

24 June 2022

Director Investigations 3
Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

BY EMAIL: investigations3@adcommission.gov.au

Dear Director,

Dumping Investigation No. 584 concerning Merchant Bar exported from Taiwan

AUSTRALIAN INDUSTRY RESPONSE TO FENG HSIN SUBMISSION (PUBLISHED 22 JUNE 2022)

InfraBuild NSW Pty Ltd (**InfraBuild**), the Australian industry applicant in this matter, refers to the submission of the largest exporter of merchant bar from Taiwan, Feng Hsin Steel Co., Ltd (**Feng Hsin**) published on 22 June 2022.¹

The consultant for the exporter, Feng Hsin, has materially misrepresented the Commission's policy on the approach to conducting causation analysis in an investigation, and in so doing, has highlighted a fundamental error in the Commission's interpretation of its own policy on this point.

Firstly, the consultant for Feng Hsin, paraphrases the Commission's *Dumping and Subsidy Manual*² as follows:

*[...] with the WTO jurisprudence which requires that any other method, other than the coincidence analysis described above, will require a 'compelling explanation' as to why causation exists notwithstanding the absence of any coincidence.*³

With respect, this truncation of the Manual is misleading. Importantly, the consultant has ignored the precondition to the provision, namely:

Where no coincidence has been found, or a 'coincidence analysis' has not been possible, the Commission may accept an alternate analytical method—such as a 'but for' analysis—

¹ EPR Folio No. 584/046.

² Anti-dumping Commission, *Dumping and Subsidy Manual* (December 2021).

³ Original fn 1: *Dumping & Subsidy Manual* – Dec 2021, page 101

when examining causation. Any alternate method will be required to be evidence based. The Commission will conduct such investigations in accordance...⁴ (emphasis added)

In other words, the Manual explicitly provides that *...where no coincidence has been found, or ...has not been possible...* then the Commission *...may accept an alternate analytical method...* This means that the Commission is not confined only to apply a method of ‘coincidence analysis’, but may also perform ‘but for’ analysis.

This highlights a fundamental omission from the Commission’s analysis in SEF 584, which InfraBuild believes it addressed in its response to the SEF, but repeats here for the sake of clarity. In SEF 584 the Commission states its policy position as follows:

*However, the commission notes that the manual sets out that a ‘but for’ analysis is **only used if a coincidence analysis is not possible, which is not the case in this investigation.**⁵*
(emphasis added)

This is not correct. Again, to repeat the Manual:

Where no coincidence has been found, or a ‘coincidence analysis’ has not been possible, the Commission may accept an alternate analytical method—such as a ‘but for’ analysis—when examining causation. (emphasis added)

In breach of its policy on this issue, the Commission failed to consider the ‘but for’ approach to causation analysis, despite industry providing detailed price undercutting evidence pointing to the causative effects of the dumped goods on both industry’s prices and sales (lost) volumes in its application and subsequent submissions. A mere assertion by the consultant acting for Feng Hsin to the contrary is not probative of this question, but (to adopt the superlatives of the consultant) *...observed as mere self-serving statements in a frantic attempt to...* terminate the investigation and ‘memory hole’ his client’s (verified) 18.1 per cent dumping margin.

In our response to SEF 584,⁶ we attempted to highlight the error in the Commission’s approach:

The Commission has wrongly concluded that in this case it is confined to use ‘coincidence analysis’ to assess causation. This is in direct contradiction of the Ministerial Direction⁷ on this point, which provides in relevant part:

⁴ Manual (December 2021), p. 101.

⁵ SEF 584, p. 57 at [8.4].

⁶ EPR Folio No. 584/043, p. 2.

*'In cases where it is asserted that an Australian **industry would have been more prosperous if not for the presence of dumped or subsidised imports, I direct that you be mindful that a decline in an industry's rate of growth may be just as relevant as the movement of an industry from growth to decline.**⁸ (emphasis added)'*

Applied here, industry's claim is that its material injury has been the decline in its rate of growth. Throughout the investigation, industry produced detailed examples of how it responded to offers of dumped imports. In each and every case, industry's response was to suppress price to secure sales volume. In other words, if not for the dumping, industry would have maintained or increased its profit margins on sales and profitability. Specifically, how the size and significance of the dumping margin can be ignored by the Commission, is clearly an error in its reasoning. To proceed on this basis would place the Commission in breach of paragraph 269TAE(1)(aa).⁹

Errors in Feng Hsin's undercutting analysis

We remind the Commission that the correct point of comparison for undercutting analysis is the importers' and industry's prices to the Australian market customer, not at the FOB export price level, as Feng Hsin's consultant seeks to suggest. Price undercutting may occur irrespective of the exporter's movement in price. However, if that price remains dumped; as the Commission acknowledges occurred throughout the investigation period; then the Commission is bound to consider the causative effects of those dumped export prices on the price undercutting behaviour of importers in the Australian merchant bar market.

CONCLUSION

Accordingly, if the Commission continues to conclude that *...no coincidence has been found...* then the Commissioner is obliged to apply a 'but for' method of causation analysis as provided for in the *Manual* and the *Ministerial Direction*.

⁷ Original fn 2: Clare, J., Minister for Home Affairs, *Ministerial Direction on Material Injury 2012*, Canberra, Commonwealth of Australia, 27 April 2012.

⁸ Original fn 3: *Ministerial Direction*, p. 2.

⁹ Original fn 4: All legislative references in this submission are to the *Customs Act 1901* unless otherwise specified.

PUBLIC RECORD



Should you have any questions concerning any aspect of this submission, please do not hesitate to contact your InfraBuild representative on record.

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT