Australian Government
Anti-Dumping Review Panel

ADRP DECISION No. 75

Alloy Round Bar exported from the People's Republic of China

April 2018

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Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
China	People’s Republic of China
Commissioner	The Commissioner of the Anti-Dumping Commission
HRC	Hot Rolled Coil
Manual	Dumping and Subsidy Manual November 2015
Milltech	Milltech Pty Ltd
Moly-Cop	Commonwealth Steel Company Pty Ltd trading as Moly-Cop
OneSteel	OneSteel Manufacturing Pty Ltd
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Commissioner made on 25 January 2018
Termination Report	The report published by the ADC in relation to the termination of the investigation into Alloy Round Bar from China dated 25 January 2018

Summary

1. For the reasons given below, I consider that the decision by the Commissioner to terminate the investigation into the alleged dumping of alloy round bar from the People's Republic of China was not the correct or preferable decision.

Introduction

2. This is an application for review by OneSteel Manufacturing Pty Limited (OneSteel) of the decision by the Commissioner of the Anti-Dumping Commission (ADC) to terminate an investigation. The decision by the Commissioner was a termination decision as defined by s.269ZZN of the *Customs Act 1901* (the Act) and hence is reviewable by the Anti-Dumping Review Panel (the Review Panel).

3. The termination decision was made by the Commissioner on 25 January 2018 and notified by publication of an Anti-Dumping Notice on that date.[1] The application for review was received by the Review Panel on 26 February 2018, within the prescribed time for such an application.

4. The application for review was not rejected under s.269ZZQA of the Act and the Review Panel accepted the reviewable grounds in the application. As required by s.269ZZRC, notice that the Review Panel intended to conduct a review was published on the Review Panel's website on 8 March 2018.

5. Pursuant to s.269ZZT(5) of the Act, the Review Panel is required to make a decision on the application within 60 days of giving the notice under s.269ZZRC that it intended to conduct a review.

[1] ADN 2018/17.

6. As Senior Member, I specified in a written direction pursuant to s.269ZYA that the Review Panel for this review was to be constituted by me.

Background

7. On 10 January 2017, the ADC initiated an investigation into the alleged dumping of alloy round bar exported to Australia from the People's Republic of China (China).[2] The initiation of the investigation followed an application by OneSteel on 15 November 2016 alleging that the Australian industry had suffered material injury caused by the export of alloy round bar from China at dumped prices.

8. The investigation period for the purpose of assessing dumping was 1 October 2015 to 30 September 2016 and the injury analysis period was from 1 July 2012. A Statement of Essential Facts was published on 27 October 2017.

9. On 25 January 2018, the Commissioner terminated the anti-dumping investigation and the ADC published the Termination Report setting out the findings and reasons for the termination. The ADC relevantly found that there had been exports to Australia at dumped prices and that the Australian industry had suffered material injury but that the injury caused by the dumped exports was negligible.

Conduct of the Review

10. Section 269ZZT(1) of the Act provides that if an application for review of a termination decision is not rejected, the Review Panel must make a decision on the application by:
    a. affirming the reviewable decision; or
    b. revoking the reviewable decision.

[2] ADN 2017/02.

11. In making a decision under s.269ZZT(1), the Review Panel must, with limited exceptions[3], have regard only to information that was before the Commissioner when the Commissioner made the decision. Except as noted below, in conducting this review I have had regard to the application for review and the documents referenced in the application and to other documents provided to the Review Panel by the ADC which were before the Commissioner when the reviewable decision was made.

12. S.269ZZRB of the Act allows the Review Panel to seek further information from the ADC in relation to information that was before the Commissioner when the reviewable decision was made and to have regard to that further information. Copies of documents which were before the Commissioner when the reviewable decision was made were requested from the ADC and supplied.

13. S.269ZZRA allows the Review Panel to hold conferences for the purpose of obtaining further information in relation to the application or review. No conferences were held under s.269ZZRA.

Grounds for Review

14. The application by OneSteel relied on three grounds which were accepted by the Review Panel under s.269ZZQA(5). These grounds were:
    - The Reviewable Decision was not the correct or preferable decision because the Commissioner's identification of the production of the Australian industry, which formed the basis of the Reviewable Decision, was not authorised by the terms of Part XVB of the Act.
    - Alternatively, if the Commissioner did correctly identify the Australian industry, his assessment of the degree of injury was incorrect because he failed to examine and assess the injury suffered by one of the alleged producers and this failure prevented a proper calculation of the degree of

[3] S.269ZZRA(2) and s.269ZZRB(2).

injury that would have demonstrated that injury to the Australian industry was not negligible.

- Alternatively, to the extent (if any) that the Commissioner's claim that a significant portion of injury experienced by OneSteel resulted from factors other than dumping formed part of the Reviewable Decision, it was not authorised by the terms of s.269TAE(2A).

Consideration of Grounds

The Australian Industry

15. During the investigation, the ADC found that the Australian industry producing like goods consisted of OneSteel, Milltech Pty Ltd (Milltech) and Commonwealth Steel Company Pty Ltd trading as Moly-Cop (Moly-Cop).[4] OneSteel disputes this finding and claims that Milltech is not part of the Australian industry and that Moly-Cop is only part of the Australian industry to the extent it produces and sells an insignificant volume of grinding rods.

16. The ADC found that Moly-Cop was a producer of alloy round bar, a majority of which is used for self-supply in the production of grinding media. The production process undertaken by Moly-Cop was described by the ADC in the Termination Report as:

> "Moly-Cop operates an integrated steel manufacturing facility at Waratah, New South Wales (NSW). It produces liquid steel using an electric arc furnace, with steel scrap as the primary raw material. Alloys are added to the liquid steel, before it is cast into billets. These billets are then hot rolled into alloy round steel bar used in the production of grinding media, referred to as 'grinding bar'. The grinding bar is used as feed material to produce grinding balls either through a roll forming or upset forge process. Moly-Cop also produces grinding rod, which is grinding bar that has been cut to

[4] Termination Report 384, section 4.1 at page 16.

length. The production of grinding bar by Moly-Cop is exclusively for self-supply for the production of grinding media. Moly-Cop sells a small volume of grinding rod to external customers."[5]

The ADC considered that Moly-Cop was part of the Australian industry, not only with respect to its production of grinding rod but also through its production of grinding bar.[6]

17. The inclusion of Moly-Cop in the Australian industry based on its production of grinding bar was stated by the ADC to be consistent with the Act and long-standing practice. With respect to past practice, OneSteel points to instances of contrary practice and, in particular, the approach which was adopted in Continuation Inquiry 400 concerning hot rolled coil (HRC) from Japan, Korea, Malaysia and Taiwan. In that case the ADC did not include in its analysis HRC produced as an input into the production of other steel products. The ADC confined its analysis to HRC produced and sold in that form.[7]

18. The starting point for consideration of this issue is s.269T(4) of the Act which provides that:

> "For the purposes of this Part, if, in relation to goods of a particular kind, there is a person or there are persons who produce like goods in Australia:
> (a) there is an Australian industry in respect of those like goods; and
> (b) subject to subsection (4A), the industry consists of that person or those persons."

The Termination Report makes the point that there is no express requirement in the legislation for a member of the Australian industry to sell or trade the goods

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[5] Termination Report 384, section 4.4.2 at page 17.

[6] As above.

[7] Report 400 at page 21.

which they produce in the Australian market. Further the ADC considered that "although OneSteel claimed that grinding bar produced by Moly-Cop was treated as WIP by the company and is not traded on the domestic market, this does not prevent Moly-Cop from being part of the Australian industry for alloy round bar".[8]

19. In further support of its approach to Moly-Cop's production, the ADC relied upon the Dumping and Subsidy Manual which relevantly provided that "the Australian industry is the sum total of the industry in Australia (not any part, whether that part be defined by geography, market, or any other criteria)."[9] The statement in the Manual is based on the decision of Justice Lockhart in *Swan Portland Cement Limited and Cockburn Cement Limited v The Minister of Small Business and Customs and the Anti-Dumping Authority*.[10]

20. I do not consider that either the extract from the Manual or the decision of Justice Lockhart are of assistance in resolving the issue raised by OneSteel. The Manual and the decision of Justice Lockhart require that the whole of the Australian industry be considered when determining whether the Australian industry is suffering material injury as a result of dumping. However, there is a preliminary issue which is whether, and to what extent, Moly-Cop was part of the Australian industry producing like goods. It seems to me that this issue was not properly addressed by the ADC in the Termination Report.

21. It is correct as the ADC points out, that there is no express requirement in the legislation for a member of the Australian industry to sell or trade the goods they produce in the Australian market.[11] However, it is still necessary to identify the

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[8] Termination Report 384, section 4.6.1 at page 22.

[9] Dumping and Subsidy Manual (April 2017) at page 16.

[10] *Swan Portland Cement Limited and Cockburn Cement Limited v The Minister of Small Business and Customs and the Anti-Dumping Authority* [1991] FCA 49.

[11] Termination Report 384, section 4.6.1 at page 22.

goods that are being produced by the particular entity to assess whether it is part of the industry producing like goods. In *GM Holden Limited v Commissioner of the Anti-Dumping Commission*[12] Justice Mortimer, referring to Justice Lockhart's decision, stated that:

> "In my respectful opinion, his Honour was correct in his approach to the term "industry", defining it by reference to a product rather than a market. This reinforces the construction I have given to "like goods produced by an Australian industry" as a phrase which focuses on the physical characteristics of the goods in question rather than their markets."[13]

22. It is the product that is being produced which determines whether a particular entity is part of the industry producing like goods. However, S.269T(4) and the concept of a person or persons who "produce like goods in Australia" 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".[14]

23. Given the above, 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

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[12] *GM Holden Limited v Commissioner of the Anti-Dumping Commission* [2014] FCA 708.

[13] Above at para 132.

[14] S.269SM(1).

production of like goods to the alloy round bar the subject of the s.269TB application.

24. 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.

25. The incongruence of 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.

26. The difficulty with the ADC's approach can also be seen with the analysis of the causation of the injury being suffered by the Australian industry. Consistent with its finding that the Australian industry consisted of Milltech, OneSteel and Moly-Cop, the ADC considered that it had to assess whether these industry members had been injured by the presence of dumped goods in the market as a whole.

27. The ADC found that injury had been experience by OneSteel and Milltech. However, there was no evidence before it of injury having been experienced by

Moly-Cop.[15] The Termination Report went on to state that "the Commissioner made no finding concerning the impact of the dumped goods on Moly-Cop".[16]

28. Apart from the difficulty the ADC's approach caused in the context of a termination decision under s.269TDA(13) (which I deal with below), the above shows clearly why the ADC's inclusion of Moly-Cop on the basis of its captive production could not be what was intended by the legislation. The ADC does not appear to have investigated injury to Moly-Cop, which if it was part of the Australian industry, would mean that the ADC had not complied with the Manual.

29. 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.[17]

30. The above leads me to the conclusion that 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.

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[15] Termination Report 384, section 8.3.2 at page 51.

[16] Termination Report 384, section 8.8 at page 70.

[17] ADN 2016/90.

31. As explained further below, the inclusion of the captive production of Moly-Cop in the Australian industry has a material effect on the analysis by the ADC of the issue whether material injury is being caused to the Australian industry. OneSteel also takes issue with the inclusion of Milltech being included in the Australian industry. Given, the finding with respect to the inclusion of the Moly-Cop production, I do not consider it necessary to deal with this issue.

Degree of Injury

32. As noted above, the ADC found that the dumped exports had caused some price and volume injury to OneSteel and price injury to Milltech. In order to quantify the injury that had been experienced by OneSteel and Milltech in the context of the Australian industry as a whole, the ADC had regard to the relative share of production set out in Figure 1 of the Termination Report and "extrapolated the injury accordingly".[18] Figure 1 includes the production by Moly-Cop of round bar which is WIP for the production of grinding bar and other grinding media. Based on this the ADC determined:
    - with regard to price effects, the cumulative injury experienced represents less than 2 per cent of the Australian industry;
    - with regards to volume effects, the lost sales volume caused by dumped alloy round bar represents less than 2 per cent of the Australian industry; and
    - when considering these injury effects, together with the other forms of injury found in Chapter 7 of the Termination Report, the ADC concluded that the injury, if any, that has been caused by dumped goods was negligible.[19]

33. The finding of negligible injury from the price effects was as a result of the ADC calculating the revenue lost by OneSteel and Milltech due to the price effects of

[18] Termination Report 384, section 8.8 at page 70.

[19] As above.

the dumped goods as a proportion of the total Australian industry (that is, weighted by reference to the respective share of production volume shown in Figure 1) as less than 2 per cent. Again, as noted above, Figure 1 includes the captive production by Moly-Cop. When this production is excluded from the calculation, the result is different, and the injury is not negligible.

34. While it is not as clear from the Termination Report, when regard is had to the confidential material[20], it appears that a similar calculation was done with respect to the finding of the negligible injury from the lost sales. The calculation appears to have been done using the Moly-Cop captive production and, if this is excluded, the injury is not negligible.

35. Obviously, if in its production of round bars as a step in the production of grinding media, Moly-Cop is not part of the Australian industry producing like goods, then the above calculations do not establish that the injury to the Australian industry was negligible. This would mean that the termination decision was not the correct or preferable decision.

36. However, even if Moly-Cop is part of the Australian industry with respect to its captive production, the approach of the ADC is still problematic. This is because the calculations by the ADC assume that Moly-Cop did not suffer any injury as a result of dumped exports. However, the Termination Report specifically states that the Commissioner did not make any finding concerning the impact of the dumped goods on Moly-Cop.

37. For a termination decision to be made under s.269TDA(13), the Commissioner must be satisfied that the injury, if any, to an Australian industry that has been, or may be caused, by the exported goods is negligible. This requires a positive

[20] Confidential Attachment 22.

finding. In the absence of any finding as to the impact of the dumped goods on Moly-Cop, the Commissioner could not have been so satisfied.

Recommendations/Conclusion

38. For the above reasons, I find that the Reviewable Decision was not the correct or preferable decision. Given this, I have not considered the third ground raised by OneSteel in its application as it is unnecessary to do so.

39. Pursuant to s.269ZZT(1) of the Act, I revoke the decision by the Commissioner to terminate the investigation into the alleged dumping of Alloy Round Bar from China made on 25 January 2018.

Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
27 April 2018