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The Director - Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2600

Anti-Dumping Review Panel Review No. 130 - Steel Reinforcing Bar

Dear Director

Please find attached a submission on behalf of Daehan Steel Co. Ltd ("Daehan"), in response to the Anti-Dumping Commission's ("the Commission") file note regarding the Anti-Dumping Review Panel's ("ADRP") request for reinvestigation of Report 546.

Daehan's circumstances during Review 546

In Report 546, the Commission outlined that it was unable to verify the completeness, relevance and accuracy of the data relating to a portion of Daehan's domestic sales and its CTMS. For this reason, it considered having regard to all relevant information. It is important to distinguish Daehan's circumstances from that of an exporter that is unwilling to cooperate and participate with a dumping inquiry.

The Commission were informed prior to the lodgement of its exporter questionnaire response, that Daehan was facing a number of factors which would hamper their ability to cooperate as they had in previous inquiries. These included:

- [REDACTED];
- [REDACTED];
- [REDACTED]; and
- the outbreak of COVID-19 prevented key personnel from accessing Daehan's workplace and accounting records during imposed quarantine measures.

In each of the previous inquiries that Daehan has participated, it has fully and properly cooperated with the Commission's on-site verification. In each of these inquiries, Daehan was able to satisfy the Commission that its data was complete, relevant and accurate. Daehan submits then that its circumstances surrounding the verification of its data during Review 546, differ to those of exporters that have chosen not to cooperate at all. Of relevance to Daehan's circumstances is the

obligation outlined in Article 6.13 of the WTO Anti-Dumping Agreement (“ADA”), for ‘*the authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.*’ It is clear that the situation faced by Daehan during Review 546 was unexpected and/or outside of its control.

Therefore, taking into account the extraordinary circumstances faced by Daehan during the review, and the ability for the Commission to take into account such difficulties, Daehan contends that the Commission was under an obligation to carefully and closely examine secondary sourced information, and disregard such information if it could not be shown to be reliable and accurate.

To that end, it is submitted that the Commission has available verified primary information relating to Daehan’s domestic sales which is the best information available, and which would nullify the need to consider unreliable secondary sourced pricing data provided by the applicant.

ADRP request for reinvestigation

In considering the grounds of appeal within the application by Infracbuild, the ADRP Panel Member noted that:

- *“the pricing information provided by InfraBuild appears to be relevant to the issue of the normal value”*; and
- it was not accepted *“that the domestic price of the goods is completely unrelated to the export price of the same goods, so that changes in the export price are irrelevant to the normal value, and consequently cannot be taken into account under s 269TAC(6).”*

The Panel Member also emphasised that *“s.269TAC(6) refers to a determination of the normal value by the Minister ‘having regard to all relevant information’ where the mechanisms identified in earlier subsections cannot be utilised.”*

The key consideration then for the Commission in conducting its reinvestigation, is whether it had properly evaluated all relevant information in deciding to ultimately based its determination on the best and most appropriate information. The requirement to evaluate and assess all relevant information in deciding which information is best for the particular circumstances, is confirmed by the Commission’s own policy guidelines and its obligations under the WTO Anti-Dumping Agreement (“ADA”).

Guidance on use of relevant information

Pursuant to Article 6.8 and Annex II of the ADA, an investigating authority may rely on the facts available where a respondent has failed to provide some or all of the necessary information requested by the investigating authority. Australia’s anti-dumping legislation incorporates and reflects those provisions in subsections 269TAB(3) and 269TAC(6) of the Act.

In addressing the function of Article 6.8 and Annex II in *US – Hot-Rolled Steel*¹, the Panel stated that *“one of the principle elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the ‘first-best’*

¹ Panel Report, US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R, para 7.55; Page 23.

information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts."

In Beef and Rice², the Panel noted that 'Annex II, entitled "Best Information Available in Terms of Paragraph 8 of Article 6" contains a number of obligations the investigating authority has to comply with in order for the use of facts available in a given case to be in accordance with Article 6.8 of the AD Agreement.'

The Panel interpreted the conditions of Annex II on the investigating authority as follows:

The use of the term "best information" means that information has to be not simply correct or useful per se, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available". This is reinforced, in our view, by the requirement in paragraph 3 of Annex II that all information which is verifiable, which is appropriately submitted and supplied in a timely fashion is to be taken into account when determinations are made. In similar vein, paragraph 5 of Annex II does not allow an authority to disregard information, even though that information is not ideal in all respects, provided the interested party has acted to the best of its ability. Finally, and perhaps most importantly, such a conclusion is evident from the requirement set forth in paragraph 7 of Annex II that, in case the authorities have to base their findings on information from a secondary source they should do so with special circumspection, and check, where practicable, the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns and from the information obtained from other interested parties during the investigation.

This requirement to undertake a comparative evaluation is supported by the Commission's stated policy in Report 159D³ and REP 203⁴. In assessing the use of relevant information for the purposes of determining export price and normal values for uncooperative parties, the Commission notes at page 16 of Report 159D, that:

Thus, in conducting an investigation, Customs and Border Protection should undertake an "evaluative, comparative assessment"⁵ of information provided by interested parties to ensure that "this information [is] the most fitting or appropriate for making determinations..."⁶.

As non-cooperating exporters do not provide Customs and Border Protection with information so that an individual dumping margin can be determined, all relevant information is actively sought from interested parties. Customs and Border Protection will ordinarily have regard to a breadth of information as a result of this inquiry. It is then necessary to critically assess this information to ascertain whether it can be relied upon in order to determine export prices and normal values pursuant to subsections 269TAB(3) and 269TAC(6) respectively. If the information is considered to be unreliable, it is disregarded pursuant to subsections 269TAB(4) and 269TAC(7).

² Panel Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, WT/DS295/R, para 7.166, page 144.

³ Reinvestigation of certain findings in REP 159C – Certain Clear Float Glass,

⁴ Reinvestigation of certain findings in REP 177 – Certain Hollow Structural Sections

⁵ Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167

⁶ Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167

On page 17 of that same report, the Commission outlined its approach to the use of relevant information from other cooperating exporters in determining export price or normal values for non-cooperating parties. It stated:

Customs and Border Protection must then scrutinise the verified information of cooperating exporters to ensure that it is reasonable in the circumstances to attribute this information to non-cooperating exporters.

Assessment of relevant information in Review 546

Secondary sourced pricing information - MEPS

Daehan contends that a sufficient evaluative and comparative assessment of all relevant information was undertaken by the Commission, despite not clearly explaining their assessment in Report 546.

The Commission's consideration of the submitted relevant information is outlined below:

InfraBuild has confidentially provided the Commission with a published price survey for Korean rebar.

The Commission did not use this pricing information as the basis for making a timing adjustment to historical normal values because the publisher of that information has previously stated that it does not consent to its use by the Commission.

The Commission does not have any other published pricing information relevant to the Korean domestic market for rebar. The Commission therefore considers the approach it has adopted in determining the normal value for Daehan to be the most appropriate approach, as it is based on verified data which is closely related to the Korean exporter concerned.

It is clear that the lack of transparency surrounding the pricing information submitted by Infrabuild, and the unwillingness of the data provider, MEPS, to allow its source data to be used by the Commission, provided the Commission with sufficient doubt about the reliability and accuracy of the relevant information. This requirement to assess the reliability of relevant information was considered and addressed by the Appellate Body in *Mexico - Anti-Dumping Measures on Rice*, in agreeing with the Panel, explaining that:

[T]he agency's discretion is not unlimited. First, the facts to be employed are expected to be the 'best information available'.... Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources 'with special circumspection'.

The lack of reliability and accuracy of the steel data published by MEPS was previously highlighted by interested parties and considered by the Commission. In its response to an issues paper from the dumping investigation into grinding balls exported from China⁷, the exporter Changshu Longte Grinding Ball Co., Ltd detailed issues with the MEPS published steel data, that provided a clear basis for doubting the reliability and accuracy of the data, and determining such information to not be the best available information, given alternative primary sources of information.

⁷ EPR 316, Record no. 26.

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Those reliability and accuracy concerns remain, and the Commission's decision to disregard MEPS published steel data as the best available information for the purposes of determining Daehan's normal value, was the correct decision.

Primary sourced domestic pricing information – Review 566

It is noted that the Panel Member highlighted in his letter to the Commissioner that “[y]ou are not, of course, confined to ‘relevant information’ within s 269ZZK(6) in conducting a reinvestigation.” This view is supported by Infrabuild in its submission of 2 March 2021, in which it provides new pricing information for consideration by the Commission, in the determination of Daehan's normal values. Given the apparent acceptance that the Commission is able to have regard to new information in its reinvestigation, Daehan contends that the Commission's verification of Daehan's domestic sales data in the current Review 566, is the best and only primary sourced sales information upon which it can rely to accurately determine normal values.

Domestic sales information from Review 566 are considered directly relevant to the reinvestigation due to the six month overlap of the nominated review periods.

Review 546 examined sales over the period 1 January 2019 to 31 December 2019, whilst Review 566 is examining sales over the period 1 July 2019 to 30 June 2020. There is then at least 6 months of domestic sales information which has been verified by the Commission in Review 566, which form at least half of the actual domestic sales investigated in Review 544.

Based on the domestic sale datasets from Review 486 and the current Review 566, the Commission is able to more accurately calculate a timing difference of only domestic sales of DBIC products, which are the subject goods exported by Daehan. A comparison of the weighted average domestic selling price for DBIC products sold over the whole of the review period from Review 486 and the 6 month period overlapping Review 546 and Review 566, shows that prices fell approximately █%.

This verified primary domestic sales information clearly refutes the claims presented by Infrabuild, which relies on unreliable and inaccurate secondary pricing information. On that basis, the Commission must maintain its original decision and disregard the MEPS sales information as it is not the best information available.

Further, Daehan proposes that given the accuracy of domestic sales information verified by the Commission in Review 566, it is now open to the Commission to determine normal values using the actual domestic sales information submitted to Review 546. That information is unchanged and reconciled through to Daehan's audited financial statements during the verification process in Review 546.

Yours sincerely

John Bracic