



10 December 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. 468 - Review of Anti-Dumping Measures applying to Steel Rod in Coils 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. 468 (SEF 468)* published on 19 November 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. 269T(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 rod in coils 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 rod in coils from China in the current review was the ascertained export prices "determined by the Minister on 6 November 2018, following ADRP Report No. 83 (in relation to Reviews 413 and 414)".⁴ However, Liberty Steel considers that a key finding of ADRP Report No. 83 was factually incorrect and therefore unreliable.

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 468 at p. 13 [4.2.1]

In *ADRP Report No. 83*, the review of the decision concerning the Commission's *Reviews 413 and 414 (the Earlier Reviews)*, Panel Member Ellis concluded that:

*"It is appropriate to 'weight' the impact of the quarterly benchmark on the overall adjustment by having regard to the volume of the goods sold in the quarters for which the benchmark is used".*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 had there not been an absence or low volume of exports. The Commission has used published steel pricing data from Platts, specifically the average price of RIC 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 1.6% lower than for the original investigation period. Accordingly, the Commission has adjusted the export price determined during the original investigation by decreasing it by 1.6% to reflect the lower prices for RIC during the review period."*⁶

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

*"If a significantly disproportionate amount of the exports relied upon under s 269TAB(2B) are made during a quarter in which the market (measured by the use of a benchmark) departs significantly from the average market conditions (measured by use of a benchmark for the whole of the relevant period), then the use of an arithmetic mean may significantly distort the adjustment under s 269TAB(2G)."*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 413 and 414*:

"In their submissions in response to the SEF, Hunan Valin and Shagang 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 RIC 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 RIC 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 RIC, 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 ADRP justifies its departure from the Commission's approach to determining the timing adjustment contained in *Report 413 and 414*, 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

⁵ ADRP Report No. 83 at p. 36 [122].

⁶ Report No. 413 and 414 (Steel rod in coil – China) at p. 15.

⁷ ADRP Report No. 83 at p. 36 [122].

⁸ Report No. 413 and 414 (Steel rod in coil – China) at p. 15-16.

(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 413 and 414*, the original approach adopted by the Commission when calculating the timing adjustment under s. 269TAB(2G) should be preferred, particularly given neither Hunan Valin or Shagang were found to have exported rod in coils to Australia during the current review period or the Earlier Reviews.

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. 83, 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. 83 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 30.3 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 468). 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.

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.

⁹ Refer for example, Article 2.4.

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 468, 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 disagrees with the Commission's assessment:

*"As a result of the current review, the dumping margin for all Chinese exporters of rod in coils including Hunan Valin and Shagang is now 39.5%. The Commissioner considers that the high dumping margin reduces the likelihood of significant reduction in export prices to avoid the intended effect of the duties, and that measures in ad valorem form would be effective in mitigating the injury to Australian industry producing like goods."*¹⁰

The below table demonstrates the variability of duties applied to Chinese exporters of rod in coils in recent years following various actions:

Action	Date	Dumping Margin Hunan Valin	Dumping Margin Shagang	Dumping Margin All Other Exporters	Form of Duty
Report 301	22.04.2016	44.1%	37.4%	53.1%	<i>Ad Valorem</i>
ADRP Report 40	13.01.2017	40.2%	36.1%	49.0%	<i>Ad Valorem</i>
Review 413 & 414	20.04.2018	24.3%	24.2%	49.0%	Combination for Hunan Valin and Shagang, <i>Ad Valorem</i> for all others
ADRP Report 83	14.11.2018	26.1%	16.4%	49.0%	Combination for Hunan Valin and Shagang, <i>Ad Valorem</i> for all others

Assuming the SEF 468 proposed dumping margin for all Chinese exporters of rod in coils is carried through to the final report for *Review 468*, there is a reasonable likelihood that the dumping margin will not remain at that level for the foreseeable future. If the outcome of *Review 468* is challenged with the Anti-Dumping Review Panel or a new Review of Measures application is lodged by the Chinese exporters, the 39.5% margin may be reduced with

¹⁰ SEF 468 at p20



no specific requirement to change the form of duty. In fact, ADRP Panel Member Fisher in *ADRP Report 31* has previously advised:

*"I find that the Panel has no power to review the decision to use the ad valorem method to calculate the dumping duty, since it is not part of the Reviewable Decision."*¹¹ [emphasis added]

Liberty Steel has long regarded the 'combination method' of duty calculation as the most effective form of measure in preventing ongoing injury, particularly for commodity products such as rod in coil. In order for all stakeholders to have confidence in the effectiveness and fairness of Australia's anti-dumping system it is important that when material injury caused by dumping has been found, that the measures recommended by the Commission and imposed by the Minister are effective in preventing ongoing injury. The strength of the combination method lies in the use of the variable duty element which acts as a floor price to capture additional interim dumping duty if the exporter further reduces the price.

Importantly, the combination method does not disadvantage importers as they have the option of applying for a duty assessment and obtaining a refund if it is found that the goods sold at the lower price were not dumped.

For this reason, Liberty Steel requests the Commission recommend that the combination method of duty calculation be imposed in this Review 468.

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT

¹¹ ADRP Report No. 31 at [19]