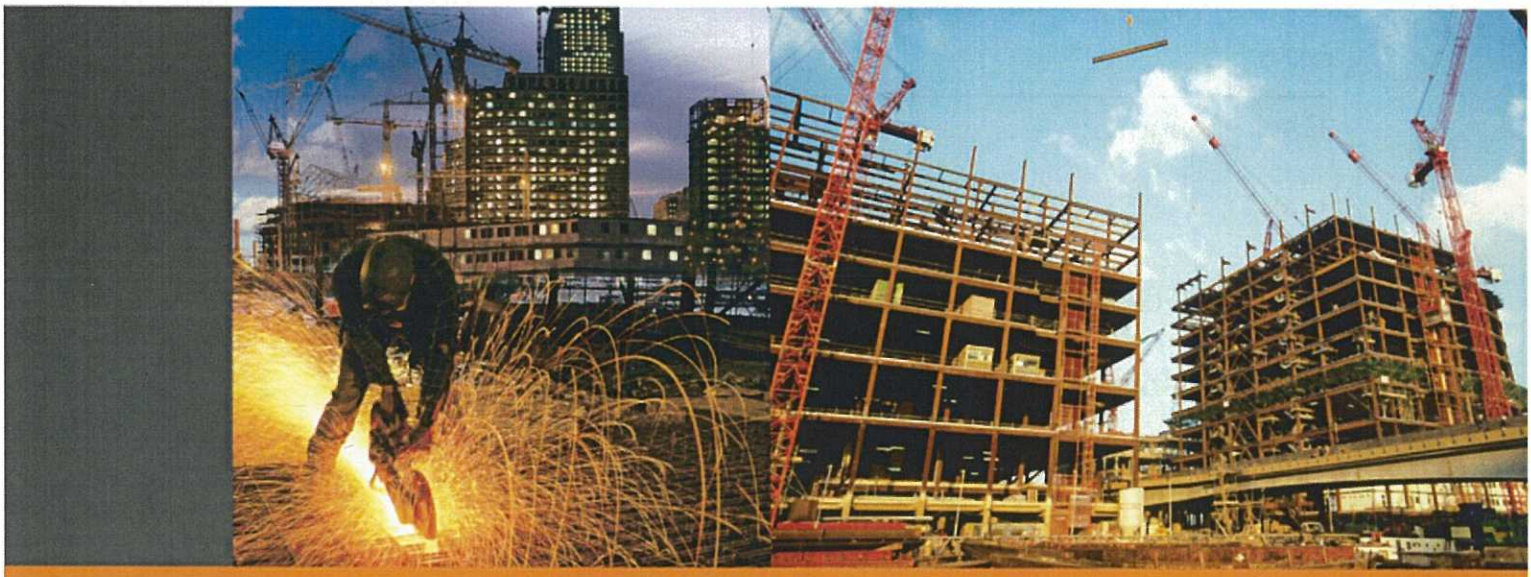
Australian Government

Anti-Dumping Review Panel

DECISION OF THE ANTI-DUMPING REVIEW PANEL



WWW.**ADREVIEWPANEL.**GOV.AU

Australian Government
Anti-Dumping Review Panel

ANTI-DUMPING REVIEW PANEL
C/O LEGAL SERVICES BRANCH
AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE
5 CONSTITUTION AVENUE
CANBERRA CITY ACT 2601
P +61 2 6275 5868 I F +61 2 6275 6784
ADRP_SUPPORT@CUSTOMS.GOV.AU

GALVANISED & ALUMINIUM ZINC COATED STEEL EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

REVIEW OF DECISIONS TO TERMINATE AN INVESTIGATION TO PUBLISH A COUNTERVAILING DUTY NOTICE

BACKGROUND

1. BlueScope Steel Limited (**the applicant**) manufactures in Australia galvanised steel and aluminium zinc coated steel (**coated steel products**). A distinction will be drawn between these products only where necessary.

2. On 18 October 2012 the applicant applied for countervailing duty notices under s269TB of the *Customs Act 1901* (**the Customs Act**) in respect of coated steel products exported to Australia from the People's Republic of China. The application was advanced on the basis that the exportation of low-priced, subsidised coated steel products from China had caused significant material injury to the Australian industry producing coated steel products since 2010-11 and threatened to continue to cause further injury.

3. The Australian Customs and Border Protection Service (**Customs**) initiated an investigation on 26 November 2012 and on 15 May 2013 published a Statement of Essential Facts (**SEF 193**). The investigation period was from 1 July 2011 to 30 June 2012. While SEF 193 foreshadowed recommending the publication of countervailing duty notices by the Minister, it foreshadowed not making such a recommendation in relation to coated steel products exported by Angang Steel Company Limited (**ANSTEEL**) and galvanized steel exported by ANSC TKS Galvanising Co., Ltd (**TAGAL**).

4. On 17 June 2013 Customs published an Australian Customs Dumping Notice (No 2013/50) terminating the investigation relating to coated steel products exported by ANSTEEL and galvanized steel exported by TAGAL. It did so on the basis that the subsidy margin was not more than 2%. Customs reasons for this decision were set out in Termination Report 193(i) of the same date (**TER193(i)**).

5. On 15 July 2013 the applicant applied for review of this termination decision. The application was not rejected and the review was allocated to me under s269ZYA of the Customs Act.

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

DECISION

7. I have decided to revoke, in part, the reviewable decision and affirm, in part, the reviewable decision. The precise terms of my decision are recorded in paragraph 24.

MATERIAL TAKEN INTO ACCOUNT

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

9. I have considered the grounds and information set out in the application made by the applicant.

10. I have had regard to further analysis of some of the information undertaken by Customs at my request (see paragraphs 19 to 22). I share the view of the TRMO (see review of TER181) in relation to a cognate provision, that regard to a further analysis of the same information is not contrary to s269ZZT(4) in its present terms.

REASONS FOR MY DECISION

11. The role of the Panel member in a review of a termination decision is to determine whether the decision to terminate was the correct or preferable one. If I conclude that it was, then I must affirm the decision (even if I consider that some of the criticisms of the process levelled by the applicant have merit). If I conclude it was not, I must revoke the decision.

The applicant's grounds

12. The applicant noted that Customs determined in relation to galvanised steel, that goods exported by ANSTEEL and TAGAL were in receipt of countervailable subsidies and the aggregate subsidy margin was assessed at 1.4% and 1.7% respectively. The applicant also noted that Customs determined in relation to aluminium zinc coated steel, that goods exported by ANSTEEL were in receipt of countervailable subsidies and the aggregate subsidy margin was assessed at 1.2%.

13. There were three limbs to the applicant's argument. The first concerned the provision of coking coal to ANSTEEL by government at less than adequate remuneration. The second concerned the calculation of the benefit received by ANSTEEL under three government programs. The third concerned the acquisition by TAGAL of feedstock from ANSTEEL where TAGAL's purchase price was influenced by the benefit ANSTEEL derived from purchasing coking coal at less than adequate remuneration.

    13.1 As to the first limb, the applicant noted the following. Customs accepted that the domestic prices of coking coal was influenced and distorted by the Government of China (**GOC**). Customs considered three options for determining adequate

remuneration. Customs elected to identify an external benchmark as the means of determining adequate remuneration rather than using private domestic prices or export prices. The benchmark was Chinese export prices for coking coal.

13.2 The applicant referred to an observation of Customs in SEF 193 that:

The use of Chinese export prices is not without problems. As noted above, coking coal is of varying qualities. The GOC was not able to identify in the export data what type of coking coal was represented in the prices. Customs and Border Protection cannot be certain that the coking coal purchased by Chinese manufacturers of galvanised steel and aluminium zinc coated steel is comparable, in terms of quality, to the exported coking coal.

13.3 In its application, the applicant argued that the Chinese export prices were not an appropriate benchmark. It argued that the appropriate benchmark was published prices as reflected in industry publications such as Steel Business Briefing (**SBB**).

13.4 The Panel requested particulars from the applicant and, in particular, requested that the applicant identify what the most appropriate benchmark was and reasons why this benchmark should have been used. The response of the applicant involved a change in focus. First it did not nominate a published price as suggested in its application. Rather the applicant appeared to argue that the benchmark should reflect, as a minimum, coking coal constituted by a blend of premium hard coking coal and low-grade coking coal. The applicant said it could not nominate relevant prices because it did not have access to GOC's coking coal export price information. Implicit in the submission was that the benchmark should be the price of coal constituted by an amalgam of hard coking coal and low-grade coking coal exported from China.

13.5 As to the second limb, the applicant noted that Customs had ascertained, for the purposes of s269TACC, the amount of the subsidy by applying a formula. It did so in considering the effect of program 30 involving capital injection by the GOC. An integer in that formula was a discount rate. The applicant noted that Customs had said, of the rate used, that the discount rate was at the lower end of the range of long-term loan rates of the exporter set out in the exporter's annual reports the 2010 and 2011 and the interim report for 2012. The applicant did not challenge the use of the formula. However the applicant argued that this discount rate was not linked to the investigation period. In its answer to the request for particulars, the applicant argued that the discount rate that should have been used was the base

interest rate determined by the Chinese Central Bank applicable between July 2011 and June 2012. That rate was 6.56%.

13.6 As to the third limb, the applicant noted that in the TAGAL exporter visit report, Customs said TAGAL was a limited liability joint venture company and ANSTEEL was a 50% shareholder. The report also noted that TAGAL purchased 95% of its value added Hot Rolled Coil (**HRC**) from ANSTEEL during the investigation period used in the manufacture of galvanised steel. The applicant asserts that TAGAL did not use, as feedstock for galvanising lines, HRC but rather used Cold Rolled Full Hard coiled steel (**CRFH**). In effect, the applicant argued that irrespective of whether the feedstock was HRC or CRFH, the benefit ANSTEEL derived from acquiring subsidised coking coal had to be factored into the assessment of the countervailable subsidies received by TAGAL. The applicant argued Customs did not do this.

14. Section 269TDA contains several provisions which operate as filters. One such provision is s269TDA(2) when read together with s269TDA(16). It was the applicable provision in the present case. The purpose of that provision is to bring to an end an investigation where there is countervailable subsidisation but it is negligible. The filter operates in this way when, because of the negligible countervailable subsidisation, there is a real prospect there has been or will be no material injury to and Australian industry or the Minister might otherwise decide not to publish a relevant notice.

15. However it is clear from the terms of s269TDA(2) that, in a case such as the present, where there had been a countervailable subsidy, the CEO can only reach a level of satisfaction leading to termination if the evidence is clear that the countervailable subsidy was not more than the threshold of 2%. The evidence must justify an affirmative conclusion that it is not more than the specified percentage. The need for an affirmative conclusion, though in a slightly different context, was discussed by Stone J in *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* [2004] FCA 1659 at [35] and, on appeal, the Full Court at [24] to [31] in [2005] FCAFC 101. The need for an affirmative conclusion is apparent from general context of the sub-section and also, in particular, the emphatic language in s269TDA(2) that "... a countervailable subsidy has been received.... **but it never, at any time during the investigation period**, exceeded the negligible level ...." together with the requirement that the investigation **must** be terminated.

16. Decision-making is a function of the real world: *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469. However, in my opinion, a conclusion that a countervailable subsidy never exceeded the negligible level should not be based on information which is, relatively obviously, imprecise or not entirely apt and where either

characteristic would allow for the real possibility that the threshold of 2% could have been exceeded. If there is such a real possibility, s269TDA(2) will not be engaged and the investigation should not be terminated. When the available information suggests, but inconclusively, the countervailable subsidy is low, that indicator is likely to inform the investigation in other ways, for example when considering the question of whether there has been or will be material injury.

17. I formed the preliminary view that aspects of the applicant's submissions in relation to the appropriate methodology were well-founded.

18. In particular, Customs' acknowledgement that problems attended the use of Chinese export prices raises the question of whether resultant calculations provided a sufficiently firm foundation for the satisfaction required to terminate the investigation under s269TDA(2).

A re-calculation on acceptance of the applicant's grounds

19. I first address the use Chinese export prices in assessing adequate remuneration. Customs did not have information which would have permitted the creation of a notional price of exported Chinese coking coal as a blend, at a minimum, of premium hard coking coal and low-grade coking coal. Accordingly, the methodology suggested by the applicant is one I am not in a position to test as I can only have regard to information that was before the CEO. However in addition to the Chinese export price, Customs did have before it, several prices (from different sources) of Australian export coking coal, which was a premium hard coking coal. For reasons explained by Customs, it did not use that price as the benchmark because, at the relevant time, the price may have been unusually high because of weather conditions in Australia (a conclusion not challenged by the applicant in this review). But taking the highest of those prices (of Australian export coking coal) and applying it to a less sophisticated but similar methodology used by Customs to calculate the subsidy margin for the coated steel product of ANSTEEL, the result is subsidy margin of significantly more than that determined by Customs in SEF 193. For galvanized steel it would have been more than 1.4% greater than the 2% specified in s269TDA. For aluminium zinc coated steel it would have been nearly 1% greater than the 2% specified in s269TDA. Both these calculations of what may have been the subsidy margin were done by Customs at my request. Another calculation done by Customs at my request was to determine the prices that would have, theoretically, produced the 2% subsidy margin. Again it involved a less sophisticated but similar methodology as used by Customs in calculating the subsidy margins in SEF 193. Those prices would have been prices approximately 5.5% (as to galvanised steel) and approximately 7.5% (as to aluminium zinc coated steel) greater than the prices actually used.

20. These calculations, by themselves, are of no real significance. However they do, in my opinion, assume some importance having regard to the observation referred to at 12.2 above. It was an observation appropriately made. However it points to the real possibility that the coal for which the export prices were ascertained (and used) as the benchmark to determine adequate remuneration, was not of comparable quality to the coal purchased by Chinese manufacturers to manufacture coated steel products. The real possibility that it was coal of lesser quality requires some caution in using the export prices as part of a series of calculations to determine the ultimate issue arising under s269TDA(2), namely whether the countervailable subsidies which had been received exceeded the negligible level of, for present purposes, 2%. The various figures referred to in paragraph 19 illustrate that if the prices actually used were wrong but only by a small margin (and within a margin which is quite conceivable) the 2% threshold would be exceeded. The information before Customs does not, in my opinion, provide a sufficiently firm foundation to conclude that the countervailable subsidy never exceeded the negligible level of 2% so as to require the termination of the investigation.

21. I am satisfied that the ultimate conclusion reached by Customs to terminate the investigation in relation to ANSTEEL coated steel products was not correct. The correct decision is not to terminate the investigation. The discussion in the preceding two paragraphs is not directly relevant to the position of TAGAL.

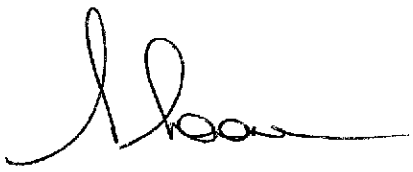
22. In relation to the discount rate used to determine the amount of subsidy under program 30, is not entirely clear from SEF 193 why Customs selected a rate at the lower end of the range of long term loan rates set out in the exporter's annual report for 2010 and 2011 and the interim report for 2012. It is to be recalled that the investigation period was from 1 July 2011 to 30 June 2012. The relevance of rates in the 2010 annual report is not immediately obvious. I made the assumption, as the applicant contended, that a more appropriate rate was the base interest rate of 6.56% determined by the Chinese Central Bank during the period July 2011 to June 2012 (and made the further assumption this was information before the CEO). I asked Customs to recalculate the subsidy margins using this rate. The recalculated amounts are only .01% greater than the margins relied on in making the decision to terminate. In the result, the approach adopted by Customs, even if wrong, had no material bearing on whether a decision should have been made to terminate the investigation.

23. In relation to the third limb of the applicant's argument, it is to be recalled that the subsidy margin assessed for TAGAL was 1.7%. It is possible to conceive of a case where, in the manufacture of goods, a production input is itself subsidised when manufactured (whether directly or indirectly) and the level of subsidisation of the input was significant. In such a case the effect of the subsidy of the input could be relevant in ascertaining the ultimate level of subsidisation of the

manufactured goods. However these general comments would need, in an appropriate case, further refinement and, potentially, a consideration of domestic and international cases concerning the assessment of subsidies in this situation. It is sufficient to say that in the present case the effect of the subsidisation of the coal cannot be said to be of an order which is likely to have a material bearing on the level of subsidisation of the galvanised steel exported by TAGAL. In any event the information necessary to make the calculations to enable the assessment implicit in the applicant's third limb, was not information before Customs and is, accordingly, not available to me. Moreover, on the information that was available to Customs HRC was purchased by TAGAL from ANSTEEL at a price above the price Customs determined as adequate remuneration. This third limb of the applicant's argument does not lead to the conclusion that the decision to terminate the investigation so far as it relates to TAGAL was not the correct decision. It was.

The outcome-the decision to terminate was partly correct and partly not correct

24. To this point I have not drawn a distinction between what, in effect, were two decisions each concerning an exporter: see s269TDA(2). I do so now. The decision to terminate the investigation so far as it relates to the exporter ANSTEEL, is revoked. The decision to terminate the investigation so far as it relates to the exporter TAGAL, is affirmed.



Reviewer: The Hon Michael Moore

Senior Anti-Dumping Review Panel Member

Date: 11 September 2013