12 December 2018

Director, Investigations 1
Anti-Dumping Commission
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Dear Director,

Resumed Dumping Investigation No. 384 concerning alloy round bar exported from China: Statement of Essential Facts No. 384a

SUBMISSION OF THE AUSTRALIAN INDUSTRY APPLICANT

Liberty Steel (formerly *Liberty OneSteel*) makes the following observations in response to the Anti-dumping Commission's (**Commission**) preliminary findings contained in the *Statement of Essential Facts No. 384a* (**SEF 384a**) published on 13 November 2018.

The Commission has incorrectly concluded that Moly-Cop comprises part of the Australian industry producing like goods under s. 269T(4)[1] to the degree that it produces "captive production" of alloy round bar, that is grinding bar produced as work-in-progress (**WIP**) for the production of grinding media, specifically grinding balls. Such a conclusion is untenable at law and under policy, and leads to a serious error of fact, specifically, the conclusion that the Australian market for alloy round bar is overwhelming dominated by Moly-Cop's captive production, that is production that does not even compete in the Australian market.

By reaching this conclusion, the Commission has directly contradicted the decision of Senior Panel Member Fitzhenry of the Anti-dumping Review Panel (**ADRP**).[2]

The Commission's preliminary decision again incorrectly introduces the wrong denominator by which to assess the materiality of injury to the Australian industry as a whole, that is, the share of alloy round bar production, by incorrectly including Moly-Cop's captive production, being goods that do not compete in the Australian market for alloy round bar, apropos, the goods under consideration.

ADRP Decision No. 75

The preliminary issue for the Commission according to the ADRP is *"whether, and to what extent, Moly-Cop was part of the Australian industry producing like goods"*.[3] This, the Senior Member asserts, still requires the Commission to *"identify the goods that are being produced by the particular entity to assess whether it is part of the industry producing like goods"*.[4] However, the definition of Australian industry producing like goods under s. 269T(4) and the concept of a person or persons who 'produce like goods in Australia' according to the Senior Member:

[1] All legislative references are to the Customs Act 1901, unless otherwise expressly stated.
[2] Refer ADRP Decision No. 75, *Alloy Round Bar exported from the People's Republic of China*, April 2018
[3] ADRP Decision No. 75 at p. 8 [20].
[4] ADRP Decision No. 75 at pp. 8-9 [21]

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> have to be considered in the context of Part XVB and the purpose and object of the legislation. That purpose and object can be described as "measures in respect of goods whose importation into Australia involves a dumping or countervailable subsidisation of those goods that injures, or threatens to injure, Australian industry"...[5]
>
> When consideration is given to the context of s.269T(4) and to the analysis which the ADC has to conduct when considering whether imported goods are causing material injury to an Australian industry, it must surely be the end product of the manufacture or production which is relevant. How otherwise would you be able to determine whether the imports are causing injury? This becomes obvious when regard is had to how the ADC does this analysis by looking at price and volume injury.[6]

Therefore, the essential question for the Senior Member, was:

> what product did Moly-Cop produce when it produced the grinding bar which it treated as WIP for the production of grinding media? To the extent of that production is it part of the Australia industry which is producing like goods to the alloy round bar the subject of the application by OneSteel under s.269TB? In my view, to the extent that Moly-Cop was producing grinding balls or other grinding media, during the production of which it created, as a step in that production, alloy round bar or grinding bar, it was part of the Australian industry producing grinding balls or other grinding media. Such production was not the production of like goods to the alloy round bar the subject of the s.269TB application.[7] [emphasis added]

In ADRP Decision No. 75, the Senior Member highlighted several of the shortcomings and incongruities of the Commission's approach of treating a person who produces like goods that are "captive", as members of the Australian industry producing like goods under s. 269T(4):

> ...the ADC's inclusion of Moly-Cop's captive production or WIP becomes obvious in its analysis of the Australian market size and market shares. Figure 4 of the Termination Report, which is described as showing the market share for alloy round bar, includes Moly-Cop's production. This is shown as separate to the market share of the grinding rods which Moly-Cop sells. However, Moly-Cop does not have any market share for its production of alloy round bar. The production which the ADC has included is for a product that has been made into grinding balls and other grinding media which are not like goods. [emphasis added]

In spite of the Senior Member's decision, the Commission in SEF 384a, has again attempted to justify its inclusion of Moly-Cop in its definition of the Australian industry under s.269T(4), with equally strained reasoning:

> The Commissioner finds that the Australian industry producing like goods consists of two distinct sectors – a sector that produces like goods for self-use in its manufacture of downstream products (this sector is referred to in this report as the captive sector), and a sector that produces like goods for sale into the Australian market (referred to in this report as the market sector). [8]

To the degree that this conclusion tacitly endorses the Senior Member's identification of the importance of the role that exposure of the goods to competition in the market for the like goods, the Commission does draw a relevant distinction between two producers (in the ordinary sense of the word) of alloy round bar. In fact, the Senior Member identifies the exposure of production to competition in the market for the like goods, as the point at which a person producing "captive product" may in fact also meet the definition of an Australian industry under s. 269T(4):

[5] ADRP Decision No. 75 at p. 22 [22].
[6] ADRP Decision No. 75 at p. 10 [24].
[7] ADRP Decision No. 75 at pp. 9 -10 [23].
[8] SEF 384a at p. 25.

> … with respect to the round bar produced by Moly-Cop in the course of its production of grinding balls and other grinding media, it was part of the industry producing grinding media and not part of the Australian industry producing like goods to the imported alloy round bar which was the subject of the investigation. This is not to say that in every case it would be the wrong approach to include captive production. It may be different, for example, where the goods maintain their character. However, in this case, I consider that the ADC should have adopted the approach it took in the HRC continuation inquiry.[9]

However, this is not the case here, and instead the Commission in SEF 384a insists on its flawed defence of its earlier conclusion by noting that:

> while captive production may be shielded from direct import competition, it may still be exposed to indirect competition in the downstream market. More generally, an assessment of injury to the Australian industry in a downstream market is not beyond the bounds of possibility.[10]

There is no legal or policy basis to support this position held by the Commission, and is explicitly inconsistent with Article 3.1 of the *Anti-Dumping Agreement*[11] which expressly requires the Commission as investigating authority to examine the impact of dumped imports on sales of like products *"in the domestic market for like products"*, i.e. the market in which dumped imports compete against domestic like product. In circumstances involving internal transfers, such as with alloy round bar, this will be the open (non-captive) Australian market.

In addition to Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*, the price effects described in Article 3.2, which the Commission is required to consider, again necessarily focus on competition between dumped imports and domestic like goods. In circumstances involving internal transfers of domestic production, as well as sales of like product to domestic customers, consideration of the open (non-captive) market should be included in an injury analysis because it is in this open and traded market that the price effects of the dumped imports will be reflected. There are therefore, no examples known to Liberty Steel in which the Commission could seriously point to injury to like goods caused by unlike goods. This incongruity was specifically addressed and rejected by the Senior Member in her decision:

> It is difficult to see how the ADC could have examined the impact on the captive production of Moly-Cop from dumped imports. The captive production of round bar by Moly-Cop as a step in the production of grinding media was not exposed to any competition from dumped goods. It was the goods which Moly-Cop produced as grinding media which were subject to competition from imported goods. At that level, as OneSteel notes in its application, Moly-Cop's production had the benefit of the imposition of anti-dumping measures on imports of grinding balls from China.[12]

Swan Portland Cement Ltd v Minister for Small Business and Customs[13]

The Commission again relied on the decision of Lockhart J in *Swan Portland Cement Ltd v Minister for Small Business and Customs (*Portland Cement*)* as *"assistance in resolving the preliminary issue of whether, and to what extent, Moly-Cop was part of the Australian industry producing like goods"*.[14]

In that case his honour stated that:

> 39. In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that

[9] ADRP Decision No. 75 at p. 11 [30].
[10] SEF 384a at p. 25 [4.1]
[11] World Trade Organisation, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
[12] ADRP Decision No. 75 at p. 11 [29].
[13] [1991] FCA 42
[14] SEF 384a at p. 28 [4.3.3].

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> industry, whether the part be determined by geographic, market or other criteria. The difficulty seems to me to lie, not in defining the expression, but in determining on the facts of a given case whether a particular industry answers the statutory description of an Australian industry. The latter is not a question of construction; it is a question of identification by the relevant fact finding body, in this case, the Authority.
>
> 40. The determination whether material injury to an Australian industry producing like goods has been, or is being caused, or is threatened, is not an exercise of counting heads of markets, production or distribution centres or things of this kind. It is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods. [15]

The case involved consideration of the claim by West Australian producers of cement clinker that they were an Australian industry separate from eastern Australian producers. In rejecting the claim Lockhart J relied on the above observations and the fact that the Australian Parliament had not enacted into law the separate geographic market provisions of the *Anti-dumping Agreement*.[16] However, in claiming that a case dealing with separate geographic markets provides authority for consolidating all Australian producers of like goods to goods of a particular kind into an Australian industry in all circumstances, the Commissioner has gone beyond both the essence of the judgement and the ordinary meaning of the relevant provisions of the Act.

Conclusions

Liberty Steel concludes that taking account of the relevant terms and overall purpose of Part XVB of the Act and the desirability of consistency in the administration of that legislation, Moly-Cop is a part of the Australian industry for the purposes of quantification of injury only in so far as it produces and sells a small volume of grinding rods.

Therefore, Liberty Steel submits that the resumed investigation must be conducted in accordance with the decisions of the ADRP in Report No. 75.

To discuss any aspect of this submission, please contact the Australian industry applicant.

FOR AND ON BEHALF OF THE AUSTRALIAN INDUSTRY APPLICANT

[15] [1991] FCA 42 at [49].
[16] [1991] FCA 42 at [46-48].