



21 May 2020

BY EMAIL

Mr Dale Seymour
Commissioner
Anti-Dumping Commission
GPO BOX 2013
Canberra ACT 2600

Dear Commissioner,

ADRP Review No. 120: Hot Rolled Structural Steel Sections exported from Japan, the Republic of Korea, Taiwan (except for exports by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand

REINVESTIGATION REQUEST

OneSteel Manufacturing Pty Limited, trading as 'Liberty Primary Steel' (**Liberty Primary**), an applicant for *Review of a Ministerial decision* made under subsection 269ZDB(1)¹, refers to Panel Member Fisher's request dated 17 March 2020 for reinvestigation of certain findings in *Report No. 499* under section 269ZZL. Without commenting substantively on the facts and evidence before you in relation to the subject of the reinvestigation, we seek to make a number of observations concerning the nature of the Panel's request. In particular, we question the appropriateness of matters of questions of law becoming the subject of a reinvestigation, and further, the correctness of the Panel's statutory interpretation as advanced in the reinvestigation request.

Questions of Law

A number of the requirements of the Panel Member's reinvestigation request appear to invite the Commission to revisit its views expressed in the original report on the correct interpretation of relevant statutory provisions. An example can be found in the Panel's explication of the legal issues involved in the establishment of Siam Yamato Steel Co Ltd's (**Siam**) normal value which concludes with the following expressed requirement:

*I require the ADC to reinvestigate the normal value, noting Siam's submission that the **normal value should be based on domestic sales of the identical goods**, assuming such sales meet the other requirements of s.269TAC(1) of the Act. [emphasis added]*

¹ All legislative references in this submission are to the *Customs Act 1901*, unless otherwise stated.

While we accept that there is no impropriety in a request to reinvestigate the specific finding of normal value and the evidence in support of that finding, the question arises as to whether section 269ZZL authorises a reinvestigation notice that canvasses legal interpretations of statutory provisions and effectively requests the Commission to adopt an alternative interpretation to that set out in the original report. In our view, there are grounds for contending that the section of the reinvestigation notice concerning Siam's normal value does not comply with the terms of section 269ZZL which is focussed on reinvestigations of findings and supporting evidence and other material rather than establishing a forum for the canvassing of questions of law.

Siam's Normal Value

The reinvestigation notice advances an interpretation of the statutory definition of 'like goods' that supports a normal value calculation based on domestic sales of identical goods in contrast to the Commission's approach in this matter of a calculation based on domestic sales of both identical goods and a selection of comparable goods.

The first argument advanced in support of the suggested interpretation by the Panel are that it best reflects the essential purpose of anti-dumping legislation which is to prevent injurious price discrimination between domestic and export sales. While it is true that limiting a price comparison to sales of identical goods in cases where such goods exist is a less complex exercise, a comparison that includes goods with closely resembling characteristics and adjustments for differences in those characteristics achieves the same outcome and satisfies the same purpose.

The second argument is that 'or' is used disjunctively in the like goods definitions set out in both the Act and the World Trade Organization Anti-Dumping Agreement (**ADA**). No argument is advanced in support of this claim. Of course it is settled law that, reflecting ordinary speech 'or' usually requires a disjunctive construction. However, by reference to either context or legislative purpose there are a number of cases that construe 'or' conjunctively - e.g. *FCT v Industrial Equity Ltd* [2000] FCA 420. There is nothing to indicate that the Panel considered the possibility of a conjunctive interpretation. For example, even in a case where an exporter's domestic sales of like goods includes goods identical to those exported to Australia, any dumping duty notice will be expressed to apply to both the GUC and like goods. In such a case the coverage of the notice extends to any exports of like goods not previously exported to Australia by that exporter. Arguably that fulfils one of the objectives of the Act – to reduce or eliminate injury that may be caused by like goods not previously exported by a particular exporter – and that objective is best met by a normal value calculated by reference to the weighted average of domestic selling prices of both identical and like goods.

The Panel's observations also include the assumption that a disjunctive interpretation cedes primacy to the use of identical goods. In our view, if 'or' is assumed to be used disjunctively, a strict interpretation of like goods would allow the ADC to calculate normal value by reference to sales of goods with closely resembling characteristics or to identical goods but not to a combination of both. The terms of the Act do not support the assumption by the Panel that a comparison of identical goods takes precedence over a comparison of goods with closely resembling characteristics.



It is also worth pointing out that most observations by the ADC and ADRP on the subject of identical goods appear to assume that the concept is concerned only with physical differences. However, we consider that under the terms of both the Act and the ADA there are grounds for asserting that to be identical goods, they must not only be indistinguishable, physically, but must share the same terms and conditions of sale (e.g. time of sale, credit terms etc.) so that no adjustments are required to achieve a proper (fair) comparison. Application of this interpretation would result in a finding of identical goods being extremely rare.

Normal Value for Tung Ho and TS Steel

We consider that it is not appropriate to conduct OCOT tests at the model level. The terms of section 269TAAD are clear. The OCOT test is to be applied to the totality of domestic sales of goods that are 'like' to the goods exported to Australia.

Although we note that the Commission claimed that:

It was unable to quantify the differences in price or cost to enable a specification difference for adjustment purposes under s.269TAC(8) of the Act. It therefore constructed a normal value for these sales pursuant to s.269TAC(2)(c) of the Act,

we do not consider that the inability to quantify price/cost differences is a ground for not making any due allowance adjustments under s269TAC(8), nor is it a ground for abandoning ascertainment of normal value under subsection 269TAC(1).

Conclusions

We encourage the Commission to take into account our observations above in the course of preparing the reinvestigation report, due on or before 15 June 2020.

FOR AND ON BEHALF OF

**ONESTEEL MANUFACTURING PTY LIMITED,
THE AUSTRALIAN INDUSTRY APPLICANT.**