

PARTNERS:

CHIN YOONG CHONG
 KOK CHEE KHEONG
 WONG CHEE LIN
 TO' PUAN JANET L.H. LOOI
 CHARMAYNE ONG POH YIN
 KHOO GUAN HUAT
 MUBASHIR BIN MANSOR
 CHENG KEE CHECK
 LEONG WAI HONG
 IVAN Y. F. LOO
 PHUA PAO YII

SIVA KUMAR KANAGASABAI
 LIM KOON HUAN
 ASHOK KUMAR MAHADEV RANAI
 SELVAMALAR ALAGARATNAM
 PREETHA PILLAI
 CLAUDIA CHEAH PEK YEE
 LOO PEH FERN
 LEELA DEVI BASKARAN
 VIJAY RAJ
 KUEK PEI YEE
 TEH HONG KOON
 RICHARD KHOO

FARIZ ABDUL AZIZ
 TREVOR JASON MARK PADASIAN
 JILLIAN CHIA YAN PING
 OON HOOI LIN
 RATHA GOVINDASAMY
 SHANNON RAJAN
 HEMALATHA PARASA RAMULU
 SHARON CHONG TZE YING
 JOCELYN LIM YEAN TSE
 SHEBA GUMIS
 FOO SIEW LI
 TAN SHI WEN

LEE AI HSIAN
 LOSHINI RAMARMUTY
 NATALIE LIM
 SHALENI SANGARAN
 TRISHLEEA SANDOSAM
 NIMALAN A/L DEVARAJA
 GRACE TEOH WEI SHAN
 JESY OOI PEI GAIK
 LEE ENG HUAT
 SHARIFAH SHAFIKA ALSAGOFF
 HAFIDAH AMAN HASHIM

CONSULTANTS:

TAN SRI DATO' V.C. GEORGE
 CHEN KAH LENG
 LEE TATT BOON
 THERESA CHONG

Our Senior Associates and
 Associates are listed on our website

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Advocates
& Solicitors

DATE : 2 September 2021

OUR REF : LKH/MSJ/22017662

OUR EXT : 903

OUR EMAIL : lkh@skrine.com
manshan.singh@skrine.com

YOUR REF : Case Number 554 / ADN 2020/073

YOUR FAX :

YOUR EMAIL : investigations4@adcommission.gov.au

PUBLIC RECORD – NON-CONFIDENTIAL

The Director - Investigations 4
 Anti-Dumping Commission
 GPO Box 2013
 Canberra ACT 2601

Dear Director,

RE : (1) DUMPING INVESTIGATION INTO IMPORTS OF CERTAIN CONCRETE UNDERLAY FILM FROM MALAYSIA
(2) COMMENTS TO THE VERIFICATION FILE NOTE BY UNISTAR INDUSTRIES SDN BHD – AN EXPORTER/MANUFACTURER FROM MALAYSIA

INTRODUCTION

1. These Comments to the Verification File Note and Calculations, received on 26 August 2021, (“**File Note**”) are made on behalf of Unistar Industries Sdn Bhd (“**Unistar**”), a Malaysian producer and exporter of concrete underlay film, and an interested party to the current dumping investigation into imports of concrete underlay film from Malaysia.

BACKGROUND

2. Unistar reserves its right to fully ventilate and raise arguments/submissions in respect of findings made by the Anti-Dumping Commission (“**ADC**”) once the Statement of Essential Facts (“**SEF**”) has been published.

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3. In the File Note, in particular Page 4 of the Variable Factors Assessment Document (“**VFA**”); Appendix 3 – Normal Value; and Appendix 4 – Dumping Margin, an error has been made when a profit of [profit%] was included to the Cost to Make and Sell (“**CTMS**”) to determine the constructed normal value for Unistar’s domestic sales.
4. In the Variable Factors Assessment Document (“**VFA**”), the ADC found that normal value was calculated under Section 269TAC(2)(c) of the Customs Act 1901 (“**Customs Act**”) using the sum of:
 - (a) Cost to make of the exported goods in accordance with Section 45(2) of the Customs (International Obligations) Regulation 2015 (“**Regulation**”);
 - (b) Domestic SG & A, on the assumption that the goods, instead of being exported were sold domestically under Section 44(1) of the Regulation; and
 - (c) An amount for profit based on data relating to the production and sale of like goods on the domestic market in the Ordinary Court of Trade (“**OCOT**”) in accordance with Section 45(2) of the Regulation.
5. The profit derived from the data relating to the production and sale of like goods on the domestic market in the OCOT (set out in Paragraph 3(c) above and Page 4 of the VFA) premised on three [number of transactions] domestic sales transactions during the Investigation Period is erroneous because these three transactions were not in the OCOT.
6. The three domestic transactions are as follows:
 - (a) [customer name] under Invoice Number [invoice details];
 - (b) [customer name] under Invoice Number [invoice details]; and
 - (c) [customer name] under Invoice Number [invoice details].

(collective referred to as the “**Three Transactions**”)

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7. Unistar's position is that an error has occurred in the File Note, when:
 - (a) The Three Transactions were listed as transactions in the OCOT; and
 - (b) A profit margin of [profit%] was included into the CTMS to determine the constructed normal value based on the Three Transactions which are not transactions in the OCOT.

LEGAL POSITION

Regulations

8. In respect of "Determination of Profit" under the Regulation, Section 45(2) of the Regulation provides that *"the Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of goods in the ordinary course of trade."*
9. Also with regard to the "Determination of Profit" under the Regulation, Section 45(3) provides that if the Minister is unable to work out the amount by using the data mentioned in Section 45(2), the Minister must work out the amount by:
 - "(a) identifying the actual amounts realised by the exporter or producer from the sale of the same category of goods in the domestic market or the country of export; or*
 - (b) 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 export; or*
 - (c) using any other reasonable method and having regard to all relevant information."*

Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science [2018] FCAFC 20 ("Steelforce")

10. Further in the case of Steelforce it was decided that:

[83] Sometimes, however, it is not possible to determine such a figure. The volume of sales in the domestic market may be too low to allow for a meaningful comparison (as was the case in this appeal). Where this occurs, s 269TAC provides alternate ways of calculating the normal value. One such way is set out in

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subsection 269TAC(2)(c) which is set out above at [10]. It provides for the amount to be the sum of two figures. The first, which is not immediately relevant, is the amount determined by the Minister to be the cost of production or manufacture (s 269TAC(2)(c)(i)); the second, which is relevant, is a hypothetical amount.

Subsection s 269TAC(2)(c)(ii) requires the positing of a hypothesis which does not correspond to the real world. It is that the goods rather than being exported to Australia were instead sold for home consumption in the ordinary course of trade [emphasis added] in the country of export. Having established that hypothesis, subsection 269TAC(2)(c)(ii) then requires the Minister to determine, first, the administrative, selling and general costs associated with the sale and, secondly, the profit on that sale. The effect of these provisions is that the Minister is required to determine the hypothetical profit on a hypothetical sale.

Dumping and Subsidy Manual

11. The Dumping and Subsidy Manual states that one of the methods that may be employed by the ADC to determine profit is to use any reasonable method available based on all relevant information, and that there is no hierarchy between the three methods that may be used under Section 45(3)(a)-(c) of the Regulation:

“A profit may be unable to be determined under Regulation 45(2) because either all of the sales have been made at a loss; or those sales that are profitable are determined to not be in the ordinary course of trade for other reasons [emphasis added].

In this situation, Regulation 45(3) sets out three other methods for profit determination. [emphasis added] The alternatives are:

(a) identify 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—Regulation 45(3)(a); or

(b) identify 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 export—Regulation 45(3)(b); or

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(c)subject to Regulation 45(4), use any other reasonable method and have regard to all relevant information—Regulation 45(3)(c). [emphasis added]

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

OCOT

12. The term OCOT is not defined in the WTO Anti-Dumping Agreement. The WTO Appellate Body Report in United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (“**US – Hot Rolled Steel**”), accepted OCOT to be defined as follows:

“Generally sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product.”¹

13. The Report in US – Hot Rolled Steel further states that:

“Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.”

14. The Appellate Body in US – Hot Rolled Steel went on to further state that:

“We note that determining whether a sales price is higher or lower than the "ordinary course" price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price.”

¹ Para 139.

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15. Therefore it can be distilled that:
- (a) The term OCOT has no precise definition under the WTO Anti-Dumping Agreement; and
 - (b) Transactions not concluded on terms and conditions that are normal commercial practices are not appropriate to be considered in calculating normal value; and
 - (c) Various considerations, above and beyond price, such as terms of the transaction and quantity can be taken into account.

Other Methods for Profit Determination

16. In the WTO Panel Report in European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India, the Panel stated that there is no hierarchical significance between the three options set out in Article 2.2.2(i)-(iii) of the WTO Anti-Dumping Agreement (which is similar to Section 45(3)(a)-(c) of the Regulation)².
17. Therefore, the investigation authority may decide on the three methods set out in Section 45(3)(a)-(c) of the Regulation in situations where the domestic sales transactions were not made in the OCOT. For the reasons that will be elaborated on below, it is Unistar’s position that the use of “any other reasonable method” having “regard to all relevant information” under Section 45(3)(a)-(c) is the most suitable method due to the unique circumstances of this investigation.

ERROR IN DETERMINING THAT THE THREE TRANSACTIONS WERE IN THE OCOT

18. As a starting point it is worth noting that Unistar operates an export orientated business where most its sales are made primarily for the export market in Australia and [country name]. Unistar only makes domestic sales transactions in very rare instances and unusual circumstances.
19. The Three Transactions, used by the ADC to determine the [profit%] profit margin, which comprised of all Unistar’s domestic sales in the Investigation Period, were prime examples of these rare instances and unusual circumstances.

² Para 6.62.

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20. The Three Transactions were not sales in the OCOT for the following reasons:

General – Unusual Circumstances

- (a) Builders' Film are sheets placed at the sub-base or the bottom surface under a slab before concrete is poured. There are regulations in countries such as Australia and New Zealand for the use of Builders' Film in construction. These regulations set out certain standards, which need to be met, for the Builders' Film to be used for construction purposes. In Australia the AS2870-2011 standard is used.
- (b) There are no regulations for Builders' Film to be used in Malaysia, and there are no standards and regulations that govern the use of Builders' Film in Malaysia. In situations where Builders' Film is used in Malaysia for constructions purposes, it is purely voluntary, and there are no standards in terms of the product specification and grade to abide by.
- (c) In fact, in Malaysia there is no such product as Builders' Film in the same way it is understood in Australia. Instead, in Malaysia, for construction purposes described above, the product is referred to as "construction film". "Construction film" in the Malaysian context is different than Builders' Film in the Australian context because there are no standards or commonly accepted specifications for "construction film" in Malaysia unlike Builders' Film which must meet standards such as AS2870-2011.
- (d) The Builders' Film produced by Unistar meets these overseas standards and regulations such as AS2870-2011 for Australia. As Unistar's Builders' Film meets these overseas standards and regulations, Unistar's product is more expensive compared to the "construction film" which Malaysian construction companies will use – as there are no standards to follow – and these companies will opt for the most cost-effective option.
- (e) Unistar's business model is to produce high quality Builders' Film meeting the overseas grades for Australia and New Zealand. Majority of Unistar's sales are to Australian customers.
- (f) As the preference in Malaysia is to use "construction film", Unistar's Builders' Film which meets the AS2870-2011 specification has no demand in Malaysia. Unistar very rarely makes any domestic sales transaction of Builders' Film.

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- (g) In the rare instances however where Unistar's Builders' Film is purchased in Malaysia, the purchases are for "off-brand use" or unusual and unconventional purposes. Normal commercial practices do not apply to these rare and abnormal transactions.
- (h) These rare purchases for "off-brand use" or unusual and unconventional purposes are generally not price sensitive, are normally one-off transactions and require a quick turnaround time from [days/weeks], compared to [days/weeks] for export sale transactions.
- (i) Due to the quick turnaround time required for these one-off transactions for "off-brand use" or unusual and unconventional purposes, supply disruption is caused to Unistar's production line producing orders for export market transactions.

Transaction 1 – [customer name] and Transaction 2 – [customer name]

- (j) Transaction 1 – [customer name] and Transaction 2 – [customer name] were purchases made by [customer name]. [commercially sensitive] is a manufacturer [customer business description, consumer goods – not related to construction]³.
- (k) These purchases of Builders' Film by [customer name] were not for conventional usage – the way in which Builders' Film is normally used. The Builders' Film purchased by [customer name] was to be used to line containers to be used to transport its products.
- (l) The Builders' Film purchased by [customer name] to line its containers is illustrated in the pictures below provided by [customer name]:

³ [Annexure 1- company search – confidential customer information].

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[commercially sensitive – picture]

[commercially sensitive – picture]

- (m) These orders for Builders' Film by [customer name] came in on very short notice with [days/weeks] notice for delivery which is significantly shorter than Unistar's sales to Australia which have [days/weeks] notice.
- (n) For Transaction 1 – [customer name], the Purchase Order was issued [purchase order details] with a delivery date [date]. This short lead time is significantly shorter than Unistar's export sales which have [days/weeks] notice⁴.
- (o) In fact, the [purchase details], states that it is for [purchase details]⁵.
- (p) Transaction 1 – [customer name], Unistar constituted an urgent sale with a short lead time. This resulted Unistar experiencing disruption to its production and supply schedule.
- (q) Due to the unconventional end-usage of the Builders' Film – which is different than the end-usage of Unistar's Australian customers, the urgency and short lead time which disrupted production/supply and the irregular commercial relationship, as well as the general factors mentioned above, Transaction 1 – [customer name] was not done in accordance with normal commercial practices. Transaction 1 – [customer name] was not made in the OCOT.

⁴ [Annexure 2: invoice, delivery order, purchase requisition and sales tax exemption – confidential commercial information and confidential customer information]

⁵ [same as above].

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- (r) For Transaction 2 – [customer name], the Purchase Order was initially issued on [date] with a delivery date of [date]⁶. On [date], this transaction was subsequently put on hold indefinitely by [customer name]⁷. Then, abruptly, [customer name] requested for the order to be executed. Delivery was done on [date]⁸.
- (s) The initial order on [date], and the abrupt notice to hold on the order, followed by the subsequent notice in [date] to execute the order based on the Revised Purchase Order [date]⁹, resulted in a significantly shorter lead time than Unistar’s export sales which have [days/weeks] notice¹⁰.
- (t) Transaction 2 – [customer name], Unistar constituted an urgent sale with a short lead time. The order was made, then put on hold, and the suddenly revised. This resulted Unistar experiencing disruption to its production and supply schedule.
- (u) Due to the unconventional end-usage of the Builders’ Film – which is different than the end-usage of Unistar’s Australian customers, the urgency and short lead time which disrupted production/supply and the irregular commercial relationship, as well as the general factors mentioned above, Transaction 2 – [customer name] was not done in accordance with normal commercial practices. Transaction 2 – [customer name] was not in the OCOT.

Transaction 3 – [customer name]

- (v) Transaction 3 – [customer name] was a purchase made by [customer name]. [customer name] is an [customer business description, steel – not related to construction] with its parent company in [country]¹¹.
- (w) These purchases of Builders’ Film by [customer name] were not for conventional usage of Builders’ Film as [customer name] is not involved in construction.

⁶ [Annexure 3.1 – purchase order and email exchange – confidential commercial information and customer information].

⁷ [same as above].

⁸ [Annexure 3.2 – purchase order, invoice and delivery order – confidential commercial information and customer information].

⁹ [same as above].

¹⁰ [same as above].

¹¹ [Annexure 4 – company search – confidential customer information].

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- (x) The Builders' Film is purchased by [customer name] to be used to cover its [customer product description] as illustrated in the picture below provided by [customer name]:

[commercially sensitive – picture]

- (y) This order for Builders' Film by [customer name] came in [days/weeks] notice for delivery which is significantly shorter than Unistar's sales to Australia which have [days/weeks] notice.
- (z) For Transaction 3 – [customer name], the Purchase Order was issued on [date] with a stipulated delivery date of [date]. This short lead time is significantly shorter than Unistar's export sales which have [days/weeks] notice¹².
- (aa) Transaction 3 – [customer name], Unistar constituted an urgent sale with a short lead time. This resulted Unistar experiencing disruption to its production and supply schedule.
- (bb) Due to the unconventional end-usage of the Builders' Film – which is different than the end-usage of Unistar's Australian customers, the urgency and short lead time of [days/weeks] which disrupted production/supply and the irregular commercial relationship, as well as the general factors mentioned above, Transaction 3 – [customer name] was not in the OCOT.

21. For the reasons set out above, the finding that the Three Transactions were in the OCOT is erroneous. Therefore, it would be erroneous to utilize the profits derived from the Three Transactions to calculate a profit to be added to the CTMS to establish the constructed normal value.

¹² [Annexure 5 – purchase order, quotation, delivery order and invoice – confidential commercial information and customer information].

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ERROR IN ADDING PROFIT MARGIN FROM THE OCOT TRANSACTIONS TO THE CTMS TO CONSTRUCT NORMAL VALUE

22. As the Three Transactions were not in the OCOT, the profit percentage to be added to the CTMS must be in accordance with Section 45(3) of the Regulation. Due to the unique circumstances of this particular case, Unistar requests for the ADC to consider making a determination of profit by utilizing any other reasonable method in accordance with Section 45(3)(c) of the Regulation.
23. This is because it is impossible to utilize Section 45(3)(a) of the Regulation as Unistar has no other domestic Malaysian sales in the Investigation Period other than the Three Transactions¹³; and because it is not suitable to utilize Section 45(3)(b) of the Regulation as there is no market for the Builders' Film produced by Unistar in compliance with the Australian and New Zealand regulations and standards.
24. In the event Section 45(3)(c) of the Regulation is utilized, as Unistar runs as export orientated business where all of its sales are made primarily for the export market, Unistar requests for the ADC to adopt Unistar's profit margin based on its export sales to Australia which amounts to [profit%].
25. Adopting Unistar's profit margin on its export sales to Australia is the most reasonable method to utilize because almost all Unistar's sales transactions in the Investigation Period, except the Three Transactions, were all export transactions. These export sales transactions to Australia provide a reasonable profit estimate made by Unistar on each of its transactions, bearing in mind that [sales quantity] Unistar's sale transactions are to Australia.
26. In the alternative, in the event Section 45(3)(c) of the Regulation is utilized to determine profit, Unistar states that the ADC may also adopt Unistar's general profit after tax from its [financial statements] for the Investigation period which [profit%]¹⁴. This is a suitable method to be used because Unistar [manufacturing information]. Therefore, the company's total profit is a good reflection on the profit margin made on Unistar's [number] sales.

¹³ [commercially sensitive – number of domestic transactions].

¹⁴ See page ** of the Confidential Version of the Exporter's Questionnaire Response for [financial statements].

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27. From an interest of justice perspective, Unistar states that it is unjust to attribute a profit margin of [profit%] based on three transactions in the domestic market to the CTMS, when Unistar's average profit margin for export sales during the Investigation Period to Australia is approximately [profit%], and [profit%] based on Unistar's total profit after tax based on Unistar's [financial statements] for the Investigation Period. Save for the Three Transactions, which Unistar has explained is not in the OCOT, Unistar never makes such high profit margins on any transactions.

CONCLUSION

28. Based on the above, the use of the profit margin [profit%] to be added to CMTS based on the Three Transactions which were not in the OCOT is erroneous.
29. It is Unistar's position that this is a suitable case for Section 45(3)(c) of the Regulation to be invoked.
30. In the event, Section 45(3)(c) is invoked, Unistar requests for the ADC to consider the following profit margins to be added to the CTMS:
- (a) Unistar's export sales to Australia during the Investigation Period amounting to approximately [profit%]; or
 - (b) Unistar's overall profit based on its management accounts for the Investigation Period amounting to [profit%].

REQUEST FOR MEETING WITH THE ADC

31. We humbly request for a virtual meeting with the Director and/or the Investigator(s) of the ADC to further discuss this matter as soon as practicable.

Yours faithfully,



C.c. Unistar Industries Sdn Bhd

SUMMARY OF ANNEXURES PROVIDED IN THE CONFIDENTIAL VERSION¹⁵

Annexure 1	Company search result which sets out the nature of business of the customer.
Annexure 2	Unistar's Invoice, Unistar's Delivery Order, the customer's Purchase Requisition and the customer's Sales Tax Exemption.
Annexure 3.1	Email correspondence between Unistar and the customer, and the customer's Purchase Order.
Annexure 3.2	Unistar's Invoice, Unistar's Delivery Order, and the customer's Revised Purchase Order
Annexure 4	Company search result which sets out the nature of business of the customer.
Annexure 5	Unistar's Invoice, Unistar's Delivery Order, Unistar's Quotation, and the customer's Purchase Order.

¹⁵ Annexure 1 to Annexure 5 contains confidential commercially sensitive information and confidential customer/client information. It is on this basis that Annexure 1 to Annexure 5 is sealed from the Public Record Version.