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Mr Graham McDonald
Member
Anti-Dumping Review Panel
c/- Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

By email

Dear Mr McDonald

Dongkuk Steel Mill Co., Ltd
Review of Ministerial decisions concerning hot rolled plate steel

This submission is made on behalf of Dongkuk Steel Mill Co., Ltd (“DSM”) under Section 269ZZJ of the *Customs Act 1901* (“the Act”).

The matters to which it refers are the subject of the review initiated by the Anti-Dumping Review Panel (“the ADRP”) concerning hot rolled plate steel (“plate steel”) exported from Korea (“the review”).

The public notice announcing the initiation of the review was published on 3 February 2014.

A Introduction

DSM has set out its position in relation to the matters raised for the ADRP’s consideration in this review in its application dated 20 January 2014 (“the Application”).

DSM considers that the Application and the attachments thereto provided detailed reasons and analysis to establish that, based on the facts and the application of the law to those facts, the correct and preferable decision should be that DSM was not the exporter of the goods under consideration that were manufactured by DSM and sold by GS Global Corporation (“GSG”) to Australia during the investigation period.

DSM does not propose to repeat each of those positions and those reasons.

The applicant in the original investigation (BlueScope Steel Limited, or “BlueScope”), has made submissions to the ADRP in this review in support of the recommendation of the Anti-Dumping Commission (“ADC”) that is the subject matter of the current review.

DSM appreciates the opportunity to provide further comments relating to the review to the ADRP. In this submission DSM would like to provide its comments in response to the submissions made by BlueScope.

NON-CONFIDENTIAL VERSION

B BlueScope Steel submissions

BlueScope has submitted two letters to the ADRP with its comments regarding the review applications lodged by DSM and by GSG. They are dated 20 and 24 February 2014. It appears that the intention of the second letter was only to reinforce and repeat one point raised in the first letter, namely that DSM cannot deny knowledge about the final destination of the goods when it sold the goods to GSG – a point DSM has never disputed.

Therefore, DSM now provides its comments in response to the first letter only.

BlueScope's letter argues that the ADC was correct in finding that DSM was the exporter of the goods sold by GSG to Australia during the investigation period, and that the export price should be determined as being the price between DSM and GSG.

The letter asserts that:

...GSG is the agent that operates between the Australian importer and the Korean producer/exporter of the hot rolled plate steel exported to Australia. GSG's role is to communicate between the Australian importer and the Korean manufacturer (DSM) the commercial elements of the sale (i.e. the price and volume of goods to be exported). It cannot be denied by DSM that it had no [sic] knowledge of the ultimate destination of the goods that it manufactured, and the price it [sic] which it sold it to the agent GSG for export to Australia.

...

It was the view of the ADC that GSG's role in the relationship was nothing more than an agent acting between the manufacturer and the Australian importer.

This assertion is incorrect. DSM wishes to point out that the ADC did not hold the view that GSG's role in the exportation of the DSM-manufactured goods to Australia was "*nothing more than [as] an agent acting between the manufacturer and the Australian importer*". The ADC rejected the proposition that GSG was the exporter of the goods on the ground that "*GSG does not act like a distributor in that it maintains its own inventory. Therefore, GSG does not meet the Commission's requirements to be named the exporter*". The fact that DSM was aware of the ultimate destination of the sale when it accepted GSG's order was also given significance in the ADC's determination.

GSG was certainly not DSM's agent. A main element of the Application before you is that exactly the opposite was established on the facts of this case, in that GSG did not operate as an agent either in legal form or in its commercial behaviour. GSG was not DSM's agent "*to communicate between the Australian importer and Korean manufacturer the commercial elements of the sale*". We believe that it was clearly established, on the specific facts and circumstances of this case, that GSG was performing the role and function of an exporter entirely independently of DSM. GSG dealt entirely separately with DSM on the one hand, and with its Australian customer on the other hand. DSM **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is evidence that DSM did not involve itself in Australian exports]**. Price determination for Australia was done by GSG. DSM **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is a characterisation of DSM as the instrument of GSG so far as GSG's exports to Australia are concerned]** GSG's supply requests for GSG's sales to Australia. DSM did not supply the goods to Australia, GSG did. DSM's sales to GSG were sales to a Korean trading company which, given all of the concomitant circumstances, constituted GSG as the exporter of the goods.

Although we disagree with BlueScope's factual portrayal of the circumstances, we do agree with the proposition that a party acting as an agent – whether legally or factually – would not be considered as the exporter in the special circumstances of an anti-dumping investigation. Thus, if a party is simply an intermediary that "does the bidding" of a manufacturer, it could not be said to be the exporter. It would

not matter whether the legal relationship of the manufacturer to the intermediary was in the nature of a commission agency, or whether it actually involved a sale to the intermediary and an on-sale. In our experience, most traders operating closely with Korean manufacturer/exporters are properly characterised as mere intermediaries, whose involvement in the export sales process would not affect the conclusion that the manufacturer was the exporter.

However, in this case a very different situation applies. Due to all of the facts, and for all of the reasons, already discovered by and explained to the ADC, the party initiating, driving, handling and pricing the export transaction was GSG, in all respects.

Further, DSM has never disputed that it was aware of the ultimate destination of the products it supplied to GSG. This information comes to the awareness of DSM, in a technical sense, when **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is details of operational arrangement between DSM and GSG]**. However it is submitted that the knowledge that a manufacturer’s computer might have about the fact that the goods are destined for Australia is not a significant enough factor, in and of itself, to determine that the manufacturer is the exporter. The position that knowledge constitutes a party as the exporter in an anti-dumping analysis is not any part of Australian law, and the adoption of that position by the ADC as an inflexible rule of policy is incompatible with Australian law.¹ All the circumstances of the exportation need to be carefully and fairly considered in order to properly characterise the role of the intermediate party.

BlueScope makes the following comments in its letter:

Within Section C of DSM’s representations to the ADRP, the activities of DSM and GSG are detailed and cited as having been sourced from the DSM Exporter Visit Report. These activities are detailed to establish a perception that DSM and GSG operate wholly independent of each other and that DSM has little knowledge as to the ultimate destination of the goods purchased by GSG. This cannot be accepted.

...

DSM cannot conveniently expunge itself from all responsibility for the supply of the hot rolled steel plate exported to Australia (and a role in the commercial negotiation of the goods)

We are disappointed that BlueScope would seek to discredit the evidence and the submissions made by our client in these mildly derogatory terms. DSM did not try to establish a “perception” that DSM and GSG operate wholly independently of each other. The facts were presented to show that GSG’s role was that of the exporter and that it was not the instrument of the manufacturer. Without wishing to repeat all of those facts, we do at least wish to mention that DSM **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is evidence that DSM did not involve itself in Australian exports]** of the sale goods. It simply considered itself to be the manufacturer of goods that GSG exported to Australia. The physical movement of the goods **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is evidence of the trading terms between DSM and GSG]**. It is submitted that the ADC applied a “knowledge” policy that does not reflect the requirements of law and which meant that the salient facts were either ignored or downgraded in their importance.

BlueScope also comments:

It is also stated by DSM that in its submission to the ADC during the inquiry that “DSM has been a long term source of supply of plate steel for GSG’s sales to Australia”. DSM fully understood that

¹ “The attribution or non-attribution of the label exporter to an intermediate party... should turn in my view upon a characterisation made of its role vis-a-vis both the Australian importer and the manufacturer in the latter’s sale of, and the former’s acquisition of, the goods in question”, per Finn J in *Companhia Votorantim De Celulose E Papel v Anti-Dumping Authority and Ors* [1996] FCA 1399 (19 April 1996).

the goods would be exported to Australia and GSG is merely an agent acting for DSM supply of hot rolled plate steel for export to Australia.

This is a misconstruction, or an inaccurate rephrasing, of the submission to which BlueScope refers. The referenced submission was a joint submission lodged on behalf of both DSM and GSG, not just DSM. The joint submission reads:

GSG considers that it is the exporter of the goods supplied by DSM which it then sold to the Australian customer. DSM has been a long term source of supply of plate steel for GSG's sales to Australia, in the sense of being [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information relates to the characterisation of DSM as instrument of GSG so far as GSG's exports to Australia are concerned, and was redacted for reasons of confidentiality in the original submission to the ADC] in order to make exports of plate steel to Australia.

A review of the confidential version of the submission makes it clear that the statement cited by BlueScope was made from GSG's perspective and that the "long term source of supply...for GSG's sales to Australia" is only "in the sense of being [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is a characterisation of DSM as the instrument of GSG so far as GSG's exports to Australia are concerned]". Contrary to BlueScope's suggestion, DSM did not acknowledge that it was the supplier to the Australian market through GSG as its mere agent.

In that section of BlueScope's letter dealing with GSG's application to the ADRP, BlueScope states the following:

BlueScope fully understands that the identification of the exporter and the export price must be determined in accordance with the legislation. BlueScope would, however, like to highlight with the ADRP that in the event DSM was found not to be the exporter of the hot rolled plate steel to Australia and that GSG was the exporter, a precedent is affirmed whereby a manufacturer of dumped goods can be shielded from an anti-dumping investigation by merely "selling" its goods via an intermediary in the country of export, prior to exportation.

DSM is sure that the ADRP will decide the matters placed before it on the basis of law, and not on the basis of a policy concern about the implications of the correct application of the law. Nonetheless, we will say that in our experience the circumstances of GSG's plate steel exports to Australia are quite different to the [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is to demonstrate that GSG did not act like a mere agent in the sales of DSM-manufactured product to Australia]. In that context, and notwithstanding that BlueScope's concern is not of legal relevance, we are not sure that the concern is well-founded.

The identification of the exporter must be accomplished in accordance with the legislation, and by taking into account the specific factual circumstances of each case. The legislation does not provide that dumping measures are to be imposed against manufacturers only. The law refers to "export price" and "exporter". The case law calls for an analysis of the roles and the behaviours of the parties concerned. In the case which is before the ADRP in this instance, the roles and the behaviours of the parties indicate that it is GSG that conducted the exportations concerned. It was not the instrument of the manufacturer at all.

Finally, we would like to address one last BlueScope comment:

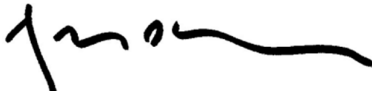
the relevant prices for determining whether the goods were exported at dumped prices are those between the manufacturer DSM and its agent, GSG [original underlining]

The anti-dumping legislation provides a legal basis for an Australian industry to be afforded a protective measure where the dumping of goods has caused material injury. It is not a platform for ensuring

manufacturers take “responsibility” for the goods they sell. The circumstances of GSG’s sales to Australia place a huge distance – in practical and commercial terms – between DSM and the export transaction. Conceptually, in terms of protection against price discrimination between markets, GSG is the party who – on the facts of this case – had the role and the responsibility as exporter of the goods. It was GSG that was in the position to decide whether to export, and at what price, and how to arrange for that to happen. The object of the anti-dumping legislation is not to penalise a manufacturer by way of the calculation of a dumping margin that does not reflect the circumstances of the exportation, and which has no correlation with the injury claimed by the Australian industry.

In conclusion, DSM respectfully requests that the ADRP should recommend that the Minister revoke the reviewable decision and substitute a new decision to be specified by the ADRP on the basis that DSM was not the exporter of the goods under consideration that were manufactured by DSM and sold by GSG to Australia during the investigation period.

Yours sincerely

A handwritten signature in black ink, appearing to read 'DM', with a long horizontal flourish extending to the right.

Daniel Moulis
Principal