

21 November 2016

The Director
Operations 3
Anti-Dumping Commission
Level 5, Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

Canberra Office
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
Australian Capital Territory 2609
+61 2 6163 1000

Brisbane Office
Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
Queensland 4064
+61 7 3367 6900

Australia

facsimile: +61 2 6162 0606
email: info@moulislegal.com
www.moulislegal.com



commercial + international

By email

Dear Director

Compañía Española de Laminación, S.L. Review of anti-dumping measures relating to rebar

We are the lawyers for Compañía Española de Laminación, S.L. ("Celsa Barcelona").

We contend that the review as attempted to be explained by *Anti-Dumping Notice No. 2016/106 – Initiation of a Review of the Anti-Dumping Measures Relating to Compañía Española de Laminación, S.L.* ("the Notice")¹ has no legal basis, and is null and void.

Our client submits that the initiation of this review represents a quite serious error on the part of the Anti-Dumping Commission ("the Commission").

Our client does not wish there to be any Ministerially-initiated review of its variable factors, and certainly not a review of three year old information, even if that could be considered to be a valid "review" under the *Customs Act 1901* ("the Act"). We submit that it cannot be so considered.

The decision to initiate such a review is an administrative decision which directly and specifically affects our client, yet our client was not consulted. The question of whether such a review was open to the Commission, and our client's attitude to such a proposal, could have been clarified, and should have been clarified, beforehand. The announcement of the review came as a complete surprise.

On behalf of our client we call for the immediate cessation of this review.

A Background

In the Notice, the Commission indicates that it has initiated a review of the anti-dumping measures applicable to steel reinforcing bar ("rebar") exported to Australia from Spain by Celsa Barcelona. It explains that the review is intended to be limited to the examination of the variable factors relevant to the taking of the anti-dumping measures as they affect Celsa Barcelona.

¹ See <http://www.adcommission.gov.au/cases/EPR%20351%20%20450/EPR%20380/001%20-%20Notice%20-%20ADN%202016-106%20Initiation%20of%20Review.pdf>

The decision to initiate the review is said to have been made by the Commission following a request by the Parliamentary Secretary on 11 October 2016, in accordance with subsection 269ZA(3) of the Act.

The Notice identifies the review period as being 1 July 2013 to 30 June 2014 (“the review period”). However this is the same as the period of investigation that was considered by the Commission in the original investigation.

In other words, this is not a variable factors review in the sense understood by the legislation. Rather, the Commission is seeking to change the outcome of the previous process that resulted in the imposition of the dumping duties in respect of our client’s exports (“original investigation”).²

Accordingly, this is an attempt to reopen matters that have already been ruled upon and finalised by way of the legal processes that have already taken place.

B Variable factors have not changed

Under subsection 269ZA(3) of the Act the Minister may, by notice in writing, request that the Commissioner initiate a review of anti-dumping measures that have been taken in respect of goods, because:

- one or more of the variable factors relevant to the taking of the measures in relation to that exporter or those exporters may have changed; or
- the anti-dumping measures are no longer warranted.

Per section 269T of the Act, a reference to “variable factors” relevant to the determination of duty payable under the *Customs Tariff (Anti-Dumping) Act 1975* on particular goods the subject of a dumping duty notice is a reference to:

- the normal value of the goods;
- the export price of the goods; and
- the non-injurious price of the goods.

As a matter of administrative procedure and statutory interpretation, in initiating this review the Commission has disregarded the proper grounds under which the discretion to initiate a review may be exercised. The Commission has improperly relied upon the supposition that under subsection 269ZA(3) of the Act, the variable factors as they apply to the goods have changed and that the grounds for the Commissioner to initiate a review were present. This is not the case.

If the period of the review is the same as the original period of investigation, the variable factors cannot have changed. We suppose that the Commission intends to change the variable factors applicable to our client’s exports, on the basis that the Commission thinks that its determination of them at the end of the original investigation was incorrect. That is not to say that the variable factors have changed. The variable factors in the period of investigation have always been the variable factors in the period of investigation. They cannot have changed.

In limiting the review period to the same period of investigation that was originally analysed by the Commission in its original imposition of dumping duties, it is self-evident that the variable factors in

² *Report No 264 – Alleged Dumping of Steel Reinforcing Bar Exported From The Republic of Korea, Malaysia, Singapore, Spain, Taiwan, The Kingdom of Thailand and the Republic of Turkey (19 October 2015) and Anti-Dumping Notice No 2015/133*, accessible at <http://www.adcommission.gov.au/cases/Pages/ArchivedCases/EPR264.aspx>

fact could not have changed. Consequently, the Commissioner could not have had the necessary satisfaction that the variable factors had changed, so as to justify the initiation of a review under subsection 269ZA(3) of the Act.

If further support were needed for the proposition that the review procedures are directed towards a change in the variable factors from one period to another, we refer to the Commission's own application form for such a review, which makes it quite clear that this is what is intended:

If you are applying for a variable factors review (in box 1 above) provide a detailed statement setting out your reasons. Include information about:

- *the factor(s) you wish to have reviewed;*
- *the amount by which that factor is likely to have changed since anti-dumping measures were last imposed, and evidence in support; and*
- *in your opinion the causes of the change and whether these causes are likely to persist.* [underlining supplied]³

The review that the Commission has purported to initiate in this matter has no reference to the amount by which any variable factor has changed since anti-dumping measures were last imposed.

Further, in the guidelines published by the Commission for applicants for a variable factors review, this is said:

*Evidence of changed normal values may be current price lists for domestic sales; quotations or invoices relating to domestic sales; or published information on the domestic selling prices. Or, where a normal value had been based on domestic costs and profit an estimate may be made of the changes that have occurred in the cost to make and sell the goods sold in the exporter's domestic market (plus any profit).*⁴

There is nothing "current" about the information that the Commission has indicated it intends to rely upon in undertaking the review.

C Not the proper purpose of a review

In initiating this review, the Commission has disregarded the proper purpose and function of a review under the Act, as a matter of statutory interpretation and administrative procedure.

The variable factors for Celsa Barcelona were determined by the Commission in the original investigation. They were not the subject of an application for review to the Anti-Dumping Review Panel ("ADRP") by Celsa Barcelona. Nervacero S.A. successfully applied to the ADRP for review of the variable factors applicable to its exports. The ADRP recommended to the Parliamentary Secretary that the variable factors for Nervacero S.A. were incorrect, to the extent of reversing the finding that Nervacero S.A. had engaged in any dumping of the subject rebar.

Whether the ADRP had the opportunity to recommend that the variable factors in respect of Celsa Barcelona were incorrect, and whether the Parliamentary Secretary would have had the power to accept such a recommendation, at that time, are interesting questions but are now moot.⁵

³ *Application for review/revocation of measures: Application form (B602) accessed at <http://www.adcommission.gov.au/accessadsystem/Pages/Forms-and-Guidelines.aspx>*

⁴ *Anti-Dumping Commission – Instructions and Guidelines for Applicants on the Application for review/revocation of measures - December 2015 at <http://www.adcommission.gov.au/accessadsystem/Documents/Forms%20and%20Guidelines/Updated%20Guidelines%20-%20Application%20for%20review%20or%20revocation%20of%20measures%20Dec15.pdf>*

⁵ Per ADRP Report No. 30.

The responsibility and functions of the Commission, the ADRP and the Parliamentary Secretary in relation to the outcomes of the original investigation were discharged. Nothing further remained to be done at the expiry of the statutory procedures for the investigation; the imposition of duties; the ADRP review of those duties; and the Parliamentary Secretary's revocation and substitution of her decision.⁶

The Parliamentary Secretary has a broad discretion to set variable factors in any investigation and it is not the function of a review such as this to amend the Parliamentary Secretary's legally binding determinations. The matter is closed.

The purpose of a variable factors review is not to review the merits of an administrative decision in respect of dumping. Its purpose is to review variable factors in the light of events taking place after the period of investigation in which the measures were set in the first place, or after the most recent previous review period. This review is nothing of the sort. In this review it appears that the Commission intends to conduct an administrative "merits-based" review of the Minister's final decision using the same facts that were already considered for the purposes of that decision.

We consider that a variable factors review is neither an appropriate nor permissible method of "correcting" any omission or error that the Parliamentary Secretary perceives to have been present in the findings of the original investigation and the subsequent ADRP review of the same.

D Data not contemporary

As a general rule, the World Trade Organisation ("WTO") considers that the period within which dumping should be investigated in an anti-dumping investigation normally should be 12 months, ending as close to the date of initiation as is practicable.

As a general rule:

(a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable;⁷

That recommendation and others concerning the periods of data collection for anti-dumping investigations to determine the existence of dumping and consequential injury were adopted by the WTO in order to facilitate the proper administration of an anti-dumping regime.

There is no apparent reason why that approach should not be consistently implemented in respect of reviews too. The Commission's decision to initiate the review at hand, with a review period which ended over two years ago, does not comply with the recommendations of the relevant WTO committee.

E Unfairness to Celsa Barcelona

Lastly, we are concerned to inquire as to whether the Commission considered the significant hardship that a review applicable only to the original period of investigation would cause to our client, in the following circumstances:

⁶ See <http://www.adreviewpanel.gov.au/CurrentReviews/Documents/APPROVED%20Public%20Notice%20Decision.pdf>
⁷ *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* - Adopted by the WTO Committee on Anti-Dumping Practices on 5 May 2000 (G/ADP/6).

- 1 Should this variable factors review conclude with a new set of variable factors being imposed, and unless our client exercise its own rights before then, it will suffer a 12 month “ban” from obtaining its own review following the conclusion of the review.⁸
- 2 If a final decision is achieved in this review – an outcome which should not be reached, given our client’s concerns – it would be made in **mid-April 2017**.
- 3 Thus, any further review requested by our client could not be lodged until, say, **mid-April 2018**.
- 4 The time at which Celsa Barcelona could expect a decision in that review would therefore not be until **October 2018**.
- 5 This sequence of time-bars and statutory review procedures would mean that Celsa Barcelona’s variable factors for exportation of its rebar to Australia **would be based on facts that existed in FY2014 for more than four years** before it could obtain more contemporaneous variable factors.

Clearly, the Commission’s currently proposed variable factors review would cause great unfairness, hardship and commercial disadvantage to our client.

F Conclusion

In light of the above, we submit that:

- the variable factors in respect of our client’s exports have not changed in the sense required by subsection 269ZA(3) of the Act;
- a variable factors review based on the same period as the period of investigation in the original investigation is oxymoronic, and is not what is stipulated nor intended by the review provisions of the Act; and
- a significant and unjustifiable disadvantage will potentially be caused to our client if the Commission does not call off this undertaking.

We respectfully and strongly request that the Commission cease the review and declare its decision to conduct a review in accordance with the Notice as void *ab initio*.⁹

Our client reserves all its rights in this matter.

Yours sincerely



Daniel Moulis
Principal Partner

⁸ *Customs Act 1901*, subsection 269ZA(2)(b).

⁹ *Similiter*, ADN 2016/106.