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Mr Tim King
Investigator
Anti-Dumping Commission
Level 35
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For Public File

Dear Mr King

Statement of Essential Facts No. 264 - Steel Reinforcing Bar exported from Korea, Malaysia, Singapore, Spain, Taiwan, Thailand and Turkey

Introduction

I refer to Statement of Essential Facts ("SEF") No. 264 concerning the investigation by the Anti-Dumping Commission ("the Commission") into an application by OneSteel Manufacturing Pty Ltd ("OneSteel") that steel reinforcing bar ("rebar") has been exported to Australia from the Republic of Korea ("Korea"), Malaysia, Singapore, Spain, Taiwan, the Kingdom of Thailand ("Thailand") and the republic of Turkey ("Turkey") at dumped prices that has caused material injury to the Australian industry producing like goods.

OneSteel welcomes the Commission's findings as they relate to the proposed recommendation to publish a dumping duty notice in respect of rebar exported to Australia from all exporters in Korea, Singapore, Spain and Taiwan (excluding Power Steel Co. Ltd "Power Steel").

The Commission is proposing to recommend the termination of investigations in respect of exports of rebar to Australia as they relate to:

- exports by Millcon Steel Public Company Limited ("Millcon") from Thailand, Ann Joo Steel Berhad ("Ann Joo Steel") from Malaysia, and Habas Sinai Ve Tibbi Gazlar Istihsal Endustri A.S. ("Habas") from Turkey on the grounds there was no evidence of dumping;
- exports by Power Steel of Taiwan as the dumping margins determined were assessed as negligible; and
- rebar exported by all other exporters from Malaysia, Thailand and Turkey as the volumes of dumped imports are considered negligible.

OneSteel notes that the Commission elected not to conduct verification visits to exporters in Malaysia and Turkey. OneSteel addresses this matter below.

Dumping margin reports

The Commission elected not to visit rebar exporters in Malaysia and Turkey based on the volume of exports from these countries "*relative to the total import volume during the investigation period*". OneSteel raised concerns with the Commission prior to exporter visits about historic volumes of rebar exported from Malaysia. The volume of rebar exports from Malaysia to Australia in 2011/12 was almost three times the volumes of 2013/14 indicating an ability for Malaysian exporters to readily increase export volumes if an

opportunity arises. The Commission, however, remained unswayed and did not proceed with verification visits of any Malaysian exporters.

OneSteel notes that the domestic legislation provides for the "sampling" of exporter information under s.269TACAA in certain circumstances, thereby providing the means by which the Commission, and therefore the Parliamentary Secretary (as the delegate of the Minister), may be satisfied as to the reliability of information, in those prescribed circumstances. Therefore, by implication, where the circumstances prescribed by s.269TACAA are not satisfied, then the Commission is required to examine the information obtained from all exporters to the investigation (in this case). The domestic legislation is, unhelpfully, silent on the meaning of 'examine' in this context. However, as a matter of statutory interpretation, regard may be had to the WTO Anti-Dumping Agreement, specifically, Article 6.6, which provides in part:

> "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based"

Indeed, the practice of on-the-spot verification is entrenched in Article 6.7 of the WTO Agreement, which provides:

> "In order to verify information provided or to obtain further details, **the authorities may carry out investigations in the territory of other Members as required**, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation…" (**emphasis added**)

Furthermore, the procedures described in Annex I to the WTO Agreement, establish the practice of on-the-spot verification. This is the most common and acceptable standard applied by other Member States, and apart from *obiter dictum* expressed in a footnote to one Dispute Settlement Panel decision[1], is considered best and sound evidentiary practice.

Therefore, it is OneSteel's contention that if the Commission is unable to examine the information of each exporter's information to the standard required under the WTO Agreement, then the option of sampling is open to it. It is not open to the Commission to apply a wholly haphazard approach to the examination of exporters' information, generating wildly varying outcomes, and therefore potentially discriminating against some exporters with preference granted to others, and different standards of examination applied to the Australian industry and other interested parties.

OneSteel fails to understand how, based simply on a review of exporter questionnaire responses ("EQR's"), the Commission was able to establish the "reasonableness of the export price, domestic sales and cost data provided". For Malaysia , with 3 co-operating exporters identified, one of which had a 17.9% PAD dumping margin applied, a reasonable approach may well have been for the Commission to apply a sampling process based on the volume of exports from each of those exporters to select at least one exporter for on-site verification.

The determination of normal values and subsequent dumping margins based upon unverified data remains a high-risk strategy in an anti-dumping investigation. OneSteel

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[1] Dispute Settlements Panel, *Argentina - Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy,* WT/DS189/R (28 September 2001) at footnote 65.

thinks that it is no coincidence that in all cases, with the exception of Millcon Thailand, for the exporters "found" not to be dumping or where the dumping margin was "assessed" as negligible, the Commission relied on financial information that was not subject to an on-site verification. Exporters not the subject of an on-site verification visit that are found not to be dumping on the basis of a desk audit of information contained in an EQR will likely seek to displace exporters of rebar that have been found to be dumping (given that the former already has well-established distribution channels into the Australian market). OneSteel views the Commission's approach to non-verification of exporters as unsatisfactory with the potential to undermine the effectiveness of the decision-making applicable to all remaining interested parties.

OneSteel would also highlight that the non-verification approach to certain exporters limits the ability of the Australian industry to challenge the findings of the Commission, as there is minimal information upon which to raise concerns on adverse findings.

Natsteel Holdings Pte Ltd – Singapore

OneSteel has provided the Commission with a separate submission (dated 18 September 2015) in relation to the Verification Report for Natsteel Holdings Pte Ltd ("Natsteel"). OneSteel reaffirms its view that the Commission cannot determine normal values for Natsteel under s.269TAC(1) or s.269TAC(2)(c) as the Natsteel data is incomplete and unreliable, particularly as it does not distinguish costs between domestically produced and imported rebar.

The Commission must re-evaluate normal values for Natsteel for the purposes of its final report and recommendations to the Parliamentary Secretary.

The Commission would also be aware from OneSteel's [18 September 2015] submission on the Natsteel verification report that it is concerned by the relationship between the exporter and the Australian importer (Best Bar Pty Ltd) and the impact of that association on the export prices to Australia throughout the investigation period. The Best Bar website 'Company Profile' testifies to the current status of the relationship stating that although the partnership forged with Natsteel in 2000 came to an end in 2014, a "*strong and respected relationship remains with Natsteel*". In an article published in March 2015[2], the Best Bar CEO referred to his "*partner Natsteel, which has been working with Best Bar for 15 years*".

It is OneSteel's view that the profitability of the sales by Best Bar Pty Ltd ("Best Bar") in Australia were not sufficiently tested to determine whether the sales were profitable over the period. The apparent "inconsistencies" in certain costs identified by the Commission further add to concerns that the export prices for Natsteel cannot be determined as being arms length.

Additionally, the relationship between the exporter and the importer (and the associated concerns as to the profitability of the sales) establishes grounds for the Commission to recommend to the Parliamentary Secretary that the form of measures to be applied to Natsteel should be based upon the combination method to ensure the exporter does not seek to reduce the export price to minimize the liability for measures post the decision of the Parliamentary Secretary.

[2] The Sydney Morning Herald Business Day article "*Best Bar steels for fight with Arrium over 'dumping' claims"* – 2 March 2015

Form of measures

Section 11 of SEF No. 264 details the Commission's assessment as to the appropriate form of measures and includes a recommendation proposing the interim dumping duties be based upon the *ad valorem* method. The Commission has noted OneSteel's submission dated 10 August 2015 that recommended measures be based upon the combination duty method as this will ensure any opportunities to circumvent the measures are minimized.

The Commission has also included discussion as to the merits of the combination duty method and the *ad valorem* duty method. In relation to the combination duty method, the Commission considers that it is appropriate where:

- circumvention behaviour is likely (including for related party dealings);
- where complex company structures exist between related parties; and
- where there has been a proven case of price manipulation in the market.

In the Commission's view the combination duty method is less suitable where there are numerous models of goods the subject of the measures which exhibit a large pricing differential, or where a falling market exists. The Commission claims that the combination duty method is "less desirable" in a falling market as the ascertained export price operates as a floor price based upon historical export price data. It further suggests that where the market prices fluctuate, the ascertained export price quickly becomes outdated, but continues to be the basis for calculating the duty. In a falling market, the Commission contends that "*whilst delivering the protective effect, in a falling market, the combination method can have adverse effects on downstream industries and can lead to increased reviews*."

The Commission appears steadfast in recommending the *ad valorem* method unless it has established that the exporter's sales to Australia are not arm's length. The Commission's reference to adverse effects to downstream industries in a falling market is a one-sided view and does not pay any due regard to the fact that the applicant industry has sustained unfair prices – often for pro-longed periods – with no possibility of retrospective remedies. In a falling market the importer can seek a duty assessment and secure a refund of any overpaid interim duties. It would seem, however, that the concerns of the importer being inconvenienced to apply for a duty assessment are of far greater importance than applying a remedy to ensure the injurious dumping does not continue (and is minimised by the most effective means i.e. measures based upon the combination duty method).

The Commission's preference for measures based upon the *ad valorem* duty method is driven by the perception that such measures are "simplest and easiest" to administer. Whether this form of measure is common in other jurisdictions is irrelevant. The Commission's priority should be in delivering the most *effective* means of redress from injurious dumping (including the future threat thereof). The most *effective* means of redressing dumping and injury may not always be the simplest or easiest to administer. In fact, the combination method is best aligned to the prospective anti-dumping collection system operative in Australia.

In Australia's prospective anti-dumping collection system, the Commission determines in an investigation what the non-dumped price (i.e. "normal value") is and those results are used to make an interim assessment of dumping duty on each import transaction at the time of entry. Thus, the injurious dumping is remedied, and companies know in advance what the actual fairly traded cost associated with each potential supplier is and can make informed decisions on choice of supplier and pricing. Indeed, the combination method gives importers and exporters a guide of an export price above which to trade with

certainty. The bi-annual *Final Duty Assessment* process, then permits importers to test whether or not each import transaction at the time of entry was in fact dumped using contemporaneous data. If not dumped, importers are entitled to a repayment of duty. On the other hand, there is no right or power to collect a short-fall in duty if the amount of dumping has increased, which can potentially occur under a prospective dumping duty collection system, where ad valorem rates alone are applied.

In fact, where *ad valorem* measures alone are applied, in a prospective dumping duty collection system, then that provides an immediate incentive to change pricing behaviour to avoid dumping duties – a reduction in export price, reduces the amount of duty collected, with an increase in dumping activity over time. In this case, there is no incentive for the importer to apply for a *Final Duty Assessment*, nor would there be an incentive for the exporter to apply for a variable factors review. It would be incumbent on the Australian industry to apply for a variable factors review, which cannot occur less than 12 months after the original imposition of duties (or previous review inquiry).

On the other hand, the combination method provides a built in disincentive to reduce export prices to avoid duties, as to do so would result in an immediate increase in the duties assessed. Thus, not only would a combination method provide an effective remedy, in a prospective duty assessment system, but it would also reduce duty collection problems. Similarly, it reduces the incentive to use 'difficult to detect' "off-invoice" discounts and rebates, as the *ad valorem* component is still applied to the higher of either the AEP or FOB export price.

The Commission is well-appraised of the significant over-capacity of steel products in the region at the present time. Exporters are highly motivated to maintain export sales volumes to ensure plant utilisation rates do not fall. In a market of over-supply exporters must hold what export sales they have. If this means reducing an export price to hold sales (and hence production) volumes against a prospect of not securing the sale (due to the impact of the combination duty on the exported goods) it is expected the export price will be reduced.

The proposed recommendation to base the interim dumping duties on the *ad valorem* form of measures encourages the exporter to reduce the export price to minimize (or avoid) the level of duties payable. This response is likely to be more prevalent where the applicable dumping margin is low, e.g. 2 to 5 per cent. Given the current world steel market over-capacity that exists, one might argue that even 5 to 10% dumping margins would not serve as a deterrent to dropping export prices for an exporter who is desperate to maintain volume and secure the sale.

The Commission's view discussed in SEF No. 264 has been that the initiation of the investigation and the imposition of the PAD may have temporarily caused some exporters and importers to change their behaviour, providing support that the "*ad valorem duty method has so far been an effective measure in this instance*". OneSteel respectfully considers that the Commission's view in this regard is flawed. The dumping margins proposed in the SEF are significantly lower in a number of instances (eg. Wei Chih 4.7% from 23.2%, Daehan Steel 9.7% from 17.6%) than the preliminary dumping margins imposed and are considered unlikely, under the *ad valorem* form of measure, to be an effective deterrent to exporters continuing to lower the export price to secure the sale and maintain volume through their facilities.

Finally, it is noted that the combination form of measures is the preferred form of measure as recommended by the House of Representatives Agriculture and Industry Committee Inquiry into Anti-Circumvention Activities (as cited by the Commission at Section 11.3.1 of SEF No. 264).

Therefore, OneSteel requests the Commission to reconsider its proposed recommendation to the Parliamentary Secretary and substitute a proposal for interim dumping duties based upon the combination duty method as the most desirable form of measure to redress the injurious dumping (including for exports between related parties).

Celsa Barcelona and Celsa Nervacero

Compania Espanola de Laminacion, S.L. ("Celsa Barcelona") and Nervacero, S.A. ("Celsa Nervacero") sought to be treated as separate entities for the purposes of dumping margin determinations. Separate normal value determinations for Celsa Barcelona and Celsa Nervacero could potentially result in a positive dumping margin for one of the related entities, and a negative margin for the other.

The Commission noted the related party provisions of s.269TAA(4)(b) and noted that the Customs Act does not provide for the collapsing of entities. The Commission further cited WTO jurisprudence, in particular the dispute settlement case involving *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* where it was established that if the relationship of the two entities was close enough they could be considered a single entity.

OneSteel concurs with the Commission's position to treat Celsa Barcelona and Celsa Nervacero as a single entity for the purposes of normal value and dumping margin determinations as the parties are sufficiently close enough to be considered related with the same management and control over either entity.

Model matching for fair comparison purposes

The matching of comparable rebar models between domestic and export sales is critical to a fair outcome for each of the exporters the subject of this investigation. Section 6.4 of SEF No. 264 indicates that the Commission "*had regard to available evidence and applied the most appropriate criteria depending on the specific circumstances of each exporter*."

OneSteel has noted that for the majority of cooperative rebar exporters in this investigation, the grades of rebar produced by the respective company are identifiable on the company website. It is unclear to OneSteel why the specific grades that have been assessed by the Commission as the most appropriate comparable grade for normal value purposes have not been readily identified in the public file edition of the verification/dumping margin report for each exporter. The grade information is not commercially sensitive. OneSteel can only assume that the suggested reasoning by the exporter as to why the domestic model (or models) must remain confidential can only be due to the overriding concern that the Australian industry will challenge the selection of the nominated model(s) for fair comparison purposes.

It is OneSteel's firm view that the model selected as the basis for determining normal values for fair comparison purposes should be readily identifiable in the public file version of the appropriate report. The non-disclosure of this information severely disadvantages OneSteel's ability to assess and potentially challenge whether the exporter has identified the correct model for fair comparison purposes. OneSteel considers that it has been denied access to all relevant and pertinent information that is required for it to fully understand whether – on a technical interpretative basis – the correct model matching of domestic and export sales models for each exporter (that are not commercially sensitive or confidential) has occurred for fair comparison purposes.

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Conclusions

OneSteel welcomes the Commission's preliminary findings as contained in SEF No. 264. OneSteel does, however, consider that the findings in investigation No. 264 are compromised requiring further investigation and assessment due to:

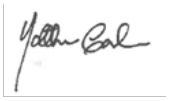
(i) the non-verification of exporter information for cooperative exporters in Malaysia and Turkey, and Power Steel of Taiwan;
(ii) the finding that sales between Natsteel and Best Bar were arms length transactions;
(iii) the non-disclosure of domestic models selected for fair comparison purposes; and
(iv) the proposed recommendation to base interim dumping duties on the ad valorem duty methodology.

OneSteel does not support the non-verification of exporter data in a new investigation where the exporter is identified as cooperative. The Commission's initial investigation with the new exporter requires full verification and validation. The Commission's current practice of risk-assessing exporters on the basis of export volumes does not provide any assurance that the exporter does not represent a future threat of material injury to the Australian injury.

Finally, OneSteel concurs with the Commission's treatment of exports by Celsa Barcelona and Celsa Nervacero as a single entity based upon the close association of the two related entities.

If you have any questions concerning this letter please do not hesitate to contact OneSteel's representative Mr John O'Connor on (07) 3342 1921 or Mr Matt Condon of OneSteel on (02) 8424 9880.

Yours sincerely



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