Australian Government
Anti-Dumping Review Panel

REPORT OF THE ANTI-DUMPING REVIEW PANEL

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REVIEW OF A DECISION TO TERMINATE PART OF AN INVESTIGATION AS IT RELATES TO:

HOT ROLLED PLATE STEEL EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA, THE REPUBLIC OF INDONESIA, JAPAN, THE REPUBLIC OF KOREA AND TAIWAN.

Contents

BACKGROUND

1. BlueScope Steel Limited (**the applicant**) manufactures in Australia certain hot rolled steel products (**plate steel**). A distinction will be drawn between these products only where necessary.

2. On 21 December 2012 the applicant applied for a countervailing duty notice under s269TB of the *Customs Act 1901* (**the Customs Act**) in respect of plate steel exported to Australia from the People's Republic of China and a dumping duty notice in respect of plate steel exported from China, the Republic of Indonesia, Japan, the Republic of Korea and Taiwan. The application was advanced on the basis that the exportation of low-priced, subsidised or dumped plate steel from these countries had caused significant material injury to the Australian industry producing plate steel and threatened to continue to cause further injury.

3. The Australian Customs and Border Protection Service (**Customs**) initiated an investigation on 12 February 2013. The Anti-Dumping Commission (**the Commission**) subsequently assumed Customs role and functions. On 1 August 2013 the Commission published a Statement of Essential Facts (**SEF 198**). The investigation period was from 1 January 2012 to 31 December 2012. While SEF 198 foreshadowed recommending the publication of a countervailing duty notice and a dumping duty notice by the Minister, it foreshadowed not making such a recommendation in relation to plate steel exported from China by Shandong Iron and Steel Company Limited (**JIGANG**) (for dumping only), from Korea by Hyundai Steel Company (**Hyundai**) and POSCO (**POSCO**) and all plate steel exported from Taiwan.

4. On 10 September 2013 the Commission published a Dumping Notice (No 2013/67) terminating the investigation relating to plate steel exported from China by JIGANG (for dumping only), from Korea by Hyundai and POSCO and all plate steel exported from Taiwan. The Commissioner's

reasons for this decision were set out in Termination Report 198 of the same date (**TER198**). The grounds identified in the Dumping Notice were:

- In relation to exporters from Taiwan: the total volume of dumped goods was negligible (s269TDA(3) of the Customs Act).

- In relation to Hyundai and POSCO: there had been no dumping (s269TDA(1) of the Customs Act)

- In relation to JIGANG: while its plate steel was dumped, the dumping margin was not more than 2% (s269TDA(1) of the Customs Act)

In relation to one Taiwanese exporter, Shang Chen Steel Co Ltd (**Shang Chen**), the investigation was terminated because there was no dumping (see TER198 at 16).

5. On 8 October 2013 the applicant applied for review of this termination decision. The application was not rejected. The review was allocated to me under s269ZYA of the Customs Act.

6. In this decision I have adopted, where I consider it is appropriate, the same structure and some of the language and expressions used by the Trade Measures Review Officer (**TRMO**) in his decisions. He performed a similar function as the Panel under earlier legislative review arrangements. His language and analysis is commendably clear and concise and on matters of substance which I have repeated, correct.

DECISION

7. I have decided to affirm the reviewable decision.

MATERIAL TAKEN INTO ACCOUNT

8. In accordance with s269ZZT(4) of the Customs Act, I have had regard only to information that was before the CEO when the CEO made the termination decision. That is, information which was available to Customs at the time the reviewable decision was made: *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* [2004] FCA 1659 at [4] per Stone J.

9. I have considered the grounds and information set out in the application made by the applicant. I also held a conference with relevant officers from the Commission in the course of my consideration.

REASONS FOR MY DECISION

10. The role of the Panel member in a review of a termination decision is to determine whether the decision to terminate was the correct or preferable one (though this general comment must be read subject to what is said below). If I conclude that it was, then I must affirm the decision (even if I consider that some of the criticisms of the process levelled by the applicant have merit). If I conclude it was not, I must revoke the decision.

The applicant's grounds

11. In its application, the applicant challenged or criticised the methodology used by the Commission in reaching the conclusion that the investigation should be terminated in relation to a number of exporters from a number of countries.

12. The following are the matters raised by the applicant:

12.1 In relation to Hyundai, the applicant noted that in TER 198 the Commission stated that *"Considering the small volume of domestic sales and the significant number of adjustments required to make the sales comparable to the export sales, normal values were determined under s269TAC(2)(c) using the cost to make and sell plus an amount of profit"*. The applicant criticised this methodology in two respects.

The first was that because the volume was low, the Commission could have determined Hyundai's normal value(s) for plate steel on the basis of domestic sales made in the ordinary course of trade by other sellers in the Korean domestic market (i.e. domestic sales by POSCO). The Commission did not consider this option which was available under s269TAC(1).

The second criticism (also made in relation to POSCO) was that the number of adjustments required if s269TAC(1) was applied, was not a basis for not using the mechanism for evaluation of normal value provided by that subsection.

12.2 Again in relation to Hyundai, the applicant contended that similar grade comparisons (of grades of plate steel exported) should have been prepared by the verification team for exports by Hyundai. The applicant noted this had been done by a team in relation to an Indonesian exporter. Had this been done, the applicant argued, interested parties would have had the opportunity to comment on whether adjustments to grades was a more suitable approach (than using CTMS data for that grade) where no domestic sales were apparent.

12.3 Again in relation to Hyundai, the applicant contended that the Commission made inappropriate negative adjustments to normal value for warranty and advertising expenses. The applicant argued that the warranty expenses were all treated as relating to domestic sales and it was unlikely that no warranty claims concerned export sales. In relation to the advertising expenses, the applicant argued it was unlikely there had been any advertising (or advertising of the amount of the adjustment) of intermediate hot rolled plate steel as opposed to marketing and advertising for coated steel products. The applicant challenged what it described as "*high-level allocation of [Selling, General & Administration (SG&A)] expenses….. where a broad range of unrelated expenses are potentially included in the company's SG&A records*".

12.4 Again in relation to Hyundai, the applicant drew attention to the fact that the Commission had "dismissed" a comparison of Hyundai's export sales to Australia with its exports sales to Canada and Japan. The Commissioner said in TER198 the "*the volumes and or nature of trade of exports to Japan and Canada were not similar to the volumes and nature of trade exported to Australia and not suitable for normal value purposes*". The applicant argued that there was no or insufficiently detail of how this conclusion was reached and, in particular, whether grade comparisons had been undertaken.

12.5 Again in relation to Hyundai, the applicant contended that the approach taken by the Commission to the level of profit used to construct normal value was flawed (and, as a consequence, the normal value was artificially low). The applicant referred to the approach adopted in a review of measures on canned pineapple exported from Thailand. In that case a level of profit for one exporter was determined by reference to domestic sales made in the ordinary course of trade for like goods by another exporter. By

analogy, the applicant argued that the Commission should have had regard to levels of profit achieved by POSCO or Donkuk Steel Mill Co Ltd (**DMS**), other Korean exporters. In addition, the level of profit to be applied should have been a level of profit adequate for reinvestment purposes.

12.6 Lastly in relation to Hyundai (which had a negative 7.9% dumping margin as determined by the Commission), the applicant pointed out that Hyundai's dumping margin was to be contrasted with the positive 18.4% dumping margin for another Korean exporter, DMS. The applicant also pointed to the fact that Hyundai's normal value was determined on the basis of a constructed methodology, while DMS's was determined on the basis of domestic selling prices made in the ordinary course of trade. As, so the applicant submitted, the Korean domestic market for plate steel was extremely competitive, the normal values for Korean exporters would be likely to be proximate. This should have alerted the Commission to conclude that Hyundai's normal value was understated reflecting a lower level of profit included in the constructed normal value.

12.7 In relation to POSCO (which had a negative 4.9% dumping margin as determined by the Commission), the applicant raised several points about adjustments made to normal value. First it contended that notwithstanding statements in TER198 that adjustments made in relation to SG&A were regularly made and did not warrant amendment (after submissions were made by the applicant following SEF198 advocating the reassessment of normal value), no justification had been advanced whether the adjustments should have been made in the first place. Secondly, the applicant made the same point in relation to negative adjustment to normal value for warranty expenses as made in relation to Hyundai (see 12.3 above). Thirdly, the applicant challenged the failure to make a

positive adjustment for warehousing costs. Fourthly it challenged the approach of the Commission in adjusting for duty drawback and, in particular, a statement by the Commission that any adjustment would be for *"an immaterial amount"*. Fifthly it challenged the failure of the Commission to assess normal value under s269TAC(1). The applicant noted the observations of the Commission *"a significant number of adjustments would be required to be made for grade, length, width, thickness, surface and edge in order to make the domestic sales of similar models comparable to the export model"* and contended that the number of adjustments was not a reason not to apply s269TAC(1). The applicant also challenged whether a large number of adjustments would be required given the applicant's understanding of the domestic market (75% of sales were 250 grade or 350 grade) and that adjustments required for non-domestic sales would be limited. Sixthly the applicant criticised the Commission's failure to undertake a "contrasting analysis" (to ascertain whether it was appropriate to make adjustments rather than using CTMS data). Lastly the applicant contended the adjustments should have been made and then an assessment made whether the adjusted sales were made in the ordinary course of trade.

12.8 In relation to JIJANG, the applicant contended that the normal value of JIJANG's hot rolled plate steel should be reassessed and should take into account a benchmark price for coking coal that included varying grades such as premium hard coking coal exported from Australia during the investigation period. This submission was based on an earlier determination by the Panel that the approach taken by Customs when assessing whether there had been negligible countervailable subsidisation for the purposes of s269TDA(2).

12.9 Also in relation to JIJANG, the applicant raised the possibility that the Commission had not taken full account of various incremental costs referred to in a submission by the applicant in August 2013. The applicant noted the minimal dumping margin determined for JIGANG.

12.10 Also in relation to JIJANG, the applicant challenged the level of profit used by the Commission in relation to Quench and Tempered (**Q&T**) Green Feed hot rolled plate steel.

12.11 In relation to one Taiwanese exporter, Shang Chen (which had a negative 3.1% dumping margin as determined by the Commission), the applicant pointed to the failure of the Commission to apply the gross margin to the adjusted cost to make and sell (**CTMS**). The applicant contended this methodology was wrong and fails to take into account any profit for the production of the goods. The applicant noted the observations of the Commission: *"The adjustment was made by applying the difference in domestic CTMS for that model plus the company's gross margin derived from its 2012 income statements. Where the adjustment was for a negative cost difference, no gross margin was applied".*

12.12 Also in relation to Shang Chen, the applicant questioned four aspects of the adjustments made to Shang Chen's normal values. The first was credit terms extended on export sales. No adjustment was made but should have been. The applicant contended that the importer purchased on a letter of credit at least 30 days. An upward adjustment to normal value was required. The second concerned inland freight. While an adjustment had been made, the applicant contended there had been no indication that the adjustments took into account the high costs associated with transporting hot rolled steel plate of greater than standard widths.

The third concerned commissions. While an adjustment had been made, the applicant queried whether it had been a flat commission or averaged across all export tonnes. The applicant raised the issue of whether the Commission had satisfied itself that the full extent of the commission had not been understated. The fourth concerned trade promotion charges. While an adjustment had been made, the applicant said the basis for the charge was not clear.

12.13 In relation to another Taiwanese exporter, China Steel Corporation/Steel Global Trading (**CSC/CSGT**), the applicant criticised the methodology of treating CSC and CSGT as a single entity. The applicant contended that separate dumping margins should have been determined for each for "transparency purposes". The applicant noted the combined dumping margin was 0.9%.

12.14 Also in relation to CSC/CSGT, the applicant noted that there had been no upward adjustments to normal values having regard to credit terms, export warehousing expenses and trade promotion charges. The applicant contended they should have been.

12.15 In relation to another Taiwanese exporter, Chung Hung Steel Corporation (**Chung Hung**), the applicant noted that the Commission had assessed the dumping margin at 5%. The applicant challenged the methodology described by the Commission in SEF198 of not assessing normal values for Chung Hung using sales by other sellers on the Taiwanese market as the Commission had determined that its export sales were negligible. The applicant contended changes in the normal value for Shang Chen and/or CSC/CSG (as it had argued for earlier) which may or will alter the dumping margin to above negligible levels, "*will*

therefore influence whether the exports by Chung Hung at dumped prices are negligible in volume".

12.16 In relation to remaining exports from Taiwan, the applicant requested (after a review of the circumstances of the Taiwanese exporters referred to in the preceding paragraphs) a further review of whether the volume of dumped exports from Taiwan is above the negligible 3%.

13. When I met with the Commission's staff, I asked them to explain the methodology they had adopted and I did so with the applicant's criticisms and comments in mind. They later provided me, as I had requested, working papers and calculations to amplify their explanation. I am satisfied that none of matters identified by the applicant were, on further analysis, deficiencies in the methodology used to reach the ultimate decision to terminate the investigation. However it is desirable I discuss some of the specific matters raised by the applicant.

The applicant was concerned that, in relation to Hyundai, s269TAC(1) should have been used and not s269TAC(2)(c). In terms, s269TAC(1) enables recourse to prices paid or payable for like goods by other sellers of like goods when "like goods are not sold by the exporter". That is, no like goods are sold by the exporter for home consumption. In the present case, like goods were sold for home consumption by the exporter though in small volumes. Accordingly, the Commission was entitled to proceed on the basis that s269TAC(1) was not engaged (and the normal value of goods exported to Australia could not be ascertained under that subsection) and was entitled to proceed to consider normal value under s269TAC(2), as occurred. This alone justified recourse to s269TAC(2)(c).

The applicant also had a concern about the Commission's failure to use s269TAC(1) in relation to certain of POSCO's sales and again challenged the reliance on a "*significant number of adjustments*" as a basis for not

using that subsection. However that reference is, in substance, a conclusion that there were no sales of like goods for the purposes of s269TAC(1). That conclusion justified use of s269TAC(2)(c).

14. Several times in the application, the applicant raised the question of whether an adjustment (or greater adjustments) should have been made for specific matters. An example was inland freight costs of Shang Chen. However the information available to the investigating officers did not show higher freight costs had been incurred in transporting hot rolled plate steel of greater than standard widths.

Because of s269ZZT(4), the Panel must have regard only to information that was before the Commissioner. The substance of this point advanced by the applicant is that further information should have been obtained and analysed but was not. Even if the applicant is correct that further information was available and should have been obtained (though I am not implying it was) in order to undertake a more appropriate or desirable method of analysis (as proposed by the applicant), that would not, of itself, justify the Panel making a decision revoking the reviewable decision under s269ZZT(1).

The Panel's powers to revoke a number of types of reviewable decisions only arise if the reviewable decision was either not the correct decision (when they has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). In relation to a termination decision, the only issue is whether the termination decision was the correct decision. That is because having regard to the terms of s269TDA, the power to terminate is not a discretionary power. It is a power that must be exercised in certain circumstances identified in the section. They include (but subject to statutory qualifications):

- there has been no dumping;

- or the dumping margins are negligible;
- there has been no countervailable subsidy;
- or countervailable subsidisation is negligible;
- volumes of dumping are negligible (subject to aggregation);
- volumes of countervailable subsidisation are negligible (subject to aggregation);
- any injury (or hindrance to establishment) is negligible in relation either to an application for a dumping duty notice and a countervailing duty notice

Unless one of those circumstances exists, the power to terminate should not be exercised. So the question will always be whether one of the identified circumstances existed. If they do not exist (or it is relatively clear that on the information before the Commissioner he or she should not have been satisfied they do exist) but a decision to terminate was made, it is not the correct decision and must be revoked. That is, the decision should not have been made. However unless the Panel is satisfied it is not the correct decision, it should be affirmed.

The ultimate conclusion that the decision was not the correct decision because a more appropriate or desirable method of analysis should have been followed, would be arrived at by actually undertaking the analysis. Then (after the analysis was complete) it would be apparent that one of the specified circumstances existed (requiring termination of investigation) or it is relatively clear that on the information before the Commissioner he or she should not have been satisfied it did exist. However without the information that the applicant says should have been obtained, is not possible to undertaking analysis that might lead to the ultimate conclusion unless the absence of the information and the failure to undertake the analysis points clearly to a conclusion that the Commissioner should not have been satisfied one of the specified circumstances did exist.

Different considerations might arise if there was an express or implied statutory duty arising under the Customs Act or Regulations to undertake a particular method of analysis which required certain information to be obtained and which was not obtained. In this latter situation, it may be open to a Panel member to revoke the reviewable decision.

This discussion draws attention to the need for an applicant to provide, in relation to any reviewable decision (including a termination decision), a statement establishing reasons for believing that the reviewable decision was not the correct decision (in relation to a termination decision) or the preferable decision: see s269ZZQ(1A). Without such a statement, the application is likely to be rejected under s269ZZQA(2) because the Panel is not satisfied that the applicant has given the Panel information setting out reasonable grounds for the reviewable decision not being the correct or preferable decision. If an application is made shortly before the expiry of the 30 days period referred to in s269ZZP (as happened in the present case), the Panel is effectively precluded from giving the applicant an opportunity to correct the application if it is at risk of rejection under s269ZZQA(2).

Insofar as I have considered (in this and earlier applications for review) the question of whether an application should be rejected, I have not applied this provision with as great a rigour as might be possible or even appropriate. The Panel has only just begun to operate. However applicants have to be conscious of the possibility that this section will be applied with full rigour in relation to a termination decision (and perhaps others) if they simply complain about the methodology adopted by the Commissioner without seeking to demonstrate (though, it must be accepted, from a position of not having all the information the Commission had) that the termination decision should not have been made either because one of the specified circumstances did not exist (thus not requiring termination of the investigation) or it is relatively clear that on the information before the Commissioner he or she should not have

been satisfied it did exist (thus not justifying termination of the investigation).

If an application is not rejected it does not follow that all grounds advanced in the application are to be viewed, or have been accepted, as reasonable grounds for the reviewable decision not being the correct decision (in relation to a termination decision) or the preferable decision (potentially in relation to other reviewable decisions). One ground may be a reasonable ground but the other grounds may not.

Also, it is important to emphasise that the power to review, is to review the operative decision. In this case, it was the termination decision. It is not a power to "review" all or some of the calculations or subsidiary decisions made which underpinned the operative decision. The application in this case is cast in terms of the applicant seeking a "review" of calculations and subsidiary decisions. Of course in many instances it will be necessary for the Panel member to look at criticisms or comments of an applicant about the way the Commissioner went about making the calculations or reaching conclusions in order the form a view about whether the operative decision was the correct decision or not. However the reviewable decision is the operative decision and it is the correctness of that decision only which is to be assessed by the Panel.

The outcome - the decision to terminate was correct

15. The decision to terminate the investigation so far as it relates to the exporters referred to in Dumping Notice No 2013/67, is affirmed.

Michael Moore
Senior Anti-Dumping Review Panel Member
6 December 2013