



Australian Government
Anti-Dumping Review Panel

► ADRP REPORT No. 12



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ADRP REPORT NO. 100
HOT ROLLED PLATE STEEL EXPORTED FROM THE REPUBLIC OF KOREA

Review of a decision of the Minister to publish a dumping duty notice in relation to Hot Rolled Plate Steel imported from the Republic of Korea

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Report of the Anti-Dumping Review Panel

Applications by: Dongkuk Steel Mill Co., Ltd; and GS Global Corporation

The Application & Background

1. Dongkuk Steel Mill Co. Ltd (**DSM**) and GS Global Corporation (**GSG**) (together, the applicants) are public corporations registered in Korea. The applicants seek review under s269ZZA and s269ZZC of the Customs Act [1901](the Act) of a decision of the Minister for Industry (the Minister), made under s269TG (1) of the Act and published on 19 December 2013, imposing dumping duties on hot rolled plate steel (plate steel) exported to Australia from, among other countries, Korea¹.
2. The application was accepted and on 22 January 2014 the Senior Member of the Review Panel, pursuant to s269ZYA of the Act, gave a written direction specifying that I be constituted to undertake the reviews. Notice of the review applications, inviting submissions, was published in nationally circulating newspapers on 3 February 2014. Submissions dated 21 and 27 February were received from BlueScope and 5 March on behalf of each of the applicants from their legal representative. I have considered the relevant information and the conclusions based on that information contained in the submissions.
3. In accordance with s269ZZK(1) of the Act the panel must either affirm the decision under review or recommend that the Minister revoke the decision and substitute a new specified decision. In undertaking the review the panel is to have regard only to 'relevant information' as that is defined in s 269ZZK(6)(a) i.e. information to which the Commissioner had, or was required to have, regard in reporting to the Minister.
4. The sole Australian producer of the plate steel the subject of the review application is BlueScope Steel Limited (BlueScope). BlueScope was the instigator to have the dumping duty investigated. On 1 August 2013 the Anti-Dumping Commission (ADC)² published a Statement of Essential Facts (SEF198). The SEF set a twelve month investigation period of 1 January-31 December 2012. After considering responses to the SEF including from the applicants, the ADC in a report dated 16 September 2013, recommended to the Minister that dumping duty notices be published (REP198). The Minister considered and accepted the recommendations made in REP198.
5. It is convenient that both review applications be considered together as the facts relating to their circumstances are interrelated and the grounds on which review is sought raise the

¹ Two Korean companies, not relevant to this review, were exempted from the Minister's decision.

² Until 1 July 2013 the function of the ADC had been carried out by the Australian Customs and Border Protection Service

same points. In the case of GSG if the substantive decision that GSG is the exporter is not upheld an alternative outcome is requested as set out in paragraph 12(ii) supra.

6. The facts are not contentious. DSM manufactures plate steel which it sells to GSG. GSG is described in the application for review as 'a major Korean trading company'.³ There is no formal corporate relationship between DSM and GSG, although they have a long standing trade relationship, with respect to a diverse range of products produced by DSM and sold by GSG to different countries.
7. Plate steel is predominantly used in Australia in the mining, engineering and construction and transport and equipment manufacturing markets. The DSM visit report records that DSM manufactures three different types of plate steel for the Australian market-for low temperature boilers, machine structure production and general welding structures-the price increased sequentially with the increase in required tensile strength and yield point⁴. REP 198 found that the imported goods are used interchangeably with Australian manufactured plate steel.
8. While s269T of the Act defines who is an importer it contains no definition of an exporter. In this case the exporter will be determined, as s269TAB(1)(c) provides, having regard to the circumstances. The circumstances are not in contention and I am satisfied are as follows:
 - a) DSM manufactures plate steel in Korea.
 - b) while DSM sells the plate steel into the domestic Korean market and undertakes direct exports to some countries it does not do so to Australia,
 - c) GSG is a Korean registered company with an extensive and diverse trading portfolio including for carbon steel products manufactured by other Korean companies. GSG is not engaged in manufacturing.
 - d) GSG and DSM are unrelated corporations but have a long standing trading relationship. GSG is the sole channel for the sale of DSM produced goods, including plate steel, to Australia. GSG also imports plate steel to Australia from another unrelated Korean plate steel manufacturer.
 - e) Australian customers place orders for DSM plate steel with GSG Australia. GSG Australia is a wholly owned subsidiary of GSG. GSG (including GSG Australia) does [REDACTED] with any Australian customers.
 - f) although related companies arms length price negotiations occur between GSG Australia and GSG. Once a price is agreed between GSG and GSG Australia, GSG places the order with DSM, which then confirms it has sufficient production capacity to fill the order,
 - g) the goods are made to meet specified standards⁵,
 - h) the importer visit report for GSG undertaken in March 2013 notes that GSG [REDACTED]
[REDACTED]
 - i) no price list or quota operates for sales made by GSG of DSM products to Australia. Periodic telephone contact between DSM and GSG occurs in which the prices to all export destinations for all products, including plate steel, are discussed⁶,

³ Application p6

⁴ DSM visit report at para 4.1.2 at p14.

⁵ which are aligned with internationally operating standards defining grade designations and the properties attaching to the product grade (REP at para 3.3.4 at p14). The GSG visit report notes that [REDACTED] DSM visit report at para 4.1.2 at p14).

⁶ DSM visit report para 4.1.2

- j) no price negotiations occur between GSG and DSM for the export of the goods to Australia. GSG's bid price is based on its understanding of DSM base production price and the current market conditions, including the price of slab,
- k) while DSM has the option of refusing an order, for instance if the price was considered unreasonable and too low for current market conditions⁷, the longstanding trust relationship and the general knowledge of pricing in the steel industry held by GSG did not result in any order being refused by DSM during the investigation period.
- l) no discounts rebates or allowances are paid by DSM-the price paid is the price as entered on the invoice.
- m) once the order is confirmed GSG enters it directly into DSM's system including the required delivery date.
- n) when production has been completed GSG arranges the export of the goods to Australia. GSG provides detailed shipment information to DSM including vessel details.
- o) the GSG visit report records DSM as paying fixed shipping and handling costs which would be incurred if the goods were transported to nearest port regardless of the ultimate shipping destination⁸. If not shipped from the nearest port GSG pays the additional costs of transport to the port of its choice.
- p) ship loading, freight and all insurances costs are paid by GSG,
- q) GSG assumes possessory title at the time the goods are picked up from the DSM factory,
- r) the GSG visit report records GSG is named as the buyer on supplier invoices and as the consignee on the bill of lading. It pays the port and wharfage, duty and delivery costs of the goods on their arrival in Australia⁹
- s) GSG pays DSM by letter of credit in US dollars on sight.¹⁰

9. Submissions to the ADC from GSG and DSM, after the verification visit, make a number of points which it is submitted demonstrate DSM is not the exporter¹¹. While all of the points made in those submissions have been considered it is only necessary here to refer to those which are, or may be, not readily apparent from the circumstances covered in the preceding paragraph, viz

- GSG is not a marketing vehicle of DSM, that function being carried out by GSG and GSG Australia marketing themselves as the provider of plate steel in Australia,
- DSM did not select the Australian market as an outlet for DSM produced plate steel, that function being carried out independently by GSG,
- DSM does not undertake any marketing or sales activity for its product in Australia, and,
- payment of DSM by GSG is not conditional on the export of the goods.

⁷ DSM visit report 4.1.2 at p14

⁸ GSG visit report para 4.1.1, DSM visit report at 4.1.5 under the subheading of "Inland transportation" describes the invoices between DSM and GSG as referring to 'a fictional FOB' basis for sales as the actual terms were modified FCA terms.

⁹ GSG visit report para 5.10 at p15

¹⁰ on sight generally refers to the sighting of the documents being the bill of lading and shipping documents

¹¹ dated 20 May 2013 from DSM and GSG and a further submission dated 27 May 2013 made on behalf of GSG

10. The submissions of 5 March emphasized aspects of the transactions on behalf of the applicants. The submission on behalf of GSG included reference to the fact that GSG placed the firm bids with DSM only after it had signed export contracts with GSG's Australian customer. It also highlighted that there was no correlation between the prices agreed between GSG and its Australian customer and the price set in the bid GSG made to DSM-the latter being unaware of the price agreed between GSG and its Australian customer. GSG it was submitted assumed the currency exchange risk –buying from DSM in US dollars and selling to the Australian customer in Australian currency. I have considered the GSG submission which contrasts the sales of plate steel to Australia it undertakes for another Korean manufacturer, where those sales are undertaken on a commission based profit, to manner in which it relates its trade with DSM. The submission also examines the differing profit and, in the case of some of the GSG/DSM sales, loss incurred between the commission based operations and those engaged in between GSG and DSM.
11. In SEF 198 and REP 198 the ADC found, and the Minister accepted, that DSM was the exporter of the plate steel. The dumping margin was determined on the ex-works (EXW) price at which DSM charged the steel plate to GSG¹² rather than invoice price paid by the importer (GSG Australia).

The Grounds

12. It is submitted that the correct or preferable decision has not been reached because the Minister accepted the ADC recommendations:
- (i) on behalf of the applicants: that DSM was the exporter, with GSG acting as an intermediary on behalf of DSM, rather than finding that GSG was the exporter,
 - (ii) on behalf of GSG: if ground (i) is not upheld and DSM is confirmed as the exporter, then GSG submits that the export price used to determine the dumping margin should be the price charged by GSG and paid by the Australian importer, GSG Australia, rather than the adjusted DSM EXW price.
13. DSM advances several reasons as to the importance it attributes to the determination of the exporter. The first is that where goods have been purchased in an arm's length transaction it is the price paid by the importer which forms the basis on which the export price is calculated. This it is submitted will be very significant not only in the determination of the dumping margin but also in ensuring that the level of the export price is fairly comparable to the level of normal value. It is additionally submitted that identification as engaging in dumping has adverse commercial implications, one of which is reputational, and another relates to future commercial prospects.

Consideration

14. Section 269TG of the Act provides that where the Minister is satisfied that goods have been exported to Australia and the export price is less than the normal value resulting in material injury to an Australian industry producing like goods anti-dumping duty may be applied. s269TAB sets out how the export price is to be determined. If the export price cannot be determined by either of the methods provided in s269TAB(1) (a) or (b) then under (c) it is to

¹² adjusted to deduct inland freight costs

be the price which the Minister determines 'having regard to all the circumstances of the exportation'. In this case it was determined by the Minister under the latter subsection.

15. The ADC finding in REP198 that the exporter was DSM and that GSG acted an intermediary was, in the absence of any provision in the Act defining who is an exporter, based on the following contained in the Dumping and Subsidy Manual (the Manual):

'Customs and Border Protection¹³ will identify the exporter as:

- a principal in the transaction located in the country of export from where the goods were shipped and who knowingly placed the goods in the hands of a carrier, courier, forwarding company or their own vehicle for delivery to Australia; or*
- a principal will be a person in the country of export who owns, or who has previously owned, the goods but need not be the owner at the time the goods were shipped.'*

.....

Depending on the facts, Customs and Border Protection considers that only in exceptional circumstances would an intermediary be found to be the exporter. Typically this will only occur where the intermediary has purchased the goods from the manufacturer; the manufacturer has no knowledge at all that the goods are destined for export to any country; and the essential role of the intermediary is that of a distributor rather than that of a trader and because it is acting more like a distributor intermediary may usually have its own inventory for all export sales.'¹⁴

16. The DSM visit report, which on this point was referred to and adopted in REP198¹⁵, records the circumstances as meeting 'the requirements of the manual' i.e. DSM as owner of the goods and, although not the owner at the time the goods were exported to Australia, placed them in the hands of a freight company (GSG) for delivery to Australia. While GSG maintains that it sets the price to Australia, the visit report records that at the time DSM accepts the price offer made by GSG it does so knowing the goods are ultimately destined for export to Australia and knowing the price the goods would attract if sold on the (Korean) domestic market.¹⁶
17. The issue of which company is to be considered the exporter when ascertaining the export price under the anti-dumping provisions of the Act was considered at first instance by Finn J in *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority* [1996] 42 ALD 7. In that case the applicant (Celpav) was the Brazilian manufacturer of paper which was exported, among other countries, to Australia. The paper was imported by an Australian company which placed its orders with a Japanese trading company (Dai Ei). Dai Ei placed the order for the paper with Celpav and the latter shipped the paper to Australia. Celpav invoiced Dai Ei which paid for the paper. Dai Ei subsequently invoiced the Australian importer. The Australian importer did not deal directly with Celpav. Dai Ei was not related to Celpav. The court held that although Dai Ei purchased the paper from Celpav and resold it

¹³ now the ADC

¹⁴ Manual chapter 6

¹⁵ REP 198 at para6.4.1 (p31)

¹⁶ DSM visit report dated July 2013 at p 18/19, GSG visitor report dated March 2013 at p 15/16

to the Australian importer, Dai Ei's role, both in respect of the Celpav and the Australian importer, was that of a marketing vehicle. The decision was affirmed on appeal to the Full Federal Court.¹⁷

18. There are obvious factual differences between the Celpav case and the present case. For instance unlike the facts in the present case Celpav was found to have arranged the shipping and paid for the carriage of the goods to the named port for export. However such differences as may exist are not determinative of the issue, any more than is the determination of the identity of the vendor of the goods. As the majority in the Celpav appeal held:

*'The use of the concept of purchase does not mean that the identity of the exporter is to be determined by identifying the vendor under the contract of purchase with the importer....It is not the passing of property which identifies the exporter....but rather the identification of which party satisfies requirements of truly being the exporter.'*¹⁸

19. It is accepted, as it was submitted on behalf of DSM¹⁹, that GSG could not be categorized as DSM's agent either by reference to that term as used in law or even to the commercial relationship between it and GSG. The reference as to who may 'truly' be the exporter is a reference to the context of what is sought to be achieved in the determination of an export price under the Act. Section 269TAB is aimed at ascertaining an export price so that that price can be compared to the normal value (fundamentally being the price paid for like goods sold in the domestic market of the country of export) in order to determine whether dumping has occurred into the Australian market.
20. As was acknowledged by Finn J at first instance in the Celpav case, and is conceded in the Manual, there may be circumstances where a trader is appropriately classified as the exporter. Such a circumstance may, for instance, arise where a trader purchases goods from a manufacturer and at the time of purchase has no arrangement to sell or export the goods and places them in storage. Subsequently a sale is concluded with an importer and the goods are exported. In such a scenario, where no importer is in contemplation at the time the trader purchases the goods from the manufacturer and an export sale is subsequently entered into, the trader may be found to be the exporter. That however, is very different from the circumstances in the instant case.
21. The submission from DSM and GSG in as far as reliance is placed on the exclusivity of GSG's (including GSG Australia) role with respect to arranging the export of DSM manufactured plate steel to Australia supports it as being the facilitator of the manufacturer/exporter rather than it being an independently operating exporter. It is the sole channel through which DSM plate steel is exported into the Australian market. The setting of price, here undertaken by GSG but with DSM having the right to refuse an order, and passing of title prior to export is not determinative of the identification of the exporter.
22. DSM is aware not only that it is manufacturing goods destined for a specifically identified market but also that it is doing so in order to fulfil a specific order as to qualities the goods must possess including their tensile strength and yield point as well as their length and weight. One product manufactured for export to Australia is non heat treated alloy steel referred to as Quench and Tempered Green Feed. It is then subjected to further post import

¹⁷ [1996] 141 ALR 297) by a majority Wilcox and RD Nicholson JJ, Northrop J dissenting)

¹⁸ ibid at p308

¹⁹ submission to ADRP dated 5 march 2014 Part B at p2

heat treatment to strengthen it. For this product the chemical constituency will be specified in the order to ensure that the required strength can be achieved after post import heat processing.

23. It is not simply that DSM is aware of the export destination of the goods, although that is a factor, but that it is aware that it is manufacturing the goods to specifications set by the ultimate purchaser of those goods in the country to which they are exported. In the circumstances of this case I am satisfied that DSM is properly categorized as the 'true' exporter.
24. In view of the recommendation I have determined to make as to the identity of the exporter it is necessary to address the GSG submission that having regard to all of the circumstances the preferable decision is that the price charged by GSG to the importer should have been adopted as the export price. REP198 briefly states the recommendation made to the Minister concerning the determination of the export price as follows:

Export prices for DSM were established under s269TAB(1)(c) using the ex works (EXW) export price from DSM to the intermediary. Inland freight costs incurred by DSM were deducted from DSM's export price'.

The basis of GSG's submission is that the ADC has taken an inconsistent approach in that in the case of a Chinese exporter (Jigang) of the same product the export price was determined to be the price charged to the importer. The point of distinction articulated in REP198 for the difference is stated to be that in the case of Jigang the importer was a related entity to the exporter whereas this is not so in the case of DSM and GSG²⁰.

25. It is submitted that the prices charged by DSM to GSG were the prices for the production of the goods unrelated to the price associated with the export of the goods from Korea. The GSG submission of 5 March emphasizes the export price if DSM is determined as the exporter as not being reflective of the prices actually paid by the importers of the goods- including a reference to the average profit margin achieved by GSG.
26. It follows from the determination of who is the exporter that the export price of the goods will be the price charged by that exporter. It would be a logical curiosity having determined who is the exporter to then adopt a different price from that charged by that exporter as the export price. The appropriate adjustment to deduct DSM's inland freight charges from the export price have been made.

Recommendation

27. For the reasons stated I recommend pursuant to S269ZZK(1)(a) that the Minister affirm the reviewable decisions.



Graham McDonald

Panel Member

28 March 2014

²⁰ REP198 at para 6.4.1 at p 31. On this point REP 198 reiterated the view identically expressed in SEF 198 at para 6.5.3 at p35