the ADC to reinvestigate various findings in REP 263, both in respect of

[3] See s.269ZZK(4) of the Act
[4] See the ADC Response, page 8

Pilotdoer and Yueling. I requested the ADC's reinvestigation in this regard by 31 March 2016. The ADC in a letter dated 24 March 2016, requested an extension of 15 days to Friday 15 April 2016 to provide the Reinvestigation Report, which extension was granted by the Review Panel. The request for reinvestigation and correspondence relating to the extension were made publically available. A copy of the Reinvestigation Report, which was received on 15 April 2016 (the Reinvestigation Report), is attached as Annexure 1 to this report.

Grounds of Review

Pilotdoer

18. Pilotdoer is an exporter of ARWs, which are the goods that are the subject of the reviewable decision application. Pilotdoer is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX.[5]

19. The ground of review relied upon by Pilotdoer for the reviewable decision not being the correct or preferable decision is that the ADC erred in calculating normal values for Pilotdoer by the use of average net profit from domestic sales made in the ordinary course of trade (OCOT) by other selected exporters.[6] Pilotdoer contends that this gave rise to determining an incorrect dumping margin for Pilotdoer.

Yueling

20. Yueling is also an exporter of ARWs and is therefore an "interested party" in relation to a reviewable decision within the meaning of s.269ZX of the Customs Act.

21. The grounds of review relied upon by Yueling are set out in its application for review,[7] being, generally, that the ADC erred by disregarding information provided by Yueling for the purpose of arriving at its findings in relation to Yueling, and in particular:

    i. The ADC erred by disregarding information provided by Yueling for the purpose of establishing export prices pursuant to Section 269TAB(4) of the Customs Act;
    ii. The ADC erred by disregarding information provided by Yueling for the purpose of establishing normal value pursuant to Section 269TAC(7) of the Customs Act;

[5] See the definition of interested party in s.269ZX(c)
[6] See Pilotdoer's application for review, pages 11 - 12
[7] See Yueling's application for review, pages 4 - 5

iii. The ADC erred in calculating the export prices of Yueling in the same way as that adopted for uncooperative exporters, under s.269TAB(3) of the Customs Act;
iv. The ADC erred in calculating the normal value of Yueling in the same way as that adopted for uncooperative exporters, under s.269TAC(6) of the Customs Act;
v. The ADC erred in calculating a dumping margin of 40.3% for Yueling, being the same level as that of an uncooperative exporter; and
vi. The ADC erred in calculating a subsidy margin of 18.5% for Yueling.

Consideration of Grounds of Review

Pilotdoer

22. I will now deal with the ground of review put forward by Pilotdoer in its application for review.

Error in Calculating Normal Values by the Use of Average Net Profit from Domestic Sales made in OCOT by Other Selected Exporters

23. Pilotdoer contends that the reviewable decision is not the correct or preferable decision in that the ADC erred by calculating normal values for Pilotdoer by the use of average net profit from domestic sales made in the ordinary course of trade (OCOT) by other selected exporters. Pilotdoer contends that this gave rise to determining an incorrect dumping margin for Pilotdoer.

24. In its application for review Pilotdoer refers to REP 263 which states that the ADC disregarded Pilotdoer's domestic sales data for the purpose of determining Pilotdoer's profit rate, because Pilotdoer did not meet the OCOT test. Reference was made in REP 263 to s.269TAAD(2) of the Customs Act which requires that for domestic sales of like goods to be considered in the OCOT, they must represent (according to REP 263), *"at least 20 per cent of the total volume of export sales during the relevant period*".[8] Accordingly, the ADC had not recommended Pilotdoer's profit be calculated under s.45(2) of the *Customs (International Obligations) Regulation 2015* (IO Regulation). The ADC considered that it was similarly unable to establish Pilotdoer's rate of profit under

[8] It should be noted that this paraphrasing of s.269TAAD(2) in REP 263 is incorrect. S.269TAAD(2) provides:

> "*For the purposes of this section, sales of goods at a price that is less than the cost of such goods are taken to have occurred in substantial quantities during an extended period if the volume of sales of such goods at a price below the cost of such goods over that period is not less than 20% of* ***the total volume of sales*** *over that period."* (my emphasis).

As can be noted, there is no reference to "export " sales.

s.45(3)(a) of the IO Regulation and calculated Pilotdoer's profit under s.45(3)(c) of the IO Regulation with reference to all relevant information, which involved using the average net profit from domestic sales made in the OCOT by other selected exporters, except Yueling.[9]

25. Pilotdoer considered that there was a failure in the ordinary course of trade (OCOT) test because the ADC took, "*an incorrect and unreasonable approach"* to evaluate whether Pilotdoer's domestic sales meet the OCOT test under s.269TAAD(2) of the Customs Act.

26. Pilotdoer contends that pursuant to s.269TAAD(2) of the Customs Act, and along with s.269TAC(5B) and s.269TAC(2)(c)(ii) and s.269TAC(4)(e)(ii) of the Customs Act, it requires that for domestic sales of like goods to be considered in OCOT, they must represent at least 20 per cent of the total volume of domestic sales, but not export sales during the relevant period (the review period in this instance). Pilotdoer contends that the ADC calculated the proportion using the total volume of export sales. Hence, Pilotdoer submits that the ADC has not complied with its own policy and its manual under the subsection 269TAAD(2) of the Customs Act to evaluate and assess whether Pilotdoer's domestic sales meet the OCOT test.

27. According to Pilotdoer, if it takes an OCOT test in accordance with the ADC's Dumping and Subsidy Manual (the Manual) domestic sales of like goods in the ordinary course of trade represent at 70 per cent of the total volume of domestic sales, and that adequately demonstrates Pilotdoer's domestic sales meet the OCOT test. Pilotdoer therefore contends that its profit should be calculated under s.45(2) of the IO Regulation. It further contends that the ADC should establish its rate of profit under s.45(3)(a) of the IO Regulation, using the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market. As such, Pilotdoer also works out the profit rate under s.45(2) of the IO Regulation[10] and in accordance with the section 7.3 of the Manual.

28. Pilotdoer concludes that the ADC should undertake an objective and correct examination of the practice in determining Pilotdoer's profit to construct normal values, and accordingly recalculate Pilotdoer's dumping margin.

29. In the ADC Response, the ADC acknowledged that Pilotdoer appears to have correctly asserted that the ADC erred in its application of the OCOT test, when determining profit under s.45(2) of the IO Regulation, by comparing the amount of sales made in the ordinary course of trade with export sales volumes, rather than domestic sales volumes. However, the ADC stated:

> *"The Commission still believes that Pilotdoer's domestic sales may still have occurred outside the ordinary course of trade, having observed the*

[9] See Pilotdoer's application for review (pages 11 -12) and REP 263 (pages 51 – 52)
[10] See Confidential Appendix 1 of Pilotdoer's app lication for review

company's proposed rate of profit is [redacted] *(as shown in the table at Attachment 14). The Commission views that this issue could warrant further investigation, and will consider how to address this issue."*

The ADC also referred the Review Panel to pages 51 to 52 of REP 263 for a discussion of the ADC's determination of profit in relation to Pilotdoer.[11]

30. A careful analysis of Pilotdoer's application, the relevant legislative provisions, the ADC's determination of profit in relation to Pilotdoer in REP 263, various submissions and documents relating to the original review, as well as the ADC's acknowledgement in the ADC Response that it erred in the application of the ordinary course of trade test, led me to request a reinvestigation of the following five findings in REP 263 in relation to the ADC's determination of profit for Pilotdoer:[12]

i. The ADC's finding that that volume of Pilotdoer's sales of the goods on the domestic market are insufficient for the purpose of determining Pilotdoer's rate of profit;
ii. The finding that Pilotdoer did not meet the ordinary course of trade (OCOT) test referred to in s.269TAAD(2) of the Customs Act, leading the ADC to disregard Pilotdoer's domestic sales data for the purpose of determining Pilotdoer's profit rate, in accordance with s.45(2) of the IO Regulation;
iii. The finding that the ADC was unable to establish Pilotdoer's rate of profit under s.45(3)(a) of the IO Regulation, using the actual amounts realised by Pilotdoer from the sale of the same general category of goods in the domestic market, because the company did not reach the required level of domestic sales of goods from the same general category of ARWs to be considered in the OCOT pursuant to s.269TAAD(2);
iv. The finding that the ADC was unable to determine profit under s.45(3)(b) of the IO Regulation, which enables the ADC to identify the weighted average profit for other selected exporters, due to the unreliability of Yueling's data;
v. The calculation of normal values for Pilotdoer by the use of average net profit from domestic sales made in the ordinary course of trade (OCOT) by other selected exporters (except Yueling) under s.45(3)(c) of the IO Regulation.

31. Before analysing the Reinvestigation Report in respect of Pilotdoer and in order to place the analysis in context, I have reproduced below the section from the Reinvestigation Report dealing with the legislative framework relating to

[11] See the ADR Response, page 11
[12] See Reinvestigation Request dated 22 February 2016 (Reinvestigation Request)

Pilotdoer's grounds of review and the reinvestigated findings, which is a succinct summary of the relevant sections of the Customs Act and IO Regulation:

"The normal value of goods determined under subsection 269TAC(2)(c) is the sum of:

- *such amount as the Minister determines is the cost of production or manufacture of the goods in the country of export; and*

on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, such amounts as the Minister determines would be the:

- *administrative, selling and general costs associated with the sale; and*
- *profit on that sale.*

The amount for profit must be worked out, in accordance with subsection 269TAC(5B), in such a manner, and taking account of such factors, as the regulations [footnote omitted] provide for that purpose.

Under subsection 45(2) of the Regulation, profit must be worked out, if reasonably practicable, by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.

If the amount of profit is not able to be worked out by using the data mentioned under subsection 45(2), then the amount is to be worked out, under the Regulation, by either:

- *identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export [or] (subsection 45(3)(a));*
- *identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of expor [or] (subsection 45(3)(b));*
- *using any other reasonable method and having regard to all relevant information (subsection 45(3)(c)).*

Any of these three alternatives can be used as there is no hierarchy."

32. With regard to first Finding (i), in the Reinvestigation Request, I referred to REP 263 where it is stated:

> *"In analysing the data submitted by Pilotdoer as part of this review, the Commission has observed that Pilotdoer continues to be an export-oriented business, with only a very low volume of like goods sold on the domestic market. The Commission considers these sales are again insufficient for the purpose of determining Pilotdoer's rate of profit."* [13]

I pointed out to the ADC, that the ADC had not provided any analysis or other legal basis for its finding that the sales are of insufficient volume for the purpose of using Pilotdoer's own data to determine the rate of profit pursuant to s.45(2) of the IO Regulation. I requested that in the reinvestigation, the ADC should take cognisance of s.45(2) of the IO Regulation, which unlike s.269TAC(2)(a) of the

[13] See REP 263, page 51

Customs Act, does not refer to a "low volume" of sales as a reason for rejecting the exporter's own data in the relevant calculation.

33. In the ADC's analysis of Finding (i) in the Reinvestigation Report, the ADC notes that in order to determine an amount for profit by applying s.45(2) of the IO Regulation, the sales used for this purpose must be in the ordinary course of trade. The ADC notes further that it is not simply a matter of testing sales at a loss under s.269TAAD but that there can be a number of factors which can be taken into account when determining whether sales are in the ordinary course of trade. The ADC makes reference to: (1) Article 2.2.1 of the World Trade Organisation (WTO) Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) which recognizes that there are reasons other than price alone that sales may be treated as not being in the ordinary course of trade; and (2) the Anti-Dumping Manual, 2015 (the Manual) which lists several circumstances that may provide a sufficient reason to consider a sale not being in the ordinary course of trade, including samples sales, promotional sales, sales made at special prices, end of season sales, low quality sales or sales in other unusual circumstances. [14] While the ADC does not complete the analysis of Finding (i) at this point, referring to its analysis of Finding (ii), it seems to me that the ADC recognises that insufficient volume of domestic sales is not a sound basis for not using Pilotdoer's own data for calculating 'profit' for the purpose of s.45(2) of the IO Regulation.

34. WTO jurisprudence on the interpretation of Article 2.2.2 of the Anti-Dumping Agreement[15] (which is the relevant WTO provision that is enacted into Australian legislation by s.269TAC(2)(c)(ii), s.269TAC(5B) and s.45 of the IO Regulation) confirms that data from low volume sales should not be excluded from the calculation of SG&A profits when constructing normal value.[16]

35. With regard to Finding (ii), Pilotdoer had pointed out in its application that the ADC erred in its application of the OCOT test by comparing the amount of sales

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[14] See the Manual, page 31

[15] Article 2.2.2 of the Anti-Dumping Agreement provides:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

[16] See Appellate Body Report, European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/AB/R (EC — Tube or Pipe Fittings), paras. 97–98 and Panel Report, European Communities — Anti-Dumping Measure on Farmed Salmon from Norway, WT/DS337/R (EC - Salmon), para.7.308 and 7.309

made in the OCOT with export sales volumes rather than domestic sales volumes. This error was acknowledged by the ADC in the ADC Response. The Review Panel therefore required that the ADC reinvestigate its finding with regard to the OCOT test in s.269TAAD(1) and (2) of the Customs Act, for the purpose of s.45(2) of the IO Regulation.

36. In the Reinvestigation Report, the ADC stated:

> "*As part of this reinvestigation, the Commission has undertaken the test referred to in s.269TAAD(2) for the purpose of subsection 45(2) of the Regulation and considers that a number of Pilotdoer's domestic sales are in the ordinary course of trade, based on that test. The details of this test are demonstrated in Confidential Appendix 1."*[17]

The ADC found that [redacted] % of Pilotdoer's domestic sales were not below cost (or are below cost but allow for recovery in a reasonable period of time) and that the profit margin for these sales was [redacted] %.[18]

37. In the Reinvestigation Request, it was noted that the ADC, in the ADC Response, while acknowledging that it had erred in the "ordinary course of trade test", stated:

> "*The Commission still believes that Pilotdoer's domestic sales may still have occurred outside the ordinary course of trade, having observed the company's proposed rate of profit* [redacted] *(as shown in the table at Attachment 14)." The Commission views that this issue could warrant further investigation, and will consider how to address this issue."*

38. I requested that in addressing this issue, the ADC should take cognisance of WTO jurisprudence, particularly in respect of the limits on discretion afforded to WTO Members by the Anti-Dumping Agreement to determine that sales that are not "in the ordinary course of trade" (other than by reason of being sales at a loss). I also requested the ADC to refer to the discussion in the Manual of "ordinary course of trade' for the purpose of working out an amount of profit in constructing normal value, in accordance with s.45 of the IO Regulation.

39. In the Reinvestigation Report, also in response to Finding (ii), the ADC considered whether there are reasons other than price which may nevertheless render any of Pilotdoer's domestic sales as being not in the ordinary course of trade. The ADC states:

> *"Although Pilotdoer's domestic sales are limited, the Commission has no evidence which would suggest that the sales are samples sales, promotional*

[17] See Reinvestigation Report, page 12
[18] See Confidential Appendix 1 of Reinvestigation Report.

sales, made at special prices, end of season sales, low quality sales or sales in other unusual circumstamces."[19]

This is a reference to the ADC's discussion in response to Pilotdoer Finding (i) where reference is made to the Manual which lists several circumstances that may provide a sufficient reason to consider a sale not being in the ordinary course of trade, which includes samples sales, promotional sales, sales made at special prices, end of season sales, low quality sales or sales in other unusual circumstamces.[20] Accordingly, the ADC considered that Pilotdoer's domestic sales ought to be considered as being in the ordinary course of trade for the purposes of s.45(2) of the IO Regulation.

40. The ADC therefore made a new finding that Pilotdoer's amount for profit, for the purposes of subsection 269TAC(2)(c) of the Customs Act, be worked out under s.45(2) of the IO Regulation, by using data relating to the production and sale of like goods by Pilotdoer in the ordinary course of trade. As a result of this new finding, the ADC calculated Pilotdoer's dumping margin to be 2.7 per cent. Pilotdoer's new normal value and new dumping margin calculation are in Confidential Appendix 1 to the Reinvestigation Report.

41. I am satisfied that in the reinvestigation, the ADC has correctly used Pilotdoer's own data for calculating the amount of profit in accordance with s.45(2) of the IO Regulation, and has now correctly applied the OCOT trade test in accordance with s.269TAAD(1) and (2) of the Customs Act, for this purpose, resulting in a new dumping margin for Pilotdoer of 2.7 per cent.

42. The ADC correctly states in the Reinvestigation Report that since it had worked out an amount for profit for Pilotdoer by using its own data in accordance with s.45(2) of the IO Regulation, the rest of the Pilotdoer's Findings (iii), (iv) and (v) were no longer applicable, and therefore did not reinvestigate these findings. There is consequently no reason for the Review Panel to address Pilotdoers grounds of review relating to these findings.

Yueling

43. I will now deal with the grounds of review put forward by Yueling in its application for review, and as set out above in the section entitled, 'Grounds of Review'.

44. Yueling made a submission pursuant to s.269ZZI within the required time period. A submission was also made by Versus Wheels International (Versus Wheels) pursuant to s.269ZZI within the required time period. Versus Wheels is an importer of ARWs manufactured in China, to Australia.

45. I will now reproduce from the Reinvestigation Report the section dealing with the legislative framework relating to Yueling's grounds of review and the

[19] See Reinvestigation Report, page 13
[20] See the Manual, page 31

reinvestigation thereof, which is a succinct summary of the relevant sections of the Customs Act and the Anti-Dumping Agreement:

a. *"For the purpose of determining export price, under subsection 269TAB(4), any information considered to be unreliable may be disregarded. Similarly, for the purpose of determining normal value, under subsection 269TAC(7), any information considered to be unreliable may be disregarded.*

b. *Where the Minister is satisfied that sufficient information has not been furnished or is not available to enable the export price of the goods to be ascertained under subsections 269TAB(1) to (2), the export price shall, under subsection 269TAB(3), be such an amount as is determined having regard to all relevant information. Similarly, where sufficient information has not been furnished or is not available to enable normal value to be ascertained under subsections 269TAC(1) to (5J), the normal value shall, under subsection 269TAC(6), be such an amount as is determined having regard to all relevant information.*

c. *In the introduction to its application for review Yueling points out that:*

   - *its application is based on the opinion formed by the ADC that it should not use the information that was submitted by Yueling for the purpose of arriving at its findings in relation to Yueling; and*
   - *each of the findings to which Yueling objects (the grounds of review), flow from that opinion.*

d. *Article 6.8 of the ADA provides that preliminary and final determinations may be made on the facts available if a party:*
   - *refuses access to necessary information; or*
   - *does not provide necessary information within a reasonable period;*
   - *or significantly impedes the investigation.*

e. *Article 5 of Annex II of the ADA states that, in respect of information provided by an interested party, even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability."*[21]

The ADC erred by disregarding information provided by Yueling for the purpose of establishing export prices and normal value pursuant to Section 269TAB(4) and 269TAC(7) of the Act, respectively

46. In its application for review, Yueling addresses its reasons for believing that the reviewable decision is not the correct or preferable one, in relation to its first two grounds of review. I will similarly examine both these claims together.

47. Yueling contends that despite being clearly accepted as a "cooperative exporter", the ADC treated Yueling in the same way as it treated uncooperative exporters, using the most unfavourable information in the determination of Yueling's export price and normal value, and ultimately the calculation of Yueling's dumping margin. Yueling points out that in REP 263, Yueling's information was disregarded for the purpose of working out export prices, due to the ADC's opinion about the accuracy of Yueling's sales data. [22] Yueling also refers to REP

[21] See Section 4.2.1 of the Reinvestigation Report, pages 14 and 15
[22] REP 263, page 23

263 further describing the ground for disregarding Yueling's information for the purpose of working out normal value, on the basis of "unreliability". [23] Yueling points out that the significant implication of these findings is that the entirety of Yuelings information was disregarded for the purpose of working out Yueling's dumping margin in the review and Yueling was treated in the same way as an *"uncooperative exporter*". [24] Yueling contends that the clear distinctions between the two categories of exporters under the Act indicate that a cooperative exporter should not be treated in the same way as an uncooperative exporter for dumping and countervailing margin determination purposes.

48. Yueling further points out that it is not disputed by the ADC that:

- throughout the review, Yueling did give the ADC relevant information to the review, being the information contained in Yueling's responses to the various exporter questionnaires and supplementary information requests by the ADC;
- throughout the review, Yueling provided information within a reasonable period of time as requested by the ADC; and
- Yueling did not impede the review.

49. Yueling then sets out the procedural sequence which led to the ADC's decision to disregard Yueling's information, culminating in the non-confidental summary of key factors which contributed to the decision, set out in REP 263:

> *"The Commission identified various inaccuracies in a key spreadsheet submitted as part of Zhejiang Yueling's exporter questionnaire, which (due to the nature and scope of these inaccuracies) could potentially lead to an inaccurate dumping margin. This included incorporating various data in the spreadsheet which could not be matched to source documents (even after a revised version of the spreadsheet was submitted), and which also indicated that the spreadsheet may be inaccurate. This has implications for the accuracy of Zhejiang Yueling's dumping margin.*

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[23] REP 263, page 28

[24] The definition of "uncooperative exporter" under s.269T of the Act provides:

"uncooperative exporter"…….means an exporter of goods that are the subject of the investigation, review or inquiry, or an exporter of like goods, where:

(d) the Commissioner was satisfied that the exporter did not give the Commissioner information the Commissioner considered to be relevant to the investigation, review or inquiry within a period the Commissioner considered to be reasonable; or
(e) the Commissioner was satisfied that the exporter significantly impeded the investigation, review or inquiry.
On the other hand, s.269T of the Act provides that "cooperative exporter" means an exporter who "…….was not an uncooperative exporter in relation to the investigation, review or inquiry".

There was a lack of clarity around distribution arrangements relating to the goods exported to Australia, which would have led to difficulties in calculating an accurate normal value and export price for Zhejiang Yueling."[25]

50. Yueling also refers to the ADC's further comment in REP 263 that it was, *"unable to verify the information provided by Yueling in the exporter questionnaire to source documents provided. Accordingly, the Commission does not consider Yueling's information is reliable."* [26]

51. Yueling points out that the reference to a "key spreadsheet" is the first dot point of the summary is a reference to the Australian Sales Spreadsheet provided by Yueling and the second dot point relates to Australian sales distribution channels. Yueling proceeds to discuss these issues, pointing out that these statements in Report 263 were repetitions of the justifications contained in the ADC's Statement of Essential Facts 263 (SEF 263) and that these statements in REP 263 failed to reflect or accommodate any of the clarifications in its response to SEF 263.[27]

52. The main contentions made in Yueling's SEF Submission (and set out again in Yueling's application for review) in regard to the ADC's concern relating to the Australian Sales spreadsheet are as follows:

- an explanation that Yueling's Australian Sales spreadsheet can be matched with the relevant invoices, contrary to the ADC's stated concern,
- an explanation that the data reported in the Australian sales spreadsheet is indeed reliable and is fully supported by the relevant sales and accounting records, contrary to the ADC's stated concern, as shown in a particular example invoice (which was used by the ADC as an example of Yueling's information not being verifiable); and
- a clarification of information regarding certain clerical issues related to the sales information. [28]

53. Yueling points out that each concern of the ADC was properly and adequately addressed by Yueling and to the best of its ability, and despite the full clarifications provided in its SEF Submission the ADC did not refer to them in its "summary of key factors". Yueling points out that under a separate heading of, "Submissions recieved in response to SEF 263", the ADC states:

"The Commission agrees that Zhejiang Yueling has cooperated with requests from the Commission to provide data and additional information. However, the Commission notes that Zhejiang Yueling made revisions to its Australian sales data which were of major significance, and which indicated that items which were not the goods had been included in Australian sales

[25] See REP 263, page 57
[26] See REP 263, page 57
[27] See Yueling's response to SEF 263 dated 19 August 2015 (Yueling's SEF Submission)
[28] See Yueling's SEF Submission, pages 2 to 7

data. Whilst the Commission acknowledges Zhejiang Yueling's clarification regarding export sales values, the Commission considers that the other issues previously identified by the Commission pertaining to the inaccuracies of export sales data, and the lack of clarity around distribution processes, are more problematic and have systemic impacts on other data used to calculate dumping margins." [29]

54. Yueling contends that the ADC therefore agreed that Yueling's SEF Submission did provide clarification regarding Yueling's Australian Sales spreadsheet and states that at no time was it made clear to Yueling what "*other issues previously identified by the ADC pertaining to the inaccuracies of export sales data*" there were. Yueling contends that in Report 263 the ADC tries to justify the decision to not only disregard the information relating to Yueling's Australian sales data, but the entirety of Yueling's information, on the basis that:

> *"The Commission finds that the potential inaccuracies previously identified in Zhejiang Yueling's sales data indicates that there could be further errors in the Australian sales sheet which have not yet been identified and which may not be identified irrespective of the nature of any additional verification activities that the Commission could undertake.*
>
> *Zhejiang Yueling has inferred the Commission has not undertaken any verification of Zhejiang Yueling's data and thereby cannot suggest the data is unreliable. The Commission notes that it has undertaken various aspects of verification work by seeking source data from Zhejiang Yueling and that this led to the identification of potential inaccuracies in the company's data. The Commission considers that even if in-country verification took place, the same concerns identified by the Commission in SEF 263 and this report would apply.*
>
> *The Commission also considers that inaccuracies in Australian sales data would have flow-on errors for other data submitted by Zhejiang Yueling. The Commission views that any inaccuracies affecting the accuracy and completeness of Zhejiang Yueling's Australian sales spreadsheet would likely affect Zhejiang Yueling's Australian CTMS data. As the Commission constructed normal values as part of this review, the potential inclusion of inaccuracies within Zhejiang Yueling's Australian CTM data could potentially lead to inaccuracies in the company's normal values. The Commission also notes that potential inaccuracies in the Australian sales spreadsheet could flow through to Zhejiang Yueling's turnover figures, which contain references to Australian sales data. Hence the Commission considers it reasonable to disregard all Zhejiang Yueling's sales, cost and turnover data for the purpose of determining the company's normal values and subsidy margin."*
> [underlining by Yueling] [30]

55. Yueling contends that the above paragraphs openly betray the fact that the ADC's decision to disregard Yueling's information was based on nothing but a series of unsubstantiated and unexplained potentialities, rather than any informed and rational opinion arrived at after proper verification, inquiry and

[29] See REP 263, page 58
[30] REP 263 at page 58 and 59

analysis. Yueling points out that the ADC is required to make its findings and recommendations based on proper enquiry and positive evidence, and that a finding that an exporter's information is inaccurate and unreliable can only be made after proper enquiries are made by the investigating authority in a way which discharges its responsibility to undertake a proper investigation and to accord Yueling the procedural fairness to which it is entitled. [31]

56. Yueling also points out that contrary to the ADC's belief, a *"potential inaccuracy"* in Yueling's Australian Sales spreadsheet would not necessarily or logically have any flow-on effect on the other information provided by Yueling, and in any case, none of the "potential" accuracy issues that were identified by the ADC to Yueling (and which were explained by Yueling) were of such a nature that would cast serious doubt on the genuineness and accuracy of the entirety of Yueling's other information. Accordingly, Yueling contends (without distracting from Yueling's primary submission that the ADC should not disregard Yueling's data at all) that the Commission must not disregard its data which is otherwise unquestioned and verifiable, such as the sales and production volume, cost to make and sell, and domestic sales, for the purpose of the calculation of normal value, a dumping margin and the subsidy margin.

57. Yueling then goes on to address the second point raised by the ADC in the 'summary of key factors' contributing to the decision to disregard all Yueling's information, that is, the "lack of clarity" regarding Yueling's Australian sales distribution channels. As it noted in its SEF Submission, Yueling was puzzled by this and did not know what the specific concerns of the ADC were, but still endeavoured to provide clarifications regarding its distribution channels in its SEF Submission. Yueling submits that should the ADC have had any questions regarding Yueling's distribution arrangement, or about Yueling's response to the ADC's information requests dated 14 May, it should have asked those questions. The explanations have at all times been simple and straightforward, and there was nothing wrong with the information that was submitted in that regard. The ADC for the first time in the 13 month review procedure, made the following comments on this point in REP 263:

> *"In relation to the uncertainty around export distribution channels, the Commission still considers that Zhejiang Yueling exported the goods to Australia via distribution channels which have not been identified by Zhejiang Yueling. Information about distribution methods is essential to determining accurate export prices and normal values, and the Commission views this information should be provided by the exporter because it will be included in exporters' confidential dumping margin calculations. As the Commission obtained additional information about distribution channels through confidential ACBPS data as well as information submitted by importers, the Commission was unable to provide Zhejiang Yueling with any clarification on this matter beyond simply asking for the company to explain all aspects of its distribution methods for Australian sales. The Commission considers it reasonable to expect exporters to have a strong understanding of the methods through which they sell and distribute goods to Australia in any event, and notes*

[31] See Yueling's application for review, page 11

that it sought information on distribution methods in Zhejiang Yueling's exporter questionnaire, as well as two subsequent requests for further information. The Commission thereby considers that it provided Zhejiang Yueling with sufficient opportunity to provide the Commission with this information, which is required to determine export prices and normal values."[32]

58. Yueling stated that it was "in the dark" as to what the ADC was referring to. Yueling had already answered all of the ADC's questions regarding its distribution channels. [33]

59. Yueling further states that the ADC appears to have adopted the assumption that certain information that it possessed should be known to Yueling, and that it should have been advised to the ADC by Yueling. This assumption was incorrect and was not tested, whether by direct or indirect inquiries of Yueling. Yueling contends that the ADC was obliged to clearly communicate such concerns to Yueling, should it seek to rely upon them in disregarding Yueling's information, and not to disregard Yueling's information based on unsupported and illogical suspicions. The finding therefore that Yueling's information can be disregarded due to some "lack of clarity" on Yueling's export sales channel is simply incorrect and unjustified.

60. Finally in dealing with its first two grounds, Yueling addresses the ADC's obligations under the Anti-Dumping Agreement, which were also dealt with in Yueling's SEF Submission. Yueling poins out that in accordance with Article 6.8 of the Anti-Dumping Agreement, determination of Yueling's dumping and subsidy margins can only be made on the basis of "facts available", if Yueling "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". Yueling points out that these descriptions clearly do not reflect Yueling's record of cooperation and provision of information to the Commission in this review. Yueling also disputes the ADC's finding that it "has been unable to verify the information provided by Yueling in the exporter questionnaire to source documents provided. Accordingly, the Commission does not consider Yuelings information is 'verifiable' with reference to Section 3 of Annex II of the Anti-Dumping Agreement, which provides for relevant investigating authorities to take into account, "All information which is verifiable… [and] supplied in a timely fashion…" Yueling contends that all of the information provided by it was and is verifiable. Further, Yueling referred to paragraphs 5 and 6 of Annex II to the Anti-

[32] REP 263, page 59

[33] At this point in Yueling's application, it refers an involvement with third party importers, whch information is claimed by the ADC in the ADC Response to not be "relevant information" in terms of s.269ZZK(6) of the Act. This is disputed by Yueling in its Submission, claiming that this information was possessed by the ADC all the time and appear to have been used to justify its decision to disregard all Yueling's information, on the basis that such information was not provided by Yueling. I do not, however, consider that it is necessary for me to rule on this issue, due to subsequent developments resulting from the ADC's Reinvestigation Report, where the ADC stated that, *"It appears that Yueling clarified the Commission's queries in relation to Yueling's distribution channels, to the best of its ability …" (see Section 4.2.3.1 of the Reinvetigation Report, page 16)*

Dumping Agreement.[34] Reference was made by Yueling to WTO jurisprudence.[35]

61. Yueling submits that the foregoing plainly establishes that the decision to disregard Yueling's information for the purpose of working out export prices and normal value were flawed and unjustified. It is Yueling's view that the Parliamentary Secretary should not have disregarded any of the information provided by Yueling in the working out of Yueling's export price and normal value and for determining Yueling's dumping margin in the review period. These incorrect findings have directly affected the other findings concerning Yueling, namely the calculation of export price, normal value, dumping margin and subsidy margin (discussed below).

62. A careful analysis of Yueling's application and submission, the relevant legislative and WTO provisions, the ADC's determinations in REP 263 in relation to Yueling, and various submissions and documents relating to the original review led me to request a reinvestigation of various findings in REP 263 in relation to the calculation of Yueling's dumping and subsidy margins, including with regard to Yueling's first two grounds of review. [36] In undertaking the reinvestigation with regard to these two findings in REP 263 (that all the information provided by Yueling should be disregarded for the purpose of establishling export prices pursuant to s.269TAB(4) and normal value pursuant to s.269TAC(7)), I requested the ADC to carefully consider Section B of Yueling's application for review and Section A and B of Yueling's SEF Submission, which was not properly addresses in REP 263. In its reinvestigation I requested ADC to reconsider, inter alia:

- Yueling's cooperation with the ADC during the course of the investigation;
- Yueling's explanations of corrections and its clarifications, both those provided voluntary and those in response to the ADC's requests (in respect of the Australian sales spreadsheet and its distribution channels);
- Its finding that Yueling's information was not "verifiable"; and
- The contention by Yueling the ADC could not reject Yueling's information as unreliable by simply assuming that it knew about third party arrangements, without seeking specific clarification from Yueling in regard thereto.

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[34] See paragraphs 5 and 6 of Anex II of the Anti-Dumping Agreement:

"5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

[35] See Panel in Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey (WT/DS211/R).

[36] See Reinvestigation Report, pages 4 - 6

I also requested the ADC to take cognisance of Australia's obligations under the Anti-Dumping Agreement, in particular, Article 6.8 and Articles 1,3,5, and 6 of Annex II, and in particular, whether it could be said that Yueling did not act, "to the best of its ability" in accordance with Article 5 of Annex II and whether Yueling could be considered to have refused access to or otherwise did not provide necessary information or significantly impeded the investigation (within the meaning of Article 6.8).

63. In the Reinvestigation Report, the ADC made the following statements and a new finding with regard to Yueling's first two grounds of reiew:

> *"Upon reinvestigation, the Commissioner has found that although Yueling provided Australian sales data to the Commission that contained inaccuracies, it appears that based on the Commission's and Yueling's correspondence, Yueling complied with the Commission regarding additional requests for information.*
>
> *The additional information provided to the Commission during Review 263 included corrected Australian sales data that, upon reinvestigation, reconciles with commercial invoices provided by Yueling.*
>
> *It appears that Yueling clarified the Commission's queries in relation to Yueling's distribution channels, to the best of its ability and within the Commission's timeframes allowed to Yueling.*
>
> *As part of this reinvestigation, the Commission assessed the analysis undertaken in Review 263 of Yueling's cost to make and sell data, which, based on that assessment, indicates that the data appears reasonable.*
>
> *The Commissioner considers, however, that the information provided to the Commission is not ideal in all respects.*
>
> *Based on the evidence and reasons above, the Commissioner has made the following new finding that Yueling's information provided to the Commission in Review 263 should not be disregarded as unreliable in its entirety."* [37]

64. I am satisfied that the approach taken by ADC in the reinvestigation of the findings that form the basis of Yueling's first two grounds of review is reasonable and in accordance with the relevant Australian legislative and WTO provisions. I accept the new finding made by the ADC in this regard.

The ADC erred in calculating the export prices and normal values of Yueling in the same way as that adopted for uncooperative exporters, under s. 269TAB(3) and s.269TAC(6) of the Act, respectively, and consequently erred in calculating a dumping margin of 40.3% for Yueling

[37] See Reinvestigation Report, page 16

65. In its application for review, Yueling addresses its reasons for believing that the reviewable decision is not the correct or preferable one, in relation to Grounds (iii), (iv) and (v) together. I will similarly examine these three claims together.

66. In dealing with these three grounds, Yueling states that it follows from its submissions on Grounds (i) and (ii) that the ADC's decisions to calculate export price, normal value, and ultimately in the working out of dumping margin, by reference to the least favourable information obtained from the other selected exporters in the review, rather than the information provided by Yueling, are also incorrect.

67. In addition to its submissions with regard to Grounds (i) and (ii), Yueling further contends (without prejudice to its position that none of its information should have been disregarded), that the only issues concerning the reliability of Yueling's information so far as the ADC was concerned were those which were limited to certain aspects of Yueling's Australian sales information. It contends even if that concern was well-founded (which it contends was not), it would be incorrect to disregard all of the information provided by Yueling, whether related or unrelated to those alleged issues. Yueling is of the view that the information provided by it that was undisputed and unchallenged by the ADC must clearly be accepted as "information available" to be used in the calculation of export price, normal value, and ultimately the dumping margin.

68. Further, arguments made by Yueling are as follows:

- There is nothing in the Customs Act which requires those amounts to be determined in the least favourable manner possible with s.269TAB(3) and s.269TAC(6) referring to "all relevant information", and not to the "least favourable information";
- The open language of those Sections gives the Minister some discretion in "having regard" to relevant information for the purpose of working out the relevant amounts, which should be guided by other sections of the Act, by observance of Australia's international obligations, and by notions of administrative fairness and natural justice;
- The fact that Yueling was identified as a cooperative exporter calls for differentiation in its treatment as compared to the treatment specified for an uncooperative exporter;
- S.269TACAB also prescribes the methods by which the relevant amounts should be worked out for exporters in the "residual exporters" category. The approach to be adopted for a cooperative exporter should not be implemented in the same unfavourable way as for an uncooperative exporter, otherwise the exporters in the "residual" category would also be treated less favourably than the legislation requires, since the normal values and export prices of these exporters are based on weighted averages of the cooperative exporters;
- Annex II of the Anti-Dumping Agreement also contains specific rules on the use of "all relevant information". Paragraph 7 directs that if the authorities have to base their findings on information from a secondary

source, they should do so with special circumspection. It is particularly indicated that the information from a secondary source (being the information not provided by the exporter itself), may lead to a less favourable determination, but only if an interested party does not cooperate. This clearly does not apply to Yueling, which provided full cooperation to the ADC during the review.

69. Accordingly, it is Yueling's submission that the decision to work out Yueling's export price and normal value, and ultimately its dumping margin, in the same way as adopted for an uncooperative exporter, is both incorrect, and not to be preferred. Once again, Yueling submits that the correct and preferable decision should be to work out the export prices and normal value based on all of the information provided by Yueling.

70. A careful analysis of Yueling's application and submission, the relevant legislative and WTO provisions, the ADC's determinations in REP 263 in relation to Yueling, and various submissions and documents relating to the original review led me to request a reinvestigation of various findings in REP 263 in relation to the calculation of Yueling's dumping and subsidy margins, including with regard to Grounds (iii), (iv) and (vi). I requested the ADC to reinvestigate the dumping calculations, even if, in the reinvestigation it confirms that Yueling's export sales data should be rejected. The ADC was directed to further reinvestigate why the information by Yueling that is unchallenged and undisputed, should not be used in the calculations of the dumping margin, and why the amounts of export price, normal value and dumping margin should be determined in the least favourable manner for Yueling, as if it were an "uncooperative exporter". I requested the ADC to bear in mind that there appeared to be no indication that any other information submitted by Yueling (other than in respect of its Australian sales data and its distribution network) was in any way inaccurate or inadequate, or was queried by the ADC, there being only unsubstantiated doubts by the ADC that other aspects of Yueling's information "may" or "potentially" be incorrect. I requested the ADC in its reinvestigation of this issue also take cognisance of Aricles 3, 5 and 7 of Annex II of the Anti-Dumping Agreement and the relevant WTO jurisprudence.

71. In its reinvestigation of the findings that the export price and normal value of Yueling be calculated in the same way as that adopted for uncooperative exporters in accordance with s.269TAB(3) and s.269TAC(6) respectively and that Yueling's dumping margin be calculated by comparing the export price and normal value so ascertained, the ADC stated:

> *"As the Commission has not disregarded Yueling's data as unreliable in its entirety, the Commissioner has made the following new findings that Yueling's:*
>
> - *export price be determined under subsection 269TAB(1)(a), being the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation;*

- *normal value be determined under subsection 269TAC(2)(c), specifically being the sum of:*
  - *Yueling's cost of production, which includes a substituted input cost for aluminium alloy based on the benchmark, London Metal Exchange (LME) spot prices;*
  - *an amount for selling, general and administrative expenses, under subsection 44(2) of the Regulation, based on Yueling's audited financial statements;*
  - *an amount for profit, worked out under subsection 45(2) of the Regulation, using data relating to the production and sale of like goods by Yueling in the ordinary course of trade.*

Adjustments to Yueling's normal value have been made for differences in inland transport and handling and other expenses.

Yueling's new normal value, export price and dumping margin calculations are at Confidential Appendix 2.

As a result of these new findings, the Commission has calculated Yueling's dumping margin to be 8.3 per cent." [38]

72. I am satisfied that the approach taken by ADC in the reinvestigation of Yueling's calculations of export price, normal value and dumping margin is reasonable and in accordance with the relevant Australian legislative and WTO provisions. I accept the new finding made by the ADC in this regard.

The ADC erred in the calculation of the subsidy margin of 18.5% for Yueling, using the same method as was adopted for uncooperative exporters

73. According to Yueling, the ADC's determination of a subsidy margin for Yueling involved two parts: (i) For the "Program 1" subsidy, the ADC decided to disregard the information provided by Yueling, and to use the "highest unit benefit", "lowest weighted average export price" and "average relevant turnover volumes" for other selected exporters.(ii) For all other Programs, the ADC decided to use the actual amount of benefit received by Yueling, but in so doing, disregarded Yueling's export price and company turnover; and attributed the amount of benefit received using "lowest relevant turnover figures" and "lowest weighted average export price" from other selected exporters.

74. In its application for review Yueling challenges the ADC's approach towards working out its subsidy margins,in a number of respects:

i. Firstly, Yueling challenges the fact that the ADC disregarded all of Yueling's information in working out its subsidy margin, except for the total "actual amount of benefit received". Yueling contends that there is no legislative basis and refers to s.269TAACA of the Act which specifically prescribes the circumstances in which the Minister may "act

[38] See Reinvestigation Report, page 17 and Confidential Appendix 2

on the basis of all facts available" and "make such assumptions as the Commissioner or the Minister considers reasonable". Yueling contends that the circumstances prescribed essentially relate to non-cooperation by the relevant entities. In Yueling's view, the description of the kind of situation which may be considered to be "noncooperation" is the same as the definition for "uncooperative exporter" under s.269T of the Customs Act, and Yueling reiterates that it was not uncooperative in its provision of information in the review procedure. Yueling notes that s.269TAACA does not authorise any "disregard" of information in the same way as provided under s.269TAB(4) and s.269TAC(7) of the Customs Act. Accordingly Yueling contends that the decision not to use Yueling's information in the calculation of amount of subsidy received by Yueling is incorrect and unlawful.[39]

ii. Yueling challenges the fact that the ADC determined the amount of the subsidy received by Yueling under programs other than Program 1, by reference to the actual amount of benefit received by Yueling, but that it disregarded Yueling's turnover volume, and worked out a per unit amount of subsidy received by reference to "lowest relevant turnover figures. Yueling contends that this methodology is particularly problematic and illogical in the context of these subsidy programs, because the benefit received by Yueling under those programs (the amount of which was accepted by the ADC), were provided to Yueling in most circumstances, by reference to Yueling's particular business performance and financial information. Lastly in relation to the determination of the unit amount of subsidy under [redacted], Yueling challenges the ADC's decision to attribute such subsidy grant based on Australian sales only. Yueling explains that the grant was provided to Yueling [redacted]

iii. Yueling also challenged the finding that it received a countervailable subsidy under Program 1. Yueling referred to its EQ reponse [41] [redacted] Yueling pointed out that the information regarding Yueling's purchases of raw materials was never disputed or questioned by the ADC at any stage of the review. Yueling contends that before conducting a margin calculation for the purposes of a "Program 1" subsidy, the ADC had to show that Yueling purchased

[39] See Section D of Attachment A of Yueling application, pages 23 and 24
[40] See Section D of Attachment A of Yueling application, pages 25 and 26
[41] See Exhibit I-4.4 of Yueling's EQ response

aluminium and or alloy from a public body for its production of the goods exported to Australia; and that the amount paid by Yueling for the aluminium/alloy to the public body was less than adequate remuneration for that supply. This was not done. Accordingly, Yueling submits that the finding that it benefited from Program 1 is incorrect and not preferable.

75. A careful analysis of Yueling's application and submission, the relevant legislative provisions, the ADC's determinations in REP 263 in relation to the ADC's calculation of Yueling's subsidy margin, led me to also request a reinvestigation of various findings in REP 263 in relation to the calculation of Yueling's subsidy margin, particularly relating to the use of Yueling's own information in the subsidy calculation. In the Reinvestigation Request, I pointed out to the ADC that there appeared to be merit in Yueling's submission in this regard since Yueling was regarded as fully cooperative by the ADC and there appeared to be no indication that any of its information submitted relating to subsidies was inaccurate. The ADC was requested to reinvestigate its finding in this regard. The ADC was also directed to reinvestigate the issue raised by Yueling with regard to [redacted], in which it challenges the ADC's decision to attribute such subsidy grant based on Australian sales only, as well the issue raised by Yueling relating to the purchase of aluminium and / or alloy, and its contention that the ADC should not consider that Yueling received a countervailable subsidy under Program 1.

76. In the Reinvestigation Report the ADC made the following finding with regard to the calculation of Yueling's subsidy margin:

> *"As the Commission has not disregarded Yueling's data as unreliable in its entirety, the Commissioner has calculated Yueling's subsidy margin to be:*
>
> - *for Program 1, the unit benefit received by Yueling, calculated as the weighted average difference between the price paid by Yueling for the aluminium input and the LME benchmark, attributed to Yueling's above determined export price; and*
> - *for all other programs, the actual amount of Yueling's benefit (as provided in its exporter questionnaire response) attributed, as a per unit amount based on Yueling's turnover, to Yueling's above determined export price.*
>
> *As a result of these new findings, the Commission has calculated Yueling's subsidy margin to be **2.5** per cent. Yueling's new subsidy margin calculations are included within Confidential Appendix 2."* [42] [my emphasis]

77. I noted that there was a discrepancy in the amount of Yueling's stated subsidy margin in the body of the Reinvestigation Report, being 2.5 per cent, and in the countervailing spreadsheet of Confidential Appendix II, which showed the total countervailing margin to be 3 per cent.This was clarified by the ADC, who

[42] See Reinvestigation Report, page 18 and Confidential Appendix 2

subsequently confirmed that there was an error in the body of the report, and that the correct figure for the subsidy margin is 3 per cent, as reflected in the countervailing spreadsheet of Confidential Appendix II.

78. I am satisfied that the approach taken by ADC in the reinvestigation of Yueling's subsidy margin calculations, with regard to using Yueling's own data, both in respect of determining the amount of the benefit and in the attribution of the amount of benefit received, is reasonable and in accordance with the relevant Australian legislative and WTO provisions. There are, however, two further issues with regard to the calculation of Yueling's subsidy margin that need to be considered:

i. Yueling's challenge of the finding that it received a countervailable subsidy under Program 1;and
ii. Yueling's challenge with regard to [redacted], in which it challenges the ADC's decision to attribute such subsidy grant based on Australian sales only.

79. I will discuss both these issues separely below:

Yueling's challenge of the finding that it received a countervailable subsidy under Program 1

80. This issue was raised by Yueling in its application for review under its ground of review challenging the calculation of its subsidy margin. [43] In its application Yueling referred to its SEF Submission where it stated that ["none of the four aluminium alloy supplier companies were State invested enterprises."] Yueling also points out that the information regarding its purchases of raw materials was never disputed or questioned by the ADC at any stage of the investigation, with the ADC's concerns being limited to Yueling's sales information. Yueling contends that before conducting a margin calculation for the purposes of a Program 1 subsidy, the ADC must first establish that Yueling purchased aluminium and or alloy from a 'public body' for its production of the goods exported to Australia, Yueling claims that the finding that it benefited from Program 1 is incorrect and not preferable. It contends that as Yueling did not purchase aluminium from a State-invested enterprise (SIE), in cirumstances where the ADC considers such SIE's to be "public bodies", it cannot have received such a countervailable subsidy.

81. REP 263 did not specifically address Yuelings claim that it has not benefited from Program 1, notwithstanding that it was raised in Yueling's SEF Submission, nor was it referred to in the ADC Response. This issue was raised again by Yueling in its submission to the Review Panel dated 21 January 2016, in terms of s.269ZZJ (Yueling's Submission). I therefore also requested the ADC to reinvestigate this issue in the Reinvestigation Request:

[43] See Secion D.6 of Yueling's application for review, page 27 and 28

> *"At the same time the ADC is requested to reinvestigate the issue raised by Yueling relating to the purchase of aluminium and / or alloy. Yueling contends that the ADC should not consider that Yueling received a countervailable subsidy under Program 1 because* [redacted]*"* [44]

82. In the Reinvestigation Report, the ADC did not directly address any legal or factual issues raised by Yueling with regard to Program 1, merely stating that:

> *"for Program 1, the unit benefit received by Yueling, calculated as the weighted average difference between the price paid by Yueling for the aluminium input and the LME benchmark, attributed to Yueling's above determined export price;*" [45]

The subsidy amount calculated for Program 1 for Yueling was set out in Confidential Appendix 2 of the Reinvestigation Report. The spreadsheet entitled,"Material Purchases" of Confidential Appendix 2 clearly shows that [redacted]

83. I therefore looked more closely at Yueling's claim as well as the findings and analysis in REP 263 that related to Program 1. In its assessment of 'public body', the ADC made a finding that it considered that evidence exists to show that the Government of the People's Republic of China (GOC) excercises "meaningful control" over aluminium and /or alloy producers, "whether or not they were enterprises with state investment", and that they are therefore considered to be public bodies within the meaning of s.269T(1) of the Customs Act.[46]

84. Most of the analysis in REP 263 on Program 1, however, addresses whether SIEs in the aluminium sector were considered to be "public bodies",[47] with minimal reference to non-SIE producers. This emphasis on SIEs perhaps led Yueling to focus its claim simply on the fact that since it did not purchase aluminium from a State-invested enterprise (SIE), in cirumstances where the ADC considers such SIE's to be "public bodies" , and therefore it cannot have received a countervailable subsidy. In support of this claim Yueling points out,

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[44] See Reinvestigation Request, page 8
[45] See Reinvestigation Report, page 18
[46] See discussion of Aluminium industry policy implementation in REP 263. Page 122 and Section 6.6 (Commission finding) of REP 263, page 126
[47] REP 263 at page 11 states:

> *"The definition of a subsidy under subsection 269T(1) requires the financial contribution to be provided by a government, public body or a private body entrusted by that government or public body to carry out a government function.*
>
> *……The Commission's focus on considering whether aluminium has been sold at less than fair market value will thereby focus on considering whether these SIEs are acting as a 'public body'."*

that the ADC at no time disputed Yueling's data relating to its purchase of raw materials. It is also clear that the ADC accepted that Yueling's purchased its aluminium and aluminium alloys from non- SIE producers and suppliers.[48]

85. Yueling does not, however, provide any detailed submissions or further analysis to support its claim and does not challenge the finding and analysis in REP 263 that non-SIEs can be considered to be public bodies.[49] While the ADC provides a detailed analysis of its consideration of the aluminum and alloy producer SIE's, being public bodies, there appears to be gaps in its analysis and resulting finding that non-SIE procers and suppliers are also considered to be public bodies. However, it is not for the Review Panel to make the case for an applicant, and based on the lack of clear and comprehensive reasons for this particular grounds of review, I am unable to make a finding in favour of Yueling in respect of its claim.

86. I would, in any event, like to point out that that since the use of a competitive LME-based aluminium cost substitute impacts on both subsidy and dumping margins, the ADC avoids double-counting of the raw materials cost uplift by removing the uplift value from exporters' dumping margins when a combined dumping and subsidy duty is imposed.[50] Therefore, even if I had made a finding that there is no subsity for Yueling in respect of Program 1, the amount of the subsidy (1) would have been added back to Yueling's dumping margin, since there would no longer be 'double-counting', making such a finding in respect of Program 1, ineffective.

Yueling's challenge with regard to Program 59, in which it challenges the ADC's decision to attribute such subsidy grant based on Australian sales only

87. This issue was raised by Yueling in its SEF Response but the ADC did not address it directly in REP 263. Yuling notes the following description in REP 263:

> *"The selected exporter found to have benefited from this program due to its involvement in the exportation of ARWs to Australia.*
>
> *No subsidy margin will be applied to the selected exporter found to have benefited from this program in relation to exportation of the goods to*

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[48] The spreadsheet in Appendix II entitled, Material Purchases" of Confidential Appendix 2 clearly shows that none of Yueling's suppliers (or manufacturer / producer if not the supplier), is a state-owned enterprise.

[49] The ADC in making its findings in regard to Program 1 refers, inter alia, to:

i. The 'previous investigation' in respect of ARWs reflected in ACBPS Report to Minister No. 181 (REP 181);
ii. The finding by the Appellate Body in United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R;
iii. The finding made by the Trade Measures Review Officer (TMRO) in relation to REP 181;
iv. The ACBPS reinvestigated findings made in the previous investigation

[50] See Chapter 8 of REP 263, page 39 and Footnote 3 of the Reinvesigation Report

countries other than Australia, as benefits received under this program were not applicable to the goods."[51]

88. Yueling notes in its application that REP 263 did not explain the basis of the finding. Yueling referred to its response in its EQ, which showed that the grant was provided to Yueling by the Department of Commerce of Zhejiang Province on 18 July 2013. Yueling further explained that it understood the eligibility for this grant was because the Company cooperated in trade remedy investigations. It claims that the grant was provided for Yueling's past participation in trade remedy investigations, and not provided in relation to Yueling's participation in the Australian investigation. It claimed that in 2013 the only investigation Yueling participated in was in relation to its export of ARWs to India, not Australia. Accordingly, it contends that it is without basis for the ADC to attribute such subsidy grant based on Australian sales only.[52]

89. There was no reference to this claim of Yueling in the ADC Response and and there appeared to be a general lack of clarity in regard to the ADC's finding in REP 263 in this regard, I therefore requested the ADC to reinvestigate this issue in the Reinvestigation Request:

"The ADC is also directed to reinvestigate the issue raised by Yueling with regard to [redacted]*."* [53]

The ADC did not, however, address the issue directly in the Reinvestigation Report, and simply incuded a subsidy margin calculation for [redacted], calculated on the basis of Australian export sales only, with no commentary relating thereto.[54]

90. The ADC's finding in REP 263 is not clear, as contended by Yueling, and there appears to be merit in Yueling's contention that the benefit received in July 2013 was not provided only in relation to Yueling's participation in the Australian investigation. Yueling claimed that in 2013, the only investigation that it participated in was in relation to its export of ARWs to India. This would seem to accord with the dates of the previous ARW investigation in Australia. Since the ADC did not reinvestigate the issue as requested or provide clarity on its findings or in any way refute Yueling's claims with regard to [redacted], either in the original investigation and in the Reinvestigation, it seems to me that the correct and preferable decision is the calculation of the subsidy margin for this program with respect to all Yueling's exports, and not just its Australian sales. This would reduce the subsidy margin from 0.02% to 0.015%

[51] See REP 263, page 134
[52] See Yueling's application for review, page 27
[53] See Reinvestigation Request, page 8
[54] See Countervailing spreadsheet of Confidential Appendix 2 to the Reinvestigation Report.

Recommendations / Conclusion

91. For the reasons set out above, pursuant to s.269ZZK(1) of the Act:

i. I consider that the reviewable decision in respect of Pilotdoer was not the correct and preferable decision, in that the there was an error in the calculation of normal values for Pilotdoer by the use of average net profit by other selected exporters, giving rise to an incorrect dumping margin for Pilotdoer. Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision using Pilotdoer's own data for calculating the amount of profit in accordance with s.45(2) of the Internation Obligation Regulation, with a new calculated dumping margin of 2.7% for Pilotdoer;

ii. I consider that the reviewable decisions in respect of Yueling were not the correct and preferable decision, in that:

a. Yueling's information was disregarded, on the basis of being unreliable, for the purpose of establishing Yueling's export prices, normal values and resulting dumping margin, resulting in an error in the calculating of Yueling's dumping margin;

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision that does not disregard Yueling's information in its entirety, with a new calculated dumping margin of 8.3% for Yueling.

b. There was an error in the calculation of Yueling's subsidy margin.

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), which I have accepted in part, I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision that uses Yueling's own data for determing the amount of the benefits as well as for the attribution of the benefits. The new decision deviates from the new reinvestigated findings by the Commissioner in that the subsidy margin in respect of [redacted] is calculated by reference to all Yueling's exports, rather than its Australian exports with a reduction in margin from 0.02% to 0.015%. This, however, has a negligible effect on the subsidy margin, The new calculated subsidy margin for Yueling is therefore 3%, as calculated by the ADC in the Reinvestigation Report.

92. I recommend that this substituted decision take effect from date that the Reviewable Decision taoke effect.

Leora Blumberg
ADRP Member
16 May 2016