Australian Government
Anti-Dumping Review Panel

# APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR A COUNTERVAILING DUTY NOTICE

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# INFORMATION FOR APPLICANTS

## WHAT DECISIONS ARE REVIEWABLE BY THE ANTI-DUMPING REVIEW PANEL?

The role of the Anti-Dumping Review Panel (the ADRP) is to review certain decisions made by the Minister responsible for the Australian Customs and Border Protection Service (ACBPS), or by the Anti-Dumping Commissioner (the Commissioner).

The ADRP may review decisions made by the Commissioner:

- to reject an application for dumping or countervailing measures;
- to terminate an investigation into an application for dumping or countervailing measures;
- to reject or terminate examination of an application for duty assessment; and
- to recommend to the Minister the refund of an amount of interim duty less than the amount contended in an application for duty assessment, or waiver of an amount over the amount of interim duty paid.

The ADRP may review decisions made by the Minister, as follows:

*Investigations*:

- to publish a dumping duty notice;
- to publish a countervailing duty notice;
- not to publish a dumping duty notice;
- not to publish a countervailing duty notice;

*Review inquiries, including decisions*

- to alter or revoke a dumping duty notice following a review inquiry;
- to alter or revoke a countervailing duty notice following a review inquiry;
- not to alter a dumping duty notice following a review inquiry;
- not to alter a countervailing duty notice following a review inquiry;
- that the terms of an undertaking are to remain unaltered;
- that the terms of an undertaking are to be varied;
- that an investigation is to be resumed;
- that a person is to be released from the terms of an undertaking;

*Continuation inquiries:*

- to secure the continuation of dumping measures following a continuation inquiry;
- to secure the continuation of countervailing measures following a continuation inquiry;

- not to secure the continuation of dumping measures following a continuation inquiry;
- not to secure the continuation of countervailing measures following a continuation inquiry;

*Anti-circumvention inquiries:*

- to alter a dumping duty notice following an anti-circumvention inquiry;
- to alter a countervailing duty notice following an anti-circumvention inquiry;
- not to alter a dumping duty notice following an anti-circumvention inquiry; and
- not to alter a countervailing duty notice following an anti-circumvention inquiry.

Before making a recommendation to the Minister, the ADRP may require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the ADRP within a specified time period.

The ADRP only has the power to make **recommendations to** the Minister to affirm the reviewable decision or to revoke the reviewable decision and substitute with a new decision. The ADRP has no power to revoke the Minister's decision or substitute another decision for the Minister's decision.

## WHICH APPLICATION FORM SHOULD BE USED?

It is essential that applications for review be lodged in accordance with the requirements of the *Customs Act 1901* (the Act). The ADRP does not have any discretion to accept an invalidly made application or an application that was lodged late.

Division 9 of Part XVB of the Act deals with reviews by the ADRP. Intending applicants should familiarise themselves with the relevant sections of the Act, and should also examine the explanatory brochure (available at www.adreviewpanel.gov.au).

There are separate application forms for each category of reviewable decision made by the Commissioner, and for decisions made by the Minister. It is important for intending applicants to ensure that they use the correct form.

This is the form to be used when applying for ADRP review of a decision of the Minister whether to publish a dumping duty notice or countervailing duty notice (or both). It is approved by the Commissioner pursuant to s 269ZY of the Act.

## WHO MAY APPLY FOR REVIEW OF A MINISTERIAL DECISION?

Any interested party may lodge an application for review to the ADRP of a review of a ministerial decision. An "interested party" may be:

- if an application was made which led to the reviewable decision, the applicant;
- a person representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision;
- a person directly concerned with the importation or exportation to Australia of the goods;
- a person directly concerned with the production or manufacture of the goods;
- a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia; or
- the government of the country of origin or of export of the subject goods.

Intending applicants should refer to the definition of "interested party" in s 269ZX of the Act to establish whether they are eligible to apply.

## WHEN MUST AN APPLICATION BE LODGED?

An application for a review must be received within 30 days after a public notice of the reviewable decision was first published in a national Australian newspaper (s 269ZZD).

The application is taken as being made on the date upon which it is received by the ADRP after it has been properly made in accordance with the instructions under 'Where and how should the application be made?' (below).

## WHAT INFORMATION MUST AN APPLICATION CONTAIN?

An application should clearly and comprehensively set out the grounds on which the review is sought, and provide sufficient particulars to satisfy the ADRP that the Minister's decision should be reviewed. It is not sufficient simply to request that a decision be reviewed.

The application must contain a full description of the goods to which the application relates and a statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision (s 269ZZE).

If an application contains information which is confidential, or if publication of information contained in the application would adversely affect a person's business or commercial interest, the application will be rejected by the ADRP unless an appropriate summary statement has been prepared and accompanies the application.

If the applicant seeks to bring confidential information to the ADRP's attention (either in their application or subsequently), the applicant must prepare a summary statement which contains sufficient detail to allow the ADRP to reasonably understand the substance of the information, but the summary must not breach the confidentiality or adversely affect a person's business or commercial interest (s 269ZZY).

While both the confidential information and the summary statement must be provided to the ADRP, only the summary statement will be lodged on the public record maintained by the ADRP (s 269ZZX). The ADRP is obliged to maintain a public record for review of decisions made by the Minister, and for termination decisions of the Commissioner. The public record contains a copy of any application for review of a termination decision made to the ADRP, as well as any information given to the ADRP after an application has been made. Information contained in the public record is accessible to interested parties upon request.

Documents containing confidential information should be clearly marked "Confidential" and documents containing the summary statement of that confidential information should be clearly marked "Non-confidential public record version", or similar.

The ADRP does not have any investigative function, and **must** take account only of information which was before the Minister when the Minister made the reviewable decision (s269ZZ). The ADRP will disregard any information in applications and submissions that was not available to the Minister.

## HOW LONG WILL THE REVIEW TAKE?

The timeframes for a review by the ADRP will be dependent on whether the ADRP requests the Commissioner to reinvestigate specific findings or findings that formed the basis of the reviewable decision.

*If reinvestigation is not required*

Unless the ADRP requests the Commissioner to reinvestigate a specific finding or findings, the ADRP must make a report to the Minister:

- at least 30 days after the public notification of the review;
- but no later than 60 days after that notification.

In special circumstances the Minister may allow the Review Panel a longer period for completion of the review (s 269ZZK(3)).

*If reinvestigation is required*

If the ADRP requests the Commissioner to reinvestigate a specific findings or findings, the Commissioner must report the results of the reinvestigation to the ADRP within a specified period.

Upon receipt of the Commissioner's reinvestigation report, the ADRP must make a report to the Minister within 30 days.

## WHAT WILL BE THE OUTCOME OF THE REVIEW?

At the conclusion of a review, the ADRP must make a report to the Minister, recommending that the:

- Minister affirm the reviewable decision (s 269ZZK(1)(a)); or
- Minister revoke the reviewable decision and substitute a specified new decision (s 269ZZK(1)(b)).

After receiving the report from the ADRP the Minister must:

- affirm his/her original decision; or
- revoke his/her original decision and substitute a new decision.

The Minister has 30 days to make a decision after receiving the ADRP's report, unless there are special circumstances which prevent the decision being made within that period. The Minister must publish a notice if a longer period for making a decision is required (s 269ZZM).

## WHERE AND HOW SHOULD THE APPLICATION BE MADE?

Applications must be EITHER:

- lodged with, or mailed by prepaid post to:

  **Anti-Dumping Review Panel**
  **c/o Legal Services Branch**
  **Australian Customs and Border Protection Service**
  **5 Constitution Avenue**
  **Canberra City ACT 2601**
  **AUSTRALIA**

- OR emailed to:

  **ADRP_support@customs.gov.au**

- OR sent by facsimile to:

**Anti-Dumping Review Panel**
**c/o Legal Services Branch**
**+61 2 6275 6784**

## WHERE CAN FURTHER INFORMATION BE OBTAINED?

Further information about **reviews by the ADRP** can be obtained at the ADRP website (www.adreviewpanel.gov.au) or from:

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City ACT 2601
AUSTRALIA

Telephone: +61 2 6275 5868
Facsimile: +61 2 6275 5784

Inquiries and requests for **general information about dumping matters** should be directed to:

Anti-Dumping Commission
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA CITY ACT 2601

Telephone: 1300 884 159
Facsimile: 1300 882 506
Email: clientsupport@adcommission.gov.au

## FALSE OR MISLEADING INFORMATION

It is an offence for a person to give the ADRP written information that the person knows to be false or misleading in a material particular (Penalty: 20 penalty units – this equates to $3400).

## PRIVACY STATEMENT

The collection of this information is authorised under section 269ZZE of the *Customs Act 1901*. The information is collected to enable the ADRP to assess your application for the review of a decision to publish a dumping duty notice or countervailing duty notice.

## *APPLICATION FOR REVIEW OF*

## *DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY NOTICE*

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☑ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

OR

**not** to publish : ☐ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

☒ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

☒ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

☒ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

☒ Full description of the imported goods to which the application relates.

☒ The tariff classification/statistical code of the imported goods.

☒ A copy of the reviewable decision.

☒ Date of notification of the reviewable decision and the method of the notification.

☒ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

☒ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature: 

Name: Charles Zhan

Position: Solicitor, Moulis Legal

Applicant Company/Entity: GS Global Corporation

Date: 20 January 2014

ATTACHMENT F

20 January 2014

# In the Anti-Dumping Review Panel

# Application for review
# Hot rolled plate steel from Korea and certain other countries

## GS Global Corporation

## 1 Applicant

**Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).**

The applicant is GS Global Corporation (hereinafter "GSG").

The address of the applicant is 10th Floor, GS Tower, 679, Yeoksam-dong, Gangnam-gu, Seoul, Korea.

GSG is a public company registered in Korea.

## 2 Applicant's contact details

**Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation**

The contact person at GSG is Mr Yun Young Moon, Manager.

His contact details are:

- telephone +82 2 2222 0114
- fax +82 2 2005 5350
- email – myy@gsgcorp.com

## 3 Applicant's representative

**Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.**

GSG is represented in this matter by Charles Zhan, Solicitor, Moulis Legal.

The contact details of Moulis Legal are:

- address - 6/2 Brindabella Circuit, Brindabella Business Park, Canberra International Airport ACT 2609
- telephone +61 2 6163 1000

- fax +61 2 6162 0606
- email – charles.zhan@moulislegal.com

A copy of the authorisation of Moulis Legal is at **Attachment B**.

Please address all communications relating to this application to Moulis Legal.

## 4 Description of imported goods

**Full description of the imported goods to which the application relates.**

This Application applies to hot rolled plate steel ("plate steel") imported from Korea. These goods are defined by the Anti-Dumping Commission ("ADC") in its Report No. 198 ("REP 198") as:

> *Flat rolled products of:*
>
> - *iron;*
> - *non-alloy steel; or*
> - *non-heat treated alloy steel of a kind commonly referred to as Quench and Tempered (Q&T) Green Feed*
>
> *of a width greater than 600 millimetres (mm), with a thickness equal to or greater than 4.75mm, not further worked than hot rolled, not in coils, with or without patterns in relief.*

## 5 Tariff classification of imported goods

**The tariff classification/statistical code of the imported goods.**

The imported goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act* 1995 ("the Tariff Act"):

- 7208.40.00 statistical code 39;
- 7208.51.00 statistical code 40;
- 7208.52.00 statistical code 41;
- 7225.40.00 statistical codes 22 and 24.

## 6 Reviewable decision

**Copy of the reviewable decision, date of notification of the reviewable decision and the method of the notification**

A copy of the decision is at Attachment C.

The reviewable decision was notified on 19 December 2013. It was published in *The Australian* on that day.

On that day the ADC also caused to be published:

- Australian Dumping Notice ADN 2013/72 – *Hot rolled plate steel Exported from the People's Republic of China, the Republic of Indonesia, Japan, the Republic of Korea and Taiwan*; and
- *Report to the Minister No. 198 – Dumping of hot rolled plate steel exported from the People's Republic of China, the Republic of Indonesia, Japan, the Republic of Korea and Taiwan* ("REP 198") - a copy of REP198 is at http://adcommission.gov.au/cases/documents/179-FinalReport-No198.pdf.

## 7 Applicant's reasons

**A statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision**

### A Introduction

BlueScope Steel Limited ("BlueScope") applied for a dumping investigation into imports of plate steel from China, Japan, Korea, Indonesia and Taiwan. The investigation was initiated on 12 February 2013.

As a result of this investigation, the Minister for Industry ("the Minister") decided on 19 December 2013 to impose dumping duties on plate steel exported to Australia from *inter alia* Korea (except Hyundai Steel and POSCO). Specifically, the Minister decided to publish notices in relation to dumping under Sections 269TG(1) and (2) of the *Customs Act* 1901 ("the Act").

GSG seeks review of this decision by the Anti-Dumping Review Panel ("ADRP") under Section 269ZZC of the Act.

Specifically, GSG seeks review of the finding that Dongkuk Steel Mill Co., Ltd ("DSM") was the exporter

of the goods manufactured by DSM that were exported to Australia during the period of investigation. GSG maintains that it was the exporter of those goods.

Even if it is found by the ADRP not to have been the exporter of the goods – a position which is not accepted by GSG – GSG also seeks review of the finding that DSM's export price is the price in the transaction between DSM and GSG. Instead, GSG maintains that in that scenario, the price charged by GSG for its sales to Australia should be the export price *"in all the circumstances of the exportation"*.

The exporter and export price findings which are the subject of this application were part and parcel of a set of findings which labelled DSM as an exporter of the goods manufactured by it at a "dumped" level of 18.4%, and which imposed an interim dumping duty of that magnitude upon the importation of those goods in the future.

The exporter finding was fundamental to the ADC's recommendations and ultimately to the making of the reviewable decision by the Minister against GSG's interests.

Given the circumstances of this case, GSG respectfully but ardently maintains that it was the exporter of the goods concerned during the investigation period. GSG maintains – as a matter of law and of logic - that it was the exporter of the goods manufactured by DSM during the investigation period. If the Minister had determined that GSG was the exporter of the goods, the question of whether or not a dumping margin applied to GSG's exports would have been worked out for GSG as exporter, using the price paid by the importer as the basis for the export price. In that scenario DSM would not have been individually named as an exporter of the goods against which interim dumping duties were ultimately imposed.

A detailed statement setting out the reasons as to why the exporter finding was not the correct or preferable decision is set out below.

## B Applicant's reasons

GSG adopts and incorporates the reasons advanced by DSM in its application to the ADRP of even date for a review of the same decision – namely the finding that DSM was the exporter of the goods - as is the subject of this application. The confidential and non-confidential versions of that Application are at **Attachments D and E** respectively ("DSM's application"). Those reasons are similarly GSG's reasons for its belief that the reviewable decision was not the correct or preferable decision.

The submissions which follow are based on two possible scenarios arising from the ADRP's review of this application and DSM's application. The first scenario is that the ADRP agrees that DSM was not the

exporter of the goods concerned. If that is the case, then the submissions set out under C below are the submissions that GSG requests the ADRP to take into account in its review and recommendation to the Minister. The second scenario is that the ADRP disagrees that DSM was not the exporter of the goods. If that is the case, then the submissions set out under D below are the submissions that GSG requests the ADRP to take into account in its review and recommendation to the Minister.

## C GSG as the exporter of the goods

GSG submits that should the ADRP agree with GSG's and DSM's position that the exporter of the goods during the investigation period was GSG and not DSM, then it naturally follows that the ADC's recommendation to the Minister that the dumping margin is to be worked out using the price charged by DSM to GSG as the "export price" is also incorrect. This is because the export price of the goods exported by GSG to Australia must be taken to have been the price paid or payable by the importer under Section 269TAB(1)(a) of the Act.

Section 269TAB(1)(a) provides that in cases where the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation), and where the purchase of the goods by the importer was an arms length transaction, the export price is to be based on the price paid or payable by the importer.

As indicated in the ADC's importer visit report of GS Global Australia ("GSG Australia visit report"), on the assumption that GSG was acting as an exporter of the goods during the investigation period, rather than as a mere trader, GSG's export of DSM products were made directly to the Australian importer GS Global Australia ("GSG Australia"),[1] and were all arms length transactions.[2]

## D DSM as the exporter of the goods

It is the primary submission of GSG that it was the exporter of the goods manufactured by DSM and exported by GSG to Australia during the investigation period. Further, the export price should be determined on that basis, as discussed in B above.

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1 ADC exporter visit report for GSG, page 11

2 GSG Australia visit report, page 20

Nonetheless, in the alternative, GSG submits that if DSM is said to be the exporter the reviewable decision is still incorrect due to the export price finding made by the ADC.

GSG submits that even if DSM is regarded as the exporter, the export price used to determine the dumping margin should nonetheless be the price charged by GSG and paid by the Australian importer, GSG Australia.

GSG notes that in working out the dumping margin for DSM, on the basis that DSM was the exporter of the goods, the ADC applied Section 269TAB(1)(c) of the Act. Section 269TAB(1) provides for three approaches towards ascertaining an export price to be used for the purposes of a margin determination.

Section 269TAB(1) provides as follows:

> *For the purposes of this Part, the export price of any goods exported to Australia is:*
>
> *(a) where:*
>
> *(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and*
>
> *(ii) the purchase of the goods by the importer was an arms length transaction;*
>
> *the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation; or*
>
> *(b) where:*
>
> *(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and*
>
> *(ii) the purchase of the goods by the importer was not an arms length transaction; and*
>
> *(iii) the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer;*
>
> *the price at which the goods were so sold by the importer to that person less the prescribed deductions; or*
>
> *(c) in any other case--the price that the Minister determines having regard to all the circumstances of the exportation.*

In summary, Section 269TAB(1)(a) and (b) prescribe that export price is to be worked out based on the price paid or payable by the importer, or charged to an non-affiliated third party by the importer, depending on whether the purchase of the goods by the importer from the exporter was an arms length transaction. Section 269TAB(1)(c) provides that, in any other case, the export price is to be determined by the Minister having regard to all the circumstances of the exportation.

It is clear from Section 269TAB(1)(a) and (b) that, for the purpose of margin determination, the normal focus of the Act is on the price at the point of importation. We consider that this focus is consistent with the overall purpose of Part XVB of the Act, which *"deals with the taking of anti-dumping measures in respect of goods whose importation into Australia involves a dumping or countervailable subsidisation of those goods that injures, or threatens to injure, Australian industry."*[3]

Section 269TAB(1)(c) recognises that circumstances different to those prescribed under Section 269TAB(1)(a) and (b) may arise, and that this may require different methods of working out the export price for the purpose of margin determination. An example is that mentioned in both Sections 269TAB(1)(a) and (b), where the goods are exported to Australia by the importer itself. Another example is where the goods are not purchased by the importer from the exporter, being the obverse of the circumstances mentioned in Sections 269TAB(1)(a) and (b). In such situations, the Minister is to use his discretion in determining the export price - the price must be determined *"having regard to all the circumstances of the exportation"*. This discretion is not unbounded, in that the exercise of any discretion should be fair and reasonable, and in particular should be consistent with the context and objective of the provision concerned.

Throughout the investigation GSG, joined by DSM, submitted to the ADC that, taking all circumstances of the exportation into account, the Minister should determine the export price to be the price charged by GSG to the importer. For example, the following was stated on their behalf:

> *We reiterate that it cannot be maintained that DSM is the exporter of the goods in the circumstances of this case. If this is not the position arrived at by Customs then without at all detracting from their position, DSM and GSG request that Customs find that:*
>
> - *the goods have been exported to Australia otherwise than by the importer, but have not been purchased by the importer from the exporter; and*
> - *the price that the Minister should determine as the export price having regard to all the circumstances of the exportation should be the price paid by the importer, being also the price charged by GSG for having the goods exported from Korea.*
>
> *The circumstances of the exportation – as we believe we have exhaustively established – is that GSG is entirely independent of DSM in relation to Australian sales, and is totally responsible for all arrangements, costs, prices and risks.*

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3 Section 269SM(1), *Customs Act 1901*

This point was re-emphasised in a further submission, in which we also noted the apparently contradictory approach adopted by the ADC in relation to another exporter in the investigation:

> *We reiterate our primary position that, in any circumstances, for determining the dumping margin for the goods manufactured by DSM and exported by GSG to Australia, the export price should be the price paid by the importer. We also note that in the joint submission of DSM and GSG, we put it to ADC that in the special circumstances of this case, the export price should be GSG's invoice price to the importer as "the price that the Minister determines having regard to all the circumstances of the exportation" under Section 269TAB(1)(c) of the Customs Act 1901.*
>
> *Our clients are confused and disappointed to observe that a contradictory approach to the one adopted in respect of them appears to have been adopted in respect of a different exporter in this investigation. In the Preliminary Affirmative Determination in this investigation, ADC's approach in relation to the Chinese exporter Shangdong Iron and Steel Company Limited, Jinan Company (JIGANG) was stated to be as follows:*
>
> > *Preliminary export prices for exports by JIGANG were established pursuant to s.269TAB(1)(c) of the Act using export prices payable by the importer, in the form of the invoice price from Jigang Hong Kong Holding Co., Limited (Jigang HK) to the Australian importer.[underlining added]*
>
> *Our clients ask ADC to review its position, and to use the price paid by the importer as the export price, in light of their previous request that this be the export price, and in light of other administrative precedent available to ADC in this regard.*

It is not clear to us that the ADC, in making the recommendation to the Minister, or the Minister, in making his decision, did have *"regard to all circumstances of the exportation"*. Even if they did then GSG sincerely requests the ADRP to review the position and to recommend that the price charged by GSG to its importer be adopted as the export price.

In REP 198, it is simply stated that:

> ***Export Prices***
>
> *Export prices for DSM were established under s.269TAB(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.* [bolding and underlining in original]

On the basis of the public record at least, it does not appear that any further information was provided to inform the Minister about the special circumstances involved in the exportation of DSM-manufactured goods by GSG to Australia, and no reasoning is evident in ADC's recommendation to the Minister as to how the circumstances of the exportation should be considered in the assessment of the export price.

In response to DSM and GSG's joint submission regarding what appeared to be a contradictory approach adopted by the ADC in relation to Jigang, REP 198 states:

*The Commission clarifies that exports by JIGANG were through a legally related intermediary, Jigang HK, and that adjustments for Jigang HK's SG&A costs were made to the normal value. Neither DSM nor GSG have suggested that they are legally related entities, and as such, the approach taken for JIGANG is not appropriate in the case of DSM and GSG.*

The requirement to take all circumstances into consideration in determining export price under Section 269TAB(1)(c) is not qualified by any relationship between the so called exporter and a so-called intermediary. The fact that DSM and GSG were not related companies does not preclude the Minister from a finding that the price charged by GSG to the importer should be used as the export price. If anything, the existence of an affiliation would seem to us to be a stronger reason for requiring further consideration to be given to the appropriate point at which the export price should be assessed.

Due to confidentiality restrictions, GSG is of course not aware of the actual circumstances and thinking that went into the assessment of export price for those other parties in this investigation. GSG asks that the ADRP take this into its consideration in the review. Nonetheless, whatever may have been the case with that example, GSG maintains that even if DSM is considered to be the "exporter" of the goods, the relevant transaction to work out the export price for dumping duty purposes should be the transaction taking place between the point of exportation and the point of importation

The prices charged by DSM to GSG were not export prices for exportation of the goods to Australia by DSM. They were prices charged by DSM acting as **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is a characterisation of DSM as instrument of GSG so far as GSG's exports to Australia concerned]** for GSG's export of the goods to Australia. They were prices agreed for sales on **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is the trading term between DSM and GSG]**. They were not the prices paid by the importer. More importantly, they were not prices of the goods exported from Korea; they merely represent the price paid by GSG to DSM - two unrelated companies within Korea - for the purchase of goods in Korea for which GSG then assumed responsibility, took possession, and arranged for exportation. We respectfully submit that in all the circumstances of this exportation, the prices paid by GSG were not relevant for margin determination.

Without wishing to labour the point, the only true exportation of the goods occurred between GSG and GSG Australia, which the ADC found to be arms length transactions. GSG submits that a proper exercise of the power prescribed by Section 269TAB(1)(c) – *"having regard to all circumstances of the exportation"* – should lead to a finding that the relevant transactions were those between GSG and GSG Australia, and that the export price was the price charged by GSG and paid by the importer.

GSG notes that the application of Section 269TAB(1)(c) was considered by the Federal Court in *Companhia Votorantim de Celulose E Papel v Anti-Dumping Authority and Ors*[4] ("the Celpav case"). In that case, the issue before the Court related to the determination of the "exporter". The Court was not directly required to consider the application of the Minister's discretion under Section 269TAB(1)(c). Despite this, we consider that the Court's reasoning in that case can inform the approach that should be adopted to the export price issue in this review.

The majority's judgement in the Celpav case rejected the appellant's claim that identification of the "exporter" should be determined in a manner so as to focus attention on the price paid by the importer, rather than the price received by the manufacturer. Despite this, the Court recognised that:

> *It is the place of export, and hence the identity of the exporter, that are fundamental to the achieving of the purpose of the anti-dumping provisions of the Act.*[5]

and,

> *They rightly pointed out that the purpose of the anti-dumping provisions of the Act is to protect Australian producers from material injury flowing from unfair foreign competition. Put simply, that competition occurs when goods are sold into the Australian market at a price lower than that pertaining in the country of export: see definition of "normal value of goods" in s 269TAC.*[6]

The Court then referred to the work of Beseler and Williams in support of its decision. In particular, it was noted that:

> *The Group* [the GATT Group of Experts] *took the view that the word "exported" in Article VI provided the guide for establishing the dumped price and this factor, together with the requirements to make due allowance for differences affecting price comparability, led it to conclude that the essential aim was to compare the normal domestic price in the exporting country with the price at which the merchandise left that country and not the price at which it was imported. The Anti-Dumping Code confirms this view by stressing that the export price should be the price of the "product exported from one country to another", and Community legislation clarifies the position even further by providing that the export price shall be the "price actually paid or payable for the product when sold for export to the Community".* [emphasis added]

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4 (1996) 141 ALR 297

5 Wilcox and R D Nicholson JJ, *Companhia Votorantim de Celulose E Papel v Anti-Dumping Authority and Ors*, (1996) 141 ALR 297; page 10

6 Ibid

For the purpose of the current application, we think that it is clear that the price of the DSM-manufactured product exported from one country (Korea) to another (Australia) was the price charged by GSG to the importer.

## 8 Conclusion and request

The decision to which this application refers is a reviewable decision under Section 269ZZA of the Act. Where references are made to the ADC and its recommendations, it is those recommendations which were accepted by the Minister and form part of the reviewable decision that DSM seeks to have reviewed.

GSG is an interested party in relation to the reviewable decision.

GSG's application is in the approved form and has otherwise been lodged as required by the Act.

We submit that the GSG's application is a sufficient statement setting out GSG's reasons for believing that the reviewable decision is not the correct or preferable decision, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information is at **Attachment F**.

On behalf of GSG, we respectfully request that the ADRP:

- undertake the review of the reviewable decision as requested by this application under Section 269ZZK of the Act; and
- recommend that the Minister revoke the reviewable decision and substitute a new decision to be specified by the ADRP on the basis that GSG, and not DSM, was the exporter of the goods under consideration that were manufactured by DSM and sold by GSG to Australia during the investigation period and that consequently, the export price of those goods was the price paid by the importer.

In the alternative, if the ADRP finds that DSM was the exporter of the goods under consideration, we respectfully request that the ADRP recommend that the Minister revoke the reviewable decision and substitute a new decision to be specified by the ADRP on the basis that the export price of those goods under Section 269TAB(1)(c) of the Act was, in all the circumstances of the exportation, the price

charged by GSG.

Lodged for and on behalf of GS Global Corp.

Charles Zhan
Solicitor

Moulis Legal

**Australian Government**

**Anti-Dumping Commission**

*Customs Act 1901 – Part XVB*

# Hot rolled plate steel

# Exported from the People's Republic of China, the Republic of Indonesia, Japan and the Republic of Korea

## Findings in Relation to a Dumping Investigation

***Public notice under subsections 269TG(1) and 269TG(2) of the Customs Act 1901***

The Anti-Dumping Commission (the Commission) has completed its investigation into the alleged dumping of hot rolled plate steel ("the goods"), exported to Australia from the People's Republic of China (China), the Republic of Indonesia, Japan, the Republic of Korea (Korea) and Taiwan.

The goods are classified to tariff subheadings

- 7208.40.00 statistical code 39;
- 7208.51.00 statistical code 40;
- 7208.52.00 statistical code 41;
- 7225.40.00 statistical codes 22 and 24,

in Schedule 3 of the *Customs Tariff Act 1995*.

A full description of the goods is available in Australian Customs Dumping Notice (ACDN) No. 2013/18 and ACDN 2013/20. These ACDNs are available on the internet at **www.adcommission.gov.au**

The Commission reported its findings and recommendations to the Minister for Industry (the Minister) in *Anti-Dumping Commission Report to the Minister No. 198* (REP 198), in which it outlines the investigations carried out by the Commission and recommends the publication of a dumping duty notice in respect of the goods. The Minister has considered REP 198 and has accepted the Commission's recommendations and reasons for the recommendations, including all material findings of fact or law on which the Commission's recommendations were based, and particulars of the evidence relied on to support the findings.

On 10 September 2013 the Commission terminated part of its dumping investigation into the goods exported by all exporters from Taiwan, Hyundai Steel Company and POSCO from Korea and Shandong Iron and Steel, Jinan Company (JIGANG) from China. *Termination Report No. 198* sets out the reasons for these terminations. This report is available on the Commission's website.

Particulars of the dumping margins established and an explanation of the methods used to compare export prices and normal values to establish the dumping margins are set out in the following table:

| | | | |
|---|---|---|---|
| China | Shandong Iron and Steel, Jinan Company (JIGANG) | <2% | Weighted average export prices were compared with weighted average corresponding normal values over the investigation period in terms of s.269TACB(2)(a) of the *Customs Act 1901*. |
| | All other exporters (except JIGANG) | 22.1% | |
| Indonesia | PT Gunung Rajapaksi (Rajapaksi) | 8.6% | |
| | PT Krakatau Steel (Krakatau) | 11.3% | |
| | PT Gunawan Dianjaya Steel (Dianjaya) | 11.3% | |
| | All other exporters (except Rajapaksi, Krakatau and Dianjaya) | 19% | |
| Japan | All exporters | 14.3% | |
| Taiwan | Shang Chen Steel Co., Ltd (Shang Chen) | <2% | |
| | Chung Hung | 5% | |
| | China Steel Corporation and China Steel Global Trading | <2% | |
| Korea | Hyundai Steel Company | <2% | |
| | Dongkuk Steel Mill, Co., Ltd | 18.4% | |
| | POSCO | <2% | |
| | All other exporters (except Dongkuk Steel Mill, Co., Ltd (DSM), Hyundai Steel Company and POSCO) | 20.6% | |

I, IAN MACFARLANE, Minister for Industry, have considered, and accepted, the recommendations of the Commission, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 198.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TG(1) of the Customs Act 1901 (the Act), I **DECLARE** that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and

(ii) like goods that were exported to Australia after 19 July 2013 (when the Anti-Dumping Commissioner of the Commission made a Preliminary Affirmative Determination under section 269TD of the Act that there appeared to be sufficient grounds for the publication of a dumping duty notice) but before the publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused or is being caused. Therefore under subsection 269TG(2) of the Act, I **DECLARE** that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from China (except JIGANG), Indonesia, Japan and Korea (except Hyundai Steel Company and POSCO).

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on prices and the consequent impact on the Australian industry including loss of sales volume, reduced revenues, price depression and suppression, reduced profits and profitability, reduced return on income and loss of employment.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures are applied to 'goods on the water' is available in ACDN 2012/34, available at **www.adcommission.gov.au**.

REP 198 and other documents included in the public record are available at **www.adcommission.gov.au**. Alternatively, the public record may be examined at the Commission office by contacting the case manager on the details provided below.

Enquiries about this notice may be directed to the case manager on telephone number 02 6275 6129, fax number 1300 882 506 or +61 2 6275 6888 (outside Australia) or **operations2@adcommission.gov.au**.

Dated this 3rd day of December 2013.

IAN MACFARLANE
Minister for Industry

GS Global Corporation

GS Tower, 679, Yeoksam-dong, Gangnam-gu,
Seoul 135-985, Korea
tel 82-2-2005-5300 fax 82-2-2005-5301
www.gsgcorp.com

**20 JAN 2014**

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

Dear Review Panel

**Application for review**
**Alleged dumping of hot rolled plate steel from Korea and certain other countries**

We confirm that we have retained the law firm Moulis Legal to represent the interests of GS Global Corporation in this matter.

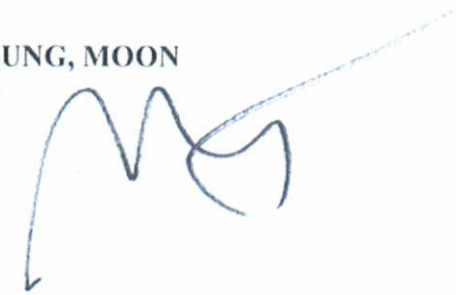
Please give Moulis Legal the same assistance and consideration in relation to the provision of information and cooperation in this matter as you would GS Global Corporation.

The lead contact person at Moulis Legal is Daniel Moulis. His email address is daniel.moulis@moulislegal.com, and he can be contacted by telephone on +61 2 6163 1000.

Please contact him directly with any inquiries.

Yours faithfully

**YUN YOUNG, MOON**
**Manager**



ATTACHMENT DE

20 January 2014

# In the Anti-Dumping Review Panel

## Application for review
## Hot rolled plate steel from Korea and certain other countries

## Dongkuk Steel Mill Co., Ltd



NON-CONFIDENTIAL

## 1 Applicant

**Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).**

The applicant is Dongkuk Steel Mill Co., Ltd (hereinafter "DSM").

The address of the applicant is 11th Floor, FERRUM Tower, 66, Suha-dong, Jung-ku, Seoul, Korea.

DSM is a public company registered in Korea.

## 2 Applicant's contact details

**Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation**

The contact person at DSM is Mr Han Ki Kim, Team Leader, International Trade Affairs.

His contact details are:

- telephone +82 2 317 1460
- fax +82 2 317 1188
- email – hanki.kim@dongkuk.com

## 3 Applicant's representative

**Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.**

DSM is represented in this matter by Daniel Moulis, Principal, Moulis Legal.

The contact details of Moulis Legal are:

- address - 6/2 Brindabella Circuit, Brindabella Business Park, Canberra International Airport ACT 2609
- telephone +61 2 6163 1000

- fax +61 2 6162 0606
- email - daniel.moulis@moulislegal.com

A copy of the authorisation of Moulis Legal is at **Attachment B**.

Please address all communications relating to this application to Moulis Legal.

## 4 Description of imported goods

**Full description of the imported goods to which the application relates.**

This Application applies to hot rolled plate steel ("plate steel") imported from Korea. These goods are defined by Anti-Dumping Commission ("ADC") in its Report No. 198 ("REP 198") as:

*Flat rolled products of:*

- *iron;*
- *non-alloy steel; or*
- *non-heat treated alloy steel of a kind commonly referred to as Quench and Tempered (Q&T) Green Feed*

*of a width greater than 600 millimetres (mm), with a thickness equal to or greater than 4.75mm, not further worked than hot rolled, not in coils, with or without patterns in relief.*

## 5 Tariff classification of imported goods

**The tariff classification/statistical code of the imported goods.**

The imported goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act* 1995 ("the Tariff Act"):

- 7208.40.00 statistical code 39;
- 7208.51.00 statistical code 40;
- 7208.52.00 statistical code 41;
- 7225.40.00 statistical codes 22 and 24.

## 6 Reviewable decision

**Copy of the reviewable decision, date of notification of the reviewable decision and the method of the notification**

A copy of the decision is at **Attachment C**.

The reviewable decision was notified on 19 December 2013. It was published in *The Australian* on that day.

On that day the ADC also caused to be published:

- Australian Dumping Notice ADN 2013/72 – *Hot rolled plate steel Exported from the People's Republic of China, the Republic of Indonesia, Japan, the Republic of Korea and Taiwan*; and
- *Report to the Minister No. 198 – Dumping of hot rolled plate steel exported from the People's Republic of China, the Republic of Indonesia, Japan, the Republic of Korea and Taiwan* ("REP 198") - a copy of REP198 is at http://adcommission.gov.au/cases/documents/179-FinalReport-No198.pdf.

## 7 Applicant's reasons

**A statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision**

### A Introduction

BlueScope Steel Limited ("BlueScope") applied for a dumping investigation into imports of plate steel from China, Japan, Korea, Indonesia and Taiwan. The investigation was initiated on 12 February 2013.

As a result of this investigation, the Minister for Industry ("the Minister") decided on 19 December 2013 to impose dumping duties on plate steel exported to Australia from *inter alia* Korea (except Hyundai Steel and POSCO). Specifically, the Minister decided to publish notices in relation to dumping under Sections 269TG(1) and (2) of the *Customs Act* 1901 ("the Act").

DSM seeks review of this decision by the ADRP under Section 269ZZC of the Act.

Specifically, DSM seeks review of the finding that DSM was the exporter of the goods manufactured by

DSM that were exported to Australia during the period of investigation. DSM maintains that it was not the exporter of those goods. DSM maintains that GS Global Corporation ("GSG") was the exporter of the goods manufactured by DSM that were exported to Australia during the period of investigation.

The exporter finding was part and parcel of a set of findings which labelled DSM as an exporter of the goods manufactured by it at a "dumped" level of 18.4%, and which imposed an interim dumping duty of that magnitude upon the importation of those goods in the future.

The exporter finding was fundamental to the ADC's recommendations and ultimately to the making of the reviewable decision by the Minister against DSM.

Given the circumstances of this case, DSM respectfully but ardently maintains that it was not the exporter of the goods concerned during the investigation period. Instead, DSM maintains – as a matter of law and of logic - that GSG was the exporter of the goods manufactured by DSM during the investigation period. If the Minister had determined that GSG was the exporter of the goods, a margin would have been determined for GSG as exporter, and DSM would not have been individually named as an exporter of the goods against which interim dumping duties were ultimately imposed.

A detailed statement setting out the reasons as to why the exporter finding was not the correct or preferable decision is set out below.

## B Legislative background to exporter/export price determination

The determination of a party as the "exporter" of goods to Australia is an important aspect of an anti-dumping investigation. The identification of DSM as the exporter in this case is of concern to DSM for two main reasons.

Under Section 269TAB(1)(a) of the Act, if the Australian importer purchases the goods from the exporter in an "arms length transaction", it is the price paid by the importer that is treated as the export price, or at least as the basis for the export price. The Minister is then required, for the purposes of working out whether the goods exported by the exporter were dumped, to compare that export price with the normal value determined for the exporter. This comparison is at the very heart of a dumping finding and of a decision whether to publish a dumping notice under Section 269TG(2) of the Act, or under Sections 269TG(1) and (2) of the Act, in respect of the exporter concerned. The level at which the export price is determined is very significant to the determination of the dumping margin itself. Furthermore, making sure that the level of the export price is fairly comparable to the level of the normal value is also a very significant aspect of the analysis.

Secondly, the identification of a party as the "exporter" in a dumping context has important commercial implications. One aspect of this is reputational. Notwithstanding the increasingly "technical" nature of dumping findings, and their frequency, no company can be content to be labelled as having engaged in "dumping" which caused "material injury" to an overseas industry. This is especially so where it quite evidently has not itself engaged in that practice.

Another aspect is the future commercial prospects of the manufacturer. The finding that a manufacturer is an exporter has the propensity to exaggerate the ultimate dumping finding that is made. That has certainly been the case in this matter, where the export price has been determined at a place which has nothing to do with the Australian market, is far removed from the Australian market, and does not even approach the price that importers actually pay on importation of the goods. An adverse finding of dumping applied to the goods manufactured by a company limits the prospective future volume of its sales. Labelling the manufacturer as the exporter – in circumstances where it was not the exporter - also prevents it from becoming an exporter, should it wish to do so, and seeking an accelerated review for its own exports.

The term "exporter" is not defined in the Act.

During the period of investigation, DSM manufactured goods meeting the description of the goods under consideration, and sold them to a number of commercial parties. None of these parties were Australian importers. One of the parties to whom DSM sold the goods was GSG, a major Korean trading company. GSG then exported the goods to its Australian customer, being the Australian importer of the goods.

However, in its recommendations to the Minister, the ADC determined the export price of the goods based on the finding that DSM was the exporter of the goods, and not GSG. This led to the finding that the Australian importer did not purchase the goods from the exporter (the "exporter" being DSM). Accordingly, the ADC recommended to the Minister that Sections 269TAB(1)(a) and (b) of the Act did not apply in relation to the DSM-manufactured goods which DSM maintains were exported to Australia by GSG. An export price for DSM-manufactured goods was therefore determined under Section 269TAB(1)(c) of the Act, which applies in "any other case" – in other words, in cases where the importer did not purchase the goods from the exporter.

The ADC recommended that the export price of the goods should be determined as if they were "exported" by DSM at the price charged by DSM to the local trading company GSG. The Minister accepted this recommendation and published a dumping duty notice against DSM with the dumping margin determined using DSM's selling price of the goods to GSG as the export price.

DSM submits that the circumstances involved in its arrangement with GSG and GSG's role in the export of DSM's products to Australia constituted GSG as the exporter of the goods during the investigation period. On a proper consideration of those circumstances, DSM maintains that the correct and preferable decision is that GSG was the exporter of the goods concerned.

It is the finding that DSM was the exporter that DSM seeks to have reviewed.

## C Factual circumstances of the exportations

It was DSM's position - from the outset of the investigation and throughout the investigation - that it was not the exporter to Australia of the goods that it manufactured. Instead, DSM explained that the goods were exported by GSG to Australia during the investigation period, as a matter of fact and of law.

At a very early point in the investigation, DSM communicated to the ADC that:

> *DSM is not an exporter of the goods to Australia during the investigation period. DSM provides its response in the capacity as the manufacturer supplier of GS Global.*[1]

In its own response to the Exporter Questionnaire, GSG admitted that it was the exporter of the goods, advising the ADC that:

> *GSG respectfully submits that its position as supplier of the GUC to Australia constitutes it as the exporter in the circumstances of this case.*[2]

After lodging its response to the Exporter Questionnaire, DSM joined with GSG in making a submission to the ADC regarding this issue.[3] In particular, it was submitted that:

> *DSM does not consider itself to be the exporter of the goods to Australia. GSG is the exporter of those goods. The facts establish that GSG is not a mere trader or intermediary on behalf of DSM, but that it is clearly the principal in the sale and export of the goods to Australia. It arranges and carries out all aspects of the exportation. For its part, all that DSM does is to position the goods in a loading dock for collection by GSG, and then to* ***[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information relates to the fact that neither party pays all freight]****.*

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1 Email from Moulis Legal to ADC dated 9 April 2013.

2 GSG Global response to the Exporter Questionnaire, page 22.

3 DSM and GSG joint submission regarding exporter-related issues dated 20 May 2013, pages 2 and 3.

> *DSM does not handle the exportation of the goods, and GSG does not merely sell documentary title (ie "paper transfer") to the goods to third parties.*
>
> *At the outset we wish to emphasise that this is a case that is out of the ordinary. There are marked differences in the role and behaviour of GSG in relation to DSM-manufactured plate steel than those of a standard "trader". In terms of Customs' anti-dumping policy, GSG does not argue that all traders are exporters. It simply argues that it is the exporter in the special circumstances of this particular case.*
>
> *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 is a characterisation of DSM as instrument of GSG so far as GSG's exports to Australia concerned]****. GSG* ***[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is a characterisation of DSM as instrument of GSG so far as GSG's exports to Australia concerned]*** *in order to make exports of plate steel to Australia.* [4]

The submission went on to detail the key facts of the DSM-GSG sales process in support of the proposition that GSG was the exporter of the goods.[5]

Further, GSG provided information to the ADC which demonstrated its unique role as the exporter of the DSM-manufactured products in relation to its sales to Australia, by contrasting its activities in relation to sales of plate steel to Australia as a mere trader for another manufacturer with its activities in relation to exports of DSM plate steel to Australia. Various aspects of the sales activities, including differences in price negotiation, sales process, profit behaviour and currency risk were presented for that purpose.[6]

Moulis Legal, acting as the solicitors for DSM and GSG separately, also made submissions to the ADC on these topics in email communications dated 25 and 27 May, and 13 June, 2013.

The facts raised in those submissions, which we believe establish that GSG was exporter of the goods rather than DSM, were further examined and verified by the ADC during its on-site verification visit of DSM and GSG.

The visit report records the following evidence:

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4 Joint submission of DSM and GSG re plate steel export to Australia dated 20 May 2013

5 *Ibid*, pages 3 to 5.

6 *Ibid*, pages 5 to 7.

- GSG is contacted by its own customer in Australia and negotiated the price and entered into contracts with the Australian customer independently, prior to contacting DSM;[7]
- there [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is confidential pricing] between GSG and DSM in relation to the goods purchased by GSG which it eventually exported to Australia - DSM accepted [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is confidential pricing] from GSG during the investigation period;[8]
- GSG regarded DSM as its [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is a characterisation of DSM as instrument of GSG so far as GSG's exports to Australia concerned] in relation to its Australian sales of the goods;[9]
- DSM believes that it operates [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is a characterisation of DSM as instrument of GSG so far as GSG's exports to Australia concerned] production of plate steel for sales by GSG to Australia;[10]
- GSG enters the order directly into DSM's system with the required delivery date once DSM staff confirms its production availability;[11]
- the sales activities of DSM in relation to its sales to GSG were minimal, [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is evidence of the minimalism mentioned] to confirm orders and prepare the goods for shipment at the time specified by GSG;[12]
- DSM [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is evidence that DSM did not involve itself in Australian exports] the pricing of plate steel to Australia;

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7 GSG visit report, page 12

8 DSM visit report, page 18; GSG visit report, page 12

9 GSG visit report, page 12

10 DSM visit report, page 13

11 DSM visit report, page 13; GSG visit report, page 12

12 DSM visit report, page 18

- the function of exporting to Australia was carried out entirely by GSG, a situation [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is evidence that DSM did not involve itself in Australian exports];[13]
- GSG obtains "responsibility" for the goods in the legal and possessory sense before the FOB point;
- GSG arranged for shipping and gave directions to DSM in relation to collection of the goods from DSM's factory;[14]
- DSM did not ship the goods concerned for export to Australia, rather, it has a [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is the trading term between DSM and GSG] arrangement with GSG which involved DSM placing the goods in the hands of a carrier that is either GSG's carrier at the factory loading point or that becomes GSG's carrier at the point of the inland freight journey [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information further describes the trading term between DSM and GSG];[15] and
- GSG exported the goods it purchased from DSM to Australia on [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information describes the trading term for GSG's exports, which makes GSG responsible to the extent of those terms].

## D The exporter finding arrived at by the ADC/Minister

REP 198 does not include any reasoning on the part of the ADC for the finding that DSM was the exporter of the goods during the investigation period. The Report states:

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13 DSM visit report, pages 14 and 18

14 GSG visit report, page 12

15 DSM visit report, pages 14, 16 and 17. See also GSG visit report, page 12. The sales term stated on the sales contract between DSM and GSG is [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is the legal description of the trading term between DSM and GSG] GSG arranged pickup of the goods from DSM's factory and delivered to GSG's own designated export port. GSG's designated ports are further from DSM's factories than the nearest ports. Accordingly, GSG assumed possessory title to the goods and paid for the additional delivery and handling costs incurred for the deliveries before the goods reached the ports of export.

> *GSG is an intermediary for goods manufactured by DSM. As the Commission determined DSM to be the exporter of these goods, the dumping margin has been determined for DSM rather than GSG.*[16]

The same statement was made in the ADC's Statement of Essential Facts for this investigation.[17]

In the ADC's visit report, the ADC considered that there was no "guidance" whatsoever under the Act in relation to the determination of the "exporter" in respect of an importation, and therefore claimed that it made its determination based on its own guidance – the Customs Dumping and Subsidy Manual (the Manual). The ADC concluded that *"DSM meets the requirements of the Manual"* for the determination of a party as the "exporter", namely that it is or can be:

> *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*

This is so despite the fact that DSM was not the principal in the export transaction, and did not arrange or place the goods for shipping to Australia. The definition in the Manual applies more closely and appropriately to the status, functions and activities carried out by GSG.

It appears to us that 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."*

It also appears that the fact that DSM knew of the ultimate destination of the sales when accepting GSG's order, and that it also knew its domestic price of the goods when making the sale to GSG, were significant to the ADC in determining that DSM was the exporter. Thus, despite DSM's clearly demonstrated remoteness from the export transaction, the ADC applied an "awareness" test to classify DSM as the exporter.

DSM submits that this "knowledge" can have little bearing on the question of who is the exporter of goods alleged to have been dumped. We believe that the question of whether a party is an "exporter" is to be determined by the contractual terms of the sales; the roles the parties perform in the exportation of goods; the sales activities involved; and the relationships between the parties to a transaction. Every

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16 REP 198, page 27

17 Referred to herein as "SEF 198", at page 24

manufacturer is aware of its domestic sales prices, and we do not know why that simple fact would constitute a manufacturer as being the exporter of goods to a foreign country like Australia where a different party actually negotiates, makes, arranges and handles those export sales.

The requirement for a party labelled as a "trader" to take inventory into stock in order to qualify as an exporter also appears to be an extraneous one, and is not mentioned in the Customs Manual.

In any event, as discussed below none of the factors mentioned by the ADC are indicated by the ordinary meaning of "exporter", and have not been considered to be relevant by the Federal Court in its consideration of what constitutes an "exporter" for the purposes of the dumping provisions of the Act. We believe that a proper appreciation of those authorities – both the dictionary meaning and the special meaning applied by the Federal Court – leads to the proposition that DSM was not the exporter in the circumstances of this case.

## E Legal interpretation – "exporter" and "export price"

The Macquarie Dictionary does not give a separate definition for the word "exporter". However "export" is defined as:

> *to send (commodities) to other countries or places for sale, exchange, etc*

The evidence established that GSG was entirely responsible for its sales to Australia. It negotiated and signed contracts with the Australian importer prior to placing any orders with DSM for production. GSG puts its own orders into DSM's production system. GSG arranged shipment and instructed DSM as to when the goods needed to be available for collection at the factory for the carriage to the port. GSG took physical and possessory responsibility in the goods by collecting the goods from DSM before the FOB point. The goods were sent to the Australian customers by GSG **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information describes the trading term for GSG's exports, which makes GSG responsible to the extent of those terms]**. GSG was stated as the shipper of the goods on the Bill of Lading when the goods were sent to Australia. All documentation involved in the export sales suggests that GSG was the exporter of the goods to Australia.

Further, the issue of "who is the exporter" and whether a "trader" or "intermediary" party can be regarded as the exporter of the goods under the Act has been examined through judicial review by the Federal Court and in previous anti-dumping investigations by the investigating authority itself.

In *Companhia Votorantim de Celulose E Papel v Anti-Dumping Authority and Ors* ("the Celpav case"),[18] the Federal Court was invited to consider the meaning of the term "exporter" under the Act and whether the applicant, a Brazilian manufacturer, should be regarded as the exporter of the goods to Australia, rather than a Japanese trading company that was involved in the exportations.

Importantly, the Federal Court made clear in the Celpav case that all the circumstances of the relevant transactions must be considered. The role of the supplier must be properly characterised in order to determine whether it is the exporter, or whether it "facilitates" the export of the manufacturer's products such that the manufacturer is more relevantly the exporter.

In the Celpav case, the Court at first instance found that Celpav's trader – the Japanese trading company - could not be characterised as the exporter of the goods. This decision was affirmed on appeal to the Full Court. Finn J noted that:

> *circumstances may exist where a supplier of goods so uses a manufacturer as its instrument in its supply of goods to an importer that the supplier can properly be characterised as the exporter of those goods from the country of origin in question.*

DSM submits that its relationship with GSG in the case of GSG's exports of the goods to Australia is precisely the circumstance where the supplier is properly to be characterised as the exporter, in the manner and context as envisaged by Finn J in the Celpav case.

The evidence establishes that DSM was not involved in any way in the export of the goods by GSG to Australia. That may appear to be a too-wide statement - in the context of DSM's awareness that GSG exported the subject goods to Australia - but it is not. The awareness was in fact the reason that DSM was not the exporter, because it was that awareness which [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information describes the minimal position of DSM and the maximum position of GSG relating to the Australian market]. For GSG's sales to Australia, DSM [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted

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18 [1996] FCA 1399 (19 April 1996)

information is a characterisation of DSM as instrument of GSG so far as GSG's exports to Australia concerned].

The supplier – GSG – absolutely and consistently used the manufacturer – DSM – as its instrument in its supply of goods to the Australian importer.

The sales to GSG were at a factory acquittal level. The sales activities on DSM's part were nothing to minimal. DSM was not involved in the pricing for the export sales by GSG. This was not a case of GSG carrying out an agency or distributorship arrangement on behalf of DSM, as there were no such arrangements. The pricing practice adopted underlines that GSG was making sales to Australia entirely in its own right. This is also evident from GSG's behaviour its [CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is a comparison of GSG's pricing and risk conduct in relation to DSM-manufactured products, to its commercial position regarding other matters] in its sales of non-DSM products.[19]

On appeal to the Full Court in the Celpav case,[20] the majority noted the judicial consideration given to the meaning of the term "exporter" by the High Court in *Henty-Bainbridge-Hawker*,[21] where Owen J said:

> *Another general submission was made that neither the defendant nor the companies which he directed and managed could be found to have been the exporter of prohibited exports because whatever goods were in fact exported were sold f.o.b. Sydney to an overseas buyer. The seller's obligations therefore ceased when the goods were placed on board the ship at the Port of Sydney and it was the overseas buyer who thereupon became the exporter of them. For the purposes of this case it is sufficient to say that if, in the case of an f.o.b. contract with an overseas buyer the seller places the goods sold on board a ship bound for foreign parts and engages with the shipowner to carry them to the overseas buyer and the goods are carried overseas, the seller has, in my opinion, exported the goods within the meaning of the Customs Act.*[22]

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19 Joint submission of DSM and GSG re plate steel export to Australia dated 20 May 2013, page 7

20 See *Companhia Votorantim de Celulose E Papel v Anti-Dumping Authority and Ors* (1996) 141 ALR 297, at pages 9 and 10.

21 (1963) 36 ALJR 354

22 *Ibid*, at page 356

In the Celpav case, the goods were shipped by the manufacturer Celpav from Brazil under CFR terms in a sale arranged by a Japanese-based trader, Dai-Ei. The trader on-sold the goods to the Australian importer.

To the contrary in the instant case, it was established, by the evidence, that DSM did not ship the goods to Australia under the terms of some direction or arrangement by a trader. Instead, DSM sold the goods to GSG, and GSG then exported the goods from Korea to Australia under **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information describes the trading term for GSG's exports, which makes GSG responsible to the extent of those terms]**.[23] Moreover, GSG purchased the goods before the point of shipment under **[CONFIDENTIAL TEXT DELETED – to allow a reasonable understanding, the deleted information is the legal description of the trading term between DSM and GSG]** discussed above, always within Korea, and always before the port. DSM played no part in the actual exportation of the goods out of Korea, apart from knowing the ultimate destination of the goods from the production order provided by GSG which stated the specification of the goods and that destination, and from the shipping schedule provided by GSG to DSM so that the goods could be made available to GSG's carrier.

Further, the Full Court majority in the Celpav case noted that in the context of determining the "exporter" and the related issue of "export price", it is important to keep in mind the fundamental purpose of the anti-dumping provisions of the Act. For both concepts, the key is "export", namely the place of export and the export price. The Court concludes that the point of consideration of the export price is at the export point:

> *We agree that anti-dumping laws could be made to focus attention on the landed cost of the goods in the country of import, rather than the price received by the producer. It seems this possibility was considered at one time. In their work* Anti-Dumping and Anti-Subsidy Law, the European Communities, *Beseler and Williams recounted some initial confusion in the General Agreement on Tariffs and Trade (GATT). They said, pp 80-1:*
>
> ...

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[23] See *Companhia Votorantim de Celulose E Papel v Anti-Dumping Authority and Ors* (1996) 141 ALR 297. After considering Owen J's decision in *Henty v Bainbridge-Hawker*, the majority of the Full Court considered that the fact that Celpav arranged for the goods to be exported out of Brazil under C&F terms strengthened the case for the finding that Celpav was the exporter.

> *The Group took the view that the word "exported" in Article VI provided the guide for establishing the dumped price and this factor, together with the requirements to make due allowance for differences affecting price comparability, led it to conclude that the essential aim was to compare the normal domestic price in the exporting country with the price at which the merchandise left that country and not the price at which it was imported. The Anti-Dumping Code confirms this view by stressing that the export price should be the price of the "product exported from one country to another", and Community legislation clarifies the position even further by providing that the export price shall be the "price actually paid or payable for the product when sold for export to the Community".* [emphasis added]

The passages quoted above were referred to by the Court in rejecting the claim that the price paid by the importer should be the prime consideration in working out which party should be considered as the exporter – in other words, that the party selling to the importer was necessarily the exporter. The Court indicated that attention should be paid to the stage where *"the 'product [is] exported from one country to another'"*. Unlike the Celpav case, where the manufacturer exported the goods from Brazil under the direction of a trader based in Japan who then on-sold the goods to Australia, there is no doubt from the facts demonstrated by DSM and GSG that the only exportation in the instant case is between GSG and its importer. The party which negotiated, contracted with the importer and arranged for the goods to be shipped from Korea was GSG, not DSM. The price of the product exported from Korea to Australia was that of the price charged by GSG to its importer, not the price paid by GSG to DSM.

In terms of previous administrative precedent, we wish to draw attention to one of the findings arrived at in the investigation concerning the alleged dumping of linear low density polyethylene from the USA and Canada.[24] In that case the then investigating authority, the Australian Customs and Border Protection Service ("Customs") found that the US trading company Entec Polymers LLC, rather than the US manufacturer of the goods, was the exporter of the goods, for the following reasons:

> *Entec negotiated the sale of the goods with the Australian importers;*
>
> *Entec booked the containers required for export;*
>
> *Entec packed the goods in the containers;*
>
> *Entec arranged for the physical transportation of the goods to the port of export;*
>
> *Entec arranged the export clearance of the goods;*

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[24] Customs' exporter visit report in relation to Entec Polymers LLC, http://adcommission.gov.au/cases/documents/70-Report-ExporterReport-Entec.pdf

*Entec arranged for the goods to be shipped to the Australian port of importation; and*

*Entec invoiced and received payment from the importers for the goods*[25]

DSM notes that GSG's practices in relation to the exports of the goods under consideration in the instant case meet the considerations taken into account by Customs in its finding that Entec was the exporter of the goods.[26]

## 8 Conclusion and request

The decisions to which this application refers are reviewable decisions under Section 269ZZA of the Act. Where references are made to the ADC and its recommendations, it is those recommendations which were accepted by the Minister and form part of the reviewable decision that DSM seeks to have reviewed.

DSM is an interested party in relation to the reviewable decision.

DSM's application is in the approved form and has otherwise been lodged as required by the Act.

We submit that the DSM's application is a sufficient statement setting out DSM's reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information is at **Attachment D**.

On behalf of DSM, we respectfully request that the ADRP:

- undertake the review of the reviewable decision as requested by this application under Section 269ZZK of the Act; and

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25 *Ibid*, page 14

26 The goods under consideration are not "packed" into containers. Because of their size and shape, they are stacked, lifted and carried, and not containerised.

- 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.

Lodged for and on behalf of Dongkuk Steel Mill Co., Ltd

Daniel Moulis
Principal

Moulis Legal