

Note on the Basis for the Reconsideration of the Subsidy Investigation of Galvanised Steel Coil from China

Purpose

1. This Note sets out the basis for the reconsideration of the application by New Zealand Steel Ltd (NZ Steel) for the imposition of countervailing duties on galvanised steel coil from the People's Republic of China (China), following the decision of the High Court in *New Zealand Steel Ltd v Minister of Commerce and Consumer Affairs* (the Judgment).¹
2. The matters addressed in this Note include:
 - A. the period of investigation in relation to (a) subsidy and (b) injury
 - B. the matters to be reconsidered
 - C. the interested parties to be involved
 - D. the information to be used in the reconsideration
 - E. the timeframe and procedures for the investigation.
3. The reconsideration is to be carried out in accordance with the Dumping and Countervailing Duties Act 1988 (the Act) as it stood at the time of the original investigation, and will also need to take into account New Zealand's obligations under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement).
4. The basis for reconsideration has been discussed with New Zealand Steel Limited (NZ Steel) and the Government of China (GOC).

Background

Original Investigation

5. The Ministry of Business, Innovation and Employment (MBIE) initiated an investigation under the Act into galvanised steel coil from China on 19 December 2016, following the receipt of an application for a subsidy investigation from NZ Steel.
6. MBIE undertook a like goods analysis, and on the basis of that analysis concluded that the subject goods description should include an upper width limit of 1260mm, to reflect NZ Steel's manufacturing capability. Consequently, the goods which were the subject of the investigation (the subject goods) were:

Galvanised steel coil with a thickness equal to or greater than 0.3mm and less than or equal to 1.9mm, and a width greater than 600mm but not greater than 1260mm, with a hot dipped galvanised (zinc) coating.
7. NZ Steel is the sole producer of galvanised steel coil in New Zealand, and constituted the domestic industry for the purposes of the investigation.
8. Following the initiation of the investigation MBIE requested information from identified importers, intermediary exporters, Chinese manufacturers, and the GOC. One importer declined to provide information. Responses were provided by several of the intermediary

¹ Available at <http://www.nzlii.org/nz/cases/NZHC/2018/2454.html>.

exporters, and one Chinese manufacturer responded to the questionnaire. The GOC provided general responses. MBIE sent supplementary questionnaires to the GOC, which responded, and to two manufacturers, which did not respond.

9. NZ Steel requested that provisional countervailing duties be imposed on the allegedly subsidised imports during the remaining period of the investigation. On 10 May 2017 the then Minister of Commerce and Consumer Affairs decided that she was not satisfied that the imposition of provisional measures was necessary to prevent material injury being caused by subsidised imports during the remaining period of the investigation.
10. In the Final Report,² MBIE considered whether there had been a financial contribution by a government or any public body which provided a benefit to the recipient, and whether any such subsidy was specific. MBIE assessed the extent to which subsidised imports of the subject goods from China may have been causing material injury to NZ Steel, and concluded that:
 - There had not been a significant increase in the volume of imports of the subject goods, over the injury investigation period, in either absolute terms or relative to production or consumption in the domestic market.
 - There was evidence of price undercutting by imports from China, and there was also evidence that the domestic industry had experienced price depression and price suppression.
 - The domestic industry had experienced an adverse economic impact on profits and related injury factors as a result of the impact of price effects.
11. Based on the subsidy levels established, MBIE concluded that material injury to an industry was not being caused by goods that were subsidised. The Minister made a final determination that the subject goods were subsidised only to *de minimis* levels and were not by reason thereof causing material injury to the industry. Notice of the final determination was provided to the parties and gazetted in accordance with section 13(2) of the Act.

Judicial Review Outcome

12. NZ Steel sought judicial review of the Minister's decision. The High Court held that there were material errors in the advice to the Minister; quashed the Minister's decision; and directed reconsideration of the application already made in accordance with the Act as it stood at the time.³
13. The Judge noted that NZ Steel had challenged MBIE's review of like good/subject goods, and suggested that the evidence provided to the Court would be relevant in any reconsideration.
14. A reconsideration is not a fresh application,⁴ and it is a matter for MBIE and the Minister over what period of time the reconsideration is to take place and what further work is required in order to reconsider what decision is to be made, although 180 days would be at the outer limit. The Judgment noted that the original Final Report was advice to the decision-maker, not

² Available at <https://www.mbie.govt.nz/info-services/business/trade-tariffs/trade-remedies/dumping-of-imported-goods/investigations-into-goods-dumping-or-subsidisation/pdf-document-library/final-report-galvanised-steel-coil-from-china.pdf>.

³ An appeal against the Judgment has been filed.

⁴ NZ Steel has opted for a reconsideration of the original decision, not a new application.

the decision itself, and the reinvestigation did not need to cast aside all of the work that it contains.

15. The reconsideration is to be conducted in light of the reasons in the Judgment.

Legal Framework for the Reconsideration

16. As noted above, the reconsideration is of the application made by NZ Steel for the imposition of countervailing duties on galvanised steel coil from China. It is to be carried out in accordance with the Act as it stood at the time of the original investigation (which means the public interest test will not apply), and will also need to take into account New Zealand's obligations under the SCM Agreement.
17. In order to reconsider the original application on the basis outlined in the Judgment, to apply the Act and to meet New Zealand's obligations under the SCM Agreement, MBIE has accepted the original application, in light of the facts and conclusions from the original Final Report and the rulings in the Judgment, as the basis for initiating an investigation under section 10 of the Act. This means that the consultation and notice provisions of the Act and the SCM Agreement will apply, along with the relevant provisions of both relating to the definition of like goods/subject goods, the determination of subsidy and material injury, and the provisions governing information.

Approach to Reconsideration

A. Period of investigation

18. The original period of investigation (POI) for subsidisation was the year ended 30 June 2016, while the investigation of injury involved the evaluation of data for the period 1 July 2011 to 30 June 2016.
19. These periods will also apply in the reconsideration.

B. Matters to be reconsidered

20. The Judgment identified the reasons for quashing the Minister's decision on the grounds that there were material errors in the advice to the Minister in the Final Report and Briefing. These errors related to MBIE's advice to the Minister on the following subsidy programmes investigated in relation to the definition of "public body" and the use of information from overseas jurisdictions:
 - Policy loans
 - The provision of inputs at less than adequate remuneration (LTAR)
 - The provision of land-use rights at LTAR.
21. The following subsidy programmes which were covered in the original investigation will not be included in the reconsideration. The Judgment made no findings of error with respect to them:
 - The provision of electricity at LTAR
 - Export buyer's credits
 - Grants

- Other subsidies.
22. In light of the Judgment, the matters to be reconsidered include the following:
- (a) The definition of the term “public body”
 - (b) The following subsidy programmes:
 - Policy loans: including consideration of whether there is a financial contribution from a government or any public body which provides a benefit through the provision of loans at preferential interest rates, and if so whether State-owned commercial banks (SOCBs) providing such loans are public bodies.
 - Provision of inputs at LTAR: including consideration of whether there is financial contribution from a government or any public body which provides a benefit through the provision of inputs at less than adequate remuneration, and if so, whether State-invested enterprises (SIEs) providing inputs are public bodies.
 - Land-use rights at LTAR: including consideration of whether there is a financial contribution through the provision of land use rights at less than adequate remuneration.
 - (c) The definition of like goods/subject goods to be covered by the reconsideration.
 - (d) Subject to the outcome of the reconsideration of the subsidy programmes, a reconsideration of whether subsidised imports of galvanised steel coil from China caused material injury to the New Zealand industry.
23. The reconsideration of these matters will be set out in two further reports:
- An Essential Facts and Conclusions (EFC) Report
 - A Final Report.
24. The EFC Report will set out the advice of the essential facts and conclusions that will likely form the basis for any final determination to be made. Parties will then have an opportunity to make submissions before the Final Report is prepared for the Minister.

C. *Interested parties*

25. Section 9 of the Act defines parties who are to be given notice for the purpose of the Act as the Government of the country of export, exporters and importers known to have an interest in the goods, and the applicant in relation to the goods.
26. MBIE notes that the SCM Agreement, at Article 12.9, states that interested parties shall include (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.
27. Article 12.10 of the SCM Agreement goes on to provide that the authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to

provide information which is relevant to the investigation regarding subsidization, injury and causality.

28. In the original investigation the interested parties included the New Zealand producer, NZ Steel; the Government of China (GOC); six Chinese manufacturers of the subject goods; six trading intermediaries; seven importers; and the China Chamber of International Commerce.
29. All of these interested parties are included in the reconsideration.

D. Information to be used

30. In the original investigation, MBIE used the following information:
 - Information contained in NZ Steel’s application and subsequent submissions
 - Information obtained during MBIE’s verification visit to NZ Steel
 - Responses by the GOC to the Government Questionnaire and Supplementary Questionnaire
 - Responses to importer/exporter/manufacturer questionnaires
 - Information arising from MBIE’s independent research into matters arising in the investigation.
31. As this is not a new investigation, MBIE will use all of the information that it considered in the original investigation and which formed the basis for its original conclusions, subject to the matters raised in the Judgment concerning the source and use of information.
32. In addition, MBIE will use the following information:
 - Any new primary information on subsidisation provided by interested parties that relates to the period of investigation
 - The comment of Dr Wolfgang Scholz on the like goods analysis, provided to the Court by NZ Steel
 - Any other relevant secondary information on subsidisation provided by interested parties or sourced by MBIE.
33. This information will be fully summarised in the EFC Report outlining the essential facts and conclusions likely to form the basis for the Minister’s final determination under section 13 of the Act.

E. Timeframe and Procedures

34. MBIE intends to complete the reconsideration as quickly as possible. At this stage, the proposed time line for the process is as follows:
 - Notice of the initiation of reconsideration - 19 December 2018.
 - Issuance of Requests for Information to interested parties for any additional information and comments on the matters covered in the reconsideration – issued with advice of initiation, and response to be provided by 18 January 2019.
 - Following consideration of the information available and the matters raised, and in light of the Judgment, MBIE will publish an Essential Facts and Conclusions Report (EFC Report), possibly by the end of February 2019.
 - There will be a period of at least 10 working days to allow interested parties to make submissions on the EFC Report.

- On the basis of the EFC Report and the comments received on it, MBIE will prepare the Final Report as the basis for the Minister's final determination.
- Subject to this timetable, a final determination could possibly be made in April 2019.

Invitation for Submissions

35. Interested parties are invited to make submissions in relation to the reconsideration at: traderem@mbie.govt.nz.
36. The Ministry is required to ensure that all interested parties have reasonable opportunity to access all non-confidential information used by the Ministry in the consideration. Non-confidential information used in the investigation is contained on the Ministry's public file for this reconsideration. Interested parties and members of the public are able to request copies of any documents which have been placed on the public file.
37. Any information which is by nature commercially confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect on the person supplying the information or upon the person from whom the information was acquired) or which is provided on a confidential basis by parties to an investigation will, upon good cause being shown, be treated as confidential by the Ministry.

Dr Peter Crabtree
General Manager
Science, Innovation and International Branch
Labour, Science and Enterprise Group

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