



14 November 2018

Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

BY EMAIL:

investigations2@adcommission.gov.au

Dear Director,

Re.: Statement of Essential Facts No. 467 - Review of Anti-Dumping Measures applying to Steel Reinforcing Bar exported to Australia from the People's Republic of China

AUSTRALIAN INDUSTRY SUBMISSION

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. 467 (SEF 467)* published on 22 October 2018.

Status of Chinese exporters as uncooperative

The Commission has reached the correct statutory inferences from the conclusion that the Chinese exporters were all 'uncooperative exporters' within the meaning of s. 269(1).¹ Specifically, the Commission was correct to apply s. 269TACAB(1) directing the Commission to recommend to the Minister that:

- the export price is to be worked out under s. 269TAB(3);² and
- the normal value is to be worked out under s. 269TAC(6).³

The question which remains is whether the Commission's determination of the export price for all exporters of rebar from China to Australia, relied on information that meets the standard of 'relevance' and 'reliability' required under ss. 269TAB(3) and (4).

Calculation of export price determined under s. 269TAB(3)

The Commission has preliminarily concluded that the best available information to determine an export price for uncooperative exporters of rebar from China in the current review was the export prices "as ascertained by the Minister on 2 October 2018 in relation to Reviews 411, 412 and 423 following ADRP Report No. 84".⁴ However, Liberty Steel considers that a key finding of ADRP Report No. 84 was factually incorrect and therefore unreliable.

In ADRP Report No. 84, the review of the decision concerning the Commission's Reviews 411, 412 and 423 (**the Earlier Reviews**), Panel Member O'Connor concluded that:

¹ All legislative references are to the *Customs Act 1901*, unless otherwise expressly specified.

² Paragraph 269TACAB(1)(d)

³ Paragraph 269TACAB(1)(e)

⁴ SEF 467 at p. 13 [4.2.1]

LIBERTY STEEL

Liberty OneSteel (Newcastle) Pty Ltd
Ingall Street, Mayfield NSW 2304

ABN: 50 623 285 718

libertygfg.com

MEMBER OF



*“a simple average of prices over the initial investigation period would not give effect to the obligation regarding proper comparison”.*⁵

This conclusion followed the Commission’s original decision in the Earlier Reviews that on the question of their making a timing adjustment under s. 269TAB(2G):

*“The Commission therefore considers that a timing adjustment is required to reflect what Hunan Valin’s export price would have been during the review period. The Commission has used published steel pricing data from Platts, specifically the average price of rebar exported from China for the original investigation period compared to the average price of the same for the review period. The Commission notes that the average price for the review period is 1.1 per cent lower than for the original investigation period. Accordingly, the Commission has adjusted the export price determined during the original investigation by decreasing it by 1.1 per cent to reflect the lower prices for rebar during the review period.”*⁶

Panel Member O’Connor criticised the Commission’s approach to the calculation of a timing adjustment, in relevant part, as follows:

*“By adopting the simple average of all Chinese export prices during the investigation period, the Commission captured prices for the goods in export sales which occurred before the date of the Applicants’ exports transactions. By taking the simple average of all export prices from China the Commission placed reliance upon pricing decisions of exporters other than the Applicants, such decisions pre-dated the date of the Applicants’ first export transaction during the investigation period.”*⁷

However, there are several factual errors and oversights in the Panel Member’s reasoning for overturning the Commission’s reasons for its original decision in the Earlier Reviews, which may be best summarised in the following extract from *Report 411, 412 and 423*:

“In their submissions in response to the SEF, Hunan Valin and Yonggang submitted that the Commission has erred in its determination of a timing adjustment under subsection 269TAB(2G). They suggest that the Commission should calculate the timing adjustment factor based on the quarterly movement of prices between the original investigation period and the review period. In essence they suggest comparing the change in rebar prices from quarter 1 in the original investigation period to quarter 1 in the review period, and as such for the remaining quarters.

“This approach, however, does not provide an accurate trend in the price of rebar between the original investigation period and the review period. Specifically, the individual respective quarters in 2014-2015 and 2016-2017 are not related in any way, but rather it is the overall trend in consecutive quarters in the interim time between periods which describes the change in price. Perhaps if there was a seasonal function in the price of rebar, the exporters’ claim may have more merit, but as it stands, the Commission considers that comparing one quarter in a different time frame to another without considering the interceding quarters is arbitrary.”⁸ [emphasis added]

The key factual oversight inherent in the ADRP’s reasons for its decision is it fails to have proper regard to the presence and absence of exports by certain exporter applicants for review of measures. Thus, for example, exporter applicants for review, such as *Jiangsu Shagang Group Co., Ltd (Shagang)*, who had not exported during the original investigation period or the subsequent review period for (Review 411) were afforded entirely

⁵ ADRP Report No. 84 at p. 32 [112].

⁶ Report No. 411, 412 and 423 (Steel reinforcing bar – China) at p. 15.

⁷ ADRP Report No. 84 at p. 31 [111].

⁸ Report No. 411, 412 and 423 (Steel reinforcing bar – China) at p. 16.

irrelevant information in the form of the export volumes of other exporters from China when used to determine a timing adjustment applied to their export price.

Furthermore, the ADRP justifies its departure from the Commission's approach to determining the timing adjustment contained in *Report 411, 412 and 423*, on drawing incorrect parallels between the need to make timing adjustments under s. 269TAB(2G) and the 'fair comparison' article and obligations of the WTO Anti-dumping agreement (**WTO Agreement**).⁹ The concept of 'fair comparison' under the WTO Agreement relates to the obligation to make fair comparison between the export price and the normal value. Applied to the concept of calculation of a timing adjustment to the determination of an export price under s.269TAB(2B), it is not clear what if any relevance there is between the two concepts, apart from one of preference on the part of the decision maker. However, applied here for the reasons first identified by the Commission in *Report 411, 412 and 423*, the original approach adopted by the Commission when calculating the timing adjustment under s. 269TAB(2G) should be preferred.

Indeed, it is further observed that the language of s. 269TAB(2G) does not prescribe the mandatory application of a timing adjustment, but rather makes its available to the Minister to apply as the Minister "determines" is "*necessary to reflect what the export price would have been had there not been an absence or low volume of exports*".

Therefore, Liberty Steel considers that the lowest ascertained export price established in the Earlier Review less any upward timing adjustment applied in ADRP Report No. 84, should be taken as the ascertained export price under s.269TAB(3) for the current review.

Timing adjustment made under s.269TAB(3)

Any decision by the Commission to recommend to the Minister to make a further timing adjustment to the lowest ascertained export price established in the Earlier Review less any upward timing adjustment applied following ADRP Report No. 84 is made under s. 269TAB(3) and lies entirely with the Minister's discretion, subject to the requirements of relevance and reliability of the information.

Applied here, the low volumes of exports (as identified under s. 269TAB(2A) in the Earlier Reviews), makes the approach to calculating a relevant or reliable timing adjustment factor under s. 269TAB(3) wholly uncertain. The Commission's approach to calculating a 32.3 per cent upward adjustment to the export price based on published FOB export prices has no relevance to the specific exporters or even Australia as the destination of those exports, and as such is an unreliable measure of export price changes between the two review periods (i.e. between the Earlier Reviews and REV 467). The decision to make this discretionary upward timing adjustment to the export price, in fact, rewards the identified exporters' decision to not cooperate with the Commission's inquiries and review.

Liberty Steel opposes the making of this timing adjustment under s. 269TAB(3).

Powers of the Minister in relation to review of anti-dumping measures

The outcome of a Division 5 Review of measures is prospective. Subject to the operation of s. 269ZDB(6)(a), the review determines the dumping measures that will be applicable to exports by those parties the subject of the review in the future. Again, subject to s. 269ZDB(6)(a), a declaration will not affect the duty payable in respect of goods that have been entered into Australia before the declaration under s. 269ZDB is made.

However, s. 269ZDB(6)(a) does permit the Minister to make a declaration which has limited retrospective effect – enabling the Minister to "back date" the declaration to the date of publication of the 'initiation' notice under s. 269ZC.

⁹ Refer for example, Article 2.4.



Liberty Steel readily observes the practice of exporters (subject to a Division 5 Review of measures), following publication of an initiation notice under s. 269ZC, but before the declaration under s. 269ZDB is made, increasing the volume of exports to Australia - especially in circumstances where there is an expectation of the variable factors changing in such a manner that will increase their future duty liabilities. As such, these exporters are exploiting any duty advantage they perceive to have during the intervening period.

Following receipt of the Commission's Exporter Questionnaire, exporters subject to a Division 5 Review have a period of 37 days to effectively calculate and form a view of their new variable factors based on their own financial information, and reach an informed view as to their likely future duty liability. It is Liberty Steel's view that at the conclusion of the 37-day period to respond to the Commission's Exporter Questionnaire that the exporters have in effect, constructive notice of their future duty liability.

Therefore, for this reason Liberty Steel considers that the Commission should as a matter of practice recommend to the Minister that any declaration made under s. 269ZDB(1) should specify the date on which responses to the Exporter Questionnaires were due, to be the date on which the declaration is to be taken to have had effect, either in relation to a particular exporter or to exporters generally, as if the Minister had fixed different variable factors in respect of that exporter or of exporters generally, relevant to the determination of duty.

Such a practice would ensure that the interests of the exporter (in terms of their constructive knowledge of their variable factors) and the interests of the Australian industry (in terms of avoiding additional injury from an exporter exploiting the delay in updating the variable factors) may be fairly balanced.

Applied here, Liberty Steel seeks the Commission recommend to the Minister that the notice declaring the outcome of Review 467, specify **10 May 2018** as the date on which the declaration is to be taken to have had effect, to exporters generally, as if the Minister had fixed different variable factors in respect of exporters generally, relevant to the determination of duty.

Proposed form of duty

Liberty Steel agrees with the Commission's assessment "*that the combination duty method continues to be the most appropriate form of duty in the current circumstances*"¹⁰.

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT

¹⁰ SEF 467 at p18