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20 February 2017

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

By email

Dear Director

Compañía Española de Laminación, S.L.
Response to Statement of Essential Facts No. 380

On behalf of our client, Compañía Española de Laminación, S.L. ("Celsa Barcelona"), we write to you in respect of the Statement of Essential Facts placed on the public record of this investigation by the Anti-Dumping Commission ("the Commission") on 30 January 2017 ("the SEF").[1]

A Introduction

With respect, we feel that the SEF is not properly reasoned, and in many respects unfairly dismisses the cogent submissions made in our letter of 21 November 2016.

For the reasons contained therein, we remain firm in our view that the review of dumping measures as initiated under *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")[2] has no legal basis under the *Customs Act 1901* ("the Act").

[1] *Statement of Essential Facts No. 380 – Review of Anti-Dumping Measures Applying to Steel Reinforcing Bar Exported from Spain by Compañía Española de Laminación, S.L.* - document 004, EPR 380.
[2] See http://www.adcommission.gov.au/cases/EPR%20351%20%20450/EPR%20380/001%20-%20Notice%20-%20ADN%202016-106%20Inititation%20of%20Review.pdf

Again with respect, we find that the SEF offers no proper nor adequate justification for the initiation of a review in the circumstance presented, and maintain our view that the review represents a quite serious error on the part of the Minister and the Commission.

Our client requests the Commission to seek independent legal advice on the view that its powers under Division 5 of Part XVB of the *Customs Act* 1901 ("the Act") extend to the reopening of matters that have been considered by the relevant investigating authorities and by the statutory review body and already legally disposed of.

We submit the following by way of reply to the Commission's responses to our submission dated 21 November 2016 as they appear in the SEF, and to the other submissions on the public record in this matter.

B No power under the ADA to undertake this review

Article 11.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("the ADA"), which deals with the review of anti-dumping measures, provides:

> *The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review* [underlining supplied].[3]

This is the only source of the power to review dumping duties, in any and all WTO Member jurisdictions that have implemented the ADA. The proviso *"that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty"*, in the context of *"the continued imposition of the duty"*, makes clear that a review is not a re-run of the decision to impose the definitive anti-dumping duty in the first place.

A review as understood by the ADA is exactly that – a review based on later facts and circumstances than those that applied in the original investigation period. It is Article 13 of the ADA that refers to *"judicial, arbitral or administrative tribunals or procedures"* for the *"prompt review of administrative actions relating to final determinations and reviews of determinations"*. Those procedures were activated and completed, and the present procedure does not fall into this category of review opportunities.

With the utmost respect we must say that we remain surprised and exasperated at the way in which the Minister and the Commission have conducted themselves in this matter. The present review is an attempt to ignore the accepted and defined legal processes and outcomes that have already transpired. In our view the SEF's apparent commitment to proceed with this review contradicts the legal outcome of the investigation, the completed ADRP review and the final Ministerial decision, and is invalid as a result.

C No express power to revoke is needed, and precedent *does* exist

We note that the SEF opines that the Act does not convey any power to *"terminate the review of measures"*.[4]

Respectfully, our request for the Commission to cease the review and declare its decision to conduct a review in accordance with the Notice as being void *ab initio* is not one to "terminate" the review,

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[3] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,* Article 11.2.

[4] SEF, p 11.

although it would have the same effect. The discretion to declare the decision to initiate as being void *ab initio* is one that does not require any expressly conveyed power under the Act. Such a discretion is inherently granted to any authority undertaking an administrative function, in that an administrator must of necessity have the power to declare a decision invalid on the basis of illegality of the conduct leading up to or motivating that decision, or the revelation of facts rendering what has been done as being illegal *ab initio* (from the beginning).

As previously submitted, the Commissioner should declare his decision under the Notice as being void *ab initio*, because the Commissioner cannot have 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. The purpose of a variable factors review is not to conduct a "merits-based review" of the Minister's final decision in respect of dumping. The responsibilities 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.[5] It is not the function of a "variable factors review" to amend a legally binding determination.

We also note the statement in the SEF that *"the submission does not identify any authority to support the view that the decision to initiate the review be declared void"*. It would be evident to the reader that we did attempt to identify such an authority in our submission, referring directly to the fact that there was a precedent for such action (footnote 9, stating *"Similiter, ADN 2016/106"*). If there was doubt as to what we were referring to in our submission it was open to the Commission to make an inquiry of us for that purpose.

Therefore, for the record, we now set out the entirety of the relevant part of *Anti-Dumping Notice 2015/140*, with respect to an anti-circumvention inquiry concerning quenched and tempered steel plate exported from Sweden, which we intended to footnote in our previous submission:

> *For the reasons above, on 19 August 2015, I could not have been satisfied under subsection 269ZDBE(2)(b) of the Act that there appeared to be reasonable grounds for asserting that circumvention activity under subsection 269ZDBB(5A) of the Act had occurred. Therefore, I:*
>
> - *consider my decision to conduct this anti-circumvention inquiry under subsection 269ZDBE(4) of the Act to be void ab initio;*
> - *revoke my decision under subsection 269ZDBE(4) of the Act;*
> - *revoke the notice published under subsection 269ZDBE(4) of the Act; and*
> - *decide under subsection 269ZDBE(1) of the Act to reject Bisalloy's application.*[6]

Accordingly, there is *"authority to support the view that the decision to initiate the review be declared void"*, in the sense that the Commission has the power to declare acts and conduct undertaken by him as being void *ab initio*, and has exercised that power. Although we should not need to cite any such authority for avoiding procedures that are or prove to be *ultra vires* (given that it is a normal and accepted practice of administrative decision making to do so where the circumstances dictate) we are pleased to have done so for the Commission's benefit in further considering its legal abilities.

On the basis that no grounds existed for the Commissioner to have the necessary satisfaction that the variable factors had changed, so as to justify the initiation of a review under subsection 269ZA(3)

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[5] See http://www.adreviewpanel.gov.au/CurrentReviews/Documents/APPROVED%20Public%20Notice%20Decision.pdf

[6] See Anti-Dumping Notice No. 2015/140 – *Certain quenched and tempered steel plate exported from Sweden - Anti-circumvention inquiry into the avoidance of the intended effect of duty* (27 November 2015), accessible at http://www.adcommission.gov.au/cases/EPR%20301%20%20350/EPR%20306%20-%20archived/007-ADN%202015-140.pdf.

of the Act, we submit that the Commissioner should declare his decision under the Notice as being void *ab initio*.

D Availability of duty assessment is no answer

We note the following remarks in the SEF in response to our submission that our client will suffer hardship as a result of the review being conducted with respect to the same investigation period as the original investigation:

> *The Commission agrees with Celsa Barcelona's summation of the legislative barriers to seeking a review of measures following the publication of a notice declaring the outcome of this review. However, the Commission notes, as does OneSteel in its submission, that the duty assessment process will be available to parties who import rebar purchased from Celsa Barcelona.*[7]

As per the Commission's own website, the purpose of a duty assessment is to ensure that the amount of dumping duty collected by the customs authority *"does not exceed the actual dumping margin for each consignment over the five-year period"* and that this provides for *"assessment of the final duty liability"*.[8] The duty assessment *"allows for any excess interim duty to be refunded where it is found that prices have changed since the original investigation or subsequent review."*[9] However, such an application for a duty assessment is retrospective, and is only capable of being lodged at the expiration of any one *"importation period"*,[10] being a period of 6 months beginning on the day of the publication of a dumping notice.[11]

A duty assessment procedure is not a cost-free procedure. The timeframe for a duty assessment is up to 185 days. *Per* the Commission's own website, the Commission generally has 155 days to consider applications for a duty assessment and then ultimately, the Minister has an additional 30 days to make a decision as to whether or not duties should be repaid to the applicant. It takes time and a money to undertake such a procedure. Thus, in addition to the hardship that our client would experience by way of initially paying unlawful interim dumping duties that may arise from this review, our client would then be required to engage in costly administrative procedures on behalf of importers every six months so that they – the importers – could get their money back.

Our client considers the response to our client's concerns in the SEF, which is to say that a "post hoc" process should console our client's concerns about the legality of the review itself, as being dismissive and unfair.

Lastly, although the duty assessment process is corrective in nature, we do not consider the duty assessment process as being in and of itself an administrative review procedure, that should be used to counteract or off-set costs attributable to the wrongful administration of the Australian anti-dumping regime. Celsa Barcelona has been faithful and entirely cooperative and compliant with the legal processes that have taken place up to the present time, but now finds that it is effectively being "penalised".

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7 SEF, p 12.
8 See http://www.adcommission.gov.au/accessadsystem/dutyassessments/Pages/default.aspx.
9 See http://www.adcommission.gov.au/accessadsystem/dutyassessments/Pages/default.aspx.
10 *Customs Act 1901* (Cth), s 269V(2).
11 See definition of *"importation period"*, as per *Customs Act 1901* (Cth), s 269T(1).

E Conclusion

As above, we reiterate our previous request, that the review be ceased by way of declaring Commission's decision pursuant to the Notice as being void *ab initio*.[12]

Our client reserves all its rights in this matter.

Yours sincerely

Daniel Moulis
Principal Partner

[12] *Supra*, fn 6.