Australian Government

Anti-Dumping Review Panel

DECISION OF THE ANTI-DUMPING REVIEW PANEL

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REVIEW OF DECISION TO IMPOSE DUMPING DUTIES ON:

ALUMINIUM ZINC COATED STEEL EXPORTED FROM THE REPUBLIC OF KOREA

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Introduction

1. Onesteel Coil Coaters Pty Ltd (**OCC**) has applied, pursuant to sections 269ZZA and 269ZZC of the Customs Act (**the Act**), for a review of the decision of the Attorney-General to impose dumping duties in respect of aluminium zinc coated steel exported to Australia from Korea.

2. The application for review was accepted and notice of the proposed review, as required by section 269ZZI, was published on 20 September 2013. The Senior Member of the Review Panel has directed in writing, pursuant to section 269ZYA, that the Review Panel for the purpose of this review be constituted by me.

3. With its application for Review OCC provided a detailed submission by Minter Ellison, a law firm it retained, to represent it. Submissions were also received from BlueScope Steel Limited (**BlueScope**) on 17 October 2013. A further submission was received from OCC dated 18 October 2013.

4. In conducting this review I have had regard to the matters set out in the application for review by OCC and the documents to which reference is made in that application. I also had regard to the submission by BlueScope and the further submission by OCC except to the extent that the submissions raised matters to which I could not have regard under sub-section 269ZZK(4).

Background

5. On 3 August 2012 an application was made by BlueScope, pursuant to section 269TB of the Act, that the Minister publish dumping notices in respect of, among other things, aluminium zinc coated steel exported from Korea. The application was accepted and an investigation was initiated on 5 September 2012.

6. The findings made as a result of the investigation were set out in Report 190 of the International Trade Remedies Branch of the Australian Customs and Border Protection Service (**Customs**). On 25 July 2013 the Attorney-General accepted the recommendations made in Report 190 and made declarations pursuant to sub-sections 269TG(1) and (2) of the Act that section 8 of the Customs Tariff (Anti-Dumping) Act 1975 (**the Dumping Duty Act**) applied to certain goods, including aluminium zinc coated steel exported from Korea, except for one exporter. Notice of the Attorney-General's decision was published on 5 August 2013.

7. Details of the anti-dumping investigation and the reasons for the imposition of anti-dumping measures are set out in Report 190.

Ground for Review

8. OCC contends that the decision to impose anti-dumping measures with respect to its exports was not the correct or preferable decision for the following reasons:

   (a) In circumstances where, during the relevant periods, the Australian industry producing unchromated steel did not sell the product to unrelated parties and did not offer the product for sale to unrelated parties on commercial terms there were no reasonable grounds for the Attorney's expression of satisfaction that the exported goods imported by OCC had caused or were causing material injury to the Australian industry;

   (b) the Commissioner's (*sic*) failure, in recommending ascertained export prices to the Attorney, to take account of significant raw material price reductions after the end of the investigation period has resulted in the determination of inflated dumping margins and the preferable determination would be one that takes account of more recent price data;

   (c) the decision to express the Ascertained Export Price (**AEP**), in US dollars rather than Australian dollars results in an increase in the floor price of the imports if the value of the Australian currency depreciates; the preferable decision would be to express AEPs in Australian dollars.

Consideration of Ground of Review

9. Each of the reasons put forward by OCC in its application for review are considered below.

No material injury caused

10. OCC produces a number of products for which unchromated aluminium zinc coated steel (**unchromated steel**) is an input. BlueScope does produce unchromated steel and there is no dispute that this is a like good to the imported product. The argument by OCC is that the imported product cannot have caused material injury to the Australian industry producing like goods.

11. The issue of unchromated steel was dealt with in Report 190 at paragraph 6.6.3 and paragraph 7.3.2.2. Customs found that the imported and locally produced unchromated coated steel goods are like goods. Importantly, the Report does not find that the imported unchromated steel is a like good to the other coated steel products coming within the description of the goods under investigation.

12. The Report then deals with the issue of whether or not the imported product should be granted an exemption under sub-section 8(7) of the Dumping Duty Act. OCC and another company had sought an exemption under paragraph (a) of this sub-section which relevantly provides that :

> "The Minister may, by notice in writing, exempt goods from interim dumping duty and dumping duty if he or she is satisfied:
> (a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade;…".

13. After examining the evidence, Report 190 concludes that BlueScope did offer like goods to all purchasers on equal terms under like conditions and accordingly, Customs did not recommend an exemption be granted.

14. OCC does not seek a review of the decision not to exempt the imported unchromated steel under sub-section 8(7) the Dumping Duty Act. Consequently, it is not necessary to consider whether or not the Review Panel has the power to review a decision under that subsection. There must however be some doubt that the Review Panel can review such a decision. It would not seem to come within the terms of section 269ZZA of the Act.

15. As noted above, OCC contends that the imported unchromated steel cannot have caused injury to the Australian industry. The evidence before Customs was that BlueScope (the only Australian producer of unchromated steel) used the unchromated steel it produced as feedstock for its painted coated steel business. Painted steel was excluded from the investigation. OCC submitted that BlueScope did not offer unchromated steel to third party customers or did not offer the product for sale on commercially sustainable terms.

16. The evidence before Customs was that there was a one off sale by BlueScope of a small quantity to a related party during the investigation period. A quote was provided by BlueScope to Customs pursuant to which it offered to supply OCC with unchromated steel. Customs examined the quote and noted that the quote was higher than the chromated product

lines which had undergone further processing. This was explained as being based on the market demand for the final painted product and that the unchromated steel was used to produce a much higher priced output product (i.e., the painted steel as compared with the chromated steel).

17. Further offers were made by BlueScope to OCC and another company to supply the unchromated steel. These were made after the publication of the Statement of Essential Facts. While these offers may have been relevant to a consideration of an exemption under sub-section 8(7) of the Dumping Duty Act, they are of little assistance in determining whether or not material injury was caused or threatened to the Australian industry by the dumped imported products. In any event, it is claimed by OCC that the offer was on less commercial terms than the previous offer.

18. In Report 190, Customs noted the claim by OCC that no injury had been caused to BlueScope by the importation of unchromated steel because BlueScope did not sell the product during the investigation period. Customs appears to have only considered the issue of the imports of unchromated steel in the context of the claim for exemption under sub-section 8(7) of the Dumping Duty Act and does not appear to have separately analysed these imports in its consideration of whether or not dumped imports of the goods under investigation had caused material injury to BlueScope.

19. In order for the Minister to have made a declaration under subsections 269TG(1) or (2) of the Act, the Minister had to be satisfied that because of the export to Australia of the unchromated steel at dumped prices, "material injury to an Australian industry producing like goods has been or is being caused or is threatened…". On the evidence as set out in Report 190, it is difficult to see how the Minister could have been so satisfied.

20. At paragraph 11.5 of Report 190, there is a finding that dumping had caused injury to BlueScope with respect to the aluminium zinc coated steel business in the form of:
    - loss of sales volumes;
    - reduced sales revenues;
    - price depression;
    - price suppression; and
    - reduced profit and profitability.

21. As BlueScope did not sell unchromated steel during the investigation period but rather used it as feedstock for its painted steel business it is difficult to see how injury in the form of the above could have been caused. Importantly, the painted steel business was excluded from the investigation.

22. The basis for the price injury suffered by BlueScope as established by Customs during the investigation and described in Report 190 was BlueScope's import pricing parity policy **(IPP**). The IPP is described at paragraph 11.4.1 of Report 190. The evidence before Customs as set out in Report 190 establishes that the IPP was not used by BlueScope when it offered the unchromated steel product for sale. Accordingly, the findings in Report 190 with respect to the effect of the IPP are not relevant to BlueScope's production of unchromated steel.

23. The Minister could only have been satisfied that the imports of unchromated steel had caused material injury if they were like goods to the coated steel products which were sold by BlueScope and with respect to which the injury findings were made. However, the finding with respect to the unchromated steel imports was specifically limited to unchromated steel being a like product to the unchromated steel produced by BlueScope. Further, the analysis undertaken by Customs for the purpose of considering the claim for exemption under sub-section 8(7) assumes that the other coated steel products are not like or directly competitive with the unchromated steel.

24. BlueScope's response to the submission by OCC was:
"BlueScope would highlight that the unchromated steel is included within the goods the subject of investigation, the Australian industry manufactures like goods to the imported goods, and it has been determined that the exported goods were at dumped prices during the investigation period. The imported goods are wholly interchangeable with locally produced unchromated steel and the dumped imports have prevented the Australian industry from selling locally produced unchromated steel to OCC."

25. The contention by BlueScope that it was prevented by the dumped prices of imported unchromated steel from selling its product to OCC, was not the focus of the investigation by Customs. Rather, the focus was on whether or not there was a basis for exempting the imports of unchromated steel under sub-section 8(7) of the Dumping Duty Act. This is unfortunate. However, what material there was before the Minister does not support a finding that BlueScope was prevented from selling its

unchromated steel product because of the dumped imports of that product. The evidence instead indicates that the reason BlueScope did not sell its product was because of how it priced its unchromated steel. There is no evidence that this pricing was done to meet the price competition from the imported product. Such evidence that there was of a pricing policy was that the product was priced by BlueScope according to the value in production of the finished painted steel product in the market. While, as Customs notes, this is an acceptable commercial practice, it does not evidence any injurious effect on BlueScope's business of the prices of the dumped product.

26. In its subsequent submission on 18 October 2013, OCC made further arguments in support of its contention that the Australian industry had not suffered material injury from the dumped imports. These arguments were not made in the application for review and were made after BlueScope had made its submission. Given that I have already concluded that the finding of material injury in relation to the imports of unchromated steel cannot be supported, I have not addressed these further arguments. They are similar to those made by POSCO (a Korean exporter) in its appeal and will be dealt with in that review.

27. For the above reasons, the decision to include the unchromated steel product in the goods the subject of the notice under subsections 269TG (1) and (2) was not the correct or preferable decision.

Ascertained Export Price

28. OCC contends that in fixing the AEP, average prices applying in a 12 month period subsequent to the investigation period should have been used rather than an average export price over the investigation period. OCC concedes that the AEP for exporters is usually determined having regard to the prices ascertained during the investigation period, which is what happened in this case.

29. The reason given by OCC for using more recent prices was that during the 12 month period following the investigation period, benchmark prices fell by more than USD 100/t. OCC argues that an AEP based on the higher export prices over the investigation period means that the anti-dumping measures are having an impact beyond that necessary to counter the alleged injury to the Australian industry and unfairly impacts downstream businesses.

30. The information as to the more recent export prices is information to which, by virtue of sub-section 269ZZK (4), the Review Panel cannot have regard. Such information does not come within the definition of "relevant information" in subsection 269ZZK (6) which restricts the information to that which the Chief Executive Officer of Customs (now the Anti-Dumping Commissioner) had or was required to have regard when making the report to the Minister under section 269TEA.

31. Even if there was information regarding more recent export prices which could be taken into account, an analysis of the relevant sections of Part XVB of the Act would still result in the submission failing.

32. The investigation period for an anti-dumping investigation is that set out in the notice issued under subsection 269TC (4) of the Act at the commencement of the investigation. Paragraph 269TC (4) (bf) of the Act refers to the examination of exportations to Australia of goods the subject of an application during a period specified in the notice as "the investigation period".

33. Pursuant to section 269TACB of the Act, the export price or prices of goods exported to Australia during the investigation period are those used to determine whether or not dumping has occurred. This determination is one of the preconditions to the decision of the Minister under sub-sections 269TG (1) and (2) of the Act to declare that section 8 of the Dumping Duty Act applies.

34. Subsection 269TG (3) requires that in any notice under subsections 269TG (1) and (2) the Minster has to include a statement of the normal value, export price and non-injurious price of the goods. These are known as the variable factors which are used in the calculation of any dumping duty.

35. In *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870, Justice Nicholas stated:

> "When s 269TG is read as a whole, it is apparent that subs (3) refers to the goods the subject of a declaration under subss (1) or (2). In particular, the references in subs (3) (c) of s 269TG to "the goods to which the declaration relates" and in subs (3) (d) and (e) to "those goods" indicate that the goods referred to are the same goods as those the subject of the declaration made under subss (1) or (2) and that they will have the same dumping margin as that calculated pursuant to s 269TACB. In my opinion, if a declaration is made under

subss (1) or (2) in respect of goods then subs (3) requires that, along with the relevant declaration, the public notice set out details of the ascertained variable factors that led to the declaration. The ascertained normal values and export prices will each be the same single figure (usually expressed as a percentage) referable to a particular exporter that was used to determine, in accordance with the requirements of s 269TACB, whether dumping occurred and, if so, at what margin.
140 Further, where in Part XVB of the Act the Minister is conferred with a discretion as to how he or she will go about determining a dumping margin, the relevant provisions usually make this quite clear. There is nothing in s 269TG to suggest that there was any intention to confer upon the Minister a discretion that would enable him or her to determine variable factors different to those utilised for the purpose of determining whether dumping occurred and, if so, at what margin."

36. The above analysis indicates that the AEP for the purpose of any dumping duty notice is to be that used to determine whether or not there was dumping. A different AEP cannot be used for the purpose of subsection 269TG (3). For this reason, it does not appear to be open to the Minister to ascertain a different export price for the purpose of the calculation of the dumping duty.

37. Accordingly, the submission by OCC that the AEP should be revised to reflect more price trends after the end of the investigation period must fail. If, subsequent to the imposition of anti-dumping measures, there are changes in the variable factors, the remedy available to an affected party such as OCC is to seek a review of the variable factors under Division 5 of Part XVB of the Act, once the 12 month period has expired.

AEP Currency

38. The final reason put forward by OCC as to why the decision of the Attorney-General was not the correct or preferable decision is that the AEP was expressed to be in US dollars rather than Australian dollars. OCC contends that this is a departure from the more common practice of expressing the AEP in Australian dollars. In fact, the Dumping and Subsidy Manual (August 2012) published by Customs provides that the AEP will generally be expressed in the currency in which the export sales are usually made (page 144).

39. OCC refers to the non-injurious price (**NIP**) as being expressed in Australian dollars as being a reason for also expressing the AEP in Australian dollars. In Report 190 the NIP for exports from Korea was fixed at the price equal to the normal value for each of the exporters. So, in this case the NIP does not have a role in the determination of the dumping

duty. However, there does not seem to be any reason why the AEP should not be expressed in US dollars. As noted by OCC the movement of the exchange rates can also erode the value of the dumping measures to Australian industry where there is an appreciating Australian dollar.

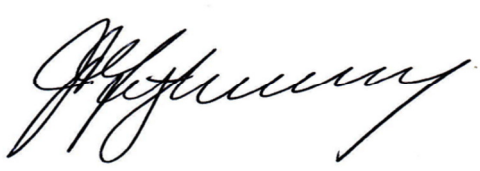
Conclusion

40. For the reasons set out above, I find that the decision to include imports of unchromated steel products in the declaration made under subsections 269TG (1) and (2) was not the correct or preferable decision.

41. Accordingly, pursuant to section 269ZZK of the Act, I recommend that the Minister revoke the reviewable decision and substitute a decision which excludes unchromated steel from the description of the goods that are the subject of the notice under subsections 269TG (1) and (2) of the Act such that section 8 of the Dumping Duty Act does not apply to exports of unchromated steel.

42. I note that OCC has proposed the following wording for the description of the goods the subject of the amended notice:
"flat rolled products of iron and non-alloy steel of a width equal to or greater than 600mm, plated or coated with aluminium- zinc alloys, not painted whether or not including resin coating, excluding products that are not chromated. "

43. The proposed wording is appropriate to reflect the above recommendation.



Joan Fitzhenry
Anti-Dumping Review Panel Member
8 November, 2013