

5 April 2018

The Director  
Investigations 3  
Anti-Dumping Commission

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Dear Director,

**Anti-circumvention Inquiry No. 452 concerning Steel Reinforcing Bar exported by Daehan Steel Co Ltd from the Republic of Korea: Submission of the Australian industry**

Liberty OneSteel (Newcastle) Pty Ltd, trading as *Liberty OneSteel*, is now the sole producer in Australia of the like goods to the goods the subject of this inquiry<sup>1</sup> (**the Australian Industry**).

The Australian Industry observes the submission of the importer, Stemcor (S.E.A.) Pte Ltd (**the importer**) and the Commission's latest *Extension of time granted to issue 'Final Report No. 452'* notice.

Firstly, the Australian industry rejects the importer's suggestion that it has "deliberately misused" the anti-circumvention provisions to "bypass the normal review mechanism".<sup>2</sup> To the contrary, the Australian industry's application accords entirely with the Commission's own expectation for the use of the 'avoidance of intended effect of measures' provisions, in circumstances where an exporter attempts to circumvent the effectiveness of measures calculated under the *ad valorem* method. Specifically, the Australian industry refers to the Commission's comments in the Final Report to the original investigation (INV 264):

Conversely, the *ad valorem* duty method has a potential disadvantage **in that export prices might be lowered to avoid the effects of the duty**. In this regard, if evidence of such circumvention exists, an anti-circumvention inquiry can investigate these situations, noting that other forms of measures are also susceptible to circumvention.<sup>3</sup> (emphasis added)

Furthermore, this interpretation by the Commission of the intent of s 269ZDBB(5A) of the *Customs Act 1901*<sup>4</sup> (the provision prescribing the circumvention activity known as 'avoidance of intended effect of measures'), is affirmed by the *Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013* and the *Customs Tariff (Anti-Dumping) Amendment Bill 2013 (the Explanatory Memorandum)*, which provides in relevant part:

51. The new circumvention activity, called 'avoidance of intended effect of duty', describes the situation where dumping or countervailing duty has been imposed and is being paid by the importer; however, the imposition of the duty has little or no effect as, over a 'reasonable period', **the price at which the goods are sold by the importer has not increased in line with the duty payable**. A reasonable period may be different for different goods depending on the characteristics of the goods, the conditions of the market for the goods, and other relevant factors. **The reasons for the effect of the duty**

<sup>1</sup> On 1 March 2018, the production and sale of the like goods transferred to Liberty OneSteel (Newcastle) Pty Ltd (ABN 50 623 285 718) from OneSteel Manufacturing Pty Limited (ABN 42 004 651 325).

<sup>2</sup> EPR Folio 452/011, p. 2.

<sup>3</sup> REP 264 – Steel Reinforcing Bar – Korea, Malaysia, Singapore, Spain, Taiwan, Thailand and Turkey, p. 105.

<sup>4</sup> References to legislative provisions shall be references to the Customs Act 1901, unless otherwise expressly stated.

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being avoided may be because there has been a reduction in profit taken on the sale, or where the export price has been decreased post the imposition of measures.<sup>5</sup> (emphasis added)

Specifically, s 269ZDBB(5A) describes, in relevant part, the act of avoidance of intended effect of duty as:

- d) the importer of the circumvention goods, whether directly or through an associate or associates, **sells those goods in Australia without increasing the price commensurate with the total amount of duty payable** on the circumvention goods under the *Dumping Duty Act*; and,
- e) the circumstances ... occur over a reasonable period. (emphasis added)

The expression, 'without increasing the price commensurate with the total amount of duty payable' is not defined. The *Macquarie Dictionary* defines 'commensurate' as "having the same measure; of equal extent or duration... corresponding in amount, magnitude, or degree". The price must be 'commensurate with the total amount of duty payable on the circumvention goods under the *Dumping Duty Act*'. In turn, the 'amount of duty payable' is determined under s 269Y - it may either be based on a recommendation to the Minister from the Commissioner (or from the Review Panel under s 269ZZU(2)) in relation to goods following the making of an application for final duty assessment under s 269V,<sup>6</sup> or absent an application lodged for an assessment of duty payable on those goods under the *Dumping Duty Act*.<sup>7</sup> Applied here, the evidence suggests that the total amount of duty payable was determined under s269Y(4), as there was no application lodged for final duty assessment.

In other words, the total duty payable would have amounted to the interim dumping duty (IDD) collected. In this case, the amount of IDD was calculated using the *ad valorem* method at a rate of 9.7 per cent. For the purpose of explanation, assume the ascertained export price (AU\$, FOB) was determined as AU\$ 100/t, with the goods on-sold into the Australian market at AU\$ 110/t (for simplicity, assume no exportation costs, generating an importer's margin of 10 per cent). To illustrate the operation of s 269ZDBB(5A)(d), assume that following the imposition of measures, the exporter continues to export the goods to Australia at the FOB price of AU\$100/t. The amount of duty payable (absent a duty assessment) is thus AU\$ 9.70/t. In order for the importer to not be said to sell the circumvention goods in Australia without increasing the price commensurate with the total amount of duty payable, then the importer must sell those goods in Australia for at least AU\$ 119.70/t. If the importer sells the circumvention goods for less than this amount, then the circumstances of circumvention envisaged by the Explanatory Memorandum are invoked, specifically:

**The reasons for the effect of the duty being avoided may be because [a] there has been a reduction in profit taken on the sale, or [b] where the export price has been decreased post the imposition of measures.**<sup>8</sup>

In the above example, if the exporter, continues to export the goods at the FOB price of AU\$100/t, and the importer sells the goods into Australia at AU\$115/t, then clearly, the first circumstance [a] applies, since the importer now has reduced its profit from a gross margin of 10 per cent to 4.8 per cent.

On the other hand, if the exporter, drops the FOB export price to AU\$90/t, and the importer sells the goods into Australia at AU\$108.60/t, then clearly the second circumstance [b] envisaged by the Explanatory Memorandum

<sup>5</sup> *Explanatory Memorandum*, p. 15.

<sup>6</sup> Subsection 269Y(1).

<sup>7</sup> Subsection 269Y(4).

<sup>8</sup> *Explanatory Memorandum*, p. 15.

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applies, since the reduction in export price has resulted in a reduction in the price of the circumvention goods sold in Australia from AU\$ 119.70/t, even though the importer continues to earn the same amount of profit (10 per cent) on the sales (calculated as, AU\$ (90\*1.097)\*1.10)). Indeed, under this circumstance, even if the importer, earns a greater amount of profit; even where the price is reduced from AU\$ 119.70/t; the importer's increased level of profitability is nevertheless irrelevant and does not absolve it of responsibility for the circumvention activity.

This interpretation is largely consistent with the Commission's own interpretation contained in the draft chapter to the *Dumping and Subsidy Manual*<sup>9</sup> (the *Draft Chapter*), which provides in relevant part:

An inquiry into alleged avoidance of the intended effect of duty is aimed at investigating whether prices of imported goods subject to measures have increased commensurate with the dumping duties paid and, if not, the reasons why the price of the imported goods has not increased in line with the total amount of duties payable. In particular, the inquiry seeks to address situations where, for example, the circumstances are occurring because:

- (a) **the exporter has, subsequent to the imposition of measures, lowered the export price** (in the absence of a corresponding decrease in normal value); or
- (b) the importer is absorbing the duties because of a compensatory or other arrangement with the exporter. (emphasis added)

The Commission's interpretation extends the ordinary meaning of s 269ZDBB(5A)(d) by seeking to compare a lower export price in proportion to contemporary normal values for the exporter. Although, the Australian industry considers this comparison superfluous to the legislative provision or the Explanatory Memorandum, it is an interpretation which sits starkly at odds with the latest submission of the importer, which suggests a comparison to the normal value, and therefore potentially higher dumping margin as an irrelevant comparison. The Australian industry considers that a comparison to the normal value may not be necessary, as the provision relies on the operation of the duty assessment provisions of the legislation to determine the amount of duty payable. In this regard, it is worth noting the Commission's previous observations concerning observed Stemcor's ability to effectively navigate the anti-dumping system in *Continuation Inquiry No. 379 concerning hollow structural sections exported from China, Korea, Malaysia and Taiwan*:

The Commission discovered evidence during the onsite verification of Kukje's only Australian customer's [Stemcor] import data, which indicated that this importer has relied on achieving favourable duty assessments in order to cover a majority of its costs to import and sell. The evidence suggests that the relationship between Kukje and its customer extends beyond that of simply seller and buyer into a relationship where jointly they have constructed a pricing methodology in order to remain competitive without dumping.<sup>10</sup>

Therefore, it may be concluded that if Stemcor considered that it was entitled to a repayment of the amount of interim duty overpaid, then it would have pursued its rights to an assessment of duty.

Even if the Commission's interpretation contained in the *Draft Chapter* is correct, and a comparison to the exporter's normal value is required, then applied here the exporter's decrease in export price during the

<sup>9</sup> Anti-dumping Commission, 'Anti-circumvention - avoidance of the intended effect of duty v1.0', <http://adcommission.gov.au/accessadsystem/Documents/DraftManualChapter-Anti-circumventionavoidanceoftheintendedeffectofduty.pdf> (accessed 15 March 2018)

<sup>10</sup> Report No. 379 at p. 55.

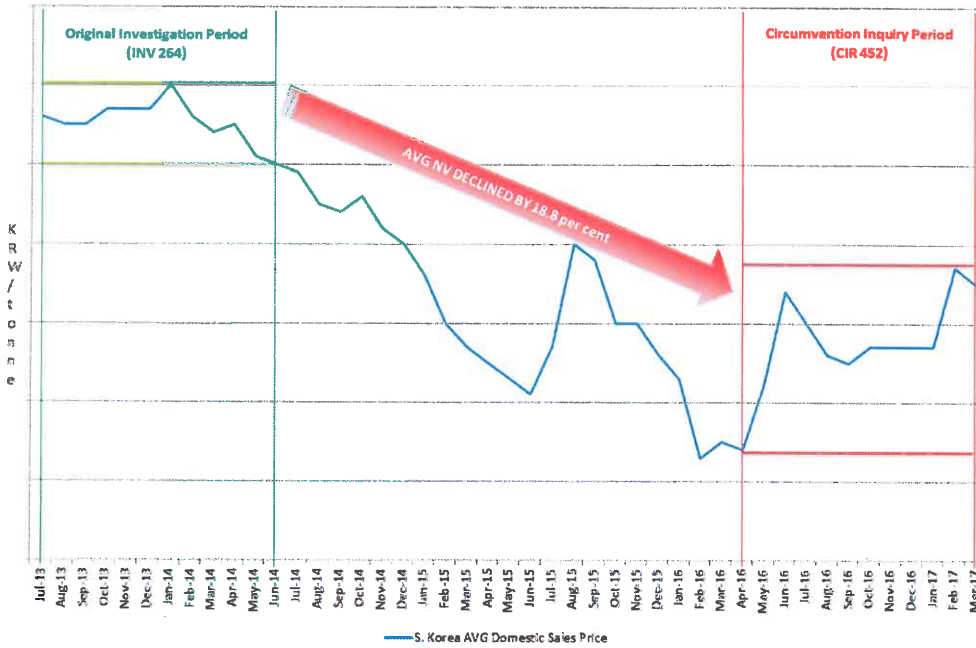
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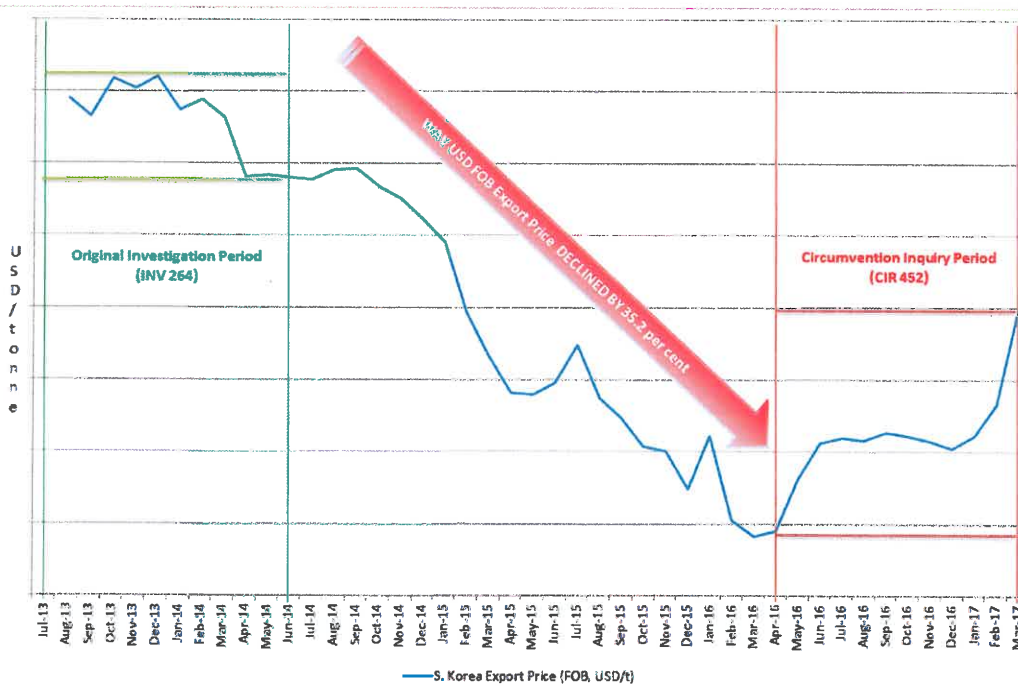
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circumvention period was greater than the corresponding decrease in the normal value (refer Figures 1 and 2, below):



**Figure 1** Movements in Korean domestic prices for the like goods between the original investigation period and current circumvention inquiry period (Source: CONFIDENTIAL ATTACHMENT)



**Figure 2** Movements in Korean export prices for the goods and circumvention goods between the original investigation period and current circumvention inquiry period (Source: CONFIDENTIAL ATTACHMENT)

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In fact, on the Australian industry's analysis, the exporter appears to be decreased its export price to Australia (**35.2 per cent**) by almost double the amount by which the Korean normal values declined between the original Investigation Period (INV 264) and the current Inquiry period (CIR 452) (**18.8 per cent**). If this analysis is borne out by the Commission's own verified evidence, then the exporter has clearly met the conditions of the circumvention activity by decreasing the export price to Australia out of all proportion to any reductions in input costs across the same period (as the importer's submission seeks to excuse). The Australian industry has compared the changes in the normal value and export price in the currencies in which these ascertained variable factors are understood to have been determined by the Commission, noting specifically the comments in *Consideration Report No. 452*, that "Daehan exports the goods to Australia in US dollars" (at p. 12).

***Proposed recommendations to the Parliamentary Secretary's exercise of powers in relation to this inquiry***

Assuming the Commissioner recommends to the Parliamentary Secretary that he find that the circumvention activity under s 269ZZDB(5A) exists, the Australian industry considers that the Commissioner include a recommendation declaring that under s 269ZDBH(2)(d) different variable factors be specified for the exporter, Daehan Pty Ltd. The Australian industry considers that specifying a different export price based on a deductive methodology should be applied.

The Australian industry considers also that both a fixed and variable component of duty calculation be applied, whereby the variable component be set at the newly specified export price.

It is noted that s 269ZDBH(1)(b) permits the Parliamentary Secretary to specify the date on which the alterations in the declaration are to take effect. Given the likely shortfall of duty collection by the Commonwealth and the need to discourage circumvention strategies by sophisticated importers the Australian industry considers that this date should be set by reference to s 269ZDBH(8), namely the date of initiation of this anti-circumvention inquiry, specifically, 20 November 2017.

**FOR AND ON BEHALF OF THE AUSTRALIAN INDUSTRY**

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