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24 November 2021

Ms J Fisher
Member
Anti-Dumping Review Panel
GPO Box 2013
Canberra
Australian Capital Territory 2601

By email

Dear Ms Fisher

Review of Ministerial Decision
Grinding balls exported from China

As you know, we act for for Changshu Longte Grinding Ball Co., Ltd ("Longte") in this review.

Longte makes this submission to the Anti-Dumping Review Panel ("ADRP") in accordance with s 269ZZJ of the *Customs Act 1901* ("the Act").

FOR PUBLIC RECORD

A Introduction

The reviewable decision subject to this review is unusual.

Section 269ZHG of the *Customs Act 1901* ("the Act") envisages that the Minister makes decisions based on the Commissioner's recommendation. In turn, s 269TE of the Act requires the Commissioner to have regard to the same considerations as the Minister in making that recommendation. Indeed, the ADRP's default jurisdiction is limited to "relevant information", on the presumption that a reviewable decision of the Minister is one based on the Commissioner's recommendation.

However, in Inquiry 569, that did not occur. The Minister rejected the recommendation made by the Commissioner under s 269ZHF(1) of the Act and went on to make his own decision, with little regard to the legal and factual requirements of that same Act.

Due to the unusual nature of the Minister's decision, care needs to be taken in this review. In this submission, Longte highlights these irregularities for the purpose of guiding the ADRP towards the correct or preferable decision, and indeed only decision, that is open to be recommended to the Minister.

B Minister's standard for continuation was erroneous and arbitrary

Section 269ZHG(1) of the Act requires the Minister to make his or her decision after considering the report of the Commissioner. The Minister's power is not unbounded. His decision must conform with the governing legislation, and broader legal requirements found in administrative law principles and the relevant international law within which the Australian anti-dumping regime operates. The Minister's decision and how it is arrived at is not "at large" nor "regal" in nature.

At a minimum, the Minister is expected to exercise his power within the bound of Australia's treaty law obligation under Article 11.3 of the *Anti-Dumping Agreement.* Article 11.3 makes it clear that measures must not be continued *"unless the authorities determine… that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury"*, and that this determination be based on positive evidence. This sets out the important legal standard for continuation inquiries. It is clearly stated as the legislative test the Commissioner must apply when considering an application for a continuation of measures under s 269ZHD(2) and when making the recommendation to the Minister under s 269ZHF(2). The expectation is evidently that the Commissioner is responsible for undertaking the investigative and fact-finding function of a continuation inquiry, and that the Minister is then responsible for making a final decision applying those facts to the relevant legal standards.

The Minister's decision, without prior notice, confounded this expectation. As Longte's application noted, the Minister adopted a standard that inverts the expected requirement:

> *After considering REP569 I am not satisfied there is evidence in support of not continuing the dumping and countervailing measures on the goods.*

This reverses the evidentiary onus established by Article 11.3 and s 269ZHF(2). The Minister's decision turned on *whether there was evidence in support of not continuing the measures*, rather than *whether there was evidence in support of continuing them*. At no time did the Minister inform interested parties that he would adopt a standard that differs to that which the Commissioner is required to apply. Indeed, even if this incorrect standard with its reversed standard of proof was adopted, the findings of Report 569 clearly established why the measures should not continue. From this perspective, the then

Minister's decision to disregard both the factual findings and the recommendations of the Commissioner is completely arbitrary and unreasonable.

There being no positive evidence in support of continuation, the only correct and preferable decision is to allow the measures to expire under s 269ZHG(1)(a), or at least with respect to Longte under s 269ZHG(4)(a)(ii).

C Reviewable decision not supported by evidence

The procedure in which the ADRP is now engaged is a review of the reviewable decision, not of the Commissioner's recommendations. In most instances, a review of the former amounts to a review of the latter. However, in this case the *Minister's Reasons for Decision on Continuation Inquiry No. 569* ("Minister's Reasons") state very plainly that:

> *I do not agree with the Commissioner's findings of fact, evidence and reasons for the Commissioner's recommendations in REP 569 that the expiration of the anti-dumping measures in respect of exports of the goods from China would not lead or be likely to lead, to a continuation of, or a recurrence of, the dumping and subsidisation and the material injury that those measures are intended to prevent.* [underlining supplied]

Report 569 sets out the Commissioner's reasons for his recommendations, including the material findings of fact upon which those recommendations were based, and particulars of the evidence relied upon to support those findings.[1] So, the reviewable decision is not based upon the findings in Report 569, because those findings were expressly *not accepted* by the Minister.

The Minister's Reasons are referred to in the notice published under s 269ZHG(1).[2] This notice is the form through which the s 269ZHG(1) decision is effected. The Minister's Reasons were intended to fill the void caused by his non-acceptance of Report 569. They are referred to by the Minister as "reasons", so we consider that they are intended to set out the Minister's material findings of fact and to refer to the evidence or other material on which those findings were based.

However, there is a dearth of any findings of fact and supporting evidence in the Minister's Reasons to support the reviewable decision. Rather, those reasons are preoccupied with *opinions* for disagreeing with the Commissioner's Report and with *sympathies* for Molycop's questioning of the Commissioner's findings of fact on a very specific issue – concerning the use of a benchmark. However such disagreements and sympathies are not findings of fact, nor identification of positive evidence, that together justify the continuation of the measures. As such, the reviewable decision is not the correct or preferable decision and is incapable of being so.

D Minister's opinion on cost benchmark was not a relevant finding

As we noted in our application, the use of a benchmark is an administrative solution, under s 43(2) of the *Customs (International Obligations) Regulations 2015* ("the Regulations"), for determining whether an exporter's financial record costs reasonably reflect competitive market costs. That usage becomes a live element in the specific context of applying the ordinary course of trade ("OCOT") test under s 269TAAD and the determination of a normal value under s 269TAC(2)(c). The Minister's decision was

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1 Section 269ZHF(5).

2 Anti-Dumping Notice 2021/95.

not based upon legislative architecture, and made no attempt to engage either of these tasks. The only positive finding stated in the Minister's Reasons was this:

> *Grinding bar is therefore closer in the production chain to the goods under consideration, and I am satisfied it is a more appropriate benchmark to use than steel billet where both benchmarks are available.*

As noted in Longte's application, the Minister's primary concern – that the Commissioner used a "billet cost" benchmark instead of a "grinding bar" benchmark – misunderstood the Commissioner's findings. The fact is that the Commissioner did construct a *grinding bar* benchmark using a number of input factors, including billet, ferroalloy and conversion costs. [3]

Longte's application also explained that the Minister's view that he was *"not satisfied that the Commissioner conducted a thorough analysis of available benchmarks for steel billet in REP 569, in light of the submission by Molycop"* was factually incorrect.[4] We note that the ADRP has sought further clarification with respect to the Commissioner's consideration and analysis of the available benchmark and the Molycop submission.[5]

Insofar as available information for both grinding bar and steel billet benchmarks is concerned, the Minister's Reasons failed to consider or recognise the circumstances specific to Longte's raw materials supply. As noted in the submission of Compañía Electro Metalúrgica S.A ("ME Elecmetal") in the continuation inquiry dated 10 June 2021:

> *We also wish to point out that MolyCop's submission appears to conflate the Commission's reference to a cost benchmark in Latin America for the purpose of evaluating the suitability of the cost of production by Longte, as recorded by Longte, with the task of determining the precise cost of production of grinding bar in Brazil or other Latin American countries. This is fundamentally flawed. The more suitable alternative cost benchmark for this purpose is the cost of producing grinding bar in China. For this purpose, the Commission will have a record of the cost of production of grinding bar by Changshu Longteng. Changshu Longteng is a100% privately owned, integrated producer of grinding bars used for its grinding media production, and relies solely on imported iron ore. Thus, Changshu Longteng's cost of production of grinding bar would provide the best basis for determining the competitive market cost benchmark of such product in China. Such a benchmark would at least be relevant for Longte, which sources grinding bar almost exclusively from Longteng.*

The dissatisfaction expressed in the Minister's Reasons is particularly problematic in relation to the determination with respect to Longte. Relevantly, the Minister does not appear to have any difficulties with the Commissioner's finding that *"[t]here is no evidence that exporters' conversion costs are influenced by the GOC"*.[6] As such, the cost of production data for the grinding bar supplied by

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3 In this regard, we also draw the ADRP's attention to ME Elecmetal's submission to the Commission during the continuation inquiry dated 1 July 2021 (being EPR569- 032). The submission explained the errors and deficiencies implicit in Molycop's position, including the fact that the information concerning "Special Bar Quality" steel provided by Molycop is irrelevant to Longte, and is not applicable to the goods under consideration produced in China. We note that this issue has been addressed in detail in Report 569 (pages 37 and 38), and that this was also recently the subject of discussion during the conference held by the Review Panel with the Commission on 8 November 2021.

4 ADRP application – Attachment 2, page 9

5 ADRP conference summary 8 November 2021, pages 2 to 4.

6 Page 34.

Changshu Longteng to Longte provides the most appropriate, relevant, and specific alternative "benchmark" for grinding bar that should have been considered, for a fact finding of the likely impact of an expiry of the measure on Longte's exports to Australia.

Section 43(2) of the Regulations requires the Minister to use an exporter's financial record costs provided they are in accordance with generally accepted accounting principles, and reasonably reflect competitive market costs associated with production of the goods. The Commission has the actual conversion costs relevant to the grinding bar used by Longte. These are relevant market costs associated with the production of the goods in China.

The Minister's rationale for rejecting the Commissioner's Report does not align with Australian law, nor with Australia's international obligations. The Minister's Reasons provide no support, or reasons, or positive evidence for the view that:

> *I am satisfied that the anti-dumping measures the subject of REP 569 should be continued because the expiration of measures would lead, or would likely lead, to a continuation of, or a recurrence of, the dumping and subsidisation and the material injury that the anti-dumping measures are intended to prevent.*

In contrast, the Commissioner's recommendation as contained in Report 569 does. That recommendation is based on positive evidence and findings that address the relevant legal criteria.

Simply, the correct and preferable decision for the ADRP to now recommend to the Minister is that the Minister's decision was wrong at law. It is not the ADRP's job to review the Commissioner's recommendations. Thus, the ADRP should now report to the Minister that the Minister should properly consider the Commission's recommendations, none of which have been properly controverted by the previous Minister, meaning that the correct and preferable decision can only be one that is based on those recommendations.

E Standards of review

As noted above, the Act premises the ADRP's jurisdiction on the expectation that the Minister's power is exercised based on the facts, findings and relevant information collected through the inquiry – a function carried out by the Commissioner. This is particularly evident from the *prima facie* requirement that the ADRP may have regard only to "relevant information" as defined by s 269ZZK(6)(d):

> *if the reviewable decision was made because of an application under section 269ZHB--the information the Commissioner had regard to, or was, under paragraph 269ZHF(3)(a), required to have regard to, when making the findings set out in the report under section 269ZHF to the Minister in relation to the making of the reviewable decision*

The present situation, where the reviewable decision is not made based on adoption of the Commissioner's findings of facts and use of positive evidence, does not require or allow the ADRP to depart from such requirement.

Further, the reviewable decision not being based on positive evidence or positive findings that go to the necessary legal elements means that the ADRP is required to consider a decision based on an absolute arbitrary exercise of power and *negativities* towards the Commissioner's findings and recommendations. This presents a barrier for the ADRP's power to require reinvestigation under s 269ZZL of the Act, because the ADRP can only require the Commissioner to reinvestigate:

> *…a specific finding or findings that formed the basis of the reviewable decision.*[7]

For the purposes of an ADRP review, what constitutes a "finding" is defined as follows:

> *…in relation to a reviewable decision under Subdivision B, means a finding on a material question of fact or on a conclusion based on that fact.*[8]

On this basis, a reinvestigation can only relate to a finding of fact (whether it is a finding of fact itself, or a conclusion based on such a fact). Importantly, that finding of fact needs to have formed the basis of the reviewable decision (ie. the decision under s 269ZHG(1)). Further, it needs to be material to that decision, in the sense that the decision hinged on its operation. While it occurred under different legislation, the Full Federal Court has considered that the term *"material question of fact"* can be understood as follows:

> *if a decision, one way or the other, turns upon whether a particular fact does or does not exist, having regard to the process of reasoning the Tribunal has employed as the basis for its decision, then the fact is a material one.*[9]

What are the material findings of fact upon which the Minister's decision was based? There are not any. The Minister's Reasons go to some extent to express his dissatisfaction with the Commissioner's recommendation and finding of fact, but did not come up with any of his own. But, the reviewable decision is not about accepting or rejecting the Commissioner's report. The Minister's decision for continuing the measures is based on an absence of evidence, which he justified by an impermissible reversal of the standard of proof and evidentiary onus, and an apparently contemptuous attitude towards the international and domestic legal bound to his power.

This means that there is limited space for any reinvestigation in this review.

In this regard, we note that in parallel to the applications of Longte and ME Elecmetal, another applicant for review, Jiangyin Xingcheng Magotteaux Steel Balls Co., Ltd argued that the Minister erred by not using the Minister's "preferred alternative benchmark" to determine normal values. Firstly, we note that the Minister has not expressed any "preference" for a benchmark other than to state that a grinding bar based benchmark might be more appropriate. We have addressed the lack of utility of this opinion with respect to the determination relevant to Longte at D above. That aside, the Minister made no findings regarding the normal values or dumping margins for any exporter. Further, as we have noted above, the use of a benchmark is merely an administrative solution to determining whether costs reasonably reflect competitive market costs under s 43(2) of the *Customs (International Obligations) Regulations 2015*, which is also something the Minister did not do.

Consequently, the Commissioner cannot be required to reinvestigate the Minister's findings under s 43(2), or its determination of normal value based on a "preferred benchmark", because the Minister made no such findings. On the other hand, these are issues which were considered, and about which

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7 Section 269ZZL(1)(a).

8 Section 269ZX.

9 *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 845, para 56 per Black CJ, Dundberg, Katz and Hely JJ.

findings were made, in the Commissioner's Report 569. However those findings did not form the basis for the reviewable decision itself.[10]

Report 569 represents the relevant information as considered by the Commissioner at the time the recommendation was made. As such, it continues to serve as relevant information that the ADRP is required to consider in making a recommendation to the Minister under s 269ZZK. The Commissioner's recommendations cannot be the subject of any reinvestigation under s 269ZZL because no contrary findings of fact, evidence and reasons were either assembled or explained in the Minister's decision.

F Concluding remarks

To be clear, we are not of the view that the ADRP cannot properly conduct its review due to these unique technical challenges. In our view the Act envisages a clear and narrowly structured nature of review that reflects the intended delegation of the fact-intense investigative/inquisitive function to the Commissioner and the inquiry process, and that requires the Minister to properly carry out his power by way of relying on the positive evidence established during the Commissioner's inquiry. In light of the legislative limits explored in this submission, where the Minister's decision has clearly failed to comply with the legal requirements, and is not based on positive evidence, the tasks that the ADRP can and should undertake in the review are few.

Ultimately, it is not the role of the ADRP to overturn a Ministerial decision. The ADRP is tasked to make a report to the Minister in relation to the application it has decided not to reject, and to provide a recommendation as to whether *the Minister* should affirm the reviewable decision or revoke that decision and substitute a specified new decision. It is our submission that the application of the relevant information and of the correct legal standard require the ADRP to recommend that the reviewable decision be revoked and substituted with a new decision. The ADRP can refer to Report 569 in making its recommendation to the Minister. Report 569 sets out compelling, evidence-based grounds as to why the measures should have expired. The Minister's reasoning for rejecting those grounds was based on a misunderstanding of both Australian and international law.

We respectfully urge the ADRP to recommend that the newly appointed Minister revoke the incorrect decision and replace it with the correct or preferable decision laid out in Report 569 without any further delay.

Yours sincerely

Charles Zhan
Partner

[10] Again, we note that the Minister's Reasons discuss the benchmark, but this is in the context of rejecting the Commissioner's report. As we have already said, the decision to not accept that report is not the "reviewable decision". The reviewable decision itself is not based on any finding under s 43(2).